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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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GAME SHOW NETWORK, LLC'S OPPOSITION TO APPLICATION FOR REVIEW OF THE HEARING DESIGNATION ORDER

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ARGUMENT

Cablevision Systems Corporation ("Cablevision") asks this Commission to ignore binding precedent in order to find that Game Show Network, LLC ("GSN") did not timely file the program carriage complaint that led to the Administrative Law Judge's conclusion that Cablevision discriminated against GSN.

Cablevision contends that GSN could have brought its complaint *only* within one year of its [redacted] carriage agreement with Cablevision, even though the agreement expired in [redacted] and even though Cablevision did not downgrade GSN's carriage on Cablevision systems until 2011.[1] But the Media Bureau correctly found — following longstanding Bureau and FCC precedent — that GSN's complaint was timely filed and that Cablevision's crabbed interpretation of the rules would "eviscerate the protections provided by the program carriage statute."[2] These findings should be affirmed and the application for review denied.

It is axiomatic that an agency's interpretation of its own procedural rules is accorded maximum deference.[3] At a minimum, the Commission has made clear that a Section 616 complaint is timely if filed within one year of the required notice from a programmer to an MVPD of its intention to file a Section 616 complaint and within one year of the allegedly

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[1] *Game Show Network, LLC v. Cablevision Systems Corp.*, Cablevision Systems Corporation's Application for Review of the Hearing Designation Order, MB Docket No. 12-122, at 2 (Dec. 23, 2016) ("Application for Review").

[2] *See Game Show Network, LLC v. Cablevision Systems Corp.*, Hearing Designation Order, 27 FCC Rcd. 5113, 5124-25 (MB 2012) ("HDO").

[3] *See Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1503 (D.C. Cir. 1987) (holding that deference to "an agency's interpretation of its own rules [is] particularly appropriate where the rule concerns procedural matters").

discriminatory act complained of.[4] In this case, GSN filed its Section 616 petition on October 12, 2011, which was within one year of the time it notified Cablevision of its intention to do so, on September 26, 2011, and within one year of the conduct it complained of — Cablevision's February 1, 2011 downgrading of GSN from a heavily penetrated tier to a sparsely penetrated sports tier. The Bureau's decision that the complaint was timely filed is on all fours with both the rule's explicit language[5] and with the Commission's consistent interpretation that treats as timely Section 616 complaints filed within one year of the complained of discriminatory conduct.[6]

The *NFL Network* case directly aligns with the facts here. There, the Media Bureau found the complaint was timely filed because it was brought within one year of Comcast's downgrading of the NFL Network from a digital basic tier to a premium sports tier, and within

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[4] *See Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, 27 FCC Rcd. 8508, 8519 (2012) (holding that "the one-year period starts to run when the complaining party . . . notifies the MVPD . . . of an intent to file a complaint"); *see also Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, Hearing Designation Order, 23 FCC Rcd. 14787, 14806 (MB 2008) (finding that "the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice"); *NFL Enterprises LLC v. Comcast Cable Commc'ns*, Hearing Designation Order, 23 FCC Rcd 14787, 14820 (MB 2008) (finding the complaint was timely filed because "[t]he The NFL filed its program carriage complaint within one year of th[e allegedly discriminatory] act and within one year of its pre-filing notice"); *TCR Sports Broadcasting Holding, L.L.P. d/b/a/ Mid-Atlantic Sports Network v. Comcast Corp.*, Hearing Designation Order, 23 FCC Rcd. 14787, 14833-35 (MB 2008) (same).

[5] 47 C.F.R. § 76.1302(f). The rules provide that any one of the following three events triggers the one-year time limitation: (1) an MVPD "enters into a contract with a video programming distributor that a party alleges to violate" the program carriage rules; (2) an MVPD offers to carry a video programming vendor's programming pursuant to impermissible terms that are unrelated to any existing contract between the MVPD and the complainant; or (3) a party has notified an MVPD that it intends to file a complaint with the Commission based on violations of the rules. *Id.*

[6] *See, e.g.*, *Tennis Channel, Inc.*, 27 FCC Rcd. at 8519.

one year of the pre-filing notice provided by the NFL Network to Comcast.[7] Here, Cablevision similarly moved GSN from an expanded basic tier to a premium sports tier. As in *NFL Network*, GSN notified Cablevision of its intent to file a complaint under Section 616 and then filed its complaint, all within one year.

