## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9216–7]**

### Proposed Administrative Settlement Agreement Under Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act for the Crown Vantage Landfill Superfund Site Located in Alexandria Township, Hunterdon County, NJ.

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of proposed administrative settlement and opportunity for public comment.

**SUMMARY:** The United States Environmental Protection Agency ("EPA") is proposing to enter into an administrative settlement agreement ("Settlement Agreement") with Georgia-Pacific Consumer Products, LP and International Paper Company (collectively "Settling Parties") pursuant to Section 122 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9622. The Settlement Agreement provides for Settling Parties' payment of certain response costs incurred by EPA at the Crown Vantage Landfill Superfund Site located in Alexandria Township, Hunterdon County, New Jersey.

In accordance with Section 122(i) of CERCLA, 42 U.S.C. 9622(i), this notice is being published to inform the public of the proposed Settlement Agreement and of the opportunity to comment. For thirty (30) days following the date of publication of this notice, EPA will receive written comments relating to the proposed Settlement Agreement. EPA will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations that indicate that the proposed settlement is inappropriate, improper or inadequate. EPA's response to any comments received will be available for public inspection at EPA Region 2, 290 Broadway, 17th floor, New York, New York 10007–1866.

**DATES:** Comments must be provided by November 22, 2010.

**ADDRESSES:** Comments should reference the Crown Vantage Landfill Superfund Site, EPA Index No. 02–2010–2021 and should be sent to the U.S. Environmental Protection Agency, Office of Regional Counsel, New Jersey Superfund Branch, 290 Broadway, 17th Floor, New York, NY 10007.

**SUPPLEMENTARY INFORMATION:** A copy of the proposed administrative settlement, as well as background information relating to the settlement, may be obtained from Elizabeth La Blanc, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 17th Floor, 290 Broadway, New York, New York 10007–1866. Telephone: 212–637–3106.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth La Blanc, Assistant Regional Counsel, New Jersey Superfund Branch, Office of Regional Counsel, U.S. Environmental Protection Agency, 17th Floor, 290 Broadway, New York, New York 10007–1866. Telephone: 212–637–3106.

Dated: September 29, 2010.

**Walter Mugdan,**

*Director, Emergency and Remedial Response Division.*

[FR Doc. 2010–26735 Filed 10–21–10; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[MB Docket No. 10–204; DA 10–1918]**

### The Tennis Channel, Inc. v. Comcast Cable Communications, LLC; File No. CSR–8258–P

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** This document designates a program carriage complaint for hearing before an Administrative Law Judge ("ALJ") to resolve the factual disputes and to return an Initial Decision.

**DATES:** The Tennis Channel, Inc. ("The Tennis Channel") and Comcast Cable Communications, LLC ("Comcast") shall each file with the Chief, Enforcement Bureau and Chief ALJ, by October 15, 2010, its respective elections as to whether it wishes to proceed to Alternative Dispute Resolution ("ADR"). The hearing proceeding is suspended during this time. If one or both of the parties do not elect ADR, then the hearing proceeding will commence on October 18, 2010. In order to avail itself of the opportunity to be heard, The Tennis Channel and Comcast, in person or by their attorneys, shall each file with the Commission, by October 22, 2010, a written appearance stating that it will appear on the date fixed for hearing and present evidence on the issues specified herein.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** For additional information on this proceeding, contact David Konczal, *David.Konczal@fcc.gov,* of the Media Bureau, Policy Division, (202) 418–2120.

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture,* DA 10–1918, adopted and released on October 5, 2010. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Synopsis of the Order

*I. Introduction*

1. By this *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("*Order*"), the Chief, Media Bureau ("Bureau"), pursuant to delegated authority, hereby designates for hearing before an ALJ the above-captioned program carriage complaint filed by The Tennis Channel against Comcast. The complaint alleges that Comcast, a vertically integrated multichannel video programming distributor ("MVPD"), discriminated against The Tennis Channel, a video programming vendor, on the basis of affiliation, with the effect of unreasonably restraining The Tennis Channel's ability to compete fairly, in violation of Section 616(a)(3) of the Communications Act of 1934, as amended ("the Act"), and Section 76.1301(c) of the Commission's Rules. 47 U.S.C. 536(a)(3); 47 CFR 76.1301(c). The complaint arises from Comcast's denial of The Tennis Channel's request to be repositioned from a premium sports tier to a more broadly distributed programming tier.

2. After reviewing The Tennis Channel's complaint, we find that The Tennis Channel has put forth sufficient evidence supporting the elements of its program carriage discrimination claim to establish a *prima facie* case. Below,

we review the evidence from The Tennis Channel's complaint establishing a *prima facie* case. We note that in the most recent program carriage decisions making a *prima facie* determination, the Bureau provided a detailed discussion of the defendant's counter-arguments to each of the claims made by the complainant. *See Herring Broadcasting Inc., d/b/a WealthTV, et al.,* Memorandum Opinion and Hearing Designation Order, 73 FR 65312, 65313–18, Nov. 3, 2008 ("*WealthTV HDO*"); *NFL Enters. LLC* v. *Comcast Cable Communications, LLC,* Memorandum Opinion and Hearing Designation Order, 73 FR 65312, 65319–23, Nov. 3, 2008 ("*NFL Enterprises HDO*"); *TCR Sports Broadcasting Holding, LLP, d/b/a Mid-Atlantic Sports Network* v. *Comcast Corp.,* Memorandum Opinion and Hearing Designation Order, 73 FR 65312, 65323–27, Nov. 3, 2008 ("*MASN II HDO*"). The Bureau did not follow this approach, however, in earlier program carriage cases. *See TCR Sports Broadcasting Holding, L.L.P.* v. *Comcast Corp.,* Memorandum Opinion and Hearing Designation Order, 71 FR 47222, Aug. 16, 2006 ("*MASN I HDO*"); *Classic Sports Network, Inc.* v. *Cablevision Systems Corp.,* Memorandum Opinion and Hearing Designation Order, 12 FCC Rcd 10288 (CSB 1997) ("*Classic Sports*"). We believe the approach taken in *MASN I HDO* and *Classic Sports* is more appropriate for a *prima facie* determination, which requires the Bureau to assess the evidence set forth in the complaint. Moreover, providing a detailed discussion of the defendant's counter-arguments to each of the claims made by the complainant may incorrectly imply that the Bureau is taking a position on the merits of those arguments. While we do not summarize each of Comcast's counter-arguments below, our review of the existing record, including Comcast's Answer, makes clear that there are substantial and material questions of fact as to whether Comcast has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules.

