

**JOINT DISSENTING STATEMENT OF
COMMISSIONERS ROBERT M. MCDOWELL AND AJIT PAI**

Re: *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, Memorandum Opinion and Order

Today, the Commission faults Comcast for not having been the first major multichannel video programming distributor (MVPD)¹ to carry Tennis Channel on the same programming tier as Golf Channel and Versus (now NBC Sports Network).² It then takes the extraordinary step of requiring Comcast to give Tennis Channel equal carriage and concomitantly to pay Tennis Channel more for programming rights. Because we do not find sufficient support for the conclusion that Comcast's refusal to carry Tennis Channel on the same tier as Golf Channel and Versus was discriminatorily motivated by different ownership interests, we respectfully dissent.³

In our view, the Commission's analysis founders on this simple fact: Comcast's treatment of Tennis Channel was within the industry mainstream. In 2010, the year in which Tennis Channel filed its complaint, *every* major MVPD in the United States distributed both Golf Channel and Versus to more subscribers than Tennis Channel. Or, to put it another way, not a single major MVPD found Tennis Channel to be "similarly situated" to Golf Channel and Versus when making carriage decisions. For example, Time Warner distributed Golf Channel to [REDACTED] of its subscribers, Versus to [REDACTED], and Tennis Channel to only [REDACTED]; Cablevision distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) more widely than Tennis Channel ([REDACTED]). On average, major MVPDs unaffiliated with any of these three channels distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) to significantly more subscribers than Tennis Channel ([REDACTED]). Even DIRECTV, which is affiliated with Tennis Channel, distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) more widely than Tennis Channel ([REDACTED]).⁴

The Commission attempts to obscure this powerful evidence concerning other MVPDs' carriage practices by comparing apples to oranges. Specifically, it matches statistics on Comcast's carriage of Tennis Channel to those of *all* major MVPDs (other than Comcast), including those with ownership interests in Tennis Channel. This yields a significantly higher penetration rate for Tennis Channel due to the inclusion of DIRECTV and DISH Network—each of which is an affiliated distributor by virtue of an ownership interest. The Commission then concludes that the "record, examined in its entirety, shows that Comcast treats Golf Channel and Versus more favorably and Tennis Channel less favorably than they are treated by other MVPDs."⁵ This statistical analysis, however, is fatally flawed. When one compares apples to apples—that is, by comparing Comcast's distribution of Tennis Channel to that of other major MVPDs *with no ownership interest in Tennis Channel*—there is no meaningful difference. About [REDACTED] of the other major MVPDs' subscribers received Tennis Channel in 2010, versus

¹ The term "major MVPDs" refers to providers with more than two million subscribers.

² The latter two networks are affiliated with Comcast, while the former is not.

³ Because we conclude that Comcast did not discriminate against Tennis Channel, we need not reach the broader constitutional and policy arguments raised in this proceeding.

⁴ See Comcast Exs. 1102, 1103. DIRECTV and DISH Network are both affiliated with Tennis Channel. See Comcast Exceptions at 15.

⁵ Order at ¶ 71.

[REDACTED] of Comcast's subscribers. The Commission ought not implicate the First Amendment interests of a private actor based upon such a miniscule variance in carriage.⁶

To be sure, the Commission addresses this point by asserting that there is no evidence that affiliated MVPDs' carriage of Tennis Channel has been influenced by their equity interests in the network. This assertion cannot be squared with the facts. Take the carriage decisions made by major MVPDs in 2010: It was DIRECTV's distribution of Tennis Channel that was clearly an outlier, not Comcast's. Tennis Channel's penetration rate at DIRECTV was an eye-popping [REDACTED] in 2010, almost [REDACTED] the unaffiliated industry average. No other MVPD came close; DIRECTV led the pack by more than [REDACTED] points. Comcast, on the other hand, was in the middle of the pack. As this example suggests, it makes no sense to include major MVPDs with an equity interest in Tennis Channel within the control group if the goal of our analysis is to isolate the effects of ownership on carriage decisions. Rather, the Commission should compare the distribution decisions made by Comcast with the distribution decisions made by MVPDs that do not have an ownership interest in *any* of the networks at issue.⁷

Finally, even accepting the Commission's statistical method, it remains the case that MVPDs still distributed Golf Channel ([REDACTED]) and Versus ([REDACTED]) *much* more widely than Tennis Channel ([REDACTED]).⁸ Therefore, the Commission's statistical analysis, taken on its own terms, does not demonstrate that Comcast's failure to place Golf Channel, Versus, and Tennis Channel on the same tier was primarily the result of discrimination on the basis of affiliation.

