ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1067

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE TENNIS CHANNEL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

COMCAST CABLE COMMUNICATIONS, LLC,

Intervenor for Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.** The petitioner is The Tennis Channel, Inc., which was the complainant in the agency proceedings below. The respondents are the Federal Communications Commission and the United States of America. On May 13, 2015, this Court granted the motion for leave to intervene of Comcast Cable Communications, LLC, which was the defendant in the proceedings below.

(B) **Rulings Under Review.** The petition for review challenges the following order of the Federal Communications Commission: Order, *Tennis Channel, Inc. v. Comcast Cable Commc'ns L.L.C.*, 30 FCC Rcd. 849 (2015), *reprinted at* JA___–__.

(C) **Related Cases.** This case was previously before this Court in *Comcast Cable Communications, LLC v. FCC*, No. 12-1337. *See* 717 F.3d 982 (D.C. Cir. 2013). Respondents are aware of no other related cases previously before this Court or any other court.

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Order	*Tennis Channel, Inc. v. Comcast Cable Commc'ns L.L.C.*, 30 FCC Rcd. 849 (2015) (JA___–__)
2012 Order	*Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C.*, 27 FCC Rcd. 8508 (2012) (JA___–__)
Tennis Channel	Petitioner The Tennis Channel, Inc.
Comcast	Comcast Cable Communications, LLC
FCC or Commission	Federal Communications Commission
Pet. Br.	Brief for Petitioner Tennis Channel
Tennis Channel I	*Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (No. 12-1337)
12-1337 FCC Br.	Brief for Respondents, *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed Dec. 3, 2012)
12-1337 Intervenor Br.	Final Brief for Intervenor Tennis Channel, Inc., *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed Dec. 3, 2012)
12-1337 Reh'g Pet.	Intervenor Tennis Channel, Inc.'s Pet. for Reh'g or Reh'g En Banc, *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed July 12, 2013)
Section 616	Section 616 of the Communications Act, 47 U.S.C. § 536
Program Carriage Rules	*Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494 (2011)
MVPD	Multichannel Video Programming Distributor (*see* 47 U.S.C. § 522(13); 47 C.F.R. § 76.1300(d))

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BRIEF FOR RESPONDENTS

INTRODUCTION

In *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (*Tennis Channel I*), this Court overturned the Federal Communications Commission's ruling that Comcast impermissibly discriminated on the basis of affiliation by refusing to carry sports programming from the Tennis Channel as broadly as it carried similar programming from two of its own affiliates. According to the Court,

"the Commission could not lawfully find discrimination because Tennis [Channel] offered no evidence that [carrying it more broadly] would have afforded Comcast any benefit," and thus there was "nothing to refute Comcast's contention that its [decision] was simply 'a straight up financial analysis.'" *Id.* at 984 (emphasis omitted). Tennis Channel's efforts to challenge that ruling through panel rehearing, rehearing en banc, or Supreme Court review all proved unsuccessful. The question in this case is simply whether the Commission reasonably adhered to this Court's decision.

After the Court's decision became final, Tennis Channel returned to the FCC and asked the Commission to reinstate the very ruling that this Court had just overturned. Despite the Court's determination that the evidence in this proceeding is insufficient to find that Comcast discriminated on the basis of affiliation, Tennis Channel asked the Commission to rule that the identical record *supports* a finding of discrimination. In the alternative, Tennis Channel asked the Commission to reopen the record for "factual enhancement," but it made no effort to suggest what further evidence it believed it would be able to produce or to explain why it could not have presented that evidence earlier, having already had a full and fair opportunity to prosecute its claim.

Adhering to the Court's decision in *Tennis Channel I*, the Commission denied Tennis Channel's complaint and declined to reopen the record. The Commission's order was both reasonable and faithful to this Court's mandate. The Court should deny Tennis Channel's petition for review and bring this proceeding to a close.

STATEMENT OF THE ISSUE

Whether the FCC acted arbitrarily or capriciously when, adhering to this Court's mandate in *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982 (D.C. Cir.), *cert. denied*, 134 S. Ct. 1287 (2013), the Commission denied Tennis Channel's program-carriage complaint and declined its request to reopen the record for unspecified "factual enhancement."

JURISDICTIONAL STATEMENT

The order under review was released on January 28, 2015. *Tennis Channel, Inc. v. Comcast Cable Commc'ns L.L.C.*, 30 FCC Rcd. 849 (2015) (*Order*) (JA___–__). Tennis Channel timely filed a petition for review in this Court on March 27, 2015, within 60 days of the release of the *Order*. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(2). This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. Title VI of the Communications Act contains a series of provisions governing the relationship between multichannel video programming distributors (MVPDs) and video programming vendors. *See, e.g.*, 47 U.S.C. §§ 531–536. MVPDs, such as cable companies, offer consumers access to multiple channels of video programming. 47 U.S.C. § 522(13); 47 C.F.R. § 76.1300(d). Programming vendors, such as broadcast stations or cable networks, produce the video programming that consumers receive on a given channel. 47 U.S.C. § 522(2); 47 C.F.R. § 76.1300(e).

By the early 1990s, Congress observed, "[t]he cable industry ha[d] become vertically integrated." Cable Television Consumer Protection and Competition Act of 1992, Pub L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1460. Cable companies and video programming vendors "often have common ownership," which "could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems." *Id.*, 106 Stat. at 1460–61.

In response to this vertical integration, Congress enacted Section 616 of the Communications Act, 47 U.S.C. § 536, which directs the Federal Communications Commission to establish regulations to prevent MVPDs

from discriminating among video programming vendors "on the basis of affiliation or nonaffiliation." 47 U.S.C. § 536(a)(3). Under the Commission's implementing regulations, which track the language of the statute, "No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors." 47 C.F.R. § 76.1301(c).

2. A video programming vendor that believes it has been discriminated against on the basis of affiliation may commence an adjudication before the Commission by filing a program-carriage complaint. 47 C.F.R. § 76.1302(a). The complaint must include evidence establishing a *prima facie* case of discrimination on the basis of affiliation. *Id.* §§ 76.1302(c)(2), (d). Because it is unlikely that direct evidence of discrimination will be available, especially prior to discovery, a programming vendor may rely on circumstantial evidence for its *prima facie* case. *Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, 11503–05 ¶¶ 13–14 (2011) (*Program Carriage Rules*), *pet. granted in part and denied in part*, *Time Warner Cable Inc. v. FCC*,

729 F.3d 137 (2d Cir. 2013).

To establish a *prima facie* case of discrimination on the basis of affiliation, a programming vendor need only show that (i) it provides programming that is "similarly situated" to the programming offered by a vendor affiliated with the defendant MVPD and (ii) the defendant MVPD has treated it differently from the similarly situated affiliated programming vendor. *Program Carriage Rules*, 26 FCC Rcd. at 11504–05 ¶ 14; *see* 47 C.F.R. §§ 76.1302(d)(2)(i)–(ii).

