

NARB PANEL #325 – January 16, 2024

**Appeal of NAD’s Final Decision #7212 Regarding Claims for
Comcast Cable Communications, LLC, Xfinity 10G Network**

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REPORT OF NARB PANEL 325

Decision Issued: January 16, 2024

Appeal of NAD’s Final Decision #7212 Regarding Claims for Comcast Cable Communications, LLC, Xfinity 10G Network

In February 2023, the advertiser, Comcast Cable Communications, Inc. (“Comcast”) rebranded its fixed (or wired) internal network with the name “Xfinity 10G Network.” Responding to the rebranding and an extensive advertising campaign that accompanied the name change, Verizon Communications, LLC (“Verizon”) and T-Mobile US, Inc. (“T-Mobile”) filed similar (but not identical) advertising challenges against the Comcast advertising at the National Advertising Division (“NAD”).

A. Background

Verizon’s challenge (see NAD Case #7213) targeted one express claim (“10G”) and one allegedly implied claim (“10G is a huge step forward from – and many times faster than – 5G”). The T-Mobile challenge (see NAD Case #7212) targeted 10G as well as a broader array of claims, identifying four express claims¹ and nine allegedly implied claims.²

Both NAD Decisions were issued on the same date (10/6/2023). Comcast appealed each, and in #7212 T-Mobile asserted a cross-appeal. At the request of Comcast, its NARB appeal in the Verizon matter (NARB Panel 326)³ was scheduled first for a NARB hearing. In order to promote efficiency and consistency in the industry self-regulatory process, NARB recruited panelists willing to serve on the panels of both appeal proceedings.⁴

The hearing in NARB Panel 326 (Verizon matter) was held on December 14, 2023. Briefly summarized, in a decision dated December 18, 2023, the panel concluded that Comcast’s use of 10G communicated unsupported express speed claims and recommended that Comcast discontinue use of 10G in the new Xfinity service name and when used to describe the network.

¹ The challenged express claims included “10G,” “Xfinity 10G Network,” and “Next Generation Network.” See NAD #7212 Decision at 1.

² Challenged implied claims included “All Xfinity customers receive ‘10G’ service,” “only Xfinity offers ‘10G’ speeds,” and “Xfinity has already achieved a major technological revolution.” See NAD #7212 Decision at 2.

³ The T-Mobile appeal is NARB Panel 325.

⁴ Comcast also requested that NARB designate the same panelists for both appeals. One panelist on Panel 326 was unable to attend the second hearing, and accordingly NARB Panel 325 proceeded with four panelists as authorized in the NARB Policies and Procedures (“Procedures”) Section 5.6.

The panel, however, did not agree with NAD that 10G communicated a 10th generation express claim.

In its Advertiser's Statement in Panel 326, Comcast stated that it declined to accept the panel's recommendation, while indicating that it might reassess its position in light of the decision in NARB Panel 325.

B. NAD Decision in #7212

As it did in NAD #7213, in its Decision in #7212, NAD evaluated Comcast's use of 10G in the brand name for the Xfinity network under the legal standard applicable to names/brands of products or services. Briefly, where a service name is challenged as misleading, NAD requires extrinsic evidence that consumers are being misled. Such extrinsic evidence would typically consist of consumer surveys.

At the same time, if a product or service name contains a false or unsubstantiated express (or literal) claim, NAD can recommend its discontinuance without the need to consult extrinsic evidence. NAD looks to see if the product name conveys a clear, specific, or objectively provable claim that is unsupported. According to NAD, it should assess a challenged brand name in isolation, and not in the context of the advertising in which it may appear. See NAD #7212 Decision at 3-4.

As an initial matter, NAD concluded that Comcast used 10G as a claim describing the Xfinity network as well as part of its new brand name for the Xfinity service. See NAD #7212 Decision at 4.

