Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

DIRECT TESTIMONY OF JONATHAN ORSZAG

I, Jonathan Orszag, hereby swear and affirm as follows:

I. ASSIGNMENT

1. I have been asked by counsel for Cablevision Systems Corporation ("Cablevision") to assess, from an economic perspective, certain claims made by Game Show Network, LLC ("GSN") regarding Cablevision's carriage of GSN. I have also been asked by counsel for Cablevision to respond to opinions offered by GSN experts Dr. Hal Singer and Mr. Timothy Brooks in their initial expert reports, their 2013 written direct testimony, and Dr. Singer's supplemental expert report produced in 2014.[1] GSN

[1] Expert Report of Hal J. Singer, Before the Federal Communications Commission, *In the Matter of The Game Show Network, LLC. v. Cablevision Systems Corporation* File No. CSR-8529-P, November 19, 2012 ("Singer Report"); GSN Exh. 223, Written Direct Testimony of Hal J. Singer, March 12, 2013 ("Singer Direct Testimony"); Supplemental Report of Hal J. Singer, Before the Federal Communications Commission, *In the Matter of Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, File No. CSR-8529-P, October 29, 2014 ("Singer Supplemental Report"); Declaration of Timothy Brooks, Before the Federal Communications Commission, *In the Matter of The Game Show Network, LLC. v. Cablevision Systems Corporation* File No. CSR-8529-P, November 19, 2012 ("Brooks Report"); GSN Exh. 222, Written Direct Testimony of Timothy Brooks, March 12, 2013 ("Brooks Direct Testimony").

DEFENDANT'S EXHIBIT
CV EXH 334

claims that Cablevision has discriminated against it on the basis of affiliation by carrying GSN on Cablevision's iO Sports and Entertainment Pak ("S&E Tier"), but carrying Cablevision-affiliated networks WE tv and Wedding Central on more widely distributed service tiers.[2]

2. I have previously submitted an Expert Report, Written Direct Testimony, Supplemental Written Direct Testimony, and a Rebuttal Report in this matter.[3] The substance of my earlier opinions has not changed, but for convenience I am submitting my prior testimony and the opinions offered in my Rebuttal Report in this comprehensive written direct testimony. Part One below (Paragraphs 34-183) consists of my initial Written Direct Testimony from March 12, 2013, including my response to the opinions offered by Dr. Singer and Mr. Brooks in their expert reports dated November 19, 2012. Part Two (Paragraphs 184-225) is my response to the March 12, 2013 Written Direct Testimony of Dr. Singer and Mr. Brooks (GSN Exhs. 223 and 222). Part Three (Paragraphs 226-261) is my response to the October 29, 2014 Supplemental Reports by Dr. Singer and Mr. Brooks.

II. QUALIFICATIONS

3. I am a Senior Managing Director and member of the Executive Committee of Compass Lexecon, LLC, an economic consulting firm. My services have

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[2] Program Carriage Complaint, Before the Federal Communications Commission, *In the Matter of The Game Show Network, LLC. v. Cablevision Systems Corporation* File No. CSR-8529-P, October 11, 2011 ("Carriage Complaint").

[3] Expert Report of Jonathan Orszag, Before the Federal Communications Commission, *In the Matter of The Game Show Network, LLC. v. Cablevision Systems Corporation* File No. CSR-8529-P, December 14, 2012; CV Exh. 231, Written Direct Testimony of Jonathan M. Orszag, March 12, 2013; CV Exh. 232, Appendices to the Orszag Direct Testimony, March 12, 2013; CV Exh. 239, Supplemental Direct Testimony of Jonathan Orszag, March 19, 2013; Rebuttal Report of Jonathan Orszag, Before the Federal Communications Commission, *In the Matter of The Game Show Network, LLC v. Cablevisions Systems Corporation*, File No. CSR-829-P, December 15, 2014.

been retained by a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies. These engagements have involved a wide array of matters, from entertainment and telecommunications issues to issues affecting the sports and retail industries. I have provided testimony to administrative agencies, the U.S. Congress, U.S. courts, the European Court of First Instance, and other domestic and foreign regulatory bodies on a range of issues, including competition policy, industry structure, and fiscal policy.

4. Previously, I served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning and as an Economic Policy Advisor on President Clinton's National Economic Council. For my work at the White House, I was presented the Corporation for Enterprise Development's 1999 leadership award for "forging innovative public policies to expand economic opportunity in America."

5. I am a Fellow at the University of Southern California's Center for Communication Law & Policy and a Senior Fellow at the Center for American Progress, a policy-oriented think tank based in Washington, DC. I received a M.Sc. from Oxford University, which I attended as a Marshall Scholar. I graduated *summa cum laude* in economics from Princeton University, was elected to Phi Beta Kappa, and was named to the *USA Today* All-USA College Academic Team. In 2004, I was named by the *Global Competition Review* as one of "the world's 40 brightest young antitrust lawyers and economists" in its "40 under 40" survey. In 2006, the *Global Competition Review* named me as one of the world's "Best Young Competition Economists." Since 2007, I have

been listed among the foremost competition economists in the world by *Who's Who Legal*.