Contrary to Cablevision's assertion, the Commission — not just the Media Bureau — has rejected the specific argument Cablevision makes in its application for review. In the *Tennis Channel* case, Comcast, like Cablevision here, argued that Tennis Channel's complaint was time-barred because the complaint was filed more than one year after Tennis Channel's 2005 carriage agreement with Comcast.[8] The Commission, however, found that the complaint was timely because it was filed within one year of both the conduct that allegedly violated Section 616 and Tennis Channel's pre-filing notification.[9] Cablevision presents no reason for the Commission to upset its longstanding precedent and disrupt the settled understanding and expectations of the parties.[10]

While Cablevision claims to have "judicial authority" for its argument that the Media Bureau misapplied the rule, its only support is the concurring opinion of one judge in the *Tennis Channel* case — an opinion that did not garner a second vote and that came after GSN filed its

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[7] *NFL Enterprises LLC v. Comcast Cable Commc'ns*, Hearing Designation Order, 23 FCC Rcd 14787, 14820 (MB 2008).

[8] *Tennis Channel, Inc.*, 27 FCC Rcd.at 8519.

[9] *Id.* at 8520.

[10] The Commission has often expressed its desire "to avoid disturbing settled expectations" when it has previously interpreted its procedural rules to create "reasoned determinations" that bear on parties' expectations and conduct. *In re Definition of Markets for Purposes of Cable Television Broadcast Signal Carriage Rules*, 16 FCC Rcd. 5022, 5028 (2001). That is precisely the case here; neither party could claim surprise at the way in which the Media Bureau applied the limitation period rule to this case.

complaint in this case.[11] Moreover, the *Tennis Channel* case presented a very different set of facts than does the instant case, and Judge Edwards' concurrence does not address what happened here. In *Tennis Channel*, Judge Edwards expressly noted that the case involved a request from the programmer for enhanced carriage: Comcast refused to take that step, and Tennis Channel's competitive position vis-à-vis Comcast and Comcast's similarly situated affiliated networks therefore remained *unchanged* between the time the contract was signed and the complaint was filed.[12] Here, Cablevision affirmatively committed a distinct discriminatory act by dramatically changing GSN's competitive position when it downgraded GSN to the sports tier, an affirmative change in status made by Cablevision that the ALJ ultimately found to be "without any valid business reason."[13] Thus, Judge Edwards' concurrence in *Tennis Channel* expressing concern that reliance solely on the notice provision of the rule would leave Section 616 complainants with unbridled discretion about when to file a complaint is not applicable here.

Neither this Commission nor any court has ever endorsed the specific argument Cablevision makes, and for good reason. Cablevision's reading of the rule would gut the program carriage statute, which is designed to provide ongoing protection for unaffiliated networks, not just protection within the first year of a carriage contract.[14] As the Commission and Media Bureau have recognized, Cablevision's reading of the rule "would allow even blatant

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[11] Application for Review, at 1 (citing *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 995 (D.C. Cir. 2013) (Edwards, J., concurring)).

[12] *Comcast*, 717 F.3d at 1004 (Edwards, J., concurring).

[13] *Game Show Network, LLC v. Cablevision Systems Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 16D-1 (ALJ Nov. 23, 2016), at ¶ 127 & n.117; *id.* at ¶ 121; *id.* at ¶ 101 (finding that Cablevision, "without any valid business reason, tagged GSN for retiering" based on GSN's non-affiliation with Cablevision).

[14] *See* Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92 at 1160 (1991), *available at* 1991 WL 125145.

affiliation-based discrimination to go unremediated, provided the [MVPD] waits at least one year before taking the discriminatory action."[15] Under Cablevision's theory, any time a party contracts with an MVPD that might later act discriminatorily, the limitations period nonetheless begins to run from the date of the contract, even if the illegal act does not occur until years later. That argument is plainly meritless.

Finally, Cablevision points to a pending rulemaking in which the Commission has proposed to clarify the time limitations in Section 616 cases as evidence supporting its reading of the rules. But the pending rulemaking only serves to confirm that GSN's complaint was timely filed. There, the Commission proposes simply to ensure that the language of the program carriage limitation more clearly codifies the way in which the rule has been consistently interpreted — specifically, that "a complaint must be filed within one year of the act that allegedly violated the program carriage rules."[16] The Commission notes that its proposed clarification is to "protect a potential defendant against stale and vexatious claims"[17] — the very concern that Judge Edwards expressed. Cablevision does not, and cannot, suggest that GSN's claim falls into that category.

CONCLUSION

The application for review should be denied because it asks the Commission to upset established precedent, has no basis in law or policy, and would result in the evisceration of the Commission's program carriage rules.

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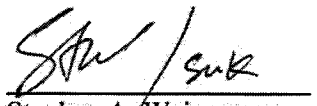
[15] *HDO*, at 5125.

[16] *Revision of the Commission's Program Carriage Rules*, Second Report & Order, 26 FCC Rcd. 11494, 11523 (2011).

[17] *Id.*

Respectfully submitted,



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