Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

THE TENNIS CHANNEL, INC.,
Complainant,

v.

COMCAST CABLE COMMUNICATIONS, LLC,
Defendant.

TO: Chief, Media Bureau

PROGRAM CARRIAGE COMPLAINT

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SUMMARY

Tennis Channel is a national cable sports network that provides comprehensive coverage of major tennis events, including the tennis Grand Slams and nearly all of the top tennis tournaments worldwide, as well as substantial original non-event programming of interest to tennis fans and tennis players. Comcast, the largest multichannel video programming distributor in the nation, currently carries Tennis Channel on its Sports and Entertainment Package, an expensive and narrowly-penetrated premium tier. This carriage complaint is necessitated by Comcast’s discriminatory refusal to provide Tennis Channel with the broader carriage that it provides to the similarly situated sports networks it owns (such as the Golf Channel and Versus) and that is otherwise appropriate in light of Tennis Channel’s quality and performance.

In June 2009, following protracted discussions centered on Tennis Channel’s insistence on being carried on broadly penetrated tiers comparable to those Comcast affords to its affiliated networks, Comcast declined to make any changes in Tennis Channel’s carriage or tiering arrangements. During these discussions, Tennis Channel provided Comcast with substantial information about major investments it had made in programming and service during recent years, such as its launch of Tennis Channel HD and its new in-depth coverage of the four tennis Grand Slams, and about the growth it had achieved in ratings performance.

Comcast did not challenge these showings, and it provided no reason for its decision, which has stranded Tennis Channel on a premium tier received—for a substantial extra charge—by only one tenth as many Comcast subscribers as Golf Channel and Versus. Even though those programming services are by all objective standards competitive with and comparable to Tennis Channel, they are carried on
Comcast’s most widely received programming tiers and are available to subscribers at no extra charge. In fact, Comcast relegates only unaffiliated services like Tennis Channel to its narrowly-penetrated premium sports tier.

This differential treatment is entirely consistent with the “different level of scrutiny” that Comcast’s President, Stephen Burke, has admitted Comcast affords its affiliated networks. According to Mr. Burke, Comcast treats affiliated networks “like siblings as opposed to strangers”; that is presumably why these channels receive enhanced carriage opportunities that unaffiliated networks do not receive.

There is no doubt that Comcast’s discriminatory refusal to provide Tennis Channel with broader carriage is based on its explicit understanding that by doing so Comcast is harming the network’s ability to compete in the cable marketplace.

Comcast’s own executives have confirmed their recognition that carriage of any program service on Comcast’s premium sports tier “would adversely affect the license revenue” earned by that network, and that the tier is “not viable” if the network is “ad-supported,” as Tennis Channel and Comcast’s affiliated sports channels are. And Comcast is itself remarkably sensitive to any actions by others that reduce the reach of the networks it owns. Thus, when DIRECTV announced its intention to move Versus to a less penetrated tier because of concerns about the channel’s quality and performance, a Versus executive called the move “a non-starter” and stated that Versus would not “accept a situation where Versus can lose 6 million viewers.” In short, Comcast has acknowledged that placement on narrowly-penetrated tiers severely undermines a sports network’s ability to compete in the cable marketplace.
The limited carriage Comcast provides to Tennis Channel causes specific and concrete harm to its ability to compete for viewers, advertisers, and the rights to cablecast tennis events. Moreover, Comcast’s position as the market leader, with power in many of the most important media markets, and its ability to influence the decisions of other cable companies, even further exacerbate these harms.

This is not a circumstance that may be dismissed simply as the unfortunate result of otherwise permissible business decisions by Comcast. As this Complaint demonstrates, there are no material operational differences—in subject matter interest, in quality of service, in ratings, or in any other objective standard of performance—that would justify the disparity between how Comcast treats Tennis Channel and how it treats its owned sports networks. Indeed, when measured against the very factors Comcast purports to use to calculate the carriage potential of individual program services, Tennis Channel outranks both the Golf Channel and Versus.

It is inescapable that Comcast’s discrimination in the terms and nature of Tennis Channel’s carriage results solely from a decision—proscribed by Section 616 of the Communications Act—to protect its networks from competition with an unaffiliated programming service, and to weaken an entity that stands in the way of Comcast’s ability to achieve its own internal programming plans.

Congress adopted Section 616 to further the public interest goal of protecting programming diversity and competition in the cable television market. It explicitly reached the judgment that such diversity and competition would be imperiled if cable system operators could discriminate against unaffiliated networks simply because they did not own them. That is precisely what Comcast has done here, and this case is
the paradigmatic example of how a cable operator like Comcast—the nation’s largest and most powerful cable operator—can engage in overt and predatory discrimination and undermine the congressional goal of a healthy marketplace populated with networks able to compete and prosper without regard to affiliation.

It is for these reasons that Tennis Channel seeks remedial orders that would require Comcast to carry Tennis Channel fairly, on the same basis as it carries its own affiliated services.
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TO: Chief, Media Bureau

PROGRAM CARRIAGE COMPLAINT

INTRODUCTION

1. Section 616 of the Communications Act of 1934, as amended, prohibits cable and satellite operators 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 non-affiliation of vendors.”

2. Congress adopted Section 616 after finding that “cable operators have the incentive and ability to favor their affiliated programmers”—that they can use their gatekeeper capacity, and the critical importance of the carriage they offer, to acquire or damage competitive

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unaffiliated programmers. 2 Pursuant to Section 616, the Commission promulgated rules intended to afford programmers with relief from such abuse. 3

3. This Complaint involves actions by Comcast Cable Communications, LLC [hereinafter Comcast], the nation’s largest cable operator, 4 to use its inherent market power—in precisely the way prohibited by the Commission—to disadvantage Tennis Channel, an unaffiliated network owned by The Tennis Channel, Inc. [hereinafter Tennis Channel], and to protect competing networks with which Comcast is affiliated.

4. This is not a case in which a company like Comcast is making a rational business decision that has the unintended effect of damaging an unaffiliated programmer. 5 Comcast’s discriminatory misconduct here both is blatant and intentional—evidenced by the striking fact that it carries all of its affiliated sports networks on broadly-distributed programming tiers, while it relegates Tennis Channel (and most other unaffiliated sports networks) exclusively to an expensive premium tier that is not received by about 90 percent of Comcast’s subscribers.

5. As this Complaint and the attached exhibits demonstrate, Comcast’s conduct is plainly and intentionally discriminatory within the meaning of Section 616. Indeed, Comcast’s President has admitted that Comcast treats affiliated networks “like siblings as


5 The language of Section 616 would reach even those decisions. 47 U.S.C. § 536.
opposed to strangers”—that affiliated networks receive carriage benefits that unaffiliated networks do not—in facial violation of Section 616. 6 One such benefit available to Comcast affiliated services is that no Comcast-owned network is carried exclusively on the premium sports tier, where Comcast carries Tennis Channel. In the words of another Comcast executive, that kind of carriage forces the relevant programmers to suffer economic conditions that are “not viable.” 7 Exempting its services from carriage on the sports tier and relegating the sports services in which it has no interest to that carriage—even when they are fully comparable to those Comcast owns—similarly constitutes a facial violation of Section 616.

6 In sum, Tennis Channel’s growth, programming quality, and audience ratings results—its very position in the consumer marketplace in which it and Comcast’s similarly situated affiliated networks compete—render it unmistakably clear that Comcast takes actions against it that constitute deliberate discrimination so as to protect Comcast-affiliated networks against increasing competition.

STATEMENT OF FACTS

A. Jurisdiction

7 This Complaint is brought in accordance with and pursuant to the jurisdiction provided by Section 616 of the Communications Act of 1934 8 and Section 76.1302 of the Commission’s rules. 9 The notice required by 47 C.F.R. § 76.1302(b) was provided by a

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7 Tr. of R. at 1911:16-1912:6, NFL Enterprises Hr’g, Apr. 17, 2009, attached at Exh. 23 (testimony of Jeffrey Shell) (“[I]f you are . . . an ad-supported network . . . then you have to price yourself such that the – not to be on a sports tier, because my view was that it didn’t work.”).


9 47 C.F.R. § 76.1302.
letter from Ken Solomon, Chairman and Chief Executive Officer of Tennis Channel, to Comcast's President, Stephen Burke, on December 10, 2009.\textsuperscript{10}

B. The Parties

1. Tennis Channel

8. Tennis Channel is a video programming vendor, as defined in 47 C.F.R. § 76.1300(e). Its mailing address is 2850 Ocean Park Boulevard, Suite 150, Santa Monica, CA 90405, and its telephone number is (310) 314-9400.

9. Tennis Channel launched on May 15, 2003 with a broad range of racquet-sport-related programming.\textsuperscript{11} Comcast began carrying the network in 2005.\textsuperscript{12}

10. Like many programmers, Tennis Channel offered preferential terms to distributors that, like Comcast, agreed to carry the network before it had become well-established.\textsuperscript{13} Thus, under the 2005 agreement, which is still in effect, Comcast received a preferential rate—

Although Comcast was required to launch Tennis Channel on systems serving a specified number of subscribers, the contract did not specify the tier on which Comcast would carry Tennis Channel.\textsuperscript{15}

\textsuperscript{10} A copy of Tennis Channel's letter to Comcast, along with proof of delivery, is attached to this Complaint as Exh. 29.

\textsuperscript{11} Declaration of Ken Solomon, ¶ 4 (Jan. 4, 2010), attached at Exh. 3 [hereinafter Solomon Decl.].

\textsuperscript{12} See Comcast & Tennis Channel, Affiliation and Distribution Agreement attached at Exh. 8 [hereinafter Affiliation Agreement]; Solomon Decl. ¶ 5.

\textsuperscript{13} See generally Affiliation Agreement.

\textsuperscript{14} Id.