6. I have been active in applied analysis of issues affecting the Multichannel Video Programming Distributor ("MVPD") sector. While I served in the federal government, I worked on a number of policy issues involving the MVPD sector, including the implementation of the Satellite Home Viewer Improvement Act of 1999, which permitted Direct Broadcast Satellite ("DBS") providers, such as EchoStar and DIRECTV, to offer subscribers local broadcast stations.[4]

7. Since leaving government, I have served as a consultant to a number of major MVPDs (*e.g.*, DIRECTV, Comcast, Cablevision, and EchoStar) and programming providers (*e.g.*, Discovery, College Sports Television). I have worked on a number of mergers and/or acquisitions in the MVPD space, including the Comcast-Time Warner-Adelphia transaction; the proposed EchoStar-DIRECTV merger; the News Corp-DIRECTV merger; and other merger matters.

8. I have also submitted testimony to the Federal Communications Commission ("Commission") and regulators throughout the world regarding mergers and regulatory matters affecting the MVPD sector. For example, I submitted testimony to the FCC regarding EchoStar's acquisition of certain assets of Rainbow DBS; assessing potential regulations regarding a la carte and themed tier programming; regarding bundled programming deals; regarding the NFL Network's claims that Comcast

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[4] *See, e.g.,* www.fcc.gov/mb/shva/shvia.pdf (downloaded on February 1, 2010). All references to "CV Exh.__" are to exhibits on Cablevision's Exhibit List. All references to "GSN Exh.__" are to exhibits on GSN's Exhibit List. For the Presiding Judge's convenience, we have compiled in CV Exh. 335 an Appendix to this Direct Testimony that includes my prior testimony appendices, my Curriculum Vitae and my listing of Materials Relied Upon for Parts I-III of this Testimony.

discriminated against the NFL Network in its carriage decisions; regarding the Mid-Atlantic Sports Network's ("MASN") claims that Comcast discriminated against MASN in its carriage decisions; regarding the Tennis Channel's claims that Comcast discriminated against the Tennis Channel in its carriage decisions; assessing the exclusive contract prohibition between vertically integrated cable operators and programmers; and regarding distant network royalty fees. I testified on damages in a contractual dispute between VOOM HD Holding LLC, a Cablevision affiliate, and EchoStar Satellite LLC. I also testified before this Court in the *NFL Enterprises v. Comcast*, *MASN v. Comcast*, and *Tennis Channel v. Comcast* proceedings. For these engagements, I analyzed the nature of competition among TV networks and among MVPDs, interviewed executives, reviewed contracts and other confidential company documents, analyzed TV networks' viewer demographics, advertising revenues, affiliate fees, programming expenditures, and other financial information, reviewed subscriber surveys, and analyzed MVPDs' network carriage decisions.

9. My full current *curriculum vitae*, including prior testimony, is set forth in Appendix 2 to CV Exh. 335. The hourly rate charged by Compass Lexecon for my work on this matter is $995 per hour, and I have a financial interest in the overall profitability of the firm. I have no financial interest in the outcome of this case.

III. EXECUTIVE SUMMARY

10. Based on my economic analyses, I have concluded that:

- At the time of GSN's retiering by Cablevision, GSN was not "similarly situated" to WE tv or Wedding Central, because there was no significant competition between the Cablevision-affiliated networks and GSN for viewers, advertisers, or programming content prior to the retiering.

- Because WE tv and Wedding Central did not compete with GSN for viewers, advertisers, or programming content in a significant way, Cablevision did not have an incentive, at the time of GSN's retiering, to discriminate against GSN on the basis of affiliation in the carriage of the network.
- Cablevision's decision to distribute GSN on the S&E Tier was consistent with rational business conduct, unmotivated by Cablevision's affiliation with WE tv and Wedding Central.
- Cablevision's distribution of GSN on the S&E Tier did not "unreasonably restrain the ability" of GSN to compete for viewers, advertisers, or programming content.

I briefly summarize the theoretical and empirical evidence for these conclusions here, and discuss them in more detail in the remainder of my testimony. I also summarize how Dr. Singer and Mr. Brooks fail to support GSN's discriminatory conduct claims.

GSN Was Not "Similarly Situated" to WE tv or Wedding Central: They Did Not Compete Significantly For Viewers, Advertisers, or Programming Content

11. The bulk of my testimony addresses whether there was significant competition between Cablevision's affiliated networks and GSN for viewers, advertising, or programming. Based on my analysis of network viewership data, advertiser spending on the networks, and the limited record regarding pitches made to the networks, I

conclude that there was no significant competition between GSN and WE tv or Wedding Central for viewers, advertisers, or programming prior to the time of GSN's retiering.

