REDACTED VERSION

Before the
Federal Communications Commission
Washington D.C. 20554

FCC 11D-01

In the Matter of	)	
	)	
	)	MB Docket No. 10-204
Tennis Channel, Inc.,	)	
Complainant,	)	File No. CSR-8258-P
	)	
v.	)	
	)	
Comcast Cable Communications, L.L.C.,	)	
Defendant.	)	

Issued: December 16, 2011 **Released: December 20, 2011**

INITIAL DECISION OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Appearances

Stephen A. Weiswasser, Esq., C. William Phillips, Esq., Paul W. Schmidt, Esq., Robert M. Sherman, Esq., Leah E. Pogoriler, Esq., and Neema D. Trivedi, Esq., *on behalf of Tennis Channel, Inc.*; Michael P. Carroll, Esq., David B. Toscano, Esq., Edward N. Moss, Esq., Joanna Cohn Weiss, Esq., Michael Scheinkman, Esq., James L. Casserly, Esq., David P. Murray, Esq., Michael D. Hurwitz, Esq., David H. Solomon, Esq., and J. Wade Lindsay, Esq., *on behalf of Comcast Cable Communications, LLC*; William Knowles-Kellett, Esq., Gary Oshinsky, Esq., and Gary Schonman, Esq. *on behalf of the Enforcement Bureau of the Federal Communications Commission.*

PRELIMINARY STATEMENT

1. On July 5, 2010, Tennis Channel Inc. ("Tennis Channel"), a video programming vendor,[1] filed a carriage complaint against Comcast Cable Communications, LLC, ("Comcast Cable").[2] Tennis Channel alleges that Comcast Cable, a multichannel video programming

[1] A "video programming vendor" is "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(6)(b).

[2] *See* Carriage Agreement Complaint filed by Tennis Channel Against Comcast, File No. CSR-8258-P (July 5, 2010) ("Complaint").

distributor ("MVPD"),[3] violated section 616 of the Communications Act of 1934, as amended,[4] and section 76.1301(c) of the Commission's rules,[5] by discriminating against Tennis Channel in the terms and conditions of video program distribution on the basis of affiliation. Tennis Channel's principal contention is that Comcast Cable unlawfully carries Tennis Channel, an unaffiliated sports network, on a narrowly penetrated premium tier available only to customers who pay an additional charge, while carrying affiliated sports networks that are similarly situated with Tennis Channel on more widely distributed tiers that are available to customers paying no extra fee. Tennis Channel in its complaint requested the Media Bureau, *inter alia*, to require Comcast Cable to carry "Tennis Channel on each of its systems on a programming tier that is no less distributed than the most highly-penetrated tier on which it carries one or more of its affiliated sports networks."[6]

2. On October 5, 2010, the Media Bureau released its Hearing Designation Order ("*HDO*")[7] in which it concluded that "substantial and material questions of fact" exist as to whether Comcast Cable has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules"[8] and designated the complaint for hearing before an Administrative Law Judge ("Presiding Judge").[9] The issues designated for hearing are as follows:

> (a) To determine whether Comcast [Cable] has engaged in conduct the effect of which is to unreasonably restrain the ability of Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by Tennis Channel, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and
>
> (b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Comcast [Cable] should be required to carry Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers and, if so, the price, terms, and conditions thereof; and/or whether

---

[3] An MVPD is "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming . . . includ[ing]. . . but not limited to a cable operator." 47 C.F.R. § 76.1000(e). MVPDs include cable operators, such as Comcast, telephone companies, such as Verizon FIOS, and satellite video program distributors, such as DirecTV and DISH Network.

[4] 47 U.S.C. § 536(a)(3).

[5] 47 C.F.R. § 76.1301(c).

[6] Complaint at 45 (¶ 101).

[7] *In the Matter of Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Memorandum Opinion and Hearing Designation Order, MB Docket 10-204, 25 FCC Rcd 14149 (MB 2010) ("*HDO*").

[8] *Id.* at 14750 (¶ 2).

[9] *Id.* at 14163 (¶ 24).

Comcast [Cable] should be required to implement such other carriage-related remedial measures as are deemed appropriate; and

(c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether a forfeiture should be imposed on Comcast [Cable].[10]

The Media Bureau directed that there be an expedited hearing "to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision" on those designated issues.[11]

3. Following the completion of discovery, and the submission of direct testimony, proposed exhibits, and trial briefs, hearings were held in the Office of Administrative Law Judges ("OALJ") courtroom at the Commission's headquarters from April 25, 2011, through May 2, 2011. Four witnesses appeared on behalf of Tennis Channel,[12] seven witnesses appeared on behalf of Comcast Cable,[13] and thousands of documentary exhibits were received into evidence.

4. Subsequently, Tennis Channel and Comcast Cable each filed (1) Proposed Findings of Fact and Conclusions of Law; (2) Proposed Reply Findings of Fact and Conclusions of Law, (3) Post-Trial Briefs, and (4) Recommended Decisions. Tennis Channel and Comcast Cable also filed a useful Joint Glossary of Terms (copy attached). The Enforcement Bureau, which participated as a party representing the public interest, filed comments in support of the complainant. Upon request, Tennis Channel and Comcast Cable were permitted to present oral argument on July 12, 2011.

---

[10] *Id.* at 14163 (¶ 24) (footnote omitted).

[11] *Id.* at 14162 (¶ 23).

[12] Tennis Channel presented the testimony of two fact witnesses: Mr. Ken Solomon, Chairman and Chief Executive Officer of Tennis Channel, and Mr. Gary Herman, Tennis Channel's Senior Vice-President of Advertising Sales. In addition, Tennis Channel presented two expert witnesses: Dr. Hal Singer, Managing Director at Navigant Economics; and Mr. Timothy Brooks, an independent media consultant and media researcher.

[13] Comcast Cable presented the testimony of four fact witnesses: Mr. Gregory Rigdon, Comcast Cable's Executive Vice-President of Content Acquisition; Mr. Madison Bond, Executive Vice-President of Content Distribution for NBC Universal and formerly Comcast Cable's Executive Vice-President of Content Acquisition; Ms. Jennifer Gaiski, Comcast Cable's Senior Vice-President of Content Acquisition, and Mr. Joseph Donnelly, Senior Vice-President and Chief Financial Officer of Comcast Programming Group. In addition, Comcast Cable presented three expert witnesses: Mr. Jonathan Orszag, senior managing director of Compass Lexecon LLC, an economic consulting firm; Mr. Michael Egan, founder and principal of Renaissance Media Partners, LLC; and Mr. Marc Goldstein, former chief executive officer of Groupm, N.A.

FINDINGS OF FACT

A. Description of Parties

5. Tennis Channel is a national cable sports network that launched on May 15, 2003.[14] Although other national networks air tennis and tennis-related programming, Tennis Channel is the only cable network in the United States dedicated to the broadcast of that sport. Tennis Channel has obtained rights to portions of all four of the leading tennis events, known as the "Grand Slam" tournaments: the French Open, the Australian Open, Wimbledon, and the U.S. Open.[15] Tennis Channel also airs approximately 100 other major tennis tournaments, including the U. S. Davis Cup, the Fed Cup, the Association of Tennis Professionals ("ATP Men's Tour") World Tour Masters 1000, and the Women's Tennis Association ("WTA") Premier Tournaments.[16] In addition to its tournament coverage, Tennis Channel produces original lifestyle, instructional and fitness series, specials, and short-form programs on tennis-related topics.[17] Since January 2008, Tennis Channel has provided its programming both in a high definition ("HD") format and in a standard definition ("SD") format.[18] Currently, approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** receive Tennis Channel from approximately 130 distributors nationwide.[19]

6. Tennis Channel is not affiliated with Comcast Cable.[20] Two satellite video programming distributors, DIRECTV and the Dish Network, have minority equity interests in Tennis Channel, and both carry Tennis Channel programming with broad distribution.[21]

7. Comcast Cable is the largest MVPD in the United States[22] with approximately 23 million subscribers.[23] Comcast Cable is part of Comcast Corporation, a vertically integrated

---

[14] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 2 (¶ 5). Launching occurs when an MVPD commences carriage of a particular video programming network.

[15] *Id.* at 7 (¶ 13).

[16] *Id.* at 2, 7-8 (¶¶ 5, 6, 13, 14).

[17] *Id.* at 3 (¶ 6).

[18] *Id.* at 6 (¶ 11). *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2766 n.25 (2005) (High-definition programming "is a television signal with greater detail and fidelity than provided by the National Television Systems Committee ("NTSC") system. The high-definition picture has approximately twice the visual resolution as NTSC. High-definition programming also provides CD-quality audio.").

[19] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

[20] *Id.* at 20 n.11.

[21] *Id.* at 5 n.3; Tennis Channel Exh. 16 (Testimony of Hal Singer) at 36 (¶ 51). As part of their affiliation agreements with Tennis Channel, DIRECTV and the Dish Network received equity shares in Tennis Channel of approximately **[BEGIN CONFIDENTIAL]** [redacted], **[END CONFIDENTIAL]** respectively. Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 5 n.3;Tr. at 511 (Ken Solomon).

company that has equity interests in a number of networks, including sports networks[24] such as Golf Channel and Versus.

8. Golf Channel is a cable sports network launched in 1995 that is devoted to golf and golf-related programming. It televises numerous golf tournaments, including Professional Golf Association ("PGA") Tour events, Champions Tour events, Nationwide Tour events, Ladies Professional Golf Association ("LPGA") Tour events, and United States Golf Association events.[25] In addition, Golf Channel also airs a variety of golf-related non-event shows such as news, interviews, comedy, and instructional programming.[26] Comcast Corporation owns a controlling interest in Golf Channel.[27]

9. Versus is a cable sports network launched in 1995[28] that covers a variety of sports and sports related programming, including National Hockey League hockey, National Collegiate Athletic Association ("NCAA") football and basketball games, Bull Riding, IndyCar and National Association for Stock Car Auto Racing ("NASCAR") racing, lacrosse, hunting, fishing, professional basketball, martial arts, off-road racing, minor league baseball, skiing and snowboarding, volleyball, diving, World Extreme Cagefighting, triathlon, and bicycling, which includes the Tour de France bicycling event.[29] Versus's programming includes both event and non-event programming.[30] Comcast Corporation owns a controlling interest in Versus.[31]

10. Comcast has minority ownership interests in the NHL Network, a company that airs National Hockey League games, and the MLB Network, a company that broadcasts Major

---

[22] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 69 (¶ 101). *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 2485 (¶ 116) (2011).

[23] Tr. at 1989, 1991 (Madison Bond).

[24] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 7-10 (¶¶ 18-20).

[25] *See* Comcast Cable Exh. 77 (Testimony of Michael Egan) at 18-19 (¶ 30). The most significant golf tournaments, known as "the Majors" — the Masters Tournament, the U.S. Open Championship, the British Open, and the PGA Championship — are aired on CBS, NBC, and ESPN, not on Golf Channel. Tr. at 1513 (Michael Egan); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 16 (¶ 27).

[26] *See* Comcast Cable Exh. 77 (Testimony of Michael Egan) at 9 (¶ 31).

[27] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 11 (¶ 19). For many years, Golf Channel and Versus were wholly owned by Comcast Corporation. As a result of Comcast Corp's merger with NBC Universal, Golf Channel and Versus were transferred to a corporate entity in which Comcast Corporation holds a majority interest and which Comcast Corporation can acquire in full over the next several years. *Id.;* Tennis Channel Exh. 102 at 20-25.

[28] Versus, then known as the Outdoor Life Network ("OLN"), originally was formed as part of a joint venture between Cox, Comcast, and Continental. Tr. at 1955, 1959 (Madison Bond).

[29] *See* Comcast Cable Exh. 77 (Testimony of Michael Egan) at 34 (¶ 57); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 15 (¶ 27).

[30] Comcast Cable Exh. 77 (Testimony of Michael Egan) at 34 (¶ 57).

[31] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 11 (¶ 19).

League Baseball ("MLB") games.[32] In addition, Comcast has an indirect equity interest in NBA TV, a company that broadcasts National Basketball Association ("NBA") games.[33] As of 2009, Comcast owned eleven regional sports networks (SportsNet Bay Area, SportsNet California, SportsNet Chicago, SportsNet Mid- Atlantic, SportsNet New England, SportsNet Northwest, SportsNet Philadelphia, Sports SouthWest, Comcast/Charter Sports Southeast, SportsNet New York, and Mountain West SportsNet).[34]

B. Comcast's Tiers, Distribution Levels, and License Fee Arrangements

11. Comcast offers to its subscribers a variety of different tiers, *i.e.*, bundled packages of cable programming services or networks, at different prices. The most highly penetrated tier is Broadcast Basic (or B1), the analog service received by all Comcast customers.[35]

12. Expanded Basic (or B2), the second most highly penetrated level of analog service, contains the core cable offerings such as ESPN, USA Network, Discovery Network and Arts & Entertainment Network.[36] Digital Starter (also known as D0 or Digitized Expanded Basic), is the digital counterpart to Expanded Basic.[37] Approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** subscribe to Expanded Basic or Digital Starter Service.[38] Both Golf Channel and Versus are carried on these broadly penetrated tiers.[39]

13. Digital Preferred (or D1), the second most highly penetrated level of service on digitized Comcast systems, provides the subscriber with additional channels. Almost **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** subscribe to Digital Preferred.[40] The NHL Network, the MLB Network, and NBA TV are among the networks carried on this tier.[41]

14. The Sports and Entertainment Package ("Sports Tier") consists of a package of sports-related channels that Comcast makes available to existing subscribers for an additional fee

---

[32] Comcast owns 15.6 percent of the NHL Network and 8.3 percent of the MLB Network. Tennis Channel Exh. 15 (Testimony of Hal Singer) at 9 (¶ 20).

[33] Comcast Spectator, a Comcast affiliate, owns the Philadelphia 76ers, an NBA team that in turn holds equity in NBA TV. Comcast Cable Exh. 75 (Testimony of Madison Bond) at 9 (¶ 23); Tennis Channel Exh.16 (Testimony of Hal Singer) at 9, 10 (¶ 20 & n.17).

[34] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 46 (¶ 64).

[35] Tr. at 1951, 2116 (Madison Bond). *See* Glossary at 8.

[36] Tr. at 1951, 2096, 2116 (Madison Bond). *See* Glossary at 8.

[37] Tr. at 1951 (Madison Bond). *See* Glossary at 8.

[38] *See* Glossary at 8.

[39] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20).

[40] Tr. at 2190-91 (Madison Bond). *See* Glossary at 8.

[41] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20).

of approximately $5 to $8 a month.[42] Approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** subscribe to the Sports Tier.[43] The Sports Tier includes channels such as NFL RedZone, ESPN Classic, CBS College Sports Network, three Fox College Sports channels, Fox Soccer Channel, Gol TV, and Tennis Channel.[44] None of the networks carried exclusively on the Sports Tier are owned, in whole or in part, by Comcast.[45]

15. The charges that Comcast Cable pays a network for the right to distribute its programming, known as license fees, are typically the specified sum per subscriber per month set forth in an affiliation agreement[46] between Comcast Cable and the network. In 2010, for example, Comcast Cable paid its programming group **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to carry Golf Channel.[47] That same year Comcast Cable paid Tennis Channel **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to carry Tennis Channel.[48]

C. The Affiliation Agreement Between Comcast Cable and Tennis Channel And Subsequent Dealings Between the Two Companies.

16. On March 4, 2005, Tennis Channel and Comcast Cable signed an Affiliation Agreement establishing the terms and conditions for the carriage of Tennis Channel on Comcast systems.[49] The Affiliation Agreement requires Comcast Cable to pay **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per year.[52] The Affiliation Agreement contains **[BEGIN**

---

[42] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

[43] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4); Comcast Exh. 75 (Testimony of Madison Bond) at 2 (¶ 6).

[44] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 1 (¶ 3).

[45] *See* Tr. at 2198 (Madison Bond); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20). Some of Comcast's affiliates are carried both on the Sports Tier and a more highly penetrated tier. For example, NHL Network and NBA TV are carried on both the Digital Preferred and Sports Tiers. Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20).

[46] An affiliation agreement is a contract under which content is licensed by a programming service, such as Tennis Channel, to an MVPD, such as Comcast Cable, for distribution to the MVPD's retail subscribers. *See* Glossary at 2.

[47] Tr. at 2217-18 (Madison Bond); Tr. at 2376 (Jennifer Gaiski).

[48] Comcast Cable Exh. 588.

[49] Comcast Cable Exh. 84 (Affiliation Agreement); Tennis Channel Exh. 144; Comcast Cable Exh. 75 (Testimony of Madison Bond) at 5 (¶ 2).

[50] Tennis Channel Exh. 144 at 6 (¶ 5.1.1).

[51] Comcast Cable Exh. 588.

[52] *Id.*

CONFIDENTIAL] [redacted] **[END CONFIDENTIAL].**[54] The agreement also gives Comcast Cable the discretion to determine the tier (or tiers) upon which it will carry Tennis Channel **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** In addition, the agreement contains a most favored nation ("MFN") clause which requires Tennis Channel to offer Comcast Cable the same rates, terms, or conditions of carriage that Tennis Channel subsequently offers to another distributor.[56] The Affiliation Agreement is effective until **[BEGIN CONFIDENTIAL]** [redacted]. **[END CONFIDENTIAL]** [57]

17. Within 18 months after the execution of the Affiliation Agreement, Comcast began carrying Tennis Channel on most of its systems.[58] By December 2010, Tennis Channel was subscribed to approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Comcast Cable's customers.[59] The vast majority of Comcast's systems carry Tennis Channel on the Sports Tier, although approximately 100 regional systems carry Tennis Channel on a more widely penetrated tier.[60]

18. In 2006, Tennis Channel signed an affiliation agreement with the Dish Network that provided Tennis Channel with a broad coverage and the Dish Network with approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in Tennis Channel. The next year, Tennis Channel signed an affiliation agreement with DIRECTV that gave Tennis Channel broad coverage and DIRECTV approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in Tennis Channel.[61] After each of these contracts was

---

[53] Tennis Channel Exh. 144 at 6 (¶ 5.1.1); Comcast Cable Exh. 86, at 3-5. Tennis Channel also gave **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Tennis Channel Exh. 144 at 6 (¶ 5.1.2).

[54] Tennis Channel Exh 144 at 10 (¶ 6.3). Tr. at 1974, 1986 (Madison Bond).

[55] Tennis Channel Exh. 144 at 9 (¶ 6.2.1). *See* Tr. at 2159 (Madison Bond).

[56] Tennis Channel Exh. 144 at 24 (¶ 15.1). As a result of Comcast Cable's acceptance of a MFN offer, the level of volume discounts was increased in 2007. Comcast Cable Exh. 86, at 3-5.

[57] Tr. at 2027 (Madison Bond).

[58] Tr. at 1988 (Madison Bond).

[59] Tennis Channel Exh. 130. Currently, Comcast carries Tennis Channel on at least **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its systems. Tr. at 1988-89 (Madison Bond).

[60] Tr. at 1989-90, 1994 (Madison Bond). **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent of Comcast's Tennis Channel subscribers receive Tennis Channel on local tiers more broadly distributed than the Sports Tier. Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 18 (¶ 28).