1. Challenger's Survey Evidence

In NAD proceeding #7213, Verizon had submitted survey evidence to try to show that Comcast's new brand name for the Xfinity service communicated misleading messages. Crediting Comcast's criticisms of the survey, NAD concluded that the survey was "fatally flawed" and gave it no weight in NAD's analysis of the issues. On appeal, the NARB panel also did not credit arguments made by either party based on the survey evidence. See NARB Panel 326 Decision at 9.⁵

In NAD proceeding #7212, T-Mobile also submitted survey evidence in an effort to show misleading messages. In response, Comcast and its survey expert raised a number of

⁵ Comcast had argued that an analysis of the open-ended responses to the survey submitted by Verizon supported the advertiser's contentions.

methodological issues and argued that the survey was fatally flawed.⁶ This time, “NAD found the survey to be reliable evidence of how consumers perceived the use of ‘10G’ in ‘Xfinity 10G network.’” NAD #7212 Decision at 5. According to NAD, the survey showed that 40% of respondents took away a message that 10G was superior to 5G, and 34.5% took away a message that 10G means “10 Gbps.” Id.

2. Express/Literal Claims Communicated by the New Service Name

Next, NAD addressed the issue of what, if any, express/literal messages are communicated by the term 10G when used in the new Xfinity brand name.⁷ NAD concluded that 10G as used in the brand names “Xfinity 10G network” and “Xfinity 10G” is an express claim that means either “10 Gbps” or “10th Generation.” See NAD #7212 Decision at 8.

In reaching the conclusion set forth above, NAD rejected the advertiser’s argument that “10G is simply a brand name and does not convey any message.” See NAD #7212 Decision at 6. NAD credited evidence of the origin of the term 10G (the cable industry 10G initiative announced in 2019 with Comcast’s participation) and “anecdotal” references in industry publications.⁸

As noted, Comcast argued that the term 10G is not capable of being considered an express claim if, as NAD found, it conveys more than one literal meaning. NAD did not accept that argument, reasoning that “[m]any words in the English language have multiple definitions.” NAD #7212 Decision at 7.

⁶ Comcast’s criticisms of the survey are discussed at length in NAD #7212 Decision at 5-6.

⁷ There may be a degree of confusion surrounding the terminology “express claims” and “implied claims.” Procedures Section 3.1-A provides that NAD challengers “must identify all express and implied claims to be considered by NAD.” In this context, “express” presumably refers to claim language actually appearing in the challenged advertising or in the actual name of a product/service. Here, for example, the term “10G” is an express claim for purposes of the NAD Procedures challenge requirements because it is actually found in the challenged brand name and in the challenged advertising. A separate issue is the determination of what message or messages, if any, are communicated by an express term, i.e., the “literal” message or messages. In addition to disputes in the record concerning what, if any, were the literal messages communicated by 10G, Comcast argued at NAD (and also on this appeal) that if a term is found to communicate two or more literal messages, it is inherently ambiguous and cannot be considered “express” for purposes of the application of NAD’s test for determining whether a product/service name communicates an “express” false or unsubstantiated message.

⁸ In its analysis of the literal messages communicated by 10G, NAD also took into account the results of the survey submitted by T-Mobile, discussed above. See NAD #7212 Decision at 6 (citing the survey results showing “that consumers are misled by the product name” in the introduction to a discussion of the express message or messages); id. at 7 (noting that NAD found the survey to be “persuasive evidence” of the express meanings conveyed by the term 10G); see also id. at 6, n. 11 (“Although consumer perception evidence is not required in assessing express claims, it can often be helpful”).

NAD’s conclusion concerning the literal messages communicated by the term 10G as it appears in the new brand name for the Xfinity service also applied, according to NAD, when the term was used in Xfinity advertising in a context other than the new brand name.

3. Substantiation

Comcast argued that, even if the messages NAD found were in fact communicated, they were substantiated. Comcast pointed to the availability (as of June 13, 2023) of 10 Gbps speeds on the Xfinity Gigabit Pro tier of service, available, according to Comcast, to 98% of Xfinity subscribers. Comcast further argued that substantial upgrades to its network resulted in internet service that was superior to wireless 5G offerings.

NAD, however, found that the two express messages were unsupported. As concerns the 10 Gbps speed message, NAD noted that the Gigabit Pro service was “difficult to find or obtain” on the Xfinity website. See NAD Decision at 8. For a consumer to actually obtain the service, Comcast would first have to install fiber to the consumer’s premises. In a footnote, NAD cited evidence pointing to the need for government approvals to install the Gigabit Pro service. See NAD #7212 Decision at 8, n. 17.