\textsuperscript{15} Affiliation Agreement.
11. In the four years since its launch on Comcast systems, Tennis Channel has become the leading provider of 24/7 tennis programming and is indeed the only cable network in the nation dedicated to covering the sport.\textsuperscript{16} In 2008, Tennis Channel offered more than 2,700 hours of worldwide event coverage, including major coverage of three of the four Grand Slam events: the Australian Open, the French Open, and Wimbledon.\textsuperscript{17} It added the fourth Grand Slam, the U.S. Open, as well as other prominent event coverage such as exclusive telecasts of every worldwide and United States Davis Cup and Fed Cup match, in 2009.\textsuperscript{18} Tennis Channel’s event coverage is spread evenly across the year, with the Grand Slams beginning in January, May, June, and August, respectively, and other major tournaments and series year-round.\textsuperscript{19}

12. In addition to covering more than 70 top tennis tournaments worldwide, Tennis Channel offers substantial non-event content, including hundreds of original lifestyle, instructional, and fitness series, specials, and short-form programs that feature the sport’s most popular athletes, historical figures, and its most highly-regarded experts.\textsuperscript{20} Moreover, Tennis Channel has been recognized for its programming quality. This past summer, for example, one observer concluded that “Tennis Channel has arrived as a real force and an equal to . . . ESPN2 on all the big tennis events.”\textsuperscript{21}

\textsuperscript{16} See, e.g., Steven Zeitchik, “Tennis, Everyone? Future’s Not as Fuzzy; Cable, Online Deals Have Sport on Upswing,” \textit{The Hollywood Reporter} (July 3, 2008).

\textsuperscript{17} Solomon Decl. ¶ 4, 8, 9.

\textsuperscript{18} \textit{Id}.

\textsuperscript{19} Solomon Decl., Exh. B.

\textsuperscript{20} Solomon Decl. ¶ 4.

13. Today, more than 23.5 million subscribers receive Tennis Channel from about 130 different distributors nationwide.\textsuperscript{22} The vast majority of those distributors—more than two thirds—offers Tennis Channel to subscribers without requiring them to purchase a premium sports tier, even though many distributors have discretion regarding their placement of the network.\textsuperscript{23} These include such large distributors as Comcast’s in-market competitors DIRECTV, Dish Network, and Verizon, and other cable operators like Cox, Insight, and Cequel.\textsuperscript{24}

14. Comcast, the nation’s largest cable operator, is one critical exception. Comcast generally carries Tennis Channel on its premium Sports and Entertainment Package,\textsuperscript{25} for which customers must pay a fee of about $5 each month over and above the amount they already pay for digital cable service.\textsuperscript{26} The subscriber fee for this tier is many times the fee that Comcast pays to acquire Tennis Channel for each subscriber.\textsuperscript{27} With only limited exceptions, Comcast has carried Tennis Channel on the premium sports tier since it began carrying the network in 2005.\textsuperscript{28} As discussed further below, this carriage pattern contrasts sharply with Comcast’s carriage of networks in which it has an economic interest. For example, Comcast carries Versus and the Golf Channel, which compete directly with Tennis Channel, on its analog

\begin{footnotes}
\item[22] Solomon Decl. ¶ 5.
\item[23] Id.
\item[24] Id.
\item[27] Solomon Decl. ¶ 5.
\item[28] Id. Comcast’s systems generally launched Tennis Channel on the premium sports tier; a few systems launched Tennis Channel on a digital basic tier but then relocated it to the premium sports tier, where it is now carried on all Comcast’s systems nationwide except one. Id.
\end{footnotes}
basic tier, ensuring that these networks reach virtually every Comcast customer, and at no additional surcharge beyond the cost of basic cable.

15. Although Comcast’s sports tier has suffered consistently from low penetration, Comcast has made several recent changes to the tier that will make it even less desirable. During 2009, Comcast moved several networks that it historically carried on the sports tier—including the NHL Network and NBA TV—to more broadly penetrated digital tiers.29 Notably, Comcast has a direct or indirect financial interest in each of these networks.30 Comcast’s parent company owns athletic teams whose events are telecast on each of these networks, and it also holds an equity interest in each network.31 The recent retiering of these networks will further reduce the overall attractiveness of the sports tier to subscribers and diminish their incentive to pay extra to acquire it. Only about ten percent of Comcast’s subscribers, or about 2.6 million homes, have been willing to pay for this premium sports tier,32 and the foregoing changes are likely to reduce the tier’s reach still further.

16. In sum, Comcast treats Tennis Channel in a fashion starkly different from the way it treats competing sports services with which it is affiliated, including services like the Golf Channel and Versus, which are offered on an analog basic tier to nearly all of Comcast’s 24

29 See, e.g., Comcast, “Important News for Comcast Customers” (June 2009), attached at Exh. 25.

30 See Declaration of Hal Singer, ¶ 15 (Jan. 4, 2010), attached at Exh. 1 [hereinafter Singer Decl.]. Comcast also added the NFL Network, with which it is not affiliated, to a digital basic tier after it settled a program carriage complaint brought against it at the FCC by NFL Enterprises LLC, an affiliate of the National Football League.

31 Id.

32 Solomon Decl. ¶ 5.
million subscribers—approximately ten times as many Comcast subscribers as Tennis Channel receives.\textsuperscript{33}

17. Comcast has stranded Tennis Channel on its sports tier even though its head of programming, Jeff Shell, has admitted that "if you’re an ad-supported network" like Tennis Channel, "the sports tier that Comcast has . . . is not viable."\textsuperscript{34} As noted, the sports tier is significantly less viable now than it was at the time Mr. Shell made this statement, given the retiering of certain networks that Comcast historically offered on the tier.

2. Comcast

18. Comcast is a cable operator and a multichannel video programming distributor (MVPD) within the meaning of 47 C.F.R. § 76.1300(d). Its mailing address is One Comcast Center, Philadelphia, PA 19103, and its telephone number is (215) 286-1700.

19. Comcast is a "market leader"\textsuperscript{35} in every sense of that phrase. With approximately 24 million subscribers, it is not only the nation's largest cable operator, but also the largest MVPD of any type in the country.\textsuperscript{36} It has customers in 39 states and the District of Columbia\textsuperscript{37} and in 24 of the top 30 designated market area (DMAs), and it is the dominant


\textsuperscript{34} Tr. of R. at 1911:16-1912:6, NFL Enterprises Hr'g, Apr. 17, 2009 (testimony of Jeffrey Shell) ("[I]f you are . . . an ad-supported network . . . then you have to price yourself such that the – not to be on a sports tier, because my view was that it didn't work.").


\textsuperscript{36} Comcast, Press Release, "Comcast Reports Third Quarter 2009 Results," at 2 (Nov. 4, 2009), attached at Exh. 26 [hereinafter Comcast 3Q09 Results].

\textsuperscript{37} Comcast Investor Relations – Comcast Products and Services, http://www.cmcsa.com/products_services.cfm (last visited Nov. 5, 2009), attached at Exh. 16.
MVPD in 19 of these top 30 media markets. Its size gives it leverage in the distribution agreements it negotiates and allows it to generate significant revenues.

20. It is, consequently, not surprising that Comcast is viewed as “a leader in the industry” and that “[o]ther cable operators” view it as a “bellwether” in developing their own “business models.” Comcast has “clout”—“the ability to make or break cable programming across the country.” “If an aspiring cable channel cannot win carriage on [Comcast and Time Warner], its fate is sealed. It’s doomed.” In brief, Comcast has the very kind of disproportionate influence in the video programming marketplace that led Congress to adopt Section 616 in the first place.

21. In addition to its role as an MVPD, Comcast is affiliated with a number of cable programming networks, several of which compete directly against Tennis Channel and all of which enjoy notably better carriage with Comcast than the Tennis Channel.

22. Comcast’s parent company has a financial interest in the Golf Channel, the MLB Network, the NHL Network, NBA TV and a variety of other national networks.

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39 Comcast, Press Release, “Comcast Reports Third Quarter 2009 Results,” at tbl. 1 (Nov. 4, 2009), attached at Exh. 26 (disclosing that Comcast generated more than $26.575 million in revenues during the first three quarters of 2009).
42 Id.
43 Comcast 3Q09 Results, Exh. 26, at 3.
Like Tennis Channel, these networks are national channels focused on coverage of a single sport.\textsuperscript{48} For example, like Tennis Channel, Golf Channel focuses on a single sport that is watched and played predominantly by affluent adults.\textsuperscript{49} These networks compete with Tennis Channel for viewers and advertisers.

23. Comcast's parent also owns Versus, a national sports network that offers programming coverage of multiple sports. Versus competes with Tennis Channel for viewers and advertisers, and it recently has competed with Tennis Channel for the right to telecast tennis programming.\textsuperscript{50}

24. Finally, Comcast's parent owns a number of regional sports networks, including Comcast SportsNet California, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Northwest, Comcast SportsNet Philadelphia, Comcast SportsNet Bay Area, and Comcast

\textsuperscript{45} In addition to its direct ownership stake in the NHL Network, Comcast's parent owns the Philadelphia Flyers NHL team, whose games are covered on the network. Comcast 8-K, Art. I, § 1.01, Exh. 28.

\textsuperscript{46} Comcast's parent owns the Philadelphia 76ers NBA team, whose games are covered on NBA TV; it thus owns a stake in the NBA and a piece of the league's network. Comcast 3Q09 Results, Exh. 26, at 4.

\textsuperscript{47} See generally Comcast 3Q09 Results, Exh. 26; Comcast 8-K, Exh. 28.


\textsuperscript{49} Declaration of Timothy Brooks (Jan. 4, 2010), attached hereto at Exh. 2, at §§ III(1)(a), III(6)(a) [hereinafter Brooks Decl.].