3. While we rule on a threshold procedural issue regarding application of the program carriage statute of limitations, we do not reach the merits on any of the other issues discussed below. Rather, the existing record, including Comcast's Answer, makes clear that there are substantial and material questions of fact as to whether Comcast has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules. We therefore initiate this hearing proceeding. We direct the Presiding Judge to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision.

4. As set forth below, the following matters are not designated for the ALJ to resolve: (i) Whether The Tennis Channel has put forth evidence in its complaint sufficient to warrant designation of this matter for hearing; and (ii) whether The Tennis Channel's complaint was filed in accordance with the program carriage statute of limitations. As required by the Commission's Rules, to the extent Comcast seeks Commission review of our decision on these issues, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 CFR 1.115(e)(3).

*II. Background*

5. Section 616(a)(3) of the Act directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors that, among other things: "prevent [an MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors." 47 U.S.C. 536(a)(3). In implementing this statutory provision, the Commission adopted Section 76.1301(c) of its rules, which closely tracks the language of Section 616(a)(3). *See* 47 CFR 76.1301(c). The Commission has established specific procedures for the review of program carriage complaints. *See* 47 CFR 76.1302.

6. While those procedures provide for resolution on the basis of a complaint, answer, and reply, the Commission expected that, in most cases, it would be unable to resolve carriage complaints solely on the basis of a written record. *Program Carriage Second Report and Order,* 58 FR 60390, Nov. 16, 1993. Rather, it anticipated that the majority of complaints would require a hearing before an ALJ, given that alleged Section 616 violations typically involve contested facts and behavior related to program carriage negotiations. In such cases, where the complainant is found to have established a *prima facie* case but disposition of the complaint requires the resolution of factual disputes or extensive discovery, the parties can elect either ADR or an adjudicatory hearing before an ALJ. Pursuant to Section 76.7(g)(1) of the Commission's Rules, the Commission may refer to an ALJ entire proceedings or discrete issues arising from proceedings. *See* 47 CFR 76.7(g)(1); *see also 1998 Biennial Regulatory Review,* 64 FR 6565, Feb. 10, 1999. If the parties proceed to a hearing before an ALJ, the ALJ's Initial Decision is directly appealable to the Commission. 47 CFR 1.276. The appropriate relief for violation of the program carriage provisions is determined on a case-by-case basis. Available sanctions and remedies include forfeiture and/or mandatory carriage and/or carriage on terms revised or specified by the Commission. For the purpose of our *prima facie* determination, we discuss below the factual bases for The Tennis Channel's claim of program carriage discrimination.

7. The Tennis Channel is a national cable sports network that launched in May 2003 with a broad range of racquet-sport-related programming. The Tennis Channel is a video programming vendor as defined in Section 76.1300(e) of the Commission's Rules. *See* 47 CFR 76.1300(e). The Tennis Channel states that, to foster its growth, it offered preferential terms to distributors, like Comcast, that agreed to carry the network before it had become well-established. The Tennis Channel asserts that, since its launch on Comcast systems, it has become the "leading provider of 24/7 tennis programming" and "the only cable network in the nation dedicated to covering the sport." According to the network, in 2008, it 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. The Tennis Channel states that in 2009 it added the fourth Grand Slam event, the U.S. Open, to its programming, as well as other event coverage such as exclusive telecasts of every worldwide and U.S. Davis Cup and Fed Cup match. In addition to coverage of more than 70 top tennis tournaments worldwide, The Tennis Channel offers non-event content, including original lifestyle, instructional, and fitness series, specials, and short-form programs featuring the sport's most popular figures.

8. Comcast is a multiple system cable operator with approximately 24 million subscribers nationwide. Comcast is a multichannel video programming distributor, as defined in Section 76.1300(d) of the Commission's Rules. *See* 47 CFR 76.1300(d). Comcast serves customers in 39 States and the District

of Columbia, and in 24 of the top 30 designated market areas ("DMAs"). A DMA is a local television market area designated by The Nielsen Company (formerly, Nielsen Media Research). There are 210 DMAs in the United States. In addition to its role as a programming distributor, Comcast is a programming supplier by virtue of its affiliation with several cable networks. Among other interests, Comcast's parent company holds a financial stake in the Golf Channel, the MLB Network, the NHL Network, NBA TV, and a variety of other national cable programming networks. Comcast's parent company also owns Versus, a national sports network that provides programming coverage of multiple sports, as well as a number of regional sports networks ("RSNs"). In general, Comcast carries the Golf Channel, Versus, and its affiliated RSNs on its widely distributed Expanded Basic/Digital Starter tier.

