

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

THE TENNIS CHANNEL, INC.,)
))
Petitioner,)
))
v.)
))
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
))
Respondents.)

No. 15-1067

REPLY OF FEDERAL COMMUNICATIONS COMMISSION

The Federal Communications Commission respectfully files this reply to petitioner Tennis Channel’s opposition¹ to the Commission’s May 12, 2015, motion for summary affirmance. In its motion, the Commission argued that this Court should summarily affirm the *Order* on review,² because it faithfully carries out the Court’s mandate in *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013). Motion at 8. The Commission explained that the Court could easily reach that conclusion “by looking to little more than the *Comcast* decision and the *Order* responding to it.” *Ibid.* Specifically, the *Order* correctly rejected

¹ Petitioner’s Opposition to Respondent’s Motion for Summary Affirmance and to Intervenor’s Motion for Summary Affirmance In Part and Dismissal In Part, or Alternatively for Summary Affirmance In Full (May 29, 2015) (“Opposition”).

² *Tennis Channel, Inc. v. Comcast Cable Commc’ns, LLC*, 30 FCC Rcd 849 (2015) (“*Order*”).

Tennis Channel’s contention that there is pertinent evidence of unlawful discrimination in the existing administrative record of its program carriage complaint, because the Court held in *Comcast* that that record contained “no such evidence.” 717 F.3d at 986; *see Order* ¶¶ 2-3, 7. Similarly, because Tennis Channel had “a full opportunity to litigate its complaint” against Comcast, the Commission correctly declined to reopen the record for new evidence of discrimination. *Order* ¶ 8. Tennis Channel’s opposition provides no sound basis to deny the Commission’s request.

ARGUMENT

1. Tennis Channel acknowledges that the *Comcast* opinion, in multiple places, states that the administrative record on its program carriage complaint lacked evidence of unlawful discrimination. Opposition at 9.³ It now argues,

³ *See, e.g., Comcast*, 717 F.3d at 986 (finding that the record contained “no such evidence” of unlawful discrimination); *ibid.* (the record not only “lack[s] affirmative evidence” of unlawful discrimination, but, in fact, “there is evidence” that Comcast did not unlawfully discriminate); *ibid.* (“The parties do not even hint at this possibility [of showing that Comcast’s losses from carrying Tennis Channel on a broader tier were the same or less than hypothetical losses from carrying Golf Channel or Versus on that tier], nor analyze its implications.”); *id.* at 987 (finding that “the record simply lacks material evidence that the Tennis [Channel] proposal offered Comcast any commercial benefit”); *id.* at 985 (Tennis Channel “offer[ed]” no “such analysis [of an offsetting benefit to Comcast] on either a qualitative or a quantitative basis”); *id.* at 987 (“Neither Tennis [Channel] nor the Commission has invoked the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose.”). *See also id.* at 994-95 (Edwards, J., concurring) (“It is clear from the record that, even accepting the FCC’s interpretation of Section 616, there is no substantial evidence of unlawful

however, that the Court didn't mean what it said, but instead was referring only to "the absence of evidence in the FCC's analysis." *Id.* (emphasis removed).

Of course, if no pertinent evidence of discrimination existed in the record, there would be no such evidence in the Commission's analysis, as the Court also acknowledged. *See Comcast*, 717 F.3d at 987 (noting that "the Commission has pointed to no evidence" of unlawful discrimination); *cf.* Opposition at 8-9. But Tennis Channel's own prior advocacy is inconsistent with its current claim that the Court left unresolved the question whether evidence of unlawful discrimination existed on the administrative record before it. In its petition for rehearing of that decision (Attachment 3 to the FCC motion for summary affirmance), Tennis Channel acknowledged that the Court found "no such evidence" of discrimination in the record. Pet. for Reh'g at 12, D.C. Cir. No. 12-1337 (quoting *Comcast*, 717 F.3d at 986). And arguing that that finding was "incorrect", Tennis Channel asserted that the Court "also erred in not remanding the case for further proceedings to determine whether such evidence exists." Pet for Reh'g at 11, 12. Tennis Channel's current contention that the Commission erred in rejecting a renewed search for evidence of unlawful discrimination in the existing

discrimination to support the Commission's decision in this case."); *id.* at 988 (Kavanaugh, J., concurring) ("As the Court's opinion explains, the FCC erred in concluding that Comcast discriminated against the Tennis Channel on the basis of affiliation.").

administrative record, thus, is no less than a claim that the Commission should have violated Tennis Channel's own prior reading of the *Comcast* decision, which it hoped to have amended on rehearing, but which is now final and controlling.⁴

That (correct) prior reading not only flows naturally from the text of the Court's opinion. As we explained in our motion (at 11-12), it also is reinforced by the Court's decision to reserve judgment on two other questions that, if decided as proposed in two concurring opinions, would have independently resolved the case against Tennis Channel.

2. Tennis Channel also challenges the Commission's decision not to reopen the administrative record to receive additional evidence on its discrimination claim – arguing that it was not seeking a “second opportunity” to litigate its program carriage complaint, as the Commission found (*Order* ¶ 8), but instead a first chance to prosecute its claim under the allegedly new “questions that the *Comcast* decision held to be ... central.” Opposition at 19-20. As we previously explained, however (Motion at 10-11), Tennis Channel's argument is mistaken because the Court expressly “decided the case on the assumption that the Commission's [*existing*] interpretation” of the non-discrimination standard “was

⁴ Tennis Channel argues that it sought rehearing of the Court's decision not to remand merely “out of concern that the FCC might *wrongly consider* the Court's silence a basis for refusing to conduct” remand proceedings on “unresolved factual issues” related to discrimination. Opposition at 14 (emphasis added). That is not a plausible reading of Tennis Channel's rehearing petition, which stated that the Court “*erred* in not remanding the case.” Pet for Reh'g at 11 (emphasis added).

correct.” *Order* ¶ 7 (emphasis added); *see Comcast*, 717 F.3d at 984 (“even under the Commission’s interpretation of § 616 (*the correctness of which we assume for the purposes of this decision*),” the record does not support Tennis Channel’s unlawful discrimination claim) (emphasis added). The Commission thus correctly determined that “Tennis Channel had a full and fair opportunity to litigate its complaint.” *Order* ¶ 8. And the Commission, in these circumstances, acted well within its discretion “in bringing the proceeding to a close.” *Ibid.*

CONCLUSION

The Court should summarily affirm the *Order* on review.

Respectfully submitted,

/s/ *Laurence N. Bourne*

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

Laurence N. Bourne
Counsel

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(202) 418-1750

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CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on June 8, 2015, I electronically filed the foregoing Reply of the Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Stephen A. Weiswasser
Covington & Burling LLP
One City Center
850 Tenth Street, N.W.
Washington, D.C. 20001
Counsel for: Tennis Channel

Robert J. Wiggers
Kristen C. Limarzi
U.S. Department of Justice
Antitrust Division, Appellate Section
Room 3224
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
Counsel for: USA

Miguel A. Estrada
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
*Counsel for: Comcast Cable
Communications, LLC*

Lynn R. Charytan
Comcast Corporation
300 New Jersey Avenue, NW
Suite 700
Washington, DC 20001
*Counsel for: Comcast Cable
Communications, LLC*

/s/ Laurence N. Bourne