

**Before the  
Federal Communications Commission  
Washington, DC 20554**

**FCC 15M-24**  
10347

In the Matter of	)	MB Docket No. 12-222
	)	
<b>Game Show Network, LLC,</b>	)	File No. CSR-8529-P
Complainant,	)	
	)	
v.	)	
	)	
<b>Cablevision Systems Corp.</b>	)	
Defendant.	)	
	)	
Program Carriage Complaint	)	

**ORDER**

**Issued: July 6, 2015**

**Released: July 6, 2015**

On June 12, 2015, Cablevisions Systems Corporation (“Cablevision”) filed its Motion *in limine* to Partially Exclude the Testimony of Dr. Hal J. Singer (“Motion”). On July 19, 2015, Game Show Network, LLC (“GSN”) filed its Opposition to that Motion (“Opposition”). The Presiding Judge rules herein on Cablevision’s Motion.

*Profit Sacrifice Test - Promotion*

Cablevision argues that the conclusions of Dr. Singer’s “profit sacrifice test” are based on unreliable assumptions that are contradicted by the record. Cablevision asserts that Dr. Singer presents no factual or economic basis for his assumption that the recipients of a promotion offered after the retiering of GSN would have churned away from Cablevision in the absence of that promotion.<sup>1</sup> Cablevision cites a February 4, 2011 e-mail by a Cablevision executive as evidence that contradicts Dr. Singer’s assumption.<sup>2</sup> Cablevision further argues that Dr. Singer gives no “credit” to the mitigating effect that Cablevision’s promotion had on churn, as he states that the holding in the D.C. Circuit’s *Tennis Channel* decision<sup>3</sup> precludes him from considering mitigation strategies.<sup>4</sup> Accordingly, Cablevision asserts that Dr. Singer should be barred from testifying about his profit sacrifice test.

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<sup>1</sup> Motion at 14.

<sup>2</sup> *Id.* at 14-15 (citing GSN Exh. 124).

<sup>3</sup> *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) (“*Tennis Channel*”).

<sup>4</sup> *Id.* at 15.

GSN argues that Dr. Singer's profit sacrifice test is reliable as it rests on Cablevision's own data and is consistent with *Tennis Channel*. GSN states that the *Tennis Channel* decision examined costs to Comcast, a multichannel video programming distributor ("MVPD"), as is Cablevision, in terms of how many subscribers would churn away if it did not carry a network more broadly. *Tennis Channel* did not apply mitigation strategies to this examination, GSN explains, so Dr. Singer's "profit sacrifice test" was made to determine the effect of retiering on Cablevision's bottom line as if the promotion were not offered at all. GSN notes that Cablevision ignores the "sound econometric modeling" applied by Dr. Singer in addition to his "comprehensive citations to the record evidence."<sup>5</sup> GSN then describes several studies that do support Dr. Singer's analysis.<sup>6</sup> Accordingly, GSN asserts that Dr. Singer's assumptions should be challenged on cross-examination, rather than simply being excluded from consideration.

Once qualified as an expert, Dr. Singer can rely on reliable hearsay, accepted economic theory, and with adequate foundation, he is qualified to offer his reasoned opinion; and he should be permitted to do so, but without needless "gadflying."<sup>7</sup> However, Dr. Singer's assumption that every single recipient of the post-retiering promotion would have left Cablevision if that promotion had not been offered seems, without more, to be speculative. At this time, the record is insufficient to determine whether Dr. Singer's assumption has sufficient foundation. The Presiding Judge expects to hear more from Dr. Singer in his direct, cross-examination, and redirect testimony on whether his assumption and conclusions are reliable.

#### *Profit Sacrifice Test – Goodwill*

Cablevision argues that there is no foundation in the record nor any basis in economic theory to support Dr. Singer's conclusion that the complaints received by Cablevision following the retiering of GSN implied a significant loss of goodwill. Cablevision argues that Dr. Singer is attempting to offer an unqualified expert opinion on the accounting concept of goodwill. Comcast alleges that Dr. Singer is not qualified to give any such opinion because he is not an expert in business accounting, he has never offered an expert opinion on goodwill, and he has not considered whether Cablevision's goodwill had been impaired from an accounting perspective by the retiering.<sup>8</sup> Cablevision also contends that Dr. Singer's calculations are not reliable because he fails to cite any evidence as to how Cablevision, the industry, or economists or accountants make such calculations.<sup>9</sup> Cablevision further argues that Dr. Singer fails to offer a basis for his opinion that Cablevision's goodwill loss from subscribers who did not receive the promotion equals the goodwill loss from subscribers who received the promotion,<sup>10</sup> and thus Dr. Singer's conclusion that the retiering resulted in a monthly, recurring loss of Cablevision's goodwill for an undefined period of time is baseless. Therefore, according to Cablevision, Dr. Singer's assumptions should be found to be unreliable and inadmissible.

