**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Game Show Network, LLC, | ) | MB Docket No. 12-122 |
| Complainant | ) | |
| | ) | File No. CSR-8529-P |
| v. | ) | |
| | ) | |
| Cablevision Systems Corp., | ) | |
| Defendant | ) | |
| | ) | |

## MEMORANDUM OPINION AND ORDER

**Adopted: July 13, 2017** **Released: July 14, 2017**

By the Commission: Commissioner O'Rielly issuing a statement; Commissioner Clyburn dissenting and issuing a statement.

## TABLE OF CONTENTS

## I. INTRODUCTION

1. This proceeding arises from a program carriage complaint filed by Game Show Network, LLC (GSN) against Cablevision Systems Corp. (Cablevision).[1] GSN is a video programming vendor that is co-owned by Sony Pictures Entertainment, Inc. and DirecTV (now AT&T).[2] Cablevision is a multichannel video programming distributor (MVPD), and it is not affiliated with GSN. In its complaint, GSN alleges that Cablevision discriminated against it on the basis of affiliation (or, more specifically, non-affiliation) in violation of the Communications Act.

2. As part of its case, GSN alleges that it is similarly situated to two cable networks—namely, WE tv and Wedding Central—which are women-oriented networks that were affiliated with Cablevision, and that Cablevision treated GSN differently than those two networks in violation of FCC rules. In particular, Cablevision changed distribution of GSN from its expanded basic programming tier to a less widely distributed premium sports tier to save on programming costs. Cablevision did not move WE tv or Wedding Central, and GSN argues, among other things, that Cablevision's decision to treat GSN differently than WE tv and Wedding Central violated federal law.

3. On November 23, 2016, the FCC's Administrative Law Judge (ALJ) issued an initial decision that granted GSN's program carriage complaint. On January 3, 2017, Cablevision appealed the ALJ's *Initial Decision* to the full Commission, and we now review that determination *de novo*. Applying this standard, we reverse the *Initial Decision*, and we deny the complaint.

4. First, we agree with the views expressed in 2015 by the staff of the FCC's Enforcement Bureau that GSN did not produce any direct evidence of unlawful, affiliation-based discrimination. Second, we again agree with the Enforcement Bureau's view that Cablevision did not make out a case based on circumstantial evidence because it failed to establish that GSN was similarly situated to the two women-oriented networks (WE tv and Wedding Central). Third, as an independent basis for denying the complaint, we find that granting GSN relief would not be consistent with the D.C. Circuit's *Tennis Channel* precedent.[3] There, the court indicated that a network bringing a program carriage complaint must show that the requested carriage would have offered some net benefit to the MVPD. Here, as explained below, we find that GSN has failed to make this showing.

5. In addition to deciding these issues, we also take this opportunity to provide a clarification, as set forth below, regarding the FCC rules that apply to the effective date of an ALJ's initial decision in a program carriage case.

## II. BACKGROUND

6. Section 616 of the Communications Act requires the Commission to establish regulations governing program carriage agreements and related practices between multichannel video programming distributors (MVPDs) and video programming vendors.[4] Section 76.1301(c) of the Commission's implementing rules prohibits an MVPD from "discriminating in video programming distribution on the

[1] *Game Show Network, LLC v. Cablevision Sys. Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 31 FCC Rcd 13841, 13842, para. 1 (2016) (*Initial Decision*).

[2] *Id.* at 13846, para. 11.

[3] *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 984 (D.C. Cir. 2013) (*Tennis Channel*) (vacating Commission's decision granting Tennis Channel's program carriage complaint because the Commission had "failed to identify adequate evidence of unlawful discrimination").

[4] 47 U.S.C. § 536.

basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors" where the effect of such conduct is "to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly."[5]

7. GSN, which launched in 1994 as Game Show Network and rebranded as GSN in 2004, provides a variety of game-show programming.[6] Cablevision is a vertically-integrated MVPD that, at the time of the complaint in this case, owned several cable networks through its subsidiary Rainbow Holdings.[7] Two of those networks were WE tv, which launched in 1997 as Romance Classics, relaunched in 2001 as WE: Women's Entertainment, and was renamed WE tv in 2006; and Wedding Central, which launched in August 2009 as a spin-off of WE tv providing wedding-themed programming, but which shut down on June 30, 2011.[8]

8. Cablevision began carrying GSN in 1997, and their carriage agreement was renewed several times until the last agreement expired on {{ }}.[9] The agreement was not renewed because GSN was requesting a higher license fee and Cablevision was requesting a {{ }}.[10] Although the parties could not agree on the terms of a renewed contract, Cablevision continued to carry GSN for a number of years, paying the same monthly license fee as under the expired agreement, until notifying GSN in December 2010 that it had decided to move GSN from its widely-distributed expanded basic tier to its narrowly-distributed premium sports tier, which had a separate cost to subscribers of $6.95/month.[11] A Cablevision executive notified GSN that "fees and ratings performance" led to the retiering decision.[12] Despite contacts between the two companies, and an attempted intervention by Sony, the retiering took effect on February 1, 2011, more than {{ }} after the expiration of the most recent carriage agreement between the parties.[13]

9. On October 12, 2011, GSN filed a program carriage complaint against Cablevision alleging discrimination in violation of Section 616 after Cablevision moved GSN from its widely-distributed expanded basic tier (iO Family) to the narrowly-distributed premium sports tier (Sports Pak) that required subscribers to pay an additional fee.[14] On May 9, 2012, the Media Bureau released its *Hearing Designation Order* (*HDO*), finding significant and material questions of fact warranting resolution at hearing.[15] The Media Bureau first found that GSN had met the standard for establishing a *prima facie* case of discrimination and that its complaint complied with the applicable program carriage

[5] 47 C.F.R. § 76.1301(c).

[6] *Initial Decision*, 31 FCC Rcd at 13845, para. 10.

[7] *Id.* at 13847, para. 13.

[8] *Id.* at 13848-49, paras. 15-16.

[9] *Id.* at 13851-52, paras. 21-22.

[10] *Id.* at 13852-53, paras. 22-23.

[11] *Id.* at 13850, 13853, 13863, paras. 18, 24, 40.

[12] *Id.* at 13863, para. 40.

[13] *Id.* at 13863-67, paras. 40-44.

[14] *See id.* at 13842-43, 13850, paras. 1-2, 18.

[15] *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hearing Designation Order, 27 FCC Rcd 5113 (MB 2012) (*Hearing Designation Order* or *HDO*); *see Initial Decision*, 31 FCC Rcd at 13843, para. 3 (discussing the *HDO*).

statute of limitations, and did not designate questions on those issues for the hearing.[16] The Media Bureau then designated the following issues for hearing: (1) whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation, and (2) in light of the evidence adduced pursuant to the foregoing issue, whether Cablevision should be required to carry GSN on its cable systems on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof, and/or whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate.[17]

10. Following discovery and a long period of abeyance related to the 2013 appeals court decision in another program carriage complaint case,[18] a hearing was conducted from July 7, 2015, through July 20, 2015.[19] Five witnesses testified on behalf of GSN, and seven witnesses testified on behalf of Cablevision.[20] Each testifying witness was cross-examined, and approximately 1,000 documentary exhibits were received into evidence.[21] After the trial concluded, the Enforcement Bureau, which had been a party to the proceeding, urged the ALJ to deny GSN's carriage complaint. The Enforcement Bureau stated that "GSN has not produced any direct evidence of unlawful affiliation-based discrimination" nor has it "satisfied the first prong of the circumstantial evidence test" by showing that GSN and Cablevision's affiliated networks were similarly situated.[22] The Enforcement Bureau recommended a "decision finding that Cablevision has not violated Section 76.1301(c) of the Commission's rules."[23]

11. On November 23, 2016, Judge Sippel issued an *Initial Decision* with findings of fact and conclusions of law. The *Initial Decision* found that GSN is a national "female-targeted" general entertainment cable network that Cablevision moved from a broadly penetrated expanded basic tier to a narrowly penetrated premium sports tier that required Cablevision subscribers to pay an additional fee.[24] The *Initial Decision* concluded that the retiering of GSN on the premium sports tier was based on GSN's non-affiliation, and that Cablevision's asserted business justifications for the move were "pretextual."[25]

12. At the time of GSN's retiering, Cablevision was affiliated with several cable networks, including three movie channels (AMC, IFC, Sundance) and two female-targeted general entertainment

[16] *HDO*, 27 FCC Rcd at 5113-14, para. 2.

[17] *Id.* at 5136-37, para. 39.

[18] *Tennis Channel*, 717 F.3d 982.

[19] *See Initial Decision*, 31 FCC Rcd at 13844-45, paras. 6-7.

[20] *Id.* at 13844, para. 7.

[21] *Id.* at 13845, para. 7.

[22] Enforcement Bureau, Comments, MB Docket No. 12-122; File No. CSR-8529-P, para. 14 (Oct. 15, 2015) (Enforcement Bureau Comments).

[23] *Id.* at para. 31.

[24] *Initial Decision*, 31 FCC Rcd at 13843, 13845, paras. 2, 10.

[25] *Id.* at 13886-88, 13894, paras. 78-83, 101.

networks (WE tv and Wedding Central).[26] WE tv is a national network, and Wedding Central never had more than approximately 4 million subscribers on three MVPDs including Cablevision.[27] The ALJ concluded that GSN, WE tv, and the discontinued Wedding Central were similarly situated "women's networks," but that GSN was treated differently from the other two on the basis of its non-affiliation with Cablevision.[28]

13. At the time of GSN's retiering, Cablevision distributed none of its affiliated networks on its premium sports tier.[29] Cablevision also distributed no general entertainment network on the premium sports tier, distributing only sports and sports-related networks on that tier.[30] At the time of the hearing, GSN remained the only general entertainment network that Cablevision had ever distributed on its premium sports tier.[31]

14. The *Initial Decision* rejected Cablevision's assertions that it had executed the retiering decision because it was facing "higher programming costs" and GSN was a "weak and unpopular network" that was out of contract.[32] The *Initial Decision* found that "carriage of GSN on the expanded basic tier accounted for only one-quarter of 1 percent of the 2011 programming budget," and that Cablevision's asserted need to reduce programming costs due to "'pressures from retransmission consent fees, skyrocketing rights fees for important sports programming, and programming network bundling practices'" had "nothing to do with the continued carriage of GSN on the expanded basic tier."[33] The *Initial Decision* found that Cablevision "tagged GSN for retiering because GSN had an expired carriage agreement with Cablevision."[34] The *Initial Decision* found, based on testimonial evidence, that Cablevision "considered retiering only non-affiliated networks having expired or expiring contracts," and "no consideration was given by Cablevision to retiering any of its affiliated networks."[35]

15. On the second element of harm, the *Initial Decision* concluded that the retiering of GSN on the premium sports tier "significantly and negatively impacted GSN's advertising and license fee revenue" and unreasonably restrained GSN's ability to compete fairly against other female-targeted networks, including similarly-situated WE tv, a Cablevision affiliate.[36] The *Initial Decision* found that GSN and WE tv "primarily sold advertising based on the same target demographics, and in large part, to the same targeted advertisers."[37] At the time of Cablevision's retiering conduct in November 2010, GSN

[26] *Id.* at 13847-49, paras. 13, 15-16. Other affiliated networks of Cablevision included the general entertainment network Fuse, local sports networks MSG, MSG Plus, and MSG Varsity (MSG refers to Madison Square Garden, a sports venue in New York), and local news network News 12. *Id.* at 13850, para. 19.