If the complainant demonstrates a *prima facie* case, the FCC's Media Bureau may refer the complaint to an administrative law judge (ALJ) to oversee discovery, conduct an adjudicatory hearing, and render an initial decision on the merits. *See Program Carriage Rules*, 26 FCC Rcd. at 11499 ¶ 6. Alternatively, if the Media Bureau determines that little or no discovery is required, the Media Bureau may itself rule on the merits of the complaint after any necessary discovery. *Ibid.*

The Commission has cautioned that "a *prima facie* case does not mean that the complainant has proven its case or any elements of its case on the merits. Rather, a *prima facie* finding means [only] that the complainant has provided sufficient evidence * * * to proceed" to discovery and a ruling on the merits. *Program Carriage Rules*, 26 FCC Rcd. at

11505 ¶ 16; *see* 47 C.F.R. § 76.1302(g)(3). Thus, "although the Media Bureau may find that a complaint contains sufficient evidence to establish a *prima facie* case * * * allowing the case to proceed, the adjudicator when ruling on the merits may reach an opposite conclusion after conducting further proceedings and developing a more complete evidentiary record." *Program Carriage Rules*, 26 FCC Rcd. at 11506 ¶ 16. For example, "if the Media Bureau determines that the complainant has established a *prima facie* case but the defendant MVPD provides legitimate and non-discriminatory business reasons * * * for its adverse carriage decision," the adjudicator may conclude that the evidence establishing a *prima facie* case is insufficient to rule for the vendor on the merits. *Id.* ¶ 17.[1]

After an initial merits decision is rendered by the administrative law judge (or the Media Bureau), any aggrieved party may file an application for review by the Commission. 47 C.F.R. §§ 1.115, 1.276, 76.10(c). The resulting final order of the Commission is subject to judicial review in the courts of appeals. 28 U.S.C. §§ 2342(1), 2344; 47 U.S.C. § 402(a).

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[1] *Prima facie* review is more limited than a full examination of the merits in part to comply with Congress's instruction to "provide for expedited review" of program-carriage complaints. 47 U.S.C. § 536(a)(4); *see* 47 C.F.R. § 76.1302(g)(1) (Media Bureau shall make *prima facie* determination within 60 days of the initial pleadings); *Program Carriage Rules*, 26 FCC Rcd. at 11508 ¶ 20 (same).

B. Factual And Procedural Background

1. Tennis Channel's complaint and the *2012 Order*

Petitioner Tennis Channel, a sports-programming network owned in part by DirecTV and Dish Network, filed a complaint with the FCC in July 2010 alleging that Comcast discriminated against it on the basis of affiliation. *Order* ¶ 4 (JA__). The complaint alleged that Comcast refused to broadcast Tennis Channel as widely as Comcast's own affiliated sports-programming networks, Golf Channel and Versus.[2] *Ibid.* Comcast carried Golf Channel and Versus on its most broadly distributed tiers, available to all subscribers at no extra charge, but placed Tennis Channel on a separate sports tier that was available only to subscribers who paid an extra fee. *Ibid.*; *see also Tennis Channel I*, 717 F.3d at 983, 984–85.

After reviewing the complaint, the Media Bureau determined that Tennis Channel put forth sufficient evidence to establish a *prima facie* case and referred the matter to an administrative law judge. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C.*, 25 FCC Rcd. 14149 (Media Bur. 2010) (*Hearing Designation Order*).

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[2] Versus is now known as NBC Sports Network. *Order* ¶ 4 (JA___); *Tennis Channel I*, 717 F.3d at 983. Consistent with this Court's previous decision and the *Order* under review, the Commission continues to refer to it as "Versus" for purposes of this litigation.

Following discovery and a six-day evidentiary hearing before Chief Administrative Law Judge Richard L. Sippel, the ALJ ruled in favor of Tennis Channel. *Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C.*, 26 FCC Rcd. 17160 (2011) (*Initial Decision*) (JA___–__). The ALJ ordered Comcast to pay a monetary forfeiture and to place Tennis Channel on the same distribution tier as Golf Channel and Versus. *Ibid.*

On review by the full Commission, the FCC upheld the ALJ's decision in relevant part.[3] *Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C.*, 27 FCC Rcd. 8508 (2012) (*2012 Order*) (JA___–__). The Commission first observed that there was record evidence that Comcast engaged in a general practice of favoring affiliates over nonaffiliates. *Id.* ¶¶ 45–50 (JA___–__). The Commission then determined that Tennis Channel was similarly situated to Golf Channel and Versus in terms of programming, demographics, advertisers, and ratings. *Id.* ¶¶ 51–67 (JA___–__). And the Commission noted that Comcast's differential treatment of Tennis Channel, denying it placement on the same distribution tier as Golf Channel and Versus, was undisputed. *Id.* ¶ 68 (JA___).

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[3] Although the Commission upheld the ALJ's order to place Tennis Channel on the same tier as Golf Channel and Versus, it disagreed with the ALJ's decision to also require Comcast to give Tennis Channel similar channel placement within that tier. *2012 Order* ¶ 91 (JA___).

"[A]bsent any persuasive evidence or argument that the reasons for the differential treatment were nondiscriminatory," the Commission concluded, Comcast's "vastly differential treatment" of Tennis Channel, "when weighed together with the similarly situated nature of the three networks and the general evidence" that Comcast favors its own affiliates, "support[s] the finding that Comcast discriminated against Tennis Channel * * * on the basis of affiliation." *2012 Order* ¶ 69 (JA___).

Comcast timely filed a petition for review asking this Court to "hold unlawful, vacate, enjoin and set aside" the Commission's decision. Pet. for Rev. at 2, *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed Aug. 1, 2012).

2. This Court's decision in *Tennis Channel I*

In *Tennis Channel I*, this Court overturned the Commission's ruling. "[T]he Commission could not lawfully find discrimination," the Court concluded, "because Tennis [Channel] offered no evidence that [carrying it more broadly] would have afforded Comcast *any* benefit," and thus there was "nothing to refute Comcast's contention that its [decision] was simply 'a straight up financial analysis.'" 717 F.3d at 984.

The Court acknowledged that there are "important similarities between Tennis [Channel] on the one hand and Golf [Channel] and Versus on the other." 717 F.3d at 987 (citing *2012 Order* ¶¶ 51–55 (JA___–__)).

The Court also observed that Comcast "distributes the content of affiliates Golf [Channel] and Versus more broadly than it does that of Tennis [Channel]." *Id.* at 985. The Court thus "assume[d]" that "the Media Bureau was correct in its finding of a *prima facie* case." *Id.* at 987.