12. In the first part of my analysis, I examine competition for viewers between the Cablevision-affiliated networks and GSN. I conclude that WE tv and Wedding Central did not face significant competition for viewers from GSN. From an economic perspective, two networks compete significantly for viewers if a significant number of viewers see them as substitutes. [redacted] The retiering of GSN [redacted] The fact that Cablevision subscribers did not significantly increase their viewership of WE tv or Wedding Central post-retiering demonstrates an absence of significant competition for viewers between WE tv and GSN or between Wedding Central and GSN.[5]

13. My analysis of STB data also shows that Cablevision viewers switched between watching WE tv and GSN or between watching Wedding Central and

[5] Dr. Singer's critique of this "direct test" analysis neither undermines its validity in any way nor any of the conclusions that rely on the test. Dr. Singer makes a number of erroneous assumptions about my direct test, rendering his critique irrelevant. Furthermore, Dr. Singer's improper modifications of my direct test do not alter the overall conclusion that GSN's retiering had [redacted] on viewership of WE tv and Wedding Central.

GSN at a relatively [redacted] The switching rates between GSN and WE tv were also [redacted] compared to the switching rate between benchmark networks that I identified because of their similarity. For example, the switching rate between [redacted] and [redacted] was almost [redacted] times [redacted] than the switching rate between WE tv and GSN. [redacted]

14. I also analyze potential competition for viewers between WE tv and GSN (and also between Wedding Central and GSN) by examining viewer audience overlap between these networks. Viewer overlap data is an imperfect metric for analyzing competition for viewers because viewers may watch two networks without considering them substitutes. But no significant viewer audience overlap between networks indicates that the networks appeal to distinct groups of viewers and thus indicates an absence of significant competition for viewers between the networks. My analysis of Cablevision's STB data and Nielsen data shows that there is very little viewer audience overlap between WE tv and GSN or between Wedding Central and GSN. Cablevision's STB data indicate that among households that watched at least an hour of WE tv during April 2010, GSN accounted for [redacted] percent of their total television viewing time, ranking [redacted] [redacted] networks. Among households that watched at least an hour of GSN during April 2010, WE tv accounted for [redacted]

percent of their total television viewing time. My analysis of the STB data shows GSN's viewer audience overlap with WE tv was less than its viewer audience overlap with [redacted] among others.[6]

15. My analysis of the Nielsen audience duplication reports likewise indicates a relatively low degree of viewer audience overlap between WE tv and GSN.[7] The reports show that a relatively small percentage of WE tv viewers also watched GSN, and that a relatively small percentage of GSN viewers also watched WE tv. The Nielsen audience duplication reports for the fourth quarter of 2010, the last full quarter prior to GSN's retiering, indicate that GSN ranked [redacted] networks in audience overlap with WE tv viewers.[8] Similarly, the fourth quarter of 2010 Nielsen duplication reports show that WE tv ranked [redacted] networks in audience overlap with GSN viewers.[9] GSN experts Dr. Singer and Mr. Brooks argue that WE tv and GSN have a relatively high degree of viewer audience overlap based on the "both duplication" measure of viewer audience overlap provided by Nielsen audience duplication reports. Both duplication for a pair of networks is the percentage of viewers who watch both networks as a share of viewers who watch *either* network. As I explain in my testimony below, both duplication is an extremely poor indicator of viewer audience overlap for the purpose of assessment of competition for viewers between networks and is likely to yield false positive results. For example, the both duplication measure indicates a relatively high degree of viewer audience overlap between GSN and [redacted], despite

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[6] *See* Table 12 below.

[7] Nielsen audience duplication reports did not track Wedding Central.

[8] Based on the persons 18+ demographic.

[9] Also based on the persons 18+ demographic.

the fact that the two networks carry different programming content and have quite dissimilar viewer demographics.

16. In sum, my analysis of the STB and Nielsen data demonstrates conclusively an absence of any significant competition for viewers between WE tv and GSN or between Wedding Central and GSN.

17. In the second part of my analysis of competition, I analyze competition for advertisers between WE tv and GSN. From an economic perspective, two networks compete significantly for advertisers if a significant number of advertisers consider the networks as substitutes. Significant competition for advertisers between WE tv and GSN implies that reducing the supply of GSN advertising would increase the demand for WE tv advertising and that WE tv's advertising rates would face pricing constraints from GSN. If WE tv faced significant competition for advertisers from GSN, WE tv may benefit from relaxing GSN's competitive constraint and Cablevision may therefore have an incentive to discriminate against GSN in the carriage of the network. Based on my analysis of viewer demographic data considered by advertisers, WE tv and GSN's advertising rates, viewer overlap data, and the net spending by advertisers on GSN and WE tv, I conclude that WE tv did not face any significant competition for advertisers from GSN.

