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Comcast aces tennis channel as D.C. Circuit calls a fault on FCC

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Cable television packages or "tiers" have long drawn the ire of sports leagues. Tiers carry specific types of programming (e.g., science fiction, business news or out-of-market sports) and are available to subscribers for an additional charge over basic programming.

In exchange for access to their games, sports leagues often contract with cable operators to get paid per subscriber, whether or not they watch the games. Recognizing that many customers resist charges getting passed through for programming of little interest, cable companies often prefer to put these more expensive games on sports tiers for customers choosing to incur the additional charge.

When the Big Ten Network was launched in 2007, for example, cable companies envisioned it as part of a sports tier available only to customers willing to pay extra. The network successfully held out to be included on expanded basic service.

In 2008, a dispute arose between the NFL Network and Comcast, the nation's largest cable TV company, for placing it on a sports tier with about 750,000 subscribers, rather than on a digital tier with more than 7 million viewers. The dispute reached the Federal Communications Commission (FCC).

The NFL's contract with Comcast called for it to receive 55 cents per subscriber each month, so getting moved stood to deprive the NFL of significant revenue. After the FCC preliminarily ruled in favor of the NFL Network, a deal was struck for Comcast to move the channel to its Digital Classic tier.

Last year, the Madison Square Garden Network similarly skirmished with Time Warner Cable about coverage on its expanded basic tier. As a result, its subscribers were left without access to New York Knicks games during the heart of the national "Linsanity" craze inspired by point guard Jeremy Lin, as well as Buffalo Sabres and other pro sports telecasts, for seven weeks until a deal was reached.

The latest shot in this continuing volley between organized sport and cable television was served just weeks ago by the Federal Circuit Court of Appeals in Washington, D.C., which ruled that The Tennis Channel (TTC) was not entitled to placement on Comcast's basic cable service and could remain on its more expensive sports tier.

Comcast included its own affiliated sports networks, Golf Channel and what is now NBC Sports Network, on its basic cable service, but relegated TTC to a sports package available only to subscribers who pay \$5 to \$8 more every month. Like the NFL Network, TTC brought its case to the Federal Communications Commission, invoking regulations barring a cable company from discriminating against unaffiliated programming networks.

An FCC administrative law judge agreed with TTC and ordered Comcast to treat it on par with its own Golf Channel and NBC Sports. On appeal, the D.C. Circuit reversed the administrative law judge, finding insufficient evidence of unlawful discrimination. Comcast dutifully explained its additional costs to distribute TTC's content more broadly, while TTC failed to show "corresponding benefits that would accrue to Comcast" by upgrading TTC.

Likewise, the FCC could not point to any net gain to Comcast by making TTC available on a more broadly available tier, merely arguing that TTC charges less per television rating point than the Golf Channel or NBC Sports. Even if the court assumed "that low charges per ratings point are the be-all and the end-all of assigning a network to a broadly accessible tier (and the record does not support such an assumption)," this evidence was directed only to TTC's cost and did "not show any affirmative net benefit."

The D.C. Circuit went so far as to suggest the "rather obvious type of proof" that the FCC should have provided, namely expert testimony that a requisite level of subscribers would leave other providers and sign up for Comcast service upon making TTC as available as the Golf Channel and NBC Sports or that a certain number of Comcast subscribers would leave without placement of TTC on a broader tier or a combination of these.

The evidence was actually to the contrary. The record of the FCC proceedings revealed Comcast's introduction of uncontested evidence that in 2007 or 2008 its southern division had acquired a network from another cable company where TTC was shown on a broader tier. Upon shifting TTC to the sports tier where it was only available for a higher fee, Comcast received zero complaints about the move.

Although both TTC and the FCC characterized Comcast's cost-benefit analysis as "pretextual" and claimed discrimination against TTC was its true motive, the court felt they were really criticizing the analysis as "too hastily performed," where the evidence did not support the charge and was essentially un rebutted in any event. With no evidence presented that Comcast stood to benefit from incurring the charge for more widely distributing TTC (and substantial evidence was required), no finding of discrimination was possible.

In a notable postscript to the ruling, the sports website Deadspin obtained a hasty e-mail sent by TTC CEO Ken Solomon to his staff the following day, pledging an appeal and characterizing as "truly a travesty of justice" the "unholy decision" issued by "three Lone Ranger judges [who] walked into the court with a mission ... looking for one thing, to teach the FCC a lesson; already decided. Ideology."

The colorful e-mail rant, sent from Paris where Solomon was attending the U.S. Open, picked up steam from there. "Conjuring this impossible justification ... that there isn't sufficient evidence to support this and every other painful and brutal discrimination complaint is like looking at a building engulfed in flames and asking 'what fire'???"

Hitting its crescendo while furiously mixing its metaphors, the e-mail continued: "It's like being raped for a decade by a brutal captor, finally winning in a long and painful public court trial (while you can't get work because of your scarlet letter), and then on appeal years later from a pre-decided Mad Hatter of a court asking you, the victim, to produce a video to prove that it ever happened."

Predictably, Solomon later issued a statement of regret for his "excessively colorful and inappropriate words."

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