But the Court explained that "under the Commission's interpretation of § 616"—which it "assume[d] for purposes of this decision" to be correct—"if [an] MVPD treats vendors differently based on a reasonable business purpose * * *, there is no violation." 717 F.3d at 984, 985. That is because "the statute prohibits only discrimination *based on* affiliation." *Id.* at 985. As a result, if the defendant MVPD offers a non-discriminatory reason for its decision, the evidence establishing a *prima facie* case may not suffice to prove discrimination; there must be at least some "material evidence," *id.* at 987, countering that justification.

Upon examining the record, 717 F.3d at 986–97, the Court found that "Tennis [Channel] offered no evidence" calling into question Comcast's claim that its decision "was simply 'a straight up financial analysis,'" *id.* at 984, 985. Whereas the cost to Comcast of carrying Tennis Channel on a broader tier would have been "substantial," because it would require Comcast to pay additional licensing fees, "Tennis [Channel] showed no corresponding benefits * * * to Comcast" to offset that cost. *Id.* at 985.

The Court identified three "rather obvious" types of evidence that Tennis Channel could have sought to use to rebut Comcast's claim that its decision was based on financial considerations, 717 F.3d at 986, but it found no such evidence in the record here.

First, Tennis Channel could have sought to challenge Comcast's financial claims by presenting "expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis [Channel] more broadly * * * such that Comcast would recoup the proposed increment in cost." 717 F.3d at 986. The Court found, however, that "[t]here is no such evidence." *Ibid.* In place of that evidence, the Commission had reasoned that Tennis Channel charged lower licensing fees than Golf Channel or Versus while generating similar ratings. *2012 Order* ¶ 78 & n.243 (JA___). But the Court faulted that analysis because of the "absence of evidence that * * * ratings point[s] [are] correlated with changes in revenue[]" for an MVPD.[4] 717 F.3d at 985–86. Without that link, "the discussion of cost per ratings point is mere handwaving." *Id.* at 986. Indeed, the Court found—

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[4] As the Commission elsewhere acknowledged, MVPD revenues depend primarily on subscriptions, not advertising, and the evidence of how the channels at issue affect subscriptions was "weak." *2012 Order* ¶ 62 (JA___); *see also* Pet. Br. 45 (acknowledging the difficulty of measuring how individual channels drive subscriber churn).

based on its own examination of the record—that there would be "no such benefits" to Comcast from distributing Tennis Channel more broadly. *Ibid.*

Second, even if broader carriage of Tennis Channel would not have generated a net profit, Tennis Channel could have sought to prove discrimination by "show[ing] that the incremental losses from carrying Tennis [Channel] in a broad tier would be the same as or less than the incremental losses Comcast was incurring from carrying Golf and Versus in such tiers." 717 F.3d at 986; *see also id.* at 987 ("comparative data might have done the job"). The Court again found, however, that "no such evidence was offered." *Id.* at 987.

Third, Tennis Channel could have sought to show through other evidence that Comcast's proffered business justification was not the actual reason for its decision, and thus "invoked the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose." 717 F.3d at 987; *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–49 (2000) (holding that "a *prima facie* case and sufficient evidence to reject the [proffered] explanation may permit a finding of liability" in an intentional-discrimination case). But the Court rejected arguments from Tennis Channel and the Commission

that Comcast's cost–benefit analysis was pretextual. 717 F.3d at 987. In the Court's view, evidence that Comcast's cost–benefit analysis was "insufficiently rigorous" and "too hastily performed" was insufficient to show pretext. *Ibid.*

Because the Court found that "the record simply lacks material evidence" to refute Comcast's claim that it declined to carry Tennis Channel more broadly based on a simple financial analysis, rather than based on affiliation, the Court unanimously granted Comcast's petition and overturned the Commission's ruling. 717 F.3d at 987.

Two judges issued separate concurrences suggesting that the Commission's decision should be overturned for additional reasons. Judge Kavanaugh would have concluded that Section 616 must be interpreted to require a showing that the MVPD possesses market power and that Tennis Channel could not make that showing. 717 F.3d at 987–94 (Kavanaugh, J., concurring). Judge Edwards would have concluded that Tennis Channel's complaint was not timely filed under the applicable statute of limitations. *Id.* at 994–1007 (Edwards, J., concurring). The panel unanimously agreed, however, that the Court "need not reach those issues" given the panel's determination that there was insufficient evidence to support a decision in favor of Tennis Channel. *Id.* at 984 (opinion of the Court).

Tennis Channel sought both panel rehearing and rehearing en banc, arguing that the Court "erred in not remanding the case for further proceedings" to further address whether Comcast violated Section 616 under the standard articulated by the panel. *See* Intervenor Tennis Channel, Inc.'s Pet. for Reh'g or Reh'g En Banc at 11, *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed July 12, 2013) (12-1337 Reh'g Pet.). The panel denied panel rehearing, and the full court denied rehearing en banc.

Tennis Channel then filed a petition for certiorari, telling the Supreme Court that it would be "surpassingly difficult to satisfy" the standard articulated by this Court. Pet. for Writ of Certiorari at 2, *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, No. 13-676 (U.S. filed Dec. 3, 2013). The Supreme Court denied review. 134 S. Ct. 1287 (2014) (mem.).

3. The *Order* under review

After this Court's decision became final, Tennis Channel returned to the FCC and petitioned the agency to reinstate the ruling that this Court had just overturned. *See Order* ¶ 6 (JA___). Tennis Channel argued that this Court's decision merely announced "new tests" for program-carriage complaints and that the existing factual record could support a finding of discrimination under those tests. *See ibid.* In the alternative, Tennis

Channel argued that if the Commission found the existing record insufficient to rule in Tennis Channel's favor, it should reopen the record and invite Tennis Channel to submit additional evidence. *See ibid.* Tennis Channel did not indicate what further evidence, if any, it believed it would be able to produce.