9. In 2005, The Tennis Channel executed an affiliation agreement with Comcast that provided for carriage of the network on Comcast systems nationwide. The agreement did not specify the tier on which Comcast would carry the network. With limited exceptions, Comcast has carried The Tennis Channel on a premium sports tier, the "Sports and Entertainment Package" ("SEP"), since the parties executed their carriage agreement. A few Comcast systems initially launched The Tennis Channel on a digital basic tier, but relocated the network to the premium sports tier. Comcast currently carries The Tennis Channel on the premium sports tier in all of its systems nationwide except one.

10. The Tennis Channel states that in early 2009, after it concluded strategic efforts to enhance the quality of its technical service and programming content, it proposed that Comcast reposition the network to a level of carriage that The Tennis Channel believed was justified given the network's expansion and service improvements. Following discussions between the parties in the spring of 2009, Comcast informed The Tennis Channel in June 2009 that it would not relocate the network to a more widely distributed programming tier. The Tennis Channel asserts that during the course of those discussions, Comcast indicated that it would retier The Tennis Channel only if the network offered a financial "incentive" to do so. Comcast states that it decided to keep The Tennis Channel on a sports tier because (i) increasing the network's distribution would increase Comcast's costs; (ii) no Comcast system expressed an interest in repositioning the network; and (iii) there was no indication of subscriber defections to another MVPD that carried the network more widely. Comcast states that it informed The Tennis Channel that it could attempt to seek broader distribution with individual Comcast systems on a market-by-market basis. Consequently, in December 2009, The Tennis Channel notified Comcast of its intention to file a program carriage complaint with the Commission, and brought its complaint shortly thereafter. Pursuant to Section 76.1302(b) of the Commission's Rules, The Tennis Channel provided its pre-filing notification to Comcast on December 10, 2009. The Tennis Channel filed its program carriage complaint with the Commission on January 5, 2010.

*III. Discussion*

11. Based on our review of the complaint and as explained more fully below, we conclude that The Tennis Channel has established a *prima facie* case of program carriage discrimination pursuant to Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules. 47 U.S.C. 536(a)(3); 47 CFR 76.1301(c). When filing a program carriage complaint, the video programming vendor carries the burden of proof to establish a *prima facie* case that the defendant MVPD has engaged in behavior prohibited by Section 616 and the Commission's implementing rules. In previous cases assessing whether a complainant has established a *prima facie* case of program carriage discrimination, the Bureau has considered whether the complaint contains sufficient evidence to support the elements of a program carriage discrimination claim: (i) The complainant is a video programming vendor as defined in Section 76.1300(e) of the Commission's Rules; (ii) the defendant is an MVPD as defined in Section 76.1300(d) of the Commission's Rules; (iii) the complainant programmer is similarly situated to a programmer affiliated with the defendant MVPD; (iv) the defendant MVPD has treated the complainant programmer differently from its similarly situated, affiliated programmer with respect to the selection, terms, or conditions for carriage; and (v) the defendant MVPD's discriminatory conduct has the effect of unreasonably restraining the ability of the complainant programmer to compete fairly. *See* 47 CFR 76.1302(c); *WealthTV HDO,* 73 FR 65312, 65312–18, Nov. 3, 2008; *NFL Enterprises HDO,* 73 FR 65312, 65318–23, Nov. 3, 2008; *MASN II HDO,* 73 FR 65312, 65323–29, Nov. 3, 2008; *MASN I HDO,* 71 FR 47222, Aug. 16, 2006; *Hutchens Communications, Inc.* v. *TCI Cablevision of Georgia, Inc.,* Memorandum Opinion and Order, 9 FCC Rcd 4849, para. 27 (CSB 1994); *see also Program Carriage Second Report and Order,* 58 FR 60390, Nov. 16, 1993.

12. With regard to the first and second factors above, the parties agree that Comcast is an MVPD and that The Tennis Channel is a video programming vendor as defined in the Commission's Rules. For purposes of the third factor, Comcast admits that it is affiliated with the Golf Channel and Versus. With respect to the remaining factors, we conclude that The Tennis Channel has put forth sufficient evidence in its complaint to establish a *prima facie* case that Comcast has engaged in unlawful discrimination in the "selection of * * * video programming" by declining to reposition the network to a more widely distributed programming tier, while carrying comparable affiliated networks on such a tier. 47 U.S.C. 536(a)(3). (As discussed below, The Tennis Channel does not contend that its existing affiliation agreement with Comcast contains discriminatory "terms" or "conditions." The Tennis Channel claims that Comcast has impermissibly discriminated in its "selection" of The Tennis Channel for placement on a sports tier while selecting its affiliated networks for placement on a more widely distributed programming tier. *See NFL Enterprises HDO,* 73 FR 65312, 65318–23, Nov. 3, 2008 (program carriage complaint alleging that defendant impermissibly discriminated by selecting complainant for placement on sports tier while selecting affiliated networks for placement on a more widely distributed programming tier).) We do not reach the merits of this claim. Rather, we find that the existing record, including Comcast's Answer, makes clear that there are significant and material questions of fact warranting resolution at hearing. Because we are not ruling on the merits of The Tennis Channel's claims at this *prima facie* stage, we find it premature to address Comcast's arguments regarding the need to interpret Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules narrowly to protect Comcast's First Amendment rights.

