

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

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant)	

TO: The Commission

**CABLEVISION SYSTEMS CORPORATION'S
EXCEPTIONS TO THE INITIAL DECISION**

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SUMMARY

The Initial Decision cannot stand. It is based on an improper application of the legal standard to prove carriage discrimination by direct evidence, disregard for the D.C. Circuit's decision in the *Tennis Channel* proceeding requiring the ALJ to determine whether broader carriage of GSN would confer a net benefit on Cablevision, a failure to consider the many factors identified by the Commission in assessing whether affiliated and non-affiliated networks are similarly situated, an erroneous analysis of Section 616's requirement that the challenged carriage decision not only harm the complainant but unreasonably restrain its ability to compete fairly and without consideration for Cablevision's constitutionally protected editorial discretion. The ALJ's Initial Decision is riddled with legal and factual errors that should lead the Commission to reach the same conclusion as the one reached by the Enforcement Bureau at the end of trial: that GSN did not discharge its burden of proving discrimination on the basis of affiliation by either direct or circumstantial evidence.

Rather than support a finding of a violation of Section 616, the record before the ALJ shows that Cablevision made a good-faith business judgment to reduce the carriage of an out-of-contract, unpopular network in order to save programming costs, without any consideration at all for the interests of its affiliated program networks. Under carriage agreements that expired in [REDACTED], Cablevision had unfettered discretion to carry GSN on any tier of service. Cablevision carried GSN on an out-of-contract basis for over [REDACTED] years. In 2010, however, in the face of rapidly-increasing programming expenditures, Cablevision considered whether it should cut costs by dropping GSN altogether or moving it to a less-penetrated tier of service. Cablevision executives debated the costs and benefits of such an action, including the amount of money Cablevision would save (up to [REDACTED] per year), the level of interest in GSN among all Cablevision customers (low), and the expected reaction from customers if GSN were dropped (limited). Cablevision ultimately decided to move GSN to a premium sports tier, rather than drop it altogether, so that the small number of Cablevision customers who wanted to continue to receive GSN could do so by paying an additional fee. After Cablevision moved GSN to that tier on February 1, 2011, Cablevision, in fact, realized savings of [REDACTED] in license fees per year, added thousands of new subscribers who wanted to view GSN on the sports tier, and, despite a short-term rise in customer complaints, suffered no or *de minimis* subscriber loss from the retiering. There is no evidence whatsoever that these decisions were carried out to protect any similarly situated affiliated network (and indeed the ALJ did not so find), or were based in any way on GSN's non-affiliation with Cablevision.

Reversal of the Initial Decision is required on each of five independent grounds:

There Is No Direct Evidence of Discrimination: The ALJ's finding of direct evidence of discrimination is fundamentally wrong. According to well-established Commission precedent and judicial authority, direct evidence is evidence that shows a defendant's discriminatory intent without further inference or presumption. It is a document or statement showing discriminatory animus on its face: a "smoking gun." Here, as the ALJ himself conceded, there is no such evidence. Not a single document shows that Cablevision's decision to

retier GSN was motivated by GSN's affiliation status and not a single witness so testified. And although GSN alleged that Cablevision's favorable treatment of its affiliates, GSN's broader carriage on other MVPDs, and negotiations after the retiering between Cablevision and GSN's parent companies gave rise to direct evidence of discrimination, the ALJ rejected GSN's claims. Taken together, this should have led the ALJ to hold that GSN had failed to prove a direct case. Instead, the ALJ ignored governing law and concluded that Cablevision's failure to consider reduced carriage of affiliated networks in lieu of GSN made out a direct case of discrimination. That conclusion is wrong; there is no Section 616 case in which the Commission (or for that matter Judge Sippel) has held that an MVPD's failure to consider reduced carriage for its affiliates constituted direct evidence. To the contrary, each case that has come before the ALJ or the Commission has been adjudicated as a circumstantial case because of the absence of evidence that, on its face, would constitute an admission that the decision was made on the basis of affiliation. This case is no different.

The ALJ Failed to Apply Controlling Precedent from the *Tennis Channel*

Decisions: Because of his erroneous conclusion that GSN had made out a case of direct discrimination, the ALJ declined to follow the ruling in *Tennis Channel*, which required him to determine the costs and benefits of Cablevision's retiering decision under the "net benefit" framework. The ALJ's failure to apply precedent would be error in any case, but it is particularly grievous error in this one, given that the ALJ questioned Cablevision's decisionmaking in order to draw inferences of discriminatory intent from Cablevision's cost-savings measures and other business judgments. Had the ALJ applied the net benefit test, there is no doubt he would have concluded that GSN failed to show that Cablevision could have realized a net benefit from broader carriage of the network; in essence, he did reach such a conclusion, finding that "cold economics" drove Cablevision's decision. The failure to conduct such a net benefit analysis—despite expert testimony from both sides concerning the costs and benefits of GSN carriage—constituted reversible error.

WE tv and GSN Are Not Similarly Situated: The ALJ wrongly concluded that GSN and Cablevision's formerly-affiliated networks were similarly situated. The Initial Decision focused almost entirely on the ALJ's finding that GSN and the affiliated networks targeted the same demographic of 25 to 54-year-old female viewers. In so doing, the ALJ either disregarded or failed to consider at all critical characteristics of the networks that showed their stark differences, most prominently the sharp differences in programming and the audience that the networks actually attracted. The ALJ failed to grapple with undisputed evidence from marketing materials and carriage agreements showing that the networks promised their MVPD partners that they would deliver different programming: GSN represented that it would provide game shows and game-related programming, while WE tv promised to provide programming for women. The ALJ ignored essentially undisputed evidence of the actual differences in the game shows aired on GSN and the women's programming aired on WE tv, which featured a variety of types of programs, but not game shows. The ALJ dismissed evidence showing that WE tv consistently delivered a core audience of women 18 to 49 and 25 to 54, while GSN, whatever its audience aspirations, did not. And undisputed evidence at trial showed that viewers and advertisers perceived the networks differently. The evidence with respect to each of these

factors overwhelmingly supports the conclusion that GSN and WE tv were not similarly situated and the ALJ's contrary conclusion should be reversed.

GSN Was Not Unreasonably Restrained from Fair Competition: The ALJ failed to apply the appropriate standard under Section 616 requiring a finding that GSN has not merely suffered harm as a result of Cablevision's carriage decision, but has been unreasonably restrained from competing fairly. As recognized in Judge Kavanaugh's *Tennis Channel* concurrence, the more relaxed reading of "restraint" applied in the Initial Decision effectively reads the words "unreasonably restrained" out of the statute. Such a reading was particularly misplaced here, as there is no dispute that GSN, unlike complainants in prior Section 616 proceedings, is a fully distributed, thriving national programming network that has increased its subscribership, revenues and profits throughout the course of this proceeding. The ALJ compounded his error by failing to grapple with the requirement that, to prove unreasonable restraint, GSN had the burden of defining and proving a legally relevant market.

The Mandatory Carriage Remedy Violates the First Amendment: The ALJ's mandatory carriage remedy violates the First Amendment. As a result of a change in control transaction earlier this year, Cablevision is no longer vertically-integrated with any network at issue in this proceeding. As a result, there can be no substantial government interest in regulating Cablevision's speech in order to protect GSN from any prospective harm arising from vertical integration; any prospective carriage decision by Cablevision will not, by definition, be the product of consideration of affiliation. Moreover, there is no evidence that Cablevision has market power in the national market for video programming distribution, and therefore Cablevision's retiering decision cannot have any anticompetitive effect on GSN. Without an important government interest to serve, a mandatory carriage remedy violates Cablevision's editorial discretion under the First Amendment.

* * *

As Commissioner Pai and then-Commissioner McDowell observed in their dissent from the Commission's original *Tennis Channel* decision, meritless carriage proceedings ultimately hurt consumers: "the Commission should not kid itself . . . additional programming costs will come out of the pockets of consumers."¹ That observation applies with particular force in a proceeding such as this one, where the ALJ made numerous legal and factual errors that, if not committed, would have led him to dismiss GSN's complaint. The Commission should reverse the Initial Decision.

¹ *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd. 8508, 8553 (2012) ("*Tennis Channel FCC*") (joint dissenting statement).

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Cablevision Systems Corporation (“Cablevision”) respectfully submits its Exceptions² to the Initial Decision of Chief Administrative Law Judge Richard L. Sippel (“ALJ”). The Commission should reverse the Initial Decision, vacate the mandatory carriage and forfeiture order, and dismiss the complaint of Game Show Network, LLC (“GSN”).

STATEMENT OF THE CASE

Beginning in 1997, Cablevision and GSN—“the network for games”—entered into a series of contracts and renewals allowing Cablevision to carry GSN on any tier of service, at Cablevision’s discretion.³

Faced with unprecedented increases in its programming budget, in the summer of 2010, Cablevision conducted a cost-benefit analysis, documented in a memorandum by a senior programming executive showing that it would save up to [REDACTED] per year in programming fees by dropping or retiering GSN.⁴ Cablevision’s analysis of viewership using customer set-top box (“STB”) data revealed GSN to be a poorly-performing network, ranking 49th out of 52 networks on Cablevision’s expanded basic tier.⁵ Cablevision assessed the potential consequences of the retiering and came to the good faith judgment that the benefit of savings from GSN’s license fee outweighed what it anticipated to be the limited negative reaction from a small percentage of Cablevision’s three million customers.⁶

Based on this analysis, during November 2010 programming budget meetings Cablevision decided to reposition GSN to a premium sports tier, where Cablevision’s small

² See 47 C.F.R. §§ 1.276–77.

³ CV Exh. 4 at 3, 12.

⁴ Initial Decision ¶ 28; CV Exh. 119.

⁵ Initial Decision ¶ 29 & n.128.

⁶ CV Exh. 119 at 3–4.

number of loyal GSN viewers could continue to access the network for an additional fee, effective February 1, 2011.⁷ As the ALJ later found, “[w]ithout any doubt, it was the cold economics of the retier favoring Cablevision . . . that drove Cablevision’s retiering decision.”⁸ Cablevision’s business decision proved to be sound: it saved over [REDACTED] per year in carriage fees and gained [REDACTED] sports tier subscribers.⁹

In October 2011, GSN filed a carriage complaint against Cablevision alleging that Cablevision’s retiering of GSN constituted unlawful discrimination under Section 616.¹⁰ Specifically, GSN sought to prove through direct and circumstantial evidence that Cablevision retiered GSN because of its non-affiliation and/or because Cablevision intended to benefit its alleged “similarly situated” affiliated networks, WE tv and Wedding Central.¹¹ In May 2012, the Media Bureau designated the matter for a hearing.¹²

At a ten-day hearing conducted in July 2015, the ALJ heard testimony from 12 live witnesses and received roughly 1,000 documents into evidence.¹³ After the hearing, the

⁷ Initial Decision ¶¶ 25, 36. There was much discussion at trial as to whether GSN belonged on that tier. The fact of the matter is that the sports tier was the only narrowly-distributed tier available that would allow GSN’s loyal viewers to continue to get the network while achieving the level of cost savings sought by Cablevision. CV Exh. 119 at 4; Tr. 1658:22–25 (Montemagno).