[61] Tr. at 511 (Ken Solomon). These two agreements can be characterized as "equity for carriage" agreements only insofar as the equity interests that Dish and DIRECTV received were a component of the deals that also provided for those distributors' carriage of Tennis Channel network. Mr. Solomon, the CEO of Tennis Channel, was directly involved in the Dish and DIRECTV negotiations, and testified

signed, Tennis Channel, pursuant to the MFN clause in its Affiliation Agreement with Comcast Cable, offered Comcast Cable the terms and conditions set forth in those two agreements. Comcast Cable declined.[62]

D. Tennis Channel's Efforts To Renegotiate The Affiliation Agreement

19. In early 2009, Tennis Channel asked Comcast Cable to increase its distribution of the network by repositioning the channel from the Sports Tier to a more highly penetrated tier.[63] Executives from Tennis Channel met with executives from Comcast Cable on May 12, 2009 at Comcast's headquarters in Philadelphia. Mr. Solomon presented his proposal for increased carriage.[64] During this meeting, Tennis Channel's CEO told Comcast Cable officials that he believed that Tennis Channel's growth and improved programming in the past two years merited increased distribution on Comcast.[65] Mr. Solomon also offered Comcast **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for expanded coverage. Tennis Channel proposed a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Mr. Madison Bond, the head of content acquisitions at Comcast Cable and the Comcast Cable official responsible for making distribution decisions, told Tennis Channel executives that he would get back to them at a later date with a response to their proposal.[67]

20. Mr. Bond was prescient in his concern that a rejection of Tennis Channel's request for broader carriage would precipitate the filing of a carriage complaint against Comcast Cable.[68]

---

credibly that the equity interests received by Dish and DIRECTV were in exchange for those distributors' relinquishment of the "free period" of service at the beginning of the contract term rather than as an exchange for a specified level of carriage. *See* Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 5 n.3; Tr. at 506-08 (Ken Solomon).

[62] Comcast Cable Exh. 75 at 9 (¶ 25).

[63] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 9 (¶¶ 18-19).

[64] *See* Tennis Channel Exhs.70, 71.

[65] *Id.* at 272; Tr. at 276 (Ken Solomon). *See* Tennis Channel Exh. 71. Improvements were described as coverage of major tennis tournaments, rights to all Grand Slam tournaments, acquisition of HD capability, and on-the-air marquee personalities such as Jimmy Connors and John McEnroe.

[66] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 11 (¶ 24). Comcast Cable Exh. 638; Tennis Channel Exh. 70; Comcast Cable Exh. 588; Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 5-6 (¶ 13). **[BEGIN CONFIDENTIAL]** [redacted]. **[END CONFIDENTIAL]** Comcast Cable Exh. 75 (Testimony of Madison Bond) at 5 (¶ 15).

[67] Tr. at 2109 (Madison Bond).

[68] Tr. at 2109, 2130 (Madison Bond). Tr. at 2349 (Jennifer Gaiski).

Mr. Bond asked Ms. Jennifer Gaiski, the executive in charge of acquisitions for Comcast Cable, (1) to analyze the costs that Comcast Cable would incur if it accepted Tennis Channel's proposal, and (2) to contact Comcast's field representatives to ascertain if there was any interest in increased distribution of Tennis Channel.[69] Ms. Gaiski made a financial cost analysis of Tennis Channel's proposal. She concluded after taking into account **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** offered by Tennis Channel, that the total annual license fees that Comcast Cable would pay if it were to accept Tennis Channel's proposal to reposition the network either on Digital Preferred or on Digital Starter would have been much higher than the license fees Comcast Cable would pay to continue to carry the network primarily on the Sports Tier. To illustrate, Ms. Gaiski calculated Comcast's cost in 2010 to carry Tennis Channel on Digital Preferred **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** However, Ms. Gaiski never made a written analysis as to what Comcast Cable could gain by repositioning Tennis Channel to a widely penetrated tier.[71] Ms. Gaiski's written analysis, for example, did not take into account the possibility that repositioning would result in additional subscribers or upgrades to Comcast Cable.[72]

21 For what might seem her desire for input, Ms. Gaiski convened a teleconference on June 8 with the four regional executives representing each of Comcast's divisions and an in-house attorney.[73] At the time of the teleconference, the regional executives were aware of Ms. Gaiski's financial cost analyses of Tennis Channel's offer.[74] In response to her inquiry, the four regional executives informed Ms. Gaiski that there was little or no local system interest or customer interest in distributing Tennis Channel on a more broadly distributed tier.[75] One of the regional executives pointed out that Comcast Cable had told the systems to keep "all costs flat" unless the increased in costs generated new subscribers.[76] Ms. Gaiski asked the division

---

[69] Tr. at 2110 (Madison Bond).

[70] Comcast Cable Exh. 588. Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 6 (¶ 14). *See* Tr. at 2115-23 (Madison Bond).

[71] Tr. at 2414, 2438-40 (Jennifer Gaiski).

[72] Tr. at 2414 (Jennifer Gaiski).

[73] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 6 (¶ 16); Tr. at. 2443 Jennifer Gaiski). Although Ms. Gaiski's written testimony states that the teleconference took place on June 6, Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 6 (¶ 16), Ms. Gaiski's handwritten notes of the teleconference identify the date as June 8. Comcast Cable Exh. 130. *See* Tr. at 2356 (Jennifer Gaiski) (acknowledging at hearing that her notes identify the date of the teleconference as June 8). Ms. Gaiski's contemporaneous handwritten notes are more reliable than her subsequent recollection of the date as set forth in her written testimony. Moreover, it is more likely that the date of the teleconference was Monday June 8, a workday, as set forth in the handwritten notes than the June 6 Saturday date referenced in her written testimony.

[74] Tr. at 2444 (Jennifer Gaiski).

[75] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 6 (¶ 16).

[76] Comcast Cable Exh. 130 at COMTTC_004993; Tr. at 2360 (Jennifer Gaiski).

representatives again to consult with local system personnel to ascertain if Tennis Channel's recent proposal had generated any interest in carrying the network more broadly and to report back "in a day or two" with their findings.[77] Comcast Cable rejected Tennis Channel's proposal on June 9, the day after the teleconference[78] — before receiving any portion of the requested feedback.

22. The weight of record evidence as discussed above leads to the inescapable conclusion that Comcast Cable convened the June 8 teleconference as a ploy to shore up its defense strategy having sensed imminent future litigation and not to gauge the interest of its local systems in repositioning Tennis Channel. Comcast Cable officials acknowledged that at the time of the teleconference, Comcast Cable had concerns that Tennis Channel might take legal action against the company.[79] A lawyer was present during the teleconference and, on the lawyer's advice, Ms. Gaiski labeled her contemporaneous handwritten notes as "work product."[80] And significantly, Comcast Cable rejected Tennis Channel's proposal before the division representatives had a chance to respond to Ms. Gaiski's request for feedback from local system personnel on whether Tennis Channel's proposal had engendered any local interest. Thus, her apparent quest for input was aborted.

23. On June 9, Mr. Bond called Mr. Solomon and informed him that Tennis Channel's proposal was too costly and that Comcast Cable was rejecting it.[81] Mr. Bond told Mr. Solomon that Comcast Cable was willing to discuss with Tennis Channel ways in which distribution might be increased on select systems,[82] but Mr. Bond offered no financial counterproposal to Tennis Channel's proposed rates.[83] After June 9, the parties did not engage in further negotiations. Tennis Channel remained on Comcast Cable's Sports Tier[84] and on July 5, 2010, Tennis Channel filed its complaint with the Commission after timely alerting Comcast Cable before filing.

E. Tennis Channel Is Similarly Situated To Golf Channel and Versus.

24. The record evidence, viewed in its entirety, demonstrates and convinces that Tennis Channel, Golf Channel, and Versus are similarly situated networks. Each of the three networks provides year-round sports programming[85] and attracts similar types of viewers, *i.e.*,

---

[77] Comcast Cable Exh. 130. *See* Tr. at 2367 (Jennifer Gaiski).

[78] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 7 (¶ 17).

[79] Tr. at 2349, 2356 (Jennifer Gaiski); Tr. at 2109, 2130 (Madison Bond).

[80] Comcast Cable Exh. 130; Tr. at 2356, 2442-43 (Jennifer Gaiski).

[81] Tr. at 352-53 (Ken Solomon); Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 7 (¶ 17).

[82] *See* Tr. at 2213-16 (Madison Bond).

[83] Tr. at 2215 (Madison Bond).

[84] Mr. Gregory Rigdon, who replaced Mr. Bond as Comcast Cable's Executive Vice-President of Content Acquisition in February 2011, testified that he decided that the appropriate level of distribution for Tennis Channel is on the Sports Tier. Testimony of Gregory Rigdon at 4 (¶ 11); Tr. at 1883 (Gregory Rigdon).

[85] *See* Tr. at 703 (Timothy Brooks); Tr. at 1600 (Michael Egan).

predominantly male, affluent adults within the same overlapping age ranges. The three networks also target the same advertisers and all three have similar ratings.[86]

1. Sports Programming

25. The weight of record evidence shows that Tennis Channel, Golf Channel, and Versus are each national cable networks, and each offers the same *genre* (a Gaelic word meaning "kind" or "style") of programming.[87] This is readily seen by the fact that all three networks broadcast sporting events, *i.e.*, tournaments, and other types of sport content, such as lifestyle, and instructional sports programming.[88] Tennis Channel and Golf Channel each are devoted to the broadcast of a single sport with "high levels of audience participation: **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Tennis Channel's viewers participate in tennis, and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Golf Channel's viewers participate in golf."[89]

26. Tennis Channel and Versus also have a history of sharing or seeking rights to the same sporting events that continues to the present. For example, from June 2006 through December 2008, Versus and Tennis Channel shared television rights to the U.S. Davis Cup, with each network holding the right to broadcast a portion of the tournament exclusively.[90] Internal documents show that Comcast Corporation has long been desirous of obtaining U.S. Open rights[91] and in 2007, it considered a plan to give Tennis Channel broader distribution in exchange for Versus obtaining Tennis Channel's rights for the U.S. Open.[92] **[BEGIN CONFIDENTIAL]** [redacted][93] **[END CONFIDENTIAL]** Finally, Comcast Corporation considered obtaining French Open rights for Versus,[94] and currently is seeking rights to Wimbledon for Versus.[95]

---

[86] Comcast Cable used Golf Channel and Versus as comparables to Tennis Channel in evaluating the 2006 and 2007 MFN-required offers of equity. Tennis Channel Exh. 39 at COMTTC_00009011.

[87] *See* Tr. at 703 (Timothy Brooks); Tr. at 1600 (Michael Egan). *See In the Matter of Applications of Comcast Corporation, General Electric Company and* NBC *Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4286 n.286 (2011) ("[I]t is likely that viewers will substitute networks with similar programming (such as substituting one national sports network for another.").

[88] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 3 (¶ 6); Tr. at 1507-08, 1515.

[89] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

[90] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 22 (¶ 31). As of January 2009,Tennis Channel held exclusive rights to that programming. *Id.*

[91] *See* Tennis Channel Exh. 35 (Mr. Jeff Shell, head of the Comcast's programming division characterizing the U.S. Open as "the one tentpole event that makes the most sense for [Versus.]") A tentpole event is "[a] network's marquee programming — in sports, for example, a key match or game coverage." Glossary at 8.

[92] Tennis Channel Exhs. 40, 41, 43, 49.

[93] *See* Tennis Channel Exh. 49.

[94] Tr. at 2592 (Joseph Donnelly).

27. Mr. Michael Egan, Comcast's programming expert, acknowledged that the programming on Golf Channel, Versus, and Tennis Channel each "consist almost entirely of sports-themed content."[96] Mr. Egan nonetheless testified that the programming on Tennis Channel is "extremely different" from the programming on Golf Channel and Versus."[97]

28. Mr. Egan's conclusion that Tennis Channel is not similarly situated to Golf Channel and Versus in programming is just not credible. Mr. Egan testified that the "WealthTV exercise [he] had done a few years ago to [had] been informative" in making an evaluation in this case as to whether Tennis Channel, Golf Channel, and Versus had similar programming.[98] Yet, the methodology used by Mr. Egan in reaching his conclusion here is inconsistent with the methodology that he used — and that this tribunal had found creditable — in *WealthTV*. In that case, Mr. Egan used a "genre analysis" to determine whether programming of the two networks in question were similar.[99] Under his analysis, Mr. Egan determined a similarity in the two networks' programming by determining the amount of time that each network aired programming in broad substantive categories called genres, *i.e.*, sports, music, movies, travel & recreation, and lifestyle.[100] Mr. Egan candidly acknowledged, however, that he did not employ a genre analysis in this case because such an analysis would show that the programming on Tennis Channel, Golf Channel, and Versus is of the same genre, *i.e.*, sports[101] (and hence the logical conclusion that the three networks had substantially similar programming), an unwanted result for Comcast Cable. Such an unequivocal admission casts serious doubt on Mr. Egan's

---

[95] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 20 (¶ 42). Comcast Cable argues that the current pursuit of Wimbledon rights for Versus is "irrelevant to determining whether Comcast [Cable] discriminated in 2009 or whether Versus was similarly situated to Tennis Channel in 2009." Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 55 (¶ 102). Tennis Channel claims, however, that its complaint involves not only an allegation that Comcast Cable discriminated against the network in rejecting its June 9, 2009 proposal for broader carriage, but also that Comcast Cable's refusal to carry Tennis Channel at the same level of distribution that it accords to Golf Channel and Versus is a violation of section 616 that continues to the present day. *See* Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 77 (¶ 293); Tr. at 1412-1414 (Tennis Channel counsel).

[96] Comcast Cable Exh. 77 (Testimony of Michael Egan) at 5.

[97] Tr. at 1495 (Michael Egan). *See* Tr. at 1662 (Tennis Channel programming is "fundamentally different" than programming on Golf Channel and Versus).

[98] Tr. at 1503 (Michael Egan).

[99] Tr. at 1598-99 (Michael Egan). In addition to a "genre analysis," Mr. Egan in *WealthTV* employed a "look and feel" analysis. *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV, v. Time Warner Cable, Inc., et al.*, Recommended Decision, 24 FCC Rcd 12967, 12978 (¶ 23) (ALJ, 2009) ("*WealthTV Recommended Decision*"), *adopted by the Commission in* 25 FCC Rcd 8978 (2011) ("*WealthTV*"). A "look and feel" analysis is an *ad hoc* comparison of the personalities of different networks "conveyed by their visuals, the speech and dress of their hosts, music, subject matter, graphics and other factors." *Id.* at 12978 n.78.

[100] *WealthTV Recommended Decision*, 24 FCC Rcd at 12977 (¶ 22).

[101] Tr. at 1600 (Michael Egan) ("I did not [employ a genre analysis] because the genre for all three of them [Tennis Channel, Golf Channel, and Versus] immediately is sports.").

impartiality as a testifying witness since it raises the spectre of giving intentionally crafted testimony hoping to win a predetermined outcome.[102]

29. Rather than relying upon a genre analysis, Mr. Egan based his conclusion that Tennis Channel and the two Comcast affiliates have dissimilar programming upon "sub-genres . . . within the sports genre."[103] For example, in concluding that the programming on Tennis Channel differed from the programming on Golf Channel and Versus, Mr. Egan referred to the specific mix of *sports* programming on each channel, pointing out the amount of event programming vs. non-event programming; the amount of live vs. non-live programming; and the amount of first run vs. repeat programming.[104] Mr. Egan acknowledged, however, that he had never undertaken this sort of sub-genre analysis before and he was unaware of any prior application of that methodology in the cable industry.[105] Nor did Mr. Egan attempt to explain why a genre analysis was appropriate in evaluating program similarity in *WealthTV,* but inappropriate in evaluating program similarity in this case. It appears that Mr. Egan's newly-coined sub-genre methodology may have been concocted for this case, and is rejected as unreliable by the Presiding Judge.[106]

30. In his written testimony, Mr. Egan did not consider it necessary, in concluding that Tennis Channel is not similarly situated to Golf Channel and Versus, to address the image that each network projects to its viewers.[107] In direct oral testimony, however, Mr. Egan claimed, for the first time, that Tennis Channel is dissimilar to Golf Channel and Versus because it evokes a different image than those two Comcast affiliates. Specifically, Mr. Egan ruminated that Tennis

---

[102] Mr. Egan's testimony also appears internally inconsistent as to the genre — or genres — of programming aired by Golf Channel and Tennis Channel. As noted, Mr. Egan's testimony characterized the programming genre of both Tennis Channel and Golf Channel as sports. Tr. at 1600 (Michael Egan). Yet, at other points in his testimony, Mr. Egan indicated that both Golf Channel and Tennis Channel have multiple genres. *See* Tr. at 1508 (Michael Egan) (Golf Channel has a "greater variety of genres" than Tennis Channel); Tr. at 1516 (Tennis Channel has "[a] smaller number of genres.").

[103] Tr. at 1601 (Michael Egan).

[104] Comcast Cable Exh.77 (Testimony of Michael Egan) at 26-31 (¶¶ 44-51). Mr. Egan also testified to perceived differences in the sports programming of Tennis Channel and/or Golf Channel in terms of exclusivity, timeliness, and programming expenditures. Comcast Cable Exh.77 (Testimony of Michael Egan) at 24-40 (¶¶ 40-66).

[105] Tr. at 1600 (Michael Egan).

[106] Even Mr. Egan's sub-genre analysis shows some similarity in programming. Mr. Egan pointed out that live event sports coverage is the "most significant" programming on Golf Channel and Tennis Channel. Tr. at 1637 (Michael Egan). Mr. Egan calculated that in 2010 Tennis Channel broadcast 1,020 hours of live programming whereas Golf Channel broadcast 1,103 hours of live programming. Comcast Cable Exh.77 (Testimony of Michael Egan) at 31 (¶ 51). To his credit, Mr. Egan acknowledged the amount of live sports coverage broadcast on Tennis Channel is close to the amount of live event sports coverage on Golf Channel. Tr. at 1645 (Michael Egan).

[107] Tr. at 1599-60 (Michael Egan) (admitting that his written testimony does not incorporate a "look and feel" analysis).

Channel projects a "very international" image[108] — an image different from Golf Channel's "country club" image[109] and Versus's "aggressive" image.[110]

31. Mr. Egan's testimony on image neither convinces nor persuades. In support of his perception that Tennis Channel projects a "very international"[111] image, Mr. Egan asserts that Tennis Channel, in covering a tournament in a foreign country, airs "interstitial bit[s]," which Mr. Egan described as "one minute or two minute" segments describing events in the host city.[112] For example, if a tournament were located in Brisbane, Australia, Mr. Egan hypothecated that during one-or two minute segments Tennis Channel "might be talking about what's going on in Brisbane during this tournament."[113] Mr. Egan's description of Tennis Channel's interstitial programming in his direct testimony, however, contains no mention of programming about events in foreign cities. Instead, Mr. Egan stated that Tennis Channel's interstitial programming was "strictly about the game of tennis . . . of interest only to the avid player and/or fan."[114] Mr. Egan's hypothetical description of Tennis Channel's foreign-city event oriented interstitial programming in his oral testimony thus is inconsistent with his written testimony in this case. In any event, this fact-finder is not convinced that a brief description of events in a foreign host city would leave in subscribers' minds the image of Tennis Channel as being "very international."[115] A customer of the Tennis Channel — a sports channel specializing in tennis-related programming — views the network for its sports content, not to obtain information on events in foreign cities. The subscriber's focus in viewing a tournament is on the game and quality of play whether the tournament is in the United States or in a foreign country. Mr. Egan's claim that Tennis Channel's image is defined by brief mention of events occurring in a foreign city hosting a tournament is simply not persuasive.

32. Mr. Egan seeks to bolster his thesis that Tennis Channel conveys an international image through the presence of two network hosts, Ms. Arlene Santana, a "Latin-American

---

[108] Tr. at 1518, 1519 (Michael Egan).

[109] Tr. at 1518 (Michael Egan).

[110] Tr. at 1534-35 (Michael Egan). Mr. Egan testified that "aggressive" is a "better word" to describe Versus's programming than "violent." Tr. at 1534.

[111] Tr. at 1518 (Michael Egan).

[112] Tr. at 1519 (Michael Egan).