A. Procedural Issues

13. As a threshold matter, we reject Comcast's contention that The Tennis Channel's complaint is foreclosed as untimely filed under the program carriage statute of limitations. Pursuant to Section 76.1302(f) of the Commission's Rules, an aggrieved programmer has a one-year period in

which to file a program carriage complaint that commences upon the occurrence of one of three specified events. 47 CFR 76.1302(f). We find that the third of those triggering events—the provision of an aggrieved programmer's pre-filing notification pursuant to Section 76.1302(b) of the Commission's Rules—is present in this case. *See* 47 CFR 76.1302(f)(3). (We agree with Comcast that the limitations period in Section 76.1302(f)(2) of the Commission's Rules, which governs carriage offers unrelated to existing affiliation agreements, is inapplicable in this case.) Contrary to Comcast's assertions, nothing in the text of Section 76.1302(f)(3) limits the applicability of that provision to situations where the defendant "unreasonably refuses to negotiate with [the] complainant." While Comcast notes that the rule now found at Section 76.1302(f)(3) formerly contained language limiting its applicability to refusals to negotiate, the Commission eliminated this language in 1994. *See Program Carriage Second Report and Order,* 58 FR 60390, Nov. 16, 1993; *Program Carriage Memorandum Opinion and Order,* 59 FR 43776, Aug. 25, 1994. Although Comcast contends that this language was eliminated to accommodate program carriage complaints filed by MVPDs and was not intended to otherwise alter the intent of this provision, the plain language of the rule allows a program carriage complaint to be filed within one year of the pre-filing notice, provided that the claim is not otherwise barred by one of the other two triggering events. *WealthTV HDO,* 73 FR 65312, 65316, Nov. 3, 2008 ("the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice"). On its face, Section 76.1302(f)(3) arguably could be read to allow a complainant to file a program carriage complaint based on allegedly unlawful conduct that occurred years before the filing of the pre-filing notice provided the complaint was filed within one year of the pre-filing notice. We are not presented with such a case here. Comcast informed The Tennis Channel in June 2009 that it would not relocate the network to a more widely distributed programming tier. While Comcast states that it invited The Tennis Channel to seek broader distribution with individual Comcast systems on a market-by-market basis, it is undisputed that in June 2009 Comcast rejected The Tennis Channel's proposal that it be moved to a more widely distributed tier across Comcast's entire subscriber base. The Tennis Channel filed its program carriage complaint within one year of this allegedly discriminatory refusal to retier the Tennis Channel, as well as within one year of its pre-filing notice. Accordingly, we conclude that the complaint was timely filed pursuant to Section 76.1302(f)(3) of the Commission's Rules. (Similarly, in both *NFL Enterprises HDO* and *MASN II HDO,* the complainant filed its complaint within one year of the pre-filing notice as well as within one year of the alleged discriminatory act.)

14. We disagree with Comcast that The Tennis Channel's complaint is barred by Section 76.1302(f)(1) of the rules, which establishes a one-year period for the filing of a program carriage complaint that commences with the "[execution of] a contract with [an MVPD] that a party alleges to violate one or more of the [program carriage] rules." 47 CFR 76.1302(f)(1). The timeliness of The Tennis Channel's complaint is not an issue designated for resolution by the Presiding Judge. As required by the Commission's Rules, to the extent Comcast seeks Commission review of our decision on this issue, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 CFR 1.115(e)(3).

15. Although the parties executed their existing carriage agreement in 2005, The Tennis Channel does not claim that this agreement contains unlawfully discriminatory prices, terms, or conditions. Nor do the parties dispute that Comcast has abided by the explicit terms of the 2005 agreement. The agreement at issue did not otherwise specify the tier on which Comcast would carry the network. Comcast thus has the discretion to carry The Tennis Channel to a greater number of subscribers than specified in the contract and on a more widely distributed tier than the premium sports tier on which Comcast currently carries The Tennis Channel. The gravamen of The Tennis Channel's complaint is that Comcast has refused to exercise its discretion to do so, while at the same time carrying its allegedly similar affiliated networks on a more widely distributed tier, and has thus failed to meet its obligation under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules to avoid discrimination on the basis of affiliation. It is this refusal, not the terms of the contract, which forms the basis for The Tennis Channel's complaint. As discussed above, The Tennis Channel establishes that this refusal to retier occurred in June 2009. The Tennis Channel filed its complaint within one year of this date, as well as within one year of the pre-filing notice.

16. This interpretation is consistent with Bureau precedent defining the scope of the Commission's program carriage statute of limitations at the *prima facie* stage of review. *See NFL Enterprises HDO,* 73 FR 65312, 65320, Nov. 3, 2008 (*prima facie* determination); *MASN II HDO,* 73 FR 65312, 65324–25, Nov. 3, 2008 (*prima facie* determination). We note that both of these cases were settled before a decision on the merits by an ALJ or the Commission. While Comcast claims that these cases were wrongly decided, we disagree and find no reason to ignore or reverse this precedent. In *NFL Enterprises HDO,* the contract at issue provided that the defendant had the contractual right to move the complainant to a premium sports tier if certain events occurred. After those events occurred, the defendant exercised this contractual right. The complainant filed a program carriage complaint alleging that the defendant's exercise of its contractual right to move the complainant to a premium sports tier, while at the same time carrying allegedly similar affiliated networks on a more widely distributed tier, was impermissibly discriminatory under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules. The complaint was filed within one year of the date of the retiering but more than one-year from the date the contract was executed. The Bureau rejected claims that the basis for the dispute was the contract and that the complaint should have been filed within one year from the date the contract was executed. The Bureau explained that the alleged act of discrimination that formed the basis for the complaint was the act of moving the complainant to a premium sports tier, not the terms of the contract. As The Tennis Channel did in this case, the complaint was filed within one year of the allegedly discriminatory act and within one year of the pre-filing notice. Thus, the Bureau held that the complaint was filed in accordance with the statute of limitations in Section 76.1302(f)(3).