[27] *Id.* at 13848-49, paras. 15-16.

[28] *Id.* at 13871, 13894-95, paras. 50, 101-02.

[29] *Id.* at 13851, para. 20.

[30] *Id.*

[31] *Id.*

[32] *See id.* at 13886-88, paras. 78, 80, 82.

[33] *Id.* at 13896, para. 105.

[34] *Id.* at 13894, para. 101.

[35] *Id.*

[36] *Id.* at 13889, para. 87.

[37] *Id.* at 13900, para. 111.

was distributed to approximately 73.5 million subscribers nationwide.[38] The retiering cost GSN less than 4 percent of its total subscribers (or 96 percent of its Cablevision subscribers), which the *Initial Decision* determined translated to approximately {{ }} less in annual subscriber fees and approximately {{ }} less in annual advertising revenue (3 percent).[39] The *Initial Decision* also found that the retiering restrained GSN's ability to compete in the New York market and, by extension, to compete nationally for advertisers.[40]

16. The ALJ issued a forfeiture to Cablevision in the maximum amount of $400,000 and ordered Cablevision to "proceed as soon as practicable with remediation . . . and forfeiture payment."[41] Cablevision was ordered to "cease engaging in its unlawful discriminatory conduct, and restore its carriage of GSN to the expanded basic tier."[42] In order to remedy its unlawful retiering, the ALJ concluded that Cablevision must carry GSN on the expanded basic tier (or the current or future tier that has 90 percent or more penetration) and at the existing license rate, until such time as the parties enter into a new carriage agreement or for a period of five years, whichever occurs first.[43] The *Initial Decision* noted that such discriminatory conduct has restrained GSN's ability to compete fairly since 2011, "a period that is more than five years and still running."[44]

17. The *Initial Decision* stated that it "shall become effective . . . 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion."[45]

18. On December 8, 2016, GSN filed a Petition to Compel Compliance with Initial Decision, requesting the Commission to order immediate compliance with the *Initial Decision*.[46] GSN states that the ALJ ordered Cablevision to restore GSN to its expanded basic tier "as soon as practicable," and that his focus on speedy remediation is consistent with the congressional intent underlying Section 616 enforcement and mandated by Commission rules that contemplate expeditious implementation of Section 616 remedies.[47] GSN states that Cablevision nonetheless has made clear that it does not intend to comply.[48]

19. On December 23, 2016, Cablevision filed an application for review of the Media Bureau's determination that GSN had filed its carriage complaint within the statute of limitations in the

[38] *Id.* at 13846, para. 10.

[39] *Id.* at 13901-02, para. 115.

[40] *Id.*

[41] *Id.* at 13904-05, paras. 124, 126.

[42] *Id.* at 13903, para. 118.

[43] *Id.* at 13903, para. 119.

[44] *Id.* at 13904, para. 120.

[45] *Id.* at 13905, para. 126 n.534 (citing 47 C.F.R. § 1.276).

[46] Game Show Network, LLC, Petition to Compel Compliance with Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P, at 6 (filed Dec. 8, 2016) (Petition to Compel).

[47] *Id.* at 1.

[48] *Id.*

Commission's rules,[49] an issue that was not further addressed by the hearing or in the *Initial Decision*.[50]

20. On January 3, 2017, Cablevision responded to GSN's Petition to Compel with an Opposition and with its separate Petition to Stay the *Initial Decision*.[51] Cablevision argues that: (1) the *Initial Decision* does not require immediate compliance by Cablevision, (2) requiring immediate compliance would violate the Administrative Procedure Act (APA) and the Due Process Clause, and (3) the status quo will not harm GSN pending Cablevision's appeal of the *Initial Decision* to the Commission.[52] In its Petition to Stay, Cablevision asserts that: (1) it is likely to succeed on the merits of its Exceptions and Application for Review, (2) Cablevision will suffer irreparable injury absent a stay, (3) the status quo will not harm GSN, and (4) the public interest favors a stay.[53]

21. On January 3, 2017, Cablevision also filed five exceptions to the *Initial Decision*:

I. The ALJ's conclusion that GSN proved discrimination through "direct evidence" is based on a misapplication of the legal standard and significant factual errors and omissions.

II. The ALJ failed to apply controlling precedent from the Commission and the D.C. Circuit's *Tennis Channel* decisions.

III. The ALJ's finding that GSN was "similarly situated" to Cablevision's affiliated networks is based on a misapplication of the legal standard and significant factual errors and omissions.

IV. The ALJ had no legal or factual basis to conclude that GSN has been "unreasonably restrained in its ability to compete fairly."

V. The ALJ's mandatory carriage order violates the First Amendment.[54]

22. On Jan. 13, 2017, GSN filed replies to Cablevision's Exceptions and to Cablevision's

[49] Cablevision Sys. Corp., Application for Review of the Hearing Designation Order, MB Docket No. 12-122; File No. CSR-8529-P (filed Dec. 23, 2016) (Application for Review). GSN filed an opposition to the Application for Review on Jan. 9, 2017. Game Show Network, LLC, Opposition to Application for Review of the Hearing Designation Order, MB Docket No. 12-122; File No. CSR-8529-P (filed Jan. 9, 2017) (Opposition to Application for Review).

[50] *Initial Decision*, 31 FCC Rcd at 13843-44, para. 4. Even though the *HDO* was released in May 2012, by Commission rule, consideration of any application for review of the *HDO* is deferred until the date for filing exceptions to the *Initial Decision*, which was in January 2017. 47 C.F.R. § 1.115(e)(3) ("Applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission."); *HDO*, 27 FCC Rcd at 5114, para. 2 n.5.

[51] Cablevision Sys. Corp., Opposition to GSN's Petition to Compel Compliance with the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (filed Jan. 3, 2017) (Opposition to Petition to Compel); Cablevision Sys. Corp., Petition to Stay the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (filed Jan. 3, 2017) (Petition to Stay).

[52] Opposition to Petition to Compel at 1-4.

[53] Petition to Stay at i-iv.

[54] Cablevision Sys. Corp., Exceptions to the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (Jan. 3, 2017) (Exceptions).

Opposition to Petition to Compel, as well as an opposition to Cablevision's Petition to Stay.[55] On Jan. 23, 2017, Cablevision filed a request for oral argument on its Exceptions[56] and a motion for acceptance of its Response in Further Support of its Exceptions, in which it argues that GSN raised five new issues in its Reply to Exceptions.[57] GSN filed an opposition to Cablevision's motion on Feb. 2, 2017.[58]

## III. STANDARD OF REVIEW

23. We review the ALJ's *Initial Decision de novo*.[59] However, we accord deference to the ALJ's credibility determinations.[60]

24. GSN argues that the credibility determinations on which the *Initial Decision* is grounded should not be overturned unless the Commission finds that the Presiding Judge's determinations were clearly erroneous.[61] Our analysis in this case generally does not involve revisiting specific credibility

[55] Game Show Network, LLC, Reply to Cablevision's Exceptions to the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (filed Jan. 13, 2017) (Reply to Exceptions); Game Show Network, LLC, Reply in Support of Petition to Compel Compliance with Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (filed Jan. 13, 2017) (Reply in Support of Petition to Compel); Game Show Network, LLC, Opposition to Cablevision's Petition to Stay the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (filed Jan. 13, 2017) (Opposition to Petition to Stay).

[56] Letter from Jay Cohen, Counsel for Cablevision Systems Corp., to the Federal Communications Commission, MB Docket No. 12-122, File No. CSR-8529-P (filed Jan. 23, 2017); *see* 47 C.F.R. § 1.277(c) ("If exceptions have been filed, any party may request oral argument not later than five days after the time for filing replies to the exceptions has expired. The Commission or delegated authority, in its discretion, will grant oral argument by order only in cases where such oral presentations will assist in the resolution of the issues presented.").

[57] Cablevision Sys. Corp., Motion for Acceptance of Cablevision Systems Corp.'s Response in Further Support of its Exceptions to the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (Jan. 23, 2017).

[58] Game Show Network, LLC, Opposition to Cablevision's Motion for Acceptance of its Response in Further Support of its Exceptions to the Initial Decision, MB Docket No. 12-122; File No. CSR-8529-P (filed Feb. 2, 2017).

[59] *See Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C.*, 27 FCC Rcd 8508, 8509, 8522, 8543, paras. 2, 35, 91 (2012) (*Tennis Channel MO&O*) (vacating the presiding judge's equitable channel placement remedy in a program carriage complaint case on *de novo* review after concluding that the record did not sufficiently establish that Tennis Channel's ability to compete fairly was unreasonably restrained by its channel placement), *vacated on other grounds*, *Tennis Channel*, 717 F.3d at 987; *Imposition of Forfeiture Against Capitol Radiotelephone Inc. d/b/a Capitol Paging*, 11 FCC Rcd 2335, 2342 (Rev. Bd. 1996) (*Capitol Radiotelephone*) (granting exception to Initial Decision in hearing case following *de novo* review of the record).

[60] *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 26 FCC Rcd 8971, 8983, para. 39 (2011); *Applications of WIOO, Inc. Carlisle, Pennsylvania for Renewal of License*, 95 FCC 2d 974, 989 (1983) ("The Commission has consistently held that '[a]bsent abuse of discretion by the Judge or the existence of facts bearing on character disqualification of the witnesses which make unnecessary reliance by the Judge upon the witnesses' demeanor, we will not . . . substitute our judgment concerning the credibility of the witness for that of the trier of fact.'") (quoting *Radio Carrollton*, 52 FCC 2d 1173, 1180 (1975), *remanded on other grounds sub nom. Faulkner Radio, Inc. v. FCC*, 557 F.2d 866 (D.C. Cir. 1977).

[61] Reply to Exceptions at 5 (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989) (noting that "credibility determinations are reviewed under the clearly-erroneous standard"); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499-500 (1984) (same)); *see also* Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

findings in the *Initial Decision*. Rather, our reversal of the *Initial Decision* in this case is based on instances where we disagree that the conclusions of law follow from the factual findings that have been made. As such, while we consider the record of this case as a whole, our decision is not premised on undoing critical determinations of credibility of individual witnesses.

## IV. DISCUSSION

25. We reverse the *Initial Decision* and deny GSN's complaint against Cablevision because we conclude that GSN has not proven that Cablevision took an adverse carriage action against it on the basis of affiliation or non-affiliation. The record as a whole indicates that Cablevision's action in choosing to distribute GSN on a premium sports tier rather than more broadly on its expanded basic tier was based on legitimate business reasons rather than on the basis of GSN's non-affiliation. We conclude that GSN has not ultimately proven through direct or circumstantial evidence that Cablevision's adverse carriage action was based on its non-affiliation with Cablevision, and that Cablevision's asserted business reasons were legitimate and non-discriminatory.[62] We also provide a reminder regarding the effective date of staff decisions ordering remedies in program carriage adjudications.