\textsuperscript{50} Comcast 3Q09 Results, Exh. 26, at 4. In 2006 Versus (then known as Outdoor Life Network) and Tennis Channel shared rights to the U.S. Davis Cup, and in 2007 the two networks jointly distributed the WTA Tour Championships. Comcast, Press Release, “The USTA Signs OLN and The Tennis Channel as U.S. Davis Cup Television Partners for 2006,” http://www.versus.com/nw/article/view/12415/ (Feb. 7, 2006); On the Baseline Tennis News, “2007 WTA Tour Championships TV Schedule for Versus, Tennis Channel” (Oct. 20, 2007), attached at Exh. 9. See also Solomon Decl. ¶ 27.
SportsNet South (collectively, "Comcast SportsNet"). These networks compete with Tennis Channel on a regional basis for viewers and advertisers. In addition, these networks carry programming coverage of World TeamTennis regional events. Tennis Channel competes with Comcast SportsNet for World TeamTennis rights, and Tennis Channel currently broadcasts World TeamTennis national events.

25. Comcast originally launched the Golf Channel as a premium channel, but it moved the network to a basic tier within months after its launch, because it concluded that distributing a sports network on a premium basis was not economically sustainable. Indeed, Comcast has acknowledged that the Golf Channel obtained this broader distribution, which it

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51 Comcast 3Q09 Results, Exh. 26, at 3.
53 Solomon Decl. ¶ 26.
55 Joe Schlosser, “Cable’s Class of 1995: A Look at How the Major Cable Launches of That Year Have Fared,” Broadcasting & Cable (Mar. 17, 1997), attached at Exh. 7 ("In January 1995, The Golf Channel teed up as a premium service hoping to entice the estimated 25 million-40 million golfers and golf viewers in the country to pay for exclusive golf tournament coverage. Eight months later, the channel converted to a basic cable network after interest from the gallery seemed stymied by the pay-to-watch theory.")
called “one of the most important keys to a fledgling cable network’s success,” specifically because the network was affiliated with it and other MVPDs.\(^{56}\)

26. Comcast generally carries Versus and Comcast SportsNet on the same basic programming tier as the one on which it carries the Golf Channel.\(^{57}\)

27. Comcast launched the MLB Network—in which it holds an equity interest—on a digital basic tier. According to one news report, “the reason that the MLBN has been able to enjoy a compatible arrangement with cable broadcasters is that it gave up a share of its equity [to Comcast and other distributors] in order to reach that goal.”\(^{58}\)

28. Likewise, Comcast announced this past summer its decision to move the NHL Network, which covers the games of the Philadelphia Flyers, the Comcast-owned hockey team, to a digital basic tier.\(^{59}\) Although Comcast did not disclose the terms of its agreement with the National Hockey League (NHL)—the entity that also provides the most valuable

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\(^{56}\) Comcast, “Company History | Golf Channel,” supra note 48 (“The cable operator investment [from Comcast and others] not only infused necessary capital to keep the business going, it brought with it one of the most important keys to a fledgling cable network’s success – distribution.”).

\(^{57}\) See, e.g., Comcast D.C. Lineup.

\(^{58}\) Diane M. Grassi, “MLB Network Rolls Out with Bait and Switch,” Sports Central (Jan. 9, 2009). Likewise, Comcast has announced plans to launch a network called the U.S. Olympic Network in 2010 on a digital basic tier. Comcast & United States Olympic Committee, Press Release, “USOC and Comcast Partner To Launch the U.S. Olympic Network” (July 8, 2009). It decided to carry this affiliated network broadly even though NBC has television rights to the Olympic Games through 2012 and even though the International Olympic Committee and other key stakeholders opposed the network’s launch. The venture ultimately was suspended over that criticism, but the experience illustrates Comcast’s consistent efforts to provide preferential terms even to ill-fated sports networks without substantial programming if they are affiliated. See “Olympic Network Was Doomed To Flame Out,” Company Town, Los Angeles Times, http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/08/olympic-network-was-doomed-to-crash-out-of-the-gate.html (Aug. 19, 2009).

programming for Comcast-owned Versus—it disclosed in early December 2009 that it now holds more than 15 percent of the equity in the NHL Network. 60

29. Finally, Comcast initially carried NBA TV on its premium sports tier, but it has since moved that network to a digital basic tier as well. Comcast’s parent company itself owns an indirect share of NBA TV by virtue of its ownership of an NBA franchise, the Philadelphia 76ers. 61

30. According to published data, 62 each of these Comcast-affiliated networks costs Comcast more per subscriber for carriage than Tennis Channel, even though each of these affiliated networks receives much broader distribution. 63 According to SNL Kagan, Comcast charges a rate of about 30 cents per subscriber per month for Versus and 26 cents per subscriber per month for the Golf Channel—

The MLB Network costs approximately 24 cents per subscriber per month, 65 while NBA TV costs 31 cents per subscriber per month and the NHL Network costs 54 cents per subscriber per month. 66

60 Comcast 8-K, Art. I, § 1.01.
61 Comcast 3Q09 Results, Exh. 26, at 4.
62 All rates in cited in this paragraph are for 2009; 2010 rates are likely to be no more than a few cents different. SNL Kagan, Economics of Basic Cable Networks at 53 (2009) [hereinafter Economics of Basic Cable Networks], attached at Exh. 20.
63 The contemplated price for the Olympic Network, see note 58, supra, has not been announced publicly.
64 Economics of Basic Cable Networks at 53.
66 Economics of Basic Cable Networks at 53.
C. Comcast’s Discriminatory Conduct

1. Background

31. Comcast has a history of violating its duty to treat unaffiliated programmers in a non-discriminatory manner and to enter into business relationships that do not restrain their ability to compete fairly in the cable marketplace. Indeed, it has been the subject of more program carriage complaints than any other distributor. In each case, the Media Bureau found that the programmer had established a prima facie case that Comcast had violated Section 616. All of these cases either are still ongoing or were settled by Comcast before a final Federal Communications Commission (FCC) decision.

32. In recognition of the serious risk that Comcast would use its power to undermine content diversity by discriminating against unaffiliated programmers, the Commission also established a special program carriage condition on its approval of Comcast’s acquisition of certain Adelphia Communications Corporation cable systems.

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33. And Comcast has acknowledged the threat that its market dominance is understood to pose to diversity in the video programming industry. It has volunteered to accept program carriage conditions on the FCC’s approval of its proposal to acquire NBC Universal.70

34. Finally, the Commission has found that in a parallel context Comcast engaged in abusive behavior by discriminating against unaffiliated content providers seeking access to Comcast’s Internet subscribers.71 In that network neutrality case, as in this one, Comcast prevented its subscribers from accessing unaffiliated sources of content in order to favor its own preferred sources. The Commission concluded that Comcast’s efforts to undermine network neutrality constituted a “discriminatory and arbitrary practice [that] unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management.”72

35. As shown below, Comcast’s treatment of Tennis Channel is a textbook example of its use of predatory and abusive tactics—all designed to shield its own services, in this case particularly the Golf Channel and Versus—from the kind of vigorous marketplace competition that Congress sought to preserve and promote through Section 616.

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70 It bears noting that, while conceding its obligation to promote programming diversity, Comcast has actually offered little to achieve that goal: it has committed to add only a handful of independent networks to more penetrated tiers without specifying which networks (and whether they will be competitors with Comcast’s networks); and it has agreed to do so on unspecified “customary terms and conditions,” which themselves may of course prove discriminatory. See David L. Cohen, Executive Vice President, Comcast Corp., Memorandum, “Comcast/GE Announcement Regarding NBC Universal,” at 5 (Dec. 3, 2009).


72 Id.
2. Tennis Channel’s Recent Expansion

36. Early in its history, Tennis Channel made the strategic decision to improve its competitive position and its cable carriage profile through a systematic plan to enhance the quality of its technical service and content production and the range of tennis events it made available to subscribers.\textsuperscript{73} That plan was concluded by 2009.\textsuperscript{74}

37. In January 2008, Tennis Channel launched Tennis Channel HD, a new channel that made Tennis Channel an industry leader in high-definition sports programming.\textsuperscript{75} Tennis Channel spent more than $100 million in 2008 to create Tennis Channel HD, and it has since increased its investment in HD programming.

38. Later in 2008, Tennis Channel completed the expansion of its tournament programming. It offered more than 2,700 hours of worldwide event coverage in 2008, an average of more than 52 hours every week of the year.\textsuperscript{77} (Tennis Channel would offer coverage of even more tennis matches if it were more broadly distributed and, therefore, had sufficient revenues to cover the cost of producing that coverage.\textsuperscript{78}) By comparison, the Golf Channel offered about 2,400 hours of event coverage in 2008, and Versus offered only about 1,350 hours.\textsuperscript{79}

\textsuperscript{73} Solomon Decl. ¶ 6.

\textsuperscript{74} Id.

\textsuperscript{75} Id. ¶¶ 6-7.

\textsuperscript{76} Id. ¶ 7. See also Letter from Jennifer T. Gaiski, Sr. Vice President, Content Acquisition, Comcast, to Nancy Pingitore, Account Director, Tennis Channel (July 26, 2007) (acknowledging Tennis Channel’s offer to provide Tennis Channel HD), attached at Exh. 9.

\textsuperscript{77} Solomon Decl. ¶¶ 8 & Exh. A.

\textsuperscript{78} Solomon Decl. ¶ 4.

\textsuperscript{79} Solomon Decl., Exh. A. See also Singer Decl. ¶ 18.
39. By 2009, Tennis Channel had acquired rights to broadcast portions of all four Grand Slam tournaments—the French Open, the Australian Open, Wimbledon, and the U.S. Open—as well as virtually every other top tournament in the world, including the Davis Cup, the Association of Tennis Professionals World Tour Masters 1000, and the Women’s Tennis Association Premier tournaments.  