[113] *Id.* In his oral testimony, Mr. Egan described another type of "programming" that he did not even view. *See* Tr. at 1517 ("I'm making this an example, I didn't see this, but they talk about what Andre Agassi is doing off the court that week during that tournament or maybe his family life or something like that."). Such speculative testimony of unobserved programming is not accepted and only detracts from Mr. Egan's credibility.

[114] Comcast Cable Exh. 77 (Testimony of Michael Egan) at 22 (¶ 36). In his written testimony Mr. Egan provided the following examples of Tennis Channel's interstitial programming: "a host or hostess may give tournament context, introduce an interview clip with a player or trainer, interpret a tennis rule, or interview a coach who explains how to make a certain shot." *Id.* at 21 (¶ 36).

[115] Tr. at 1518 (Michael Egan).

woman" and Ms. Angela Sun, an "Asian-American woman."[116] Mr. Egan's suggestion that an American network's on-the-air-use of American professionals of Latina and Asian extraction creates an international, *i.e.*, a non-American, image is not only incorrect, but also approaches being repugnant.

33. Based upon his observation that Ms. Santana appeared to be in her 20s, Mr. Egan also concluded that Tennis Channel presents a "young" image as compared to the more "mature" image of Golf Channel.[117] Mr. Egan, however, does not identify the ages of Golf Channel hosts, or otherwise attempt to substantiate his claim that Golf Channel portrays a more "mature" image than Tennis Channel. As shown below, the weight of record evidence convinces this fact finder that Golf Channel and Tennis Channel appeal to audiences in the same age ranges, a finding in tension with Mr. Egan's unsupported assertion that Tennis Channel presents a more youthful image than Golf Channel.

34. Nor did Mr. Egan substantiate his claim that Golf Channel has a "country club" image that differs from Tennis Channel's image. In support of finding a "country club" image, Mr. Egan cites a single episode of a program, "Live From," which consisted of a discussion of whether the golfer, who Mr. Egan characterizes as a "young kid," *i.e.*, a 21 year old pro who was then leading in the Masters and subsequently would go on to win the tournament.[118] According to Mr. Egan, the show conveyed a country club image because it was set in front a fireplace that "look[ed] like one of the rooms of a clubhouse of the Masters, Augusta."[119] Mr. Egan, however, does not provide specific examples of other Golf Channel shows that project a country-club atmosphere. A "country club" background of a single episode of one Golf Channel program does not establish the universal image of the network. Moreover, Mr. Egan made no attempt to show that Tennis Channel — which is also devoted to a sport commonly played in country clubs[120] — does not also convey a country club atmosphere.[121]

---

[116] Tr. at 1519 (Michael Egan).

[117] Tr. at 1514, 1519 (Michael Egan).

[118] Tr. at 1514 (Michael Egan).

[119] *Id.* Official Notice is taken of the fact that each year the prestigious PGA Masters Golf tournament is played at the Bobby Jones Country Club in Augusta, Georgia, and that the Bobby Jones Country Club generally prohibits women from playing golf at the venue, but does permit women to play golf on selected "women's days."

[120] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

[121] Mr. Egan characterized Golf Channel's announcers as "authoritative" (*i.e.*, "[t]hey know what they're talking about") and "in charge." Tr. at 1513 (Michael Egan). Mr. Egan did not claim, however, that Tennis Channel announcers are any less knowledgeable or any less "in charge" than are Golf Channel announcers. Similarly, Mr. Egan characterized Golf Channel's image as "not risqué," Tr. at 1518 (Michael Egan), a characterization amply supported by Mr. Egan's descriptions of Golf Channel's programming. However, Mr. Egan's descriptions of Tennis Channel's programming — tennis tournaments and tennis related material —equally show that programming consists of only G-rated fare. *See id.* at 1508-09 (Michael Egan).

35. Mr. Egan's testimony regarding Versus's image also is unpersuasive. Mr. Egan testified that Versus's "hooks and bullets" programming *i.e.*, hunting and fishing, supports his characterization of Versus's image as aggressive.[122] The hunting or fishing shows described by Mr. Egan, however, cannot be convincingly characterized as programming portraying aggression. For example, Mr. Egan describes "Jimmy Houston's Outdoors" as depicting a "good old boy from the South" who is "talking to you and he's fishing, catching bass, or whatever."[123] "Elk Hunt Fever," a show that Mr. Egan himself characterizes as "more strategic" than aggressive, involves a guide "telling you about the wind and about [other] conditions" associated with the hunt, such as the terrain and the topography, which hardly constitutes aggressive programming.[124]

36. Mr. Egan acknowledges that Versus's "hooks and bullets" programming constitutes only a minority of the network's programming.[125] He broadly characterized "Versus [as] a kaleidoscope" that "covers 20 different sports," contrasting that it with Golf Channel and Tennis Channel which are single sport networks having "a defined content and personality."[126] Significantly, in arguing that Versus has an aggressive image, Mr. Egan did not account for the network's broadcast of a variety of non-aggressive sporting activities, such as skiing, snowboarding, biking, basketball, baseball, aquatics and diving.[127] Mr. Egan's failure to base his conclusion upon the whole of the network's programming is a further reason that Mr. Egan's conclusion that Versus portrays a different image than Tennis Channel is rejected.

2. Audience Characteristics

a. Affluent Viewership

37. Substantial record evidence shows that Tennis Channel, Golf Channel and Versus attract affluent viewers. The 2010 MRI data, a widely accepted source for demographic comparison, shows that the average median household income for Tennis Channel, Golf Channel and Versus is **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** These figures support Tennis Channel's claim that the average median household income of the three networks are both **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to each other, and substantially above the **[BEGIN**

---

[122] Tr. at 1534-35 (Michael Egan).

[123] Tr. at 1535-36 (Michael Egan).

[124] Tr. at 1537-38. (Michael Egan). Only one hunting and fishing show described by Mr. Egan arguably could be characterized as showing aggressive programming, *i.e*,. Federal "Premium Dangerous Game, which depicted the hunting of aggressive animals. Tr. at 1536 (Michael Egan).

[125] Tr. at 1535 (Michael Egan) (acknowledging that "hooks and bullets" programming constitutes only one-third of Versus's total programming).

[126] Tr. at 1539-40 (Michael Egan).

[127] Tr. at 1539-40 (Michael Egan). *See* Comcast Cable Exh. 77 (Testimony of Michael Egan) at 34 (¶ 57); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 15 (¶ 27).

[128] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 17, 24 (¶¶ 33, 44); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** average median household income for all networks.[129]

38. In its Answer in this case, Comcast Cable acknowledged that "[v]iewers of both Tennis Channel and Golf Channel are among the highest-income households."[130] Relying upon Experian Simmons data for the fall 2009 and summer 2010 time period, however, Comcast Cable now argues that the median household income for Tennis Channel viewers is **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** the average median household income for Golf Channel and Versus.[131] As shown below, 2009 and 2010 Experian Simmons data, which is inconsistent with the MRI data, is not creditable and is thus rejected.

39. The 2009 and 2010 Experian Simmons data produce anomalous and questionable results. For example, the Experian Simmons data show that Fine Living and Bloomberg Television — networks that clearly are designed to attract affluent viewers —had viewers with **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** median household incomes in 2009 and 2010.[132] The 2009 and 2010 Experian Simmons data also are out of step with the 2007 Simmons data, which showed that Tennis Channel's median household income in 2007 was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** a figure that is in line with the 2010 MRI data. Acceptance of the 2009 and 2010 Experian Simmons data thus would mean that the median household income of Tennis Channel viewers had plummeted between 2007 and 2009 by **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** even though in that period Tennis Channel had aired the same type of tennis and tennis-related programming that thus would be expected to attract the same types of viewers that it had earlier.[134]

---

[129] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 17, 24 (¶¶ 33, 44).

[130] Comcast Cable Answer at 52 (¶ 99). *See also* Tennis Channel Exh. 108 (Comcast document stating that "professional tennis is similar to [professional golf] in its appeal," attracting "dedicated viewers with higher financial means, education and sophisticated lifestyles").

[131] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 44 (¶ 87). For example, in the fall 2009, Comcast Cable points out that the Experian Simmons data show a median household income of only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for Tennis Channel as compared to the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** median household income for both Golf Channel and Versus. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 44 (¶ 87); Comcast Cable Exh. 195 at 11. In his written testimony Comcast Cable expert Mr. Egan relied upon the Experian Simmons data in concluding that Tennis Channel viewer is in a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than Golf Channel or Versus. Comcast Cable Exh. 77 (Testimony of Michael Egan) at 51 (¶¶ 89, 90). In his subsequent oral testimony, however, Mr. Egan acknowledged that "[b]ased on the evidence that I have seen [including the MRI data], I would have to say I'm uncertain on that metric." Tr. at 1749 (Michael Egan).

[132] Comcast Cable Exh. 195 at 11.

[133] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at n.24.

[134] *Compare* Comcast Cable Exh.195 *with* Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at n.24. It is not surprising that the 2009 and 2010 Experian Simmons data are questionable given that the results are based upon a very small sample: **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Tennis Channel viewers in the fall of 2009 and **[BEGIN CONFIDENTIAL]** [redacted]

b. Upscale Advertisers

40. The litany of upscale advertisers on Tennis Channel cast further doubt on the accuracy of the 2009 and 2010 Experian Simmons median household income figures. According to Comcast Cable's economic expert, Mr. Jonathan Orszag, the top four advertisers on Tennis Channel are **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** respectively[135] — companies highly unlikely to advertise on a channel viewed primarily by **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** viewers.[136] Moreover, as noted above, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Tennis Channel's viewers participate in tennis, which is a leisure activity often played in resorts and country clubs by persons of affluence,[137] not by **BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** viewers as reported by the 2009 and 2010 Experian Simmons data. Based on the weight of the record evidence, it is found that Tennis Channel and Golf Channel both attract upper income viewers and upscale advertisers.

c. Predominantly Male Viewership

41. For advertisers, there are three basic categories of channels for adults: (1) networks that predominately appeal to male audiences, (2) networks that appeal predominately to female audiences, and (3) networks that appeal equally to male and female audiences.[138] The preponderance of the record evidence shows that the audience for Tennis Channel is predominantly male. The 2010 MRI data show that Tennis Channel has a ratio of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** viewers[139] — a male to female ratio that is significantly higher than the industry average of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[140] The same data also show that Golf Channel and Versus attract more male than female viewers: the percentage of male viewers on Golf Channel and Versus being

---

[redacted] **[END CONFIDENTIAL]** Tennis Channel viewers in 2010. Comcast Cable Exh. 195 at 1. *See* Tr. at 1754 (Michael Egan).

[135] Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 42.

[136] *See* Comcast Cable Exh. 11 **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** decided to sponsor Tennis Channel's prime time Wimbledon coverage because "the highly affluent demographic profile of Tennis Channel viewers provides **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** with an efficient and targeted media platform.").

[137] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

[138] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 16 (¶ 31). *See* Tr. at 712 (Timothy Brooks).

[139] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 18 (¶ 33). *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

[140] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 18 (¶ 33).

[BEGIN CONFIDENTIAL] [redacted], **[END CONFIDENTIAL]** respectively.[141]

42. Comcast Cable maintains that there is "no dispute" between the parties as to the accuracy of the 2010 MRI data regarding the gender make-up of the respective channels.[142] Instead, Comcast Cable claims that those data show that Tennis Channel's audience differs significantly from the male dominated audiences of Golf Channel and Versus because "only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Tennis Channel viewers are men."[143] However, Comcast Cable's own expert, Mr. Marc Goldstein, testified that a channel that delivers three men for every two women — a ratio very similar to the gender composition of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** — skews male.[144] Thus, even though Tennis Channel's audience has a lower male to female ratio than the audiences of Versus and Golf Channel, the three networks are similar in that the audience of each network is male skewed.[145]

d. Age Ranges

43. Typically, networks market themselves by describing their viewership within specified age ranges as defined by Nielsen.[146] Networks that cater to children are divided into categories for (1) youth-oriented and (2) child and teen oriented, while networks that market to adults are bracketed into broad age categories (*e.g.*, ages 18-to-49, ages 25-to-54, ages 35-to-64).[147] Mr. Timothy Brooks, Tennis Channel's expert, testified that Tennis Channel, Golf

---

[141] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 18, 24 (¶¶ 33, 44); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 17 (¶ 28).

[142] Comcast Cable Reply Findings of Fact and Conclusions of Law at 30 (¶ 271).

[143] *Id*; Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 43 (¶ 86).

[144] Tr. at 2714 (Marc Goldstein).

[145] Comcast Cable claims that a number of Tennis Channel documents describe the network as having an even gender balance. Comcast Cable Findings of Fact and Conclusions of Law at 44 n.217. However, the first document cited by Comcast Cable describes Tennis Channel as having a 57 percent male to 42 percent female ratio, a ratio consistent with a male skew. *Id., citing* Comcast Cable Exh. 180 at TTCCOM_0002072. Some of the other documents relied upon by Comcast Cable speak to the number of females enjoying the sport of tennis, not the viewers of the network. *E.g.*, Comcast Cable Exh. 217 at TTCCOM_ 00033380. Some documents cited by Comcast Cable do characterize Tennis Channel as having an even gender balance; other record evidence, however, shows that Tennis Channel portrays its audience as male-skewed. See, *e.g.*, Tr. at 681-82 (Timothy Brooks); Comcast Cable Exh. 800 at TTCCOM_00070616. As set forth in this section, the weight of reliable record evidence, taken as a whole, shows Tennis Channel, Golf Channel, and Versus are similar in that the audience of each network is make-skewed.

[146] Tr. at 714 (Timothy Brooks).

[147] *Id. See also* Tr. at 626 (Gary Herman) (testifying that the core demographic of Tennis Channel is the 35-to-64 age group).

Channel, and Versus each target adults in the overlapping 25-to-54 or 35-to-64 age brackets.[148] Mr. Brooks' testimony on this issue is creditable.

44. Relying upon the median ages of the viewers of the three networks, Comcast Cable argues that Tennis Channel's viewers are older than those of Versus and younger than those of Golf Channel.[149] Although Comcast Cable correctly notes that the median audience ages of the three networks are somewhat different,[150] the undisputed record evidence establishes that companies use age ranges — not median ages — to market their networks to advertisers.[151] The median viewer ages of Tennis Channel, Golf Channel, and Versus are each **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and thus are consistent with — indeed corroborate — Tennis Channel's showing that the three networks target the same age groups.

3. Advertisers

45. The weight of reliable evidence shows that advertisers on Tennis Channel overlap substantially with advertisers on Golf Channel and Versus.[152] For example, in 2010, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Golf Channel's revenue from its 30 largest non-endemic advertisers[153] came either from recent advertisers on Tennis Channel or from companies that Tennis Channel was soliciting to advertise.[154] Similarly, in 2010, **[BEGIN**

---

[148] *Id.* at 713-14 (Timothy Brooks).

[149] Comcast Cable's Proposed Findings and Conclusions of Law at 45 (¶ 88).

[150] The median ages of Versus, Tennis Channel, and Golf Channel **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** respectively. *See* Comcast Cable Exh. 77 (Testimony of Michael Egan) at 50 (¶ 87).

[151] Tr. at 713-14 (Timothy Brooks).

[152] *See* Tennis Channel Exhs. 188, 189.

[153] Endemic advertisers are advertisers that promote only products or services specific to a particular sport. Tennis Channel Exh. 15 (Testimony of Gary Herman) at 3, 4 (¶¶ 7, 10).

[154] *Id.* at 4 (¶ 9) & Tennis Channel Exh. B. Comcast Cable argues that these are inflated figures because they exclude endemic advertisers. The percentage of advertising revenue derived from endemic advertisers, however, is relatively small. *See* Comcast Cable Exh. 238 (Herman Dep.) at 254 (Golf Channel's revenues from endemic advertising represent **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its total advertising revenues; Tennis Channel's advertising revenues from endemic advertising represent **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its total advertizing revenues). Notwithstanding the exclusion of endemic advertisers, the figures set forth above show a substantial overlap in the sources of advertising revenues on Tennis Channel and Golf Channel, and on Tennis Channel and Versus. Mr. Gary Herman, Tennis Channel's Senior Vice President of Advertising Sales, stated that he excluded endemic advertisers to show that, even the exclusion of advertisers that are least likely to purchase overlapping advertising, there was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** advertising revenues from companies that advertised both on Tennis Channel and Golf Channel and on Tennis Channel and Versus. Comcast Cable Exh. 238 (Herman Dep.) at 237, 249-50. Record evidence supports that claim: Excluding endemic advertisers, Tennis Channel competes for **[BEGIN CONFIDENTIAL]** [redacted]

CONFIDENTIAL] [redacted] **[END CONFIDENTIAL]** of Versus's revenues from its 30 largest non-endemic advertisers came from companies that either had purchased advertisements on Tennis Channel in 2009, or had been solicited by Tennis Channel in the preceding two years.[155]

46. Comcast Cable argues that these data overstate the advertiser overlap because they include both companies that advertise on Tennis Channel and companies that Tennis Channel had solicited, *i.e.*, made formal proposals for advertising arrangements.[156] However, taking into account both categories provides a more complete measure of the direct competition existing between Tennis Channel and the Comcast Cable sports affiliates for advertising revenues.[157] Nonetheless, substantial record evidence shows significant overlap even when comparing only companies that actually placed advertisements. Out of Tennis Channel's 30 largest non-endemic advertisers in 2010, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** advertised on Golf Channel that year and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** advertised on Versus.[158] An analysis of the 30 largest non-endemic advertisers on Golf Channel and Versus also shows substantial overlaps. In 2010, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Golf Channel's revenues from its top-30 non-endemic advertisers came from companies that had recently purchased advertising on Tennis Channel[159] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Versus's revenues came from its top-30 non-endemic advertisers also purchasing advertising on Tennis Channel.[160]

[redacted] **[END CONFIDENTIAL]** in revenues. *See* Tennis Channel Exh. 15 (Testimony of Gary Herman) at Exh. B.

[155] Tennis Channel Exh. 15 (Testimony of Gary Herman) at 3-4 (¶ 8) & Tennis Channel Exh. B.

[156] Comcast Cable provided no record support for its suggestion that Tennis Channel solicited advertisers for the purpose of manufacturing evidence of advertiser overlap for litigation purposes. Mr. Herman, Tennis Channel's executive in charge of advertising, specifically denied that charge and his testimony on that point is creditable. *See* Tr. at 684 (Gary Herman).

[157] A number of companies chose not to advertise on Tennis Channel because it has limited distribution. Some companies that are solicited by Tennis Channel purchase airtime on Golf Channel or Versus because those Comcast affiliates have broader coverage. Tennis Channel Exh. 15 (Testimony of Gary Herman) at 6-8 (¶¶ 15-20).

[158] *Id.* at 4 (¶ 10) & Exh. C.

[159] Tennis Channel Exh. 15 (Testimony of Gary Herman) at 4 (¶ 9) & Exh. B. The figures above do not include wholly endemic advertisers. *Id.* at 3, 4 (¶¶ 7, 10).

[160] *Id.* at 3 (¶ 8) & Tennis Channel Exh. B. In claiming that there is little overlap in the number of companies that actually advertise on each network, Comcast Cable states that "[a]mong each network's top fifty advertisers in 2010, only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** companies overlapped between Tennis Channel and Golf Channel, and only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** companies overlapped between Tennis Channel and Versus." Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 48-49 (¶ 92). Yet data submitted in the written testimony of Comcast Cable's economic expert, Mr. Jonathan Orszag, show those numbers increasing considerably when the top 100 companies are considered. See, *e.g.*, Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 42 (Of Tennis Channel's top 30 advertisers. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** are also within the top 100 advertisers on Golf

47. Relying upon the testimony of its expert, Mr. Marc Goldstein, Comcast Cable argues that the advertising overlap does not show that advertisers view the networks as being similar, since advertisers often purchase time on different networks to reach different audiences.[161] Mr. Goldstein notes, for example, that Procter and Gamble might advertise Pampers (diapers) on one channel and Gillette products (razors and shaving cream) on another.[162] Companies like Procter and Gamble, however, allocate advertising dollars into different budgets that are based upon different types of program content, *e.g.*,, sports, general lifestyle, and news.[163] Tennis Channel, Golf Channel and Versus directly compete against each other for advertising specifically funded from budgets allocated to sports programming,[164] not for the advertising of the company as a whole.[165] Procter and Gamble uses its sports budget to fund advertisements on sports networks for products such as its Gillette line;[166] Procter and Gamble does not use its sports advertising budget to fund advertisements for Pampers.