### A. GSN Has Failed to Show Program Carriage Discrimination Based on Non-affiliation

26. To establish a *prima facie* case of discrimination on the basis of affiliation, a programming vendor must show (1) that the defendant MVPD discriminated against it on the basis of affiliation or non-affiliation and (2) that the effect of this conduct was to unreasonably restrain its ability to compete fairly.[63] In order for a program carriage case to proceed to discovery and a possible evidentiary hearing, the complaint must be accompanied by evidence sufficient for the Media Bureau to conclude, without yet considering any evidence to the contrary, that the complainant has met the *prima facie* standard.[64] The Commission has "emphasize[d]," however, that "a Media Bureau finding that a complainant has established a *prima facie* case does not mean that the complainant has proven its case or any element of its case on the merits."[65] Rather, "although the Media Bureau may find that a complaint contains sufficient evidence to establish a *prima facie* case . . . thus allowing the case to proceed, the adjudicator when ruling on the merits may reach an opposite conclusion after conducting further proceedings and developing a more complete evidentiary record."[66]

27. We conclude that GSN has failed to establish program carriage discrimination in violation of the Commission's rules because it has failed to show through either direct evidence or

[62] Because we deny GSN's complaint based on the record developed in this case, we do not address Cablevision's alternative argument that the Media Bureau erred by finding that GSN had filed its complaint in compliance with the Commission's statute of limitations regarding program carriage complaints. *See* Application for Review at 1 (asserting that complaint was untimely because it was filed "almost a decade" after carriage agreement between the parties); *HDO*, 27 FCC Rcd at 5121-25, paras. 12-16 ("It is [the] allegedly discriminatory act of repositioning of GSN, not the terms of the contract, which forms the basis for GSN's complaint.").

[63] 47 C.F.R. § 76.1302(d)(3)(iii); *see also Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 26 FCC Rcd 11494, 11502-05, paras. 11-15 (2011) (*2011 Program Carriage Order*).

[64] *See 2011 Program Carriage Order*, 26 FCC Rcd at 11502, para. 10 (explaining that the threshold showing of a *prima facie* case "is important to dispose promptly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings").

[65] *Id.* at 11505, para. 16.

[66] *Id.* at 11506, para. 16.

circumstantial evidence that Cablevision discriminated against it based on affiliation or non-affiliation. Although the *Initial Decision* concluded that there was direct evidence of discrimination, we reverse that conclusion because GSN has not adduced documentary, testimonial, or any other evidence which states directly—that is, without further inference or presumption—that the adverse carriage decision at issue was based on GSN's non-affiliation with Cablevision. We also conclude that GSN has failed to demonstrate through circumstantial evidence that Cablevision's decision to distribute GSN on a premium sports tier was based on affiliation or non-affiliation because we find that the Commission's circumstantial evidence test has not been met in this case. Because GSN has not shown through direct or circumstantial evidence that Cablevision discriminated against it on the basis of non-affiliation when it repositioned GSN, we do not reach the question whether Cablevision's retiering decision had the effect of unreasonably restraining GSN's ability to compete.

### 1. GSN Has Failed to Demonstrate Discrimination Through Direct Evidence

28. The Commission's direct evidence standard permits a complainant to establish that a defendant discriminated in video programming distribution on the basis of affiliation or non-affiliation through "documentary evidence or testimonial evidence" that supports its claim.[67] In the *2011 Program Carriage Order*, the Commission gave the following examples of the types evidence that could support a *prima facie* case of discrimination based on affiliation or non-affiliation under the Commission's direct evidence standard: (1) an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the programming vendor because it is not affiliated with the MVPD; and (2) an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD.[68]

29. The *Initial Decision* concluded, based on the preponderance of the evidence, that GSN had met its burden of proving discrimination on the basis of non-affiliation by direct evidence and by circumstantial evidence.[69] With regard to direct evidence, the *Initial Decision* concluded that GSN proved discrimination with "Cablevision's admissions and other proof as to how Cablevision treats GSN and its affiliated networks differently in the terms and conditions of carriage."[70] Additionally, the *Initial Decision* concluded that certain Cablevision's admissions—for example, that there was nothing GSN could do to reverse the retiering decision—were statements showing a discriminatory intent.[71] The *Initial Decision* found that GSN had proven that Cablevision, in its retiering decision, considered retiering only non-affiliated networks having expired or expiring contracts, and that no consideration was given by Cablevision to retiering any of its affiliated networks, including those that also had expired or expiring agreements.[72]

30. Cablevision argues that the *Initial Decision* has not properly applied the Commission's direct evidence standard.[73] Cablevision states, and GSN agrees, that direct evidence is evidence that on

[67] 47 C.F.R. § 76.1302(d)(3)(iii)(B)(1).

[68] *2011 Program Carriage Order*, 26 FCC Rcd at 11503-04, para. 13.

[69] *Initial Decision*, 31 FCC Rcd at 13893, para. 99.

[70] *Id.* at 13893, para. 100.

[71] *Id.* at 13893, para. 100 n.444.

[72] *Id.* at 13894, para. 101.

[73] Exceptions at 5-8.

its face clearly shows that a decision was based on affiliation (or non-affiliation), without requiring any inference or presumption.[74] This is in contrast to circumstantial evidence, which does require an inferential step to conclude that the decision was made on the basis of affiliation or non-affiliation.

31. The Commission's examples of direct evidence in the *2011 Program Carriage Order* support Cablevision's argument. Cablevision asserts that the Commission's direct evidence standard was not met because "no document or testimony in the record reflects that Cablevision acted because of GSN's non-affiliation or the objective to protect its affiliated networks."[75] In the *2011 Program Carriage Order*, the Commission provided examples of an email from the MVPD, or an affidavit from the programming vendor recounting a statement by the MVPD, showing on their face that the MVPD took an adverse carriage action against the video programming vendor *because* it was not affiliated with the MVPD.[76] In the email example, no further inference needs to be drawn to establish discrimination because the email itself establishes a causal relationship between the adverse carriage action and the fact that the vendor was non-affiliated with the MVPD. Likewise, in the affidavit example, no further inference needs to be drawn because, if the factfinder accepts the testimony as true, the purported statement by the MVPD establishes a causal relationship between the adverse carriage action and the fact that the vendor was not affiliated with the MVPD.

32. In the case at hand, GSN argues that Cablevision only considered retiering non-affiliated networks, and did not consider retiering affiliated networks.[77] But evidence that Cablevision did not consider retiering some other channels does not, without further inferences, establish why Cablevision decided to retier GSN; it therefore does not constitute direct evidence that the reason that Cablevision decided to retier GSN was its non-affiliation (as opposed to other factors). Unlike the two examples of direct evidence in the *2011 Program Carriage Order*, the evidence here does not on its face establish that the reason that the MVPD took an adverse carriage action was that the programming vendor was not affiliated with the MVPD, but instead leaves open the question of why GSN was subject to retiering in this instance.

33. This is consistent with the Commission's approach in the *Tennis Channel MO&O*, in which the Commission treated evidence that the MVPD treated its affiliated networks as "siblings," and gave them "greater access to some degree" and "a different level of scrutiny" compared to non-affiliated networks, as *circumstantial* evidence of discrimination rather than *direct* evidence.[78] If evidence that an MVPD generally looks favorably upon its affiliates were instead treated as direct evidence, without any showing that such a policy was the reason for a particular adverse carriage action, then such MVPDs would be subject to litigation and potential liability *any time* they take an adverse carriage action against a

[74] Reply to Exceptions at 8 ("Cablevision and GSN agree that 'direct evidence' of discrimination is evidence that, if true, requires no 'inferential leap' in order for a court to find discrimination."); *see also* Enforcement Bureau Comments at para. 15 ("[D]irect evidence of affiliation-based discrimination usually consists of specific evidence clearly showing that an MVPD took an adverse carriage action against a programming vendor because it is not affiliated with the MVPD or to benefit affiliated networks, such as an email or other documents reflecting the relevant carriage negotiations.").

[75] Exceptions at 7.

[76] *2011 Program Carriage Order*, 26 FCC Rcd at 11503-04, para. 13.

[77] Reply to Exceptions at 3-4; *see also Initial Decision*, 31 FCC Rcd at 13894, para. 101.

[78] *Tennis Channel MO&O*, 27 FCC Rcd at 8525-26, 8533, 8536, paras. 46, 49, 69, 75; *see also Initial Decision*, 31 FCC Rcd at 13879, para. 64 n.325 (recognizing that "there was no direct evidence of discrimination in *Tennis Channel*," notwithstanding the testimony that the MVPD there looked more favorably upon its corporate siblings).

non-affiliate, even when it is clear that the particular action at issue was taken for other reasons unrelated to affiliation. The D.C. Circuit rejected that approach in its decision in *Tennis Channel*, holding that evidence of the MVPD's general favoritism toward its affiliates was insufficient to support a program carriage complaint when the record indicated that the adverse carriage decision was made based on "a straight up financial analysis."[79]

34. This approach is further supported by examples from other types of discrimination cases.[80] The Commission has stated that in defining discrimination under section 616, the Commission relies on "the extensive body of law addressing discrimination in normal business practices."[81] Cablevision notes that the Commission's framework for evidentiary standards aligns with the standards under federal antidiscrimination law, where direct evidence that a decision was made "because of" an impermissible factor would be an admission by the decisionmaker showing discriminatory intent.[82] Thus, direct evidence that a carriage decision was "based on" affiliation or non-affiliation would be a statement, email, or other admission from an MVPD stating on its face that a carriage action was taken because a video programming vendor was or was not affiliated with the MVPD.

35. The Enforcement Bureau agreed with Cablevision in comments filed at the end of the hearing: "There is no smoking gun in the record. GSN has adduced no evidence that shows, on its face, that Cablevision discriminated against GSN based on affiliation. Accordingly, the Bureau recommends to the Presiding Judge that he find that GSN has not demonstrated affiliation-based discrimination through direct evidence."[83]

36. GSN asserts that Cablevision's purported admissions that it applied a different set of rules to GSN than it did to its affiliates, along with GSN's subsequent retiering, are "the essence of direct evidence of discrimination."[84] GSN points to discrimination cases indicating that an admission of the application of an existing policy which itself constitutes discrimination is direct evidence of discrimination.[85] In arguing that "[p]recisely such direct evidence existed here," GSN cites "direct admissions" by Cablevision that it applied rules to GSN that it never applied to its affiliates, solely on the basis of its non-affiliation, and argues that such an apparent policy of systematic discrimination provides ample direct evidence because it "leaves the finder of fact with no conclusion but that the action was discriminatory."[86]

37. GSN cites as an example findings by the ALJ that contractual negotiations between Cablevision's programming affiliate and MVPD sides were not conducted at arm's length, which meant

[79] *Tennis Channel*, 717 F.3d at 984, 985-86.

[80] Exceptions at 6-7.

[81] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2645, para. 7 n.6 (*1993 Program Carriage Order*) (quoting House Report).

[82] Exceptions at 6-7

[83] Enforcement Bureau Comments at para. 18.

[84] Reply to Exceptions at 7.

[85] *Id.* at 9.

