

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

ORDER

Adopted: January 27, 2015

Released: January 28, 2015

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a program carriage complaint filed by The Tennis Channel, Inc. (“Tennis Channel”) alleging that Comcast Cable Communications, LLC (“Comcast”), a multichannel video programming distributor (“MVPD”), discriminated against it on the basis of affiliation in violation of Section 616 of the Communications Act of 1934, as amended (“the Act”) and its implementing rules. We also deny a Petition for Further Proceedings and Reaffirmation of Original Decision¹ filed by Tennis Channel in the wake of the D.C. Circuit’s decision in *Comcast Cable Communications, LLC v. FCC* (“Comcast decision”).²

2. In the Comcast decision,³ the United States Court of Appeals for the District of Columbia Circuit vacated a Commission order (“*MO&O*”)⁴ that held that Comcast had violated Section 616 of the Act,⁵ and the Commission’s program carriage rules⁶ by relegating Tennis Channel (a cable

¹ Petition for Further Proceedings and Reaffirmation of Original Decision (filed Mar. 11, 2014) (“Petition”).

² 717 F.3d 982 (D.C. Cir. 2013).

³ *Id.*

⁴ See *Tennis Channel, Inc., Complainant, v. Comcast Cable Communications, L.L.C., Defendant*, Memorandum Opinion and Order, 27 FCC Rcd 8508 (2012).

⁵ 47 U.S.C. § 536(a)(3). Section 616 of the Act instructs the Commission, in relevant part, to establish regulations designed to:

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

Id.

⁶ 47 C.F.R. § 76.1301(c).

network unaffiliated with Comcast) to a premium-pay programming tier on its cable systems, while more broadly distributing its affiliated sports networks, Golf Channel and Versus. The court overturned the decision on evidentiary grounds, ruling that the record in the proceeding failed to establish that affiliation had played a role in the level of carriage that Comcast had provided to Tennis Channel.⁷

3. In light of the D.C. Circuit's decision, in this Order, we: (i) reverse the Initial Decision in this matter and deny Tennis Channel's program carriage complaint based on the court's finding that there is no record evidence of unlawful discrimination under Section 616 of the Act and its implementing rules; and (ii) deny Tennis Channel's Petition for Further Proceedings and Reaffirmation of Original Decision. Below we set forth a brief history of the proceeding and explain the basis for our decision.

II. BACKGROUND

4. In July 2010, Tennis Channel, a video programming vendor, filed a complaint with the Commission alleging that Comcast, an MVPD, discriminated against it on the basis of affiliation in violation of Section 616 of the Act and its implementing rules.⁸ In particular, it alleged that Comcast carries Tennis Channel, with which Comcast is not affiliated, on a tier with narrow penetration that is available only to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks, Golf Channel and Versus (now NBC Sports Network), on a tier with significantly higher penetration that is available to subscribers at no additional charge.⁹

5. In December 2011, following a full evidentiary hearing, an Administrative Law Judge ("ALJ") rendered an Initial Decision finding that Comcast discriminated against Tennis Channel on the basis of affiliation, and that such discrimination had the effect of restraining Tennis Channel's ability to compete fairly in violation of Section 616 of the Act and its implementing rules.¹⁰ The ALJ, among other things, ordered Comcast to pay a monetary forfeiture and to carry Tennis Channel at the same level of distribution as Golf Channel and Versus.¹¹ Comcast appealed that decision to the Commission.¹² In July 2012, the Commission issued the *MO&O*, which largely affirmed the ALJ's decision.¹³ Comcast filed a petition for review of the *MO&O* in the D.C. Circuit, asking the court to "hold unlawful, vacate, enjoin, and set aside" the Commission's order.¹⁴ As noted, the D.C. Circuit, in May 2013, granted Comcast's petition for review.¹⁵

⁷ See 717 F.3d at 987.

⁸ See *MO&O*, 27 FCC Rcd at 8509, ¶ 1.

⁹ *Id.*

¹⁰ *Id.*, ¶ 2.

¹¹ *Id.*

¹² In addition, Comcast separately filed an Application for Review of a decision by the Media Bureau finding that Tennis Channel's complaint was not barred by the program carriage statute of limitations. The Commission denied the Application for Review in the *MO&O*. *Id.* at 8519, ¶¶ 28-34.

¹³ See *id.* at 8509, ¶ 3, 8519, ¶ 27. The Commission found, consistent with the ALJ's ruling, that Comcast had discriminated against Tennis Channel on the basis of affiliation and that such discriminatory treatment unreasonably restrained Tennis Channel's ability to compete against Comcast's similarly situated affiliates. In particular, the Commission agreed with the ALJ's finding that Tennis Channel, Golf Channel, and Versus are similarly situated networks, and that Comcast gave Golf Channel and Versus more favorable channel placement and broader carriage than Tennis Channel due to their affiliation with Comcast.