NAD also noted that the number of subscribers to the Gigabit Pro tier “is only a small percentage of Comcast’s total subscribers.” Id. In a submission designated confidential, Comcast provided certain relevant data concerning usage of that tier, but because it only disclosed the total number of “small businesses” as well as consumer subscribers, the advertiser did not actually disclose the total number of consumer subscribers to the Gigabit Pro service tier. NAD concluded that in its view, the service name “identifies the entire network as 10G” whereas few Xfinity customers receive 10 Gbps speeds.

Turning to the second literal communication (10th generation), NAD, citing its precedent, concluded that broad superiority claims require supporting evidence that appropriately matches the breadth of the claims. The advertiser argued that the Xfinity 10G network is vastly superior to 5G, and in support cited data from SamKnows.

NAD found the proffered SamKnows data to be insufficient to support the 10th generation claim, noting that the data was provided in chart form only, with no information concerning how the data was collected, sample size, geographic region, how comprehensive the data was, and how the reported averages were calculated, among “other open questions.” See NAD #7212 Decision at 10. NAD also pointed out that Comcast did not offer a comparison of the speeds available on the lower Xfinity tiers of service with speeds available on any wireless 5G service. Thus, according to NAD, there was no information on “the metric consumers are most likely to associate with a

broad, unqualified superiority claim.” NAD #7212 Decision at 10.⁹

4. Other Claims Challenged by T-Mobile

Comcast pointed out that over the last five years it had spent more than \$20 billion in upgrading its network, and that the upgrades resulted in significant improvements across all of its tiers of service. Based on these upgrades, NAD concluded that Comcast properly supported its express claim challenged by T-Mobile that the Xfinity network represented the “Next Generation Network” and the implied claim that Comcast had achieved a “major technological revolution.”

Finally, NAD addressed the challenged implied claim that the Xfinity network was available during power outages. NAD concluded that Comcast did not provide a reasonable basis for the claim.¹⁰ Comcast has advised NARB that it is not appealing this recommendation.¹¹

C. Party Arguments on the Appeal

The panel understands that the briefs submitted to the panel were finalized by the parties and submitted to NARB before the parties were aware of the decision in NARB Panel 326. The panel members did not receive the Panel 325 briefs until after it had decided the appeal in Panel 326.

Certain issues resolved by its Decision in Panel 326 are again before the panel.¹² The panel understands its responsibility to consider and evaluate all arguments presented at the NARB Panel 325 hearing, even if previously considered in NARB Panel 326. The panel members did not receive the Panel 325 briefs until after it had decided the appeal in Panel 326.

The arguments of the parties are briefly summarized below:

1. Comcast Arguments Supporting Its Appeal

- Comcast argues that NAD avoided applying the proper legal standard applicable to product/service names by ignoring the well-accepted distinction between express and implied claims. Comcast asserts that NAD’s analysis of the term 10G was improperly

⁹ As concerns certain SamKnows data that arguably showed that the Comcast network was superior to wireless 5G networks on specific metrics, NAD found that there was “insufficient evidence in the record” to show an impact on end-user performance “in a consumer relevant way.” See NAD #7212 Decision at 10.

¹⁰ NAD observed that, because it recommended that the advertiser discontinue references to 10G, NAD did not address allegedly implied claims that contained 10G.

¹¹ Any compliance issue concerning this recommendation will be handled by NAD, not NARB.

¹² T-Mobile’s cross-appeal raises an issue not previously addressed by the panel.

based on an unprecedented assertion concerning a “continuum” between express claims and implied claims, a standard that Comcast argues conflicts with Federal Trade Commission (“FTC”) law, Federal Lanham Act Law and NAD precedent. Comcast adds that, as a part of industry self-regulation, NAD should be applying existing legal principles, not creating new ones.