[86] *Id.*

that Cablevision executives could not "walk away" from an affiliate during contract negotiations.[87] By contrast, GSN was left without a contract, which allowed it to be retiered.[88] At most, this would be evidence that GSN was treated differently than affiliates with respect to contract negotiations, which might be part of a circumstantial evidence case, but it is not direct evidence that Cablevision decided to retier GSN because it was non-affiliated rather than for other reasons. As Cablevision states, uneven treatment of similarly situated entities "is the test for a circumstantial case, not a direct one."[89]

38. GSN also states that Cablevision admitted never considering retiering or dropping an affiliate from carriage at the time it decided to retier GSN.[90] Again, this would be evidence that GSN was treated differently than affiliates and could be part of a circumstantial evidence analysis, but it does not constitute direct evidence that the reason Cablevision decided to retier GSN was that it was not an affiliate.[91] Similarly, claims that Cablevision applied a test of "must have" programming to GSN and not

[87] *Id.* at 10-11 (citing *Initial Decision*, 31 FCC Rcd at 13894, para. 101).

[88] Reply to Exceptions at 11. It is simply not credible, as GSN asserts, that Cablevision "refused to meaningfully negotiate with GSN over a new contract," then later used the absence of a contract to "justify retiering GSN." *Id.* GSN remained out of contract for nearly {{ }}, during which time Cablevision continued to pay monthly license fees, and as the *Initial Decision* notes, Cablevision could have unilaterally dropped GSN from carriage at any time because it had no contractual obligation and was carrying it at will. *Initial Decision*, 31 FCC Rcd at 13902, para. 118 ("On two occasions, Cablevision considered but rejected a legitimate business option to unilaterally drop its carriage of GSN."); *see also id.* at 13853, para. 24 ("As of the date of the hearing in July 2015, Cablevision had carried GSN at-will at the {{ }} license rate for {{ }}, and continues to do so."). The *Initial Decision* states that "GSN had an expired carriage agreement for an extended time but, to GSN's detriment, Cablevision would not realistically negotiate a new one," *id.* at 13893, para. 97, but this is at odds with specific findings that the impasse over a renewal was based on the negotiating positions of both sides. *See, e.g.*, *id.* at 13898, para. 108 n.491 ("[T]he preponderance of the evidence shows that the parties' negotiations reached an impasse because GSN was seeking a higher license rate while Cablevision would not consider *any increase to the existing rate* that was unaccompanied by {{ }}.") (emphasis in original). It is also inconsistent with the Commission's policy, cited in the same paragraph, that our program carriage regulations must strike a balance that proscribes behavior prohibited by the statute, "but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations." *1993 Program Carriage Order*, 9 FCC Rcd at 2648, para. 14.

[89] Exceptions at 8.

[90] Reply to Exceptions at 3-4, 11. GSN further states that Cablevision had a "practice of admittedly *never* considering retiering or dropping an affiliate," citing various passages from the *Initial Decision*. *Id.* at 11. But the *Initial Decision* did not find that Cablevision had an official policy or practice of never retiering affiliates; it found only that Cablevision did not consider retiering any of its affiliated networks at the time it decided to retier GSN. *See, e.g.*, 31 FCC Rcd at 13894, para. 101. There are many reasons why Cablevision might not have considered retiering any affiliated networks at that time, including that many affiliates had existing carriage agreements which did not permit retiering and that Cablevision may not have been aware of a business case for retiering any affiliates with expiring agreements. And insofar as one witness testified that Cablevision believed itself to be powerless to ever retier an affiliated network, the ALJ found this testimony "not credible because it is contradicted by substantial evidence." *Id.* In any event, any evidence that affiliated networks could never be retiered still would not be *direct* evidence, because it would not on its face establish that the reason Cablevision decided to retier GSN was its non-affiliation rather than other reasons (such as legitimate business considerations), and instead should be considered as *circumstantial* evidence under the Commission's evidentiary framework.

[91] It appears that the only affiliated networks that could have been considered for retiering, {{

}}, were AMC, IFC, and Sundance. *See Initial Decision*, 31 FCC Rcd at 13858-59, para. 33 n.148. GSN has not argued that there was any business case for Cablevision to consider retiering those networks, and thus the evidence leaves open the possibility that Cablevision retiered GSN, but did not consider retiering these affiliates, for

others, or that Cablevision failed to consider how much money it could save by retiering affiliated networks, are more appropriately considered in a circumstantial case and do not constitute direct evidence that GSN was retiered because it was not an affiliate.[92]

39. Finally, GSN argues that Cablevision's statement that the retiering decision was "final" once it occurred, and that it would not reconsider, showed Cablevision's willingness to walk away from a non-affiliate when it would never walk away from affiliated networks.[93] This also could be evidence of differential treatment of affiliated and non-affiliated networks in a circumstantial case, but it does not provide direct evidence that GSN was retiered because it was not affiliated with Cablevision. In any event, the record reflects that Cablevision *did* engage in further negotiations with GSN after the retiering decision was communicated, notwithstanding its earlier statement that the decision was final, but those negotiations were ultimately unsuccessful.[94]

40. In sum, GSN has not shown direct evidence that it was subject to an adverse carriage action on the basis of affiliation or non-affiliation. Based on the particular facts in this case, the ALJ did make a number of findings regarding differential treatment of GSN and Cablevision affiliates, but those findings are more appropriately considered under the Commission's circumstantial evidence standard, which we do in the following section.

41. We conclude, as the Enforcement Bureau has urged, that GSN has not established through application of our direct evidence standard that Cablevision discriminated against it in the selection, terms, or conditions for carriage of video programming when it changed GSN's distribution from its expanded basic tier to its premium sports tier.

### 2. GSN Has Failed to Demonstrate Discrimination Through Circumstantial Evidence

42. GSN has not demonstrated through circumstantial evidence that Cablevision engaged in prohibited program carriage discrimination against GSN. Considering the record as a whole, GSN has failed to show that GSN's programming was similarly situated to that of former Cablevision affiliates.

43. The Commission's circumstantial evidence standard permits a complainant to establish that a defendant MVPD discriminated in video programming distribution on the basis of affiliation or non-affiliation through "[e]vidence that the complainant provides video programming that is similarly situated" to video programming provided by a vendor affiliated with the MVPD and "that the defendant [MVPD] has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming."[95] Whether programming is "similarly situated" is based on a combination of factors, including genre, ratings, license fee, target audience, target advertisers, target

---

legitimate business reasons rather than based on GSN's non-affiliation. In contrast with GSN, the affiliated networks were able to reach mutually agreeable terms for renewal of their contracts. *See id.* at 13859-60 n.155 (noting that license rates for the affiliated networks were considered at the November 8, 2010 budget meeting and it was agreed that in the renewal of their expiring carriage agreements, the license rates would "{{ }}."

[92] Reply to Exceptions at 11-12.

[93] *Id.* at 12 (citing *Initial Decision*, 31 FCC Rcd at 13863, para. 40).

[94] *See Initial Decision*, 31 FCC Rcd at 13865-66 paras. 42-43; *see also id.* at 13899-90 para. 109.

[95] 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2).

programming, and other factors.[96] Based on these two types of circumstantial evidence, an inference can be made of discrimination on the basis of affiliation or non-affiliation.[97] The Commission provided for this alternative two-part showing because it recognized "it is unlikely that direct evidence of a discriminatory motive will be available to potential complainants."[98]

44. The *Initial Decision* concluded after a hearing that GSN's programming was similarly situated to that of two video programming vendors affiliated with Cablevision: WE tv and Wedding Central.[99] Because GSN was retiered, and the similarly situated WE tv was not, the ALJ inferred that Cablevision's carriage action against GSN was based on discriminatory intent.[100] Thus, the *Initial Decision* found that GSN had proven by a preponderance of the evidence that Cablevision discriminated against GSN in favor of WE tv, on the basis of non-affiliation, in retiering GSN to the premium sports tier.[101] Although Wedding Central was also found to have similarly situated programming, the *Initial Decision* found that "it may have made sense that Cablevision would choose GSN for retiering simply because it did not cost Cablevision anything to distribute Wedding Central broadly."[102]

45. We conclude that GSN has not established that GSN's programming is similarly situated to that of WE tv or Wedding Central. The Commission has explained that an evaluation whether programming is similarly situated should be based on examination of a combination of factors put forth by the complainant.[103] As noted, to determine whether a complainant provides video programming that is similarly situated to video programming provided by a vendor affiliated with a defendant MVPD, we consider "a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."[104] Although no single factor is necessarily dispositive, the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming.[105]

46. Following the hearing in this case, the Enforcement Bureau recommended a finding that the programming was not similarly situated because the record "shows that GSN targets (and attracts) a different audience than WE tv and Wedding [Central] and that GSN's programming is not comparable to

[96] 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

[97] *See* Exceptions at 6-7; Reply to Exceptions at 8.

[98] *2011 Program Carriage Order*, 26 FCC Rcd at 11504, para. 14; *see also id.*, 26 FCC Rcd at 11504, para. 13 (recognizing that "direct evidence of affiliation-based discrimination will seldom be available to complainants and is not required to establish this element of a *prima facie* case").

[99] *Initial Decision*, 31 FCC Rcd at 13871, 13900, paras. 50, 111.

[100] *Id.* at 13900-01, paras. 110, 112 ("The only conclusion that can be drawn from the record as a whole is that if Cablevision's intent had not been to discriminate against GSN on the basis of its non-affiliation with Cablevision, then logic dictates that Cablevision probably would have retiered the similarly situated WE tv.").

[101] *Id.* at 13901, para. 112.

[102] *Id.* at 13900, para. 112. As a new network attempting to get established, Wedding Central was not charging a per subscriber license fee for carriage.

[103] *2011 Program Carriage Order*, 26 FCC Rcd at 11504-05, para. 14.

[104] 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i); *2011 Program Carriage Order*, 26 FCC Rcd at 11504, para. 14.

[105] *2011 Program Carriage Order*, 26 FCC Rcd at 11505, para. 14.

the programming available on WE tv and Wedding [Central]."[106] The ALJ disagreed, concluding in the *Initial Decision* that "[t]he preponderance of the evidence" shows that GSN and WE tv (and the discontinued Wedding Central) were similarly situated because he found that the networks each "offered similar advertiser-supported entertainment programming," targeted and reached "an audience that was predominantly adult female," and "compet[e] for the same advertisers."[107] Cablevision argues, consistent with the Enforcement Bureau's recommendation, that GSN has not established that GSN's programming was similarly situated to that of WE tv and Wedding Central.[108]

47. Upon examining the relevant factors—including genre and target programming, target audience, actual audience, and advertiser appeal—we conclude that GSN has not shown that it is similarly situated to WE tv or Wedding Central under our rules for adjudicating program carriage complaints.[109]

48. *Genre and Target Programming*. The record reflects that, at the time of retiering, 91% of GSN's programming consisted of game shows (with another 7% consisting of poker games).[110] By contrast, at the time of GSN's retiering, 93% of WE tv's programming fell within the reality, drama, comedy, movie, and news genres.[111] Wedding Central aired similar programming, with about 75% of Wedding Central's programming consisting of shows that previously aired on WE tv, and nearly all of it revolving around weddings.[112]

49. The ALJ dismissed these differences because he believed that game shows fall under "the programming genre that is modernly referred to as reality competition, which is a subcategory of reality programming."[113] We find that this is the subject of considerable dispute in the record, and somewhat contradicted elsewhere in the *Initial Decision*, where the ALJ appeared to recognize significant differences in programming, stating "it is not remarkable . . . that viewers generally did not view GSN, which primarily and uniquely offers game show programming, as offering the same type of women-oriented programming as WE tv," which offered reality programming.[114]

50. We reject GSN's argument that its programming overlaps with that of WE tv as part of a "relationship" genre. This argument appears to rest on GSN's contention that, of the 66 shows it aired between 2009 and 2011, four shows (*Baggage*, *Love Triangle*, *The Newlywed Game*, and *Family Feud*) involved "relationship" elements that allegedly resemble three reality shows on WE tv (*Bridezillas*, *Rich*

[106] Enforcement Bureau Comments at 9.