80 Each Grand Slam tennis event lasts two weeks, and each of the four is the sport’s equivalent of a Super Bowl.  
81 In contrast, the Golf Channel does not offer live coverage of any of golf’s Majors, which are that sport’s comparable events.  
82 In all, Tennis Channel covered more than 70 top tennis tournaments during 2009 worldwide. 

40. Tennis Channel’s investments in content have been substantial. The network spent almost $75 million to acquire and telecast the Grand Slams in 2008 and 2009, as well as $25 million for other event programming. 

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41. On a parallel track, tennis has recently experienced unique growth as a participatory sport—an expansion of public involvement and interest that has been fully consistent with Tennis Channel’s unique growth in popularity with viewers over this period. 

42. The dramatically increased viewer interest in tennis and Tennis Channel’s substantial investment in programming and service delivery has resulted in enhanced viewer satisfaction with Tennis Channel. Between 2007 and 2009—coinciding with Tennis Channel’s significant programming expansion—the number of viewers who reported in an independent industry survey that they were “very satisfied” with Tennis Channel grew substantially, as did

80 Solomon Decl. ¶ 9. 
81 Id. 
82 Singer Decl. ¶ 18. 
83 Solomon Decl. ¶ 4. 
84 Id. ¶ 8. 
85 See paragraph 81, infra.
the number of viewers who indicated that Tennis Channel was important to their enjoyment of
cable television.\footnote{Brooks Decl. \S III(4)(c).}

43. Within its universe, Tennis Channel consistently produces ratings on par
with Comcast’s comparable affiliated services. For example, during the second quarter of 2009,
the networks’ average all-day ratings in Tennis Channel-rated markets were identical.\footnote{Id.}
Mr. Timothy Brooks, an independent media consultant, a former executive of several cable networks,
and a former chairman of the Media Ratings Council, an independent industry ratings body,
concluded that over the first nine months of 2009, the ratings of Tennis Channel and the Golf
Channel were “statistically . . . extremely close.”\footnote{Id. \S III(2)(j).} And in August and September 2009, Tennis
Channel and Versus had average total day ratings in their common Nielsen coverage area that
were essentially the same.\footnote{Id. \S III(3)(a).}

44. Today, Tennis Channel ranks among the most popular cable networks for
its most desirable events. For instance, Mr. Brooks concluded that during U.S. Open live
primetime coverage on September 5, 2009, “Tennis Channel ranked #4 among all cable networks
within its coverage area, equaling USA Network and exceeding such cable stalwarts as A&E,
Discovery, Bravo and CNN.”\footnote{Id. \S III(2)(e).} As Mr. Brooks explained, “[t]he Tennis Channel rating of 1.04
was more than five times higher than that of Golf Channel, which was .19 on [that] night.”\footnote{Id. In}
November 2009, Tennis Channel provided week-long coverage of every match in the ATP World Tour Final. The only ATP World Tour Final match that Tennis Channel did not carry live and exclusively was the final match on the afternoon of November 29, but Tennis Channel’s encore telecast of that match scored a .27 household rating—nearly double the .14 rating for live coverage of the same event that same morning on ESPN2.  

3. Comcast’s Limitation of Tennis Channel to the Sports Tier

45. By early 2009, Tennis Channel had achieved and could document dramatic growth and unique popularity; ratings successes; license fees among the lowest of sports networks; and high value proposition to distributors. At that point, it proposed that Comcast move the network from the limited-distribution sports tier to a more broadly-penetrated tier—comparable to the carriage Tennis Channel is afforded on the systems of many other MVPDs, including those of Comcast’s principal direct competitors, DIRECTV, Dish Network, and Verizon, as well as other cable companies such as Cox.

46. After a number of presentations outlining these points, on March 4, 2009, Comcast’s Executive Vice President – Content Acquisition, Madison Bond, responded by telephone to Tennis Channel’s proposal. Mr. Bond told Tennis Channel’s Chairman and Chief Executive Officer, Ken Solomon, that Comcast would consider repositioning Tennis Channel only if Tennis Channel offered Comcast a financial “incentive.”

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92 Id.
93 Solomon Decl. ¶ 10-11.
94 Id. ¶ 13. To the best of Tennis Channel’s knowledge, Versus, the Golf Channel, and Comcast SportsNet, which are affiliated with Comcast, have never been required to offer an “incentive” in exchange for broad carriage on Comcast’s systems. In particular, when Comcast repositioned the Golf Channel from premium to basic months after its launch because of poor performance,
47. Mr. Bond reiterated this demand in a March 30 telephone call with Mr. Solomon. In that conversation, Mr. Bond indicated that he thought Tennis Channel would never be able to provide a significant enough financial incentive since, in Mr. Bond’s view, it would be “too expensive” for Tennis Channel.

48. Tennis Channel did offer such an incentive to Comcast at a May 12, 2009 meeting at Comcast headquarters:

49. Tennis Channel offered because (for reasons discussed herein) broad distribution is essential to Tennis Channel’s business model, and Tennis Channel believes (as Comcast’s own executives believe) that it is not economically feasible to be carried——only on the limited-distribution sports tier.

50. During the meeting, Tennis Channel showed how the rapid expansion of Tennis Channel’s programming and the increase in its popularity put the network on a par with

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see notes 55-56, supra, Tennis Channel is unaware that Comcast demanded any “incentive.” See Solomon Decl. ¶ 14.
95 Solomon Decl. ¶ 14.
96 Id.
97 Id. ¶ 17.
98 Id.; see also Tennis Channel Proposal to Comcast (May 12, 2009), attached at Exh. 24.
99 See paragraphs 10 and 30, supra.
100 Solomon Decl. ¶ 18.
the Comcast-affiliated sports networks carried on Comcast’s analog or digital basic tiers. It also described the ways in which carrying Tennis Channel more broadly would create advantages for Comcast as a distributor.

51. After a month without substantive contact between Tennis Channel and Comcast, Mr. Bond called Mr. Solomon on June 9, 2009 to announce that Comcast was rejecting the incentives that Tennis Channel had offered. Rather than offer any counterproposal or explaining the decision, Mr. Bond indicated that Comcast would not agree to give Tennis Channel the level of distribution it sought—or, indeed, any increased national distribution—under any circumstances. During recent pre-Complaint discussions, Comcast has again refused to propose any concrete carriage terms that would provide improved or non-discriminatory treatment for Tennis Channel.

52. Comcast’s June 9 decision to reject Tennis Channel’s request and carry Tennis Channel on significantly less favorable terms than its affiliated sports networks—even though Tennis Channel compares favorably to Comcast’s similarly situated affiliates—constituted an act of discrimination in violation of Section 616 of the Communications Act of 1934106 and the Commission’s program carriage rules.107

101 Id. ¶ 19
102 Id.
103 Id. ¶ 20.
104 Id.
105 Id. ¶ 29.
107 47 C.F.R. §§ 76.1300 et seq. See also Omnibus HDO.
LEGAL STANDARD

53. Under the Commission’s program carriage rules, an MVPD may not “engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.” 108

54. The Commission will find that an MVPD has discriminated against an unaffiliated network in violation of the program carriage rules if: (a) the unaffiliated network is “similarly situated” with an affiliated network; 109 (b) the MVPD treated the similarly situated networks differently because of their affiliation; 110 and (c) the differential treatment unreasonably harmed the unaffiliated network’s ability to compete. 111

55. If the Commission finds that an MVPD has violated the program carriage rules, it will “order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor’s programming on defendant’s video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor’s programming.” 112

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108 Id. § 76.1301(c).
110 TCR ¶ 29 (finding differential treatment where the affiliated network was carried on analog basic and the cable operator agreed to carry the independent network, if at all, only on digital basic); Omnibus HDO ¶ 76.
111 TCR ¶ 30; Omnibus HDO ¶¶ 77-78. The complainant need not show that, “without carriage, [the complainant] cannot compete at all, i.e., would exit the industry, operate at a loss, or suffer some similar major disadvantage.” TCR ¶ 30. Instead, it is sufficient to show that the differential treatment “restrained [the complainant’s] ability to compete fairly for viewers, advertisers, and sports programming rights.” Id. ¶ 31.
112 47 C.F.R. § 76.1302(g)(1).
I. TENNIS CHANNEL IS SIMILARLY SITUATED WITH COMCAST’S AFFILIATED SPORTS NETWORKS.

56. In order to establish that unaffiliated programming services are “similarly situated” with those in which an MVPD has an interest, a complainant under Section 616 is not required to show that two networks are “identical.”\(^{113}\) Instead, a complainant will successfully have demonstrated that the two networks are similarly situated if, for example, it showed that they generally compete with each other and have similar levels of viewer popularity.\(^{114}\) With respect to Comcast’s affiliated sports networks, Tennis Channel fully satisfies this standard.

57. Tennis Channel and the Comcast affiliates described above are all sports television networks.\(^{115}\) All of these networks (including the Comcast SportsNet networks in the aggregate) are distributed on a national basis.\(^{116}\)

58. As sports networks, Tennis Channel, Versus, and the Golf Channel compete for the attention of the same pool of viewers. First, like many sports networks, the three networks attract affluent viewers: According to a survey by the independent research firm Simmons Market Research Bureau, Inc., Tennis Channel’s median viewer has a household income of $82,754, while the viewers of Golf Channel and Versus have median household incomes of $71,786 and $65,353, respectively.\(^{117}\) Of viewer households with incomes above $100,000, the median income for Tennis Channel viewers is $148,700.\(^{118}\) That puts Tennis

\(^{113}\) *Omnibus HDO* ¶ 27, 39, 51, 75.

\(^{114}\) *TCR* ¶ 27-28 (finding the Mid-Atlantic Sports Network, a regional sports network focused on Washington Nationals and Baltimore Orioles baseball games, similarly situated with News 14 Carolina, a regional news channel operated by Time Warner).

