

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

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

ORDER

Adopted: May 11, 2012

Released: May 14, 2012

By the Commission: Commissioner Rosenworcel not participating.

1. On December 20, 2011, the Chief Administrative Law Judge issued an Initial Decision in this proceeding granting a complaint filed by The Tennis Channel, Inc. (The Tennis Channel) against Comcast Cable Communications, LLC (Comcast).¹ The Initial Decision concludes that Comcast violated sections 616 of the Communications Act and 76.1301(c) of the Commission’s rules² by unreasonably discriminating against The Tennis Channel with respect to the terms and conditions of its carriage by Comcast’s cable systems.³ As a result, the Initial Decision orders Comcast to pay a forfeiture of \$375,000 and carry The Tennis Channel on the same tier as Comcast’s affiliated sports programming networks, Golf Channel and Versus (now NBC Sports Network).⁴ In addition, the Initial Decision requires Comcast to afford The Tennis Channel “equitable treatment (*vis-à-vis* Golf Channel and Versus) as to channel placement.”⁵ Comcast has filed exceptions to the Initial Decision as well as an application for review of the hearing designation order (HDO).⁶ Comcast argues, among other things, that the Initial Decision misapplies section 616 of the Act, violates Comcast’s First Amendment rights, and improperly orders a channel-placement remedy, and that the HDO erroneously rejected Comcast’s claim that the complaint was barred by the applicable statute of limitations.⁷

¹ *The Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR 8258-P, 26 FCC Rcd 17160 (2011) (Initial Decision).

² 47 U.S.C. § 536; 47 C.F.R. § 76.1301(c).

³ Initial Decision at ¶¶ 105-116.

⁴ *Id.* at ¶¶ 117-119, 121.

⁵ *Id.* at ¶ 120. The Initial Decision does not specify how the compensation Comcast must pay The Tennis Channel is to be determined. *See id.* at n.359.

⁶ Comcast Cable Communications, LLC, Exceptions to Initial Decision, MB Docket No.10-204, File No. CSR 8258-P (filed Jan. 19, 2012); Comcast Cable Communications, LLC, Application for Review of Comcast Cable Communications, LLC (filed Jan. 19, 2012); *see also* The Tennis Channel, Inc., Reply to Exceptions to Initial Decision (filed Feb. 6, 2012); The Tennis Channel, Inc., Opposition to Application for Review (filed Feb. 6, 2012).

⁷ Exceptions at ii-iv; Application for Review, *passim*.

2. The Tennis Channel seeks an order compelling Comcast's immediate compliance with the Initial Decision.⁸ The Tennis Channel asserts that, under the Commission's rules and the terms of the HDO,⁹ the Initial Decision became effective on release.¹⁰

3. Comcast opposes The Tennis Channel's request. Comcast asserts that, by its own terms, the Initial Decision was automatically stayed by Comcast's filing of exceptions, but it seeks a stay in the event the Commission determines otherwise.¹¹ Comcast asserts that a stay is warranted under the Commission's four-part test for determining whether to grant a stay.¹² Among other things, Comcast claims that, absent a stay, it will suffer irreparable harm because the carriage remedy violates its First Amendment rights; will require Comcast to shift other programming to different channels (twice if the remedy is later overturned), which will cause disruption to those programmers and to viewers; and may require Comcast to pay additional compensation to The Tennis Channel.¹³ In addition, it asserts that section 10(c) of the Administrative Procedure Act (APA)¹⁴ prohibits the Commission from making the Initial Decision immediately effective, and it further claims that a stay is necessary to protect its right to due process because the HDO did not designate for hearing the issue of whether the complaint was time-barred, and it therefore was unable to present evidence that it believes would support its argument that the complaint was time-barred.¹⁵

⁸ The Tennis Channel, Inc., Petition to Compel Comcast's Compliance with Initial Decision (filed Jan. 13, 2012); see also The Tennis Channel, Inc., Opposition to Comcast's Conditional Petition for Stay (filed Feb. 6, 2012).

⁹ *The Tennis Channel v. Comcast Cable Commc'ns, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149, 14163 n.119 (MB 2010) ("Unless the Commission grants a stay of the ALJ's decision, such decision will become effective upon release and will remain in effect pending appeal.").

¹⁰ Petition to Compel at 3-7 (citing HDO at n.119 and 47 C.F.R. §§ 76.10(c)(2), 76.1302(j)(1) (formerly 76.1302(g)(1))).

¹¹ Comcast Cable Communications, LLC, Opposition to Tennis Channel's Petition to Compel Comcast's Compliance with Initial Decision at 6-9 (filed Jan. 25, 2012) (discussing note 361 of the Initial Decision); Comcast Cable Communications, LLC, Comcast's Conditional Petition for Stay (filed Jan. 25, 2012); see Initial Decision, *supra* note 1, at n.361 ("This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case of its own motion. 47 C.F.R. § 1.276(b).").