⁸ Initial Decision ¶ 46.

⁹ *Id.* ¶ 47 n.234.

¹⁰ *Id.* ¶ 1. *See also* Compl. ¶¶ 4, 6.

¹¹ Compl. ¶¶ 4, 6, 52–53.

¹² *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 27 FCC Rcd. 5113, 5114 (MB May 9, 2012) (“HDO”). The Media Bureau denied Cablevision’s statute limitations defense as a matter of law. *Id.* at 5121–22. Cablevision has filed an Application for Review of this ruling.

¹³ Initial Decision ¶¶ 5–7.

Enforcement Bureau filed comments urging dismissal of GSN’s complaint because GSN had neither presented direct evidence of discrimination nor sufficiently proven through circumstantial evidence that GSN was similarly situated to WE tv or Wedding Central.¹⁴

On November 23, 2016, the ALJ issued an Initial Decision finding for GSN. Although the ALJ rejected GSN’s claims that Cablevision retiered GSN to benefit WE tv and Wedding Central, as well as the allegedly “direct evidence” of discrimination GSN presented at trial, he nonetheless concluded that “direct evidence” of disparate treatment of GSN by Cablevision demonstrated the requisite discrimination.¹⁵ Because of his conclusion that GSN had come forward with direct evidence, the ALJ declined to apply governing precedent from the *Tennis Channel* case requiring GSN to carry its burden of showing that Cablevision would have received a net benefit from continued broad carriage of GSN. Finally, the ALJ engaged in a truncated analysis of the Commission’s relevant factors to find that WE tv, a women’s network owned by a Cablevision affiliate, and GSN were similarly-situated, primarily because both networks targeted and were viewed by an “adult female audience.”¹⁶ The ALJ found that the retiering unreasonably restrained GSN’s ability to compete, and recommended that Cablevision pay a forfeiture and be required to carry GSN on an expanded basic tier, for five years, at the rate under the parties’ expired contract.¹⁷

In May 2016, after the completion of trial, the Commission approved an

¹⁴ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Enforcement Bureau’s Comments, MB Docket No. 12-122, ¶¶ 15–20 (Oct. 15, 2015).

¹⁵ *See, e.g.*, Initial Decision ¶¶ 100, 108–110, 113.

¹⁶ *Id.* ¶ 50.

¹⁷ *Id.* ¶¶ 119–20.

agreement and plan of merger between Cablevision and Altice, N.V.¹⁸ The transaction closed in June 2016, when Cablevision merged into a subsidiary of Altice USA.¹⁹ Following the transaction, Cablevision is no longer affiliated with WE tv, Wedding Central, or any network other than regional news and local high school sports networks.²⁰

EXCEPTIONS PRESENTED

The Initial Decision should be reversed on five dispositive issues:

- 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.

¹⁸ See Declaration of Michael Schreiber (“Schreiber Decl.”) ¶ 9, attached as Exhibit A to Cablevision’s Petition to Stay the Initial Decision.

¹⁹ Schreiber Decl. ¶¶ 1–9.

²⁰ See 47 C.F.R. §§ 76.1300(a)–(b); Schreiber Decl. ¶ 10.

ARGUMENT

The Commission reviews the Initial Decision *de novo*, while according deference to the ALJ’s live witness credibility determinations where appropriate.²¹ The Commission must establish “a rational connection between the facts found and the choice” it makes,²² and its decision must be based “on consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence.”²³ Under these standards, the ALJ’s legal and factual errors warrant reversal of the Initial Decision and entry of judgment for Cablevision.

I. The ALJ Erroneously Found “Direct Evidence” of Discrimination

The ALJ fundamentally misapplied the evidentiary standards that govern the inquiry into discriminatory intent under Section 616 and, as a result, came to the erroneous conclusion that GSN had proven a direct case.

In defining discrimination under Section 616, the Commission relies on “the extensive body of law addressing discrimination in normal business practices” under Title VII, the ADA, and the ADEA.²⁴ Unlike these statutes, Section 616 does not address “disparate

²¹ See, e.g., *Tennis Channel FCC*, 27 FCC Rcd. at 8522 (citing *In re Imposition of Forfeiture Against Capitol Radiotelephone Inc.*, 11 FCC Rcd. 2335, 2342 (1996)). Despite this deference, the Commission may “upset [credibility] findings [if] such reversal is supported by substantial evidence.” *Id.* at 2342.

²² *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 731 (D.C. Cir. 2016).

²³ 5 U.S.C. § 556(d).

²⁴ See *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Prot. & Competition Act of 1992, Dev. of Competition & Diversity in Video Programming Distrib. & Carriage*, Second Report & Order, 9 FCC Rcd. 2642, 2645 n.6 (1993) (“1993 Program Carriage Order”). See also *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 24 FCC Rcd. 12967, 12997–98 (ALJ 2009) (“*WealthTV ALJ*”), *aff’d* 26 FCC Rcd. 8971 (2011) (“*WealthTV FCC*”); but see *TCR Sports Broad. Holding, LLP, d/b/a Mid-Atlantic Sports Net v. Time Warner Cable, Inc.*, 25 FCC Rcd. 18099, 18105 n.49 (2010) (“*MASN*”).

impact” claims.²⁵ Rather, Section 616 outlaws only intentional discrimination—disparate treatment “*based on affiliation.*”²⁶

The Commission has previously concluded that a complaining network may prove intentional discrimination “on the basis of affiliation or non-affiliation” through either “direct evidence” or “circumstantial evidence.”²⁷ Direct evidence of discrimination is “documentary evidence or testimonial evidence,”²⁸ such as “an email from the defendant MVPD” or witness testimony showing that “the MVPD took an adverse carriage action against [a network] because [it is] not affiliated with the MVPD.”²⁹ Circumstantial evidence is “evidence that [a complainant] provides video programming that is similarly situated to” an MVPD’s affiliate, coupled with “evidence that the defendant MVPD has treated the . . . complainant . . . differently than the similarly situated [network].”³⁰

This framework 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,³¹ while circumstantial

²⁵ See *WealthTV ALJ*, 24 FCC Rcd. at 12997 n.242.

²⁶ *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) (“*Tennis Channel*”) (citing *MASN*, 25 FCC Rcd. at 18115).

²⁷ See *In re Revision of the Commission’s Program Carriage Rules, Leased Commercial Access; Dev. of Competition & Diversity in Video Programming Distrib. & Carriage*, Second Report & Order, 26 FCC Rcd. 11494, 11503–04 (2011) (“2011 Program Carriage Order”).

²⁸ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(1).

²⁹ 2011 Program Carriage Order, 26 FCC Rcd. at 11503–04; see also HDO, 27 FCC Rcd. at 5119–20.

³⁰ 2011 Program Carriage Order, 26 FCC Rcd. at 11504.

³¹ *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1000 n.8 (10th Cir. 2011) (holding that such an admission would be the statement “I fired him because he was too old,” whereas

evidence “requires an additional inferential step to demonstrate discrimination.”³² Direct evidence is “evidence that, if believed, proves the fact of discriminatory animus without inference or presumption.”³³ It is “‘a smoking gun’ showing that the decision-maker *relied upon* a protected characteristic” in taking a discriminatory action.³⁴

The ALJ paid lip service to these well-established standards, but then ignored them. He recognized that “GSN must show that its non-affiliation with Cablevision ‘actually played a role in the process and had a determinative influence on the outcome,’” and could make this showing through “direct evidence such as statements showing a discriminatory intent.”³⁵ Yet 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. To the contrary, the ALJ considered and rejected every element of the “direct” case GSN sought to prove at trial.³⁶ The ALJ found that “GSN has not proven that Cablevision discriminated against GSN with the intent of favoring WE tv,” and that Cablevision retired GSN “without considering how it would impact Cablevision’s programming side.”³⁷

“[e]ven a highly-probative statement like ‘You’re fired, old man’ still requires the factfinder to draw the inference that the plaintiff’s age had a causal relationship to the decision”).

³² *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095–96 (9th Cir. 2005) (internal citations omitted).

³³ *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016).

³⁴ *Lapera v. Fed. Nat’l Mortg. Ass’n*, No. 15 Civ. 447, 2016 WL 5415615, at *11 n.17 (D.D.C. Sept. 28, 2016).

³⁵ Initial Decision ¶ 99 (citing *WealthTV ALJ*, 24 FCC Rcd. at 12997–98).

³⁶ *Id.* ¶¶ 108–09. Specifically, GSN alleged that Cablevision favored its affiliates under [REDACTED], distributed GSN more narrowly than other MVPDs, and engaged in post-retiring negotiations with GSN-owners DIRECTV and Sony about restoring broader GSN carriage. *Id.*

³⁷ *Id.* ¶¶ 109, 113; *see also id.* ¶ 38.

These findings required the ALJ to conclude that GSN failed to make out a direct case. As the Enforcement Bureau stated in its post-trial comments, “[t]here 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.”³⁸ The ALJ’s failure to reach the same conclusion is reversible error.

The ALJ attempted to support his finding of direct discrimination in “Cablevision’s admissions and other proof as to how Cablevision treats GSN and its affiliated networks differently in the terms and conditions of carriage.”³⁹ But, as the ALJ himself acknowledges elsewhere in the Initial Decision, “uneven treatment of similarly situated entities” is the test for a circumstantial case, not a direct one.⁴⁰ The Commission has so concluded in every prior carriage decision and, in fact, the ALJ’s own decisions in *Wealth TV* and *Tennis Channel* recognize that purportedly disparate treatment is the hallmark of a circumstantial rather than direct case.⁴¹

A. Cablevision’s Pre-Retiering Conduct Is Not Direct Evidence of Discriminatory Intent

The ALJ found “direct” evidence of discrimination in Cablevision’s decision-making process leading to the retiering. But nothing in that process revealed that GSN’s

³⁸ Enforcement Bureau’s Comments ¶ 18.

³⁹ Initial Decision ¶ 100.

⁴⁰ *Id.* ¶ 99 (citing *WealthTV ALJ*, 24 FCC Rcd. at 12998).