\(^{115}\) Solomon Decl. ¶ 11; Singer Decl. ¶ 18.

\(^{116}\) Solomon Decl. ¶¶ 11, 12.

\(^{117}\) Singer Decl. ¶ 19; Brooks Decl. §§ III(2)(j), III(3)(f).

\(^{118}\) Brooks Decl. § III(2)(i).
Channel and the Golf Channel, whose median household income in the $100,000-and-higher survey was $144,500, together in the top ten networks for median income among these affluent households. The networks’ viewers also are gender-mixed but predominantly male: nearly 60 percent of Tennis Channel viewers are male and about 70 percent of Golf Channel and Versus viewers are male.

59. The three networks also compete directly for advertisers. Forty-nine percent of Versus’s revenue from its top 30 advertisers comes from companies that have purchased advertising on Tennis Channel or from companies that evaluated formal proposals from Tennis Channel during one of the past four “up-front” periods during which advertisers seek such proposals. The comparison between Tennis Channel and Golf Channel is even more striking: sixty-eight percent of the revenue that Golf Channel earns from its top 30 advertisers comes from those that have purchased advertising on Tennis Channel or from companies that evaluated Tennis Channel proposals during one of the past four “up-fronts.”

60. Finally, Tennis Channel competes with Versus and Comcast SportsNet for tennis programming. Versus has carried professional tennis programming. Indeed, Tennis

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119 Id.
120 Singer Decl. ¶ 19; Brooks Decl. §§ III(2)(i), III(3)(e).
121 Declaration of Gary Herman, ¶ 8 (Jan. 4, 2010), attached at Exh. 4 [hereinafter Herman Decl.].
122 Id. ¶ 9. The fact that sports networks—and, particularly, sports networks with similar demographics—compete for these advertisers is confirmed by Comcast’s recent announcement that it would leverage synergies in advertising sales among its sports networks by launching a consolidated Comcast Sports Sales group within the company. Jon Show & John Ourand, “Comcast Combines Versus, Golf Channel Sales Efforts,” Street & Smith’s Sports Business Journal, at 03 (Jan. 26, 2009). That conclusion also is shown by the fact that, according to a study of affluent viewers by Ipsos Mendelsohn, Tennis Channel competes regularly with Golf Channel for advertisers. Brooks Decl. § III(2)(j).
Channel and Versus shared rights to tennis tournaments in 2006 and 2007.\textsuperscript{123} Similarly, like Tennis Channel, Comcast SportsNet covers tennis (having carried the SAP Open and World TeamTennis in 2009), and the networks presently share rights to telecast World TeamTennis events.\textsuperscript{124}

61. Tennis Channel has presented relevant data regarding the ratings performance of Tennis Channel, the Golf Channel, and Versus to Mr. Brooks, who concluded that Tennis Channel "is similar in audience appeal to Golf Channel and Versus" and that "Tennis Channel has been harmed by its lack of distribution . . . in terms of absolute audience levels and therefore revenue."\textsuperscript{125}

62. As to specific ratings in comparable service areas, Mr. Brooks has concluded that Tennis Channel's ratings in its coverage area are generally comparable to those of Golf Channel and that the networks "were essentially tied" in terms of popularity during many of the periods he reviewed.\textsuperscript{126} During the many weeks in which it telecast its most popular events, Tennis Channel's ratings dwarfed those of the Golf Channel. As described above,\textsuperscript{127} Mr. Brooks found that Tennis Channel's U.S. Open coverage area ratings "equal[ed] USA Network and exceed[ed] such cable stalwarts as A&E, Discovery, Bravo and CNN" and that those ratings were far above the relevant ratings for the Golf Channel.\textsuperscript{128} Finally, Mr. Brooks noted that "Tennis Channel compares very favorably with Golf Channel within their common coverage

\textsuperscript{123} Solomon Decl. ¶ 26; Singer Decl. ¶ 22.

\textsuperscript{124} Solomon Decl. ¶ 26; Singer Decl. ¶ 22. See also notes 52 & 54, supra.

\textsuperscript{125} Brooks Decl. § I(2). See also id. §§ III(2)(a), III(3)(f).

\textsuperscript{126} Id. § III(2)(g).

\textsuperscript{127} See ¶ 44, supra.

\textsuperscript{128} Brooks Decl. § I(2).
area, where viewers have access to both” and that “Tennis Channel would be a strong competitor to Golf Channel for a wide range of national advertisers but for its limited distribution.”

63. Likewise, Mr. Brooks found that Tennis Channel’s ratings were generally comparable to those of Versus. While Mr. Brooks concluded that Versus’s program schedule was more “uneven” than Tennis Channel’s—leading to more ratings fluctuations—he determined that Versus’s total-day ratings were only modestly ahead of those of Tennis Channel in the networks’ common coverage area and that Tennis Channel exceeded Versus’s ratings during the most recent period he reviewed. Significantly, Mr. Brooks noted that, “[a]lthough Versus promotes itself as ‘the fastest-growing sports cable network in the country,’ its national ratings were essentially flat for the five years from 2004 to 2008”—a period when Comcast generally carried the network on a broadly-distributed analog tier—and that Versus’s “average has generally hovered around one-tenth of a rating point,” close to Tennis Channel’s comparable rating over the past year. Finally, as was the case with Tennis Channel and the Golf Channel, Mr. Brooks found that Versus attracts an audience that is gender-mixed but skewed toward men, further evidence that the networks compete for many of the same advertisers and viewers. These conclusions are consistent with those of expert economist Dr. Hal Singer, who found that “Tennis Channel is similarly situated to Comcast’s affiliated, national sports networks carried on the Standard Service tier, the Golf Channel and Versus.”

129 Id. § III(2)(j).
130 Id. § III(3)(a).
131 Id. § III(3)(b).
132 Id. § III(3)(a).
133 Id. § III(3)(c).
134 Id. § III(3)(e).
135 Singer Decl. ¶ 2. See also id. ¶¶ 17-22.
II. COMCAST DISCRIMINATES AGAINST TENNIS CHANNEL BECAUSE IT IS UNAFFILIATED.

64. The second prong of the Commission’s program carriage discrimination test asks whether the cable operator is treating the unaffiliated network in a less satisfactory way than it is treating its similarly-situated affiliated networks on the basis of affiliation.\textsuperscript{136} Comcast’s poorer treatment of Tennis Channel, compared to its affiliated sports networks, is incontrovertible, as is the admitted fact that the basis for the different treatment is affiliation.\textsuperscript{137} Comcast distributes Versus and the Golf Channel to virtually all of its 24 million subscribers—on the least expensive programming tier that it offers aside from its Limited Basic Service tier—and those subscribers can receive the network without paying an additional fee.\textsuperscript{137} The Comcast SportsNet networks likewise are available to the vast majority of subscribers to the Comcast systems that distribute them.\textsuperscript{138}

65. In contrast, Comcast customers who want to receive Tennis Channel must subscribe to a premium tier (including a number of other sports services)\textsuperscript{139} and must pay an additional $5 each month for the programming, in addition to the rate that they must pay to purchase an entry-level package of digital (rather than analog) cable programming and acquire a digital cable box.\textsuperscript{140} Only about ten percent of Comcast’s subscribers have taken this step.\textsuperscript{141}

\textsuperscript{136} TCR ¶ 29 (finding differential treatment where the affiliated network was carried on analog basic and the cable operator agreed to carry the independent network, if at all, only on digital basic).

\textsuperscript{137} Comcast D.C. Lineup; Singer Decl. ¶ 2, 14.

\textsuperscript{138} Id.

\textsuperscript{139} In Washington, D.C., the tier includes the Big Ten Network, Horse Racing Television, TV Games, the Fox College Sports regional channel, Fox Soccer Channel, GolTV, Speed Channel (also available as an extra-charge HD channel), NFL Red Zone, and CBS College Sports. Comcast D.C. Lineup at 8.


\textsuperscript{141} Solomon Decl. ¶ 5.
The low subscribership to the tier—and Comcast’s failure to relegate even one of its affiliated sports networks to the tier—provide additional evidence that the sports tier is not a viable opportunity for any network.

67. When the Golf Channel—originally a premium channel—faced difficulty competing shortly after its launch because of the inevitably low subscribership that it received, Comcast shifted the network to a basic tier, even though at that time Golf Channel had not achieved widespread success, and it did not have a strong programming lineup.\textsuperscript{142} Comcast has conceded that it took this step specifically because it owned the Golf Channel.\textsuperscript{143} Comcast’s refusal to offer the same benefit to Tennis Channel, after being shown compelling evidence that broader carriage was warranted, is a specific act of discrimination, particularly since Tennis Channel is a far more attractive and developed network than the nascent Golf Channel that Comcast granted broader coverage to in 1995.

68. What is striking about Comcast’s treatment of its affiliated networks is that it is uniform: Comcast generally carries its affiliated networks on broadly-penetrated tiers. In contrast, the premium sports tier is occupied \textit{only} by unaffiliated networks.\textsuperscript{144} That is consistent with Comcast President Stephen Burke’s observation that Comcast treats its affiliated networks “like siblings as opposed to strangers”—meaning that affiliated networks receive benefits from Comcast that unaffiliated networks do not.\textsuperscript{145} Among these benefits are, according to Mr. Burke, “a better audience with” Mr. Bond and other Comcast executives who make

\textsuperscript{142} \textit{See} paragraph 25 & notes 55-56, \textit{supra}.

\textsuperscript{143} \textit{Id}.

\textsuperscript{144} \textit{See, e.g.}, Comcast D.C. Lineup at 8.