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<sup>5</sup> Opposition at 8

<sup>6</sup> *Id.* at 8-9.

<sup>7</sup> The same is true for all qualified expert witnesses participating in this proceeding.

<sup>8</sup> Motion at 16 (citing Deposition of Hal Singer Tr. 323:16-22 (March 6, 2015)).

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.*

To the contrary, GSN contends that the figure that Dr. Singer relies on in his goodwill calculation comes from Cablevision's own records<sup>11</sup> and is a reasonable measure of the diminution of goodwill because it measures how much Cablevision was willing to offer as a subsidy to keep complaining customers from churning.<sup>12</sup> GSN also asserts that Dr. Singer did not conclude that Cablevision suffered monthly recurring losses for an unmeasured period of time, but took no position on how long a loss in goodwill Cablevision would experience.<sup>13</sup> Again, GSN asserts that cross-examination of its expert, not exclusion, is the appropriate remedy for testing the reliability of its expert.

It is unclear if there are distinctions between how "goodwill" is used in a business accounting analysis and how Dr. Singer uses the term in his expert testimony as an economist. For instance, while Dr. Singer grounds his goodwill calculation on the willingness of dissatisfied subscribers to tolerate price increases,<sup>14</sup> he fails to posit clearly how that finding relates to his assumption that Cablevision's loss of goodwill equals the cost of its post-retiring promotion as applied to all disaffected Cablevision customers, without regard to whether the promotion was actually received. Dr. Singer also does not explain how the passage of time impacts his assumptions. While GSN contends that Dr. Singer has taken no position on how long lost goodwill would be felt by Cablevision, he treats the value of goodwill loss as an indefinite monthly cost in calculating Cablevision's total costs.<sup>15</sup> There must be a better record to support the Presiding Judge's evidentiary ruling on the assumptions supporting Dr. Singer's goodwill calculation. Therefore, the ruling on Cablevision's objection must await cross-examination and redirect.

#### *Profit Sacrifice Test – Changes in Assumptions*

Cablevision contends that Dr. Singer's "profit sacrifice test" is unreliable because critical assumptions have changed in his analysis without any "principled basis" for doing so.<sup>16</sup> Cablevision cites matters on which it alleges Dr. Singer's opinion has changed since March 2013.<sup>17</sup> Cablevision also notes that Dr. Singer's testimony states in several places that even assuming one of his assumptions is flawed, other assumptions would allow the Presiding Judge to rule in GSN's favor.<sup>18</sup> To the contrary, Cablevision believes that there is no methodology offered that can support such a fluid approach to Dr. Singer's assumptions and that it simply encourages the invention of evidence that would support Dr. Singer's ultimate conclusion. Cablevision asserts that this approach reveals that Dr. Singer's assumptions are unreliable and must be excluded as an unreliable expert opinion under Rule 702 of the Federal Rules of Evidence.<sup>19</sup>

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<sup>11</sup> Opposition at 10 (citing GSN Exh. 294).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> GSN Exh. 301 at 54 ¶ 83.

<sup>15</sup> *See* GSN Exh. 301 at 56 ¶ 84.

<sup>16</sup> Motion at 18.

<sup>17</sup> Motion at 18-19.

<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 19-20.

GSN asserts that Dr. Singer has not changed opinions; he has merely made analyses that meet the evidentiary standard set forth in *Tennis Channel*.<sup>20</sup> GSN believes Dr. Singer's conclusions to be consistent with his analyses, which are based on Cablevision's data.<sup>21</sup> GSN contends that any weaknesses in the assumptions should be tested in the traditional manner of cross-examination and not be excluded outright on a premature evidentiary ruling.

The Presiding Judge agrees with GSN. Dr. Singer has not altered his assumptions in a mercenary way as Cablevision suggests, but notes that the analyses of Dr. Singer have merely changed in scope, not in substance, and are shown by him to be responsive to the evidentiary standards set forth in *Tennis Channel*. The Presiding Judge is aware of Cablevision's concern about possible "wobble room" that Dr. Singer may be attempting to build into his opinion. But exclusion is not justified on that basis. The Presiding Judge believes that he can sort through expert assumptions and can assign each the appropriate weight in reaching conclusions.

