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	)	

TO: The Commission

PETITION OF GAME SHOW NETWORK, LLC TO COMPEL CABLEVISION'S COMPLIANCE WITH INITIAL DECISION

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December 8, 2016

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SUMMARY

In his 65-page Initial Decision released November 23, the Commission's Chief Administrative Law Judge (the "ALJ") ordered an end to more than five years of uninterrupted discrimination by Cablevision Systems Corporation ("Cablevision") against Game Show Network, LLC ("GSN"). After considering the record of a lengthy evidentiary hearing and hundreds of pages of briefing, the ALJ found that Cablevision unlawfully discriminated within the meaning of Section 616 of the Communications Act of 1934 and the Commission's regulations when it moved GSN from Cablevision's expanded basic service tier to a pay-extra premium sports tier in February 2011.[1]

The ALJ ordered Cablevision to remedy its past discrimination by, *inter alia*, restoring GSN to its broadly carried expanded basic tier "as soon as practicable."[2] His focus on speedy remediation is consistent with the congressional intent underlying Section 616 enforcement and mandated by Commission rules that contemplate expeditious implementation of Section 616 remedies.

Cablevision has nonetheless refused to provide any timetable for compliance with the order and instead has made clear that it does not intend to comply. As a result, GSN and Cablevision's own subscribers continue to bear the burden of Cablevision's discrimination in direct contravention of the ALJ's order.

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[1] *Game Show Network, LLC v. Cablevision Systems Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 12-122, File No. CSR-8529-P, 16D-1, at ¶¶ 121-23 (rel. Nov. 23, 2016) [hereinafter "Initial Decision"].

[2] *Id.*, at ¶ 126.

The ALJ found that the "consequences of Cablevision's unilateral retiering of GSN were substantially harmful"—costing GSN 96 percent of its Cablevision subscribers, a reduction of approximately [redacted] in annual advertising revenue, and the forfeiture of approximately [redacted] in subscriber fees to which it would otherwise have been entitled, as well as restraining GSN's ability to compete in the New York market and, by extension, to compete nationally for advertisers.[3] GSN's damages that accrued over the past five-plus years by reason of the retiering substantially exceed [redacted], without regard to the substantial costs associated with its efforts to obtain redress from the Commission. The ALJ ordered Cablevision's immediate compliance because it had "unreasonably restrained GSN's ability to compete fairly since 2011, a period that is more than five years and still running."[4]

The ALJ found that Cablevision's conduct warranted the maximum forfeiture he was permitted by law to impose.[5] His decision also establishes that Cablevision would not be harmed by restoring GSN; he found that GSN is popular among Cablevision's customers, inspires loyalty from them, and draws greater viewership than other networks on the expanded basic package, including some that Cablevision was trying to protect.[6] Cablevision should not be permitted to avoid the consequences of its illegal behavior by simply not complying promptly with the ALJ's order and the Commission's rules.

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[3] *Id.*, at ¶¶ 115-16.

[4] *Id.*, at ¶ 120.

[5] *Id.*, at ¶ 120, 124.

[6] *Id.*, at ¶¶ 102-05.

BACKGROUND

The Carriage Litigation

GSN filed its Program Carriage Complaint against Cablevision on October 12, 2011, alleging that Cablevision had discriminated against GSN in the terms and conditions of carriage, in violation of Section 616, when in February 2011 it moved GSN from its expanded basic tier to a pay-extra premium sports tier.[7] On May 9, 2012, the Media Bureau found that GSN had made out a *prima facie* case of discrimination by Cablevision, and set the case for a hearing.[8] The hearing was ultimately held in July 2015, following a period of delay designed to permit the parties to evaluate the impact of the D.C. Circuit's decision in *Comcast Cable Comm. v. FCC* and to complete a new round of discovery.[9] The record was closed on October 30, 2015, and the ALJ's decision was released on November 23, 2016.[10]

The ALJ's Findings

The ALJ found that GSN was moved from Cablevision's expanded basic tier to the system's pay-extra premium sports tier because it was not affiliated with Cablevision. He flatly rejected Cablevision's purported business justifications for the move, all of which he labeled as "pretextual."[11] He rested that conclusion on at least four evidentiary bases, each one of which is

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[7] Game Show Network, LLC, Program Carriage Complaint, File No. CSR-8529-P, at ¶¶ 1-2 (filed Oct. 12, 2011) [hereinafter the "Complaint"].

[8] *Game Show Network, LLC v. Cablevision Systems Corp.*, Hearing Designation Order and Notice of Opportunity for Hearing of Forfeiture, MB Docket No. 12-122, File No. CSR-8529-P, DA 12-739, at ¶ 36 (rel. May 9, 2012) [hereinafter "HDO"].

[9] *Game Show Network, LLC v. Cablevision Systems Corp.*, Order, MB Docket No. 12-122, File No. CSR-8529-P, FCC 13M-2 (rel. June 25, 2013).

[10] *See* Initial Decision, at 1; *id.*, at ¶ 9.

[11] *Id.*, at ¶¶ 83, 85-86, 101-07, 112.

sufficient to sustain his order: *First*, he found that Cablevision's decision to move GSN (and not any other network carried by or affiliated with Cablevision) could not be justified as a business matter because the amount Cablevision saved by retiering GSN was minimal, representing approximately only one-quarter of 1 percent of its [redacted] programming budget.[12] *Second*, he relied on direct evidence that "Cablevision, in its retiering decision, considered retiering only non-affiliated networks" and that "no consideration was given by Cablevision to retiering any of its affiliated networks."[13] *Third*, he concluded that GSN competed directly against Cablevision's similarly situated affiliated networks for viewers and advertising revenue, that GSN actually attracted greater viewership than some of those affiliates, and that the retiering decision had the specific effect of harming GSN's ability to compete with them.[14] *Fourth*, he concluded that Cablevision was so wedded to its discriminatory plan that it held to it even in the face of significant evidence of consumer outrage at the decision, a resulting loss of at least 5,000 subscribers, and its own need to pay subsidies to [redacted] subscribers whom it feared would drop Cablevision unless they could watch GSN without the additional cost of the pay-extra premium sports tier.[15]

The ALJ therefore ordered Cablevision to restore carriage of GSN on the expanded basic tier (or a current or future tier that has 90 percent or more penetration) "as soon as practicable";

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[12] *Id.*, at ¶¶ 78, 116.

[13] *Id.*, at ¶¶ 20 (noting that, "[a]t hearing, GSN remained the only general entertainment network that Cablevision has ever distributed on its premium sports tier."), 101.

[14] *Id.*, at ¶¶ 102-03, 110-15.

[15] *Id.*, at ¶¶ 46-48, 104.

to pay GSN at least the license rate that it paid GSN prior to the retiering for a period of five years; and to forfeit $400,000, the maximum permitted by statute.[16]

Cablevision's Non-Compliance

Cablevision has made clear that it will not comply with the ALJ's Order in a timely manner unless ordered to do so. It offers no technical reason for a delay in the restoration of GSN to the expanded basic tier. Moving GSN would not require Cablevision to alter its channel lineup or otherwise disrupt its existing service.[17] The conversion of GSN from the pay-extra premium sports tier to the expanded basic tier would require little more than the equivalent of flipping a switch. Given that the ALJ found that the retiering of GSN allowed Cablevision to save only "one-quarter of 1 percent of its [redacted] programming budget," Cablevision would actually benefit from carrying GSN more broadly because of GSN's high ratings and intense subscriber loyalty.[18] Cablevision's refusal to restore GSN to the expanded basic tier therefore must be judged to be little more than a reaction to a decision and regulatory scheme it dislikes.

Indeed, if more than five years of litigation, a clear judicial finding of discrimination, and a regulatory scheme that mandates prompt remediation cannot produce restoration of GSN's carriage rights *now*, then Cablevision will have largely succeeded. By escaping its obligation to

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[16] *Id.*, at ¶¶ 117-26.

[17] *See id.*, at ¶ 108 n.499 (describing GSN's argument regarding its unfavorable channel placement on Cablevision's systems). The exception in Section 76.1302, *see infra* notes 20-21, delaying the effective date of a decision where it would "require the defendant multichannel video programming distributor to delete existing programming from its system" is inapplicable here. *See* 47 C.F.R. § 76.1302(j)(1). GSN is already carried on Cablevision's system and its restoration to the expanded basic tier would not require Cablevision to delete any existing programming.

[18] *See* Initial Decision, at ¶¶ 102-04, 116.

comply immediately, Cablevision will have gone a long way toward rendering toothless a vital tool that Congress created to protect the public's interest in diverse programming and programming sources.

ARGUMENT

I. THE COMMISSION SHOULD ORDER CABLEVISION IMMEDIATELY TO COMPLY WITH THE ALJ'S DECISION.

A. Cablevision is Required to Provide Non-Discriminatory Carriage Now.

Section 76.10 of the Commission's regulations provides that, while ALJ decisions in other contexts are subject to automatic stays upon appeal by operation of the rules, "in proceedings brought pursuant to [the rules governing carriage disputes] the decision by the administrative law judge *will become effective upon release* and will remain in effect pending appeal."[19] The mandate of Section 76.10 is reinforced in Section 76.1302—the portion of the Commission's rules that governs this proceeding[20]—which provides that a remedial order issued upon completion of a program carriage hearing "*shall become effective upon release*."[21] The

[19] 47 C.F.R. § 76.10 (c)(2) (emphasis added).

[20] The HDO explicitly referenced the applicability of 47 C.F.R. § 76.1302 in this case. *See* HDO, at ¶ 4 ("The Commission has established specific procedures for the review of program carriage complaints.") (citing 47 C.F.R. § 76.1302).

[21] 47 C.F.R. § 76.1302 (j)(1) (emphasis added); *see also In the Matter of Revision of the Commission's Program Carriage Rules*, 26 F.C.C. Rcd. 11494, 11533 (2011) ("The program carriage rules provide that the remedy ordered by the Media Bureau or ALJ is effective upon release of the decision . . . .").

The Commission's *sua sponte* order of a stay of the ALJ's decision in 2012 in the *Tennis Channel* case does not suggest a contrary view regarding the importance of immediate implementation of Section 616 orders. *Tennis* was the first instance in which an MVPD had been ordered to carry a network under Section 616, and the Commission decided to preserve the *status quo* to properly consider—for the first time—the effects of such a remedy. *See In the Matter of the Tennis Channel, Inc.*, 27 F.C.C. Rcd. 5613, 5615 (2012) ("This is the first program carriage adjudication in which an initial decision requires the defendant to carry the (continued…)

mandates of Section 76.10 and Section 76.1302 follow directly from the directive of Section 616 that carriage complaints receive "expedited review"[22] and the Commission's direction to ALJs to "resolve program carriages complaints expeditiously."[23]

The ALJ's unequivocal declaration that "Cablevision must proceed as soon as practicable with [the] remediation" was therefore a necessary and appropriate application of the policies and rules enacted by Congress and the FCC.[24] That he reached this judgment after a lengthy and

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complainant's programming, and it presents important issues that are likely to recur in future program carriage adjudications."). As a result, the Commission explicitly waived the rule providing for the automatic effectiveness of the ALJ's decision and imposed a stay on its own motion. *See id.* ("[T]o the extent necessary, [we] waive section 76.1302(j)(1) of our rules, which provides that an order mandating program carriage shall become effective upon release unless it would require the defendant to delete existing programming."). The GSN case is now, of course, not the first to require an MVPD to place the complaining programmer on an expanded tier. Moreover, the remedy here is even less a novelty or disruption for Cablevision since GSN has simply been asking for restoration of the place on Cablevision's expanded basic tier that it had occupied for years before Cablevision illegally moved it to the pay-extra premium sports tier, and not, as in *Tennis*, first carriage on an expanded tier.

[22] 47 U.S.C. § 536(a) (4).