¹² Comcast's Conditional Petition for Stay at 8. The Commission and courts traditionally examine (1) whether the movant is likely to succeed on the merits, (2) whether, in the absence of a stay, the movant would suffer irreparable injury, (3) whether grant of a stay would harm other interested parties, and (4) whether a stay would serve the public interest. See, e.g., *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480 (2005).

¹³ Comcast's Conditional Petition for Stay at 5-7, 17-28. Contrary to The Tennis Channel's assertion, Comcast's submission of declarations in support of its claim that it would suffer harm absent a stay was not improper. Opposition to Comcast's Conditional Petition for Stay at 26-28 & n. 118 (asking the Commission to strike Comcast's declarations or allow The Tennis Channel to introduce supplemental testimony and cross-examine Comcast's declarants). The Tennis Channel's argument assumes incorrectly that Comcast is seeking to introduce the declarations in support of its exceptions.

¹⁴ 5 U.S.C. § 704.

¹⁵ Opposition to Tennis Channel's Petition to Compel at 9-14. In support of its APA argument, Comcast asserts that the Commission's rules require aggrieved parties to seek Commission review as a prerequisite to seeking judicial review and that the Communications Act does not include such a requirement. Under these circumstances, according to Comcast, the Commission may not give immediate effect to the Initial Decision, and instead must stay the decision pending Commission review, in order to comply with section 10(c) of the APA, 5 U.S.C. § 704 ("Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is

(continued....)

4. The Tennis Channel and the Commission's Enforcement Bureau oppose Comcast's request for stay.¹⁶ The Tennis Channel asserts that the Initial Decision became effective upon release, and it objects to the grant of a stay. Among other things, The Tennis Channel disagrees with Comcast's arguments regarding the APA and the statute of limitations and claims that its "sole remedy is to obtain prospective nondiscriminatory carriage of its programming," because it "has no obvious way to recover lost subscriber fees, advertising revenues, or other monetary relief under the applicable program carriage rules."¹⁷

5. This is the first program carriage adjudication in which an initial decision requires the defendant to carry the complainant's programming,¹⁸ and it presents important issues that are likely to recur in future program carriage adjudications. In addition, the Initial Decision imposes a tier placement remedy without providing guidance on questions of compensation, a matter on which the parties disagree.¹⁹ The Initial Decision further imposes a channel placement remedy that is not defined. Without examining the record in detail, it is not possible to determine at this point whether Comcast is likely to succeed on the merits, but upon further examination of the record, the Commission may reverse or modify specific rulings.²⁰ Harms to both parties may result from either compelling immediate compliance or granting a stay, but the balance of harms does not tilt sharply in favor of either party. If we compel immediate compliance, Comcast would be required to implement the carriage remedy without guidance on compensation, a matter that the parties dispute, and it may have to undertake multiple channel

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inoperative, for an appeal to superior agency authority."). Opposition to Tennis Channel's Petition to Compel at 9-12.

¹⁶ The Tennis Channel, Inc., Opposition to Comcast's Conditional Petition for Stay; FCC Enforcement Bureau, Enforcement Bureau's Comments on Conditional Petition for Stay (filed Feb. 6, 2012).

¹⁷ The Tennis Channel Opposition to Comcast's Conditional Petition for Stay at 5-8, 12, 36. *See also id.* at 37 ("To further delay relief would be contrary to Congress's clear intent to provide for 'expedited review' of program carriage complaints, an admonition grounded in its recognition of the serious and harmful effects of discrimination."); *id.* at 14-34 (addressing Comcast's arguments on the merits and irreparable injury).

¹⁸ Under the terms of the Commission's order in the *Adelphia* proceeding, the Media Bureau reviewed *de novo* an arbitration decision mandating carriage of the Mid-Atlantic Sports Network (MASN) by Time Warner Cable. The Bureau upheld the carriage remedy. *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atl. Sports Network*, 23 FCC Rcd 15783 (MB 2008), *reversed*, 25 FCC Rcd 18099, 18115 (2010), *pet. for review pending TCR Sports Broad. Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC*, No. 11-1151 (4th Cir. filed Feb. 17, 2011); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable Inc., et al.*, 21 FCC Rcd 8203 (2006). Implementation of the remedy in that case involved the deletion of an existing service, and under the Commission's rules, 47 C.F.R. § 76.1302(j)(1) (formerly 47 C.F.R. § 76.1302(g)(1)), the Bureau decision was stayed pending Commission review. *TCR*, 25 FCC Rcd at 18100 n.7. In contrast, this matter does not involve the deletion of an existing channel, so section 76.1302(j)(1) does not apply.

¹⁹ *See* Initial Decision at n.359 (explaining that, although the HDO directed the ALJ to establish the price and other terms and conditions of carriage if the Initial Decision imposed a carriage remedy, the Initial Decision need not make this determination because it does not specify the tier on which Comcast must carry The Tennis Channel but instead simply requires Comcast to treat The Tennis Channel and its similarly situated affiliated networks the same with respect to the level of carriage); Exceptions at 39; Reply to Exceptions at 39-40; *see also* HDO, 25 FCC Rcd at 14163 (designating as an issue the question "whether Comcast should be required to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of Comcast subscribers and, if so, the price, terms, and conditions thereof . . .").