⁴¹ For example, in the *WealthTV* matter, the ALJ rejected WealthTV’s argument that “the disparate treatment of two networks by itself” is sufficient to make out a claim under Section 616. *WealthTV ALJ*, 24 FCC Rcd. at 12999–13000. And in the *Tennis Channel* matter, the Commission (in a ruling subsequently reversed on appeal) affirmed the ALJ’s holding that Tennis Channel “conclusively establish[ed] discrimination by circumstantial evidence,” including evidence that Comcast “did not consider repositioning” its affiliated networks. *Tennis Channel FCC*, 27 FCC Rcd. at 8526, 8537.

affiliation “actually played a role in the process and had a determinative influence” on Cablevision’s decision to retier GSN.⁴²

First, the ALJ found that Cablevision’s failure to consider whether to reduce the carriage of its affiliated networks constituted direct evidence.⁴³ But there is no basis in the record to support a finding that Cablevision retiered GSN, instead of networks such as Fuse or MSG, based on affiliation.⁴⁴ Nor is it relevant that some of those affiliated networks had, like GSN, “expired or expiring contracts.”⁴⁵ That finding, even if correct, would not constitute direct evidence. And it was not correct: WE tv—the affiliated network allegedly similarly situated to GSN—was not out of contract.⁴⁶

The ALJ compounded his mistake by concluding that, because Cablevision and WE tv were under common ownership, Cablevision could unilaterally alter the term of its carriage agreement with WE tv that barred or penalized retiering.⁴⁷ That finding is unsupported by the record. Witnesses from both Cablevision and Rainbow Networks—whom the ALJ found trustworthy—testified that contract negotiations between Cablevision and Rainbow were at

⁴² Initial Decision ¶ 99 (citing *WealthTV ALJ*, 24 FCC Rcd. at 12997–98).

⁴³ *Id.* ¶¶ 101–02.

⁴⁴ The ALJ pointed to no evidence in the record as to the contractual status or popularity of these other networks. Nor does he explain the basis for imposing on Cablevision the obligation to perform a carriage assessment of all of its affiliates each time it makes a carriage decision.

⁴⁵ Initial Decision ¶¶ 101–02.

⁴⁶ See CV Exh. 99 at 8 (showing WE tv with a contract expiring [REDACTED] and financial penalties for repositioning to lower penetration levels).

⁴⁷ Initial Decision ¶ 101.

“arms-length” and “hard.”⁴⁸ Moreover, the ALJ does not deal with the fact that there was no reason to retier WE tv, a far more popular network with Cablevision’s subscribers than GSN, as measured by Cablevision’s STB data.⁴⁹ In short, there is no basis in the record to conclude that Cablevision’s decision to retier GSN rather than WE tv was motivated by affiliation and not business judgment.

Second, the ALJ found direct evidence of discrimination in Cablevision STB data showing, in the ALJ’s opinion, that “GSN was as popular a network as any network distributed on the expanded basic tier.”⁵⁰ This finding is inexplicable: the STB data cited by the ALJ showed that GSN ranked 49th of 52 expanded basic networks at one point in 2010, and 45th of 56 expanded basic networks at another.⁵¹ That is hardly support for the conclusion that GSN was a “popular” network.⁵²

Third, the ALJ found direct evidence of discrimination in GSN’s showing that expanded basic carriage of GSN was “only one quarter of 1 percent” of Cablevision’s 2011 programming budget.⁵³ But the undisputed record shows that Cablevision faced rising

⁴⁸ Tr. 1931:5–9 (Broussard); CV Exh. 339 ¶ 10 (Broussard); Tr. 1548:18 (Montemagno); CV Exh. 337 ¶¶ 78–80 (Montemagno).

⁴⁹ See CV Exh. 117 at 6 (showing WE tv ranked in the top 20 expanded basic networks).

⁵⁰ Initial Decision ¶ 103; see also *id.* ¶ 80 (holding that GSN was a “uniquely popular network”).

⁵¹ *Id.* ¶¶ 29, 37.

⁵² The ALJ’s finding that GSN was in the “top 25 percent” or “top 13 percent” of all 500 networks distributed by Cablevision is misleading because many of those 500 networks are not distributed broadly. *Id.* ¶¶ 29, 37, 103 n.459. The relevant inquiry is how GSN fared in comparison to other networks on the broadly distributed expanded basic tier, because the question facing Cablevision was whether to keep the network on that tier. Cablevision correctly relied upon an analysis reflecting GSN’s rank in the bottom ten percent of networks on the expanded basic tier. *Id.* ¶¶ 29, 37.

⁵³ *Id.* ¶ 105.

programming costs in 2010 and 2011,⁵⁴ and the president of its cable distribution division testified that the [REDACTED] million Cablevision saved by retiering GSN was “probably [REDACTED] [REDACTED] of the cash flow increase budget year over year.”⁵⁵ There is no doubt that Cablevision considered the [REDACTED] in annual fees saved by retiering GSN a “material amount of money.”⁵⁶ The ALJ’s conclusion that Cablevision’s costs had “nothing to do with the continued carriage of GSN” is entirely inconsistent with the record.⁵⁷

Fourth, the ALJ suggested that Cablevision could have retiered other unaffiliated networks along with or instead of GSN.⁵⁸ The ALJ’s conclusion is speculation, not fact-finding, and in any case is not direct “evidence that, if believed, proves the fact of [Cablevision’s] discriminatory animus without inference or presumption.”⁵⁹ To the contrary, if any discriminatory intent can be gleaned from these facts, it is only because the ALJ inferred that affiliation, and not Cablevision’s valid business judgments, motivated Cablevision’s decision.

B. Cablevision’s Post-Retiering Conduct Is Not Direct Evidence of Discriminatory Intent

The ALJ also purports to find direct evidence of Cablevision’s discriminatory animus in Cablevision’s post-retiering conduct, finding that Cablevision made an economically unsound decision that must have been the product of discrimination rather than business

⁵⁴ *Id.* ¶¶ 25–26, 31–32.

⁵⁵ Joint Exh. 1 (Bickham) 94:13–17; *see also id.* 95:13–17 (“[W]hen I think about programming cost, I think of the [REDACTED] million and I look at how can I trim that. And so [REDACTED] million is [REDACTED] percent of that, so it’s not an insignificant number when you look at it that way.”); Tr. 1656:25–1658:6 (Montemagno).

⁵⁶ Initial Decision ¶¶ 33 n.150, 116 n.521.

⁵⁷ *Id.* ¶ 105.

⁵⁸ *Id.* ¶ 106.

⁵⁹ *Rodriguez*, 820 F.3d at 765.

judgment. These findings also fail to show that an “illegitimate criterion”—affiliation—
 “actually motivated [Cablevision’s] decision.”⁶⁰

The ALJ’s finding is rooted in what he characterizes as the “subscriber outrage” arising from the retiering. The ALJ appears to believe that, in response, Cablevision should have reversed its carriage decision: he found evidence of discrimination in the steps Cablevision took instead to manage customer complaints (a sports tier promotion for some subscribers) and the number of subscribers who, according to the ALJ, Cablevision lost as a result of the retiering.⁶¹ It is true that the number of complaints may have exceeded the “minimal outcry” that had been expected.⁶² But the undisputed evidence showed that those complaints ended within days after the effective date of retiering.⁶³ To the extent that Cablevision underestimated the number of complaining subscribers, it represents at most an error in business judgment, not direct evidence of discrimination.

The ALJ’s finding that customer complaints constituted direct evidence is also based on factual findings with no support in the record. The Initial Decision concludes that, to quell complaints, Cablevision offered the sports tier containing GSN on a promotional basis to more than [REDACTED].⁶⁴ In fact, the undisputed evidence shows that Cablevision added [REDACTED] subscribers as a result of the tiering. Although [REDACTED] of those subscribers

⁶⁰ *Shirrell v. St. Francis Med. Ctr.*, 793 F.3d 881, 887 (8th Cir. 2015) (alterations in original) (quoting *Putman v. Unity Health Sys.*, 348 F.3d 732, 735 (8th Cir. 2003)).

⁶¹ Initial Decision ¶¶ 45–48, 102–04.

⁶² CV Exh. 119 at 3.

⁶³ Tr. 1525:12–1526:2 (Montemagno); *see also* CV Exh. 337 ¶ 72 (Montemagno). Specifically, Cablevision received 20,000 calls in the first two days and approximately 7,600 over the next eight days, by which point the calls had stopped. Initial Decision ¶ 45.

⁶⁴ Initial Decision ¶ 47 n.234.

received a temporary subsidy for the sports tier, approximately [REDACTED] new subscribers paid for the tier.⁶⁵ When coupled with Cablevision’s savings of more than [REDACTED] in annual GSN subscriber fees, it is clear that the only correct conclusion that could be reached is that the retiering was the product of “cold economics,” not discrimination.

The ALJ’s contrary finding is based on another computational error. Although the Initial Decision concludes that Cablevision lost over [REDACTED] subscribers as “a result of GSN’s retiering,” there is no evidence to support it.⁶⁶ GSN’s own expert opined that Cablevision lost [REDACTED] subscribers as a result of the retiering, but that opinion is grounded in a regression that is not significant at any of the 1%, 5%, or 10% levels generally accepted among statisticians. As a result, the model lacks the statistical rigor to support any finding of subscriber loss caused by the retiering as opposed to routine customer churn.⁶⁷ The ALJ’s finding that Cablevision lost, over time, an additional [REDACTED] subscribers who received the free sports tier promotion, is similarly devoid of evidentiary support.⁶⁸ Of the [REDACTED] subscribers who received the sports tier promotion, [REDACTED] of them left Cablevision at some unidentified point between 2011 and the date of trial in July 2015.⁶⁹ But there was no evidence before the ALJ to support the

⁶⁵ See CV Exh. 316; Initial Decision ¶ 47 n.234.

⁶⁶ Initial Decision ¶¶ 48, 102.

⁶⁷ Tr. 1035:18–1040:7 (Singer); Tr. 2560:22–2562:13 (Orszag). Cablevision’s expert, Jonathan Orszag, gave unrebutted testimony that 5% is the “conventional level” of statistical significance, and that 10% constitutes “weak significance.” Tr. 2562:10–2563:1 (Orszag). On cross-examination, GSN’s expert, Hal Singer, admitted that his estimate of lost subscribers was not significant at even the 10% level. Tr. 1038:4–7, 1040:3–7 (Singer). As a result, as Mr. Orszag opined, there is no statistically sound basis for finding that Cablevision suffered any customer losses as a result of the retiering. Tr. 2559:4–2560:11, 2562:10–2563:1 (Orszag).