In the *Order* under review, the Commission denied Tennis Channel's petition. *Tennis Channel, Inc. v. Comcast Cable Commc'ns L.L.C.*, 30 FCC Rcd. 849 (2015) (*Order*) (JA___–__). "[B]ased on the [C]ourt's conclusion that the record contains no evidence that Comcast discriminated against [Tennis Channel] unlawfully" under Section 616 and the Commission's implementing regulations, the Commission denied Tennis Channel's program-carriage complaint against Comcast. *Order* ¶¶ 3, 7 (JA___–__). The Commission determined that *Tennis Channel I* did not establish any "new tests" for discrimination or alter the evidentiary standard that governs program-carriage complaints, but "simply provided examples of the types of evidence that might have been adequate" under the Commission's longstanding approach. *Order* ¶ 7 (JA___–__). The Commission recognized that it is bound by *Tennis Channel I*'s "conclu[sion] that there was no evidence to support any of [the Court's] hypothetical examples of how Tennis Channel might have proven its discrimination claim" and that

the Court "neither invited nor directed the Commission to address on remand the evidentiary shortcomings identified in its decision." *Ibid.*

The Commission also declined Tennis Channel's request to reopen the record for unspecified "factual enhancement." *Order* ¶ 8 (JA___). It noted that Tennis Channel has already "had a full and fair opportunity to litigate its complaint." *Ibid.* "To the extent the Commission has discretion to reopen the proceeding," the agency "conclude[d] that the interest in bringing the proceeding to a close outweighs any interest in allowing Tennis Channel a second opportunity to prosecute its program carriage complaint." *Ibid.*[5]

SUMMARY OF THE ARGUMENT

The FCC faithfully adhered to this Court's decision in *Tennis Channel I* when it denied Tennis Channel's program-carriage complaint. *Tennis Channel I* repeatedly explained that the Commission could not find discrimination on the basis of affiliation because the record lacks material evidence countering Comcast's claim that its carriage decision was based on financial considerations. The Commission reasonably understood that holding to foreclose any ruling in favor of Tennis Channel. Nothing in the

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[5] On August 6, 2015, this Court denied the FCC's and Comcast's motions for summary affirmance of the *Order*, finding "[t]he merits of the parties' positions * * * not so clear as to warrant summary action."

Court's decision suggests that the Court anticipated or intended for the FCC to conduct further proceedings on remand.

Tennis Channel argues that the Court could not have meant to preclude the FCC from reexamining the evidence, either because the record is voluminous or because doing so would usurp the role of the agency. The FCC must take the Court at its word, however, and cannot disregard the plain terms of this Court's decisions. In any event, neither argument casts doubt on the Court's ruling. Appellate courts are regularly asked to rule on sufficiency-of-the-evidence challenges, even in cases with voluminous records, and can rely on the parties to bring the relevant record materials to the court's attention in their briefs. And nothing precludes a court from foreclosing further proceedings in the rare circumstance where it finds that the fully developed record is devoid of evidence capable of supporting agency action.

Finally, to the extent that the Commission had discretion to reopen this proceeding for the submission of new evidence, it reasonably declined to exercise that authority here. Tennis Channel already received a full and fair opportunity to prosecute its program-carriage complaint, and it has not shown that the FCC in any way misled it or prevented it from submitting any relevant evidence. Indeed, Tennis Channel has never

identified what additional evidence it believes it could produce or explained why it was unable to present that evidence earlier. The Commission reasonably determined that the interest in bringing this proceeding to a close outweighs any interest in giving Tennis Channel a second opportunity to litigate its complaint.

ARGUMENT

I. THE COMMISSION FAITHFULLY ADHERED TO THIS COURT'S MANDATE IN DENYING TENNIS CHANNEL'S PROGRAM-CARRIAGE COMPLAINT.

In reversing the Commission's prior decision in this proceeding, this Court held in *Tennis Channel I* that "the Commission could not lawfully find discrimination" because the record lacks sufficient evidence to counter Comcast's claim that its carriage decision was based on financial considerations. 717 F.3d at 984. The FCC understands that decision to foreclose any ruling in favor of Tennis Channel. Tennis Channel argues that the Court should not have conducted its own review of the record and should have instead directed the Commission to reassess the evidence, but the Commission is not at liberty to disregard the Court's instructions. The Commission's decision to deny Tennis Channel's complaint, which faithfully adhered to the terms of the Court's decision, was both reasonable and consistent with this Court's mandate.

A. The Commission Reasonably Understood *Tennis Channel I* To Foreclose Any Decision In Favor Of Tennis Channel.

1. The FCC accepts, as it must, the Court's ruling in *Tennis Channel I* that "the Commission could not lawfully find discrimination" in this case "because Tennis [Channel] offered no evidence * * * to refute Comcast's contention that its [carriage decision] was simply 'a straight up financial analysis.'" 717 F.3d at 984. The Commission was bound by that ruling in all subsequent proceedings in this matter. *See, e.g.*, *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 858–59 (D.C. Cir. 2003) (per curiam); *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1376–77 (D.C. Cir. 1999).

Tennis Channel I repeatedly explained that Tennis Channel was unable to prove discrimination on the basis of affiliation because, according to the Court, the record lacked material evidence countering Comcast's claim that its carriage decision was based on financial considerations. *See, e.g.*, 717 F.3d at 984 ("[W]e conclude" that "Tennis [Channel] offered no evidence that its rejected proposal would have afforded Comcast *any* benefit" and presents "nothing to refute Comcast's contention that its rejection of Tennis [Channel]'s proposal was simply 'a straight up financial analysis.'"); *id.* at 985 ("Tennis [Channel] showed no

corresponding benefits that would accrue to Comcast by its accepting" Tennis Channel's request for broader carriage); *ibid.* ("[N]either Tennis [Channel] nor the Commission offers such an analysis on either a qualitative or quantitative basis."); *id.* at 986 ("There is no such evidence" that "Comcast would recoup the proposed increment in cost" from broader carriage of Tennis Channel); *ibid.* ("the record lack[s] affirmative evidence along these lines"); *id.* at 987 ("no such evidence was offered"); *ibid.* (noting "the lack of evidence from which one might infer net benefit"); *ibid.* ("[T]he record simply lacks material evidence that the Tennis [Channel] proposal offered Comcast any commercial benefit."); *see also id.* at 994–95 (Edwards, J., concurring) ("It is clear from the record" that "there is no substantial evidence of unlawful discrimination to support the Commission's decision").

The Commission reasonably understood this holding to foreclose any decision in favor of Tennis Channel and accordingly denied its complaint. *See Order* ¶ 7 (JA___–__). Nothing in the Court's decision suggests that the Court anticipated or intended for the FCC to conduct further proceedings on remand. Tennis Channel itself apparently recognized as much, arguing in its rehearing petition that the panel "erred in not remanding the case for further proceedings" for "the FCC [to] consider

whether Tennis Channel can satisfy" the standard articulated by the panel. *See* 12-1337 Reh'g Pet. at 11–12.