- Comcast argues that NAD’s finding that the new service name for the Xfinity network communicates that “all” Xfinity users will receive 10 Gbps speeds misconstrues the differences between wired networks and wireless networks, a difference, according to Comcast, that is well-known to consumers. Comcast argues that consumers understand that different tiers of service are available on wired networks, whereas wireless companies provide uniform service to their subscribers.
 - Comcast contends that the survey offered by T-Mobile was “fatally flawed,” citing and relying on the criticisms submitted by Comcast’s survey expert. Among other criticisms, Comcast points out that the T-Mobile survey used only one print advertisement as the survey stimulus, and argues that the results of the survey cannot be generalizable to the new Xfinity network name when used in other advertisements/commercials. Comcast further argues that the survey control was improper, and that the survey only asked questions about “10G,” and not the full name of the Xfinity service. Comcast also argues that the survey’s closed-ended questions were improper and leading, and that the data from the open-ended questions showed that the allegedly implied messages were in fact not communicated.
 - Comcast argues that its Xfinity service “wildly outperforms” T-Mobile’s wireless network. The advertiser asserts that NAD’s failure to recognize its network’s superiority conflicts with NAD precedent that has recognized shortcomings of wireless networks compared to cable networks. Comcast also argues that the term 10G at most communicates a monadic, not a superiority, claim.
 - Comcast argues that requiring it to discontinue its brand name would be an “extraordinary and drastic remedy” in light of the advertiser’s \$20 billion investment in network improvements. It argues that NAD’s recommendation is “even more nonsensical” because of the breadth of the advertising collateral in the challenged campaign which, it argues, NAD failed to consider as bearing on the meaning of its new brand name.
 - Comcast offers disclosures as the appropriate solution for any remaining concerns, arguing that disclosures are common in the telecommunications industry and arguing further that the FTC has accepted disclosures as a solution in a comparable matter.
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- Finally, Comcast argues that NAD’s decision, if not reversed, would have harmful and serious impacts on the future of advertising self-regulation and “force a crisis of legitimacy for advertising self-regulation.”

2. T-Mobile Opposition to Comcast’s Appeal

- T-Mobile rejects the advertiser’s argument that NAD’s decision will force a crisis of legitimacy for advertising self-regulation. T-Mobile argues that, to the contrary, NAD’s recommendation to discontinue 10G usage is in keeping with NAD’s role in protecting consumers from false and misleading claims.
 - T-Mobile argues that the phrase “Xfinity 10G network” can properly be considered a tagline, not a product/service name. It points out that Comcast labelled the phrase “tagline” in pre-challenge correspondence. Accordingly, according to T-Mobile, Comcast should not be entitled to have the phrase evaluated under the more lenient standard applicable to product/service names.
 - T-Mobile argues that this panel in its decision in NARB Panel 326 correctly concluded that 10G communicated a speed superiority message which included providing 10 Gbps speeds on the Xfinity network.
 - T-Mobile argues that Comcast has improperly attempted to bolster its position on the express-claim issue by distorting federal court Lanham Act legal principles as well as NAD precedent. T-Mobile argues that NAD decisions show that alphanumeric terms can convey express messages. As respects federal Lanham Act law, T-Mobile argues that Comcast relies on the federal court “false by necessary implication” doctrine, a principle that, T-Mobile argues, has no relevance in NAD proceedings.
 - T-Mobile argues that NAD, and this panel in NARB Panel 326, correctly took into account the views of industry observers and what T-Mobile characterizes as industry experts. It also argues that it is particularly significant that Comcast’s CEO participated in a cable industry announcement of the 10G initiative, which linked 10 Gbps speeds to references to 10G. According to the challenger, the term 10G was imbued with the literal meaning 10 Gbps speeds by the cable industry itself.
 - T-Mobile argues that its consumer survey was methodologically sound and demonstrated that 10G as used in the new Xfinity product name communicates the implied messages 10 Gbps speeds and better than 5G.
 - T-Mobile argues that NAD was correct in concluding that the Xfinity Gigabit Pro service
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tier did not support a 10 Gbps speed communication. T-Mobile cites to evidence in the record, cited by NAD in its #7212 Decision at 9, n. 17, arguably showing that subscribing to that service tier “includes multiple requirements, receiving permits from local governments, building out fiber to the home, and exorbitant fees.” T-Mobile further argues that (as NAD found), information concerning the Gigabit Pro service tier is difficult to find on the Xfinity website.