⁶⁸ Initial Decision ¶ 48.

⁶⁹ CV Exh. 337 ¶ 73 (Montemagno); Tr. 1626:14–1627:10 (Montemagno).

conclusion that those subscribers terminated their relationship with Cablevision as a result of the retiering of GSN. The ALJ’s contrary conclusion is simply speculation.

Finally, the ALJ purported to find direct evidence of discrimination in “Cablevision’s admissions . . . that there was nothing GSN could do to reverse the retiering decision.”⁷⁰ Although the ALJ found that Cablevision told GSN its retiering decision was “final” shortly after it was made, he also acknowledged the extensive negotiations over the following three months between Cablevision and GSN’s owners, DIRECTV and Sony, to try to strike a deal for expanded basic carriage for GSN.⁷¹ There is no evidence that Cablevision engaged in these negotiations under false pretenses: the ALJ expressly found that Cablevision’s proposals to Sony concerning GSN carriage were not made in “bad faith.”⁷² The fact that these negotiations failed is not any evidence of discrimination, and certainly not direct evidence.

C. Cablevision’s Justifications for Retiering GSN Were Not “Pretextual”

As the D.C. Circuit explained in *Tennis Channel*, “if the MVPD treats vendors differently based on a reasonable business purpose . . . there is no violation.”⁷³ Unlike a number of past proceedings, the Commission does not have to rely solely on witness recollection to discern the business purpose underlying Cablevision’s carriage decision.⁷⁴ In July 2010, months before the retiering, Mr. Montemagno, a senior Cablevision programming executive, prepared a

⁷⁰ Initial Decision ¶ 100 n.444.

⁷¹ *Id.* ¶¶ 40–44.

⁷² *Id.* ¶ 83 n.402.

⁷³ *Tennis Channel*, 717 F.3d at 985.

⁷⁴ *See, e.g., MASN*, 25 FCC Rcd. at 18114 (noting if the defendant MVPD had “document[ed] its asserted reasons for denying . . . carriage at the time it considered MASN’s request, it might have avoided or truncated the protracted litigation that followed from its decision”).

detailed analysis of the costs and benefits of continued carriage of GSN.⁷⁵ Nowhere in that analysis is there any reference to WE tv, Wedding Central, or any other affiliated network. The analysis does, however, lay out a compelling case for retiering: 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 data; and Cablevision could save up to [REDACTED] per year by repositioning GSN or dropping it altogether. The memorandum considered potential costs, including customer complaints that were anticipated to be “minimal” and potential retaliation by [REDACTED].⁷⁶

The ALJ improperly dismissed Cablevision’s analysis as “pretextual.”⁷⁷ That finding is based on a misapplication of the law and a misreading of the record. As explained in *Tennis Channel*, a pretextual decision is one in which “an otherwise valid business consideration is . . . cover for some deeper discriminatory purpose.”⁷⁸ But an honestly-held belief in the reasons for a decision does not constitute pretext, even if they later prove to be mistaken.⁷⁹ “Showing pretext . . . requires more than simply criticizing the [defendant’s] decisionmaking

⁷⁵ See CV Exh. 119.

⁷⁶ CV Exh. 119 at 3–4.

⁷⁷ Initial Decision ¶¶ 78–83, 86, 105–07.

⁷⁸ *Tennis Channel*, 717 F.3d at 987; see also *Black’s Law Dictionary* (14th ed.) (pretext is a “false or weak reason or motive advanced to hide the actual or strong reason or motive” for a decision).

⁷⁹ See *Woodard v. Fanboy, LLC*, 298 F.3d 1261, 1265 (11th Cir. 2002) (pretext is not “evidence that the defendants was mistaken about the facts” but instead is “evidence . . . that the defendant did not honestly believe the facts upon which he allegedly based his non-discriminatory decision.”).

process.”⁸⁰

The ALJ’s finding of pretext is based on nothing more than second guessing Cablevision’s decisionmaking process. The record shows that Cablevision 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.⁸¹ Although the ALJ concluded that the cost savings realized by retiering GSN were not, in his view, material, Cablevision’s executives testified without contradiction that in their view, the savings were meaningful in the context of Cablevision’s programming budget increases.⁸² And to the extent that the Initial Decision attempts to buttress the finding of pretext by concluding that Cablevision “miscalculated the worth” of GSN by labeling it a “weak network,” that conclusion, if credited, shows at most that Cablevision made an error in business judgment, not that its decision was the product of discrimination.⁸³

The Initial Decision also finds evidence of pretext in Cablevision’s failure to consider reducing the carriage of other networks. The D.C. Circuit rejected the same argument as having “little bearing” on the actual carriage decision at issue in *Tennis Channel*, where the Commission argued that Comcast’s carriage decision “was not based on a good-faith cost-benefit analysis” because “Comcast subjected Tennis Channel to a ‘cost-benefit’ test for carriage that it

⁸⁰ *Hairston v. Vance-Cooks*, 773 F.3d 266, 272 (D.C. Cir. 2014); *see also Barbour v. Browner*, 181 F.3d 1342, 1346 (D.C. Cir. 1999) (“Title VII . . . does not authorize a federal court to become a super-personnel department that reexamines an entity’s business decisions.”).

⁸¹ Initial Decision ¶¶ 25, 31–32.

⁸² *Id.* ¶¶ 33 n.150, 116 n.521; Joint Exh. 1 (Bickham) 94:13–17, 95:13–17; Tr. 1657:2–1657:21 (Montemagno).

⁸³ Initial Decision ¶¶ 82, 104 n.466.

concededly did not even apply to its own affiliates.”⁸⁴ In this case, as in that one, there is no evidence that Cablevision weighed the costs and benefits of retiering GSN, and not its affiliated networks, as a pretextual cover for discrimination. There is no contrary requirement in Section 616 that a vertically integrated MVPD must compare the costs and benefits of continued carriage of a network against the costs and benefits of carrying any or all of its affiliated networks.

Finally, the record cannot support the conclusion that Cablevision’s executives directed the retiering of GSN with discriminatory intent. There is no substantial evidence to support the ALJ’s finding that Mr. Bickham first decided to retier GSN in July 2010 for reasons unrelated to cost savings, and then directed Mr. Montemagno to justify that decision on cost grounds.⁸⁵ Mr. Bickham’s request came in a July 2010 “finance meeting” in which cost-savings were discussed; as he confirmed at his deposition, Mr. Bickham asked for “a carriage assessment to evaluate and explore the possibility of removing GSN from our lineups in an effort to save [REDACTED] in annualized license fees.”⁸⁶ Mr. Montemagno’s memorandum provided a number of options, ranging from dropping GSN to moving it to different tiers.⁸⁷ Mr. Bickham considered Mr. Montemagno’s analysis and reviewed the supporting materials, including Cablevision’s STB data.⁸⁸ Cablevision executives, including Mr. Bickham and

⁸⁴ Br. of Resp’t FCC, *Comcast Cable Commc’ns v. FCC*, No. 12-1337, 2012 WL 5460853, at *31–32 (Nov. 7, 2012); *Tennis Channel*, 717 F.3d at 987.

⁸⁵ Initial Decision ¶ 81.

⁸⁶ CV Exh. 117 at 3; CV Exh. 121A at 1; Joint Exh. 1 at 22:21–23:13, 23:25–25:15 (Bickham).

⁸⁷ See CV Exh. 119 (July 25, 2010 GSN carriage analysis); Initial Decision ¶¶ 28–30.

⁸⁸ Initial Decision ¶ 30 & n.136.

Mr. Montemagno, then revisited this issue in November 2010 as part of the 2011 programming budget process, ultimately deciding to retier GSN to shave costs from the programming budget.⁸⁹

In short, the record demonstrates that Mr. Bickham’s motivation in retiering GSN was cost-savings. The ALJ reached the opposite conclusion only by ignoring both Mr. Bickham’s uncontradicted testimony and other undisputed evidence. Because Mr. Bickham testified by written deposition rather than by live testimony, the ALJ could not have made a credibility finding. As a result, the ALJ’s decision to ignore Mr. Bickham’s testimony merits no deference.⁹⁰ There is simply no evidence that Mr. Montemagno’s detailed carriage analysis—the type of probative evidence often lacking in carriage cases—was “pretextual cover” for discrimination or an “[attempt] to cover it up after the fact.”⁹¹

II. The ALJ Failed to Apply Controlling Precedent from the *Tennis Channel* Decision

The *Tennis Channel* decision makes clear that GSN had the burden of proving at trial that Cablevision would have benefited from maintaining GSN’s carriage on a broadly-penetrated tier.⁹² The ALJ made no finding that GSN had discharged that burden. To the contrary, he expressly declined to follow the guidance of *Tennis Channel*, declaring it inapposite because GSN had proven discrimination by direct evidence.⁹³ The ALJ committed error in sidestepping the requirements of *Tennis Channel*; nothing in the decision declares the net benefit

⁸⁹ *Id.* ¶¶ 33–36.

⁹⁰ The ALJ’s finding that Mr. Montemagno’s carriage analysis was pretextual fails for another reason. Even if Mr. Bickham’s sole reason for retiering GSN was that it could be done “without having a negative impact on the business,” Initial Decision ¶ 82, that decision is completely permissible as long as it was not motivated by affiliation. There is no evidence that it was.

⁹¹ *Id.* ¶ 86.

⁹² *Tennis Channel*, 717 F.3d at 985–86.

⁹³ Initial Decision ¶ 64 n.325.

test irrelevant because there is other, purportedly direct, evidence of discrimination. 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, if any, as a result of subsidies and customers defections, to determine whether Cablevision made a rational economic decision to retier GSN. The ALJ's failure to do so is, standing alone, reversible error.

The ALJ's refusal to opine on net benefit is all the more puzzling because the ALJ altered the trial schedule because of *Tennis Channel*, and then carefully considered fact and expert evidence directed at its holding. That evidence showed that, when weighed against the [REDACTED] in annual cost-savings from retiering GSN, there was no net benefit to carrying GSN broadly.⁹⁴ Cablevision undertook precisely the type of analysis that the D.C. Circuit affirmed as evidence of good-faith business reasons for a carriage decision.

Post-retiering analysis bears out Cablevision's business judgment. Even if Cablevision lost some subscribers from the retiering,⁹⁵ the revenue lost by Cablevision is more than set off by the approximately [REDACTED] in carriage fees Cablevision saved and [REDACTED] of dollars Cablevision earned every year from approximately [REDACTED] new subscribers to the sports tier (each of whom paid an additional \$6.95 per month at the then-current price).⁹⁶ Cablevision's expert, Mr. Orszag, 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.⁹⁷ As the ALJ

⁹⁴ See *supra*, pp. 1–2, 10–11, 14–15.