18. Companies that wish to reach certain demographics with advertising messages may consider two networks as substitutes for advertising if the networks have similar viewer demographics. My analysis of the viewer demographic data from Nielsen shows that WE tv and GSN were significantly dissimilar in their viewer demographics. The Nielsen data indicate that GSN viewers had a much higher

median age [redacted] than WE tv viewers [redacted]. In the fourth quarter of 2010, only about [redacted] percent of WE tv's viewership was by adults over the age of 65, while more than [redacted] percent of GSN's viewership was by this demographic.[10] [redacted] On these demographic measures and others, WE tv and GSN ranked very differently among the 95 cable networks for which Nielsen demographic data are available.

19. To examine how WE tv and GSN differed along multiple dimensions of demographics, I calculate an aggregate measure of distance between WE tv's and GSN's demographics using a method proposed by statistician P.C. Mahalanobis in 1936 ("Mahalanobis distance"). Dr. Singer performed a similar calculation in his March 12, 2013 Direct Testimony. I calculate the Mahalanobis distance between network pairs using 10 different viewer demographic measures, including viewer median age, female share of viewership, median viewer income, and others. My calculations of the Mahalanobis distance reveal that there were [redacted] cable networks that were closer to WE tv in viewer demographics than GSN was, and [redacted] networks that were closer to

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[10] Total Day ratings for persons 18 and older.

[11] Total Day ratings for persons 18 and older.

[12] Total Day ratings.

GSN than WE tv was. Dr. Singer's calculations of the Mahalanobis distance are unreliable because, among other methodological errors, they exclude key viewer demographics, such as viewer age. My conclusions concerning significant differences in WE tv's and GSN's viewer demographics are consistent with my conclusions concerning minimal audience overlap and absence of significant competition for viewers between WE tv and GSN. Because WE tv and GSN offered advertisers largely distinct sets of viewers with very different demographic profiles, advertisers were unlikely to have considered WE tv and GSN to be substitutes for one another.

20. Dr. Singer's update of his Mahalanobis distance calculations in his March 12, 2013 Direct Testimony does not fully address the problems of his earlier (flawed) Mahalanobis distance calculations. For example, he still has not incorporated key demographic information, such as the age of the viewer, into his calculations. Further, Dr. Singer's updated Mahalanobis distance analysis does not show that WE tv and GSN were [redacted] in terms of viewer demographics.

21. Data on actual advertising expenditures on GSN and WE tv are also consistent with an absence of significant competition for advertisers between the two networks. Data from SNL Kagan indicate that WE tv's advertising rates, based on the price per viewer, were [redacted] than GSN's during 2010. [redacted] The large disparity in advertising rates between WE tv and GSN, before GSN's retiering, further indicates a significant difference in how advertisers viewed the two networks.

22. In his March 12, 2013 Written Direct Testimony, Dr. Singer concludes that the overlap in the set of advertisers that advertised on both WE tv and GSN indicates that advertisers viewed WE tv and GSN as substitutes. Dr. Singer shows that most of WE tv's top 40 advertisers between July 2010 and July 2011 also advertised on GSN. But Dr. Singer's advertiser overlap analysis is deeply flawed in a number of key respects. First, Dr. Singer ignores the fact that most large advertisers advertise on virtually all the national cable networks so that an overlap in advertisers between two networks is not particularly meaningful in terms of identifying networks that compete with each other for advertisers. Second, Dr. Singer assumes erroneously that the mere fact that a company advertises on both WE tv and GSN implies that the company must view the two networks as substitutes. For example, an advertiser may decide to advertise on WE tv to reach [redacted] and advertise on GSN to reach [redacted]. Thus, the fact that the advertiser buys advertising spots on both WE tv and GSN does not prove that the advertiser views WE tv and GSN as a substitutes. Third, network pairs with a high degree of advertiser overlap (calculated using Dr. Singer's method) can have very different viewer demographic profiles. For example, in 2010, of the top 40 GSN advertisers, [redacted] percent advertised on WE tv and [redacted] percent also advertised on [redacted] – a channel featuring science fiction programming.[13] Although WE tv skews female in terms of viewership composition, [redacted] skews male. Therefore, for all these reasons, Dr. Singer's advertiser overlap analysis is unreliable and

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[13] Consistent with Dr. Singer's calculations in his report, the [redacted] percent overlap is weighted by advertisers' revenues.

is likely to lead to many false positives in identifying networks that compete for advertisers in a significant way.

23. In sum, the viewer demographic and advertising data I examine demonstrate an absence of any significant competition for advertisers between WE tv and GSN.

24. In the last part of my analysis of competition between WE tv and GSN, I consider competition for programming rights. I conclude that there was no significant competition between WE tv and GSN for programming rights. [redacted] Dr. Singer provides no evidence of competition for programming rights between WE tv and GSN, much less significant competition.

Cablevision Had No Incentive to Discriminate Against GSN

25. My analysis demonstrates that Cablevision did not have any incentive to discriminate against GSN. Under standard economic theory, Cablevision could only plausibly have had an incentive to discriminate against GSN if Cablevision's affiliated networks faced significant pricing constraints from GSN. WE tv and Wedding Central would have only faced pricing constraints from GSN if they faced significant competition for viewers, advertising, or programming from GSN, and no more than a few other networks. My analysis shows that WE tv and Wedding Central did not face significant competition from GSN and that there were numerous networks that were closer competitors to WE tv and Wedding Central than was GSN. Any competitive constraint provided by GSN was negligible at the time of GSN's retiering. Moreover,

even if WE tv and Wedding Central significantly competed with GSN (and they did not), the effect of the retiering on GSN's ability to compete was too minimal to have had any effect on WE tv and Wedding Central. Importantly, Dr. Singer has not provided any reliable support for a conclusion that WE tv and/or Wedding Central benefitted from Cablevision's decision to carry GSN on the S&E Tier, which would have provided the underlying economic incentive – according to Dr. Singer's theory – for the retiering of GSN. Thus, it is clear that Cablevision would not have reasonably expected its affiliated networks to reap any benefits from GSN's retiering, and GSN's retiering was not likely motivated by such benefits.

Cablevision's Decision to Retier GSN Was Consistent With Sound Business Judgment

26. I also conclude, based on my review of the economic evidence, that Cablevision's decision to retier GSN was consistent with sound business judgment. [redacted]

[redacted]

27. [redacted]

28. Dr. Singer makes inappropriate modifications to my analysis of Cablevision's subscriber churn *(i.e.*, the percentage of subscribers terminating service with Cablevision) following GSN's retiering. Nonetheless, even Dr. Singer's modification shows that GSN's retiering [redacted] Cablevision service – that is, consistent with my analysis, the effects that Dr. Singer estimates are not statistically different from zero. In fact, in his direct written testimony, which was completed prior to the D.C. Circuit decision in *Comcast v. FCC* (the "D.C. Circuit decision"), Dr. Singer did not show that Cablevision incurred losses within its cable division in carrying GSN on S&E Tier.[14] However, "in light of the D.C. Circuit's decision," Dr. Singer discovered new profit losses for Cablevision from carrying GSN on the S&E Tier. Moreover, Dr. Singer's new post-D.C. Circuit decision analysis (in his October 29, 2014 Supplemental Report) cherry-picks the components of his profit sacrifice test and simply posits new numbers to

[14] *See infra*, ¶¶ 210 – 215.

make the calculations support his desired conclusions. Dr. Singer's new (October 29, 2014 Supplemental Report) conclusions are based on conjecture, speculation, and unsupported (and flagrantly contradictory) assumptions.

29. Dr. Singer claims that carriage of GSN by other MVPDs provides evidence of discrimination by Cablevision in carriage of GSN. While it is important to consider carriage decisions by other MVPDs, this evidence must be evaluated in its proper context. Absence of significant competition for viewers, advertisers, and programming between GSN and either WE tv or Wedding Central makes the carriage decisions of other MVPDs less relevant in the assessment of Cablevision's carriage of GSN. In addition, the decisions of other MVPDs must be evaluated in light of the fact that Cablevision's subscriber base is much more concentrated in one DMA (New York) than other MVPDs. [redacted] It is, therefore, reasonable for Cablevision to conclude that the benefits of broad carriage of GSN do not outweigh the costs of such carriage.

Cablevision's Decision to Retier GSN Did Not Restrain GSN's Ability to Compete Fairly

30. My final conclusion is that Cablevision's retiering of GSN has had no significant effect on GSN's ability to compete for viewers, advertisers, and carriage rights. GSN's loss of [redacted] subscribers was [redacted] percent of its [redacted] million total U.S. subscribers. GSN's experts do not provide any reliable

evidence that this modest loss has restrained GSN's ability to compete. In fact, Dr. Singer's testimony here contradicts his statements in prior cases, where he testified that a network has to be foreclosed from 20 percent of the market to be a victim of presumptively anticompetitive behavior, and that a network with 40 million subscribers has surpassed the minimum number necessary to compete nationally.

31. Dr. Singer also claims that "Cablevision wields sufficient market power in the New York DMA to engender significant foreclosure of independent networks such as GSN."[15] Dr. Singer's market power claims are unsupported and confusing. Despite his conclusory claim that "Cablevision wields sufficient market power in the New York DMA,"[16] Dr. Singer fails to establish that Cablevision possessed significant market power in a relevant market or that there is any link between his asserted Cablevision market share of 40 percent and the alleged discriminatory conduct. As a result, Dr. Singer cannot possibly draw any reliable conclusions about Cablevision's incentives to engage in the alleged discriminatory conduct against GSN.