Now, however, Tennis Channel seeks to recharacterize the Court's decision as holding only that *the analysis in the Commission's order* failed to point to the necessary evidence. *See* Pet. Br. 25–26. That is incorrect. The Court's decision resulted from a failure of proof, not from the particular explanation in the order, as illustrated by the numerous passages in which the Court faulted Tennis Channel (not the Commission alone) for the absence of evidence. *See, e.g.*, 717 F.3d at 984 ("Tennis [Channel] offered no evidence"); *id.* at 985 ("Tennis [Channel] showed no corresponding benefits"); *ibid.* ("neither Tennis [Channel] nor the Commission offers such an analysis"); *id.* at 986 ("The parties do not even hint at this possibility"); *id.* at 987 ("Neither Tennis [Channel] nor the Commission" has shown pretext). To be sure, as Tennis Channel observes (Pet. Br. 25), the closing paragraph of the Court's decision disagreed with the Commission's assessment of the evidence. *See* 717 F.3d at 987. But the opinion repeatedly explains that the *record* (which was developed by Tennis Channel and Comcast, not by the Commission) lacks evidence sufficient to find that Comcast engaged in unlawful discrimination, and

it is this lack of evidence—not any failure of explanation—that doomed the Commission's ruling.

If this Court had intended for the FCC to conduct further proceedings on remand, it presumably would have said so. *See, e.g.*, *FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 700–01 (D.C. Cir. 2015); *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014); *SBC Commc'ns Inc. v. FCC*, 407 F.3d 1223, 1225, 1232 (D.C. Cir. 2005) (Williams, J.); *see also Atl. City*, 329 F.3d at 858 ("[I]n those cases where we have allowed [an agency to reinstate its decision], we had remanded the proceedings for further explanation."). And while courts occasionally say so expressly when they intend to foreclose further proceedings, *see* Pet. Br. 33, an agency remains obligated to follow the Court's directions even when those directions are implicit. *Cf. Qualcomm*, 181 F.3d at 1377 ("Although the court might have been more explicit, its instruction to the FCC * * * was * * * clear in the context" of the proceeding before the court). Here, the Commission reasonably understood the Court's decision in *Tennis Channel I* to neither invite nor permit the agency to conduct its own reexamination of the record, which the Court itself already addressed,

or to conduct any further proceedings on remand.[6]

2. The separate concurring opinions confirm the FCC's understanding that the *Tennis Channel I* panel did not intend for the Commission to conduct further proceedings. Two members of the three-judge panel would have reversed the Commission and foreclosed further proceedings on other grounds—that Tennis Channel's complaint was untimely or that Comcast lacked requisite market power to be covered by Section 616—but the panel unanimously agreed that it "need not reach those issues" in light of the Court's holding that the evidence was insufficient to permit a finding of unlawful discrimination. 717 F.3d at 984.

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[6] Tennis Channel contends (Pet. Br. 33) that the Commission was required under 47 U.S.C. § 402(h) to treat the Court's decision as an implicit remand. But even assuming that is correct and that Section 402(h) applies here, the pertinent question is the *scope* of the matters the agency may lawfully consider on remand. Here, the Court overturned the Commission's prior ruling and held that there is insufficient evidence to find that Comcast engaged in unlawful discrimination; nothing in the opinion suggests that the Court meant to authorize or invite any further proceedings. If Section 402(h) applied, it would authorize the Commission only "to carry out the judgment of the court," 47 U.S.C. § 402(h), by denying Tennis Channel's complaint. And if it applied, Section 402(h) would affirmatively prohibit the agency from reopening the record or considering new evidence unless the Court specifically authorized the agency to do so. *See Order* n.30 (JA___–__). *But see In re Meadville Master Antenna, Inc.*, 36 F.C.C.2d 591, 594 ¶ 6 (1972) (determining that Section 402(h) does not apply to this type of proceeding).

If the principal opinion had intended to permit further proceedings on remand, then it would not have been the judgment of the Court, since two judges appear to have opposed further proceedings. Tennis Channel contends (Pet. Br. 36–37) that it is not clear whether either rationale advanced in the concurring opinions would have received a second vote, but there is no need for a panel to agree on a common *rationale* to issue a *judgment*. If no single rationale garnered the support of a majority of the panel, the panel could issue its judgment without a single controlling opinion. *See, e.g.*, *Obama v. Klayman*, --- F.3d ---, 2015 WL 5058403 (D.C. Cir. Aug. 28, 2015) (per curiam); *Dool v. Burke*, 497 F. App'x 782 (10th Cir. 2012) (per curiam); *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239 (10th Cir. 2012) (per curiam); *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989) (per curiam).

That the panel found it unnecessary to reach the dispositive issues discussed in the concurring opinions indicates, moreover, that the Court understood its principal opinion to fully resolve the case. Considerations of judicial efficiency ordinarily counsel against remanding a matter for further costly and time-consuming agency proceedings if those proceedings

would be rendered moot by another issue that is fully briefed and ripe for decision. In the rare circumstance that a court believes judicial efficiency to be best served by reserving decision on potentially dispositive issues, it presumably would say so explicitly. That Tennis Channel can identify only three decisions in the past twenty years that "do[] precisely that" (Pet. Br. 36 n.5), and that all of those decisions—unlike the decision here—*explicitly* state that they are deferring resolution of certain issues until after a decision on remand, demonstrates the implausibility of Tennis Channel's speculation (Pet. Br. 36–37) that the Court *silently* did so here.[7] In any event, the Court did not say that it was deferring these issues until after remand; it said that it "need not reach those issues" at all. 717 F.3d at 984.

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[7] In fact, none of the three cases cited by Tennis Channel resembles the circumstances here or offers Tennis Channel any meaningful support. *See Wedgewood Vill. Pharm. v. DEA*, 509 F.3d 541, 553 & n.16 (D.C. Cir. 2007) (remanding for agency to clarify its interpretation of statutory terms before the court could resolve evidentiary challenge and other issues); *Fla. Mun. Power Agency v. FERC*, 411 F.3d 287, 292 (D.C. Cir. 2005) (remanding for agency to explain its refusal to consider an impossibility exception before the court could decide whether pricing scheme was just and reasonable); *Trans Union Corp. v. FTC*, 81 F.3d 228, 230–35 (D.C. Cir. 1996) (after finding agency decision invalid due to unresolved factual issues, court declined to reach pure constitutional issue but proceeded to consider alternative statutory argument that would have been dispositive).

3. The denial of Tennis Channel's rehearing petition confirms that the FCC was not expected to conduct further proceedings. Although Tennis Channel repeatedly mischaracterizes that filing as merely a petition for "rehearing en banc," Pet. Br. 34–35, Tennis Channel in fact requested "rehearing en banc *or panel rehearing*," 12-1337 Reh'g Pet. at 1 (emphasis added). Its petition asked the Court to "remand[] the case for further proceedings" for "the FCC [to] now consider whether Tennis Channel can satisfy" the standard articulated by the panel. *Id.* at 11–12. If the panel had intended to permit further proceedings, it could have simply amended its opinion to state that it was remanding the case for further proceedings to allow the FCC to reevaluate the evidence in light of its opinion. The panel's refusal to do so confirms that it intended its decision to bring this proceeding to a close.