⁹⁵ See *supra*, pp. 11–14.

⁹⁶ Initial Decision ¶ 48 n.235; CV Exh. 334 ¶¶ 141, 150, 214 (Orszag); Tr. 889:23–25, 890:5–8 (Singer).

⁹⁷ CV Exh. 334 ¶ 214 (Orszag).

expressly held, “[w]ithout any doubt, it was the cold economics of the retier favoring Cablevision”—the opportunity to save ██████ million/year in programming expenses—“that drove Cablevision’s retiering decision.”⁹⁸ Exactly right. Because GSN failed to show that Cablevision would have benefited from carrying GSN broadly, Cablevision’s decision would have passed muster under *Tennis Channel*.⁹⁹ The ALJ’s failure even to do the analysis is reversible error.

III. The ALJ Erred in Concluding that GSN Is Similarly Situated to WE tv and Wedding Central

The Commission can rely upon circumstantial evidence to infer discrimination only if Cablevision treated GSN differently than a “similarly situated” affiliate.¹⁰⁰ The ALJ found GSN—a network centered on game shows and contests—to be similarly situated to WE tv and Wedding Central—two networks focused on women. That determination is based on a misapplication of Commission rulemaking and prior decisions, the ALJ’s own precedent, and the record, all of which compelled the contrary conclusion.

The applicable standard is clear: a finding that networks are similarly situated is “based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming and other factors,”¹⁰¹ including network marketing, audience data, and “look and feel.”¹⁰² The ALJ, however, ignored the majority of these factors, essentially concluding that, because the networks attempted to reach the same target audience of women

⁹⁸ Initial Decision ¶ 46.

⁹⁹ See *Tennis Channel*, 717 F.3d at 985–87.

¹⁰⁰ See 47 C.F.R. § 76.1302(d)(3)(B)(2); *WealthTV ALJ*, 24 FCC Rcd. at 13000.

¹⁰¹ 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

¹⁰² See *WealthTV ALJ*, 24 FCC Rcd. at 12980.

viewers, they were similarly situated. He did not take into account ordinary course business documents demonstrating the differences in WE tv and GSN's programming and target audiences. He ignored the comprehensive genre analysis performed by Cablevision's expert detailing the sharp differences between the networks' programming. And the ALJ dismissed extensive data with respect to the actual audiences that the networks attracted that cannot be reconciled with his conclusion that the networks are similarly situated.

A. The ALJ Disregarded Substantial Evidence that the Programming on the Networks Is Entirely Different

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. In an effort to avoid the import of this evidence, the Initial Decision states that that "it is not material that GSN's women-oriented programming primarily consisted of game shows," while WE tv and Wedding Central's programming did not.¹⁰³ That conclusion conflicts with the Commission's rules, which required the ALJ to compare both "genre" and "target programming," as well as precedent from the ALJ himself in which he has recognized the central role of programming in determining whether networks are similarly situated.

1. The Networks Promoted Different Programming in Marketing Materials

WE tv's marketing and promotional materials focused on programming by or featuring women or about subjects that were specifically of interest to women.¹⁰⁴ The ALJ's

¹⁰³ Initial Decision ¶ 64.

¹⁰⁴ CV Exh. 42 at 3, 6, 22 (2008 WE tv upfront presentation); CV Exh. 61 at 21 (2009/2010 WE tv upfront presentation); CV Exh. 100 at 14 (2010/2011 WE tv upfront presentation); CV

finding that GSN is similar to WE tv flies in the face of ordinary-course business documents in which GSN highlighted its “unique” game show programming genre to MVPDs, advertisers, and promotional partners. For example, GSN told Comcast, its largest distributor, that “GSN is the *only* TV network devoted exclusively to games.”¹⁰⁵ To drive home that point, GSN prepared a chart for Comcast that set apart GSN as a unique provider of game show programming, in contrast to the genres offered by other networks, including “Women’s Entertainment Networks” such as WE tv.¹⁰⁶ Likewise, GSN told Cablevision during negotiations that it is the “only TV network uniquely focused on: classic game show favorites with new original programming.”¹⁰⁷ Former GSN distribution executive Dennis Gillespie testified that GSN’s “games” genre differentiated it from other networks, and current CEO David Goldhill acknowledged that GSN uses the “competitive DNA in absolutely everything we do.”¹⁰⁸

Moreover, the ALJ did not give proper weight to evidence showing that a material part of GSN’s programming—up to three primetime nights per week—consisted of poker programs that specifically targeted a male audience.¹⁰⁹ Although the ALJ dismisses GSN’s heavy rotation of poker programming as “infomercials,” this finding has no record support.¹¹⁰

Exh. 166 at 9 (2011 WE tv-Comcast presentation); CV Exh. 168 at 33 (2011/2012 WE tv upfront presentation).

¹⁰⁵ CV Exh. 50 at 2; Tr. 306:7–19, 307:8–23 (Goldhill).

¹⁰⁶ CV Exh. 50 at 3; *see also* CV Exh. 37 at 4 (2008 GSN affiliates presentation); CV Exh. 43 at 4 (2008 GSN-Comcast presentation); CV Exh. 51 at 3 (2009 GSN affiliates presentation).

¹⁰⁷ CV Exh. 52 at 2; *see also* CV Exh. 109 at 15 (GSN presentation to DISH stating it was “the *ONLY* network dedicated to games and the *ONLY* place where audiences come to play every day”).

¹⁰⁸ Tr. 307:2–3 (Goldhill); Joint Exh. 4 at 73:17–75:7, 76:12–77:7, 80:3–23 (Gillespie).

¹⁰⁹ *See, e.g.*, CV Exh. 169 (poker programming aired for thirteen hours a week).

¹¹⁰ Initial Decision ¶ 54.

The poker programs were not produced by advertisers, but by production companies, just like GSN's other shows. And GSN promoted its poker programs during its annual "upfront" presentations of the network's programming lineup, in which it sought to attract advertisers from all industries, not just the poker or gaming industries.¹¹¹

The Commission has appropriately relied upon a complaining network's marketing presentations to MVPDs and advertisers as important admissions when those presentations contradict the allegations of similarity made in carriage proceedings. For example, in *WealthTV*, the ALJ relied on such presentations in rejecting the claims of the complaining network, a conclusion the Commission endorsed.¹¹² Here, however, the ALJ ignored these admissions, asserting that "marketing" is not one of the Commission's enumerated factors to determine similarity and finding that, because "the nature of marketing is to distinguish one entity from another," this factor is "not useful."¹¹³

The ALJ has it backwards. The marketing materials created by GSN are unambiguous admissions by GSN that it provided unique game show programming that distinguished it from other networks generally, and women's networks such as WE tv specifically. These contemporaneous documents, created for the central business purpose of attracting carriage and advertising—the two revenue streams available to cable networks such as GSN—are flatly inconsistent with the ALJ's holding that GSN was similarly situated to WE tv.

2. The Networks Agreed to Provide Distinct Programming in Their Carriage Agreements

The ALJ also ignored undisputed evidence showing that GSN and WE tv entered

¹¹¹ CV Exh. 656 at 3, 9.

¹¹² *WealthTV FCC*, 26 FCC Rcd. at 8980.

¹¹³ Initial Decision ¶ 57 & n.291.

into contracts with their MVPD partners in which they represented that they would provide fundamentally different types of programming. Carriage agreements typically describe a network’s programming content; these provisions are central terms in carriage agreements and frequently enforced by MVPDs.¹¹⁴ The evidence before the ALJ included carriage agreements with multiple MVPDs, spanning over ten years.¹¹⁵ Those agreements show that GSN consistently described its network and promised to deliver content made up [REDACTED]

[REDACTED] WE tv’s carriage agreements are markedly different, undertaking to provide programming [REDACTED]

[REDACTED] The ALJ failed to address the import of these agreements, which cannot be reconciled with his conclusion that GSN aired “women-oriented” programming.

3. The ALJ’s Conclusions Concerning Programming are Unsupported by the Record

The ALJ incorrectly concluded that “it is not necessary to the finding of similarity that the networks air the same type of women-oriented programming.” That conclusion could not be more inconsistent with Commission guidance, which explicitly instructs the ALJ to

¹¹⁴ Tr. 1924:4–22 (Broussard).

¹¹⁵ *See, e.g.*, CV Exh. 2 at 6–7; CV Exh. 3 at 1–2, 8; CV Exh. 5 at 2, 29; CV Exh. 9 at 1; CV Exh. 13 at 4; CV Exh. 14 at 1–2, 21–35; CV Exh. 24 at 5, 24; CV Exh. 25 at 12; CV Exh. 200 at 12–13.

¹¹⁶ *See* CV Exh. 2 at 6 ([REDACTED] affiliation agreement with [REDACTED]); CV Exh. 27 at 26 ([REDACTED] affiliation agreement with [REDACTED]).

¹¹⁷ CV Exh. 7 at 7; *see also* CV Exh. 13 at 33 ([REDACTED] agreement with [REDACTED] where WE tv described its programming as [REDACTED]).

consider genre differences and target programming when assessing whether two networks are similarly situated.¹¹⁸ The ALJ did so in prior proceedings and his failure to do so here constituted reversible error.¹¹⁹

The Initial Decision fails to take into account the substantive genre analysis undertaken by Cablevision expert Michael Egan, which the ALJ labels “not credible,” despite the fact that the ALJ, the Commission, and the Ninth Circuit all credited a similar analysis in *Wealth TV*.¹²⁰ That analysis showed that, between 2009 and 2011, GSN devoted 98% of its broadcast hours to game shows and gaming, while, by contrast, WE tv aired that programming less than 1% of the time.¹²¹ The Initial Decision does not dispute that analysis but dismisses it by incorrectly concluding that GSN’s programming should be characterized as “reality competition,” a genre in which cameras follow participants in real-world settings.¹²² The record

¹¹⁸ See 47 C.F.R. § 76.1302(d)(iii)(B)(2)(i); 2011 Program Carriage Order, 26 FCC Rcd. at 11504–05.

¹¹⁹ *WealthTV ALJ*, 24 FCC Rcd. at 12977–83.

¹²⁰ *Herring Broad., Inc. v. FCC*, 515 F. App’x 655, 656–57 (9th Cir. 2013) (holding that the Commission “reasonably relied on the expert testimony of Michael Egan to conclude that the two networks did not show similar programming”); *WealthTV FCC*, 26 FCC Rcd at 8983–84 (rejecting challenge to ALJ’s reliance on Egan); *WealthTV ALJ*, 24 FCC Rcd. at 12977–79 & n.91 (describing Egan’s “consistent, convincing, and well organized expert testimony”).

