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Melissa Rachel Heller

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# FCC Affirms Decision, Rules in Favor of Tennis Channel Against Comcast

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Author: [Melissa Rachel Heller](#), J.D Candidate, Class of 2014, Benjamin N. Cardozo School of Law

Tennis Channel and Comcast have been [engaged](#) in a bitter dispute over the provider's refusal to carry Tennis Channel since July 2010. Tennis Channel claimed that Comcast discriminated against the channel and gave preferential treatment to other sports networks, such as The Golf Channel and Versus. Tennis Channel argued that this impeded its ability to compete fairly in the video programming marketplace. [In December 2011](#), an administrative judge ruled in favor of Tennis Channel and [fined Comcast \\$375,000](#). Additionally, the judge ordered Comcast to give equal treatment to the channel. Comcast appealed the decision, which was subsequently affirmed by the Federal Communications Commission, Appellate Division. The order issued by the FCC held that "Comcast had discriminated with regard to carriage against Tennis Channel and in favor of Golf Channel and Versus on the basis of affiliation in violation of Section 616 of the Communications Act, 47 U.S.C. § 536, and Section 76.1301(c) of the Commission's rules, 47 C.F.R. § 76.1301(c)." That decision gave Comcast 45 days to comply with the order.

On August 1, 2012, Comcast filed suit against the FCC in Washington D.C., asking the U.S. Court of Appeals to throw out the FCC ruling. Comcast argued that the ruling was "arbitrary and unconstitutional." Kyle McSlarrow, the Washington president of Comcast/NBC Universal [commented](#), "[t]he decision will accomplish nothing other than to drive up programming costs and enrich a group of wealthy investors in the Tennis Channel." (Investors include tennis greats Andre Agassi and Pete Sampras, among [others](#).)

The FCC handed down an order on August 9th (read the full decision [here](#)), which denied Comcast's petition for a stay of the implementation of the order pending the completion of judicial review. The FCC concluded that the July 24th order was correct and grounded in evidence supporting the finding that Comcast discriminated against Tennis Channel. Moreover, the Commission rejected Comcast's contention that the harms to Tennis Channel are "highly generalized and speculative."

In the August 9th order, the Commission examined a four-part test in determining whether the order should be stayed. In order for the stay to be granted, Comcast, as the petitioner, needed to show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and, (4) the public interest favors granting a stay. According to the FCC, "[t]he relative importance of the four criteria will vary depending on the circumstances of the case, but a showing of

irreparable injury is generally a critical element in justifying a request for stay of an agency order. In this case, we conclude that Comcast has satisfied none of the four factors in the stay calculus. Accordingly, with one exception discussed below [in which a limited stay was granted with respect to the small number of systems that (according to Comcast) 'do not currently carry Tennis Channel and have inadequate bandwidth to add' another channel], we find that a stay is not warranted and deny the petition."

The Commission rejected Comcast's constitutional, statutory, administrative law and evidentiary claims, on account of not being persuasive. First, the Commission found Comcast's contention that Tennis Channel violated the statute of limitations (an argument that was rejected twice) unpersuasive because Tennis Channel's notification of an intent to file a complaint in December 2009 was within one year of the challenged conduct (which began in June 2009) and did not concern the 2005 contract between Tennis Channel and Comcast. Therefore, Comcast is unlikely to prevail on this issue.

Furthermore, Comcast's argument that the order misapplied and misinterpreted Section 616 (relating to whether Tennis Channel was unable to compete fairly in the video programming marketplace) was rejected, as the Commission's interpretation of a statutory provision that Congress has assigned it to enforce is entitled to substantial judicial deference. The FCC pointed out that in the specific context of FCC orders involving program carriage complaints, the U.S. Court of Appeals, Fourth Circuit, recently held that "[r]eview under this standard is highly deferential, with a presumption in favor of finding the agency action valid." The Commission inferred that the evidence in the record shows Tennis Channel was distributed less broadly than similar sports channels carried by Comcast. Additionally, "discriminatory treatment unreasonably restrained Tennis Channel's ability to compete in the marketplace by impairing its ability to acquire programming, sell advertising and collect advertising revenue, and conversely provides its affiliates Golf Channel and Versus a significant competitive advantage."

The Commission also concluded that the order did not violate the First Amendment. The appropriate standard of review is intermediate scrutiny. According to the August 9th order, "[a] content-neutral regulation will withstand intermediate scrutiny if it: (1) 'advances important governmental interests unrelated to the suppression of free speech'; and (2) 'does not burden substantially more speech than necessary to further those interests.' The Commission's action in this proceeding easily satisfies that standard." Comcast acknowledged the government interest in fair competition in the video programming marketplace, but challenged the loss of control over the channels that stems from this order. However, the promotion of fair competition outweighs that interest. Therefore, the Commission fully explained that the remedy in this case does not burden substantially more speech than necessary.

Although Comcast argued that the order would “impose immediate, substantial burdens on Comcast that cannot be undone if the Order is overturned on judicial review,” the Commission found that these claims do not suffice to show irreparable harm. Comcast failed to show that being required to provide Tennis Channel with equal coverage to The Golf Channel and Versus would infringe on Comcast’s First Amendment rights. Additionally, Comcast’s asserted economic injuries, which include updating websites, databases and programming guides, among allocating resources to increase Tennis Channel coverage, stemming from the order’s equal-carriage requirement, fall far short of demonstrating that sort of requisite “irreparable” harm. Finally, Comcast’s claim that it may be required to pay a higher fee to Tennis Channel for broader coverage than is provided in the contract was rejected as being theoretical.

For these reasons, the Commission decided that the harm to others and public interest considerations weigh against a stay. The Tennis Channel has been, and continues to be, disadvantaged by Comcast’s refusal to provide it with the broader carriage it provides The Golf Channel and Versus.

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