B. The Commission Was Compelled To Follow This Court's Mandate.

Confronted with the Court's decision in *Tennis Channel I*, Tennis Channel now argues that the Court could not actually have meant what it said. It insists that the Court could not have reviewed the full record to rule on the sufficiency of the evidence, Pet. Br. 26–27, and that accepting the Court's claim to have done so would violate "basic administrative law

principles," Pet. Br. 30–34. In effect, Tennis Channel asks for the FCC to disregard the plain terms of this Court's decision—something the agency cannot do. *See Atl. City*, 329 F.3d at 858–59. In any event, we do not believe that either argument casts doubt on the Court's ruling, let alone precludes the Commission from obeying the Court's mandate and denying Tennis Channel's complaint.

1. The size of the record does not permit the Commission to second-guess this Court's decision.

Tennis Channel concedes that "at times" *Tennis Channel I* "appears to * * * suggest[] that 'the record lack[s] affirmative evidence'" essential to prevail on its program-carriage complaint. Pet. Br. 26 (quoting *Tennis Channel I*, 717 F.3d at 986, 987). But it then insists that, given the size of the record in this case, the Court could "not * * * ha[ve] conclusively determined that the entire record * * * contained nothing to support a ruling for Tennis Channel." *Ibid.*

That argument is baseless. Appellate courts are regularly asked to rule on sufficiency-of-the-evidence challenges, even in cases with voluminous records. The Commission takes the Court at its word that—in ruling that "the record simply lacks material evidence," "the record lack[s] affirmative evidence," "[t]here is no such evidence," and "Tennis [Channel]

offered no evidence," 717 F.3d at 984, 986, 987—it indeed meant that the record is insufficient to support a finding of unlawful discrimination.

In any event, the Commission does not view the size of the record to be an obstacle to judicial review, either in general or in this case in particular, especially when a court can rely on the parties to bring the relevant record materials to its attention. The Federal Rules of Appellate Procedure require the parties to a proceeding to include in their briefs "appropriate references to the record" and "citations to the * * * parts of the record on which [a party] relies." Fed. R. App. P. 28(a)(6), (8)(A); D.C. Cir. Handbook §§ IX(A)(8)(h), (j); *see also* Fed. R. App. P. 28(e); D.C. Cir. R. 28(b). The rules further instruct that the joint appendix "must * * * contain[]" any "parts of the record to which the parties wish to direct the court's attention." Fed. R. App. P. 30(a)(1)(D); *accord* D.C. Cir. R. 30(b); D.C. Cir. Handbook § IX(B)(1). And Tennis Channel participated as an intervenor in *Tennis Channel I*, *see* Final Br. for Intervenor Tennis Channel, Inc., *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed Dec. 3, 2012) (12-1337 Intervenor Br.), which afforded it full opportunity both to support the Commission's decision and to address any "points not made or adequately elaborated upon in the principal brief," D.C. Cir. R. 28(d)(2).

Tennis Channel thus misses the mark when it complains (Pet. Br. 26) that "the Court [did] not cite any evidence * * * that [was] not referenced either in Tennis Channel's complaint, the FCC's 2012 order, in the appellate briefs, or at oral argument." The parties canvassed the record and discussed all of the relevant evidence in their presentations to the Court, so it is unsurprising that all of the evidence identified by the Court was referenced in the parties' briefs and oral arguments. Nor, in any event, is a court even obliged to consider portions of the record not identified by the parties; rather, it is the responsibility of the parties—which in *Tennis Channel I* included Tennis Channel itself, as an intervenor in support of the Commission—to bring all potentially relevant record materials to the Court's attention.

Notably, Tennis Channel nowhere denies that the record evidence discussed in its brief (at 40–46) was generally presented to the Court in *Tennis Channel I*. Often it was presented by Tennis Channel itself. General evidence that Comcast gave preferential treatment to its affiliates was presented both by Tennis Channel, 12-1337 Intervenor Br. at 6–7, 9, 17, 19–20, and by the Commission, *2012 Order* ¶¶ 45–49 (JA___–__); Br. for Resps. at 26–29, *Tennis Channel I*, No. 12-1337 (D.C. Cir. filed Dec. 3, 2012) (12-1337 FCC Br.). Evidence that Tennis Channel provided better

value to Comcast than Golf Channel because it cost less per ratings point was presented by Tennis Channel, 12-1337 Intervenor Br. at 8, 18, and by the Commission, *2012 Order* ¶ 78 & n.243 (JA___); 12-1337 FCC Br. at 31–32, but ultimately rejected by the Court, 717 F.3d at 985–86. And evidence that Comcast's cost–benefit analysis was pretextual was presented both by Tennis Channel, 12-1337 Intervenor Br. at 7–8, 18–19, and by the Commission, *2012 Order* ¶¶ 77–82 (JA___–__); 12-1337 FCC Br. at 16–17, 31–32, but again rejected by the Court, 717 F.3d at 986. All of this evidence was readily before the Court when it decided *Tennis Channel I*.

2. Principles of administrative law do not allow the Commission to disregard this Court's decision.

Tennis Channel also argues that the FCC's decision to accept this Court's characterization of the record contravenes "basic administrative law principles." *See* Pet. Br. 30–34. It insists that a reviewing court may examine only "the reasons supplied by the agency," and may remedy any lapse only by returning the case to the agency to issue a new explanation. Pet. Br. 30. But this Court has never construed its authority so narrowly.

There is nothing anomalous about a court directing the entry of judgment or the dismissal of a complaint on the rare occasion when it finds

the fully developed record devoid of evidence capable of supporting agency action. This Court has on a number of occasions done just that. For example, upon finding that an order of the National Labor Relations Board could not be supported by substantial evidence, this Court vacated the Board's decision and refused to remand the case because a remand "would be an empty gesture." *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1066 (D.C. Cir. 1992). In another case, after finding the record "entirely devoid of evidence, much less substantial evidence, supporting" an agency decision denying social security benefits, the Court vacated that decision and directed the agency to issue an award of benefits. *Vance v. Heckler*, 757 F.2d 1324, 1325 (D.C. Cir. 1985). And in a decision cited by *Tennis Channel I* as support for reversing the Commission's prior order in this very case, *see* 717 F.3d at 987, the Court "'declined to remand to the agency where that disposition would serve no useful purpose'" upon finding "no evidence in the record before th[e] court" to support an agency order. *Guardian Moving & Storage Co. v. ICC*, 952 F.2d 1428, 1433 (D.C. Cir. 1992) (quoting *Am. Trading Transp. Co. v. United States*, 841 F.2d 421, 426 (D.C. Cir. 1988)).