4. Ratings

48. The record evidence shows that Tennis Channel, Golf Channel, and Versus have remarkably similar ratings. Mr. Timothy Brooks, Comcast Cable's ratings expert, conducted a systematic ratings comparison of the three channels.[167] As shown below, the weight of persuasive evidence, taken as a whole, shows a substantial overlay in advertisers and advertising revenue existing between Tennis Channel and Golf Channel, and Tennis Channel and Versus.

Channel). Moreover, Mr. Herman testified that, of the top 30 advertisers (other than endemic advertisers) on Golf Channel in 2010, **[BEGIN CONFIDENTIAL]** ■ **[END CONFIDENTIAL]** had purchased advertising on Tennis Channel since 2009. Tennis Channel Exh. 15 (Testimony of Gary Herman), Exh. B. Similarly, of the top 30 advertisers (other than endemic advertisers) on Versus in 2010, **[BEGIN CONFIDENTIAL]** ■ **[END CONFIDENTIAL]** had purchased advertising on Tennis Channel since 2009. *Id.* As shown in this section, the weight of persuasive evidence, taken as a whole, shows a substantial overlap both between Tennis Channel and Golf Channel, and between Tennis Channel and Versus.

[161] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 47 (¶ 91). *See* Comcast Cable Exh. 79 (Marc Goldstein) at 9 (¶¶ 39-40).

[162] *See* Comcast Cable Exh. 79 (Marc Goldstein) at 9 (¶¶ 39-40).

[163] Tr. at 656-67 (Gary Herman).

[164] Tr. at 572, 579, 616, 673 (Gary Herman).

[165] *See* Tennis Channel Exh. 15 (Testimony of Gary Herman) at 2 (¶ 5) (Because Tennis Channel is a sports channel, its "primary competitors [for advertising] are other sports networks).

[166] *See* Tr. at 656-57 (Gary Herman).

[167] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 4-15, 18-22, 24-25 (¶¶ 9-28, 34-41, 45); Tr. at 728 (Timothy Brooks). It is standard industry practice for Nielsen to provide raw data that has to be calculated by the user. Tr. at 725 (Timothy Brooks). Consistent with that practice, the Nielsen data relied upon by Mr. Brooks were calculated (but not analyzed) by Tennis Channel under Mr. Brooks "strict supervision." Tr. at 726 (Timothy Brooks).

Mr. Brooks also derived coverage area ratings[168] from Nielsen local market ratings in each of the markets where Tennis Channel, Golf Channel, and Versus are measured.[169] Based upon these coverage area ratings, Mr. Brooks showed that Tennis Channel, Golf Channel, and Versus are rated "within hundredths of a rating point of each other."[170] For example, for the first nine months in 2010, the average total-day household ratings for Tennis Channel and Golf Channel were exactly **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].**[171] Versus averaged a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** total-day household rating for that time period.[172] As Mr. Brooks creditably testified, "advertisers and other consumers of ratings typically would treat network ratings of **[BEGIN CONFIDENTIAL]** .[redacted] **[END CONFIDENTIAL]** as functionally the same."[173]

49. Without presenting contrary ratings data, Comcast Cable argues that the coverage area ratings relied upon by Tennis Channel are unreliable because the denominator for a coverage area rating does not consist of all households in a given market, but only those households in the market that can receive the cable network. Because Tennis Channel reaches substantially fewer homes than either Golf Channel or Versus, Tennis Channel uses a smaller denominator in calculating its own ratings than it uses in calculating ratings for Golf Channel and Versus. Comcast Cable argues that these coverage area ratings inflate Tennis Channel's ratings vis-à-vis the ratings for Golf Channel and Versus.[174] That argument is rejected as illogical and unpersuasive. Coverage area ratings are "routinely used on a national basis to compare networks with differing distribution"[175] — and for good reason. As Mr. Brooks pointed

---

[168] A "coverage area rating" measures "the number of households or persons viewing a network, as a percentage of all households or persons receiving the network." Glossary at 4. In contrast, a "total market rating" measures "the number of households or persons viewing a network as a percentage of all households in a market, whether or not those households receive the network. *Id.* at 9.

[169] Tr. at 728 (Timothy Brooks). Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 6-7 (¶ 14).

[170] Tr. at 709 (Timothy Brooks).

[171] These data are corroborated by the ratings of the top events shown on the two networks. Of the top 100 rated events for the first nine months of 2010, approximately half were on Tennis Channel and half were on Golf Channel. *Id.* at 12 (¶ 24). *Cf.* Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 14-5, 18 (¶¶ 28, 34).

[172] *Id.* at 20 (¶ 36).

[173] *Id.* at 20 (¶ 38). Attitudinal measures of viewer satisfaction from Beta Research Corporation studies corroborate the fact that Versus and Tennis Channel are similarly situated. Digital Basic Cable Subscriber studies rates viewer satisfaction on a scale of 1.0 (lowest) to 4.0 (highest). In 2010, Tennis Channel achieved a rating of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].** Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 25 (¶ 47). A basic Cable Networks study for the same year showed that Versus also achieving a rating of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].** *Id.* at 26 (¶ 49).

[174] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 51-52 (¶ 97).

[175] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 9 n.10. *See also* Tr. at 745 ("massive practice" of the industry is to use coverage area ratings to compare networks with differing distribution). **[BEGIN CONFIDENTIAL]** [redacted]. **[END CONFIDENTIAL]** *See* Tennis Channel Exh. 46.

out, using total market ratings, which measure all homes without consideration of whether that home can receive the network, "would seriously skew the results toward networks with greater coverage."[176] The weight of reliable evidence and logic supports the use of coverage area ratings as a valid method of comparing Tennis Channel with the two Comcast affiliates and the coverage area ratings relied upon by Mr. Brooks are persuasive.[177] Mr. Brook's coverage area ratings persuasively establish Tennis Channel, Golf Channel, and Versus to be similarly situated in viewer appeal.

5. Programming Expenditures

50. Comcast Cable maintains that Tennis Channel spends significantly less money on programming costs than Golf Channel or Versus. Relying upon its economic expert, Mr. Jonathan Orszag, Comcast Cable argues that programming cost is "a proxy, albeit imperfect," for viewer appeal and programming quality.[178] Comcast Cable claims that Tennis Channel's lower programming costs shows that the network has less viewer appeal and lower quality programming than the two Comcast-affiliated sports networks.[179] That argument is rejected.

51. Comcast Cable correctly points out that the record evidence shows that Tennis Channel's programming expenditures are substantially less than the programming expenditures of Golf Channel and Versus.[180] It does not follow, however, that Tennis Channel's smaller programming expenditures show that the network has less viewer appeal or broadcasts programming that is inferior or less popular than the programming of Comcast's two sports networks. Rating data measuring subscriber viewing of the respective networks provide a more

---

[176] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 10 n.10. For example, assume that in a market of one million, network A has 100 percent coverage and network B has one percent coverage. Also assume that network A is watched by one percent of the viewers that are capable of receiving the network (10,000 of one million) and that network B is watched by 50 percent of viewers that are capable of receiving the network (5,000 of 10,000). Under a total market rating, network A would receive a higher rating than network B.

[177] Reliable record evidence showing that Tennis Channel, Golf Channel and Versus have the same or similar ratings undermines Comcast Cable's contention that "[t]he uncontroverted evidence shows that there is no significant subscriber demand for Tennis Channel, whereas there is significant subscriber demand for Golf Channel and Versus." Comcast Cable's Proposed Reply Findings of Fact and Conclusions of Law at 27 (¶ 265). Comcast Cable would not likely carry Tennis Channel on **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its systems, Tr. at 1988 (Madison Bond), if there were no significant demand for the network.

[178] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 49 (¶ 93). *See* Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 25 (¶ 39). *See* Tr. at 1126 (Orszag).

[179] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 49 (¶ 93).

[180] *See* Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 30. Although Tennis Channel has smaller programming expenditures than Golf Channel or Versus, the amounts that it has spent on programming are considerable. For example, Tennis Channel has invested **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to acquire and broadcast the Grand Slams and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** more to acquire rights to non-Grand Slam tournaments. Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 6 (¶ 12).

direct and more accurate measure of viewer appeal than programming expenditures. And, as shown in the previous section, Tennis Channel, Golf Channel and Versus have remarkably similar coverage area ratings showing that the three networks are similar in viewer appeal notwithstanding differences in program expenditures.[181] Dr. Hal Singer, Tennis Channel's economic expert, testified persuasively that programming expenditures are *not* a proxy for the value or quality of network programming.[182] As an example, Dr. Singer pointed out that "reality television shows and talent competitions are extremely popular—that is, are highly valued by viewers, advertisers, and distributors—yet often cost relatively little to make."[183] Dr. Singer's testimony on this point is creditable.

52. Notwithstanding differences in programming expenditures, the weight of the more convincing evidence, considered in its entirety, shows that Tennis Channel is similarly situated to Golf Channel and Versus. The record evidence shows that Comcast Cable did not consider Tennis Channel's programming expenditures in deciding the level of Tennis Channel's carriage.[184] Also, as noted above, programming expenditures are not a valid proxy for the popularity or value of a network's programming. The criteria relevant to the issues in this case — audience demographics, advertising, and ratings — establishes that Tennis Channel is similarly situated to Golf Channel and Versus.

E. Comcast Discriminates Against Tennis Channel in Favor of Golf Channel and Versus Solely on the Basis of Affiliation.

53. It is undisputed that Comcast gives more favorable channel placement[185] to Golf Channel and Versus than it does to Tennis Channel. Comcast's Washington D.C. system, for example, carries Versus on Channel 7 and Golf Channel on Channel 11, both are low numbers just two channels away from ESPN. In contrast, Comcast's same system carries Tennis Channel on Channel 735, which is located 726 channels above ESPN, and thereby is placed in an unfavorable position to capture viewers that "surf" the network.[186]

54. It is also undisputed that Comcast Cable carries Golf Channel and Versus far more broadly than it carries Tennis Channel. As noted above, Comcast Cable carries Golf Channel and Versus on the highly penetrated Expanded Basic or Digital Starter tiers reaching

---

[181] Comcast Cable's claim that Tennis Channel programming is inferior to Golf Channel and Versus also is undermined by the similarity in three networks' ratings, which indicate that viewers do not place less value on Tennis Channel's programming.

[182] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 55 (¶ 79).

[183] *Id.*

[184] *See* Tr. at 1884 (Gregory Rigdon); Tr. at 2255 (Madison Bond).

[185] Channel placement denotes the channel number that is assigned to a network. Networks favor the low numbers which attract viewers that surf the network, *i.e.*, viewers that select a network by starting at Channel 1 and pushing the Channel Up button. Sports networks also generally prefer placement in close proximity to ESPN. Tr. at 2265-66 (Madison Bond). *See*. Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 33 (¶ 66).

[186] Tennis Channel Exh. 100. *See* Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 34 (¶ 66).

approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its subscribers.[187] In contrast, Comcast Cable generally carries Tennis Channel on the narrowly-distributed Sports Tier that reaches only about **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Comcast's subscribers.[188]

55. As shown below, the weight of reliable record evidence demonstrates that the differences in channel placement and penetration level are based upon affiliation.[189] Top executives in Comcast Cable have acknowledged that Comcast Cable gives preferential treatment to its affiliated networks. Mr. Steven Burke, then President of Comcast Cable and Chief Operating Officer of Comcast Corporation, acknowledged that Comcast's affiliated networks such as Golf Channel and Versus "get treated like siblings as opposed to like strangers."[190] According to Mr. Burke, Comcast's affiliates receive a "different level of scrutiny" than unaffiliated providers.[191] Mr. Bond, the previous Comcast Cable executive responsible for distribution decisions, testified that Comcast Cable has a "sibling relationship" with its affiliated networks that "probably [affords those companies] greater access."[192]

56. Comcast Cable has affiliation agreements that effectively require Comcast systems to carry Golf Channel and Versus on highly distributed tiers.[193] In contrast, Comcast Cable does not require any of its cable systems to carry Tennis Channel — a network shown to be similarly

---

[187] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 7-8 (¶ 18).

[188] *Id.* at 8 (¶ 18).

[189] In the Commission's order of conditional approval of the recent merger between Comcast Corp. and NBC Universal, the Commission stated that "Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons." Tennis Channel Exh. 13, *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, Memorandum Opinion and Order,* 26 FCC Rcd 4238, 4285 (¶ 117) (2011) ("*MO&O*"). The Technical Appendix to the *MO&O* states that an "analysis of Comcast's data on carriage and channel placement shows (1) that Comcast currently favors its affiliated programming in making such decisions and that (2) this behavior stems from anticompetitive motives rather than due to reasons that arise from vertical efficiencies." *Id.* at ¶ 65. Notwithstanding those statements, however, the Commission did "not reach any conclusion as to whether Comcast has discriminated against any particular unaffiliated network in the past." *Id.* at n.163. Comcast Cable correctly notes that findings in the merger *MO&O* are not binding in this proceeding. *See* Comcast Cable Reply Findings of Fact and Conclusions of Law at 22 (¶ 252). It is noted that this formal hearing is *de novo*. Therefore, all findings contained in this *Initial Decision*, including those concerning Comcast Cable's preferential treatment of its affiliates, are based solely on the record evidence compiled in this proceeding, not on any comments made or conclusions reached or suggested in the *MO&O* in its Technical Appendix.

[190] Tennis Channel Exh 7 at 3.

[191] *Id.*

[192] Tr. at 2249 (Madison Bond). Comcast also has admitted that its investment in Golf Channel "brought with it one of the most important keys to a fledgling cable network's success — distribution." Tennis Channel Exh. 61. *See also* Tennis Channel Exh. 21.

[193] Tr. at 2160-61 (Madison Bond). *See* Comcast Cable Exh. 75 (Testimony of Madison Bond) at 11 (¶ 31).

situated with Golf Channel and Versus — on a broadly distributed tier.[194] Ms. Gaiski, Comcast Cable's Senior Vice President, communicated to "the field" (*i.e.*, Comcast cable systems across the country), that Tennis Channel is one of the networks that should be placed on the Sports Tier.[195] A Comcast Cable system can reposition Tennis Channel to a more highly distributed tier only if it obtains the approval of Mr. Rigdon, Comcast Cable's Executive Vice-President of Content Acquisition.[196] Mr. Rigdon has testified that he "would not grant that approval."[197]

57. Comcast Cable's practice is to transmit affiliated sports networks more broadly than unaffiliated sports networks. In general, the larger the interest that Comcast has in a network, the greater the distribution provided by Comcast Cable. Thus, Comcast Cable's majority-owned sports networks, Golf Channel and Versus, are carried on the very highly penetrating Expanded Basic or Digital Starter tiers. Comcast Cable carries NHL Network, MLB Network, and NBA TV — sports networks in which it has minority or indirect ownership — on the less highly penetrating Digital Preferred Tier that reaches approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its subscribers.[198] Every one of Comcast Cable's affiliated networks is carried on more widely distributed tiers than the Sports tiers. In fact, Comcast Cable carries only unaffiliated sports networks exclusively on the narrowly penetrated Sports Tier.[199]

58. The weight of record evidence further shows that affiliation by itself generally is sufficient to ensure that a sports network is widely distributed on Comcast systems. For example, in 2010, Comcast Cable planned to launch the U.S. Olympic Network, a new affiliated network featuring Olympics programming, "as part of its digital basic offerings" which would "giv[e] it more exposure than competing premium sports cable channels,"[200] despite the fact that

---

[194] Tr. at 2160 (Madison Bond).

[195] Tr. at 2407-08, 2482-84 (Jennifer Gaiski).

[196] Tr. at 1877 (Gregory Rigdon).

[197] *Id.* The record evidence shows that Comcast 's corporate headquarters prevented one local Comcast cable system from carrying Tennis Channel on a broader tier. Tennis Channel and Comcast's San Francisco system had reached an agreement for dual illumination, whereby Tennis Channel would be carried simultaneously on the Sports Tier and D2, a more widely distributed tier, whereas Tennis Channel, *inter alia*, would provide a tennis racquet to new digital subscribers to D2 or the Sports Tier. Tennis Channel Exhs. 24, 30. The agreement was approved by Comcast Cable's Denver regional office, but Comcast Cable officials at corporate headquarters refused to authorize it. Tennis Channel Exh. 31, 48. Tr. at 2293 (Madison Bond).

[198] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20).

[199] *Id.* Tr. at 2198 (Madison Bond). Comcast Cable does not carry the unaffiliated ESPN networks, on the Sports Tier. As Dr. Singer testified, ESPN I treated as a "special case among all sports networks nationwide" because they "have some of the most valuable sports programming." Tr. at 847 (Hal Singer). Comcast Cable also does not currently carry the unaffiliated NFL Network on the Sports Tier. Comcast Cable had repositioned the NFL Network from the Sports Tier to Digital Preferred in accordance with settlement of a litigated carriage discrimination complaint. Tennis Channel Exh. 16 (Testimony of Hal Singer) at 9 (¶ 20); Tr. at 846 (Hal Singer); Tr. at 2243-44 (Madison Bond).

[200] Tennis Channel Exh. 77; Tr. at 2189 (Madison Bond).

the U.S. Olympic Network had no rights to air any of the Olympic games.[201] Before it acquired hockey programming, Mr. Jeff Shell, head of Comcast's programming division, characterized OLN, the network subsequently renamed Versus, as "a crappy channel that was dead in the water."[202] Notwithstanding that low estimation of OLN's worth by a top Comcast executive, Comcast Cable maintained its broad distribution of that "crappy channel" and did not consider repositioning that network to the Sports Tier.[203]

59. Moreover, the record evidence demonstrates that Comcast Cable gives a network greater distribution when it acquires equity in such sports network. In 2009, Comcast Cable repositioned the NHL Network from the Sports Tier to the more highly penetrated Digital Preferred Tier pursuant to an agreement in which Comcast obtained equity in the network. That agreement directly tied the amount of equity that Comcast would receive in the network to the level of distribution provided by Comcast Cable.[204] In addition, Comcast Cable originally had planned to place a new MLB Network on the Sports Tier, but upon receiving equity in the network, launched the network in 2009 on the more highly distributed Digital Preferred Tier.[205]

60. Comcast Cable gives special assistance or favorable treatment to its affiliated networks in a variety of ways. For example, Versus had a contract with the National Hockey League for the rights to telecast professional hockey games that required the network to maintain a penetration level of at least **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. In order to ensure that Versus was in compliance with this commitment, Comcast Cable Vice-President Jennifer Gaiski in 2009 directed her staff to ensure that all Comcast cable systems provided Versus at a minimum with the specified level of carriage.[206] Comcast Cable's expert Michael Egan testified that it is "unusual" for a cable distributor such as Comcast Cable to ensure that a network has sufficient distribution to fulfill a contract for programming rights.[207] Moreover, in 2009, Mr. Bond assisted Versus in its negotiations with DIRECTV relating to level of distribution and other terms and conditions of Versus's carriage.[208]

---

[201] Tr. at 2184, 2186-89 (Madison Bond). Tennis Channel Exh. 76-77. The U.S. Olympic Network was never launched. Tr. at 2184 (Madison Bond).

[202] Tennis Channel Exh. 26; Tennis Channel Exh. 143 (Jeffrey Shell Deposition) at 39.