The Commission attempts to explain away the large disparity between major MVPDs' distribution of Golf Channel and Versus, on the one hand, and Tennis Channel, on the other, through what it calls the "ripple effect." It describes this phenomenon as follows:

[O]ne MVPD's decision to carry a network at a specific level of distribution increases the likelihood that another MVPD will carry that network at the same level of distribution. A major MVPD's decision to widely distribute a network provides that network with greater access to subscribers, particularly in major cities, and additional publicity, which in turn makes broader carriage by other MVPDs more appealing and likely. An MVPD's decision to narrowly distribute

⁶ Assuming, as the Commission asserts, that intermediate scrutiny applies, the Commission must demonstrate that its restriction of First Amendment freedom "is no greater than is essential to the furtherance of [a substantial governmental] interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1996). The Commission's remedy in this case plainly does not meet this test. The Commission identifies the promotion of "fair competition" as the substantial governmental interest at stake here, *see* Order at ¶ 104, but then orders Comcast to treat Tennis Channel more favorably than all other major MVPDs. We fail to see how such a mandate promotes fair competition; rather, it is a requirement for Comcast (and only Comcast; *see* note 10 *infra* and accompanying text) to favor one particular competitor in the marketplace.

⁷ The Commission raises the red herring of discrimination with respect to disproportionate carriage of Tennis Channel by DIRECTV and DISH Network, asserting that "the mere fact of vertical integration does not itself establish affiliation-based discrimination by the vertically integrated MVPD in favor of its affiliated network." Order at ¶ 74. But the question is not whether—nor does our position here require us to show that—DIRECTV and DISH Network engaged in discrimination based upon affiliation. (Among other things, we nowhere claim that either provider carried Tennis Channel more broadly than an unaffiliated similarly situated channel or unreasonably restrained any other channel's ability to compete.) The question is merely whether those providers' carriage decisions were likely affected by equity interests, such that they should be excluded from the calculation of major MVPDs' carriage decisions. Common sense compels an affirmative answer to that question, especially given the statistics reviewed above.

⁸ *See* Comcast Exs. 1102, 1103.

a network reduces the network's total subscribers, which lowers the licensing revenue it earns, reduces its ability to attract advertisers, and limits its ability to make the investments, such as raising revenue to purchase programming, that are necessary to compete with other sports networks.⁹

Let us assume for the sake of argument that the ripple effect exists. On this view, had Comcast decided to carry Tennis Channel on the same tier as Golf Channel and Versus, Tennis Channel would have received more advertising revenue and additional subscription fees. These additional revenues, in turn, then could have been used to acquire and produce better programming, and that programming could have made Tennis Channel more attractive to other major MVPDs. Even granting all of this, the ripple effect still is not relevant, much less decisive, with respect to the question presented in this case. If a network such as Tennis Channel is insufficiently attractive for major MVPDs to distribute widely, why is Comcast obligated to be the first mover and provide the network with the revenue and publicity that it needs in order to become attractive to other MVPDs? Comcast's obligation under our rules is to provide unaffiliated networks with non-discriminatory—not preferential—treatment.¹⁰

Moreover, any waves the ripple effect creates surely are counteracted by the straightforward effect of competition. If consumers demand Tennis Channel as much as the Golf Channel and Versus but Comcast discriminates against it, Comcast's competitors have a golden opportunity to lure Comcast's customers away by distributing Tennis Channel as widely as (if not more widely than) the other two networks. That not a single major MVPD chose this course of action in 2010 is telling—not one company apparently thought that the marketplace demanded Tennis Channel as much as the Golf Channel and Versus.¹¹ Thus, Comcast's carriage of Tennis Channel simply reflected, rather than drove, the industry norm.

⁹ Order at ¶ 73 (footnotes omitted).