17. In *MASN II HDO,* the contract at issue provided that the defendant would carry the complainant on certain specified systems but left it to the defendant's future discretion to choose to carry the complainant on systems not specified in the contract. After negotiations regarding carriage of the complainant on systems not specified in the contract reached an impasse, the complainant filed its program carriage complaint. The complainant alleged that

the defendant's refusal to exercise its discretion to carry the complainant on systems not specified in the contract, while at the same time carrying allegedly similar affiliated networks on those systems, was impermissibly discriminatory under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules. The complaint was filed within one year of the date when negotiations regarding carriage of the complainant on systems not specified in the contract reached an impasse, but more than one-year from the date the contract was executed. The Bureau rejected claims that the basis for the dispute was the contract and that the complaint should have been filed within one year from the date the contract was executed. The Bureau explained that the alleged act of discrimination that formed the basis for the complaint was the defendant's refusal to exercise its discretion to carry the complainant on systems not specified in the contract, not the terms of the contract. As The Tennis Channel did in this case, the complaint was filed within one year of the date of the allegedly discriminatory refusal to carry the complainant on systems not specified in the contract and within one year of the pre-filing notice. Thus, the Bureau held that the complaint was filed in accordance with the statute of limitations in Section 76.1302(f)(3).

18. As *NFL Enterprises HDO* and *MASN II HDO* demonstrate, Bureau precedent establishes that a complainant may have a timely program carriage claim in the middle of a contract term if the basis for the claim is an allegedly discriminatory decision made by the MVPD, such as tier placement, that the contract left to the MVPD's discretion. The exercise of such discretion is subject to the MVPD's obligations under the program carriage statute, which prohibits an MVPD from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage * * *." 47 U.S.C. 536(a)(3). Comcast claims that such an interpretation would create uncertainty and "open the floodgates to program carriage cases" because parties could bring complaints at any time, regardless of the existence of a non-discriminatory agreement, based on a demand to renegotiate the terms of the contract. We disagree because neither this case, nor the previous *NFL Enterprises HDO* and *MASN II HDO* cases, involves a request to renegotiate a term in an existing contract. Rather, all of these cases involve contracts which left a carriage decision to the defendant's discretion, and the gravamen of the complaints is whether the defendant's exercise of such discretion was consistent with its obligations under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules. Moreover, we note that the present case is the only program carriage complaint filed in the two years since the Bureau adopted *NFL Enterprises HDO* and *MASN II HDO,* thus refuting Comcast's claim that this interpretation of the statute of limitations will "open the floodgates to program carriage cases."

19. As the Bureau explained in *NFL Enterprises HDO,* "[w]hether or not Comcast had the right to [make a tiering decision] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules." *See NFL Enterprises HDO,* 73 FR 65312, 65320, Nov. 3, 2008. Subsequent to the Bureau's decision in *NFL Enterprises HDO,* the Chief ALJ supported this view in denying a motion for a ruling on judicial estoppel and laches issues. *See NFL Enterprises LLC* v. *Comcast Cable Communications, LLC,* Memorandum Opinion and Order, FCC 09M–36 (Chief ALJ 2009), at para. 3 (denying motion that program carriage case should be dismissed because complainant was also pursuing a contract-based claim in state court, explaining that "NFL Enterprises seeks to vindicate its alleged private contractual rights in the New York litigation and its alleged federal and regulatory rights in this case * * *. The statutory and regulation issues in this case are separate and distinct from the contractual issues in the New York action."). As in *NFL Enterprises HDO* and *MASN II HDO,* we designate the present case for a hearing to determine whether Comcast exercised its discretion consistent with its obligations under the program carriage statute and rules when it declined to tier The Tennis Channel on a more widely distributed tier.

20. Under Comcast's interpretation of the program carriage statute of limitations, a programmer would be forever barred from bringing a discrimination claim unless the claim is brought within one year from the date the contract was executed. While Comcast notes that such an interpretation would provide certainty to MVPDs, it would also preclude programmers from bringing legitimate claims regarding allegedly discriminatory actions occurring more than one year after a contract was executed. Tennis Channel explains that fledgling networks often enter into contracts that provide the MVPD with tiering flexibility that allows the MVPD to increase the network's distribution as it develops. Under Comcast's interpretation, a programmer would be precluded from bringing a program carriage discrimination claim after the first year of the contract even if the MVPD refuses to provide the programmer with increased distribution in order to favor its own affiliated network.

21. Despite Comcast's claims to the contrary, this precedent is consistent with the decision of the Cable Services Bureau in *EchoStar* dismissing a program access case on procedural grounds. *See EchoStar Communications Corp.* v. *Fox/Liberty Networks, LLC,* 13 FCC Rcd 21841 (CSB 1998), *recon. denied, EchoStar Communications Corp.* v. *Fox/Liberty Networks, LLC,* 14 FCC Rcd 10480 (CSB 1999). The contract at issue in *EchoStar* specified the rate the complainant would pay for the defendant's programming. Over one year after the parties entered into the contract, however, the complainant sought to renegotiate the rate set forth in the contract. The Bureau found that the complaint was barred by the applicable statute of limitations, which requires that program access complaints be brought within one year of the date of execution of an affiliation agreement that allegedly violates the Commission's program access requirements. Thus, unlike the present case where the contract at issue does not specify the tier on which Comcast will carry The Tennis Channel and instead leaves tier placement to Comcast's discretion, *EchoStar* involved a complainant's attempt to renegotiate a rate set forth in the contract more than one year after the contract's execution date. Here, The Tennis Channel's complaint does not relate to any of the specific rates, terms, or conditions set forth in the parties' contract, but rather, Comcast's allegedly discriminatory tiering decision that occurred subsequent to the contract's execution. Citing *EchoStar,* the Commission later explained that "an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory." *1998 Biennial Regulatory Review,* 64 FR 6565, Feb. 10, 1999. As discussed above, The Tennis Channel does not allege that the contract at issue contains discriminatory provisions and does not seek to amend its contract.