¹⁴ 717 F.3d at 987.

¹⁵ See *supra* n. 2. The D.C. Circuit had stayed the Commission's *MO&O* prior to vacating it. See *Comcast Cable Communications, LLC. v. FCC*, No. 12-1337, Order (D.C. Cir. Aug. 24, 2012).

6. In the wake of the D.C. Circuit's decision, Tennis Channel in March 2014 filed with the Commission a Petition for Further Proceedings and Reaffirmation of Original Decision.¹⁶ In its Petition, Tennis Channel asserts that the D.C. Circuit's decision created "new tests" for program carriage discrimination that the Commission heretofore has not articulated or applied.¹⁷ Thus, Tennis Channel argues, the Commission must issue a new order resolving its program carriage complaint that applies such "tests" to the record.¹⁸ Tennis Channel asserts that the existing factual record is adequate to support a finding of discrimination under those tests.¹⁹ In the alternative, Tennis Channel argues that should the Commission determine that it needs additional evidence to satisfy the court's evidentiary requirements, it should designate the issues requiring enhancement and reopen the record.²⁰

III. DISCUSSION

7. We reverse the ALJ's Initial Decision and deny Tennis Channel's program carriage complaint based on the court's conclusion that the record contains no evidence that Comcast discriminated against it unlawfully under Section 616 of the Act and its implementing rules.²¹ Tennis Channel claims that the court established "new tests" for determining whether an MVPD's denial of a request for carriage is unlawfully discriminatory and that the Commission thus must order additional briefing so that Tennis Channel may show that the record contains evidence sufficient to support grant of its complaint.²² We disagree. The court explicitly stated that it decided the case on the assumption that

¹⁶ See Petition. Prior to filing its Petition with the Commission, Tennis Channel filed a petition in the D.C. Circuit for an *en banc* rehearing, which was summarily denied. See Order, No. 12-1337 (D.C. Cir. Sept. 4, 2013). Tennis Channel then filed a petition in the U.S. Supreme Court for a *writ of certiorari* to review the D.C. Circuit's decision, which also was denied. See Order, No. 13-676 (U.S. Feb. 24, 2014).

¹⁷ See Petition at ii, 3, 7.

¹⁸ See *id.* at 11-13. Tennis Channel asserts that the Commission must establish a new briefing cycle that directs the parties to file limited proposed findings of fact and conclusions of law on the issues identified by the court. *Id.* at iii, 13-26.

¹⁹ *Id.* at 13-26. Tennis Channel also argues that grant of its Petition is necessary "to give life to the [program carriage] condition imposed in the *Comcast-NBCU* merger order." *Id.* at 3-4.

²⁰ *Id.* at 26-27. Comcast filed an Opposition to Tennis Channel's Petition. See Comcast's Opposition to Tennis Channel's Petition for Further Proceedings and Reaffirmation of Original Decision (filed Mar. 18, 2014) ("Opposition"). Comcast argues, among other things, that because the court made a definitive determination that the record lacked evidence sufficient to support a finding of unlawful discrimination and rejected Tennis Channel's request for rehearing *en banc*, the Commission is barred from reopening the proceeding. *Id.* at 8-22.

²¹ Because we are reversing the ALJ's decision on this basis, the remaining factual and legal issues presented by the record and raised in Comcast's exceptions are moot. In particular, the issue whether Tennis Channel's complaint was barred by the program carriage statute of limitations is moot because we deny the complaint based on the court's ruling. Thus, we dismiss Comcast's Application for Review in this proceeding.

²² See *id.* at 1-2; Reply in Support of Petition for Further Proceedings and Reaffirmation of Original Decision (filed Mar. 28, 2014) at 1, 8 ("Reply"). In particular, Tennis Channel asserts that the Commission should order additional briefing so that it can show that the record contains the types of evidence that the court stated would have been sufficient to demonstrate program carriage discrimination. Tennis Channel characterizes such evidence as:

- (1) . . . evidence that Comcast had reason to expect a 'net benefit' in its distribution business from carrying Tennis Channel as broadly as Golf Channel or Versus; (2) . . . evidence that Comcast's distribution business incurred greater 'incremental losses' from carrying Golf Channel or Versus on a broader tier than it would incur from carrying Tennis Channel on such tier; or (3) evidence that Comcast's purported business justifications for [refusing to] carry Tennis Channel more broadly were merely 'pretextual cover' masking a discriminatory purpose to benefit its affiliated and competing services at Tennis Channel's expense.