¹⁰ The Commission's repeated references to Comcast's size or market share do not widen the scope of that obligation. See Order at ¶¶ 9 (“Comcast is the largest MVPD in the United States with approximately 23 million subscribers.” (footnotes omitted)); 73 (explaining that the ripple effect is best understood “when viewed in light of Comcast's substantial market share”); 75 (referring to “Comcast's significant market share and the influence it wields in the MVPD market”); 86 (noting that “Comcast is the nation's largest MVPD”); 87 (“Comcast is the nation's largest MVPD. It directly represents nearly 24 percent of the market, and has even greater influence on the market due to the ripple effect.” (footnotes omitted)); and n.330 (“Comcast is the nation's largest distributor.”). To the extent that the Commission uses Comcast's size as a justification for ordering the company to assist non-affiliated programmers, it strains the legal underpinning of Section 616 of the Communications Act and Section 76.1301(c) of our rules. See 47 U.S.C. § 536; 47 C.F.R. § 76.1301(c). And if the Commission is using market share as a proxy for market power, we are not aware of any preferential-treatment obligation in other areas of competition law, even where (unlike here) market power is acknowledged. For example, traditional antitrust law does not impose an obligation to deal, let alone to offer preferential treatment. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust laws proscribing monopolization “were enacted for ‘the protection of competition, not competitors’” (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))). Nor does a refusal to deal with respect to exclusive, statutorily granted intellectual property rights imply liability. See 35 U.S.C. § 271(d)(4) (“No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his . . . refus[ing] to license or use any rights to the patent.”). Even the “essential facilities” doctrine does not go so far as to require affirmative aid, but merely reasonable access. See, e.g., *Aspen Highlands Skiing Corp. v. Aspen Skiing Corp.*, 738 F.2d 1509, 1519 (10th Cir. 1984) (noting that “a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it”), *aff'd*, 472 U.S. 585 (1985).

¹¹ The Commission finds it significant that Comcast's most direct competitors, satellite providers, carry Tennis Channel more broadly than Comcast. See Order at n.234. But it is more noteworthy that, notwithstanding the fact that both satellite providers own equity interests in Tennis Channel, neither DIRECTV nor DISH Network did in (continued...)

Perhaps recognizing this problem, the Commission buries a major concession in footnote 290 of its decision. There, the Commission suggests that the reason for its decision isn't Comcast's differential treatment of Tennis Channel and Golf Channel and Versus. The real problem is Comcast's placement of Tennis Channel on the Sports Tier rather than the Digital Preferred Tier. The Digital Preferred Tier is an intermediate tier that would have given Tennis Channel additional subscribers, but not as many as Golf Channel and Versus (which are carried on the widely selected Digital Starter Tier or Expanded Basic Tier).

This concession devastates the Commission's case. Tennis Channel complained that it was being discriminated against vis-à-vis Golf Channel and Versus, two affiliated networks that are broadly carried in the Digital Starter Tier. Therefore, to prevail in this case, Tennis Channel is required to prove that it was unlawful for Comcast to refuse to carry Tennis Channel on the same tier as Golf Channel and Versus. Tennis Channel did *not* complain to the Commission that it was being discriminated against vis-à-vis the affiliated networks that appear on Comcast's Digital Preferred Tier, namely, MLB Network, NBA TV, and NHL Network. Tennis Channel is of course free to file such a complaint and ask for carriage on the Digital Preferred Tier, but that is not the complaint the Commission adjudicates here. The record and the decision below do not compare the programming, distribution, advertising revenue, or other relevant indicators of whether or not Tennis Channel is similarly situated to these Digital Preferred Tier networks. However, the Commission does have a full record regarding the carriage decisions of Comcast and other MVPDs regarding Golf Channel and Versus, and that record demonstrates that Comcast's refusal to place those channels on the same tier as Tennis Channel was in keeping with industry practice.

* * *

Consider, finally, the broader impact of today's decision on consumers. If the Commission merely ordered Comcast to carry Tennis Channel on the same tier as Golf Channel and Versus, that alone would make Comcast an industry outlier. But to add insult to injury, the Commission also effectively obligates Comcast to pay Tennis Channel for this privilege.¹² As a result, in order to shield themselves from discrimination complaints, Comcast and other MVPDs will be more likely to carry networks they do not want, on tiers with broader penetration, and at higher prices than ever before—at least if they are foolish enough to be willing to invest in content creation. And the Commission should not kid itself. These additional programming costs will come out of the pockets of consumers, not from MVPDs' bottom lines.

For all these reasons, we respectfully dissent.

(Continued from previous page) _____

2010 what the Commission believes that Comcast should have done: distribute Tennis Channel as broadly as Golf Channel and Versus.

¹² The Commission's claim that Comcast could comply with its decision without giving Tennis Channel broader carriage elevates form over substance. See Order at ¶ 90 ("We are also not persuaded by Comcast's argument that it should not have to pay Tennis Channel for broader carriage. As an initial matter, the remedy only requires Comcast to provide Golf Channel and Tennis Channel with equal carriage. Comcast could comply with this remedy without providing Tennis Channel broader carriage."). Comcast theoretically could move Golf Channel and Versus (now NBC Sports) alongside Tennis Channel in the Sports Tier. By doing so, however, Comcast would be distributing Golf Channel and NBC Sports far more narrowly than other MVPDs, to the detriment of Comcast subscribers who presumably value that programming. We very much doubt the Commission believes that this will happen.