B. Discrimination Claim

1. Similarly Situated

22. We find that The Tennis Channel has provided evidence sufficient to demonstrate for the purpose of establishing a *prima facie* case of program carriage discrimination that it is similarly situated with Comcast-affiliated networks—the Golf Channel and Versus. (Comcast disputes that The Tennis Channel is similarly situated to the Golf Channel and Versus.) The Tennis Channel asserts that the relevant programming services are all nationally distributed sports television networks that generally compete in the same markets and have similar levels of viewer popularity. In particular, The Tennis Channel claims that it competes with Versus and the Golf Channel for the same viewers, advertisers, and programming. In support of its contention, The Tennis Channel points to the results of a survey purporting to show that the three networks attract affluent viewers that are predominantly male. In particular, the survey results indicate that the median household income for viewers of The Tennis Channel, Golf Channel, and Versus are $82,754, $71,786, and $65,353, respectively. Of viewer households with incomes above $100,000, the median income for The Tennis Channel and Golf Channel viewers is $148,700 and $144,500, respectively, which places those two networks in the top ten networks for median income among these affluent households. The survey results indicate that nearly 60 percent of The Tennis Channel viewers are male, and approximately 70 percent of Golf Channel and Versus viewers are male. With regard to competition for advertisers, The Tennis Channel has put forth evidence indicating that almost half of Versus's revenue from its top 30 advertisers derives from companies that either have purchased advertising on The Tennis Channel, or have evaluated formal proposals from The Tennis Channel during one of the past four "up front" periods in which advertisers solicit such proposals. Similarly, The Tennis Channel claims that 68 percent of the revenue that the Golf Channel earns from its top 30 advertisers originates from companies that have purchased advertising on The Tennis Channel or from companies that evaluated The Tennis Channel proposals during one of the past four "up front" periods. The Tennis Channel further asserts that it competes with Versus for tennis programming, and has shared rights to tennis tournaments with Versus.

23. In addition, The Tennis Channel has submitted evidence demonstrating that The Tennis Channel's ratings in its coverage area are generally comparable to those of both the Golf Channel and Versus. With regard to the "value proposition" of The Tennis Channel (*i.e.,* the rate charged by the network relative to the popularity of the network's programming), the network claims that it compares favorably to both Versus and the Golf Channel. The Tennis Channel asserts that, according to published data, the ratio between the license fee charged for the Golf Channel and its average all-day rating—the "price per point" of the network—is $3.13, and that Versus's price per point is $2.75. Although national ratings for The Tennis Channel are unavailable due to the network's limited distribution, The Tennis Channel claims that its average all-day household rating for the first nine months of 2009, in the local markets where it is rated, made its price per point approximately $1.46.

24. Similarly, The Tennis Channel contends that it surpasses Versus and the Golf Channel in terms of the quantity of event coverage and level of viewer engagement or participation in the covered sporting events. The Tennis Channel maintains that, in 2008, it offered more than 2,700 hours of worldwide event coverage, the vast majority of which was composed of exclusive events within the United States. By comparison, the Golf Channel and Versus offered only 2,400 and 1,350 hours of event coverage, respectively, that year. The Tennis Channel further asserts that it holds exclusive rights to telecast significant portions of all four of the major events in its field, the Grand Slams, and covers the world's top 70 tennis tournaments. By contrast, The Tennis Channel maintains, the Golf Channel does not offer live or first-run coverage of the most significant events in its field, the Majors. In addition, The Tennis Channel claims that ice hockey and the Tour de France comprise Versus's most popular programming, and that Versus covers only two games in the ice hockey championship series, the Stanley Cup Finals. The Tennis Channel puts forth the results of a recent study by an industry trade association indicating that tennis is "the fastest-growing sport in the country." The study purports to show that participation in tennis grew 43 percent between 2000 and 2008. Conversely, the study indicates that participation in golf dropped one percent, and participation in ice hockey, Versus's principally featured sport, declined 22 percent during the same period.

2. Differential Treatment

25. We also find that The Tennis Channel has put forth evidence sufficient to demonstrate for the purpose of establishing a *prima facie* case of program carriage discrimination that Comcast has treated The Tennis Channel differently "on the basis of affiliation or nonaffiliation" from Comcast's similarly situated, affiliated networks. (Comcast argues that its differential treatment of The Tennis Channel is justified by various legitimate and non-discriminatory reasons.) Comcast distributes Versus and the Golf Channel to virtually all of its subscribers on a comparatively inexpensive, widely distributed programming tier, and such subscribers need not pay an additional fee to receive those programming networks. By contrast, Comcast customers wishing to receive The Tennis Channel must subscribe to a premium tier and pay a monthly fee for the programming, in addition to fees they must pay to purchase an entry-level package of digital cable programming and acquire a digital cable box. According to The Tennis Channel, customers that subscribe to Comcast's SEP must pay approximately five dollars each month in addition to the fees they must pay for digital cable service. The SEP also includes other sports programming services. In Washington, DC, for example, this premium tier includes the Big Ten Network, Horse Racing Television, TV Games, the Fox College Sports regional channel, Fox Soccer Channel, GolTV, Speed Channel, NFL Red Zone, and CBS College Sports. According to The Tennis Channel, approximately ten percent of Comcast's customers subscribe to the SEP. The Tennis Channel claims that Comcast carries all of its affiliated programmers on broadly penetrated tiers, whereas Comcast's premium sports tier is occupied only by unaffiliated networks. The Tennis Channel has also provided evidence that Comcast affords more favorable channel positioning to sports networks with which it is affiliated. For example, in Washington, DC, Comcast carries Versus and the Golf Channel on low-numbered channels that are adjacent to EPSN and ESPN2, two popular sports programming networks. The Tennis Channel, however, is located at channel 735, adjacent to other networks that comprise Comcast's SEP.