²⁰ *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Request for Stay Pending Judicial Review*, 23 FCC Rcd 1705, 1707 (CGB 2008) (stay will allow the Commission sufficient time to consider arguments, that, "if borne out by further Commission examination, may cause the Commission to reconsider [its ruling].").

realignments to implement the channel placement remedy. Any relief to which The Tennis Channel is entitled will be delayed by a stay, assuming the Initial Decision otherwise would be effective. A stay will preserve the status quo while the Commission has an adequate opportunity to examine the record and the ALJ's disposition of each issue closely, and it will avoid potential disruption to consumers and any affected third-party programmers in the event that the Commission subsequently reverses or modifies the ALJ's remedy.²¹ A stay pending Commission review of the Initial Decision and HDO will not unduly delay the grant of any relief to which The Tennis Channel may be entitled.²² Under these circumstances, we find that grant of a stay for administrative reasons is equitable and will serve the public interest.²³

6. For these same reasons, we deny The Tennis Channel's petition to compel compliance and, to the extent necessary, waive section 76.1302(j)(1) of our rules, which provides that an order mandating program carriage shall become effective upon release unless it would require the defendant to delete existing programming.²⁴ Because we are staying the Initial Decision on our own motion, we dismiss Comcast's conditional petition for stay as moot.²⁵

7. Accordingly, **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 536, and sections 76.10(c)(2), 76.1301, and 76.1302 of the Commission's rules, 47 C.F.R. §§ 76.10(c)(2), 76.1301-1302, the Initial Decision **IS STAYED** pending Commission review of the Initial Decision and Hearing Designation Order in this proceeding.

8. **IT IS FURTHER ORDERED** that the Conditional Petition for Stay and the Motion for Acceptance of Comcast's Reply to Tennis Channel's Opposition to Comcast's Conditional Petition for Stay filed by Comcast Cable Communications, LLC, and the Opposition to Motion for Acceptance of

²¹ See *WTVG, Inc. and WUPW Broadcasting, LLC*, 25 FCC Rcd 12263, 12268 (MB 2010) (disruption to viewers relates to the public interest factor).

²² We note that Comcast has stated that even though it believes the Initial Decision will not become effective unless and until the Commission affirms it, it is "nonetheless engaging in good-faith planning for compliance with and implementation of the Initial Decision, should it become effective." Opposition to Tennis Channel's Petition to Compel at 5 n.11. We expect that Comcast will continue its efforts in this regard notwithstanding our stay.

²³ See *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925 ("In litigation involving the administration of regulatory statutes designed to promote the public interest, [the public interest] factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.").

²⁴ 47 C.F.R. § 76.1302(j)(1); see *id.* § 1.3 (Commission may waive any rule on its own motion for good cause).

²⁵ In granting a stay on our own motion for the reasons stated, we need not consider Comcast's arguments in favor of a stay. See *AT&T Services, Inc. & S. New England Tel. Co. d/b/a AT&T Connecticut*, 26 FCC Rcd 14293, 14293 & n.7 (MB 2011) ("In taking this action on our own motion for administrative purposes, we express no view whether Defendants' showings in the *Petition* satisfy any of the requirements for a stay."); *Verizon Tel. Companies & Verizon Services Corp.*, 26 FCC Rcd 14295, 14295 & n.7 (MB 2011) (same). For this reason, we also dismiss as moot Comcast's Motion for Acceptance of Comcast's Reply to Tennis Channel's Opposition to Comcast's Conditional Petition for Stay (filed Feb. 10, 2012), and The Tennis Channel's Opposition to Motion for Acceptance of Comcast's Reply, or in the Alternative, Request for Leave to File Surreply (filed Feb. 14, 2012). In light of our action, we do not need to resolve the parties' dispute about the effective date of the Initial Decision or determine whether immediate implementation of the remedy would violate the APA. If the Commission affirms the Initial Decision, Comcast can seek a stay pending judicial review at that time if it wishes to do so. See Comcast's Conditional Petition for Stay at 8 ("[T]he Commission should grant a stay pending the conclusion of *all* review, including judicial review should the Commission ultimately affirm any part of the Initial Decision.") (emphasis in original). In the event that Comcast does so, our conclusions in granting the present administrative stay will not necessarily determine or prejudge any future findings we might make on Comcast's application for a stay pending judicial review of the Commission's order. For example, in ruling on a stay application following a thorough review of the merits of this dispute, we may assess the public interest differently from our present analysis at this preliminary stage of the administrative proceedings.

Comcast's Reply, or in the Alternative, Request for Leave to File Surreply, filed by The Tennis Channel, Inc. **ARE DISMISSED** as moot.

9. **IT IS FURTHER ORDERED** that the Petition to Compel Comcast's Compliance with Initial Decision filed by The Tennis Channel, Inc. **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary