REDACTED – FOR PUBLIC INSPECTION

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	)	

BRIEF IN FURTHER SUPPORT OF CABLEVISION SYSTEMS CORPORATION'S EXCEPTIONS TO THE INITIAL DECISION

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SUMMARY

Cablevision's Exceptions set forth the reasons why the Initial Decision cannot stand, and nothing in GSN's Reply provides a reason to affirm the ALJ's flawed opinion. The Reply, however, fundamentally misstates the law governing the Commission's review of Cablevision's Exceptions. We submit this short additional brief to assist the Commission's review of the Initial Decision by correcting those misstatements in five respects:

First, contrary to GSN's assertions in the Reply, Cablevision is not trying to relitigate the case tried before the ALJ. Rather, we are urging the Commission to apply the well-established standard of *de novo* review. GSN's repeated pleas for deference to the ALJ are inconsistent with that well-established standard.

Second, GSN's Reply argues for a test for direct evidence of discrimination that is utterly inconsistent with case law and relevant Commission precedents. Contrary to GSN's argument, disparate treatment of affiliated and non-affiliated networks does not in and of itself constitute direct evidence of discrimination under Section 616. The Commission has previously so held. As has the ALJ. Nothing in Section 616 requires an MVPD that has determined to make an adverse carriage decision with respect to an unaffiliated network to analyze whether it should instead take such action with respect to a network with which it is affiliated. Nor was there any evidence in this proceeding, as GSN erroneously argues, that Cablevision had a "policy" of systematically favoring its affiliated networks.

Third, GSN's Reply misinterprets the holding of the D.C. Circuit in *Tennis Channel*. Nothing in that opinion supports the creation of a 3-prong "alternative" test that GSN purports to satisfy. And contrary to GSN's assertion, the ALJ did not find that GSN met the requirements of *Tennis Channel*. Rather, he concluded that there was no need for him to apply *Tennis Channel* in light of his (erroneous) holding that GSN had proven a direct case of discrimination.

Fourth, GSN wrongly contends that the ALJ faithfully followed the guidance of the Commission in determining that GSN was similarly situated to networks affiliated with Cablevision. GSN ignores clear Commission precedent that required the ALJ to consider all of the factors bearing on similarity, not just those that supported his conclusion, particularly such critical factors as the overlap in actual audience and a detailed analysis of the nature as well as look and feel of the programming.

Fifth, GSN erroneously argues that the Commission should not consider the impact of Cablevision's change-in-control transaction on the relief ordered by the ALJ. GSN has made no showing as to why the Commission should not take into account that Cablevision is no longer vertically integrated with the networks at issue in the proceeding before the ALJ. To the contrary, the failure to do so would be erroneous in light of the important First Amendment principles at stake in every carriage proceeding and the inapplicability of the injunctive relief ordered by the ALJ.

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ARGUMENT

Cablevision Systems Corporation ("Cablevision") respectfully submits this brief in further support of its Exceptions to the Initial Decision[1] in order to assist the Commission by addressing five arguments presented for the first time in the Reply of Game Show Network, LLC ("GSN").[2]

I. GSN Mischaracterizes the Standard of Review

GSN repeatedly contends in the Reply that Cablevision is attempting to re-litigate the case in an effort to avoid the ALJ's trial findings. Not so. Cablevision seeks only the *de novo* review of the ALJ's "Initial Decision" to which it is entitled.[3] Nothing about the length of the trial, the number of exhibits or witnesses, or the extent of the briefing transforms the standard of review into one of undue deference to the ALJ. Rather, the Commission must ensure that the ALJ's decision is correct, based "on consideration of the whole record . . . and supported by and in accordance with the reliable, probative, and substantial evidence."[4] Although the Commission gives the ALJ a limited degree of deference in assessing the credibility of live witnesses, the Initial Decision's critical flaws are not the product of such assessments. To the contrary, the ALJ fundamentally erred by ignoring substantial fact and expert evidence undermining his conclusions.

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1 *Game Show Network, LLC* v. *Cablevision Systems Corp.*, MB Docket No. 12-122, Cablevision Systems Corporation's Exceptions to the Initial Decision (Jan. 3, 2017) ("Exceptions").

2 *Game Show Network, LLC* v. *Cablevision Systems Corp.*, MB Docket No. 12-122, Reply of Game Show Network, LLC to Cablevision's Exceptions to the Initial Decision (Jan. 13, 2017) ("GSN's Reply").

3 *See* Exceptions at 5.

4 *Id.*

Moreover, a proper *de novo* review will show that the ALJ improperly substituted his judgment for that of Cablevision in assessing the business rationale for GSN's retiering. The ALJ's error is rooted in his apparent rejection of the testimony of the senior Cablevision executive with authority to make that decision, John Bickham, a *deposition* witness for whom no credibility finding could be made.[5] The ALJ concluded that Mr. Bickham's testimony undermined Cablevision's position that it retiered GSN to save programming costs,[6] but Mr. Bickham's deposition testimony is to the contrary. During a "finance meeting" Mr. Bickham asked his team 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."[7] Mr. Bickham testified that his consideration of retiering GSN "was strictly a cost issue" designed to "reduce our cost associated with [GSN] and therefore reduce our overall cost."[8] This testimony, as well as the record as a whole, contradicts the ALJ's finding.

II. GSN Urges the Commission to Apply the Wrong Standard for Direct Evidence of Discrimination

The ALJ committed reversible error by finding "direct" evidence of discrimination without identifying a single piece of proof *compelling* the conclusion that Cablevision retiered GSN because it was non-affiliated.[9] GSN asserts that, before taking any

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[5] *See id.* at 14–18.

[6] *Game Show Network, LLC* v. *Cablevision Sys. Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 16D-1, ¶ 82 (ALJ Nov. 23, 2016) ("Initial Decision").

[7] Exceptions at 17.

[8] Joint Exh. 1 at 38:8–23 (Bickham).

[9] *See* Exceptions at 6–8. GSN concedes that a direct case may be proven only by evidence "which, if believed, *requires* the conclusion that unlawful discrimination was at least a

adverse carriage action against a non-affiliated network, a vertically integrated MVPD can only avoid a finding of direct discrimination by first considering whether to take the same action against its affiliated networks, whether or not the affiliated and unaffiliated networks are similarly situated and without regard to costs of carriage, subscriber interest, or any other rational business judgments that go into an MVPD's carriage decision.

This is not the law. A "cable operator may permissibly choose to carry an affiliated network rather than an unaffiliated network for reasons independent of the networks' affiliation status," and therefore "[c]able operators need not treat all programmers equally."[10] As the ALJ himself has held, "the disparate treatment of two networks by itself does not establish violations of sections 616 and 76.1301(c)."[11]

That is because disparate treatment is not "direct evidence" of discrimination—"smoking gun" proof that on its face shows discriminatory intent. The Commission has made clear that "direct evidence" is a document or testimony that *compels* a finding of discrimination by demonstrating that "the MVPD took an adverse carriage action against [a network] because [it is] not affiliated with the MVPD."[12] By contrast, circumstantial evidence "requires an additional inferential step to demonstrate discrimination," which, in this context, turns on findings that

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motivating factor in the employer's actions." *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 394–95 (6th Cir. 2008) (quoted at GSN's Reply at 8–9).

[10] *TCR Sports B'dcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network* v. *FCC*, Brief for Respondents, 2011 WL 2534120, at *26–28 (4th Cir. June 27, 2011); *see also TCR Sports B'dcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network* v. *Time Warner Cable, Inc.*, 25 FCC Rcd. 18099, 19006 (2010) ("a vertically-integrated MVPD may treat unaffiliated programmers differently from affiliates, so long as it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity").

[11] *Herring B'dcasting, Inc. d/b/a WealthTV* v. *Time Warner Cable, Inc.*, 24 FCC Rcd. 12967, 12999–13000 (ALJ 2009) (hereinafter "*WealthTV*").

[12] Exceptions at 6.

networks are similarly situated and that an MVPD treated the unaffiliated network differently than its affiliated network without a valid business justification.[13]

The evidence GSN characterizes as "direct"—such as Cablevision's negotiating posture with its affiliates and its refusal to reverse the retiering decision—does not alone *compel* the conclusion that Cablevision's decision to retier GSN was driven by considerations of affiliation.[14] At best, this "uneven treatment" is circumstantial evidence from which GSN could argue that an inference of discriminatory animus should be drawn if (1) GSN discharged its burden of proving that it was "similarly situated" to one of Cablevision's affiliated networks; and (2) Cablevision's actions were not taken for "legitimate, non-discriminatory business purposes."[15] The Enforcement Bureau recognized this, concluding that the evidence GSN offered at trial "is more accurately characterized as circumstantial evidence, not direct evidence."[16] Yet neither the ALJ nor GSN addresses the Enforcement Bureau's conclusion.

In an effort to turn circumstantial proof into direct evidence, GSN contends that Cablevision had a "policy" of discriminating against non-affiliated networks in favor of affiliated ones.[17] GSN's assertion of a policy is based on flawed inductive reasoning: because in *this* case, on *these* facts, Cablevision gave consideration to retiering or dropping a number of unaffiliated, out of contract networks, including GS, and not to retiering or dropping any affiliated networks, that decision-making constituted a "policy" of treating unaffiliated networks less favorably than

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[13] *Id.* at 6–7.

[14] *See* GSN's Reply at 10–12.

[15] *WealthTV*, 24 FCC Rcd. at 12997–98.

[16] *Game Show Network, LLC* v. *Cablevision Systems Corp.*, MB Docket No. 12-122, Enforcement Bureau's Comments ¶¶ 15–18 (Oct. 15, 2015) ("Enforcement Bureau's Comments").

[17] *See* GSN's Reply at 9–10.

affiliated ones. In fact, the record is devoid of any proof at all of such a "policy," formal or otherwise. GSN's contrary argument is based on a scrap of evidence that Cablevision programming executives could not "walk away" from negotiations with affiliates. But that evidence demonstrates, at most, that Cablevision's programming group felt obliged to continue negotiations with affiliated networks in circumstances where they would have terminated such negotiations with independent networks, not that the product of those negotiations differed depending upon the affiliation of the network or otherwise reflected a policy of dealing with carriage of affiliated networks at less than arms-length.[18] Indeed, the final carriage agreements reflect that Cablevision struck deals with its affiliated networks consistent with those reached with other major MVPDs.[19] That is why the ALJ specifically rejected GSN's suggestion that Cablevision's dealings with its affiliates constituted direct evidence of discrimination.[20]

Having rejected GSN's purported evidence of direct discrimination, the ALJ nonetheless concluded that Cablevision's business justifications for the retiering were "pretextual." But, contrary to GSN's argument in the Reply, "pretext" cannot be proven by having the ALJ substitute his business judgment for Cablevision's. But that is all that underlies the ALJ's finding.[21] Rather than prove pretext, the record as a whole demonstrates that Cablevision made a good faith determination that: (1) GSN did not have programming that

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[18] Tr. 1546–48 (Montemagno).

[19] *See* Tr. 1549:3–6 (Montemagno); CV Exh. 339 ¶¶ 11–13 (Broussard) (Cablevision carried WE tv at a high level of penetration, as did other MVPDs); *compare, e.g.*, CV Exh. 7 at 60 (carriage agreement between WE tv and Cablevision) *to* CV Exh. 14 at 39, CV Exh. 26 at 7–8, CV Exh. 8 at 22 (carriage agreement between WE tv and [redacted] respectively).

[20] Initial Decision ¶ 108.