¹²¹ CV Exh. 651; see also CV Exh. 332 ¶ 30 (Egan). From 2012 to 2014, GSN devoted 95% of its broadcast hours to game show; by contrast WE tv aired no game shows at all. CV Exh. 332 ¶ 287 (Egan). The ALJ pointed out that WE tv aired one original game show, *Most Popular*, in a period not covered by the Egan study. However, the Initial Decision omits the undisputed fact that the show ran for only six episodes in 2009 before it was dismissed by WE tv as “an experiment that failed pretty miserabl[y].” Tr. 1713:2–17 (Dorée); CV Exh. 338 ¶ 32 (Dorée).

¹²² Initial Decision ¶ 62. Moreover, the ALJ erred in relying on GSN’s programming expert, Mr. Brooks, who admitted on cross examination that he conducted no systematic analysis of GSN or WE tv’s programming, and indeed, that his opinions were not “based on any review of the programming on these networks” during the relevant period. Tr. 1165:15–1166:8 (Brooks). Put another way, Mr. Brooks purported to opine on the nature of the programming

cannot support such a conclusion: game shows played out before a live studio audience with contestants and prizes cannot be fairly characterized as reality competition.¹²³ And, in any case, that conclusion is irrelevant to the question of GSN's similarity with WE tv because there is no evidence that the programming on WE tv could be characterized the same way.¹²⁴

The ALJ's conclusion that WE tv and GSN showed similar programming was no doubt reinforced by his refusal to accept any "sizzle reels" of that programming into evidence. GSN and WE tv routinely created these "sizzle reels," clips of programming created for promotional purposes that are intended to convey to advertisers and others the essence of the networks' programming. The ALJ refused to receive them because of his belief that he was prohibited from doing so by 47 C.F.R. § 1.357.¹²⁵

This was error. On its face, Section 1.357 simply expresses a preference for transcripts of audio recordings rather than the recordings themselves. Whatever the purpose of that rule might be, it does not apply to audiovisual as opposed to audio recordings and it would make no sense to apply such a rule in the context of a proceeding in which one of the central

without viewing any of it. By contrast, Mr. Egan watched all or parts of multiple episodes of 26 different WE tv programs and 27 different GSN shows; he also spent a combined 55 hours watching full-length episodes of programming on both networks. CV Exh. 332 ¶ 16.

¹²³ Shows like *Family Feud* and *The Newlywed Game*, both of which aired frequently on GSN, are classic game shows as defined by Mr. Egan: they feature a scripted competition, strictly controlled by the show's producer and emcee, which takes place in one location. See CV Exh. 332 ¶¶ 24–25. Mr. Egan determined that GSN aired just one reality competition show during the relevant time period. See CV Exh. 332 ¶ 26 n.26.

¹²⁴ See CV Exh. 332 ¶ 26 n.26 (Egan).

¹²⁵ Tr. 2151:18–2153:14. The rule states: "Unless offered for the sole purpose of attempting to prove or demonstrate sound effect, mechanical or physical reproductions of sound waves shall not be admitted in evidence. Any party desiring to offer any matter alleged to be contained therein or thereupon shall have such matter typewritten on paper of the size prescribed by § 1.49, and the same shall be identified and offered in duplicate in the same manner as other exhibits." 47 C.F.R. § 1.357.

questions is the similarity of that audiovisual programming. A review of the sizzle reels would have provided powerful visual evidence of the sharp differences between GSN and WE tv.¹²⁶

In sum, the ALJ ignored substantial record evidence demonstrating that GSN and WE tv aired different programming. Failure to credit this evidence requires reversal.

4. Consumer Survey Evidence Confirmed that GSN and WE tv Show Dissimilar Programming

The ALJ also erred by ignoring the un rebutted consumer survey evidence introduced by Cablevision demonstrating that viewers perceived women’s networks such as Lifetime and Oxygen to have similar programming to WE tv but saw no similarity between the programming on WE tv and GSN.¹²⁷ Relegating the survey to a footnote, the ALJ did not question its validity, methodology, or findings. Instead, he concluded that “it is not remarkable or material 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.”¹²⁸ The ALJ may not have found the survey result “remarkable,” but there can be no dispute that those results are inconsistent with his erroneous conclusion that the networks are similarly situated.

¹²⁶ Finally, the Initial Decision fails to account for the lack of competition between GSN and WE tv in vying for rights to the same programming. The ALJ found the degree of competition to be significant to his analysis in *Tennis Channel*, but failed here to consider the issue at all. *See Tennis Channel*, 26 FCC Rcd. at 17171. What the record shows is that, among the thousands of shows pitched to GSN and WE tv, only [REDACTED] overlapped, and neither network expressed any interest in developing any of the [REDACTED]. CV Exh. 334 ¶ 135 (Orszag); *see also* CV Exh. 332 ¶ 75 (Egan).

¹²⁷ Tr. 1401:6–11, 1413:2–11 (Poret); CV Exh. 233 ¶¶ 28–30, 34 (Poret).

¹²⁸ Initial Decision ¶ 64 n.322 (emphasis added).

B. The ALJ Improperly Disregarded Substantial Evidence Showing Differences in Actual Audience

The ALJ found it compelling that GSN purported to target the same 25 to 54-year old women viewers targeted by WE tv. However, the ALJ erred in disregarding substantial evidence that, whatever its “target” audience may have been, GSN’s actual audience was not similar to that of WE tv. The ALJ’s analysis of the actual audiences attracted by GSN and WE tv begins and ends with his conclusion that women comprise more than 70% of the viewership of the two networks.¹²⁹ This superficial analysis glosses over the extensive Nielsen ratings data and other evidence showing fundamental demographic differences in the GSN and WE tv audiences that, when properly considered, preclude any finding of similarity between the networks.

The record demonstrates that, although GSN claimed to target women viewers aged 25 to 54, GSN’s actual audience skewed older and more male than its purported target. For example, between 2007 and 2011, women 55 and older consistently comprised the largest segment of GSN’s audience. Men 55 and older constituted the next biggest group of GSN viewers.¹³⁰ In other words, the two largest groups of GSN viewers fell outside of the network’s purported target demographic, with a median viewer age [REDACTED].¹³¹ And even in its purported 25 to 54 target demographic, GSN failed to attract women in significant numbers. GSN’s CEO conceded that GSN’s viewers between the ages of 25 to 54 were

¹²⁹ *Id.* ¶¶ 51–55.

¹³⁰ CV Exh. 314 at 11. Women 55+ made up roughly [REDACTED] of GSN’s audience in the 4th quarter of 2010; men 55+ comprised [REDACTED] of the audience in that same quarter. *Id.*

¹³¹ CV Exh. 314 at 12.

████████████████████ for every quarter between 2007 and 2011, and only reached ██████████ women twice during this entire period.¹³²

WE tv, by contrast, consistently delivered an actual audience of women 25 to 54 that was orders of magnitude larger than GSN's. Women 25 to 54 routinely made up the network's largest viewing group.¹³³ In the fourth quarter of 2010, WE tv attracted an average primetime audience of ██████████ women 25 to 54; GSN, on the other hand, had an average primetime audience of only ██████████ women 25 to 54.¹³⁴ For WE tv, unlike GSN, men 55 and older never constituted the network's largest or second-largest viewer demographic. These differences resulted in WE tv, unlike GSN, having a median viewer age within its target demographic.¹³⁵

The ALJ acknowledged that GSN had an older and more male audience than WE tv.¹³⁶ He erroneously dismissed that distinction as “immaterial” because “it is a network's target audience, not its actual audience, that drives advertising and programming decisions.”¹³⁷ But precedent and probativeness should have led the ALJ to the opposite conclusion: “data on actual audience demographics” is highly material in the determination of similarity, and indeed, can be the “most compelling evidence in the record.”¹³⁸ If it were not, any network could claim to be

¹³² CV Exh. 314 at 5; Tr. 369:8-18 (Goldhill).

¹³³ CV Exh. 156 at 3.

¹³⁴ Compare CV Exh. 314 at 11 with CV Exh. 156 at 3.

¹³⁵ CV Exh. 93 at 1, 5.

¹³⁶ Initial Decision ¶ 69.

¹³⁷ *Id.* ¶ 70.

¹³⁸ *Tennis Channel FCC*, 27 FCC Rcd. at 8527, 8530–31. The Commission noted that “data demonstrating a network's actual demographics [is] more compelling than a network's representation of its own demographics.” *Id.* at 8531 n.192.

similarly situated to another simply by declaring its aspiration to attract the same audience.¹³⁹ In the end, a network’s measure of success in appealing to a particular demographic can only be measured by the audience it actually attracts. The ALJ’s failure to recognize that fundamental fact led him to reach an erroneous conclusion on the similarity of GSN and WE tv.

C. The ALJ Erred in Concluding that the Networks Had Similar Target Audiences

Not only did the ALJ disregard stark distinctions in programming and actual audience, his conclusion that both GSN and WE tv targeted women 25 to 54 and 18 to 49 is itself unsupported by the record. There is no dispute that WE tv targeted women in these age groups.¹⁴⁰ The evidence as a whole shows that GSN did not. As the Initial Decision concedes, GSN “emphasized [its] wide appeal” and “did not market itself to cable distributors as a women’s network.”¹⁴¹

The ALJ disregarded multiple GSN presentations to MVPDs in which GSN defined its target demographic as “adults”—that is, men and women. Those presentations touted that GSN offered “family-friendly programming with wide audience appeal” which delivered a

¹³⁹ While relying upon the purported “shared viewing” of GSN and WE tv (Initial Decision ¶ 70), the ALJ ignored that the Nielsen data underlying GSN’s expert’s work are based on minimal one- or six-minute viewing samples of the two networks over a single quarter. GSN Exh. 300 ¶ 34 (Brooks); Tr. 1278:21–1280:22 (Brooks). The ALJ failed to take into account the substantially more complete data gleaned from Cablevision’s set top boxes, which showed that GSN accounted for only [REDACTED] of the total viewership among households that watched WE tv for at least one hour in April 2010. CV Exh. 334 ¶ 82 (Orszag).

¹⁴⁰ *See, e.g.*, Tr. 1699:14–19, 1700:14–1702:6, 1728:20–1734:14 (Dorée); CV Exh. 91 at 18 (“WE tv is for women 18-54 everywhere who want to relate and engage with the entertainment they watch.”); CV Exh. 124 at 5–6 (presentation to Charter highlighting WE tv’s female audience).

¹⁴¹ Initial Decision ¶ 57.