\textsuperscript{145} Tr. of R. at 1695:17-1696:22, \textit{NFL Enterprises} Hr’g, Apr. 16, 2009 (testimony of Stephen Burke).
distribution decisions and "a different level of scrutiny" when Comcast evaluates whether and how it will carry a network.\(^{146}\)

69. This disparity between Comcast's treatment of its affiliated and unaffiliated sports networks is illustrated by Comcast's carriage decisions for its Washington, D.C. cable system, which are typical of the carriage terms on Comcast systems nationwide. The following table describes the carriage situation on that system.

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Notes: * Comcast owns 8.3 percent of MLB Network. ** Comcast holds equity in NBA TV through its ownership interest in the National Basketball Association. *** Comcast owns 15.6 percent of the NHL Channel, and the League provides anchor programming for Versus. ^ MASN is carried subsequent to a settlement of a carriage complaint, as is the NFL Network, which is carried on Comcast's "Digital Starter" tier, which is Comcast's most broadly distributed level of digital service. ^^ Comcast also sells the HD version of NFL Red Zone as a part of its extra-charge HD package.

70. As this table makes clear, Comcast carries most of the networks that its parent company owns outright on its broadly-distributed "Standard Service" tier, which is available to nearly all of its subscribers. Other networks in which Comcast has a shared financial interest are carried on an intermediate digital basic tier. And all of the sports networks that are entirely independent of Comcast—that is, in which Comcast holds no financial interest—are carried on the poorly-penetrated premium sports tier unless Comcast is forced to carry a network differently, as it is with the ESPN family of networks, which have sufficient market power to

\(^{146}\) Id.
demand broad distribution, and MASN and the NFL Network, which Comcast repositioned following settlement of FCC program carriage complaints against it.\footnote{148}

71. Comcast’s discriminatory treatment also is revealed in the strikingly more favorable channel positioning it affords to the sports networks it owns. According to Comcast’s Washington, D.C. lineup, it carries Versus, Comcast SportsNet, and the Golf Channel on low channel numbers (7, 10, and 11, respectively) that book-end ESPN and ESPN2, the two channels that are likely to be the most heavily used by sports fans.\footnote{149} Tennis Channel—at channel 735—is about as far away as possible from this so-called “beachfront real estate.”\footnote{150} In stark contrast to Comcast’s discriminatory numbering decisions, Verizon carries the Golf Channel HD and Tennis Channel HD near each other at channels 593 and 590, respectively; on DIRECTV, these networks are 218 and 217; and on Dish Network, they are 401 and 400.\footnote{151}

72. Favorable channel positioning is essential to the success of a network because positioning at low-numbered channels—near popular local broadcast stations, for instance—drives traffic to networks, whereas networks that are far away from the bottom of the channel list are less likely to receive casual traffic.\footnote{152} Comcast’s preferential positioning of its affiliated networks makes it more likely that sports viewers will watch Comcast-affiliated sports channels casually when switching channels to or from ESPN and ESPN2, whereas Tennis

\footnote{147} See Singer Decl. ¶ 15. 
\footnote{148} Id. 
\footnote{149} Comcast D.C. Lineup at 1. 
\footnote{150} Id. at 8. 
\footnote{151} Singer Decl. ¶ 18. 
\footnote{152} Brooks Decl. § IV(1)(d).
Channel is likely to be seen predominantly by the Comcast subscribers who intentionally seek it out. 153

73. Thus, Comcast’s preferential treatment of its affiliated networks, with respect to channel positioning and more generally, helps those networks compete against unaffiliated sports channels regardless of the programming they offer. Removing unaffiliated options from the frequently-traveled low channel numbers and segregating them in an extra-pay tier makes it far less likely that a viewer seeking to watch sports will watch the unaffiliated Tennis Channel. But, as Dr. Singer has observed, disadvantaging Tennis Channel also allows “Comcast . . . to expand its footprint from golf, hockey, and bull riding into complementary sports programming, including tennis.” 154 Comcast’s motivation to do so, Dr. Singer has explained, “is particularly salient because Comcast’s objective according to its 2008 Annual Report is to expand its reach into sports programming: ‘We have invested and expect to continue to invest in new and live-event programming . . . .’” 155 Dr. Singer also observed that “Comcast’s ‘Programming segment,’ ‘which consists primarily of [its] consolidated national programming networks, including E!, Golf Channel, VERSUS, G4 and Style,’ earned revenues of $1.4 billion in 2008” and that the “programming division’s operating cash flow grew at 28.3 percent in the second quarter of 2009, whereas its . . . cable division grew by only 4.1 percent.” 156 “[T]he fact that Comcast already carried tennis programming on two of its networks . . . and Comcast’s stated intentions to expand its sports programming footprint” cause Dr. Singer “to infer that

153 Singer Decl. ¶¶ 18, 31; Comcast D.C. Lineup at 8.
154 Singer Decl. ¶ 41.
155 Id. See also Solomon Decl. ¶ 26 (reporting “that Comcast had entered what were ultimately unsuccessful discussions [with the USTA] about acquiring rights to cablecast the U.S. Open”).
156 Singer Decl. ¶ 41 (citations omitted).
Comcast highly values the programming rights currently secured by Tennis Channel.”

Acquiring those rights, Dr. Singer found, could among other results allow Comcast to “seek higher carriage fees from its downstream rivals (DirecTV, Dish, and Verizon) as a means of raising rivals’ costs.”

74. Other than as an effort to advantage its affiliated networks, there is no rational basis for Comcast’s decision to carry its affiliated sports networks on basic tiers but to limit the unaffiliated Tennis Channel to the premium sports tier. Indeed, the data show that Comcast’s discriminatory conduct works in several respects to the disadvantage of Comcast’s cable division—for example, by reducing Comcast’s ability to earn revenue from Tennis Channel local advertising availabilities in programming and making Comcast less attractive to consumers evaluating which competing distributor (including, most significantly, DIRECTV, Dish Network, and Verizon) offers the most attractive programming packages. Nonetheless, the protection that this carriage decision provides against meaningful additional competition for the Golf Channel, Versus, and other networks more than makes up for this forgone revenue for the Comcast corporate family as a whole.

III. COMCAST’S DISCRIMINATION UNREASONABLY RESTRAINS TENNIS CHANNEL’S ABILITY TO COMPETE FAIRLY.

75. The third prong of the Commission’s program carriage test is whether the cable operator’s affiliation-based discrimination “unreasonably restrain[s] the ability of an

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157 Id.
158 Id.
159 Id. ¶ 2, 23-38. See also Section III(A), infra.
160 Singer Decl. ¶ 40.
unaffiliated video programming vendor to compete fairly.”\textsuperscript{161} If so, the cable operator has violated Section 616.

A. Comcast’s Affiliation-Based Discrimination Is Unreasonable.

76. As Dr. Singer has concluded, Comcast’s affiliation-based discrimination is unreasonable.\textsuperscript{162} That is, Comcast behaves differently from the way that a reasonable distributor, considering only the relevant non-affiliation-based factors, would behave.\textsuperscript{163} Dr. Singer has concluded that “[t]here are two potential anticompetitive motivations for Comcast’s discriminatory conduct: (1) to protect Comcast’s affiliated programmers from greater competition, and (2) to extend Comcast’s market power into additional areas of sports programming.”\textsuperscript{164}

77. Indeed, Comcast’s carriage decisions with respect to Tennis Channel are inconsistent with the factors outlined by the president of Comcast Corporation’s programming division, Jeff Shell, as relevant to those decisions: (i) the quantity of event coverage offered by the network;\textsuperscript{165} (ii) the extent to which viewers are engaged in the sport or sports covered, as measured by viewer participation in those sports;\textsuperscript{166} and (iii) the “value proposition” of a network.\textsuperscript{167}

78. On each of these metrics, Tennis Channel performs as well as or better than Comcast’s affiliated sports networks that receive broader carriage. Specifically:

\textsuperscript{161} 47 U.S.C. § 536(a)(3).
\textsuperscript{162} Singer Decl. ¶¶ 38-43.
\textsuperscript{163} Id.
\textsuperscript{164} Id. ¶ 40.
\textsuperscript{165} Direct Testimony of Jeff Shell, NFL Enterprises Hr’g, ¶ 4.
\textsuperscript{166} Id. ¶ 11.
\textsuperscript{167} Id. ¶¶ 4, 5, 7, 8, 13, 15, 23.
79. *Quantity of event coverage.* In 2008, Tennis Channel offered more than 2,700 hours of worldwide event coverage, and the vast majority of Tennis Channel’s covered tournament events are Tennis Channel exclusives within the United States.® This figure compares favorably with the 2,400 and 1,350 hours of event coverage offered in 2008 by the Golf Channel and Versus, respectively.®

80. Similarly, Tennis Channel has exclusive rights to telecast significant portions of all four of the major events in its field, the Grand Slams.® It also covers the world’s top 70 tennis tournaments.® The Golf Channel does not offer live or first-run coverage of the most significant events in its field, the Majors, which are telecast instead on CBS, NBC, and ESPN.® Moreover, the Golf Channel’s event coverage usually involves less popular early rounds of tournaments, with the more popular late rounds typically covered by other networks.® Versus’s most popular programming is ice hockey and the Tour de France. The remainder of its programming includes bullriding, cagefighting, and other events that it has sought for years to replace with more marketable and mainstream sports programming.® Versus covers only two games in the ice hockey championship series, the Stanley Cup Finals, with the later (and most popular) games telecast on NBC.® Because of the small number of desirable events carried on

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® Solomon Decl. ¶ 8 & Exh. A.
® Id.
® Id.
® Id.
® Id.
® Id.
® Id.
® Id.
® Id.
® Id.
® Id.
Versus, DIRECTV called the network “a paid programming and infomercial channel with occasional sporting events.”{176} (DIRECTV no longer carries Versus on its system.){177}

81. **Viewer participation.** Tennis, like golf, is a sport in which many viewers also participate.{178} Unlike most other sports, the popularity of tennis as a sport is expanding rapidly. Based on a recent study by SGMA International, the leading sports industry trade association, the *Wall Street Journal* reported that tennis is “the fastest-growing sport in the country.”{179} The SGMA study showed that participation in tennis grew 43 percent between 2000 and 2008.{180} That statistic is particularly significant because, as the *Journal* observed, tennis “was one of only four sports to experience any increase during the study period and [it] outpaced its nearest rival, racquetball, by 32%”{181}; racquetball also is covered occasionally on Tennis Channel. In contrast, participation in golf dropped one percent, and participation in ice hockey, Versus’s most popular sport, dropped 22 percent.{182} And in absolute terms, tennis participation is at a record high: a November 2009 study showed that 30.1 million Americans are tennis players.{183}

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{177} Singer Decl. ¶ 38.