Indeed, Tennis Channel's own authorities (*see* Pet. Br. 33) reject the "proposition that a court of appeals must remand a case for additional investigation or explanation once an error is identified," *Ghebremedhin v. Ashcroft*, 392 F.3d 241, 243 (7th Cir. 2004) (per curiam), and caution against "convert[ing] judicial review of agency action into a ping-pong game," *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992) (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969)). Yet under the approach Tennis Channel now advocates, a court could never bring an agency case to a close except by perpetually remanding the matter until the agency relents.

To be sure, if agency action requires affirmative factual findings "which Congress has exclusively entrusted to an administrative agency" to make, a court may not usurp the agency's role and deem that burden satisfied based on its own factfinding. *SEC v. Chenery Co.*, 318 U.S. 80, 88 (1943). "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Ibid.* Thus, as Tennis Channel argues (Pet. Br. 30–31), when an agency must find certain facts in order to take action, a court may not

uphold agency action and find this burden satisfied based on facts not found by the agency.

Here, however, the Court did not make any affirmative factual findings (as would be required to uphold the Commission's action on other grounds), but simply noted the absence of any evidence that would permit the agency to make such findings. None of the cases cited by Tennis Channel (Pet. Br. 30–31) addresses the situation here, where a court *vacates* agency action because the record *lacks* facts sufficient to satisfy the agency's burden. Just as it is "familiar appellate procedure" that "the appellate court cannot take the place of the jury" when "the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made," *Chenery*, 318 U.S. at 88, it is equally well established that it does not invade the province of the jury—or, here, of the agency—for the court to direct a judgment of acquittal when it finds the evidence insufficient for a reasonable jury to make that factual determination.

Nor does the Court's decision appear to contravene the "ordinary remand rule," which says that an agency should ordinarily be permitted to "make an initial determination" in which it "can bring its expertise to

bear" and, "through informed discussion and analysis, help a court later determine" the matter. *INS v. Ventura*, 537 U.S. 12, 17–18 (2002) (per curiam) (internal quotation marks omitted); *see also, e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 186–87 (2006) (per curiam) (finding "no special circumstance here that might have justified the [court's] determination of the matter in the first instance"); *R.I. Higher Educ. Assistance Auth. v. Secretary, U.S. Dep't of Educ.*, 929 F.2d 844, 857 (1st Cir. 1991) (remanding for consideration of "matters which * * * were not[] addressed by the agency" where "the administrative record has not been fully developed"). In this case, the Commission already developed a complete record and made an initial determination that gave the Court the full benefit of its expertise, so the "consideration[s] that classically support[] the law's ordinary remand requirement," *Ventura*, 537 U.S. at 17, would not appear to support a remand here.

For its part, even Tennis Channel eventually concedes that a reviewing court may "foreclose further agency proceedings" in "rare circumstances" upon finding the evidence insufficient to support agency action. Pet. Br. 32, 33. The Commission understands *Tennis Channel I* to have found that this case presents those rare circumstances, given the ample indications that the Court did not anticipate or intend for the

Commission to conduct further proceedings. But even if that decision could be read to give the FCC discretion to conduct further proceedings, the Commission's decision not to do so was a reasonable exercise of that discretion, as we next explain.

II. THE COMMISSION'S DECISION NOT TO REOPEN THE RECORD FOR UNSPECIFIED "FACTUAL ENHANCEMENT" WAS NOT ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION.

To the extent that the Commission had discretion to reopen the record for the submission of new evidence, *see E. Carolinas Broad. Co. v. FCC*, 762 F.2d 95, 99–101 (D.C. Cir. 1985); *In re Meadville Master Antenna, Inc.*, 36 F.C.C.2d 591, 594 ¶ 6 (1972), the agency reasonably declined to exercise that authority here.[8] "Where [an agency] refuses to reopen a proceeding, what is reviewable is merely the lawfulness of the refusal." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) (emphasis omitted). "Absent some provision of law requiring a reopening * * *, the basis for challenge must be that the refusal to reopen was 'arbitrary, capricious, or an abuse of discretion.'" *Ibid.* (quoting 5 U.S.C. § 706(2)(A)).

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[8] Because the Commission declined to exercise its discretion to reopen the record, it was unnecessary to address whether Section 402(h) applies here or how that provision would affect the Commission's consideration of any new evidence. *See Order* n.30 (JA___–__).

Tennis Channel's petition to reaffirm the Commission's original decision included a cursory request that, "if the Commission disagrees" with its contention that the existing record permits a decision in its favor, "[the Commission] should * * * allow the parties to produce additional evidence." Pet. for Further Proceedings & Reaffirmation of Original Decision at 26–27 (JA___–__). That request comprised just two sentences at the end of a 27-page filing. *Ibid.* Tennis Channel made no effort to suggest what further evidence, if any, it believed it would be able to produce if the record were reopened, nor did it explain why it could not have presented that evidence in the original proceedings before the administrative law judge.

The Commission denied that request, explaining that Tennis Channel already "had a full and fair opportunity to litigate its complaint" and that "the interest in bringing the proceeding to a close outweighs any interest in allowing Tennis Channel a second opportunity to prosecute its program carriage complaint." *Order* ¶ 8 (JA___). That decision was not arbitrary, capricious, or an abuse of discretion.

A. Tennis Channel Had A Full And Fair Opportunity To Prosecute Its Complaint.

Tennis Channel has already received "a full and fair opportunity * * * to prosecute its program carriage complaint." *Order* ¶ 8 (JA___). As Tennis Channel itself recounts, it "compil[ed] a comprehensive evidentiary record," Pet. Br. 2, and participated in "extensive discovery and a six-day evidentiary hearing," Pet. Br. 9, yielding "a hearing transcript exceeding 3,000 pages, testimony from 11 witnesses, and 871 exhibits," Pet. Br. 26. Tennis Channel does not contend that the FCC ever denied it the opportunity to submit any evidence at any point during those proceedings.

Tennis Channel nonetheless argues that it was denied "an opportunity *for the first time* to develop evidence bearing on questions that [*Tennis Channel I*] held to be central inquiries in this case," Pet. Br. 51, because "the dispositive factual issues were only identified on judicial review of the agency's decision," Pet. Br. 38–39. This argument apparently rests on Tennis Channel's claim that *Tennis Channel I* "applied novel evidentiary tests for determining whether the FCC's pre-existing legal standard [for program-carriage claims] had been met." Pet. Br. 28. That position is mistaken on several levels.

To begin with, the Court did not change the evidentiary standards that govern program-carriage complaints under Section 616. Rather, the Court simply provided several examples of the "type[s] of proof" that a video programming vendor should want to adduce to show that the MVPD's decision was not supported by any reasonable business justification, but was instead based on affiliation. 717 F.3d at 986. These were simply examples of what could constitute "evidence of unlawful discrimination," the Court explained, "under the Commission's interpretation of § 616" that has been in place throughout this proceeding. *Id.* at 984.

