

Litigator of the Week: Miguel Estrada of Gibson, Dunn & Crutcher LLP

By Jan Wolfe
May 30, 2013



Miguel Estrada of Gibson, Dunn & Crutcher LLP hasn't let his failed nomination to the U.S. Court of Appeals for the D.C. Circuit stop him from shaping the contours of constitutional and regulatory law. His latest triumph came on Tuesday, when the same court he almost joined a decade ago ruled that his client Comcast Corporation didn't improperly discriminate against the Tennis Channel by refusing to make it as widely available as other sports programming. The ruling, which reverses a decision by the Federal Communications Commission, is being widely viewed as a check on the agency's power to regulate cable companies.

"Any time you take on an agency of the U.S. government, it's a bit daunting," Estrada told us. "They have resources and people who know their stuff. We were fortunate to have a strong case on several different fronts."

Like other cable companies, Comcast has an ownership stake in some of the channels it carries, including NBC Sports Network (formerly Versus) and the Golf Channel. In 2003, Comcast agreed to start carrying the Tennis Channel, which is not a Comcast affiliate. Comcast placed the channel in a premium subscription tier, meaning subscribers had to pay an extra monthly fee to watch it. In 2009, the Tennis Channel asked to be placed into a more easily accessible bundle of channels—one that included Comcast affiliates Golf Channel and NBC Sports.

Comcast rejected the Tennis Channel's proposal, which would have incurred additional fees for Comcast. The cable company said that its customers just aren't all that interested in 24/7 tennis coverage. Tennis Channel, for its part, accused Comcast of violating congressionally-mandated FCC regulations prohibiting cable companies from discriminating against channels on the basis of affiliation. In the 1990s, the FCC created a trial-like procedure for hearing such discrimination complaints. Perhaps wary of angering cable companies, only three networks have ever availed themselves of the procedure. Of those three, two settled and one lost at the FCC.

Nevertheless, in a groundbreaking 3-2 decision, a panel of

FCC commissioners sided with Tennis Channel in July 2012, as we reported here. The agency fined Comcast the maximum amount of \$375,000 and, more importantly, ordered it to put Tennis Channel on equal footing with Golf Channel and NBC Sports.

Comcast's lawyers at Gibson Dunn appealed to the D.C. Circuit, and at an oral argument in February Estrada called the FCC decision "one of the most outrageous invasions of the First Amendment since the Sedition Act." He likened it to a court dictating what content *The New York Times* could put on its front page. Putting aside the free speech issue, Estrada also asserted that there were valid business reasons why Comcast declined to broaden Tennis Channel's distribution.

As our sister publication *The National Law Journal* reported earlier this week, that second argument ended up carrying the day. "Without showing any benefit for Comcast from incurring the additional fees for assigning Tennis a more advantageous tier, the Commission has not provided evidence that Comcast discriminated against Tennis on the basis of affiliation, Senior Circuit Judge Stephen Williams wrote on behalf of a three-judge majority.

Even one of the FCC's commissioners, Ajit Pai, sees the decision as a signal that the agency overreached. As one of the dissenting voices at the FCC stage of the case, he was happy about the the reversal. "I hope that the Commission will heed the lesson of today's D.C. Circuit decision and refrain from attempting to micromanage cable operators' programming," he said in a statement.

"This case involves one of those statutes that has been on the books for a long time. It's been on the books since a different technological era," Estrada said. "The FCC was trying to use it in a way that was not intended under the law."

Comcast, meanwhile, must be feeling pretty satisfied with its choice of outside counsel. Tuesday's ruling comes just weeks after Estrada scored a landmark win at the U.S. Supreme Court in *Comcast v. Behrend*, persuading the justices to throw out an antitrust class action against his client.