{178} Singer Decl. ¶¶ 19, 29.


{180} SGMA Int’l, supra.

{181} Karp, supra note 179.

{182} SGMA Int’l, supra note 179.

{183} United States Tennis Ass’n, Press Release No. 199-2009, “U.S. Tennis Participation Tops 30 Million People for the First Time in More Than 25 Years” (Nov. 17, 2009), attached at Exh. 27; Solomon Decl. ¶ 3.
82. "Value proposition" of a network. In judging whether a network represents a good "value," Comcast has said that it considers the rate charged by the network in comparison to the popularity of the network's programming. As an absolute matter, Golf Channel and Versus have markedly higher rates than Tennis Channel. Moreover, according to published figures, the ratio between the license fee charged for Golf Channel and its average all-day national rating—the "price per point" of the network—is $3.13. Versus's price per point is lower, at $2.75. By contrast, Tennis Channel's low license fee means that its price per point if it were nationally rated by Nielsen would be more favorable than those of the Golf Channel and Versus even if it earned far lower ratings. Although no national rating for Tennis Channel is available—because of Tennis Channel's suppressed distribution—Tennis Channel's average all-day household rating over the first nine months of 2009, in the local markets where it is rated, made its price per point approximately $1.46.

83. After considering these and other factors, Dr. Singer has concluded that a reasonable distributor would carry Tennis Channel on terms that are comparable to or better than the terms on which it carried Versus and the Golf Channel. More generally, he has concluded

184 Direct Testimony of Jeff Shell, NFL Enterprises Hr'g, ¶¶ 4, 5, 7, 8, 13, 15, 23. See also Tr. of R. at 1678:10-20, NFL Enterprises Hr'g, Apr. 16, 2009 (testimony of Stephen Burke) (explaining that Comcast makes tiering decisions by considering whether "the price value [is] there" for a network).

185 Singer Decl. ¶ 24 & tbl. 4.

186 Id.

187 Id. ¶ 24.

188 See paragraph 89, infra.

189 See Singer Decl. ¶ 24 & tbl. 4; Brooks Decl. § III(2)(k). The price per point cited for Tennis Channel is based on the network's average price; as noted at paragraph 10, supra.

190 Id. ¶¶ 27, 44. See also Brooks Decl § III(6)(d) ("Based on this data Tennis Channel, Golf Channel and Versus should be able to generate comparable revenue if they had comparable distribution, and viewer satisfaction with Tennis Channel is high. I would therefore expect them
that a reasonable distributor considering all the relevant non-affiliation-based factors would not have treated these networks differently. 191 Because Comcast treats Tennis Channel’s competitors with which it is affiliated far better than it treats Tennis Channel, Dr. Singer has concluded that, as an economic matter, Comcast’s behavior would be neither reasonable nor economically efficient unless it reflected a judgment relating to the affiliation of the networks. 192

B. Comcast’s Discrimination Restrains Tennis Channel’s Ability To Compete Fairly.

84. Finally, Comcast’s discrimination has immediately and dramatically harmed Tennis Channel’s ability to compete against other similarly situated cable networks, including the Golf Channel, Versus, and Comcast SportsNet.

85. Impairment of overall distribution and subscription fee revenue. Comcast’s President Stephen Burke has noted that tiering of a sports network would necessarily “reduce[] the network’s number of subscribers,” which “would adversely affect the license revenue” earned by the network. 193 Indeed, Comcast’s failure to carry Tennis Channel at the level of carriage offered to Versus and Golf Channel has deprived Tennis Channel of more than 21 million subscribers. 194 Because Tennis Channel is paid by distributors—including Comcast—

to be treated at least the same when it comes to distribution. However with respect to Comcast this has not been the case.”.

191 Id.
192 Id.
193 Tr. of R. at 1741:16-1742:1, NFL Enterprises Hr'g, Apr. 16, 2009 (testimony of Stephen Burke), attached at Exh. 22.
194 Singer Decl. ¶¶ 2, 30. The fact that Comcast’s sports tier has not amassed more subscribers is itself evidence of this harm. As Dr. Singer has concluded, sports programming is an “experience good,” meaning that consumers are most likely to gain interest in it only after they have experience with it. And while consumers can gain casual experience with Comcast’s affiliated sports networks because they are available on general-interest tiers, Comcast subscribers are unlikely to have the same exposure to Tennis Channel. Id. ¶ 30. See also Brooks Decl. ¶ IV(1)(d).
on a per-subscriber basis, the loss of this substantial number of subscribers directly deprives Tennis Channel of revenue, while Comcast’s affiliated networks, which receive broader distribution on Comcast’s systems, continue to earn larger license fees, both on a per-subscriber basis and in total. These larger license fees can be used to invest in more attractive programming, appeal to more advertisers, attract more viewers, and otherwise improve the network; without those fees, these steps are much more challenging. These investments are particularly important because networks with smaller distribution ordinarily receive less unpaid publicity than their more broadly-distributed competitors; that has been particularly true, for example, in the case of Tennis Channel’s competition with the Golf Channel for media attention. For all of these reasons, Comcast’s differential treatment puts Tennis Channel at a competitive disadvantage against Comcast’s affiliated sports networks and other networks with which it competes.

86. The subscriber deficit caused by Comcast’s discrimination is particularly harmful to Tennis Channel because Comcast is the dominant cable operator in seven of the nation’s ten largest television markets, and it has a substantial presence in eight of the top ten markets. Tennis Channel’s success depends not only on attracting a large number of total subscribers but also on targeting core and casual tennis fans alike located in major television

195 Solomon Decl. ¶ 22.
196 Singer Decl. ¶¶ 30-39.
197 Brooks Decl. §§ IV(1)(a), IV(1)(b).
198 See Singer Decl. ¶ 32.
199 SNL Kagan, “All Video by DMA - 3rd Quarter 2009” (2009), attached at Exh. 19. See also Herman Decl. ¶ 12.
markets dominated by Comcast—as well as advertisers and programming licensors that are seeking audiences in such markets.  

87. This effect is further magnified because many smaller MVPDs follow Comcast’s lead, and Tennis Channel’s poorer distribution by Comcast makes it more difficult for Tennis Channel to negotiate for equitable distribution by other distributors.  

88. *Impairment of advertising revenue.* As Comcast’s Mr. Burke also has acknowledged, the smaller viewership of Comcast’s premium sports tier reduces the value of advertising on the networks that, like Tennis Channel, are placed there. In Tennis Channel’s experience, advertisers view distribution as one of the most important factors in their purchasing decisions. Indeed, many national advertisers use a threshold number of subscribers—often stated as around 40 million subscribers—as a method for judging whether a network will be considered a viable competitor for national advertising purchases. Although it is not the case that a network with fewer than 40 million subscribers will earn no advertising revenues, having a distribution level substantially below that threshold makes it more difficult for the network to attract national advertisers.  

89. Advertisers generally consider networks’ Nielsen national ratings as an important factor in their advertising purchasing decisions. However, networks with fewer than 40 to 50 million subscribers ordinarily do not receive Nielsen national ratings because such

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200 Solomon Decl. ¶ 21.  
201 Id. ¶ 23; Singer Decl. ¶¶ 2, 32.  
202 Tr. of R. at 1741:20-1742:1, NFL Enterprises Hr’g, Apr. 16, 2009 (testimony of Stephen Burke).  
203 Herman Decl. ¶ 10.  
204 Id.  
205 Id.  
206 Id. ¶¶ 24-25; Brooks Decl. § IV(1)(e).
ratings offer little value for their price: they cost over $1 million per year (a substantial cost for a small network like Tennis Channel), but for networks with limited distribution they are perceived by advertisers to be less accurate. \(^{207}\) Tennis Channel, in line with other networks of its size, instead purchases Nielsen’s local metered market ratings, which employ a different methodology than the national ratings to measure viewership in the top 56 DMAs. \(^{208}\) As a result, Tennis Channel’s inability to present national Nielsen ratings that advertisers can use for direct comparisons among the competitors undermines Tennis Channel’s ability to sell national advertising as effectively as it would if it were distributed in more households. \(^{209}\) Conversely, distributing Tennis Channel to substantially fewer households means that Comcast does not have to compete as aggressively to win a greater share of national advertisers’ budgets for the Golf Channel and Versus.

90. Because of these challenges, potential Tennis Channel advertisers, including top cable advertisers, \(^{210}\) have excluded the network as a competitor for national advertising contracts. Indeed, informed Tennis Channel that the network was too narrowly distributed to warrant a media buy, even though

\(^{210}\) Herman Decl. ¶ 24; Brooks Decl. ¶ II(1)(c).

\(^{209}\) Herman Decl. ¶ 25; Brooks Decl. ¶ IV(1)(e).

\(^{207}\) Herman Decl. ¶ 24; Brooks Decl. ¶ II(1)(c).

\(^{208}\) Herman Decl. ¶ 24; Brooks Decl. ¶ II(1)(d).