#### *Net Profit Sacrifice Test - Relevance*

Cablevision argues that Dr. Singer's "net profit sacrifice test" is irrelevant as a matter of law because it was explicitly rejected in *Tennis Channel*. Cablevision relies on *Tennis Channel* for the proposition that evidence of the net benefit of retiering WE tv and Wedding Central "would in itself have little bearing on the lawfulness" of any decision by Cablevision to retier GSN.<sup>22</sup>

GSN contends that the *Tennis Channel* panel did, in fact, adopt this standard by posing the query of whether "the incremental losses from carrying [the unaffiliated network] in a broad tier would be the same as or less than the incremental losses [the MVPD] was incurring from carrying [affiliated networks] in such tiers."<sup>23</sup> GSN reminds all that Dr. Singer quotes directly from the *Tennis Channel* decision in defending his analysis.<sup>24</sup>

GSN's analysis and argument are convincing. The *Tennis Channel* panel looked at whether Comcast treated Tennis Channel differently based on a reasonable business purpose.<sup>25</sup> As part of that analysis, the panel examined Comcast's hastily prepared cost-benefit analysis. The panel found that it was conceivable that an unaffiliated programming network could demonstrate that an MVPD would benefit from the network's broader carriage where the incremental losses from carrying the unaffiliated programming network in a broad tier would be the same as or less than the incremental losses the MVPD incurred from carrying affiliated networks in such tiers.<sup>26</sup> From this language, it is clear that the panel opened the door for discriminatory treatment to be demonstrated through a comparative retiering analysis. Later in its opinion, the panel again stated its willingness to allow complainants to take a comparative approach, stating that "[i]f accompanied by evidence that (assuming [the affiliated networks] had been on the sports tier at the time of Tennis [Channel]'s proposal in 2009) a shift of them to

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<sup>20</sup> Opposition at 6-7.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> Motion at 20 (citing *Tennis Channel*, 717 F.3d at 986-87).

<sup>23</sup> Opposition at 5-6, 11 (citing *Tennis Channel*, 717 F.3d at 986).

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Tennis Channel*, 717 F.3d at 985.

<sup>26</sup> *Id.* at 986.

broader coverage would have yielded incremental revenue equivalent to what Tennis [Channel] demanded in 2009, *the comparative data might have done the job.*<sup>27</sup> GSN must be permitted to make such a showing here.

Cablevision has failed to place that portion of the panel’s opinion that it cites into context. When the panel asked at oral argument about the lack of evidence of the benefits that would have accrued to Comcast as a result of the tiering change, Commission counsel relied on the Commission’s solution of having Comcast bring its own affiliated networks into tiering parity with Tennis Channel by broadening or narrowing the penetration of all.<sup>28</sup> The panel found that this remedy was not evidence that Tennis Channel would have received a net benefit if carriage was broadened.<sup>29</sup> Narrowing distribution of Comcast’s affiliated networks “*would in itself* have little bearing on the lawfulness of Comcast’s rejection of Tennis [Channel]’s actual proposal to extend distribution of the latter’s content.”<sup>30</sup> In other words, evidence that retiering an affiliated network to a less penetrative tier that is occupied by an unaffiliated network would have a positive financial impact on an MVPD, when considered alone, does not prove that retiering the unaffiliated network to the more penetrative tier occupied by the affiliated network would provide a financial benefit to that MVPD. *Tennis Channel* does not bar the demonstration of impermissible discrimination by comparing the financial impact of retiering similarly situated affiliate networks.

Accordingly, consistent with *Tennis Channel*, Dr. Singer’s “net profit sacrifice test” is relevant to the issues to be heard in this proceeding, and the objection is denied.

#### *Net Profit Sacrifice Test - Reliability*

Cablevision argues that Dr. Singer’s “net profit sacrifice test” is unsupported by fact. It states that Dr. Singer fails to acknowledge that Cablevision could not retier WE tv under its carriage arrangement.<sup>31</sup> Cablevision also asks the Presiding Judge to find that Dr. Singer’s method of cost calculation in considering a hypothetical WE tv retiering is inconsistent with his methods in calculating that same value for the GSN retiering.<sup>32</sup> Cablevision argues that such “cherry-picking” of data should result in the exclusion of Dr. Singer’s opinion on his net profit sacrifice test.

GSN responds that Dr. Singer used reliable facts obtained from Cablevision data in making his calculations. GSN cites the record to support its belief that Cablevision had absolute flexibility to determine its relationship with its affiliated WE tv “with or without a contract.”<sup>33</sup> Cablevision’s objections do not take issue with Dr. Singer’s methodology, GSN argues, but only with his expert conclusions.

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<sup>27</sup> *Id.* at 987 (emphasis added).