“loyal, broad-based audience.”¹⁴² The former senior GSN executive with responsibility for many of these presentations confirmed their accuracy. He testified that GSN marketed itself to attract a “broad-based” audience of “men and women and of all ages,” not just women.¹⁴³ Other GSN documents further highlighted its roughly even split in men and women viewers as being consistent with its target audience.¹⁴⁴

The ALJ improperly dismissed this evidence and testimony as a “sales pitch.”¹⁴⁵ The truth of the matter is that these documents represent written representations to GSN’s largest distribution partners, such as Comcast, setting out the network’s view of its target audience. And GSN made the same “sales pitch” in reports to its own board of directors, in which it [REDACTED]

[REDACTED]¹⁴⁶ There would have been no reason for GSN executives to report to their board on viewing among this larger group unless, as its “sales pitches” indicated, the network in fact targeted all adult viewers. The ALJ’s contrary conclusion is not supported by the record.

Moreover, in concluding that GSN and WE tv targeted similar audiences, the ALJ misinterpreted evidence showing that subscribers who lost access to GSN after the retiering

¹⁴² See, e.g., CV Exh. 50 at 4, 16 (GSN’s 2009 presentation to Comcast); CV Exh. 39 at 32 (Brighthouse); CV Exh. 48 at 30 (Comcast Spotlight); CV Exh. 109 at 4 (DISH).

¹⁴³ Joint Exh. 4 at 72:19–73:11 (Gillespie). Although the ALJ suggests that Cablevision mischaracterized Mr. Gillespie’s testimony, it speaks for itself. Mr. Gillespie conceded that GSN marketed itself to “men and women . . . of all ages,” not simply to women. *Id.*

¹⁴⁴ See CV Exh. 81 at 7 (November 2009 presentation to DISH); CV Exh. 90 at 11 (January 2010 presentation to Comcast Spotlight); Tr. 318:24–320:11 (Goldhill).

¹⁴⁵ Initial Decision ¶ 57.

¹⁴⁶ CV Exh. 143 at 39–41 (GSN’s 2010 Management Committee Presentation); CV Exh. 193 at 50, 53 (GSN’s 2011 Management Committee Presentation).

increased viewership of WE tv by roughly 1.4 seconds per day.¹⁴⁷ The ALJ cited this evidence as support for his finding that the networks competed for viewers.¹⁴⁸ But the ALJ ignored that such a *de minimis* increase in WE tv viewing had no economic or statistical significance. As a result, it provides no support for the ALJ’s conclusion that viewers perceived WE tv and Wedding Central as substitutes for GSN.¹⁴⁹

The ALJ also purported to find support in the “switching analysis” performed by Cablevision’s expert, Mr. Orszag, for the ALJ’s conclusions of common viewership among the three networks.¹⁵⁰ Again, the ALJ’s finding is based on a misapprehension of Mr. Orszag’s work, which showed that WE tv’s viewers switched to 32 other networks more often than switching to GSN. That is powerful evidence that the networks did not compete for viewers.¹⁵¹

D. The ALJ Erred in Assessing the Evidence of Advertising Competition

The ALJ also overlooked substantial evidence showing that advertisers would not consider GSN and WE tv to be similarly situated. Cablevision’s advertising expert, Mr. Blasius, an experienced ad buyer responsible for purchasing billions of dollars of advertising over three decades,¹⁵² testified that the significant differences in the actual audiences delivered by WE tv

¹⁴⁷ Initial Decision ¶ 67 n.332.

¹⁴⁸ *Id.*

¹⁴⁹ CV Exh. 334 ¶ 54 (Orszag). Cablevision’s expert, Mr. Orszag, concluded that the effect of the retiering on WE tv’s viewership was so small that WE tv would never benefit from it in any meaningful way, such as increased Nielsen ratings relied upon by advertisers. Tr. 2527:3–2528:18 (Orszag).

¹⁵⁰ Initial Decision ¶ 68.

¹⁵¹ CV Exh. 334 ¶¶ 61–64 (Orszag); Tr. 2534:1–10 (Orszag).

¹⁵² *See* Tr. 2383:14–17, 2387:6–8 (Blasius); CV Exh. 201.

and GSN would preclude advertisers from perceiving GSN and WE tv as similarly situated.¹⁵³ That testimony, ignored by the ALJ, rests on the unremarkable proposition that advertisers are only willing to pay for viewers that they reach. Advertisers seeking to reach women 25 to 54 would find WE tv to be an efficient vehicle and GSN to be inefficient because WE tv consistently delivered far more viewers in that demographic. Although GSN delivered many older male and female viewers, in the real world, advertisers view those additional viewers as “wasted impressions.”¹⁵⁴

The ALJ also failed to consider GSN’s and WE tv’s placement in different advertising “clusters” on DISH and DIRECTV—further marketplace evidence that advertisers and MVPDs did not consider the networks to be similar. An advertiser wishing to target a specific demographic, such as women, can restrict its ad buy on these DBS services to a group of networks with similar audience profiles.¹⁵⁵ WE tv was included within clusters targeting women, while GSN was in the gender-balanced “adults” cluster on both DIRECTV and DISH.¹⁵⁶ An advertiser purchasing advertising time in the female clusters would see their ads on WE tv, but not GSN.

¹⁵³ CV Exh. 228 ¶¶ 1–2 (Blasius). For example, Nielsen primetime ratings for the 2009-2010 broadcast year show that WE tv delivered a [REDACTED] rating in the women 25 to 54 demographic, while GSN delivered only a [REDACTED] in the same demographic. Cablevision’s expert also provided a number of other metrics upon which an advertiser would distinguish between GSN and WE tv, including the concentration of a network’s audience in a certain demographic, the index rating of a network in target demographics, the median age of the network’s viewers, and the cost per thousand viewers. *See* CV Exh. 228 ¶ 2 (Blasius).

¹⁵⁴ Tr. 2399:11–2400:7 (Blasius).

¹⁵⁵ CV Exh. 212 at 5 (DIRECTV clusters); CV Exh. 298 at 4 (DISH clusters). DIRECTV was, of course, one of the corporate parents of GSN.

¹⁵⁶ CV Exh. 212 at 5; CV Exh. 298 at 4; Tr. 655:22–656:21 (Hopkins). The female clusters included other women’s networks such as Lifetime Movie Network, Oxygen, Style, OWN, and E!

The ALJ’s contrary conclusion, that advertisers would view the networks similarly, is erroneously based on two pieces of evidence. The first is his finding that GSN targeted and sold advertising to the same demographics targeted by WE tv.¹⁵⁷ In fact, GSN sold only a small fraction of its overall advertising in the guaranteed demographic of women 25 to 54.¹⁵⁸ Although it is true, as the ALJ recites, women 25 to 54 accounted for nearly [REDACTED] percent of GSN’s upfront advertising sales (advertising sold at the beginning of a television season), these sales accounted for only [REDACTED] percent of the network’s overall advertising sales.¹⁵⁹ The majority of advertising on GSN was either sold without a target demographic at all or to a variety of other demographics, including men.¹⁶⁰

Second, the ALJ found overlap between GSN’s and WE tv’s “top three advertisers” as evidence of similarity. In reality, such overlap is immaterial.¹⁶¹ The top three advertisers on each network are among the nation’s largest consumer companies that purchase advertising on virtually every cable network.¹⁶² The fact that two of those three companies bought advertising on both GSN and WE tv is not probative of any similarity between the networks.

¹⁵⁷ See Initial Decision ¶¶ 73–75.

¹⁵⁸ Tr. 768:3–769:15, 764:8–765:15 (Zaccario).

¹⁵⁹ GSN Exh. 174 at 2; Tr. 731:11–16 (Zaccario).

¹⁶⁰ GSN Exh. 174 at 30; Tr. 768:2–769:15 (Zaccario) (testifying that [REDACTED] of GSN’s advertising revenue in 2010 came from direct response advertising which has no guaranteed demographic).

¹⁶¹ See Initial Decision ¶ 77. GSN’s top three advertisers are, in descending order, [REDACTED] and WE tv’s are [REDACTED]. *Id.*

¹⁶² CV Exh. 228 ¶¶ 58–65 (Blasius); CV Exh. 228 Table 5; CV Exh. 334 ¶ 127 (Orszag).

E. WE tv Did Not Consider GSN to Be a Competitor

The Initial Decision failed to give proper weight to the evidence showing that “WE tv neither viewed GSN as a competitor nor included it as a part of its competitive set.”¹⁶³ The fact that WE tv did not consider GSN as a women’s network competitor is fundamentally at odds with the notion that the networks in fact competed for audience, advertising, or anything else. The record shows that WE tv vigorously monitored the “women’s networks” in its competitive set, including [REDACTED]. [REDACTED]. WE tv took “deep dives into looking at their programming, what their biggest hits were, where their core audience was, and how they were positioning themselves.”¹⁶⁴ 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.¹⁶⁵ None of those reports mentioned GSN.¹⁶⁶

IV. The ALJ Erred in Holding that the Retiering Unreasonably Restrained GSN’s Ability to Compete Fairly

The ALJ failed to apply the appropriate standard for unreasonable restraint under Section 616.¹⁶⁷ A network cannot prove unreasonable restraint “merely by showing that the

¹⁶³ See Initial Decision ¶ 84.

¹⁶⁴ Tr. 1736:10–17 (Dorée).

¹⁶⁵ Tr. 1749:6–9, 1755:16–23 (Dorée); CV Exh. 338 ¶ 28 (Dorée); CV. Exh 305 (example of one-page report about Oxygen).

¹⁶⁶ Tr. 1755:4–7, 1755:24–1756:8, 1875:12–25, 1878:12–18 (Dorée).

¹⁶⁷ The Commission has interpreted the unreasonable restraint provision to require analysis of “the impact of the charged adverse action ‘on the programming vendor’s subscribership, licensee fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale.’” HDO, 27 FCC Rcd. at 5120 n.57,

defendants’ individual carriage decisions adversely affected its competitive position in the marketplace.”¹⁶⁸ But that is all the ALJ found here: economic losses of subscriber fees and advertising revenue that are the consequence of every adverse carriage decision.¹⁶⁹

The evidence at trial established that GSN (unlike other cable networks in prior carriage proceedings) is thriving: it is a fully-distributed national network backed by well-resourced corporate parents that has enjoyed increased distribution, subscribership, and advertising revenues since the retiering.¹⁷⁰ Since the retiering, GSN’s subscribers have increased, growing from 73.5 million to [REDACTED] million.¹⁷¹ GSN has been profitable each year,

5133–35; *Time Warner Cable*, 729 F.3d 137, 149 (2d Cir. 2013) (quoting 2011 Program Carriage Order, 26 FCC Rcd. at 11505 n.60).