[21] Exceptions at 15–16.

appealed to a large segment of its customer base; (2) GSN was an out-of-contract network that could be retiered without any claim for breach of contract; and (3) Cablevision could shave [redacted] million from its rising programming budget by retiering GSN in such a manner that the networks would remain available to the small number of customers who viewed the network. Although the Initial Decision purports to find that Cablevision erred in certain of these business judgments, Cablevision's good-faith assessment—or even its decision not to revisit its action—is not discriminatory merely because the ALJ concluded that, with the benefit of hindsight, Cablevision should have made a different business judgment.[22]

III. GSN Misinterprets the *Tennis Channel* Decision

In the Initial Decision, the ALJ explicitly refused to apply the D.C. Circuit's governing *Tennis Channel* opinion, holding that he "need not reach the . . . question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN."[23] GSN tries to sidestep that error by contending that the ALJ nevertheless made findings that satisfy the requirements of *Tennis Channel*. Neither the opinion nor the Initial Decision can support GSN's argument.

GSN argues that *Tennis Channel* established "alternative tests" for proving Section 616 discrimination: (1) pretext; (2) the "incremental loss" test; and (3) the "net benefit"

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[22] *See* Initial Decision ¶¶ 40, 102–104. Moreover, the ALJ had no grounds to conclude that Cablevision in fact made an error of judgment. As set forth in Cablevision's Exceptions, the ALJ had no basis in the record to find that Cablevision provided a short-term subsidy to [redacted] complaining customers (in reality, it provided the subsidy to only [redacted] and no basis to find that Cablevision lost [redacted] subscribers as a result of the retiering (in reality, it lost none). *See* Exceptions at 12–13.

[23] Initial Decision ¶ 86.

test.[24] The opinion creates no such alternative tests. As the Commission has held, *Tennis Channel* "*did not alter the evidentiary standards* by which a complainant shows a violation of Section 616, but simply provided examples of the types of evidence that might have been adequate to prove that broader carriage would have yielded net benefits to [the MVPD]."[25] *Tennis Channel* reinforces that there is only one standard for proving discrimination: GSN had to come forward with evidence showing that broad GSN carriage "would have yielded net benefits" to Cablevision.[26] By expressly refusing to consider whether GSN had sustained this burden, the ALJ committed clear error.[27]

GSN's assertion that the ALJ found that GSN had discharged its burden under *Tennis Channel* cannot withstand scrutiny. The ALJ did not make "express findings sufficient to support the incremental loss theory."[28] To the contrary, the ALJ stated that he "need not reach . . . the question of whether Cablevision experienced . . . a net loss . . . as a result of retiering GSN."[29] Nor does the fact that Cablevision paid a higher license fee to WE tv advance its argument. Mere proof that WE tv commanded a higher fee than GSN says nothing about the

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[24] GSN's Reply at 18.

[25] *Tennis Channel, Inc.* v. *Comcast Cable Comm'ns, LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 15-7 (Jan. 28, 2015) (emphasis added); *see also Tennis Channel, Inc.* v. *FCC*, 827 F.3d 137, 140 (D.C. Cir. 2016) ("The Commission concluded that the evidentiary test emphasized in [*Tennis Channel*] was not novel.").

[26] *See* Exceptions at 19–20.

[27] Contrary to GSN's assertions, moreover, had the ALJ properly applied *Tennis Channel*, he could not have found evidence of discrimination. As the record shows, Cablevision presented substantial evidence of the net benefits of the retiering. Based on this proof, the ALJ concluded that "[w]ithout any doubt, it was the cold economics of the retier favoring Cablevision"—the opportunity to save [redacted] million/year in programming expenses—"that drove Cablevision's retiering decision." Initial Decision ¶ 46.

[28] GSN's Reply at 18.

[29] Initial Decision ¶ 86.

harm Cablevision would incur if it retiered WE tv, and the ALJ engaged in no analysis and made no finding concerning the consequences of retiering that network.

Similarly, GSN claims the Initial Decision includes "factual findings sufficient to establish" that continued carriage of GSN would have given Cablevision a "net benefit." But GSN cannot cobble together an analysis now that the ALJ expressly refused to undertake. And GSN's net benefit analysis is rooted solely in the testimony of an expert whose study failed the most basic tests of statistical significance.[30]

The ALJ did not conduct the "net benefit" analysis required by *Tennis Channel* because he erroneously concluded it was not necessary, and there is no substantial evidence in the record to demonstrate that GSN could have satisfied that test. As a result, the Commission has no basis on which to find that GSN discharged its burden under *Tennis Channel.*