32. Dr. Singer also claims GSN lost significant advertising revenue as a result of the retiering [redacted] However, there are a number of serious problems with Dr. Singer's advertising revenue analysis. First, Dr. Singer uses a flawed model for predicting GSN's general rate revenue. Second, the effect of the retiering on GSN's total revenue is unclear because Dr. Singer only models GSN's general rate revenue, which represented roughly one half

15 Singer Supplemental Report ¶ 34.

16 Singer Supplemental Report ¶ 25.

of GSN's total revenue. Third, Dr. Singer's analysis ignores the improvement in GSN's financial performance post-retiering. GSN has grown significantly, as measured by [redacted], since the network was retiered by Cablevision, which suggests that GSN was not harmed in its "ability… to compete fairly" for distribution, advertising, or viewership since it was retiered by Cablevision.[17] Dr. Singer argues that [redacted] but he lacks any credible basis for making such claims.

33. Dr. Singer's critique of my analysis of competition between networks makes incorrect inferences about the implications of my conclusions. None of Dr. Singer's criticisms undermines my conclusion that WE tv and Wedding Central faced insignificant competition from GSN and that Cablevision lacked incentives to engage in discriminatory conduct against GSN.

IV. PART ONE: ORIGINAL WRITTEN DIRECT TESTIMONY

34. I submitted the following analysis in Part One (Paragraphs 34-183) as my Written Direct Testimony in this matter on March 12, 2013.

35. In 1993, the Commission adopted regulations (as directed by Section 616 of the Communications Act of 1934, as amended) which state that:

> "No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[18]

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[17] *See infra*, ¶ 35.

[18] *See* 47 C.F.R. § 76.1301(c)).

I understand that the analysis of whether Cablevision's carriage of GSN amounts to discrimination on the basis of affiliation, in part, entails analyzing whether GSN and Cablevision's affiliated networks are "similarly situated." As an economist, I interpret the "similarly situated" criterion as a test of whether the networks compete in a significant way for viewers, advertising, or programming content.[19]

36. I also understand that under the Commission's regulations, pursuant to Section 616, to establish that Cablevision has committed a program carriage violation, GSN must demonstrate that:

> (a) Cablevision's distribution of GSN discriminated "on the basis of affiliation … in the selection, terms, or conditions for carriage of video programming;" and
>
> (b) The effect of Cablevision's distribution of GSN was to "unreasonably restrain the ability" of GSN "to compete fairly."[20]

Thus, my analysis focuses on (i) whether GSN and Cablevision's affiliated programming networks – WE tv and Wedding Central – competed in a significant way for viewers, advertising, or programming content, (ii) whether Cablevision's decision to carry GSN on the S&E Tier amounted to discrimination on the basis of affiliation, and (iii) whether Cablevision's carriage of GSN on the S&E Tier had the effect of restraining unreasonably GSN's ability to compete fairly.

37. For the purposes of my analysis, I am going to treat WE tv and Wedding Central as Cablevision affiliates. Cablevision spun off WE tv and Wedding

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[19] If the networks did not compete in a significant way for viewers, advertisers, or programming content, Cablevision would not have an incentive to engage in discrimination. *See infra*, ¶ 38.

[20] Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C., *Memorandum Opinion & Order*, Docket No. 10-204, File No. CSR-8258-P, FCC (Jul. 24, 2012) ¶ 4.

Central to AMC Networks, Inc. ("AMC Networks") in July 2011.[21] Wedding Central also ceased operating as a network in July 2011.[22] However, Cablevision owned both WE tv and Wedding Central prior to July 2011, and specifically in the first quarter of 2011, when Cablevision retiered GSN and put it on the S&E Tier.[23]

FROM AN ECONOMIC PERSPECTIVE, GSN WAS NOT "SIMILARLY SITUATED" TO WE tv OR WEDDING CENTRAL: THEY DID NOT COMPETE SIGNIFICANTLY FOR VIEWERS, ADVERTISERS, AND PROGRAMMING CONTENT

38. Under standard economic theory, Cablevision could only plausibly have had an incentive to discriminate against GSN in favor of its affiliated networks, WE tv and Wedding Central, if the prices charged by the affiliated networks were effectively constrained by GSN.[24] If the prices charged by Cablevision's affiliated networks were not significantly constrained by GSN, WE tv and Wedding Central could not have obtained any benefits from GSN's retiering by Cablevision or from any alleged reduction in GSN's ability to compete.[25] The prices charged by WE tv and Wedding Central could have been effectively constrained by GSN only if WE tv and Wedding Central faced significant competition for viewers, advertisers, or programming content from GSN.

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[21] *See* http://investors.amcnetworks.com/releasedetail.cfm?ReleaseID=588762 (accessed December 13, 2012).

[22] *See* www.multichannel.com/content/amc-networks-divorces-wedding-central (accessed December 12, 2012).

[23] Given the Commission's ownership attribution rules, I understand and will assume that WE tv is still considered an affiliate of Cablevision, even though AMC Networks is now a separate, publicly traded corporate entity.

[24] Dennis Carlton, "A General Analysis of Exclusionary Conduct and Refusal to Deal--Why Aspen and Kodak Are Misguided," *Antitrust Law Journal* 68, pp. 659-683, 2001; and Michael Whinston, "Tying, Foreclosure, and Exclusion," *American Economic Review* 80, pp. 837-859, 1990.

[25] I should note that if the prices charged by WE tv and Wedding Central were effectively constrained by many cable networks other than GSN, there would be no significant benefit to Cablevision's affiliated networks from any reduction in GSN's ability to compete, and, therefore, Cablevision would not have had any incentive to discriminate against GSN in its carriage of the network.

Thus, significant competition between GSN and Cablevision's affiliated networks WE tv and Wedding Central is a critical precondition for discriminatory conduct. Absent significant competition, Cablevision would not have had any *incentive* to discriminate against GSN in the carriage of the network.[26]

39. My analysis demonstrates an absence of significant competition between WE tv and GSN and also between Wedding Central and GSN. Moreover, as I discuss below, Dr. Singer and Mr. Brooks provide no credible evidence that WE tv or Wedding Central faced significant competition for viewers, advertisers, or programming content from GSN.

There Was No Significant Competition for Viewers between GSN and WE tv or between GSN and Wedding Central

40. Two networks compete significantly for viewers if a significant number of viewers see the networks as substitutes or, alternatively, if reducing the availability of one network increases significantly the demand for the other network.

41. A <u>direct</u> test of whether GSN and WE tv or GSN and Wedding Central competed for viewers may be performed by analyzing the effect of Cablevision's repositioning (or retiering) GSN from the expanded basic tier to the S&E Tier in February 2011 on the viewership of WE tv and Wedding Central by Cablevision's subscribers. [redacted] Under this test, there would be evidence of competition between GSN and WE tv (or Wedding Central) if

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[26] I use the term significant competition to distinguish from insignificant competition between cable networks. For example, there may be one viewer who is deciding whether to watch WE tv or GSN so that the two networks are competing for the viewership of that individual. However, competition between WE tv and GSN for just one viewer would be too insignificant to affect the networks' incentives in conducting business. Conversely, if the networks were competing for a relatively large (or significant) number of viewers, the competition between the networks would have the potential to affect the networks' business conduct.

Cablevision's repositioning of GSN onto the S&E Tier significantly increased WE tv's (or Wedding Central's) viewership. My analysis shows that Cablevision's retiering of GSN did not have a significant effect on WE tv's and Wedding Central's viewership.

42. I perform a number of other economic analyses to corroborate the results of such a direct test of competition between the networks. In particular, I analyze viewers' switching rates between networks. The switching rates provide an alternative measure of competition for viewers. I also examine viewer audience overlap between networks. Viewer audience overlap can provide additional insight into the state of competition for viewers. Both the network switching and viewer audience overlap analyses are consistent with the results of the direct test of competition for viewers. [redacted]

<u>Set-Top Box Data Provide a Reliable Basis for the Analysis of Network Competition</u>

43. [redacted]

[27] {{Nearly all of the Cablevision subscribers affected by the repositioning of GSN were in the New York DMA. (*See* GSN_CVC_00154095 and GSN_CVC_00154096.)}} As of year-end 2010, Cablevision had 3.0 million video subscribers in the New York Metropolitan service area and 3.3 million subscribers overall. *See* Cablevision Systems Corp NY 10-K, filed February 11, 2011, Part I.1.

[redacted]

44. Table 1 below shows basic viewership statistics for the April 2010 and 2011 periods. The April 2010 data set includes [redacted] subscribers.[28] Table 1 indicates that in April 2010 about [redacted] percent [redacted] of Cablevision New York DMA subscribers received GSN. Consistent with Cablevision's retiering of GSN in February 2011, in April 2011 only about [redacted] percent of Cablevision's New York DMA subscribers received GSN.