¹⁶⁸ *WealthTV ALJ*, 24 FCC Rcd. at 13002; see also *Time Warner Cable v. FCC*, 729 F.3d at 166 (“[W]e do not assume that the FCC will effectively nullify the unreasonable restraint requirement of [Section 616] by recognizing *any* detrimental effect on an unaffiliated network . . . rather than demanding proof of the significant or material detrimental effect implicit in the term ‘unreasonable restraint.’”).

¹⁶⁹ See, e.g., Initial Decision ¶¶ 115–16. Although the ALJ states that the retiering “significantly and negatively impacted GSN’s advertising and license fee revenue,” *id.* ¶ 87, the evidence shows that GSN lost less than [REDACTED] of its subscribers and less than [REDACTED] of its total advertising revenue. Although GSN also sought to prove a financial impact from the retiering that extended beyond Cablevision’s footprint, the ALJ rejected each of GSN’s claims. While GSN argued that the retiering hurt its ability to attract advertisers because some ad buyers in the New York DMA might be Cablevision subscribers, the ALJ was “not persuaded that this . . . is evidence of harm within the purview of [S]ection 616.” *Id.* ¶ 90 n.418. Similarly, the ALJ did not credit GSN’s speculative claim that this case forestalled a “domino effect” on GSN’s carriage with other MVPDs.

¹⁷⁰ See, e.g., Tr. 219:9–12 (Goldhill) (noting that since the retiering, [REDACTED]; Tr. 609:16–610:3, 692:21–693:7 (Hopkins) (discussing post-retiering subscriber growth), 694:4–21 (Hopkins) (testifying that GSN has concluded new deals with [REDACTED] since 2011); CV Exh. 256 at 10 (showing post-retiering increase in advertising revenues).

¹⁷¹ CV Exh. 256 at 4–5; CV Exh. 325 at 7.

holds [REDACTED]

[REDACTED]¹⁷²

The ALJ found only that the retiering harmed GSN, not that GSN was unreasonably restrained. A complaining network is, by definition, always worse off after an adverse carriage decision. The Commission therefore recognizes that “Section 616 . . . appl[ies] only where an anticompetitive impact is shown in a particular case,”¹⁷³ and “demand[s] proof of the significant or material detrimental effect implicit in the term ‘unreasonable restraint.’”¹⁷⁴ Judge Kavanaugh made the same point in his concurrence in *Tennis Channel*, emphasizing that Section 616 “applies only to discrimination that amounts to an unreasonable restraint under antitrust law” and, thus, discrimination “becom[e]s potentially problematic . . . only when a video programming distributor possesses market power.”¹⁷⁵ By failing to follow that approach here, the ALJ “badly misread” Section 616 and “mistakenly focuse[d] on the effects of [Cablevision’s] conduct on [GSN] . . . rather than on overall competition.”¹⁷⁶

Finally, the ALJ failed to identify a relevant market in which Cablevision has market power sufficient to restrain GSN. If the relevant market were the national market for video programming distribution in which GSN competes, Cablevision, with less than [REDACTED] of

¹⁷² Tr. 360:20–23, 398:22–25, 400:18–401:7 (Goldhill); CV Exh. 263 at 4 (GSN’s 2013–14 consolidated financial statements); CV Exh. 262 at 14–15 (GSN’s 2014 budget).

¹⁷³ Br. of FCC at 42, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013); *see also Time Warner Cable*, 729 F.3d at 164 (Section 616 “prohibits only affiliation-based discrimination by MVPDs and only when such discrimination is shown to have an anticompetitive effect”).

¹⁷⁴ *Time Warner Cable*, 729 F.3d at 166.

¹⁷⁵ *Tennis Channel*, 717 F.3d at 988 (Kavanaugh, J., concurring).

¹⁷⁶ *Id.* at 991–92.

the national market, lacks market power.¹⁷⁷ As for any other potentially relevant market, such as a local one, GSN’s expert witness refused to address the issue and the Initial Decision does not define any.¹⁷⁸ In fact, the evidence at trial cannot support the conclusion that Cablevision has market power in the New York DMA.¹⁷⁹

V. The ALJ’s Mandatory Carriage Order Violates the First Amendment

The mandatory carriage remedy recommended by the ALJ violates the First Amendment.¹⁸⁰ As the Commission has recognized, Section 616 “regulates speech based on affiliation with an MVPD,” and is thus subject, at minimum, to intermediate scrutiny.¹⁸¹ Thus, the Commission may not infringe Cablevision’s right to “determine the composition of networks

¹⁷⁷ See CV Exh. 270; Compl. ¶ 2; *Tennis Channel*, 717 F.3d at 992–94 (Kavanaugh, J., concurring) (finding that an MVPD with 24% market share in the national market for video programming distribution lacked market power and questioning whether any MVPD could have market power given current market conditions).

¹⁷⁸ GSN Exh. 301 ¶ 109 (Singer) (taking “no position as to whether Cablevision has . . . market power”).

¹⁷⁹ GSN Exh. 175 at 21; CV Exh. 271; CV Exh. 337 ¶ 31 (Montemagno); Tr. 1510:2–25 (Montemagno). Although Dr. Singer refused to address the issue, Cablevision’s expert, Mr. Orszag, credibly testified that Cablevision “doesn’t have the type of market power that rises to a competition issue,” because “there are so many substitutes now for people sitting within the Cablevision footprint, [that] Cablevision’s ability to exercise market power has been handcuffed.” Tr. 2688:8–10, 2689:14–17 (Orszag).

¹⁸⁰ See Initial Decision ¶¶ 117–19. Cablevision has challenged any potential carriage remedy on First Amendment grounds from the outset of this case; the Media Bureau rejected Cablevision’s challenge as unripe, and the ALJ concluded that he did not have authority to consider the issue. HDO, 27 FCC Rcd. at 5121 n.62; Initial Decision ¶ 118 n.526.

¹⁸¹ Second Report & Order, 26 FCC Rcd. at 11517–18; see also *Tennis Channel*, 717 F.3d at 993 (Kavanaugh, J., concurring) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994)). Moreover, because the carriage-discrimination regulations are “*de facto* content based,” they are subject to strict scrutiny. See *Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 434 (6th Cir. 2004).

on its cable systems” absent a substantial government interest.¹⁸² To justify its power to compel speech, the Commission relies on its “substantial government interest” in barring vertically-integrated MVPDs from “hinder[ing] the ability of an unaffiliated programming vendor to compete in the video programming market” by favoring affiliated networks.¹⁸³

Whatever governmental interest might have once justified mandatory carriage in this proceeding ended when Cablevision underwent a change in control transaction earlier this year. As of June 2016, Cablevision is wholly independent of WE tv and any other network with which it was formerly under common control, other than regional news and high school sports networks.¹⁸⁴ Cablevision is not now affiliated with any programming network similarly situated to GSN, and therefore has no incentive to discriminate against GSN on the basis of affiliation.¹⁸⁵

Consequently, a mandatory carriage remedy providing GSN with prospective relief is unlawful. Courts recognize in a variety of contexts that injunctions are “designed to deter, not to punish,”¹⁸⁶ and that an injunction should not issue when there is no risk of future

¹⁸² *Tennis Channel FCC*, 27 FCC Rcd. at 8545; *Tennis Channel*, 717 F.3d at 994 (Kavanaugh, J., concurring); see also *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of California*, 475 U.S. 1, 16 (1986) (“For corporations as for individuals, the choice to speak includes within it the choice of what not to say.”).

¹⁸³ 2011 Program Carriage Order, 26 FCC Rcd. at 11517; see also *Tennis Channel FCC*, 27 FCC Rcd. at 8548 (“[T]he purpose of Section 616 is to promote competition and diversity in the video programming market and address concerns about vertical integration of MVPDs and programmers.”).

¹⁸⁴ Schreiber Decl. ¶ 10.

¹⁸⁵ See, e.g., Initial Decision ¶ 96. GSN, in contrast, is affiliated with AT&T, the nation’s largest MVPD, and is hardly the type of independent programmer Section 616 seeks to protect.

¹⁸⁶ See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

wrongdoing.¹⁸⁷ Because there is no present risk of affiliation-based discrimination against GSN, the Commission has no interest—much less a substantial interest—in prospectively enjoining Cablevision from exercising its editorial discretion to carry GSN as it sees fit.¹⁸⁸ For these reasons, even if the Commission affirms the ALJ’s findings of discrimination—which it should not—a mandatory carriage remedy is unlawful.¹⁸⁹

CONCLUSION

For the reasons set forth above, Cablevision respectfully requests that the Commission reverse the Initial Decision, cancel the proposed forfeiture, and deny the relief sought by GSN, or remand to the ALJ for a decision under the proper standards. In all events, the Commission should vacate the mandatory carriage order.

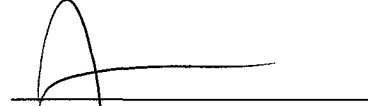
¹⁸⁷ *E.E.O.C. v. Everdry Mktg. & Mgmt., Inc.*, 348 F. App’x 677, 679 (2d Cir. 2009) (injunction properly denied where “the post-trial record demonstrates that” the business where discrimination occurred “is no longer a viable operating entity”); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 109 (1998) (“Because respondent alleges only past infractions of [the statute], and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.”).

¹⁸⁸ The Commission also has no basis to order mandatory carriage because there is no evidence that Cablevision has “market power” in the “national video programming distribution market.” *Tennis Channel*, 717 F.3d at 994 (Kavanaugh, J., concurring); *see also Time Warner Cable*, 729 F.3d at 165 (market power is a “significant consideration” when assessing whether an MVPD unreasonably restrained a complainant’s ability to “compete fairly.”) Undisputed evidence at trial showed that Cablevision serves less than ██████ of subscribers in the national market in which GSN competes, and is subject to intense competition in its New York footprint. *See* CV Exh. 337 ¶¶ 26–34 (Montemagno). Because GSN can compete without broad carriage on Cablevision, the relief recommended by the ALJ impermissibly infringes on Cablevision’s editorial discretion, without a substantial government interest. *See Agape Church, Inc. v. FCC*, 738 F.3d 397, 414–15 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

¹⁸⁹ At minimum, Cablevision requests, pursuant to 47 C.F.R. §§ 1.276(c)(3)–(4), that the Commission direct the Media Bureau or the ALJ to make additional findings of fact and conclusions of law regarding the impact of Cablevision’s change in control transaction on the remedial provisions recommended by the ALJ.

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Respectfully submitted,

A handwritten signature in black ink, appearing to be "Jay Cohen", written over a horizontal line.

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