\(^{209}\) Herman Decl. ¶ 16.

\(^{211}\) Id.

spent to advertise on the Golf Channel and Versus, respectively, through May of 2009. (For its part,
spent about on the Golf Channel and about on Versus during the same period.)

91. Similarly, even advertisers that target upper-income customers, such as , agree that Tennis Channel delivers the audience demographics they desire and is a good fit for their respective brands, but have declined to advertise on Tennis Channel because of its limited distribution.

92. The reduced number of subscribers caused by Comcast’s discrimination, especially in major markets, requires Tennis Channel to invest more resources in advertising sales than would be necessary if Tennis Channel were broadly distributed by Comcast. And because Tennis Channel—which charges a very low license fee to its distributors in order to ensure broad distribution—relies on advertising revenue to thrive, the harm to its ability to compete for advertising business affects the network in a particularly detrimental manner.

93. Impairment in ability to compete for programming. Reduced distribution also makes it more difficult for Tennis Channel to acquire rights to the most desirable tournaments. For example, officials were reluctant to award tournament rights to Tennis Channel because the network was not distributed broadly enough. In order to secure these rights, Tennis Channel had to promise officials that

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212 Id.
213 Id. ¶ 17.
214 Tr. of R. at 1741:20-1742:1, NFL Enterprises Hr’g, Apr. 16, 2009 (testimony of Stephen Burke).
215 See Solomon Decl. ¶ 23.
216 Id. ¶ 24.
217 Id. ¶ 25.
94. Likewise, the rightsholders of the 
would not grant Tennis Channel live coverage of the singles
finals matches (the most popular matches of any tournament) due to distribution concerns, and
instead awarded the rights to .219 The other portions of these tournaments, however,
were carried on Tennis Channel.220

95. Similarly, was chosen over Tennis Channel to air semi-finals
and final matches of the

221

96. Deprivation of economies of scale. Finally, Comcast’s discrimination has
prevented Tennis Channel from competing on an equal basis with Comcast’s affiliated networks
and other large sports networks by depriving Tennis Channel of economies of scale. Many of
the expenses of a cable network—such as personnel, equipment, infrastructure, and
programming expenses—are fixed regardless of the network’s number of subscribers.222
Because a greater number of subscribers increases a network’s revenues—through subscriber

218 Id.
219 Id. ¶ 24.
220 Id.
221 Id.
222 Singer Decl. ¶ 33.
fees and advertising—without proportionally increasing the cost to the network, it is less expensive, on a per-subscriber basis, for a broadly-distributed network to operate than it is for a more narrowly-distributed network providing a comparable service.\textsuperscript{223} This effect is magnified because networks like Tennis Channel that have fewer subscribers must spend money to market their service to new subscribers in order to persuade them to spend an additional $5 each month—many times the rate that Comcast pays for Tennis Channel—to watch it.\textsuperscript{224} Likewise, networks with broader distribution also receive more unpaid publicity in the popular press.\textsuperscript{225} In short, Comcast has created disincentives for new viewers to learn about Tennis Channel while making it more expensive for Tennis Channel to operate and more difficult for it to achieve publicity. These are essential steps to suppressing a competitor to Comcast’s own sports networks.

97. As a result of these harms to Tennis Channel, networks that have broader distribution and enjoy economies of scale are better able to reinvest revenues in their services and provide enhanced programming to consumers\textsuperscript{226}—whereas Tennis Channel, as a result of Comcast’s discrimination, has been forced to limit its programming expenses. One immediate impact on Tennis Channel of Comcast’s discrimination is that its high per-subscriber expenses have forced the network to limit marketing, production, and programming expenses, including expenses associated with instructional programming focusing on health and fitness.\textsuperscript{227} Tennis

\textsuperscript{223} Id.; see also Solomon Decl. ¶ 27.
\textsuperscript{224} Solomon Decl. ¶ 27. In addition, analog customers must pay to upgrade to digital cable.
\textsuperscript{225} Brooks Decl. § IV(1)(a).
\textsuperscript{226} Singer Decl. ¶ 34.
\textsuperscript{227} Solomon Decl. ¶ 28.
Channel also was not able to renew agreements to cover certain smaller tournaments during 2010 because of budget constraints.  

* * *

98. Comcast's President, Stephen Burke, has admitted that placement of an ad-supported sports network like Tennis Channel on a premium sports tier would "affect the network's ability to compete with other networks."  

The president of Comcast Corporation's programming group, Jeff Shell, agrees, admitting that "if you're an ad-supported network" like Tennis Channel, "the sports tier that Comcast has . . . is not viable."  

99. Versus representatives recently echoed these statements while opposing DIRECTV's repositioning of Versus in August 2009. Versus President Jamie Davis stated that DIRECTV's repositioning of Versus on a more narrowly distributed and more expensive tier was "a non-starter" for the network.  

Mr. Davis also said that he could not "accept a situation where Versus can lose 6 million viewers" as a result of DIRECTV's relocation of Versus to the tier on which it carries Tennis Channel and most other sports networks, far more deeply-penetrated than the level at which Comcast carries Tennis Channel on its own systems.  

100. In short, Comcast has acknowledged repeatedly—at least in the case of its affiliated networks—that placement on a narrowly-penetrated tier severely undermines a

228 Id.

229 Tr. of R. at 1741:12-1742:11, NFL Enterprises Hr'g. Apr. 16, 2009 (testimony of Stephen Burke).

230 Tr. of R. at 1911:16-1912:6, NFL Enterprises Hr'g. Apr. 17, 2009 (testimony of Jeffrey Shell) ("[I]f you are . . . an ad-supported network . . . then you have to price yourself such that the — not to be on a sports tier, because my view was that it didn't work.").


network's ability to compete fairly. That conclusion is equally true for unaffiliated networks, particularly ones like Tennis Channel that are small relative to their Comcast-affiliated competitors. Comcast's decision here to relegate Tennis Channel to a sports tier notwithstanding its quality and vitality—solely because it is unaffiliated—constitutes a blatant violation of Section 616 and the Commission's program carriage rules.

REQUEST FOR RELIEF

101. The Media Bureau should require Comcast to carry Tennis Channel on non-discriminatory terms and conditions. Specifically, Comcast should 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. And it should carry Tennis Channel in standard definition on all of its systems and in high definition on all of its systems that support high-definition programming.

102. Moreover, Comcast should be required to pay a license fee for its carriage of Tennis Channel equal to

until


233 Based on Comcast's current carriage patterns, this would be its Standard Service tier, see Comcast D.C. Lineup at 1, since Comcast presently carries the Golf Channel, Versus, and Comcast SportsNet on that tier.

234 If at any time during the effective period of this remedy, Comcast carries the video programming of any of its affiliated sports networks on any distribution service that is not defined as a cable system, Comcast should be required, at Tennis Channel's option, to carry Tennis Channel on such system at a rate equal to the per-subscriber fee that would apply if such carriage were on a cable system.

235 See Affiliation Agreement
103. Comcast should be required to launch or reposition Tennis Channel within 30 days of the Media Bureau’s order requiring such carriage, and it should maintain Tennis Channel at its expanded position until the expiration of the parties’ carriage agreement.

104. Comcast should be required to negotiate in good faith with Tennis Channel for a new agreement to govern carriage of Tennis Channel after expiration of the parties’ existing agreement. The Media Bureau should require that such an agreement provide that Tennis Channel will be carried (in both standard definition and in high definition) on each Comcast system (1) on a tier that is no less distributed than the most highly-penetrated tier on which Comcast carries one or more of its affiliated sports networks; and (2) at a rate that is no less than

105. Although Comcast may offer pretextual justifications for its misconduct, the fundamental facts underlying this Complaint are basic and undisputed. Disposition of this dispute does not require extensive discovery or resolution of any factual disputes. Accordingly, the Media Bureau should grant the requested relief based on the pleadings.  

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237 The same conditions that apply to Comcast’s carriage during the current term should apply to any such renewal term. See notes 233-234, supra.

238 See Second Report and Order, 9 FCC Red at 2655. If the Bureau determines that any particular issue cannot be resolved on the pleadings, it should designate only that issue for hearing. To expedite resolution of this Complaint, the Bureau should clarify that all factual issues resolved in the Bureau order are not included within the hearing designation.
106. If Comcast seeks Commission review of the Media Bureau’s order requiring non-discriminatory carriage of Tennis Channel, Comcast should be required, at Tennis Channel’s option, to carry Tennis Channel on the terms ordered by the Bureau for an additional period equal to the time elapsed between the staff decision and the Commission’s ruling.\(^\text{239}\)

Respectfully submitted,

\[Signature\]

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Counsel to The Tennis Channel, Inc.

January 5, 2010

\(^{239}\) See 47 C.F.R. § 76.1302(g)(1).
VERIFICATION

I, Ken Solomon, am Chairman and Chief Executive Officer of The Tennis Channel, Inc. I verify that (1) I have read this submission; (2) to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and (3) this Complaint is not interposed for any improper purpose.

Ken Solomon
Chairman and Chief Executive Officer
The Tennis Channel, Inc.
2850 Ocean Park Blvd., Suite 150
Santa Monica, CA 90405
(310) 314-9400

January 5, 2010
CERTIFICATE OF SERVICE

I, Robert M. Sherman, hereby certify that on this fifth day of January, 2010, I caused a true and correct copy of the foregoing Program Carriage Complaint to be served by overnight delivery upon:

Stephen Burke, President
Comcast Cable Communications, LLC
One Comcast Center
Philadelphia, PA 19103

with copies to Comcast’s counsel:

Lee M. Goldsmith, Senior Counsel
Comcast Cable Communications, LLC
One Comcast Center, 50th Floor
Philadelphia, PA 19103

James L. Casserly
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[Signature]

Robert M. Sherman