[203] Tr. at 2297 (Madison Bond); Tr. at 2410 (Jennifer Gaiski).

[204] Tr. at 21179-82 (Madison Bond). *See* Tr. at 853 (Hal Singer).

[205] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 10 n.18. *See* Tr. at 855 (Hal Singer). Approximately 100 Comcast systems serving **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent of Comcast's Tennis Channel subscribers receive Tennis Channel on a broadly distributed tier. Comcast Cable Exh. 80 (Testimony of Jonathan Orszag) at 18 (¶ 28); Tr. at 1989-90, 1994 (Madison Bond). The record evidence shows that Comcast Cable is more likely to carry Tennis Channel **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in markets in which it faces significant competition from another distributor. Tennis Channel Exh. 16 (Testimony of Hal Singer) at 11 (¶ 22).

[206] Tennis Channel Exh. 84; Tr. at 2393-98 (Jennifer Gaiski).

[207] Tr. at 1705 (Michael Egan).

[208] Tr. at 2230-34 (Madison Bond). *See also* Tennis Channel Exhs. 89, 92-98.

Even though he was then Comcast Cable's Executive Vice-President of Content Acquisition, Mr. Bond freely acknowledged that he was "representing the programming side in these negotiations."[209]

61. Comcast Cable also has taken an active role in ensuring that its affiliated networks obtain favorable channel placement. In 2008, Ms. Gaiski reported that she had successfully persuaded a number of Comcast local systems to give Versus favorable channel placement, *i.e.*, "adjacent to or within 2-3 channels slots of ESPN and/or ESPN 2" or "within 2 channel slots of the local RSN[regional sports network]."[210]

F. The Distribution Decisions of Other MVPDs Do Not Justify Comcast Cable's Carriage of Tennis Channel on a Narrowly Penetrated Tier.

62. Comcast Cable argues that the distribution decisions of other MVPDs show that its decision to carry Tennis Channel on the Sports Tier while carrying Golf Channel and Versus on broadly distributed tiers has a legitimate, non-discriminatory basis. Comcast Cable states that all major MVPDs carry Golf Channel and Versus broadly whereas most major MVPDs carry Tennis Channel on sports tiers. Comcast Cable asserts that every major MVPD carries Golf Channel and Versus to more subscribers than Tennis Channel. It claims that the record evidence shows that the distribution levels of the three networks on Comcast systems is in line with the market generally and that such evidence demonstrates that its carriage decisions are non-discriminatory business decisions.[211] For two reasons, those arguments are rejected.

63. First, the distribution decisions of other MVPDs do not establish that Comcast Cable's carriage of Tennis Channel on the Sports Tier is a result of a legitimate, non-discriminatory business decision because Comcast Cable's distribution of Tennis Channel has an influence on the distribution decisions of other MVPDs.[212] Substantial record evidence shows that MVPDs are influenced by the carriage decisions of other MVPDs.[213] Thus, when one MVPD carries a network at a particular level of distribution, it has a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** that makes it more likely that other MVPDs will carry the network at the same level of distribution.[214] Because Comcast Cable is the largest MVPD in the United States, its carriage decisions have a strong influence on other MVPDs.[215]

---

[209] Tr. at 2234 (Madison Bond).

[210] *See* Tennis Channel Exh. 55. *See* Tr. at 2270-74 (Madison Bond).

[211] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 29, 33 (¶ 60, 69).

[212] *See* Tr. at 722 (Timothy Brooks); Tr. at 1903-04 (Gregory Rigdon); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 41, 62-63, 70 (¶ 55, 89, 101).

[213] *See* Tr. at 722 (Timothy Brooks); Tr. at 1903-04 (Gregory Rigdon); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 41, 62-63, 70 (¶ 55, 89, 101).

[214] Tennis Channel Exh. 38, at COMTTC_00052319.

[215] *See* Tr. at 722 (Timothy Brooks).

64. The influence of MVPDs' carriage decisions on other MVPDs is reflected in carriers' affiliation agreements. The MFN clauses that are routinely inserted into affiliation agreements[216] not only ensure that the MVPD is informed of subsequently negotiated rates, terms or conditions of carriage that the network provides to another MVPD, but also give an MVPD the right to modify its own affiliation agreement to incorporate those rates, terms or conditions of carriage set forth in the other MVPD's affiliation agreement. Some affiliation agreements specifically are structured in a way that ties the level of distribution that a network receives to its aggregate subscriber count. Notably, the affiliation between Tennis Channel and **[BEGIN CONFIDENTIAL]** [redacted]. **[END CONFIDENTIAL]**.[217]

65. Comcast Cable itself has recognized **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** During its renewal negotiations with Charter Communications, Comcast Cable executives were concerned that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. Conversely, Comcast Cable officials recognized that a decision by Charter to carry the networks broadly **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. Given the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Comcast Cable's carriage of Tennis Channel, the penetration levels of other MVPDs do not support Comcast Cable's claim that its carriage of Tennis Channel on the Sports Tier is the result of a legitimate, non-discriminatory business decision.[221]

66. Second, contrary to Comcast Cable's assertion, its distribution of Golf Channel, Versus, and Tennis Channel is not in line with the distribution of those networks in the market generally. Substantial record evidence shows that Comcast Cable carries its affiliates, Golf Channel and Versus, at a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** penetration rate than other MVPDs. According to Comcast Cable's economic expert, Mr. Jonathan Orszag, Comcast Cable in 2010 carried Golf Channel to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its subscribers, a penetration rate **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than Golf Channel's penetration rates on DIRECTV, Verizon, Cox, Dish Network, AT&T, Time Warner, Bright House, Charter, and

---

[216] *See generally* Tr. at 2238 (Madison Bond).

[217] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 5 (¶ 8 n.4).

[218] Tennis Channel Exh. 38, at COMTTC_00052319.

[219] *Id. See* Tr. at 1901-02 (Gregory Rigdon).

[220] Tennis Channel Exh. 38, at COMTTC_00052319.

[221] According to Mr. Rigdon, the Comcast Cable executive responsible for distribution decisions, when a network "gives a concession to a distributor that's visible, such as retiering rights, it's going to be used . . . [by] other distributors as something they want." Tennis Channel Exh. 140 (Gregory Rigdon Deposition) at 114.

Cablevision.[222] Mr. Orszag acknowledged that Comcast Cable's penetration rate for Golf Channel was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than the rest of the market.[223] Similarly, Mr. Orszag testified that Versus's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** penetration rate on Comcast Cable in 2010[224] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than the rest of the market[225] and exceeded Versus's penetration rate on DIRECTV, Cox, Dish Network, AT&T, Time Warner, Bright House, Charter, and Cablevision.[226]

67. Substantial record evidence also shows that Comcast Cable carries Tennis Channel at a lower penetration rate than other MVPDs. Tennis Channel's average penetration rate on all MVPDs in 2010 was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL],** over twice Tennis Channel's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** penetration rate on Comcast Cable.[227] And when Tennis Channels' penetration rate on Comcast is compared with Tennis Channel's combined penetration rate on other large MVPDs, the differential is even greater. In the third quarter of 2010, for example, Tennis Channel's average penetration rate among MVPDs with at least two million subscribers other than Comcast Cable was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL],** a penetration rate **[BEGIN CONFIDENTIAL]]** [redacted] **[END CONFIDENTIAL]** higher than Tennis Channel's **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** penetration rate on Comcast.[228]

68. Comcast Cable argues that other cable companies provide the most relevant benchmarks for Comcast Cable's carriage decisions.[229] It points out that Tennis Channel's penetration rate on Comcast Cable is higher than Tennis Channel's average penetration rate of all other cable companies.[230] Comparing Comcast Cable's penetration rate with the penetration rate of only cable MVPDs, however, ignores a sizable segment of the industry, *e.g.*, telephone companies and satellite MVPDs — indeed, the very MVPDs that Comcast has recognized to be

---

[222]Comcast Exh. 80 (Testimony of Jonathan Orszag) at 14 (¶ 23).

[223] Tr. at 1299-1300 (Jonathan Orszag).

[224] Comcast Exh. 80 (Testimony of Jonathan Orszag) at 14 (¶ 23).

[225] Tr. at 1300 (Jonathan Orszag).

[226] *See* Comcast Exh.80 (Testimony of Jonathan Orszag) at 14 (¶ 23). Verizon was the only MVPD identified by Mr. Orszag that had a higher penetration rate for Versus in 2010 than Comcast Cable. *Id.*

[227] Comcast Exh. 80 (Testimony of Jonathan Orszag) at 40 (¶ 29, Table 2B); Tr. at 1376-77 (Jonathan Orszag).

[228] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 40 (¶ 54).

[229] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 33 (¶ 68).

[230] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 34 (¶ 69). Comcast relies upon record evidence showing that Tennis Channel's penetration rate on Comcast Cable — **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** whereas Tennis Channel's average penetration rate on all other cable companies is **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].** Comcast Cable Exh.80 (Testimony of Jonathan Orszag) at 13 (¶ 23, Table 1A).

chief competitors.[231] As Comcast Cable has pointed out in this case, "one should review the carriage decisions of all MVPDs."[232]

69. On September 12, 2011, after the record in this case had been closed, Comcast Cable filed a supplemental notice, with attached press reports, to advise the Presiding Judge that certain evidence in the hearing record is no longer accurate."[233] The record evidence referenced in the Supplemental Notice specified that as of 2009 or 2010 Verizon and Cablevision carried Tennis Channel at distribution levels of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].**[234] The press reports attached to the Supplemental Notice stated that Verizon and Cablevision had decided to opt out of the contract negotiated between Tennis Channel and the National Cable Television Cooperative and thus no longer carried Tennis Channel. The press reports also stated that Tennis Channel and Verizon were continuing to negotiate a new deal and Tennis Channel subscribers on Verizon were told the drop was temporary.[235]

70. As set forth in an order dated September 26, 2011, the supplemental material will not be considered in this Initial Decision. [236] Comcast Cable filed the Supplemental Notice after the record had closed but did not file a motion requesting the Presiding Judge to reopen the record to include that material. The Supplemental Notice thus is not evidence and is not a part of the record. The Notice and the attached hearsay press reports are of questionable reliability untested by the formal adversarial process. Contrary to Comcast Cable's contention, the Supplemental Notice and its attachments do not show that the record exhibits are not "accurate."[237] The exhibits referenced in the Supplemental Notice provide Tennis Channel's distribution levels on Verizon and Cablevision as of 2009 or 2010. The Supplemental Notice and accompanying press reports do not address Tennis Channel's distribution levels in the time period covered by those exhibits, let alone purport to show that the specific data contained in the exhibits are incorrect.[238]

---

[231] *See* Tr. at 2309-10 (Madison Bond).

[232] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 62 (¶ 116). Comcast Cable also contends that the distribution decisions of DIRECTV and Dish Network are not probative because they carry Tennis Channel pursuant to equity-for-carriage deals. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 35 (¶ 70). As noted above, however, Tennis Channel gave equity to Dish and DIRECTV in exchange for those distributors' relinquishment of the "free period" of service at the beginning of the contract term rather than as an exchange for a specified level of carriage. *See* Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 5 n.3; Tr. at 506-08 (Ken Solomon).

[233] Comcast's Supplemental Notice to Update Certain Record Evidence" (Sept. 12, 2011) at 1.

[234] Tennis Channel Exhs. 110 & 192; Comcast Cable Exhs. 659 & 1103.

[235] *Id.* at App.

[236] *Order*, FCC 11M-26 (released September 26, 2011).

[237] Supplemental Notice at 1.

[238] Supplemental Notice at 1.

G. Comcast Cable's Justifications for its Disparate Treatment Do Not Persuade.

71. Comcast Cable claims that there are legitimate, non-discriminatory reasons that explain and justify it awarding Golf Channel and Versus much broader distribution than Tennis Channel. First, Comcast Cable attributes the different levels of distribution to the fact that its affiliated networks sought broad carriage in an earlier time period than Tennis Channel. Second, Comcast Cable claims that its decision to decline Tennis Channel's 2009 offer was based on results of a cost-benefit analysis unrelated to Tennis Channel's status as unaffiliated network. As shown below, these arguments are not persuasive.

1. The Different Time Period that the Networks Sought Carriage

72. Comcast Cable points out that Golf Channel and Versus (then named OLN) achieved wide distribution by the late 1990s, before the advent of sports tiers when it was easier for networks to obtain broad carriage. Once networks gain broad penetration, according to Comcast Cable, MVPDs rarely reposition networks to less widely penetrated tiers because such action would upset the settled expectations of subscribers and generate "subscriber churn." Comcast Cable asserts that it provides Tennis Channel with narrower distribution than Golf Channel and Versus because Tennis Channel sought distribution in a later time period.[239]

73. The weight of record evidence shows, however, that Comcast Cable provided its affiliated sports networks broad distribution in the same time period that it provided Tennis Channel with narrow coverage. For example, in 2009 Comcast Cable placed its affiliated MLB network on the broadly distributed Digital Preferred Tier.[240] In the same year, Comcast Cable acquired equity in the NHL network and gave that network broader distribution by moving it to the Digital Preferred Tier.[241] In 2009, Comcast Cable also moved NBA TV, a network in which it has an indirect ownership interest, from the Sports Tier to the Digital Preferred Tier. And in 2010, Comcast Cable made plans to launch its affiliated U.S. Olympic network on a broadly distributed tier.[242] As noted above, Comcast Cable does not carry *any* affiliated network exclusively on the Sports Tier, even affiliated networks that were launched at the same time or later than Tennis Channel. Clearly, the weight of record evidence shows that it is difficult for a network to obtain wide distribution from Comcast Cable only if the network is not affiliated with Comcast.[243]

---

[239] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 27-28 (¶¶ 55-57).

[240] *See* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 10 n.18. *See* Tr. at 855 (Hal Singer).

[241] Tr. at 2179 (Madison Bond). *See* Tr. at 853 (Hal Singer).

[242] Tennis Channel Exh. 77; Tr. at 2189 (Madison Bond). Comcast Cable also has recently launched other types of affiliated networks on broadly penetrated tiers. For example, in 2008 Comcast Cable launched Retirement Living TV, an affiliated network, on its Digital Preferred Tier. Tr. at 2190 (Madison Bond).

[243] Comcast Cable points out that Golf Channel and Versus paid substantial sums to Comcast Cable and other distributors in launch initiates to reduce the cost of broad carriage. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 6, 27 (¶¶ 14, 57). However, Tennis Channel also provided **[BEGIN CONFIDENTIAL]** [redacted]

74. The record evidence also shows that MVPDs, usually at the time of renewal, consider whether to keep the networks they carry on a particular tier, or whether to reposition those networks to different tiers.[244] In fact, Comcast Cable has moved *unaffiliated* networks to more narrowly penetrated tiers, including its repositioning of the NFL network from the Digital Preferred Tier to the Sports Tier in 2007.[245] When Comcast Cable renewed its affiliation agreements with Versus and Golf Channel in 2009 and 2010, respectively,[246] however, it did *not* undertake a cost-benefit analysis as to whether it should reposition those affiliated networks to a different tier. Nor did Comcast Cable, in retaining those networks on widely penetrated tiers, otherwise consider consumer demand for those networks.[247] In fact, "not at any time" did Comcast Cable consider moving Golf Channel or Versus to the Sports Tier.[248] Rather, Comcast Cable effectively guarantees Golf Channel and Versus (but not unaffiliated networks) continued broad distribution on Comcast systems.

[redacted]. **[END CONFIDENTIAL]** Tennis Channel Exh. 144 at 6 (¶ 5.1.2).

[244] Comcast Cable contends that MVPDs rarely downgrade the position of networks they carry. *See* Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 28 (¶ 57). Significantly, Comcast Cable does not claim that MVPDs will not *consider* moving a broadly distributed network to a more narrowly distributed tier. *See* Tr. at 2240 (Madison Bond) (acknowledging that "from time to time distributors do threaten to move networks down at renegotiation periods."). In fact, the record evidence shows that MVPDs other than Comcast Cable have proposed negatively repositioning or dropping Versus and Golf Channel. For example, in 2007, Charter Communications ("Charter") proposed during renewal negotiations to reposition Golf Channel and Versus to less highly penetrated tiers. Tr. at 1905-08, 1919 (Gregory Rigdon). And in 2009, DIRECTV "threaten[ed] to cut off Versus all together." *See* Tr. at 2261-62 (Madison Bond). After Charter proposed to negatively reposition Golf Channel and Versus, Comcast Cable funded a marketing campaign and ran a "crawl"— a prompt scrolling across the bottom of the television screen — urging viewers to contact Charter and object to the proposed change. In response, many viewers sent e-mails and made telephone calls to Charter. In light of such viewer response, coupled with a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** from Comcast Cable, Charter withdrew its proposal to obtain rights to migrate the networks to less widely distributed tiers. Tr. at 1905-08, 1919 (Gregory Rigdon); Tennis Channel Exh. 140 (Gregory Rigdon Deposition) at 112-13.

[245] Tr. at 2243 (Madison Bond). Comcast Cable also has negatively repositioned other unaffiliated networks. *See* Tennis Channel Exh. 139 (Madison Bond Deposition) at 220-21.

[246] Comcast Cable Exh. 458, Tennis Channel Exh. 155.

[247] Tr. at 2226-28 (Madison Bond). Comcast Cable claims that viewer response to Charter's proposal to negatively reposition Golf Channel and Versus demonstrates that there is significant viewer demand for those networks. As noted above, however, there is no evidence that Comcast Cable ever considered viewer reaction in renewing affiliation agreements with Golf Channel and Versus which required those networks to be placed on widely penetrated tiers. Moreover, the record evidence shows that Comcast Cable executives were skeptical that viewers would react at all if another distributor stopped carrying Versus. For example, when DIRECTV threatened to drop Versus, Comcast executives were "not sure how many [Versus} subs[cribers] [would] make a service provider decision . . . or even a phone call, based on temporarily losing Versus." Tennis Channel Exh. 80 at COMTTC_00015420. *See* Tr. at 2261-62 (Madison Bond).

[248] Tr. at 2409-10 (Jennifer Gaiski). *See* Tr. at 2297 (Madison Bond).

2. Comcast Cable's "Cost-Benefit Analysis"

75. Comcast Cable argues that it declined Tennis Channel's 2009 offer after conducting a cost-benefit analysis showing that Comcast would incur substantial costs if it were to grant Tennis Channel broader carriage. Claiming that conclusion was based on business reasons unrelated to affiliation, Comcast Cable contends that its retention of Tennis Channel on the Sports Tier does not show discrimination, and does not violate sections 616 and 76.1301(c).[249] That argument is unpersuasive for two reasons.

76. First, Comcast Cable in its so-called "cost-benefit analysis" did not evaluate the benefits of carrying Tennis Channel on a more widely penetrated tier. Ms. Gaiski, in her written financial cost analysis of Tennis Channel's proposal, only analyzed increased costs to Comcast Cable of carrying Tennis Channel on Digital Preferred or Digital Starter tiers *vis-à-vis* retaining that network on the Sports Tier.[250] Ms. Gaiski made no attempt to quantify benefits to Comcast Cable in carrying Tennis Channel on more widely penetrated tiers.[251] Ms. Gaiski did not even make a written analysis of additional subscribers or upgrades that might result from the acceptance of Tennis Channel's offer.[252] Nor did she request, or receive, any such written analyses from division representatives.[253]

---

[249] Contrary to Comcast Cable's assertion, the case is not merely about whether Comcast Cable was justified in declining Tennis Channel's 2009 proposal to modify the affiliation agreement. The issue designated for hearing is broader: whether Comcast Cable "unreasonably restrained the ability of Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by Tennis Channel." *HDO,* 25 FCC Rcd at 14163 (¶ 24). To be sure, Tennis Channel alleges that Comcast Cable unlawfully rejected its 2009 proposal. Tennis Channel also claims, however, that Comcast Cable's refusal to carry it at the same level of distribution that it accords to Golf Channel and Versus constitutes a violation of sections 616 and 76.1301(c) that continues to the present. *See* Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 77 (¶ 293); Tr. at 1412-1414 (Paul Schmidt, Tennis Channel attorney).