- T-Mobile argues that while Comcast insists that its Gigabit Pro service tier is available to 98% of its customer base, according to T-Mobile, Comcast FCC filings show that that tier of service is only available to fewer than 10% of the Xfinity consumer customer base.
- Finally, T-Mobile argues that NAD’s “aspiration” qualifier language alternative (see NAD #7212 Decision at 20) is unworkable as a qualifier for the Xfinity network’s new brand name.¹³

3. T-Mobile Arguments Supporting its Cross-Appeal

As noted, at the NAD, T-Mobile challenged the claim “Next Generation Network.” See NAD #7212 Decision at 1. T-Mobile cross-appeals from NAD’s failure to recommend that this express claim be withdrawn.¹⁴

T-Mobile argues, first, that as concerns wireless technology, consumers have come to understand that each successive generation of technology represents a significant technological advance. It further argues that the distinction between internet and mobile offerings has become blurred. In support of this blurring position, T-Mobile points to several factors, including Comcast’s targeting T-Mobile and Verizon 5G services in Xfinity advertising and Comcast’s promoting its internet and wireless services in the same Xfinity advertising.

As a consequence, according to T-Mobile, consumers will understand the challenged Next Generation claim as communicating that Xfinity’s network represents a material advancement over the current 5G technology with respect to both internet and mobile service. This claim, according to T-Mobile, is not substantiated. T-Mobile points to, and endorses, NAD’s analysis of, and rejection of, the SamKnows data relied on by Comcast. NAD, as noted, declined to rely on the SamKnows data as substantiation for the 10G message because of a lack of information concerning how the SamKnows data was compiled, certain shortcomings in the data (according to NAD), and

¹³ It is unclear whether Comcast disagrees with this contention, as it argues that this NAD recommendation is “unworkable.”

¹⁴ T-Mobile also cross-appeals from NAD’s failure to recommend the discontinuance of the allegedly implied claim that “Xfinity has already achieved a major technological breakthrough.” The panel will consider this implied claim as incorporated in the arguments concerning the Next Generation claim.

what NAD concluded with respect to certain of the data was a failure to show consumer-relevant differences.

Finally, T-Mobile points to references in the record where Comcast relied on asserted “ongoing” improvements to the Xfinity network, i.e., projected improvements not yet implemented. T-Mobile argues that promises of future network advances cannot satisfy Comcast’s burden of providing substantiation for its current performance/superiority claims.

4. Comcast’s Opposition to T-Mobile’s Cross-Appeal

- Comcast argues that its investment of \$20 billion in network improvements has in fact achieved a “major technological revolution.” According to Comcast, it has documented material network improvements in speed, reliability, latency, and ubiquity.
- Comcast argues that its network improvements to date support and justify NAD’s decision to find that Comcast’s “Next Generation” claim is properly supported. In addition, Comcast argues, the claim is also supported because the technology used in the updated Xfinity network facilitates planned and continuous improvement and innovation. This capacity for continuing upgrades is, according to Comcast, a “revolutionary approach.”
- T-Mobile’s position on its cross-appeal is, according to Comcast, asserted in “bad faith” because NAD has consistently found that wireless networks provide inferior service to cable networks.
- As concerns T-Mobile’s criticisms of the SamKnows data, Comcast points out that in November, 2023, NAD relied on SamKnows data in finding that Comcast’s claim that Xfinity was a “better internet” in the context of speed, consistency, and reduced lag and latency.¹⁵
- Comcast points out that T-Mobile failed to submit any data to support its challenge to the Next Generation claim.
- Comcast argues that, in context, the Next Generation claim conveys a message about improvements in cable technology, and not a comparison to wireless 5G internet service. However, alternatively, according to Comcast, its SamKnows data shows that its Xfinity network is superior to wireless 5G technology.
- Comcast argues that the panel should affirm NAD’s decision on the Next Generation claim

¹⁵ The NAD Decision is Case # 7229 (11/17/23). The challenger there was Verizon.

to avoid giving the cellular industry a “monopoly” over the term “generation.” To accept T-Mobile’s arguments, according to Comcast, would call into question the legitimacy of advertising self-regulation and raise serious First Amendment concerns.

D. Discussion

The panel notes at the outset that it understands its responsibility to carefully evaluate the evidence and arguments submitted by both parties, notwithstanding its decision in Panel 326 on comparable issues.