<sup>28</sup> *Id.* at 986.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 987 (emphasis added).

<sup>31</sup> Motion at 21.

<sup>32</sup> *Id.*

<sup>33</sup> Opposition at 12-13.

The degree of flexibility that Cablevision has in its carriage arrangements with its affiliated networks is an issue of fact that must be further examined in this case. While the Presiding Judge's findings on this matter may have implications for the weight he assigns to the experts' opinions, he will not allow controversy alone to exclude expert opinion. Further, the Presiding Judge concludes that Dr. Singer's testimony does not "cherry-pick" in the way Cablevision describes. Rather, Dr. Singer's methodology assumes the cost of retiering GSN to be the base cost for retiering WE tv, which he then adjusts by comparing viewer intensity.<sup>34</sup> While there may be other criticisms of his methodology, complaints of "cherry-picking" cannot be among them, since his comparative method utilizes the same factors for both networks. Therefore, this objection to Dr. Singer's testimony is denied.

#### *Recent Singer Opinions and Singer Rebuttal*

Cablevision alleges that Dr. Singer introduces several new opinions into his direct testimony that attempt to buttress his past opinions or to challenge the opinions of Cablevision's experts.<sup>35</sup> Cablevision believes such testimony violates the parties' prehearing scheduling agreement, which did not provide for the filing of rebuttal or supplemental expert reports.<sup>36</sup> Cablevision seeks to have these opinions excluded or, in the alternative, for GSN to be precluded from objecting to any rebuttal that Cablevision may offer at trial.

GSN counters by arguing that Dr. Singer's testimony has been timely submitted in a manner consistent with the expectation of the parties.<sup>37</sup> GSN asserts that Cablevision has responded to Dr. Singer's analyses in the report of its own expert, Dr. Jonathan Orszag. GSN argues that Cablevision had the opportunity to question Dr. Singer at his supplemental deposition earlier this year. GSN also notes that several key reports on which Dr. Singer's recent opinions rely were produced by Cablevision only after Dr. Singer completed his expert report.<sup>38</sup> The characterization of these opinions as "new" is unfounded, GSN asserts, as they were based on data that was unavailable before the report was filed. GSN takes the position that Dr. Singer should not be barred from using discovery that was made available to him during the supplemental discovery period, and that any new testimony only amplified analysis and conclusions that already existed in Dr. Singer's 2014 Supplemental Report.<sup>39</sup>

#### *A Procedural Compromise*

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure provides that expert witnesses must provide a written report to opposing parties that contains a complete statement of all opinions the witness will express and the basis and reasons for them. Although Dr. Singer provided his Rule 26 report to Cablevision in 2014, he did not provide, or seek leave to provide, a rebuttal report. Therefore, the rebuttal arguments that are interspersed within Dr. Singer's testimony arguably may be a surprise and therefore become at risk of exclusion. However, they

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<sup>34</sup> See GSN Exh. 301 at 60 ¶ 91.

<sup>35</sup> Motion at 23.

<sup>36</sup> *Id.*

<sup>37</sup> Opposition at 13.

<sup>38</sup> *Id.* at 9.

<sup>39</sup> *Id.* at 14.

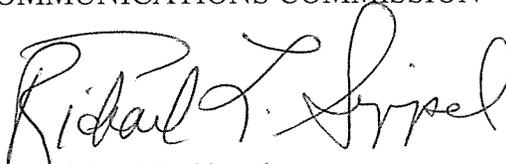
may still be salvaged provided that GSN is correct that these rebuttal arguments do not constitute new analysis but are mere amplification of the opinions expressed in his report.

The Presiding Judge believes such rulings, though at times tricky, can best be made at hearing. At hearing, objections earlier made in writing sometimes can become less worrisome, and are sometimes seen in a different light after cross-examination. As part of cross-examination, Cablevision counsel may specify portions of Dr. Singer's testimony that it believes to be new opinion of which it lacked notice, and GSN may attempt in *voir dire* to show that those opinions appeared in Dr. Singer's 2014 Supplemental Report, or resulted from discovery produced after his report was filed.

In addition, Cablevision's expert witnesses may, by leave of the court, submit their own written rebuttal testimony, provided that written rebuttal testimony consists of only amplifications of earlier opinions that were expressed in prior reports, and that written testimony is submitted and served on counsel at least two hours before the witness takes the stand.

**SO ORDERED.**

FEDERAL COMMUNICATIONS COMMISSION<sup>40</sup>



Richard L. Sippel  
Chief Administrative Law Judge

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<sup>40</sup> Courtesy copies sent to counsel *via* email on date of issuance.