[107] *Initial Decision*, 31 FCC Rcd at 13871, para. 50; *see id.* at 13871-86, paras. 50-77.

[108] Exceptions at 20-21.

[109] Because Wedding Central was not widely distributed and aired for only 22 months before it was discontinued, the available information concerning its demographics, advertising, and other issues is somewhat limited. Where such information is not available, we assume that Wedding Central was similar to WE tv, since Wedding Central primarily aired wedding-themed programming that previously aired on WE tv.

[110] Cablevision Exh. 332—Direct Testimony of Michael Egan (Egan Expert Testimony) at para. 30 & tbl.; *see also* Exceptions at 21 ("The record demonstrates without any real dispute that the programming on GSN consisted almost exclusively of game shows and contests with winners and prizes, and that WE tv and Wedding Central aired almost no such programming.").

[111] Egan Expert Testimony at para. 30 & tbl.

[112] Egan Expert Testimony at para. 28 n.27.

[113] *Initial Decision*, 31 FCC Rcd at 13878, para. 62.

[114] *Id.* at 13878-79, paras. 62-64 & nn. 315, 322.

*Bride, Poor Bride*, and *I Do Over*).[115] We agree with Cablevision's expert that "relationships" is a common theme that occurs across many genres—including comedy, drama, movies, talk shows, and sci-fi, among others—rather than a genre itself.[116] In any event, the mere handful of "relationship-themed" shows that aired on GSN are far too little to overcome the enormous overall differences in programming between GSN and WE tv/Wedding Central.

51. Our conclusion that GSN and WE tv targeted and aired different types of programming is supported by the lack of competition between GSN and WE tv in vying for rights to the same programming, a consideration that the Commission gave significant weight in the Tennis Channel case.[117] The evidence here shows that there were no programs that aired on both networks between 2009 and 2011, and there is no evidence of any competition to acquire programming during that time.[118] Of the {{ }} programs pitched to WE tv each year, only seven shows were also pitched to GSN in all of 2011 and 2012, and it appears that GSN declined to pursue any of these shows.[119]

52. *Target Audience*. The record is clear that WE tv specifically and consistently targeted women ages 18-49 and 25-54 (which are particularly desirable demographics for advertisers[120]). It targeted this audience through women- and family-centric programming with an emphasis on weddings, raising children, and being part of a family, presented from a distinctly female point of view.[121]

53. The evidence concerning GSN's target audience is less clear. The ALJ pointed to testimony from current GSN executives, offered specifically for purposes of this litigation, that GSN seeks to appeal to a female audience and that its "mission every day is to program and market to women."[122] But he also recognized that "when marketing its service to cable distributors, GSN 'consistently emphasized its wide appeal to a broad-based, family audience'" and "did not market itself to cable distributors as a women's network."[123] Internal correspondence among GSN executives likewise reflects confusion over who the network's target audience is, asking {

[115] *See* Egan Expert Testimony at paras. 108, 116.

[116] *Id.* at paras. 108-115, 252, 296-297.

[117] Exceptions at 27 n.126; *Tennis Channel MO&O*, 27 FCC Rcd at 8527, para. 52 (finding similarity in sports programming between Tennis Channel and Versus because the two channels had "a history of repeatedly sharing or seeking rights to the same sporting events").

[118] Egan Expert Testimony at paras. 74-75.

[119] Egan Expert Testimony at para. 75; *see also* Cablevision Exh. 334—Direct Testimony of Jonathan Orszag (Orszag Expert Testimony) at para. 135.

[120] Cablevision Exh. 228—Direct Testimony of Lawrence Blasius (Blasius Expert Testimony) at para. 23; Egan Expert Testimony at paras. 48, 308; *Initial Decision*, 31 FCC Rcd at 13874, para. 55 ("GSN President [David] Goldhill confirmed that `GSN's target audience is women primarily 25-54, secondarily 18-49, and tertiarily, all ages.'") (quoting Tr. at 186:24-25).

[121] *See* Egan Expert Testimony at paras. 48-50, 61, 140-151.

[122] *Initial Decision*, 31 FCC Rcd at 13874, para. 55.

[123] *Id.* at 13875-76, paras. 56-57; *see also* Exceptions at 22, 24 (collecting citations to "ordinary-course business documents in which GSN highlighted its 'unique' game show programming genre to MVPDs, advertisers, and promotional partners").

}}[124] And unlike WE tv, which overtly marketed itself to female viewers, GSN's "self-description did not mention women, relationships, or topics of special interest to many women, but instead said it offers 'original and classic game programming.'"[125]

54. Indeed, much of the evidence indicates that, in contrast to WE tv's "single-minded theme and focus on 18-54 year old women, their relationships, and their families via the shows themselves and the promos in between them,"[126] GSN knowingly embraced a much broader audience of adults.[127] GSN's presentations to advertisers[128] and distributors,[129] press releases,[130] and internal documents[131] all frequently identified its target demographics as including adults of both genders. Indeed, in advertising sales materials that GSN made available to Cablevision, GSN wrote that {{

}}.[132]

55. *Actual Audience.* The ALJ concluded that GSN, WE tv, and Wedding Central were similar because each had an audience that skews predominantly female, despite acknowledged evidence that the composition of the networks' audiences differed in other respects.[133] But characterizing a network's audience at such a high level of generality can mask significant differences between networks. For example, as one of Cablevision's experts points out, both History Channel and ESPN have audiences that are predominantly male (with a similar degree of skew as GSN and WE tv), but no one is likely to contend that History Channel and ESPN are similar networks.[134]

56. A closer examination reveals stark differences in the actual audiences of GSN and WE tv. In particular, GSN's audience skews significantly {{ }}. The median age of GSN's female viewers at the time of retiering was {{ }}, whereas the median age of WE tv's female viewers was {{ }} on a total-day basis and {{ }} in primetime.[135] The median age of GSN's viewers was therefore {{ }} than the {{ }} of the Women 18-49 demographic and {{ }} than the

[124] As quoted in Egan Expert Testimony at para. 169 n.171.

[125] Egan Expert Testimony at paras. 61-62.

[126] Egan Expert Testimony at para. 70.

[127] *See* Egan Expert Testimony at paras. 152-168.

[128] *See* Egan Expert Testimony at paras. 160-162.

[129] *See* Egan Expert Testimony at paras. 157-159.

[130] *See* Egan Expert Testimony at para. 156.

[131] *See* Egan Expert Testimony at para. 162.

[132] Egan Expert Testimony at para. 164.

[133] *Initial Decision*, 31 FCC Rcd at 13871-73, 13882, paras. 50-53, 69. The ALJ's contention that "it is a network's target audience, not its actual audience, that drives advertising," *id.* at 13882, para. 70, is contrary to much of the evidence, *see* Blasius Expert Testimony at paras. 11-28. We agree with Cablevision that a network cannot "claim to be similarly situated to another simply by declaring its aspiration to attract the same audience." Exceptions at 29-30.

[134] Orszag Expert Testimony at para. 91.

[135] Blasius Expert Testimony at para. 32; Orszag Expert Testimony at para. 102.

{{ }} of the Women 25-54 demographic.[136] In fact, the percentage of GSN's viewers who fell within these two demographics was {{ }} than that of the U.S. population as a whole, whereas the percentage of WE tv's viewers in these desirable demographics was {{ }} than that of the population as a whole.[137] These demographic trends persist, and indeed are even more exaggerated, when broken down into smaller age brackets.[138]

57. According to Nielsen data from 2009 and 2010, whereas women ages 18-49 or 25-54 made up {{ }} of WE tv's total audience, they made up {{ }} of GSN's audience.[139] Among Women 18-49 and Women 25-54, WE tv's ratings were {{ }} those of GSN, while GSN's {{ }} audience had {{ }} among Women 65 and older.[140] {{ }} of GSN's audience was Women 55 or older and {{ }} was Women 65 or older, whereas {{ }} of WE tv's audience was Women 55 or older and {{ }} was Women 65 or older.[141]

58. Viewer overlap studies and switching analysis performed by each party's experts showed mixed results.[142]

59. *Advertiser Appeal*. Given the very substantial differences in programming and demographics, it is unlikely that advertisers would regard GSN and WE tv or Wedding Central as substitutes.[143] Indeed, GSN's and WE tv's advertising sales data reflect that advertisers target different demographics on the two networks.[144]

60. GSN notes a finding that "90 percent of WE tv's top 40 advertising accounts advertised on GSN and 93 percent of GSN's top 40 advertising accounts advertised on [WE tv]."[145] Two of each network's top three advertisers were also in the top three companies advertising on the other network.[146] Although some of the same companies advertised on both GSN and WE tv, this standing alone does not mean that the companies viewed the channels as substitutes. For example, as one of Cablevision's experts explained, a company might purchase advertising on WE tv to reach {{ }} women and on GSN to reach {{ }} women.[147] Moreover, many of the companies that advertised on both networks are large conglomerates that advertise their products across most or all of the national cable networks and

[136] Blasius Expert Testimony at para. 32.

[137] Blasius Expert Testimony at para. 33.

[138] Blasius Expert Testimony at para. 37.

[139] Egan Expert Testimony at paras. 196, 199, 309; *see also* Orszag Testimony at para. 102 (reporting similar numbers from the fourth quarter of 2010).

[140] Egan Expert Testimony at paras. 190-192, 199, 309.

[141] Egan Expert Testimony at paras. 196, 309. Among adults generally, according to Nielsen data from the fourth quarter of 2010, {{ }} of GSN's total viewership was over the age of 65, whereas {{ }} of WE tv's total viewership was over the age of 65. Orszag Expert Testimony at para. 102.

[142] *See Initial Decision*, 31 FCC Rcd at 13881-83, paras. 67-68, 70.

[143] Blasius Expert Testimony at paras. 29-38; Orszag Expert Testimony at paras. 100, 102, 106.

[144] Blasius Expert Testimony at para. 50.

[145] Reply to Exceptions at 29 (citing *Initial Decision*, 31 FCC Rcd at 13885, para. 76).

[146] *Initial Decision*, 31 FCC Rcd at 13886, para. 77.