3. Harm to Ability To Compete Fairly

26. The Tennis Channel has put forth evidence sufficient to demonstrate for the purpose of establishing a *prima facie* case of program carriage discrimination

that Comcast's unwillingness to distribute the network more broadly and its disparate treatment of the network has unreasonably restrained The Tennis Channel's ability to compete fairly. (Comcast disputes that The Tennis Channel has been unreasonably restrained in its ability to compete fairly.) The Tennis Channel claims that Comcast's failure to carry the network at the same level offered to Versus and the Golf Channel has impaired the network's overall distribution and subscription fee revenue, thereby depriving The Tennis Channel of license fees that can be used to improve the network. Because Comcast is the dominant cable operator in seven of the ten largest television markets, The Tennis Channel asserts that its refusal to expand The Tennis Channel's distribution is particularly detrimental to the network. Moreover, The Tennis Channel contends that the smaller viewership of Comcast's premium sports tier reduces the value of advertising on networks carried on that tier. The Tennis Channel claims that many national advertisers use a threshold number of subscribers, *e.g.,* 40 million subscribers, as a benchmark for assessing whether a network will be considered a viable competitor for national advertising purchases. Thus, The Tennis Channel asserts, networks with a distribution level below that threshold experience more difficulty attracting national advertisers. Indeed, The Tennis Channel claims that top cable advertisers have excluded the network as a competitor for national advertising contracts due to its narrow distribution. By contrast, The Tennis Channel claims, some of those national advertisers have expended significant resources to place ads on both the Golf Channel and Versus.

27. In addition, The Tennis Channel asserts that Comcast's disparate treatment has impaired the network's ability to compete for programming, and points to several examples where the network either failed to win programming rights or was forced to make concessions in order to obtain such rights. Finally, The Tennis Channel claims that Comcast's refusal to expand its distribution has deprived the network of economies of scale. The Tennis Channel points out that, because a cable network's expenses are fixed irrespective of the number of subscribers, broader distribution of the network increases revenues without increasing costs. Thus, it claims, the operating costs are substantially less for a widely distributed network than for one whose distribution is more limited. As a consequence of its inability to realize economies of scale, The Tennis Channel asserts that it has been forced to limit marketing, production, and programming expenses, and was unable to renew agreements for certain smaller tournaments in 2010.

4. Referral to ALJ or ADR

28. Based on the foregoing, we find it appropriate to designate the captioned complaint on the issues specified below for a hearing before an ALJ. The question of whether The Tennis Channel has put forth evidence sufficient to warrant designation of this matter for hearing is not an issue before the Presiding Judge. As required by the Commission's Rules, to the extent Comcast seeks Commission review of our decision on this issue, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 CFR 1.115(e)(3). Despite our *prima facie* determination, the Presiding Judge will conduct a *de novo* examination of all relevant evidence after developing a full and complete record. Pursuant to Section 76.7(g)(2) of the Commission's Rules, each party will have ten days following release of this *Order* to notify the Chief, Enforcement Bureau and Chief ALJ, in writing, of its election to resolve this dispute through ADR. The hearing proceeding will be suspended during this ten-day period. In the event that both parties elect ADR, the hearing proceeding will remain suspended, and the parties shall update the Chief, Enforcement Bureau and Chief ALJ monthly, in writing, on the status of the ADR process. If both parties elect ADR but fail to reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau and Chief ALJ in writing, and the proceeding before the ALJ will commence upon the receipt of such notification. If both parties elect ADR and reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau, Chief ALJ, and Chief, Media Bureau in writing, and the hearing designation will be terminated upon the Media Bureau's order dismissing the complaint becoming a final order. If one or both parties do not elect ADR, then the hearing proceeding will commence the day after the ten-day period has lapsed.

29. Notwithstanding our determination that The Tennis Channel has made out a *prima facie* case of program carriage discrimination by Comcast, we direct the Presiding Judge to develop a full and complete record in the instant hearing proceeding and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision on each of the outstanding factual and legal issues. In addition, we direct the Presiding Judge to make all reasonable efforts to issue his Initial Decision on an expedited basis. In furtherance of this goal, we encourage the Presiding Judge to place limitations on the discovery tools available to the parties.

30. Pursuant to Section 76.10(c)(2) of the Commission's Rules, a party aggrieved by the ALJ's decision on the merits may appeal such decision directly to the Commission in accordance with Sections 1.276(a) and 1.277(a) through (c) of the Commission's Rules. 47 CFR 76.10(c)(2). 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. However, if the ALJ's decision would require a defendant MVPD to delete existing programming from its system to accommodate carriage, the order for carriage will not become effective unless and until the decision of the ALJ is upheld by the Commission. 47 CFR 76.1302(g)(1).