According to the Court, the value of this sort of evidence should have been "rather obvious," 717 F.3d at 986, under Section 616 (as that provision has consistently been interpreted throughout this proceeding). And even if the law were unsettled as to whether this evidence was *required* to prove discrimination, it was certainly *probative*, so Tennis Channel should have produced any such evidence when it had the opportunity to do so. Tellingly, even after the Court issued its decision, Tennis Channel offered the Commission no hint of what additional evidence it believes it could produce that it did not already present earlier in the proceeding.

Tennis Channel offers no persuasive argument that the FCC in any way misled it or prevented it from offering any evidence when litigating its complaint. It points (Pet. Br. 28–29) to the Commission's decision in *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099 (2010) (*MASN*), *pet. denied*, 679 F.3d 269 (4th Cir. 2012), but *MASN* only confirms that Tennis Channel was on notice of the potential relevance of cost–benefit evidence. In *MASN*, the Commission denied a program-carriage complaint because it found that the defendant MVPD's decision was motivated by "the high cost of carriage" rather than affiliation. *Id.* at 18112–13 ¶ 19. The Commission relied on cost–benefit evidence "show[ing] that, comparing MASN's considerable price to its unremarkable ratings, MASN provides significantly less value" than the affiliated programming vendors that were carried more broadly. *Ibid.* Far from suggesting that cost–benefit evidence is unnecessary or irrelevant, *MASN* instead makes clear that such evidence can be dispositive. And to the extent Tennis Channel contends that *MASN* placed the burden to produce that evidence solely on the defendant MVPD, not on the complainant, the Commission expressly

declined to endorse that position. *See* 25 FCC Rcd. at 18105 ¶ 11.[9]

If Tennis Channel possessed any further evidence that was even potentially probative of discrimination, it should have developed and offered that evidence during the earlier proceedings before the ALJ. A party is not entitled to present only a partial case and seek a decision from the Commission (and review by this Court) while reserving the right to put on additional evidence later if its initial showing is found insufficient. That Tennis Channel might have thought it could prevail on a lesser showing would not excuse its failure to make a full showing when it was given a full and fair opportunity to do so.

B. Tennis Channel's Request To Reopen The Record Is Outweighed By The Interest In Bringing This Proceeding To A Close.

The Commission reasonably determined that "the interest in bringing the proceeding to a close" supports its decision not to reopen the

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[9] In a footnote, Tennis Channel contends—with no elaboration—that three other Commission or Media Bureau orders suggest that cost–benefit evidence is somehow irrelevant for program-carriage complaints. *See* Pet. Br. 29 n.2. But those orders discuss only what is necessary to make out a *prima facie* case—which can be satisfied by showing that the defendant MVPD treated the complainant differently from a similarly situated affiliated programming vendor—not what is necessary to prevail on the merits after the MVPD proffers a legitimate business reason for its decision. *See Program Carriage Rules*, 26 FCC Rcd. at 11505–06 ¶¶ 16–17.

record for the submission of additional evidence that the parties could have submitted the first time around. *Order* ¶ 8 (JA___).

This Court has held that when a party could have "advanc[ed] [its] arguments in the initial proceedings" prior to judicial review, the FCC is not required to consider them on remand, because "efficiency and fairness values * * * would be seriously compromised if agencies were obliged to furnish such second bites at the apple." *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 471 (D.C. Cir. 1989). As the Supreme Court has recognized, "there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction." *Int'l Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 341 (1945); *see Order* n.28 (JA___).

Tennis Channel nowhere disputes that the agency has a valid and important interest in bringing its proceedings to a close after all parties have had a fair opportunity to present their arguments. As this Court has held, an agency's "interest in and need for finality, as articulated and supported [by the agency], constitute a fully adequate basis" for declining to reopen a matter. *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1187 (D.C. Cir. 1985).

Here, giving Tennis Channel a second opportunity to prosecute its claim would unduly tax the agency's scarce administrative resources. *Cf. JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) ("We place a high value on finality in administrative processes, for finality 'conserv[es] administrative resources and protect[s] the reliance interests of regulatees who conform their conduct to the regulations.'") (alterations in original) (quoting *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981)). It would also threaten to "deprive a victor in the courts of the spoils of its victory." *Qualcomm*, 181 F.3d at 1378. And after more than five years of litigation, further extending this proceeding would only further contravene Congress's instruction to "provide for expedited review" of program-carriage complaints. 47 U.S.C. § 536(a)(4).

Under these circumstances, the agency reasonably concluded that the interest in bringing this matter to a close outweighs any interest in giving Tennis Channel a second opportunity to prosecute its complaint. The Commission therefore acted well within its discretion when it declined to reopen the record to conduct further proceedings.

CONCLUSION

The petition for review should be denied.

Dated: October 21, 2015

Respectfully submitted,

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I, Scott M. Noveck, hereby certify that on October 21, 2015, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

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47 U.S.C. § 522 provides in pertinent part:

§522. Definitions

For purposes of this subchapter—

* * *

(13) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;

* * *

(20) the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

47 U.S.C. § 536 provides in pertinent part:

§536. Regulation of carriage agreements

(a) Regulations

Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall—

* * *

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

* * *

47 C.F.R. § 76.1300 provides in pertinent part:

> **§76.1300 Definitions.**
>
> As used in this subpart:
>
> * * *
>
> (d) **Multichannel video programming distributor.** The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.
>
> (e) **Video programming vendor.** The term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

47 C.F.R. § 76.1301 provides in pertinent part:

> **§76.1301. Prohibited practices.**
>
> * * *
>
> (c) **Discrimination.** No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

47 C.F.R. § 76.1302 provides in pertinent part:

> **§76.1302. Carriage agreement proceedings.**
>
> (a) **Complaints.** Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. * * *

* * *

(d) ***Prima facie* case.** In order to establish a *prima facie* case of a violation of §76.1301, the complaint must contain evidence of the following:

* * *

(iii) **Discrimination.** In a complaint alleging a violation of §76.1301(c):

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B)(*1*) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors; or

(*2*)(*i*) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in §76.1300(a)) with the defendant multichannel video programming distributor, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(*ii*) Evidence that the defendant multichannel video programming distributor has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(*2*)(*i*) of this section with respect to the selection, terms, or conditions for carriage.

* * *

(g) ***Prima facie* determination.** (1) Within sixty (60) calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed), the Chief, Media Bureau shall release a decision determining whether the complainant has established a *prima facie* case of a violation of §76.1301.

* * *

(4) If the Chief, Media Bureau finds that the complainant has not established a *prima facie* case of a violation of §76.1301, the Chief, Media Bureau will dismiss the complaint.

* * *