[147] Orszag Expert Testimony at para. 22.

whose sheer advertising volume places them among the top advertisers across a wide range of channels, so simple measurements of advertiser overlap may not be particularly meaningful or reliable.[148] For example, of GSN's 40 largest advertisers, a similar percentage advertised on WE tv as also advertised on {{ }}, even though {{ }} is not generally viewed as similarly situated to either channel.[149]

61. *Other Factors.* Finally, Cablevision points to evidence in the record that, as a general matter, WE tv "neither viewed GSN as a competitor nor included it as a part of its competitive set."[150] Cablevision introduced evidence that WE tv vigorously monitored the "women's networks" in its competitive set, including {{ }}.[151] Cablevision testimony indicated that WE tv took "deep dives" into looking at the programming of these channels, what their biggest hits were, where their core audience was, and how they were positioning themselves.[152] Additionally, WE tv employees compiled and circulated daily, weekly, monthly, quarterly, and annual reports on the performance of the networks in their competitive set, and "WE tv Fact Sheets" for their advertising sales group that ranked networks, "including those with high women 18 to 49 and 25 to 54 audiences."[153] Cablevision notes that "[n]one of those reports mentioned GSN."[154]

62. Considering all of these factors, we find that GSN is not similarly situated to WE tv or Wedding Central. We recognize that a programming vendor who believes it has been discriminated against on the basis of affiliation may have difficulty identifying an identically situated affiliated network. Our rules therefore do not require a complainant to point to an identical comparator, only one who is similarly situated. Here, however, the evidence simply does not show that GSN's programming is similarly situated to that of WE tv or Wedding Central.

### B. Cablevision's Asserted Business Reasons Were Legitimate and Non-Discriminatory.

63. Even if GSN had met its burden of putting forward some direct or circumstantial evidence of discrimination, we would nonetheless deny the complaint in this case because we find that, on the record as a whole, Cablevision's decision to retier GSN was based on legitimate and non-discriminatory business reasons rather than on affiliation.

64. The Commission has previously noted that merely establishing a *prima facie* case "does not mean that the complainant has proven its case or any elements of its case on the merits."[155] For

[148] Blasius Expert Testimony at para. 61; Orszag Expert Testimony at paras. 123-24, 127.

[149] Orszag Expert Testimony at paras. 22, 128.

[150] Exceptions at 35; *Initial Decision*, 31 FCC Rcd at 13888, para. 84. *But see* Reply to Exceptions at 30 & n.158 (citing GSN exhibit presenting "internal WE tv 'competitive fringe ranker' slide listing GSN along with other of WE tv's admitted competitors").

[151] Exceptions at 35 (collecting citations to record testimony); *see also* Orszag Expert Testimony at 88-89, 121.

[152] Exceptions at 35 (citing Tr. 1736:10-17 (Dorée)).

[153] Exceptions at 35; Orszag Expert Testimony at 121.

[154] *Id.*

[155] *2011 Program Carriage Order*, 26 FCC Rcd at 11505, para. 16 (stating that "a *prima facie* finding means that the complainant has provided sufficient evidence in its complaint, without the Media Bureau having considered any evidence to the contrary, to proceed."); *see id.* at 11502, para. 10 (noting that requiring complainants to make a *prima facie* showing "is important to dispose promptly of frivolous complaints and to ensure that only legitimate complaints proceed to further evidentiary proceedings").

example, if "the complainant has established a *prima facie* case, but the defendant MVPD provides legitimate and non-discriminatory business reasons . . . for its adverse carriage decision," the adjudicator might conclude on the full evidentiary record that the complainant has failed to prove that it was subject to discrimination on the basis of affiliation.[156] Similarly, the court in *Tennis Channel* has made clear that because the statute "prohibits only discrimination *based on* affiliation . . . . if the MVPD treats vendors differently based on a reasonable business purpose . . . there is no violation."[157]

65. The *Initial Decision* stated that "[a]n examination of the record as a whole however reveals no such economic reason for choosing to retier GSN instead of WE tv."[158] The *Initial Decision* rejected Cablevision's asserted business reasons for retiering GSN, including cost savings, asserting that "[t]he inescapable conclusion is that if Cablevision's intention was only to save costs and not to discriminate on the basis of non-affiliation, Cablevision would have retiered an affiliated network to the premium sports tier."[159] The *Initial Decision* found that Cablevision's "so-called business reasons serve only as pretextual cover for engaging in discriminatory conduct, or for attempting to cover it up after the fact."[160]

66. Cablevision argues that the *Initial Decision* erred in finding that its asserted business justifications for retiering were pretextual, and that the *Initial Decision* is inconsistent with precedent in *Tennis Channel* requiring GSN to prove that Cablevision would have benefited from maintaining GSN's carriage on a broadly penetrated tier.[161] We agree with Cablevision that its asserted business reasons for retiering GSN—costs savings and value of its programming[162]—were legitimate and not a pretext for discrimination.[163]

### 1. Cost Savings

67. Cablevision produced evidence that it was under increasing programming cost pressure at the time of the retiering and looked at the possibility of dropping or reducing the carriage of a number of networks, including GSN.[164] The *Initial Decision* made numerous factual findings based on this evidence, citing testimony by a Cablevision programming executive that 2010 was a "transformational time in the industry," because broadcasters were asking for significant retransmission consent fees that

[156] *Id.* at 11506, paras. 16-17.

[157] *Tennis Channel*, 717 F.3d at 985.

[158] *Initial Decision*, 31 FCC Rcd at 13900-01, para. 112.

[159] *Id.* at 13898, para. 107.

[160] *Id.* at 13889, para. 86.

[161] Exceptions at 15-16, 18.

[162] *See, e.g.*, Exceptions at 14-18.

[163] In a previous order, the Commission reserved decision on whether the burden shifts to the MVPD to prove that it acted on legitimate and non-discriminatory business reasons or, instead, the ultimate burden of proof (and thus the obligation to disprove any proffered business justification) remains on the complainant at all times. *See TCR Sports Broad. Holding, L.L.P. d/b/a/ Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099, 18105, para. 11 (2010), *pet. denied*, 679 F.3d 269 (4th Cir. 2012). We again need not resolve that issue here, because we find that the evidence supports Cablevision's asserted business justifications no matter who bears the ultimate burden of proof.

[164] Exceptions at 16; *see Initial Decision*, 31 FCC Rcd at 13854, 13857-60, paras. 25, 31-34.

Cablevision had never paid before, and fees for sports programming were going up dramatically.[165] The *Initial Decision* also cited testimony by another Cablevision executive that such programming by broadcast stations and sports networks was "must-have" and "commercially critical" for its cable systems.[166] Testimony also indicated that large media conglomerates were bundling their network offerings together, requiring distributors to purchase them all, rather than choosing, and negotiating for, the services they believed had the most value for their customers.[167] In the face of such economic pressures at the time, Cablevision was trying to generate more revenue as well as cut expenses, including trying to trim its programming budget.[168] As one Cablevision executive put it, programmers with a great deal of leverage, "such as the broadcast stations and networks with sports programming, were aggressively raising their rates . . . which limit[ed] Cablevision's budget for other, less crucial programming."[169]

68. Cablevision notes that in July 2010, a number of months before the retiering, a senior executive prepared a detailed analysis of the costs and benefits of continued carriage of GSN, an analysis that made no reference to WE tv, Wedding Central, or any other affiliated network.[170] According to Cablevision, the analysis laid out a compelling case for retiering because "GSN was an out-of-contract network, giving Cablevision full tiering flexibility; GSN was at 'the very bottom' of viewership among expanded basic networks, according to STB [set-top box] data; and Cablevision could save up to {{ }} per year by repositioning GSN or dropping it altogether."[171] The analysis considered potential costs, including customer complaints that were anticipated to be "minimal" and potential retaliation by {{ }}.[172]

69. Cablevision characterizes the *Initial Decision* finding that its asserted cost justifications were pretext as "based on nothing more than second guessing Cablevision's decisionmaking process."[173] Although the *Initial Decision* found it important that Cablevision's savings only amounted to one-quarter of one percent of its programming budget,[174] Cablevision asserts that "Cablevision's executives testified without contradiction that in their view, the savings were meaningful in the context of Cablevision's programming budget increases."[175] The Cablevision executives testified that in November 2010, when it

[165] *Initial Decision*, 31 FCC Rcd at 13854, para. 25.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 13854, para. 25 & n.113.

[169] *Id.* at 13854, para. 25 n.111.

[170] Exceptions at 14-15.

[171] *Id.* at 15; *see Initial Decision*, 31 FCC Rcd at 13855, para. 27 n.117 (referencing Cablevision executive's testimony that Cablevision constantly evaluated the cost of programming as to whether or not it was worth it, but it was not possible generally for Cablevision to drop or reposition a network that was in contract unless Cablevision had drop rights or repositioning rights, so when considering repositioning programming networks to save costs, Cablevision will "only look at networks that are out of contract, or networks that have agreements that grant us carriage flexibility.").

[172] Exceptions at 15.

[173] *Id.* at 16.

[174] *Initial Decision*, 31 FCC Rcd at 13896, para. 105.

[175] Exceptions at 16 (citing *Initial Decision*, 31 FCC Rcd at 13859, para. 33 n.150).

was considering what to do with GSN and three other non-affiliated networks distributed on the expanded basic tier that had expired or expiring carriage agreements, the focus was on managing against the year-over-year increase in programming costs in the 2011 programming budget as opposed to the total cost of programming, so saving three percent of that increase by retiering GSN was "certainly a material amount of money."[176]

70. Cablevision also challenges as not supported by substantial evidence the *Initial Decision*'s finding that a particular Cablevision executive first decided to retier GSN in July 2010 for reasons unrelated to cost savings, and then directed a subordinate to justify that decision on cost grounds.[177] As Cablevision recounts, the executive's request came in a July 2010 finance meeting in which cost savings were discussed, and the executive asked for "a carriage assessment to evaluate and explore the possibility of removing GSN from Cablevision's lineups in an effort to save {{ }} in annualized license fees."[178] When the issue was revisited in November 2010 as part of the 2011 programming budget process, Cablevision executives ultimately decided to retier GSN to shave costs from the programming budget.[179] While the *Initial Decision* found the cost justification pretextual in part because the retiering was uncommon, the record indicates that Cablevision could very well have dropped GSN altogether, but chose to place it on the premium sports tier so any subscribers who really wanted to watch it could do so.[180]

71. On this record, we agree with Cablevision that the decision to move GSN to the premium sports tier appears to have been consistent with sound business judgment.[181] While a relatively {{ }} percentage of Cablevision's subscribers watched GSN, the households that watched GSN {{ }}.[182] Under these circumstances, it makes economic sense to move GSN to a more narrowly distributed tier to save programming costs while providing an opportunity for avid watchers of GSN to continue watching the network.

### 2. Value of GSN's Programming

72. Besides rejecting as pretextual Cablevision's assertion that it retiered GSN to save on programming costs in a challenging economic environment, the *Initial Decision* also rejected Cablevision's claim that it retiered GSN based on ratings performance. Based on the record and the findings in the *Initial Decision*, the weight of the evidence appears to be on Cablevision's side.

73. The *Initial Decision* stated that "diametrically contrary to Cablevision's assertion . . . the preponderance of evidence proves beyond any equivocation that GSN was a uniquely popular network

[176] *See Initial Decision*, 31 FCC Rcd at 13858, para. 33 & n.150.

[177] Exceptions at 17.

[178] *Id.*; *Initial Decision*, 31 FCC Rcd at 13855, para. 27

[179] Exceptions at 18; *Initial Decision*, 31 FCC Rcd at 13858-61, paras. 33-36.

[180] *Initial Decision*, 31 FCC Rcd at 13886-87, 13902, paras. 79, 118; *id.*, 31 FCC Rcd at 13862-63, para. 39 (citing Cablevision testimony that moving GSN to the premium sports tier was better than dropping GSN, as originally proposed, because retiering saved almost the entire amount of carriage fees being paid to GSN without completely taking the programming away from Cablevision subscribers—*i.e.*, "if someone had to have the Game Show Network, they could subscribe to that tier of service and see the network").