The panel unanimously concludes that 10G as used by Comcast communicates the express claim that the Xfinity network provides subscribers with 10 Gbps speeds. This conclusion is bolstered by the evidence of the meaning of the term 10G given to it by the cable industry. Also relevant is the meaning ascribed to the term 10G by the cable industry commentators. The panel further notes that, while Comcast has raised criticisms of the survey submitted by T-Mobile that may undercut the overall strength of the survey evidence, the panel concludes that the responses to the open-ended survey questions provide further support for the conclusion that the term 10G communicates that subscribers to the Xfinity network receive 10 Gbps speeds.¹⁶

The panel next addresses the issue of whether the 10 Gbps message is supported. On this issue, the burden of providing proper support is on the advertiser.

Comcast cites as support for the 10 Gbps speed express message its Gigabit Pro service tier, which, according to the advertiser, provides 10 Gbps speeds and is available to 98% of Xfinity customers. For the reasons discussed below, the panel concludes that Comcast has failed to support the express claim.

First, the panel accepts the limitations concerning the Gigabit Pro service pointed out by both NAD and the challenger. These include the difficulty of finding the availability of the service on the Xfinity website, the possible need to obtain local government permission to install the necessary fiber, and the relatively high cost of the service.

Next, NAD concluded that the percentage of Xfinity customers who have subscribed to the Gigabit Pro service tier is very small. The panel notes that there is no direct evidence in the record concerning how many consumer subscribers have signed up for this tier. In addressing the amount of usage in the confidential position of its submission, Comcast only disclosed the total number of subscribers combining small businesses with consumers. The Comcast advertising in the record, however, is directed at consumers.

¹⁶ As in its decision in Panel 326, the panel does not rely on the “continuum” analysis referred to by NAD in the #7212 Decision at 6, n. 11.

Turning to T-Mobile’s cross-appeal, the panel agrees with NAD’s conclusions and finds that Comcast has provided support for its Next Generation claim. From the record evidence, there does not appear to be any well-accepted definition for what constitutes a new generation of technology for cable internet systems. Comcast, moreover, has shown that its substantial investment in the Xfinity network has resulted in significant improvements in key metrics of interest to consumers, which the panel concludes are sufficient to support the general concept of “next generation” as used in the advertising.

E. Recommendations

The panel recommends that Comcast discontinue use of the term 10G in the product service name “Xfinity 10G network” and when 10G is used descriptively to describe the Xfinity network.

In addition, consistent with language NAD included as an alternative in its Conclusion, NAD #7212 Decision at 12, Comcast is free to use 10G in a manner that is not false or misleading, consistent with this panel decision (e.g., in a manner that does not misleadingly describe the Xfinity network).

The panel thanks Comcast and T-Mobile for participating in industry self-regulation in the interest in promoting truth in advertising.

F. Advertiser’s Statement

Comcast will comply with NARB’s recommendation as described below, notwithstanding its concern that the Panel’s decision and analysis does not follow, and is inconsistent with, the applicable legal standards for advertisers.

Comcast is pleased that the Panel found its “next generation” claim supported (considering its “major technological breakthrough” claim as incorporated in such), and appreciates the Panel’s recognition that the Xfinity network provides significant, consumer-relevant benefits. Comcast thanks the Panel for acknowledging that there may be issues in the survey submitted by T-Mobile, and not relying on the closed-ended survey questions. Comcast strongly disagrees, however, with NARB’s finding that 10G is an express claim conveying that the Xfinity network provides subscribers with a minimum of 10 Gbps speeds. Moreover, the recommendation to discontinue the brand name is unwarranted, in light of Comcast’s argument that it makes available 10 Gbps of internet speed to 98% of its subscribers upon request.

Although Comcast strongly disagrees with NARB’s analysis and approach, Comcast will discontinue use of the brand name “Xfinity 10G Network” and will not use the term “10G” in a manner that misleadingly describes the Xfinity network itself. Consistent with the Panel’s

recommendation, Comcast reserves the right to use the term “10G” (or “Xfinity 10G”) in a manner that does not misleadingly describe the Xfinity network itself.

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