[250] Comcast Cable Exh. 588; Tr. at 2437 (Jennifer Gaiski).

[251] Tr. at 2439 (Jennifer Gaiski) (testifying that she gave "no thought to preparing an analysis of what Comcast [Cable] might gain by moving Tennis Channel to a more widely distributed tier.").

[252] Tr. at 2414 (Jennifer Gaiski). "Advertising Availabilities" or "ad avails" are "[a]dvertising units during the programming of a network . . . that are made available for the distributor to sell under a standard term of an affiliation agreement. Glossary at 2. Comcast Cable argues that it would not have derived a benefit from an increase in ad avails resulting from an acceptance of Tennis Channel's proposal due to its excess inventory in ad avails. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 19-20 (¶ 39). Ms. Gaiski testified, however, that Comcast Cable in declining Tennis Channel's offer "never gave any consideration" to whether or not acceptance of Tennis Channel's offer would generate additional revenues to Comcast Cable through the sale of ad avails on Tennis Channel. *Id*

[253] Tr. at 2439 (Jennifer Gaiski). As shown by her handwritten notes labeled "work product," Ms. Gaiski in a June 8 teleconference with the four regional executives received initial negative feedback as to consumer interest in repositioning Tennis Channel. She requested the division representatives to confer with the local systems and to report in "a day or two" whether Tennis Channel's offer had engendered any interest. Comcast Cable Exh. 130; Tr. at 2367 (Jennifer Gaiski). Comcast Cable, however, declined

77. Second, Tennis Channel is the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** nationally rated sports network carried by Comcast Cable.[254] The costs to Comcast Cable in repositioning Tennis Channel to a broadly penetrated tier are far less than costs to Comcast Cable in broadly distributing Golf Channel and Versus.[255] The per-subscriber license fees that Comcast Cable pays to Golf Channel and Versus are substantially higher than per-subscriber license fees paid to Tennis Channel.[256] As a consequence, Comcast Cable pays substantially more for carrying Golf Channel and Versus than it would if it were to carry Tennis Channel at the same level of distribution. For example, Comcast Cable in 2010 paid **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to carry Golf Channel.[257] Under discounts offered in Tennis Channel's 2009 proposal, Comcast Cable in 2010 would have paid Tennis Channel **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL],** for the same expanded level of distribution.[258]

78. An established method for determining the value of a network is to compare its license fee to its rating by applying a license-fee-per-rating point metric.[259] Based upon 2009 figures, Tennis Channel's license-fee-per-rating point, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is substantially lower than the license-fee-per-rating points for either Golf Channel **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** or Versus **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].** [260] Had Comcast Cable

---

Tennis Channel's offer the next day, before the division representatives had a chance to respond with the requested input. For the reasons set forth in *paragraphs* 21, *supra*, the weight of record evidence shows that Comcast Cable convened the teleconference to shore up its defense of possible future litigation rather than to truly gauge the interest of its local systems.

[254] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 32 (¶ 46).

[255] Ms. Gaiski did not undertake any analysis comparing Comcast Cable's cost of broadly carrying Tennis Channel vis-à-vis its cost of broadly carrying Golf Channel and Versus. Tr. at 2433 (Jennifer Gaiski).

[256] The license fees that Comcast Cable paid Golf Channel in 2010 were **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per subscriber. Tr. at 2218 (Madison Bond); Tr. at 2376 (Jennifer Gaiski). Comcast Cable executives provided inconsistent testimony as to Versus's per subscriber license fees. According to Mr. Bond, Comcast Cable pays **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per subscriber to carry Versus, Tr. at 220 (Madison Bond) whereas Ms. Gaiski testified Versus charged **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per subscriber, Tr. at 2377 (Jennifer Gaiski). The license fees that Comcast Cable in 2010 paid Tennis Channel in 2010 were **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** per subscriber. Comcast Exh. 588. Thus, the weight of record evidence shows Golf Channel and Versus charge substantially higher per subscriber license fees than Tennis Channel.

[257] Tr. at 2218 (Madison Bond); Tr. at 2376 (Jennifer Gaiski). According to Mr. Bond, in 2010 Comcast Cable's license fees to carry Versus amounted to approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Tr. at 2221 (Madison Bond).

[258] Comcast Cable Exh. 588.

[259] Comcast Cable has utilized the license-fee-per-rating-point metric in carriage negotiations to compare the value of Versus to other networks. *See* Tennis Channel Exh. 82, at COMTTC_00010949.

[260] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 32-33 (¶ 46).

accepted Tennis Channel's 2009 proposal, with its substantial discounts, Tennis Channel's license-fee-per-rating point would have been even more favorable. Tennis Channel's license-fee-per-rating point thus further undermines Comcast Cable's claim that its refusal to grant Tennis Channel broader distribution is based upon cost rather than upon affiliation.

H. Economic Benefits in Favoring Affiliated Networks

79. There is an economic benefit realized by Comcast in retaining a dual distribution system that involves carrying Tennis Channel (and other unaffiliated sports networks) exclusively on the Sports Tier, while carrying affiliated sports networks on widely penetrated tiers. Networks on the Sports Tier in the aggregate charge Comcast between **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in license fees to distribute their programming.[261] Comcast in turn charges subscribers to the Sports Tier an additional fee of $5 to $8 a month to receive those networks' programming.[262] Apart from some incremental marketing costs, the net difference — which amounts to approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** — is pure profit to the Comcast enterprise.[263] Comcast Cable therefore has a clear economic incentive to retain popular *unaffiliated* networks on the Sports Tier to ensure that the Sports Tier continues to be profitable. Mr. Rigdon, the Comcast executive responsible for determining how networks are carried on Comcast systems, stated that "[t]he Tennis Channel helps bolster the value proposition of the [S]ports [T]ier."[264] Mr. Rigdon acknowledged that one reason he would not grant approval to repositioning Tennis Channel from the Sports Tier is because that action would "take value out of the [S]ports [T]ier and threaten those revenues."[265]

80. Networks placed on the Sports Tier, are disadvantaged *vis-à-vis* the affiliation networks distributed on widely penetrated tiers. That is because license fees are calculated on a per subscriber basis and as a result, those networks receive less in license fees than if carried on broadly distributed tiers. Limited distribution also makes it more difficult for those networks to attract advertisers and compete for programming rights.[266] Thus, Comcast has an economic incentive to protect its affiliated sports networks from these disadvantages by carrying them on broadly penetrated tiers, while leaving only unaffiliated networks disadvantaged on the least penetrated Sports Tier. This disparate treatment in distribution clearly is monetarily advantageous for Comcast Cable, but it also clearly is affiliation-based discrimination which Congress has outlawed.

---

[261] Tr. at 2301 (Madison Bond).

[262] Comcast Cable Exh.78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

[263] Tr. at 2301-02 (Madison Bond).

[264] Tennis Channel Exh. 140 (Gregory Rigdon Deposition) at 146. Mr. Bond in an internal Comcast Cable memorandum identified one of his major business objectives for 2008 as "enhanc[ing] the sports tier." Tennis Channel Exh. 51 at COMTTC_00012811; Tr. at 2292 (Madison Bond).

[265] Tr. at 1879 (Gregory Rigdon).

[266] *See* paragraphs 82-91, *infra*.

I. Comcast Cable's Disparate Treatment Unreasonably Restrains Tennis Channel's Ability to Compete Fairly.

81. As shown in this section, Comcast Cable's unequal treatment of Tennis Channel *vis-à-vis* its sports affiliates has adversely affected the ability of Tennis Channel to compete fairly in the video programming marketplace. Through its discriminatory actions as described herein, Comcast Cable has depressed the number of Tennis Channel's subscribers, diminished the amount of its license fees, reduced its ability to procure valuable programming rights, and made it more difficult for Tennis Channel to sell advertising.

1. Subscribers and License Fees

82. Comcast Cable's decision to retain Tennis Channel on the Sports Tier greatly diminishes the number of Tennis Channel subscribers which in turn reduces the amount of its earnings derived from license fees. Tennis Channel has **[BEGIN CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** subscribers than it would have if Comcast Cable gave it the same level of distribution as Golf Channel and Versus.[267] Had Comcast Cable provided Tennis Channel with the same level of distribution given to its two similarly situated sports affiliates, Tennis Channel's aggregate subscribership would have increased from nearly **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**[268] to approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].** And given the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** that Comcast Cable's carriage decisions have on other MVPDs,[269] and the existence of affiliation agreements with other MVPDs that tie carriage on highly distributed tiers to Tennis Channel's aggregate subscriber count,[270] the actual increase in the number of subscribers would have been even greater.

83. License fees that Comcast Cable and other MVPDs pay Tennis Channel for its programming are calculated on a per subscriber basis.[271] Because only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Comcast's customer base subscribe to the Sports Tier, Tennis Channel's licensing revenues are **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than the licensing revenues it would have earned had it been placed on broader distributed tiers.[273] License fees are the largest source of revenue for networks such as Tennis Channel.[274] Smaller licensing revenues make it

---

[267] Tr. at 2096 (Madison Bond); Comcast Cable Exh. 588.

[268] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

[269] *See* paragraph 63, *supra* & paragraph 110, *infra.*

[270] *See* paragraph 64, *supra.*

[271] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 17 (¶ 38).

[272] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

[273] *Id.*

[274] Tr. at 299-300 (Ken Solomon).

more difficult for Tennis Channel to make investments (*e.g.*, procuring sports programming rights) that are necessary for Tennis Channel to remain competitive with other sports networks.[275] In addition, its smaller subscribership precludes Tennis Channel from taking advantage of economies of scale that would reduce costs of providing service on a per-subscriber basis.[276]

84. Comcast Cable argues that Tennis Channel is not unreasonably restrained in its ability to compete for subscribers because any Comcast subscriber who wants to view Tennis Channel can subscribe to the Sports Tier or switch to DIRECTV, Dish Network, or another distributor.[277] That argument is unpersuasive as a defense to network discrimination. Comcast subscribers pay an additional fee of approximately $5 to $8 a month for the Sports Tier [278] to view Tennis Channel whereas those subscribers need not pay any additional fee to view Golf Channel and Versus. The fact that only about **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of customers pay that additional fee[279] demonstrates that this added cost in fact is a significant impediment to Tennis Channel's ability to attract the one in four viewers in the United States that subscribe to Comcast.[280] Comcast Cable points out that it is possible for a customer that does not want to pay the additional Sports Tier fee to cancel his or her Comcast subscription, subscribe to a different MVPD, and view Tennis Channel as a non-Comcast subscriber. That possibility, however, does not diminish Tennis Channel's showing that its status as an unaffiliated network impedes in its ability to compete for Comcast subscribers, who need not pay an additional fee or switch to another MVPD in order to view Golf Channel or Versus.

85. Unfavorable channel placement makes it less likely that persons who locate networks through "channel surfing" will select Tennis Channel. Thus, Tennis Channel's poor channel placement on Comcast systems also hinders the ability of Tennis Channel to attract viewers. And surfers fortuitously reaching an inconveniently placed Tennis Channel are less likely to revisit and become regular viewers through exposure to the network over time.[281]

2. Reduced Distribution Impacts Programming Rights

86. Tennis Channel's limited distribution on Comcast Cable hinders the network's ability to compete for valuable programming rights in two ways. First, as noted above, the level

---

[275] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 17 (¶ 38).

[276] Tennis Channel Exh. 16 (Testimony of Hal Singer) at 63 (¶ 90).

[277] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 71 (¶ 136); Comcast Cable's Proposed Reply Findings of Fact and Conclusions of Law at 41 (¶ 289).

[278] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

[279] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4); Comcast Exh. 75 (Testimony of Madison Bond) at 2 (¶ 6).

[280] *See generally* Tennis Channel Exh. 16 (Testimony of Hal Singer) at 69-70 (¶ 101).

[281] *See* Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 33 (¶ 66); Tennis Channel Exh. 16 (Testimony of Hal Singer) at 61 (¶ 87).

of distribution affects the amount a network earns in license fees. Consequently, with limited distribution, Tennis Channel receives lower license fees and therefore has less money to spend on valuable programming rights.[282] Second, those holding broadcast rights to high-profile events "want the widest exposure possible," and therefore favor networks having wider distribution.[283]

87. Tennis Channel has been unable to secure certain valuable programming rights due to its limited distribution. For example, rights holders of the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** declined to give Tennis Channel the right to telecast live coverage of each tournament's last match of singles because of the network's limited distribution.[284] Limited distribution also prevented Tennis Channel from securing rights to air the semi-final and final matches of the **[BEGIN CONFIDENTIAL]** [redacted][285] **[END CONFIDENTIAL]**

88. Comcast itself recognizes that limited distribution impedes Tennis Channel's ability to obtain valuable programming rights. A top Comcast executive stated that it would be a **[BEGIN CONFIDENTIAL]** [redacted][286] **[END CONFIDENTIAL]** Ironically, had it ever occurred to this perceptive executive that Tennis Channel's insufficient distribution was a result of Comcast Cable's placement discrimination?

3. Advertising

89. Advertisers insist that their commercials be viewed by as many persons as possible. Therefore, a network's distribution is the most important factor in a network's ability to sell advertising and to receive advertising revenues.[287] The record evidence shows that Tennis Channel's placement on Comcast's Sports Tier substantially reduces the number of its potential viewers and thus makes it more difficult for the network to sell advertising.

---

[282] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 17 (¶ 38).

[283] Tennis Channel Exh. 17 (Testimony of Timothy Brooks) at 33 (¶ 65). *See* Tr. at 718 (Timothy Brooks).

[284] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 18 (¶ 40).

[285] *Id.* The rights holder to the U.S. Open, the United States Tennis Association, **[BEGIN CONFIDENTIAL]** [redacted]. **[END CONFIDENTIAL]** Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 18 (¶ 40). Tennis Channel was awarded programming rights to the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 18-19 (¶ 41).

[286] Tennis Channel Exh. 143 (Jeffrey Shell Deposition) at 53-54.

[287] Tr. at 592-93 (Gary Herman).

90. Mr. Gary Herman, Tennis Channel's Senior Vice President of Advertising Sales, testified that the network's limited distribution is "the single most prevalent reason" given by advertisers for not placing advertisements on Tennis Channel.[288] Many advertisers are hesitant to purchase national advertising on networks with less than 40 million subscribers.[289] With its unfavorable placement on the Sports Tier, Tennis Channel reaches **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** subscribers,[290] a subscriber count substantially below the 40 million subscriber threshold. A number of advertisers, including **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in recent years have declined to purchase national television advertising on Tennis Channel due to its limited distribution.[291] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** purchased advertising time on Tennis Channel only during a freeview period[292] — a period in which Tennis Channel's distribution temporarily exceeded the 40 million subscriber threshold — but decided against purchasing advertising on Tennis Channel in other periods due to its narrow distribution.[293] Similarly, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** purchased almost all its advertising on Tennis Channel during freeview periods.[294] The company informed Tennis Channel that it has "attractive content and demographics outside of the freeview period, [but its] distribution is not large enough for **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to consider a significant advertising purchase other than what [it has] purchased in connection with [the] freeviews.[295]

91. Tennis Channel also receives less advertising revenues from the advertisements that it is able to sell. That is because with its limited distribution, the "network receives lower prices per unit of advertising time and lower total advertising revenues than it otherwise would command."[296]

---

[288] Tr. at 592 (Gary Herman).

[289] Tennis Channel Exh. 15 (Testimony of Gary Herman) at 5 (¶ 11).

[290] Tennis Channel Exh. 14 (Testimony of Ken Solomon) at 3 (¶ 8).

[291] *Id.* at 6-7, 8 (¶ 16, 20).

[292] A freeview or free preview is a "period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers. Glossary at 5. The viewership of Tennis Channel increases substantially in the freeview periods.

[293] Tennis Channel Exh. 15 (Testimony of Gary Herman) at 7-8 (¶ 18).

[294] *Id.* at 7 (¶ 17).

[295] *Id.*

[296] *Id.* at 9 (¶ 24).

4. Threat to Survival

92. Finally, Tennis Channel attempts to convince that Comcast Cable's limited distribution of Tennis Channel threatens its ability to survive.[297] It claims that financial analyses prepared by Comcast Cable in conjunction with MFN offers made by Tennis Channel in 2006 and 2007, show that Tennis Channel would have "'no value' if it remains on Comcast's Sports Tier."[298] Financial analyses of 2006 and 2007, however, are not useful in assessing the effect of Tennis Channel's placement on the Sports Tier in the later time period covered by the complaint.[299] As Tennis Channel admits, "by 2009, [the] Tennis Channel was a very different network from what it was in 2006 and 2007" in as much as it had "acquired rights to telecast three out of the four remaining majors, invested in high-definition television, and added famous commentators for its programming."[300] Thus, Tennis Channel's claim that its continued placement on the Sports Tier threatens its ability to survive is not adequately substantiated. However, it is not necessary for a network to show that its very survival is imperiled in order to satisfy its burden of showing that an MVPD's actions favoring affiliated networks had unreasonably restrained its ability to compete fairly.

CONCLUSIONS OF LAW

93. Section 616 the Communications Act, added by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[301] directs the Commission to promulgate rules which "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."[302]

94. In accordance with that directive, the Commission adopted section 76.1301(c), as an implementing rule that closely tracks the operative language of section 616. Section 76.1301(c) states that:

> "[n]o 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

---

[297] Tennis Channel's Proposed Finding of Fact and Conclusions of Law at 45 (¶ 167). As Comcast Cable points out, Comcast's 2007 financial analysis in fact concluded that Tennis Channel was worth **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** on the Sports Tier. Comcast Cable Exh. 66 at COMTT_00009011. *See* Comcast Cable Proposed Reply Findings of Fact and Conclusions of Law at 41 (¶ 288).

[298] *Id.* at 47 (¶ 172).

[299] Similarly, the fact that Comcast Cable rejected Tennis Channel's MFN offers in 2006 and 2007 do not show that that Comcast Cable's rejection of a different offer in 2009 was non-discriminatory.

[300] Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 71 (¶¶ 264, 268).

[301] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[302] 47 U.S.C. § 536(a)(3).

> 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."[303]

95. Sections 616 of the Act and 76.1301(c) of the rules address Congress' concern that "vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."[304] Congress was aware that cable operators in certain instances could abuse their market power to the detriment of unaffiliated programmers.[305] Congress enacted sections 616 and 76.1301(c) to protect programming vendors against discrimination that arises from their non-affiliation with MVPDs, which also has an anti-competitive effect.

96. At the same time, Congress wanted to ensure that its bar against such discrimination not act to "restrain[] the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace."[306] Indeed, one of the purposes underlying the 1992 Cable Act, of which section 616 is a part, is to" rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming," a legislative objective that the Commission took into account in adopting section 76.1301(c).[307]

97. A party seeking to establish a violation of sections 616 and 76.1301(c) must show (1) that the MVPD discriminated against a programming vendor in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation and (2) that the effect of such discrimination unreasonably restrained the ability of the programming vendor to compete fairly.

98. This section of the Initial Decision will first address the burden of proof and First Amendment concerns raised by Comcast Cable. It then considers, under the two-part standard set forth in paragraph 97, whether Comcast Cable has violated sections 616 and 76.1301(c) and addresses the remedies that should be imposed.

---

[303] 47 C.F.R. § 76.1301(c). Tennis Channel is a national video programming vendor as defined by section 616 of the Act and section 76.1301(c) of the Commission's rules. 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

[304] *Implementation of Sections 12 and 19 of The Cable Television Consumer Protection And Competition Act Of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 (¶ 2) (1993) ("*Second Report*"), *recon. granted in* part, 9 FCC Rcd at 4415 (1994) ("*Second Report Reconsideration*"). *See* S. Rep. No. 102-92, 102nd Cong., 1 Sess. 1991 at 25, 1991 WL 125145 ("Senate Report").