Petition at 11-12.

the Commission's interpretation of Section 616 was correct,²³ and concluded that the record lacked any evidence to rebut Comcast's claim that broader carriage of Tennis Channel would yield no benefits for Comcast.²⁴ Contrary to Tennis Channel's assertion, the court did not alter the evidentiary standards by which a complainant shows a violation of Section 616, but simply provided examples of the types of evidence that might have been adequate to prove that broader carriage would have yielded net benefits to Comcast. Moreover, the court concluded that there was no evidence to support any of its hypothetical examples of how Tennis Channel might have proven its discrimination claim.²⁵ The court neither invited nor directed the Commission to address or remand the evidentiary shortcomings identified in its decision.²⁶ For these reasons, we reject Tennis Channel's assertion that the Commission must order additional briefing on the question whether the existing record satisfies purported "new tests" established by the court for unlawful program carriage discrimination, and deny Tennis Channel's complaint.

8. For the same reasons, we also deny Tennis Channel's Petition. In addition to the arguments noted above, Tennis Channel asserts in its Petition that, should the Commission conclude that additional evidence is needed to satisfy the court's evidentiary requirements, it should designate the issues requiring factual enhancement and reopen the record.²⁷ We decline to do so. To the extent the Commission has discretion to reopen the proceeding, we conclude that the interest in bringing the proceeding to a close outweighs any interest in allowing Tennis Channel a second opportunity to prosecute its program carriage complaint.²⁸ In this regard, we note that Tennis Channel has had a full and fair opportunity to litigate its complaint.²⁹ Moreover, we disagree with Tennis Channel's contention that the Commission is statutorily required to permit further briefing and submission of additional evidence.³⁰

²³ See 717 F.3d at 984 ("Comcast prevails with its third set of arguments – that even under the Commission's interpretation of § 616 (the correctness of which we assume for purposes of this decision), the Commission has failed to identify adequate evidence of unlawful discrimination.")

²⁴ See *id.* ("Comcast also argued that . . . Tennis Channel offered no evidence that its rejected proposal would have afforded Comcast *any* benefit. If that is correct, as we conclude below. . . ."). See also *id.* at 985 ("Tennis showed no corresponding benefits that would accrue to Comcast" from broader carriage of Tennis Channel); *id.* at 986 ("Not only does the record lack affirmative evidence along these lines, there is no evidence that such benefits exist."); *id.* at 987 ("[T]he record simply lacks material evidence that the Tennis proposal offered Comcast any commercial benefit. . . . Without showing any benefit for Comcast . . . , the Commission has not provided evidence that Comcast discriminated against Tennis on the basis of affiliation. . . . [N]one of [the Commission's evidence] establishes benefits that Comcast would receive if it distributed Tennis Channel more broadly. On this issue, the Commission has pointed to no evidence").

²⁵ See *id.* at 986-987 ("A rather obvious type of proof would have been expert evidence to the effect that X number of subscribers would switch to Comcast if it carried Tennis more broadly, or that Y number would leave Comcast in the absence of broader carriage, or a combination of the two, such that Comcast would recoup the proposed increment in cost. There is no such evidence. . . . Not only does the record lack affirmative evidence along these lines, there is evidence that no such benefits exist.").

²⁶ We note that Tennis Channel, in its petition for rehearing *en banc*, had argued that the court erred in not remanding the case to the Commission for further proceedings. As noted above, the court summarily denied that petition. See Tennis Channel Reply at 12 n. 33.

²⁷ See Petition at 26-27.

²⁸ See *International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 341 (1945) ("Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction."); see also 47 U.S.C. §154(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . .").

²⁹ See *supra* n.16.

³⁰ Tennis Channel points to Section 402(h) of the Act in asserting that the court's vacatur necessarily operates as a remand to the Commission for further proceedings to resolve the complaint. See Petition at 11 n. 32. To the extent (continued....)

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, that the Initial Decision in this matter **IS REVERSED**.
10. **IT IS FURTHER ORDERED** that Tennis Channel's Complaint in the above-captioned proceeding, **IS DENIED**.
11. **IT IS FURTHER ORDERED** that the Petition for Further Proceedings and Reaffirmation of Original Decision filed by Tennis Channel, **IS DENIED**.
12. **IT IS FURTHER ORDERED** that Comcast's Application for Review in the above-captioned proceeding **IS DISMISSED**.
13. **IT IS FURTHER ORDERED** that this proceeding **IS TERMINATED**.
14. This action is taken pursuant to authority in Sections 4(i), 4(j), 303(r) and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 536, and Sections 1.282 and 76.1302 of the Commission's rules, 47 C.F.R. §§ 1.282, 76.1302.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page) _____
that Section 402(h) applies to this case, we note that such provision would in fact bar the Commission from reopening the proceeding because the court has neither ordered nor authorized the Commission to do so. *See* 47 U.S.C. § 402(h) ("In the event that the court shall render a decision and enter an order reversing the order of the Commission, . . . it shall be the duty of the Commission . . . to forthwith give effect thereto, and *unless otherwise ordered by the court*, to do so upon the basis of proceedings already had and the record upon which said appeal was heard and determined") (emphasis added). However, we need not resolve the question whether Section 402(h) applies here because we deny Tennis Channel's petition on the basis of our administrative discretion.