[181] *See, e.g.*, Orszag Expert Testimony at paras. 140-155.

[182] Egan Expert Testimony at para. 188.

that was highly valued by and attracted the loyalty of Cablevision subscribers."[183] Inexplicably, the *Initial Decision* cites as support STB data indicating that, at the time of GSN's retiering, out of the 56 networks that Cablevision distributed on the expanded basic tier, *GSN ranked 45th*, and WE tv ranked 16th.[184] This is consistent with other evidence indicating that GSN was anything but a "uniquely popular network."[185] Cablevision's analysis indicated that "the removal of GSN from our systems will result in minimal customer outcry and we can easily withstand the activity."[186] The analysis noted that Cablevision was "not too concerned about our lack of carriage [of GSN] while our competitors continue to offer it."[187]

74. The *Initial Decision*'s finding that GSN was a "uniquely popular" network appears to be based on the fact that Cablevision "lost subscribers to its detriment as a result of its retiering of GSN to the premium sports tier."[188] However, the *Initial Decision*'s own findings do not dispute that Cablevision's decision to retier GSN may have been one that was net profitable.[189] In response to Cablevision's claim that "the weight of the evidence supports the conclusion that Cablevision made a profitable decision," the *Initial Decision* states: "True perhaps, but Cablevision omits the damage done to GSN by its retiering strategy . . . ."[190] The impact on GSN is not relevant to whether Cablevision made a business decision on program carriage to lower its costs and increase its profits as an MVPD. The fact that Cablevision has not been harmed by its carriage decision is more an indication that its asserted business purpose of cost savings is bona fide than it is an indication of pretext.

75. The *Initial Decision* also rejects Cablevision's claims that GSN was not "must have" programming, which is odd given the nature of its programming.[191] Cablevision defines such programming as being "limited to programming found on broadcast and sports networks," and further describes it as programming that would cause subscribers to "call and disconnect" if they lost access to

[183] *Initial Decision*, 31 FCC Rcd at 13887, para. 80.

[184] *Id.*at 13887, para. 80 n.390; *see also id.* at 13895, para. 103 (stating "Cablevision's own evidence – its set-top box data – proves that GSN was as popular a network as any network distributed on the expanded basis tier," but citing as support the fact that each network that Cablevision distributed on the expanded basic tier ranked among the top third of all networks distributed by Cablevision on any tier). The fact is that STB data in the record indicate clearly that GSN was not "as popular a network as any network distributed on the expanded basic tier."

[185] *Id.* at 13856, para. 29 ("GSN's performance [was] . . . in the very bottom among [expanded basic] networks"); *id.* at 13856, para. 29 & n.128 (based on STB data for the period February through June 2010, which Cablevision used to assess whether to drop Cablevision from carriage, GSN ranked "49th out of 52 networks" on the expanded basic tier, or "roughly on par with minimally viewed foreign language networks.").

[186] *Id.* at 13857, para. 30 (quoting from July 2010 Cablevision memorandum used to assess whether to continue carriage of GSN).

[187] *Id.* at 13857 n.130. However, Cablevision's analysis did indicate that while GSN's viewing audience was not large, "based on the number of viewing hours, GSN's performance was 'more in line with the bottom 40% of iO Family networks, suggesting that the few viewers that watch appear to watch it with regularity.'" *Id.* at 13856-57, para. 29.

[188] *Id.* at 13895, para. 103.

[189] *Id.* at 13886, para. 78.

[190] *Id*.

[191] *Id.* at 13894, para. 102.

it.[192] GSN does not carry the kind of programming commonly described as "must have."[193] However, the *Initial Decision* referenced the fact that "a historically high number of Cablevision subscribers called to complain of GSN's retiering."[194] The *Initial Decision* asserted that "[i]ncredibly but actually, more than 5000 Cablevision subscribers disconnected their cable service upon losing access to GSN by Cablevision's retiering."[195] Given record evidence that "the historically high volume of GSN complaint calls precipitously declined,"[196] and Cablevision was able to sustain the retiering by offering a six-month subscription to the premium sports tier free of charge to a total of 24,000 subscribers overall,[197] it appears that Cablevision's original assessment was correct that GSN could be retiered "without having a negative impact on the business."[198] In fact, not only did Cablevision save {{ }} in annual license fees, but it earned additional revenue from new subscribers to its premium sports tier who remained following the promotion.[199] In describing the fallout of the retiering decision, the *Initial Decision* states that "[w]ithout any doubt, it was the cold economics of the retier favoring Cablevision, with no consideration of the gender or preference of subscribers or the genre of programming, that drove Cablevision's retiering decision."[200] In our view, however, this statement describes a business decision made based on economics, not one that is pretext for a prohibited consideration. The fact that thousands of subscribers complained about Cablevision's programming decision and some even canceled their subscriptions does not provide a basis for concluding that GSN is "must have" programming or that Cablevision's assertions about the value of that programming to its subscribers was mere pretext for discrimination.

76. The *Initial Decision*'s finding of pretext on the basis of Cablevision's failure to retier other networks also does not persuade us.[201] While the ALJ's conclusion that Cablevision could have saved as much or more from retiering another channel rather than GSN appears to consider the amount that would be saved in license fees, it does not take adequate account of the subscriber losses Cablevision would have risked if it were to drop or retier a network more popular than GSN. The record here contains no evidence to show that retiering any other channel would have been net profitable (much less as profitable as retiering GSN), or at least there is no non-speculative basis upon which we could reach such a determination.[202] The *Initial Decision* also fails to account properly for the legitimate business reasons why Cablevision might decide not to retier other channels—for example, many channels (including WE tv) were subject to existing carriage agreements that did not allow them to be retiered at the time, and the record indicates that Cablevision did in fact consider retiering or dropping other networks but ultimately

[192] *Id.*

[193] *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report, 32 FCC Rcd 568, 582 (MB 2017) (referencing "non-replicable sports programming" as an example of must have programming).

[194] *Initial Decision*, 31 FCC Rcd at 13894, para. 102.

[195] *Id.*

[196] *Id.* at 13867, para. 45.

[197] *Id.* at 13869, para. 47

[198] *Id.* at 13887, para. 82.

[199] *Id.* at 13890, 13895, paras. 88, 104.

[200] *Id.* at 13868-69, para. 46.

[201] *Id.* at 13896-97, paras. 106-07.

[202] *Cf.* Orszag Expert Testimony at paras. 211, 253-56.

decided against doing so based on a variety of legitimate factors.[203]

### 3. *Tennis Channel* Precedent

77. In light of the *Initial Decision*'s finding of intentional discrimination, the *Initial Decision* declined to reach the "alternate question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN from the expanded basic tier to the premium sports tier."[204] Because we have taken a different view of the strength of the direct and circumstantial evidence it has put forward, it is important to consider whether GSN has met even the minimal evidentiary standard set forth in *Tennis Channel*.

78. In *Tennis Channel*, the court vacated a Commission decision granting a program carriage complaint by video programming vendor Tennis Channel against Comcast, an MVPD, on the basis that "the record simply lack[ed] material evidence that the Tennis proposal offered Comcast any commercial benefit."[205] The court found that "[w]ithout 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."[206] In other words, because an MVPD can take an adverse carriage action as long as it is not based on affiliation or non-affiliation, a video programming vendor must counter an MVPD's properly supported defense that it has treated vendors differently based on a reasonable business purpose.[207]

79. In *Tennis Channel*, the court found that, "[i]n contrast with the detailed, concrete explanation of Comcast's additional costs under the proposed tier change, Tennis [Channel] showed no corresponding benefits that would accrue to Comcast by its accepting the change."[208] The court explained that the complainant could counter this proffered defense by presenting evidence that the underlying financial calculation was wrong or other evidence that the defense was mere pretext, and thus financial considerations were not the actual reason for the MVPD's decision.[209]

80. Cablevision asserts that, consistent with *Tennis Channel*, GSN had the burden of proving at trial that Cablevision would have benefited from maintaining GSN's carriage on a broadly penetrated tier.[210] According to Cablevision, the net benefit test laid out in *Tennis Channel* required the ALJ to do a thorough analysis of the fees Cablevision saved by retiering, the additional revenues it earned, and losses,

[203] *Initial Decision*, 31 FCC Rcd at 13857-60, paras. 31-35.

[204] *Id.*, 31 FCC Rcd at 13889, para. 86.

[205] *Tennis Channel*, 717 F.3d at 987.

[206] *Id.*

[207] *See id.* at 985; *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11506, para. 17 (stating that where a complainant has established a *prima facie* case of discrimination, but the defendant MVPD provides "legitimate and non-discriminatory business reasons in its answer for its adverse carriage decision, the Media Bureau might conclude . . . that the complaint can be resolved on the merits based on the pleadings.").

[208] *See Tennis Channel*, 717 F.3d at 985; *see also id.* at 984 ("Comcast . . . argued that the Commission could not lawfully find discrimination because Tennis offered no evidence that its rejected proposal would have afforded Comcast *any* benefit. If this is correct, as we conclude below, the Commission has nothing to refute Comcast's contention that its rejection of Tennis's proposal was simply 'a straight up financial analysis,' as one of its executives put it.").

[209] *See id.* at 985-87.

[210] Exceptions at 18.

if any, as a result of subsidies and customer defections, to determine whether Cablevision made a rational economic decision to retier GSN.[211] As noted, the *Initial Decision* expressly declined to undertake this analysis.[212]

81. We agree that GSN has not countered Cablevision's asserted business reasons for retiering GSN with the type of evidence concerning the net benefit of carrying GSN as requested that would meet the *Tennis Channel* standard.[213] The evidence that has been put forward by Cablevision based on its post-tiering analysis suggests that there would be no net economic benefits to Cablevision from restoring GSN to the expanded basic tier. Cablevision points out that even if it lost some subscribers from the retiering, the revenue lost is more than offset by the approximately {{ }} in carriage fees Cablevision saved and {{ }} of dollars Cablevision earned every year from new subscribers to the sports tier.[214]

82. Cablevision's expert reviewed the evidence of potential subscriber losses, Cablevision's cost savings, and incremental sports tier profits, and concluded that Cablevision's choice to retier GSN was, in retrospect, a profitable one.[215] There is no contrary finding in the *Initial Decision*.[216] In fact, assessments in the *Initial Decision* that "[w]ithout any doubt, it was the cold economics of the retier favoring Cablevision . . . that drove Cablevision's decision"[217] and "[t]rue perhaps" with regard to Cablevision's claims that the weight of the evidence supports a conclusion that Cablevision made a profitable decision suggest that GSN has not been able to meet its evidentiary burden.[218] Based on the findings in the *Initial Decision*, GSN has not established that Cablevision's decision to distribute it on the premium sports tier was anything but a reasonable business decision leading to lower costs and increased profits in a competitive environment.[219]

---

[211] *Id.* at 19.

[212] *See id.*

[213] *Tennis Channel*, 717 F.3d at 986 (providing examples of projected MVPD subscriber gains and losses from a carriage decision as one way to counter an MVPD's evidence based on license fee costs).

[214] Exceptions at 19.