[305] Senate Report at 24.

[306] *Second Report Reconsideration*, 9 FCC Rcd at 2643 (¶ 1). *See Second Report*, 9 FCC Rcd at 2648 (¶ 15).

[307] *Second Report Reconsideration*, 9 FCC Rcd at 2648 (¶ 15), *quoting* 1992 Cable Act, § 2(b)(2). *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage,* First Report and Order, 8 FCC Rcd 3359, 3402 ¶ 145 (1993).

A. Burden of Proof

99. Tennis Channel urges a bifurcated, shifting burden of proof in carriage complaint proceedings. Tennis Channel argues it bears an initial burden of establishing a *prima facie* case of discrimination. The burden then shifts to the Comcast Cable to show legitimate, non-discriminatory reason(s) for its disparate treatment.[308] Since the Media Bureau earlier found that Tennis Channel had established a *prima facie* case sufficient to designate this case for hearing,[309] Tennis Channel argues that Comcast Cable bears the burden to prove it did not violate sections 616 and section 76.1301(c). Comcast Cable disagrees, asserting that Tennis Channel bears the burden of proving its claim by a preponderance of the evidence.[310]

100. This Initial Decision reaffirms the ruling made at oral argument that Tennis Channel bears the burden of proof.[311] Although the Media Bureau on the basis of the initial complaint proceedings found that Tennis Channel had established a *prima facie* case sufficient to set this case for hearing, the evidence compiled after the completion of this formal evidentiary hearing is more complete, accurate, and reliable than the evidence considered by the Media Bureau in issuing the *HDO*. For example, after the *HDO* was issued, the parties obtained and/or confirmed information through full discovery. Also, the parties' direct testimony was tested by searching cross-examination of well informed trial counsel. Moreover, placing the burden of proof on Tennis Channel is consistent with the allocation of the burden of proof in previous carriage complaint cases, including *WealthTV*,[312] and with the historic practice of requiring that the party seeking relief by Commission order bear the burden of proving by preponderance of the evidence that violations occurred.[313]

101. In the final analysis of this case, however, the manner in which the burden of proof is allocated is immaterial to its disposition. For under any rubric of allocation of burdens of proof, the preponderance of the reliable evidence presented in this case, viewed in its entirety, establishes that Comcast Cable discriminated against Tennis Channel in its sports tier carriage of that network on the basis of affiliation, and that this discrimination had the effect of restraining Tennis Channel's ability to compete fairly in violation of section 616 of the Act and section 76.1301(c) of the Commission's rules.

---

[308] Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 78 (¶ 300).

[309] *HDO*, 25 FCC Rcd at 14149 (¶ 2).

[310] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 77 (¶ 152).

[311] Tr. at 2820 (Presiding Judge).

[312] *WealthTV Recommended Decision*, 24 FCC Rcd at 12995 (¶¶ 57-58) (*quoting Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003)).

[313] *See, e.g. Schaffer v. Weast*, 546 U.S. 49, 56, (2005) (noting that where the statute is silent the "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims). *See also* 5 U.S.C. § 556(d) (providing in the absence of statutory direction that "the proponent of a rule or order has the burden of proof.)" *See also Director of Office of Workers' Compensation Programs Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).

B. First Amendment Concerns

102. Comcast Cable argues that the relevant sections of the Act and implementing rule must be construed narrowly so as not to infringe upon its editorial discretion protected by the U.S. Constitution's First Amendment.[314] A narrow construction of sections 616 and 76.1301(c) is not necessary in this case to protect Comcast Cable's First Amendment rights. This case is not about Comcast Cable's editorial discretion to decide whether to distribute Tennis Channel programming. Comcast Cable has decided to carry Tennis Channel widely across its systems, albeit generally limited to the Sports Tier, and is perfectly willing to distribute Tennis Channel to subscribers who are willing to pay an additional fee of $5 to $8 a month.[315] This case involves only whether the terms and conditions associated with Comcast Cable's distribution of Tennis Channel constitute discrimination or favoritism on the basis of affiliation or non-affiliation. As shown below, the adjudication of that issue does not adversely affect Comcast Cable's First Amendment rights.[316]

103. Recall that Tennis Channel seeks only an order requiring Comcast Cable to carry Tennis Channel at the same level of distribution that it carries Golf Channel and Venus. That remedy would require Comcast Cable to give Tennis Channel the same level of distribution it provides to Golf Channel and Versus, without mandating any particular level of carriage. Notwithstanding Comcast Cable's assertion to the contrary, that remedy, if granted, would not constitute "mandatory carriage,"[317] or otherwise compel speech. The remedy considered here thus leaves completely to Comcast Cable the "editorial judgment"[318] as to whether to carry Tennis Channel, and if so, the manner in which the distribution should be effected. Therefore, under the proposed remedy, Comcast Cable retains absolute discretion to (1) reposition Tennis Channel to broadly penetrated tiers that are occupied by Golf Channel and Versus, or (2) move Golf Channel and Versus to the Sports Tier, or (3) reposition all three channels to an intermediate tier, or (4) not to carry the three channels at all. In other words, the proposed remedy requires only elimination of discrimination in carriage between Tennis Channel and the two Comcast affiliates, without dictating how any of the three networks are to be carried, or not carried. Thus, contrary to Comcast Cable's contention, that remedy does not "impose speech."[319]

---

[314] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 81-82 (¶¶ 160-61). Comcast Cable does not argue that sections 616 and 76.1301(c) are facially unconstitutional.

[315] Comcast Cable Exh. 78 (Testimony of Jennifer Gaiski) at 2 (¶ 4).

[316] Contrary to Comcast Cable's contention, sections 616 and 76.1301(c) are not content-based. *See* Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 81-82 (¶¶ 160). Sections 616 and 76.1301(c) are economic provisions that prohibit discrimination on the basis of affiliation or non-affiliation, not on the basis of content.

[317] Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 100 (¶ 198).

[318] *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network*, Memorandum Opinion and Order, 25 FCC Rcd 18099, 18106 (¶ 12) (2010).

[319] Comcast Cable Proposed Findings of Fact and Conclusions of Law at 103 (¶ 203).

104. Because this case involves the congressionally mandated elimination of discrimination and not coerced speech, a narrow interpretation of sections 616 and 76.1303(c) is not necessary to protect Comcast Cable's First Amendment rights. Sections 616 and 76.1303(c) will be interpreted in this *Initial Decision* in accordance with the language of those provisions of law, their legislative and administrative intent, common sense, and applicable precedent.

C. Discrimination on the Basis of Affiliation or Non-Affiliation

105. A video programming vendor seeking to satisfy its burden of proving a violation of sections 616 and 76.1301(c) must first establish that the vertically integrated MVPD in question discriminated against it in the selection, terms, or conditions of carriage "on the basis of [the] affiliation or non-affiliation."[320] In order to establish such discrimination, a party must prove that affiliation or non-affiliation "'actually played a role in th[e] process and had a determinative influence on the outcome." [321] A party can make that showing by direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence, such as disparate treatment of similarly situated entities,[322] *e.g.,* that an MVPD affords unaffiliated networks less favorable terms and conditions of carriage than it provides to a similarly situated affiliated network. In making a circumstantial showing, a party need not show that the affiliated and unaffiliated networks are identical in all respects to establish that they are similarly situated.[323] It is only necessary to show a substantial similarity. *Id.*

106. The record evidence in this case clearly shows that Tennis Channel is similarly situated to Golf Channel and Versus. The three networks provide the same *genre* of programming in the form of sports programming throughout the year.[324] The three networks have similar audience demographics in that they attract affluent viewers who are predominantly male in the overlapping 25-to-54 or 35-to-54 age brackets.[325] The three channels target or serve many of the same advertisers[326] and have remarkably similar ratings.[327] And even though Golf Channel and Versus spend more money on programming than does Tennis Channel, the clear weight of the record evidence, considered in its entirety, shows Tennis Channel to be a sports network similarly situated to Golf Channel and Versus.

---

[320] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[321] *WealthTV Recommended Decision*, 24 FCC Rcd at 13397-98 (¶ 63) (*quoting Hazan Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

[322] *Id.* at 13398.

[323] *See Eaton v. Indiana Dept. Of Corrections*, 657 F.3d 551 (7th Cir. 2011). *Cf. Amrhein v. Health Care Service Corp*, 546 F.3d 854, 860 (7th Cir. 2008). *See Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007) ("a 'similarly situated' requirement . . . properly understood, does not demand identicality."). *See also WealthTV,* 25 FCC Rcd at 8978 (¶ 22).

[324] *See* paragraph 25, *supra.*

[325] *See* paragraphs 43-44, *supra.*

[326] *See* paragraphs 45-47, *supra.*

[327] *See* paragraphs 48-49, *supra.*

107. The undisputed record evidence further shows that Comcast Cable gives Tennis Channel less favorable treatment in the terms and conditions of carriage than it provides to Golf Channel and Versus. Comcast generally carries Tennis Channel on the narrowly distributed Sports Tier that only reaches **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of Comcast subscribers. In contrast, Comcast carries Golf Channel and Versus on highly distributed tiers to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its subscribers.[328] In addition, Comcast gives Tennis Channel less favorable channel placement than it provides to Golf Channel and Versus.[329] Comcast Cable's provision of more advantageous carriage terms and conditions to its network affiliates Golf Channel and Versus, than it does to the similarly situated unaffiliated network, Tennis Channel, is reliable, convincing, and particularly strong circumstantial evidence of disparate treatment that is based solely on affiliation.

108. Other record evidence corroborates that Comcast Cable's unequal treatment of Tennis Channel is based on affiliation. Senior Comcast executives have acknowledged that Comcast's affiliates get cared for like "siblings," in contrast to unaffiliated networks which are dealt with like "strangers."[330] Moreover, the less favorable carriage distribution accorded to Tennis Channel is part of a general overall pattern in which Comcast Cable gives affiliated sports networks more distribution than unaffiliated sports networks. Comcast Cable carries not one affiliated sports network exclusively on the Sports Tier. Convincingly, there is even a correlation between a sports network's distribution on Comcast Cable and Comcast's ownership interest in that network: networks in which Comcast has equity tend to have greater distribution on Comcast Cable's systems.[331]

109. Substantial record evidence also shows that Comcast Cable gives special assistance or favors to its affiliated sports networks that it does not provide to unaffiliated networks. For example, Comcast Cable took steps to ensure that Versus fulfilled distribution requirements in a contract for valuable programming rights; a Comcast Cable executive represented Versus in its carriage negotiations with another MVPD; and another Comcast Cable executive assisted Versus in obtaining favorable channel placement on Comcast Cable's systems.[332] No such services were provided to Tennis Channel.

110. Comcast Cable argues that decisions of other MVPDs to give Tennis Channel narrower distribution than Golf Channel and Versus show that its own carriage of Tennis Channel has a legitimate non-discriminatory basis. That argument is unpersuasive for two reasons. First, substantial record evidence shows Comcast Cable's distribution decisions have **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** on the industry. Thus, Comcast Cable's retention of Tennis Channel on a narrowly penetrated tier influences other

---

[328] *See* paragraphs 54, *supra.*

[329] *See* paragraph 53, *supra.*

[330] *See* paragraphs 55, *supra.*

[331] *See* paragraph 57-59, *supra.*

[332] *See* paragraph 60, *supra.*

MVPDs to carry Tennis Channel at the same level of distribution.[333] Second, substantial record evidence also shows that Comcast Cable's distribution of Tennis Channel, Golf Channel, and Versus are not in line with the market. In fact, Comcast Cable carries Golf Channel and Versus at a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** penetration rate than the industry average while it carries Tennis Channel at a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** penetration rate than the industry average.[334]

111. Substantial record evidence further shows that affiliation, not the time period in which Tennis Channel asked for broader distribution, was the driving force behind Comcast Cable's decision to retain the network on the Sports Tier. During the very time period in which Tennis Channel sought increased distribution, Comcast Cable placed, repositioned, or proposed placement of its affiliated sports networks onto widely distributed tiers,[335] while leaving only unaffiliated networks exclusively on the Sports Tier.

112. Although Comcast Cable claims that it denied Tennis Channel broader carriage based upon a cost benefit analysis, the record shows that Comcast Cable did not analyze the benefits that would accrue from giving Tennis Channel greater penetration. Comcast Cable's purported cost concerns are undermined by the undisputed fact that Tennis Channel's proposed license fees were substantially less than the license fees Comcast Cable pays to distribute Golf Channel and Versus, which the record evidence establishes are similarly situated to Tennis Channel.[336]

113. Comcast Cable's practice of retaining Tennis Channel on the Sports Tier while distributing all its affiliated sports networks, including Golf Channel and Versus, on more widely distributed tiers is economically advantageous to Comcast. The Sports Tier is highly profitable, and retaining a popular network like Tennis Channel on that tier increases the value of the Sports Tier and bolsters its profitability. At the same time, carrying all of its affiliated networks on more broadly distributed tiers protects those networks from the financial disadvantages associated with restricted distribution. This dual system of distribution is strongly persuasive evidence of an affiliation-based discrimination.[337]

114. As Comcast Cable points out, repositioning Tennis Channel to a more widely distributed tier would require Comcast Cable to pay greater license fees than it would if it were to retain Tennis Channel primarily on the Sports Tier. An entity, however, cannot avoid complying with an anti-discrimination statute on grounds of the costs incurred to eliminate the discrimination.[338] In any event, eliminating the discrimination does not necessarily require Comcast Cable to pay Tennis Channel additional license fees. Comcast Cable, for example,

---

[333] *See* paragraph 65, *supra.*

[334] *See* paragraphs 66-67, *supra.*

[335] *See* paragraph 72-74, *supra.*

[336] *See* paragraph 75-78, *supra.*

[337] *See* paragraph 79-80, *supra.*

[338] *See generally City of L.A. Dep't of Water v. Manhart*, 435 U.S. 702, 716-18 (1978); *EEOC v. Indiana Bell Tel Co.*, 256 F.3d 516 , 523-24 (7th Cir. 2002).

could readily avoid higher payments by repositioning Golf Channel and Versus to the Sports Tier.

D. Unreasonable Restraints on Ability to Compete Fairly

115. In order to establish a violation of sections 616 and 76.1301(c), a video programming vendor must show that the effect of the MVPD's discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly."[339] Tennis Channel adequately has satisfied its burden of proof as to this issue. Comcast Cable's decision to carry Tennis Channel on the Sports Tier while providing similarly situated affiliated networks Golf Channel and Versus with broader coverage, adversely affects Tennis Channel in a variety of ways.

116. First, as a result of Comcast Cable's discriminatory treatment, Tennis Channel has **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** than Golf Channel and Versus, which in turn greatly diminishes the amount of its subscribers' fees.[340] Second, Comcast Cable's discriminatory treatment of Tennis Channel in channel placement also impedes its ability to attract subscribers.[341] Third, diminished licensing revenues *vis-à-vis* Golf Channel and Versus makes it more difficult for Tennis Channel to acquire valuable programming rights and to make other investments in the network.[342] And fourth, with fewer subscribers, Tennis Channel has greater difficulty in attracting advertising and must charge lower prices per unit than it otherwise could for that advertising that it is able to attract.[343]

E. Remedy

117. *Forfeiture*. The *HDO* requires that the Presiding Judge, in light of the evidence adduced in the hearing, "determine whether a forfeiture should be imposed on Comcast [Cable]."[344] Given that the record evidence establishes by a preponderance of evidence that Comcast Cable has violated section 616 of the Act and section 76.1301(c) of the Commission's rules, [345] the imposition of a forfeiture is appropriate in this case. Both Tennis Channel as Complainant, and the Enforcement Division as advocate for the public interest, recommend that the Presiding Judge order Comcast Cable to pay a forfeiture in the amount of $375,000.[346]

---

[339] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[340] *See* paragraph 82, *supra.*

[341] *See* paragraphs 84-85, *supra*

[342] *See* paragraphs 86-88, *supra*

[343] *See* paragraphs 89-91, *supra*

[344] *HDO*, 25 FCC Rcd at 14163 (¶ 24) (footnote omitted).

[345] 47 U.S.C. § 536(a)(3); 76.1301(c).

[346] Enforcement Bureau Comments at 17 (¶ 35); Tennis Channel Proposed Findings of Fact and Conclusions of Law at (¶¶ 317-327). After the Enforcement Bureau recommended that the Presiding Judge grant Tennis Channel's relief in this case, Comcast Cable made comments that could be construed as criticizing the competency of the Bureau's attorneys. Tr. at 2901, 2922-23, 2947, 2970) (oral

Comcast Cable denies that any remedy should be imposed, but acknowledges that "[t]he appropriate remedy if a violation had been found in this matter would be the imposition of a forfeiture."[347] Comcast Cable does not argue that the specific facts of this case show that an amount lesser than the maximum $375,000 forfeiture would be appropriate or justified if it were found to have violated the Act and the Commission's rules.

118. Section 503(b)(1)(B) of the Communications Act and section 1.80(a)(a)(2) of the Commission's rules authorize the assessment of a forfeiture where, as in this case, a person has "willfully or repeatedly failed to comply" with a provision of the Communications Act or the Commission's rules.[348] Because Comcast Cable is a cable operator, it is subject to a maximum forfeiture of $37,500 per day for a single, continuing violation up to a maximum fine of $375,000.[349] In determining the forfeiture amount, "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, [and] ability to pay must be taken into account as well as any "other matters as justice may require."[350] Based upon these factors, the maximum forfeiture of $375,000 is warranted for the serious violations of law in this case. As shown above, the proven violations are a product of a corporate policy of Comcast's favoring its affiliates *vis-à-vis* unaffiliated entities in the terms and conditions of carriage. The violations of law continued for a substantial period of time and continue to the present day. Comcast in the past has violated Commission rules[351] and certainly is able to pay a substantial fine in the above amount. Indeed, as the Enforcement Bureau pointed out, a forfeiture in a lesser amount "would be unlikely to deter a company as large as Comcast from future violations of [the] rules in its future cable carriage decisions."[352] Accordingly, an assessment of a forfeiture in the amount of $375,000 against Comcast Cable is in the public interest.

---

argument). Any such criticism is wholly without foundation. Enforcement Bureau counsel in this proceeding at all times acted in a competent and professional manner.

[347] Comcast Proposed Findings of Fact and Conclusions of Law at 101 (¶ 199); Comcast Proposed Reply Findings of Fact and Conclusions of Law at 56 (¶ 317).

[348] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(f)(2).

[349] 47 C.F.R. § 1.80(b)(1).

[350] 47 U.S.C. § 503(b)(2(e); 47 C.F.R. § 1.80(b)(4).

[351] *In the Matter of Comcast Corp.*, Notice of Apparent Liability for Forfeiture and Order. 24 FCC Rcd 929 (EB 2009).