[23] *In the Matter of Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. & Competition Act of 1992 Dev. of Competition & Diversity in Video Programming Distribution & Carriage*, 9 F.C.C. Rcd. 2642, 2656 (1993) [hereinafter 1993 Second Report and Order]; *see also In the Matter of Revision of the Commission's Program Carriage Rules*, 26 F.C.C. Rcd. 11494, 11507 (2011) (noting, in the context of setting forth deadlines for ALJs to act on carriage disputes that "Congress directed the Commission to 'provide for expedited review' of program carriage complaints."); *id.* at 11508 (adopting deadlines for ALJ consideration of carriage disputes to "ensure" that the goal set forth in the 1993 Program Carriage Order "to resolve cases 'expeditiously' . . . is achieved."); 1993 Second Report and Order, 9 F.C.C. Rcd. 2642, at 2656 ("*A ruling on the merits by the ALJ . . . will become effective upon release. In the absence of a stay, any relief or remedies . . . will remain in effect pending appeal. Stays will not be routinely granted*.") (emphasis added).

[24] Initial Decision, at ¶ 126.

The remedy's immediate effectiveness is not altered by the ALJ's boilerplate footnote that "[t]his Initial Decision shall become effective and this proceeding shall be terminated 50 days after its release if exceptions are not filed within 30 days thereafter." *See id.*, at ¶ 126 n.534. The footnote recites the general rule governing other types of F.C.C. appeals—a rule that (continued…)

fully briefed proceeding and careful consideration of the issues should further lead the Commission to compel Cablevision to restore GSN to full carriage without delay.

B. GSN Is Suffering Ongoing and Irreparable Harm from Cablevision's Failure to Comply.

Absent the Commission's intervention, GSN will continue to suffer irremediable harm. The ALJ found both direct and circumstantial evidence of discrimination, including that GSN has lost subscribers, revenue, and the ability to compete for advertisers, all of which will continue until Cablevision complies.[25] Swift enforcement is also appropriate because GSN can never recover what it has lost by reason of Cablevision's discrimination; Section 616 and its implementing regulations do not provide for monetary damages for past discrimination.[26] GSN's only remedy is the swift imposition of the relief mandated by the circumstances of this case.

The public also suffers from Cablevision's prolonged non-compliance.[27] Cablevision's subscribers have been denied access to GSN as part of their basic cable package for more than five years, and they are denied the GSN service entirely unless they are prepared to pay a large

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the Commission explicitly superseded by its direction that orders in carriage disputes have immediate effect. *Compare* 47 C.F.R. § 1.276 (d) (general rule that "[n]o initial decision shall become effective before 50 days after public release of the full text thereof is made unless otherwise ordered by the Commission") *with* 47 C.F.R. § 76.10(c)(2) (with respect to carriage disputes, ordering that "unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal."). Further, it defies logic that the ALJ would have intended to contradict his own order directing compliance "as soon as practicable" by the recitation of the general standard.

[25] *See generally* Initial Decision, at ¶¶ 99-116.

[26] *See In the Matter of Revision of the Commission's Program Carriage Rules*, 26 F.C.C. Rcd. 11494, 11529 (2011) (noting damages awards for carriage cases unavailable).

[27] The Commission's rules requiring MVPDs to provide subscribers with 30 days' notice before changing their service package is not applicable here. *See* 47 C.F.R. § 76.1603(b) (setting forth rule). The rule imposes a notice requirement only "if the change is within the control of the cable operator." 47 C.F.R. § 76.1603(b). The restoration of GSN here is mandated by the ALJ's order and the FCC's rules, and therefore it is not a matter within Cablevision's "control."

monthly surcharge of $6.95 per month to obtain GSN along with a package of other networks that, in fact, serve a different audience.[28]

CONCLUSION

For the reasons set forth above, GSN respectfully requests that the Commission order Cablevision to comply with the Initial Decision immediately by restoring GSN to its expanded basic tier (or the current or future tier that has 90 percent or more penetration), as well as to pay GSN the license rate of [redacted] per subscriber, in accordance with the ALJ's Initial Decision.

Respectfully submitted,

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December 8, 2016

[28] *See* Initial Decision, at ¶ 18.

CERTIFICATE OF SERVICE

I, Stephen Kiehl, hereby certify that on December 8, 2016, copies of the foregoing were served by electronic mail and hand and/or overnight delivery upon:

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