[215] *Id.*

[216] Although the *Initial Decision* found that Cablevision lost more than 5,000 subscribers due to the retiering, there is no indication of the annual value associated with such losses that would overcome Cablevision's argument that its programming decision was net profitable, presumably because the *Initial Decision* expressly avoided undertaking a net benefit analysis. *See Initial Decision*, 31 FCC Rcd at 13889, para. 86 ("In light of the foregoing finding of intentional discrimination, the Presiding Judge need not reach the alternate question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN from the expanded basic tier to the premium sports tier.").

[217] *Id.* at 13868-69, para. 46

[218] *Id.* at 13886, para. 78 (referencing claims by Cablevision that its carriage decision was profitable because it saved {{ }} in license fees, earned substantial revenues from new Sports and Entertainment tier subscribers, and saw no meaningful increase in customer churn).

[219] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2648, para. 14 (declaring that the Commission's regulations implementing section 616 must strike a balance that not only proscribes behavior prohibited by the specific language of the statute, but also "preserves the ability of affected parties to engage in legitimate, aggressive negotiations").

### C. Other Issues

83. Because we find that GSN has not proven that Cablevision discriminated against it on the basis of affiliation or non-affiliation, it is not necessary to decide certain other questions raised in the Exceptions and various other filings in this docket since the *Initial Decision*.[220] Therefore, as noted above, we do not decide in this order whether the effect of Cablevision's actions was to unreasonably restrain GSN's ability to compete fairly, which is an additional element that GSN was required to prove in order to establish a violation of the Commission's rules or the statute.[221] Similarly, because we conclude that Cablevision has not violated the program carriage rules or section 616 of the Act in this instance, we do not address Cablevision's arguments that any remedies for such a violation would violate its First Amendment rights.[222] We do address a dispute about when program carriage decisions become effective, which has been an issue both with respect to the Tennis Channel complaint case and the GSN case.

84. *Program Carriage Decisions Become Effective Upon Release.* Section 76.1302(j) of the Commission's rules provides that an order imposing remedies in a program carriage proceeding "shall set forth a timetable for compliance," and "shall become effective upon release."[223] Likewise, section 76.10(c)(2) provides that in proceedings brought pursuant to section 76.1302, "unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal."[224] These rules override the general rule in hearing cases that initial decisions are not immediately effective and the timely filing of exceptions shall stay the effectiveness of the initial decision until the Commission's review of it is completed.[225] Rather than setting forth a specific timetable, the *Initial Decision* ordered compliance with the remedies "as soon as practicable" and cited the general rule regarding effectiveness of an initial decision.[226]

85. We find that it would be useful to provide guidance on the effective date issue for future proceedings, as the issue seems likely to recur. As noted, the Commission has adopted a specific rule to address remedies for violations of the program carriage rules.[227] That rule states that an order of such

[220] Because we grant Cablevision's Exceptions in part, resulting in denial of GSN's complaint against Cablevision, we dismiss as moot Cablevision's Motion for Acceptance of Response in Further Support of its Exceptions to the Initial Decision, as well as GSN's Opposition to such motion, and we give no consideration to the arguments raised in these filings, which were filed after the round of pleadings authorized by the Commission's rules in this proceeding. *See* 47 C.F.R. § 1.277(c).

[221] *See* 47 U.S.C. § 536(a)(3); 47 C.F.R. §§ 76.1301(c), 76.1302(d)(3)(iii)(A).

[222] *See, e.g.*, Exceptions at 38-40. We note that the Commission's program carriage rules have been found to comply with the First Amendment as a general matter. *See Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 160, 164, 171 (2d Cir. 2013) (holding that "the program carriage regime is neither content based nor impermissibly speaker based," and satisfies intermediate scrutiny because it "promotes important government interests in fair competition and diversity of information services in the video programming market" and is "narrowly tailored not to burden substantially more speech than necessary to further those interests.").

[223] 47 C.F.R. § 76.1302(j).

[224] 47 C.F.R. § 76.10(c)(2).

[225] *See* 47 C.F.R. § 1.276(d).

[226] *Initial Decision*, 31 FCC Rcd at 13905, para. 126 n.534 ("This Initial Decision shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 CFR § 1.276.").

[227] 47 C.F.R. § 76.1302(j).

remedies "shall become effective upon release" unless any order of mandatory carriage would require the MVPD to delete existing programming.[228] In this case, deletion of existing programming was not raised as an issue, so the specific rule found in 47 C.F.R. § 76.1302(j) would provide that the remedies in the *Initial Decision* become effective upon release.[229]

86. However, the *Initial Decision* purported to rely on the more general rule found in 47 C.F.R. § 1.276(d) under which decisions are not effective immediately upon release. This led to confusion among the parties about the *Initial Decision*'s effective date. Indeed, GSN filed a Petition to Compel Compliance with the Initial Decision citing the specific program carriage rules, and Cablevision responded with a Petition to Stay the Initial Decision based on the general rule.

87. We now clarify that the specific rules found in 47 C.F.R §§ 76.1302(j), 76.10(c)(2) govern in these types of program carriage disputes. As a result, the FCC's ALJ should, going forward, make clear that 47 C.F.R. §§ 76.1302(j), 76.10(c)(2) apply unless an initial decision specifies a lawful basis upon which a different rule or result should apply. In this case, however, because we reverse the *Initial Decision*, we deny GSN's Petition to Compel, and we dismiss Cablevision's Petition to Stay as moot.

## V. CONCLUSION

88. We conclude that GSN has failed to prove that Cablevision discriminated against it on the basis of affiliation or non-affiliation in February 2011 when it changed GSN's distribution from Cablevision's expanded basic tier to its premium sports tier. Therefore, we deny GSN's program carriage complaint filed with the Media Bureau on October 12, 2011.

## VI. ORDERING CLAUSES

89. Accordingly, **IT IS ORDERED** that the Initial Decision in this matter **IS REVERSED.**

90. **IT IS FURTHER ORDERED** that Game Show Network, LLC's complaint in the above-captioned proceeding **IS DENIED.**

91. **IT IS FURTHER ORDERED** that Cablevision's Exceptions to the Initial Decision **ARE GRANTED IN PART** and **DISMISSED IN PART.**

92. **IT IS FURTHER ORDERED** that Cablevision's Application for Review in the above-captioned proceeding **IS DISMISSED AS MOOT.**

93. **IT IS FURTHER ORDERED** that Game Show Network, LLC's Petition to Compel Compliance with Initial Decision **IS DENIED.**

94. **IT IS FURTHER ORDERED** that Cablevision's Petition to Stay the Initial Decision **IS DISMISSED.**

95. **IT IS FURTHER ORDERED** that Cablevision's Motion for Acceptance of Response in Further Support of its Exceptions **IS DISMISSED AS MOOT.**

[228] *Id.* In the case that an order of mandatory carriage would result in the deletion of existing programming, and the MVPD seeks review of the staff or ALJ decision in a program carriage adjudicatory proceeding, the order for carriage will not become effective until such decision is upheld by the Commission. *Id.*

[229] *Id.*

96. This action is taken pursuant to authority in sections 4(i), 4(j), 5(d), and 616 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 155(d), 536, and sections 1.282, 76.10, 76.1302 of the Commission's rules, 47 C.F.R. §§ 1.282, 76.10, 76.1302.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**DISSENTING STATEMENT OF**
**COMMISSIONER MIGNON L. CLYBURN**

Re: *Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant*, Memorandum Opinion and Order, MB Docket No. 12-122

It clearly states on our agency's website, that the job of the FCC's Administrative Law Judge (ALJ), is to "preside[] at the hearing during which documents and sworn testimony are received in evidence, and witnesses are cross-examined." Such evidentiary hearings are quite familiar to me as a former state commissioner, and I have remarked in the past that the FCC could benefit from conducting similar hearings during its own rulemaking process.

The reality is that our agency is not structured to undertake such an extensive examination, and therefore relies on the ALJ to conduct evidentiary hearings. The office functions like a trial court, reviewing thousands of documents, hearing witness testimony, and rendering a decision based on a preponderance of the evidence. This process can take years, and it should come as no surprise that reversing an ALJ's decision is quite infrequent. Research by my staff found a few examples from the 1980s and early 90s where the Commission reversed ALJ decisions, involving individual broadcast applications. And while some may point to the Tennis Channel case as a recent example, the Commission's reversal of the ALJ decision came only after the D.C. Circuit's decision.

In this case however, the ALJ reached its decision after cross-examination of a dozen witnesses and a review of approximately 1,000 documentary exhibits. Fast forward to just over a month ago, when I was asked to consider an order reversing the expert findings of an impartial ALJ.

After due consideration, I dissent from today's order, because I conclude that the Commission improperly overruled the ALJ's decision. The Commission reviews questions of law de novo, but accords deference to the ALJ on issues of fact. In the instant Order, the Commission dives deep into the underlying record, dredging up issues of fact around the evidence of discrimination, that should have remained undisturbed if it correctly followed the standard of review. Today we set a dangerous precedent, one that I hope will not become a trend.

Allow me to also take this opportunity to highlight a related issue. My views on the plight of independent programmers is widely known, and while GSN may have owners with deep pockets, this case demonstrates the inherent challenges facing programmers who are not vertically integrated with a pay-TV distributor. This is why I believe the time is now, for us to move to a final order, that ensures independent and diverse voices, have a place in a vibrant media landscape.

**STATEMENT OF**
**COMMISSIONER MICHAEL O'RIELLY**

Re: *Game Show Network, LLC, Complainant, v. Cablevision Systems Corp., Defendant,* MB Docket No. 12-122

I support the item and its conclusion. At the same time, I have difficulty understanding the process in this case and why it took nearly six years to resolve a program carriage complaint. That is not acceptable under any circumstances.

In all honesty, I lost control of the remote years ago, and most of the time the TV is now tuned to *Bubble Guppies*, *Paw Patrol* or *Elmo's World*. But I still sneak in a show or two occasionally and my wife is fond of a number of programs that many would consider women's programming, such as *Say Yes to the Dress*. That said, I have a hard time seeing any scenario in which WE tv or Wedding Central, which no longer exists, could be comparable in any way to the potential target audience of the GSN. Moreover, based on the information presented, it appears that Cablevision made a decision based on its business interests regarding carriage and not one intended to discriminate against GSN. The item properly disposes of these arguments and resolves the complaint correctly.

Looking at the larger picture, this entire process suggests that the Administrative Law Judge (ALJ) function is not working as intended and may no longer be the most efficient means to complete our work. Like others, I would like to see the Commission develop an alternative procedure, in concert with our Congressional overseers, to use our existing processes to sunset or end the ALJ function, or, at a minimum, reduce those matters that are considered by an ALJ. That's not meant as anything personal against our current ALJ. But, as this case highlights, the Commission has to rule on all ALJ decisions anyway, so it is just adding an unnecessary layer to the overall process. I am willing to hear arguments to the contrary, but I cannot fathom a situation where the Commission or Bureau staff cannot get the necessary facts to come to a reasoned decision. More importantly, I don't support the use of the ALJ and hearing designation order process as a threat or means to kill a proposed merger application. Let's end the charade and have Commissioners vote one way or another on applications put before us. I had hoped to expand upon these points in a draft blog I've been considering on this topic for quite a while, but I think I'll just hold off for now.