IV. GSN Cannot Justify the ALJ's Decision to Disregard Substantial Evidence Showing that GSN and WE tv Are Not Similarly Situated

In its Reply, GSN accuses Cablevision of propounding an overly narrow test of whether GSN was similarly situated to WE tv.[31] In fact, the opposite is true: GSN urges the Commission to affirm the ALJ's constricted analysis rather than review the record as a whole to determine whether all of the relevant factors previously identified by the Commission support the Initial Decision. A proper *de novo* review of the record, and the application of the correct, multi-factor standard for determining network similarity set forth by the Commission, can only lead to one conclusion: that the ALJ erred in ignoring substantial evidence showing that GSN and WE tv were not similarly situated.

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[30] *See* GSN's Reply at 19–20 (citing Singer's written direct testimony); *see* Exceptions at 13, 19–20.

[31] GSN's Reply at 21.

The Commission standard is undisputed. The ALJ is to look to numerous, non-exhaustive factors in making a finding of similarity, including: "genre, ratings, license fee, target audience, target advertisers, target programming" and "other factors,"[32] such as evidence on network marketing, audience data and "look and feel."[33] Here, by contrast, the ALJ selected certain factors and entirely overlooked others such as actual audience data, Nielsen demographic ratings and actual programming genres. Despite the critical role such proof played in other carriage proceedings, the ALJ also disregarded important evidence such as binding programming descriptions in carriage contracts, admissions in marketing materials, and reliable empirical analyses based on actual network programming schedules. And he compounded that error by refusing to view the actual programming on the networks, relying on an inapplicable Commission rule that did not in fact preclude him from receiving audiovisual evidence.

This evidence led the Enforcement Bureau to advise the ALJ at the conclusion of the trial that GSN had failed to prove a circumstantial case of discrimination, because GSN was not similarly situated to any network affiliated with Cablevision. Notably neither the ALJ nor GSN address the Enforcement Bureau's conclusion. But it is rooted in the substantial evidence ignored by the ALJ showing stark differences in actual audience (based on reliable Nielsen data), programming (based on business documents and expert testimony), and target audience (based on GSN's contemporaneous admissions in marketing materials).[34] A *de novo* review of the record will compel the same conclusion.

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[32] 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i).

[33] *See WealthTV*, 24 FCC Rcd. at 12980.

[34] Enforcement Bureau's Comments ¶¶ 21–30.

V. GSN Provides No Basis for Infringing on Cablevision's First Amendment Rights

GSN asserts in its Reply that the Commission may not consider the import of the change in control transaction that resulted in Cablevision becoming independent of WE tv and any other affiliated network at issue in this proceeding.[35] GSN is wrong. This change in circumstances is highly relevant because it removes any basis for the prospective carriage relief ordered by the ALJ.

First, GSN makes a procedural argument that the Commission should be foreclosed from considering the transaction because Cablevision did not seek to reopen the record before the ALJ. GSN cites no rule or precedent that prevents the Commission from taking up the matter now, and we are aware of none.[36] The record at trial was long closed by the time the Cablevision-Altice transaction closed in June of 2016, and GSN would have undoubtedly opposed any effort by Cablevision to reopen the record (indeed as it does now).

Second, GSN makes the substantive argument that the Altice transaction is "legally irrelevant."[37] To the contrary, the transaction undermined any government interest that might have once justified mandatory carriage in this proceeding. Injunctions are "designed to deter, not punish" and may not stand when there is no risk of future harm.[38] Because there is no longer any risk that Cablevision will engage in affiliation-based discrimination against GSN, the Commission has no substantial interest in prospectively enjoining Cablevision from exercising its editorial discretion.

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[35] GSN's Reply at 38.

[36] *Cf.* 47 C.F.R. §§ 1.106(b)(2)(i), 1.106(c) (permitting Commission review of facts that have newly arisen on reconsideration of a prior order).

[37] GSN's Reply at 38.

[38] Exceptions at 39–40.

CONCLUSION

For the reasons set forth above and in the Exceptions, 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.

Dated: January 23, 2017

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