[352] Enforcement Bureau Comments at 17. The Commission's forfeiture guidelines set forth base forfeiture amounts (subject to upward or downward adjustments) for a number of infractions but not for violations of program carriage rules. 47 C.F.R. § 1.80(b)(4) note § 1. The base forfeiture amounts for the cable leased access rules is $7500. *Id.* Where the guidelines provide no base forfeiture amount for the specific infraction involved in a particular case, the Commission's staff has based the forfeiture upon analogous violations for which there is a specified base forfeiture. *See In the Matter of Nexstar Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 18160, 18162-63 (MB 2005); *In the Matter of Fox Television Stations, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 9847, 9851 (EB 2005). The forfeiture guidelines, however, are not mandatory. *See* 47 C.F.R. § 1.80(b)(4) note ("The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute."). Given the long duration of the violation at issue in this case, the use of a

119. *Mandatory Equality in Treatment.* A forfeiture penalizes Comcast Cable for its violations, but it does not remediate the unlawful discrimination. Sections 616 and 76.1301(c) are provisions of law prohibiting discrimination in the terms and conditions video program distribution on the basis of affiliation. Clearly, an appropriate remedy for a violation of those provisions would be an order compelling elimination of the discriminatory treatment that gave rise to the violations. Therefore, in addition to forfeiture, Comcast Cable should afford Tennis Channel the same treatment in the terms and conditions of video program distribution that it provides to its similarly situated affiliates, Golf Channel and Versus. Subject to an exception regarding analog services that is noted below, this remedy requires Comcast Cable to carry Tennis Channel at the same level of distribution that it carries Golf Channel and Versus.[353] Comcast Cable otherwise has full discretion in determining the level of penetration it chooses to carry the three channels. However, it cannot continue to discriminate against Tennis Channel in favor of Golf Channel and Versus in terms and conditions of their distribution.[354]

120. This requirement of non-discriminatory treatment also requires Comcast Cable to provide Tennis Channel with equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement. Undisputed record evidence establishes that Comcast gives more favorable channel placement to Golf Channel and Versus than it does to Tennis Channel.[355] Comcast Cable's argument is unavailing that this remedy is inappropriate because Tennis Channel did not specifically request modified channel placement in its complaint.[356] The *HDO* directs the Presiding Judge to determine whether to order Comcast Cable to carry Tennis Channel "and/or

---

base forfeiture of $7500 per day (the base forfeiture for the violation of an analogous cable rule), even in the absence of any upward adjustments, provides for the maximum fine of $375,000. The forfeiture guidelines thus support the imposition of a $375,000 forfeiture in this case.

[353] Given bandwidth limitations, Comcast Cable argues that adding Tennis Channel to the analog expanded basic level of service would require it to delete an existing network's position on that tier. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 46 (¶ 300). At oral argument, counsel for Tennis Channel stated that Tennis Channel was "not asking" that it be placed on an analog tier if such placement would require Comcast to displace existing networks on that tier. Tr. at 2978. The Enforcement Bureau similarly "recommends tailoring the remedy to exclude all analog systems where bandwidth limitations would require the deletion of existing programming in order to distribute Tennis Channel on the system." Enforcement Bureau Comments at 16 (¶ 33). The requirement that Comcast Cable give Tennis Channel the same treatment in video program distribution as it provides to Golf Channel and Versus set forth above excludes parity on analog systems where the addition of Tennis Channel would require displacement of existing networks.

[354] The Enforcement Bureau asserts that "an appropriate remedy would be to direct Comcast [Cable] to carry Tennis Channel at an average penetration rate equal to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL].**" Enforcement Bureau Comments at 16 (¶ 33). That proposed remedy, however, has a double flaw: it would not eradicate the disparate treatment of similarly situated entities and, by mandating a specific level of carriage, would unnecessarily intrude upon Comcast Cable's business decisions.

[355] *See* paragraph 53, *supra.*

[356] *See* Comcast Cable's Proposed Reply Findings of Fact and Conclusions of Law at 57 (¶ 318).

whether Comcast [Cable] should be required to implement such other carriage-related remedial measures as are deemed appropriate."[357] Equitable treatment in channel placement is a "carriage-related remedial measure" that the Presiding Judge expressly is authorized to consider under the *HDO*.[358]

121. The requirement of non-discriminatory treatment does not, as Comcast Cable contends, compel Comcast Cable to carry Tennis Channel at any particular level of distribution.[359] As noted above, Comcast Cable may carry all three networks on broadly penetrated tiers, carry all three networks on the Sports Channel, or even decide not to carry the three networks at all. Thus, this mandate of non-discriminatory treatment only requires that Comcast Cable stop discriminating against Tennis Channel while favoring Golf Channel and Versus in terms and conditions of carriage. The remedy imposed in this order does not, as Comcast Cable erroneously contends, infringe upon Comcast Cable's editorial discretion by "forcing broader carriage" of Tennis Channel.[360]

ULTIMATE CONCLUSIONS AND DECISION

122. Based on the foregoing findings of facts and conclusions of law, it is concluded that Tennis Channel has satisfied its burden of proving that Comcast Cable engaged in discrimination

---

[357] *HDO*, 25 FCC Rcd at 14163 (¶ 24).

[358] Comcast Cable argues that it would be inappropriate for the Presiding Judge to order it to carry Tennis Channel at the same penetration level that it carries Versus and Golf Channel until the Commission finally resolves its statute of limitations defense. Comcast Cable argues that newly discovered evidence supports its arguments on the statute of limitations issue. *See* Comcast Cable's Proposed Reply Findings of Fact and Conclusions of Law at 58-59 (¶¶ 321-24). That argument is without merit. As Comcast Cable acknowledges, the *HDO* specifically directed the Presiding Judge *not* to resolve "whether Tennis Channel's complaint was filed in accordance with the program carriage statute of limitations." *HDO*, 25 FCC Rcd at 14150 n.4. Notwithstanding that instruction, the *HDO* expressly directs the Presiding Judge to determine, in light of the evidence adduced at the hearing, the carriage-related remedial measures, if any, that should be imposed in this case. *Id.* at 14163 (¶ 24(b)). The *HDO* thus specifically contemplates that the Presiding Judge in his order will address the remedies that are appropriate to this case even though the statute of limitations issue remains unresolved at this stage of the proceedings.

[359] Tennis Channel asks the Presiding Judge to order Comcast Cable to "pay carriage fees for Tennis Channel at the per-subscriber rate set forth in the affiliation agreement." Tennis Channel's Proposed Findings of Fact and Conclusions of Law at 82 (¶ 315). The Enforcement Bureau suggests that Tennis Channel's 2009 proposal to Comcast Cable might set an appropriate price schedule or alternatively that the Presiding Judge require additional briefing on the issue. Enforcement Bureau Comments at 16 (¶ 34). Comcast Cable argues that if it were found that Tennis Channel were entitled to broader distribution, it should not receive any additional fees for that broader distribution. Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 4, 105-06 (¶¶ 8. 207-09). The *HDO* directs the Presiding Judge to set "the price, terms, and conditions" of carriage only if Comcast Cable is ordered "to carry . . . Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers." *HDO*, 25 FCC Rcd at 14163 (¶ 24(b)). Thus, it is not necessary for this order to contain any prescription of license fees in this case.

[360] *See* Comcast Cable's Proposed Findings of Fact and Conclusions of Law at 102 (¶ 202)

in the selection, terms or conditions of carriage on the basis of its non-affiliation with Tennis Channel.

123. Based on the foregoing findings of facts and conclusions of law, it is further concluded that Tennis Channel has satisfied its burden of proving that Comcast Cable unreasonably restrained Tennis Channel's ability to compete fairly.

124. In light of the ultimate conclusions reached in paragraphs 122 and 123, IT IS DECIDED AND ADJUDICATED that Comcast Cable has violated section 616(a) of the Communications Act and section 76.1301(c) of the Commission's rules.

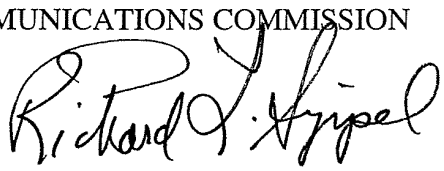
ORDERS

125. IT IS ORDERED that pursuant to section 503 of the Communications Act of 1934, as amended, Comcast Cable IS ORDERED TO PAY THE GOVERNMENT A MONETARY FORFEITURE in the amount $375,000.[361]

126. IT IS FURTHER ORDERED that Comcast Cable is prohibited from discriminating against Tennis Channel *vis-à-vis* its similarly situated affiliates, Golf Channel and Versus, in terms and conditions of video program distribution.

127. IT IS FINALLY ORDERED that Comcast Cable must proceed as soon as practicable with remediation as discussed in paragraphs 125 and 126 above.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Chief Administrative Law Judge

[361] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case of its own motion. 47 C.FR. §1.276(b)

REDACTED VERSION

JOINT GLOSSARY OF TERMS

À La Carte	Offering a network on an individual per-channel basis rather than as part of a package or tier of programming (defined below).
Ad Avails (or Advertising Availabilities)	Advertising units during the programming of a network (usually 2-3 minutes per hour) that are made available for the distributor to sell under a standard term of an affiliation agreement. The network reserves the remaining advertising time for sale itself.
Affiliated	A network is "affiliated" with an MVPD for the purposes of the program carriage rules if the MVPD holds an ownership interest in the network that is attributable under Section 76.1300(a)-(b) of the Commission's rules. As a general rule, a programmer is "'affiliated' with respect to a multichannel distributor if the distributor holds five percent or more of the stock of the programmer, whether voting or non-voting." *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, Second Report and Order*, MM Docket No. 92-265, 9 FCC Rcd 2642 ¶ 19 (rel. 1993).
Affiliation Agreement	In this context, a contract pursuant to which content is licensed by a programming service (such as Tennis Channel) to an MVPD (such as Comcast) for distribution to the MVPD's retail subscribers.
Analog	Cable systems distribute analog video signals in the form of modulated radio frequency transmitted through a closed transmission path such as coaxial cable or fiber. Interference or signal ingress during cable transmission, and the accumulation of "noise" as signals are amplified over the course of transmission, can result in reduced picture quality. Until recent years, all television signals for decades were analog, which requires substantially more bandwidth than digital signals for distribution of the same content. Many cable systems still distribute analog channels. *Compare* Digital (defined below).
Anchor Programming	A term used by Tennis Channel in this proceeding to refer to coverage of sporting events on a live basis or within two weeks after the event occurred.
B1	*See* Tier.

B2	*See* Tier.
Bandwidth	The capacity available for delivery of content (voice, video, and data) through a cable system. A standard-definition digital channel generally occupies about one-tenth the bandwidth of a linear analog channel, and a high-definition digital channel generally occupies about one-third the bandwidth of a linear analog channel.
Carriage Agreement	*See* Affiliation Agreement.
CCR	Channel Change Request. A form submitted by Comcast system employees to Comcast regional, divisional, and corporate management for approval to change its channel lineup. Changes include launching a network on a system for the first time, dropping a network, moving a network to a new channel number, and/or moving a network to a new tier (melting or negative repositioning).
Channel Capacity	The maximum number of programming services that can be simultaneously carried within the bandwidth of a cable system devoted to video distribution.
Comcast	Defendant Comcast Cable Communications, LLC (itself or one of its affiliates).
Comcast Cable Communications, LLC	Subsidiary of Comcast Corp. that distributes multichannel video programming. Comcast Cable Communications, LLC is the Defendant in this case.
Comcast Corp.	Parent company to Comcast Cable Communications, LLC and Comcast Programming Group.
Comcast Programming Group	Until 2011, the group within Comcast Corp. that operated certain of Comcast's affiliated cable networks, including Versus and Golf Channel.
Comcast SportsNet	The brand name for a group of regional sports networks that are affiliated with Comcast. The Comcast SportsNet services offer multi-sport programming. *See* RSN.

Core Audience	The demographic group (e.g., age and gender group) that predominates in a network's audience, or is the predominant target of its programming.
Coverage Area Rating	The number of households or persons viewing a network, as a percentage of all households or persons that receive the network. *Compare* Total Market Rating.
Crawl	Line of scrolling text moving ("crawling") across the screen.
D0	*See* Tier.
D1	*See* Tier.
DS	*See* Tier.
DBS	Abbreviation for "Direct Broadcast Satellite." An MVPD (defined below) that transmits video programming from satellites directly to dishes at the viewer's location. DIRECTV and Dish Network (also known as EchoStar) are DBS operators.
Digital	Video signals transmitted through encoding into streams of binary electronic "bits." Compared to analog distribution, digital signals are less susceptible to interference during transmission, resulting in higher signal quality and resolution. Digital signals require less bandwidth than would be required for analog signals distributing the same channel. *Compare* Analog.
Digital Classic	*See* Tier.
Digital Starter	*See* Tier.
Distribution Incentives	Consideration offered by a network that is designed to make it less expensive for an MVPD (defined below) to distribute or expand distribution of the network. Examples include cash, marketing assistance, discounted licensing fees, equity, or free periods of carriage. When distribution incentives are provided to encourage an MVPD to launch a programming service for the first time on a system, they also are referred to as "launch support" or "launch incentives" (defined below).
DMA	Abbreviation for "Designated Market Area." A geographical designation of a media market, created by Nielsen Media Research.

Dual Illumination	The carriage of a network on more than one tier at once.
Freeview	Short for "free preview." A period during which a network authorizes an MVPD to distribute its programming to incremental subscribers without charge to the incremental subscribers or to the distributor for these subscribers.
Golf Channel	A network focusing on golf and golf-related programming that, prior to the merger of Comcast and NBC-Universal, was wholly-owned by Comcast.
Grand Slams	The four most prestigious annual tennis tournaments: the Australian Open, the French Open, Wimbledon, and the U.S. Open.
HD	Abbreviation for "High Definition." Digital transmission of video programming with substantially improved video and audio quality using any of the following formats: 1080p, 1080i, 720p.
Headends	Local facilities used to collect and transmit multichannel video programming from a distributor to the customer.
HH	Household.
Launch Support	Also known as "Launch Incentives." Payments or other consideration offered by a network that is designed to pay an MVPD (defined below) to launch the network's programming service or to distribute it more broadly. Examples include cash, marketing assistance, discounted licensing fees, equity, or free periods of carriage.
License Fee	The fee that an entity pays for the right to distribute programming. In the context of a relationship between a network and an MVPD, the license fee, also called a carriage fee, is paid by the MVPD to the network in exchange for the right to carry the network. The license fee is typically specified in the affiliation agreement and expressed as an amount of money per subscriber per month. In the context of a relationship between a network and the owner of programming rights, see "Rights Fees."

Licensing Rights	In the context of a relationship between a network and the owner of programming rights, the network's rights to telecast programming.
Linear Network	Linear networks, such as Tennis Channel, Golf Channel, and Versus, are channels that offer programming on a continuous and fixed schedule established by the network. *Compare* VOD (defined below).
Major Championships	Also called the "Majors." The four most prestigious annual men's golf tournaments: the Masters Tournament, the U.S. Open Championship, the British Open Championship, and the PGA Championship.
Major League Sports Networks	The primary national leagues that offer team sports in the United States are the National Football League, the National Basketball Association, Major League Baseball, and the National Hockey League. Each league has a network that offers live games and other programming related to that league's sport: respectively, the NFL Network, NBA TV, the MLB Network, and the NHL Network.
Melt	To move a channel from a less distributed to a more distributed tier of service (*e.g.*, from the Sports Tier to D1).
Metered Market	Nielsen-defined television market in which Nielsen measures audiences by way of electronic meters attached to television sets. There are 56 metered markets in the United States, reaching about 70% of all television homes in the country.
MFN	Abbreviation for "Most Favored Nations." A provision in affiliation agreements granting a distributor the right to be offered any more favorable rates, terms, or conditions subsequently offered or granted by a network to another distributor.
MSO	Abbreviation for "Multiple System Operator," which refers to a cable company that owns or operates multiple cable systems, often in different geographic locations. Comcast Cable Communications, LLC; Time Warner Cable; Cox; Cablevision; and Charter are the five largest MSOs in the United States.

MVPD	Abbreviation for "Multichannel Video Programming Distributor." An entity engaged in the business of making available for purchase by subscribers or customers, multiple channels of video programming. MVPDs include traditional cable operators, such as Comcast and Time Warner Cable, telephone companies, such as Verizon FiOS and AT&T U-Verse, and DBS operators, such as DirecTV and DISH Network.
Nielsen Local Market Rating	Total Market Rating published by Nielsen for a specific local market, as defined by Nielsen. *Compare* Nielsen National Rating.
Nielsen National Rating	Total Market Rating or Coverage Area Rating published by Nielsen for the Nielsen national market. *Compare* Nielsen Local Market Rating.
OLN	Outdoor Life Network (Versus's name before 2007).
Penetration	A network's "penetration" is a percentage reflecting the proportion of a particular MVPD's subscribers that receive a particular network.
Prime Time	In general, the three evening hours (four on Sunday) programmed by broadcast and cable networks from 8 p.m. until 11 p.m. Eastern and Pacific Time and from 7 p.m. until 10 p.m. Central and Mountain Time, Monday through Saturday, starting an hour earlier on Sunday.
PSPM	Abbreviation for "per subscriber per month." *See* License Fee.
Rate Card	The standard set of license fee rates offered by a programmer to MVPDs.
Rights Fees	A network's payments to entities that own content for the rights to telecast specific programming owned by those entities.
RSN	Abbreviation for "Regional Sports Network." A network that telecasts sports-related programming targeted to fans in a particular geographic region.
SD	Abbreviation for "Standard Definition," which refers to transmission of video programming at traditional resolutions (e.g., 480i).
Shoulder Programming	Non-anchor programming shown on a network. *See also Anchor Programming.*

Sports Entertainment Package ("SEP")	*See* Tier.
Sports Tier	*See* Tier.
Subscriber	A customer of an MVPD. Sometimes referred to as a "sub."
Telco	Abbreviation for "Telephone Company." Refers to telephone companies, such as Verizon and AT&T, that provide multichannel video programming and are MVPDs.
Tennis Channel	A network focusing on tennis and other racquet-sport-related programming. Tennis Channel is unaffiliated with Comcast and is the Complainant in this case.
Tent Pole Content	A network's marquee programming—in sports, for example, a key match or game coverage. An event that supports (*i.e.*, draws audiences to) content both before and after it.
Tier	A bundle of cable programming services or networks sold to subscribers at a package price, or the level of service on which a channel is carried. Each tier typically carries an incremental cost to the subscriber. Tiers on Comcast cable systems include: ▪ **Broadcast Basic or B1:** Broadcast Basic (or Limited Basic) generally refers to the most highly penetrated level of analog service on Comcast systems. It is received by [redacted] Comcast's video customers. This package contains the broadcast networks and certain other governmentally mandated content. ▪ **Expanded Basic or B2:** Expanded Basic refers to the most highly penetrated level of analog service on non-digitized Comcast systems after government-mandated broadcast basic. ▪ **Digital Starter, D0, or Digitized Expanded Basic**: Digital Starter is the most broadly distributed digital tier, and the most highly penetrated level of service on digitized Comcast systems after government-mandated broadcast basic. In 2009, Digital Starter had approximately [redacted] subscribers. Taken together, Expanded Basic and Digital Starter are received by about [redacted] of Comcast's subscribers. ▪ **Digital Preferred or D1:** Digital Preferred is the second most broadly distributed digital tier and is distributed to

	[redacted] of Comcast's total subscribers. In 2009, Digital Preferred had approximately [redacted] million subscribers. ▪ **Sports Entertainment Package (SEP) or Sports Tier:** A package of sports-related channels which Comcast makes available to almost all of its subscribers for an additional monthly fee of approximately $5-8. In 2009, approximately [redacted] subscribers [redacted] received the Sports Tier.
Total Market Rating	The number of persons or households viewing a network, as a percentage of all television households in a market, whether or not those households receive the network. *Compare* Coverage Area Rating.
TTC	Tennis Channel.
Versus	A network providing multi-sport programming that, prior to the merger of Comcast and NBC-Universal, was wholly-owned by Comcast. Formerly known as the Outdoor Life Network (OLN).
Vertically Integrated MVPD	A company that is affiliated with both an MVPD and a network. Comcast Corp. is vertically integrated.
VOD	Abbreviation for "Video-on-Demand," which refers to programming offered on a per-program basis, either with or without a separate per-program fee (in this latter case – "Free VOD" or "Free On Demand"). Video-on-Demand programming typically can be viewed at any time selected by the viewer, often with pause, fast-forward and rewind functionality. *Compare* Linear.
Weighted Average	An average in which each unit in the series being averaged is multiplied by a weight relative to its importance, the result summed and the total divided by the sum of the weights.