*IV. Ordering Clauses*

31. Accordingly, *it is ordered,* that pursuant to Section 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 409(a), and Sections 76.7(g) and 1.221 of the Commission's Rules, 47 CFR 76.7(g), 1.221, the captioned program carriage complaint filed by The Tennis Channel, Inc. against Comcast Cable Communications, LLC, is *Designated For Hearing* at a date and place to be specified in a subsequent order by an Administrative Law Judge upon the following issues:

(a) To determine whether Comcast has engaged in conduct the effect of which is to unreasonably restrain the ability of The Tennis Channel to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by The Tennis Channel, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the Commission's Rules; and

(b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Comcast 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; and/or whether Comcast should be required to implement such other

carriage-related remedial measures as are deemed appropriate; and

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

32. If the ALJ requires Comcast to carry The Tennis Channel on its cable systems on a specific tier or to a specific number or percentage of subscribers, the ALJ shall determine whether such remedy would "require [Comcast] to delete existing programming from its system to accommodate carriage of" The Tennis Channel. 47 CFR 76.1302(g)(1). If the ALJ determines that this remedy would require Comcast to delete existing programming, then this remedy will be treated as Section 76.1302(g)(1) treats "mandatory carriage," thus delaying the effectiveness of this remedy unless and until the decision of the ALJ is upheld by the Commission. In that event, if the Commission upholds the remedy ordered by the ALJ in its entirety, Comcast will be required to carry The Tennis Channel's programming for an additional period equal to the time elapsed between the ALJ's decision and the Commission's ruling, on the terms and conditions approved by the Commission.

33. *It is further ordered,* that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), The Tennis Channel and Comcast *Shall Each File* with the Chief, Enforcement Bureau and Chief ALJ, by October 15, 2010, its respective elections as to whether it wishes to proceed to Alternative Dispute Resolution. The hearing proceeding *Is Hereby Suspended* during this time. If one or both of the parties do not elect ADR, then the hearing proceeding will commence on October 18, 2010. If both parties elect ADR, the hearing proceeding will remain suspended, and The Tennis Channel and Comcast shall update the Chief, Enforcement Bureau and Chief ALJ monthly on the status of the ADR process. Such updates shall be provided in writing and shall reference the MB docket number and file number assigned to this proceeding. If both parties elect ADR but fail to reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau and Chief ALJ in writing, and the proceeding before the ALJ will commence upon the receipt of such notification by the Commission. If both parties elect ADR and reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau, Chief ALJ, and Chief, Media Bureau in writing, and the hearing will be terminated upon the Media Bureau's order dismissing the complaint becoming a final order.

34. *It is further ordered* that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), in order to avail itself of the opportunity to be heard, The Tennis Channel and Comcast, in person or by their attorneys, *Shall Each File* with the Commission, by October 22, 2010, a written appearance stating that it will appear on the date fixed for hearing and present evidence on the issues specified herein, provided that, if both parties elect ADR, each party shall file such written appearance within five days after notifying the Chief, Enforcement Bureau and Chief ALJ that it has failed to settle the dispute through ADR. In light of the expedited basis of this hearing proceeding, the deadline for filing written appearances set forth in Section 1.221(c) of the Commission's Rules, 47 CFR 1.221(c), is waived and replaced with the deadlines set forth above. In addition, Section 1.221(f) of the Commission's Rules, 47 CFR 1.221(f), provides that a "fee must accompany each written appearance filed with the Commission in certain cases designated for hearing." However, neither the Act nor our rules specify a fee for hearings involving program carriage complaints. *See* 47 CFR 1.1104; *see also* 47 U.S.C. 158. Accordingly, neither The Tennis Channel nor Comcast is required to pay a fee in connection with the filing of their respective appearances in this proceeding.

35. *It is further ordered* that, if The Tennis Channel fails to file a written appearance by the deadline specified above, or fails to file prior to the deadline either a petition to dismiss the above-captioned proceeding without prejudice, or a petition to accept, for good cause shown, a written appearance beyond such deadline, the Administrative Law Judge *Shall Dismiss* the above-captioned proceeding with prejudice for failure to prosecute.

36. *It is further ordered* that, if Comcast fails to file a written appearance by the deadline specified above, or fails to file prior to the deadline a petition to accept, for good cause shown, a written appearance beyond such deadline, its opportunity to present evidence at hearing will be deemed to have been waived. If the hearing is so waived, the Presiding Judge shall expeditiously terminate this proceeding and certify to the Commission the captioned complaint for resolution based on the existing record.

37. *It is further ordered* that in addition to the resolution of the issues (a) through (c) in paragraph 18 above, the Presiding Judge shall also determine, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an Order for Forfeiture shall be issued against Comcast for each violation or each day of a continuing violation, except that the amount issued for any continuing violation shall not exceed the amount specified in Section 503(b)(2)(C), 47 U.S.C. 503(b)(2)(C), for any single act or failure to act.

38. *It is further ordered* that for the purposes of issuing a forfeiture, this document constitutes notice, as required by Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. 503.

39. *It is further ordered* that a copy of this *Order* shall be sent by Certified Mail—Return Receipt Requested and regular first class mail to (i) The Tennis Channel, 2850 Ocean Park Boulevard, Suite 150, Santa Monica, CA 90405, with a copy (including a copy via e-mail) to Stephen A. Weiswasser, Esq., Covington and Burling LLP, 1201 Pennsylvania Avenue, NW., Washington, DC 20004–2401 (*sweiswasser@cov.com*); and (ii) Comcast Cable Communications, LLC, One Comcast Center, Philadelphia, PA 19103, with a copy (including a copy via e-mail) to David P. Murray, Esq., Willkie Farr & Gallagher LLP, 1875 K Street, NW., Washington, DC 20006 (*dmurray@willkie.com*).

40. *It is further ordered* that the Chief, Enforcement Bureau, is made a party to this proceeding without the need to file a written appearance, and she shall have the authority to determine the extent of her participation therein.

41. *It is further ordered* that a copy of this *order* or a summary thereof shall be published in the **Federal Register**.

Federal Communications Commission.

**Nancy Murphy,**

*Associate Chief, Media Bureau.*

[FR Doc. 2010–26766 Filed 10–21–10; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10 a.m. on Tuesday, October 19, 2010, to consider the following matters:

*Summary Agenda:* No substantive discussion of the following items is