45. The April 2011 STB data set includes [redacted] subscribers.[29] Of the [redacted] subscribers in the April 2010 STB data, [redacted] subscribers were still subscribers in the April 2011 STB data.[30] Thus, between April 2010 and April 2011, [redacted] subscribers in the April 2010 STB data set (or about [redacted] percent) cancelled their subscription to Cablevision cable services. The April 2011 STB data set includes [redacted] subscribers that joined the Cablevision service between April 2010 and April 2011. [redacted]

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28 [redacted]

29 [redacted]

30 [redacted]

[redacted]

46. [redacted]

[redacted]

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31 [redacted]

32 [redacted]

33 In fact, this is an error that Mr. Brooks commits in his report. He attributes post-retiering changes in the ratings of GSN, WE tv, and other networks entirely to GSN's retiering. (*See* Brooks Report ¶¶ 37-43.) There are numerous factors, besides GSN's retiering, that potentially affect viewership of networks in individual DMAs, and it is inappropriate to assume (as Mr. Brooks does) that post-retiering changes in ratings are driven entirely by the GSN's retiering as opposed to factors such as the appeal of programming, viewer demographics, or programming promotions. Thus, Mr. Brooks commits a common fallacy of confusing correlation with causation. "Correlation does not imply causation" is a basic scientific principle that says that just because two things happen at the same time does not mean that one caused the other. Mr. Brooks's logic runs afoul of this principle.

[redacted]

47. GSN expert Timothy Brooks has raised questions about the reliability of STB data.[34] In Appendix 1 at Appendix C (CV Exh. 335), I present an analysis that tests the reliability of Cablevision's STB data. Overall, my conclusion is that the STB data are reliable for the purposes of my analysis. I also demonstrate in Appendix 1 at Appendix A (CV Exh. 335) that the STB data are consistent with Nielsen ratings data, which GSN's own experts rely on. The consistency between the STB and Nielsen ratings data further demonstrates the reliability of the STB data. Moreover, the principal conclusions of my analysis of the STB data are corroborated by analyses of other data, including Nielsen ratings data.[35]

48. I now address the specific assertions made by Mr. Brooks about STB data. Mr. Brooks raises questions about whether STB data can identify instances of actual viewership with complete certainty (e.g., he notes that just because the set-top box is tuned to a particular channel, it does not mean that anyone is watching the channel). Mr. Brooks asserts that STB data "reflects *tuning*, not *viewing*."[36] Mr. Brooks points out that STBs may remain turned on even after the TV set is turned off, which would indicate

[34] Brooks Report ¶¶ 48 – 64.

[35] [redacted]

[36] Brooks Report ¶ 49, emphasis in original.

tuning into a network even though no one is watching.[37] He also points out that STB data may not capture delayed viewing such as viewing a program via a Digital Video Recorder ("DVR").[38] But Mr. Brooks's criticisms of the STB data are irrelevant for the analysis I conduct herein. Mr. Brooks's comments suggest a fundamental misunderstanding of how STB data are used in my analysis. No viewership data collection process, including the one used by Nielsen, is error free. The relevant question is not whether STB data measure viewership perfectly, but rather whether STB data are reliable for the analysis of network competition. Based on my analysis, the answer to that question is an unambiguous "yes."

49. [redacted]

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[37] *Id.*

[38] *Id.*

[39] [redacted]

50. [redacted][40] In fact, a study conducted by Mr. Brooks himself finds that the use of STB data is pervasive among MVPDs, which suggests that industry participants consider the STB data reliable to use in the ordinary course of business.[41]

51. Mr. Brooks also claims that the reliability of the STB data is undermined by the lack of uniformity across the industry in how the data are obtained and processed. Again, Mr. Brooks appears to misunderstand my analysis of STB data. [redacted] Thus, Mr. Brooks's criticisms of lack of uniformity of STB data are misguided.

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40 [redacted] *See* also "Audience Measurement Knowledge Primer," October 14, 2012.

41 Tim Brooks, Stu Gray, & Jim Dennison, *The State of Set-Top Box Viewing Data as of December 2009*, February 24, 2010.

[redacted]

52. [redacted] If there were significant competition for viewers between GSN and WE tv, the retiering of GSN would have caused a significant increase in the viewership of WE tv (and likewise for competition between GSN and Wedding Central). Thus, a *direct test* of competition for viewership is a test of whether the retiering of GSN has resulted in a significant increase of either WE tv's or Wedding Central's viewership. My application of the direct test demonstrates that there was no significant increase in WE tv's or Wedding Central's viewership as a result GSN's retiering. Therefore, I find that there was no significant competition for viewers between GSN and WE tv or between GSN and Wedding Central prior to retiering of GSN.

53. I provide a technical description of the direct test in CV Exh. 335, Appendix 1 at Appendix B. [redacted]

[redacted]

54. [redacted] [redacted] [redacted] [redacted]

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42 [redacted]

[redacted]

55. The effect of GSN's retiering on WE tv's and Wedding Central's viewership is also small relative to the viewership retiering effects for other networks. [redacted]

56. [redacted]

[43] The network listed as "Nickelodeon" in Table 2 represents a combination of Nickelodeon and Nick at Nite that share the same channel. Likewise, the network listed as "Cartoon" in Table 2 represents a combination of Cartoon Network and Adult Swim that also share the same channel. Thus, Nickelodeon and Cartoon entries in Table 2 stand for the channels that carry Nickelodeon/Nick at Nite and Cartoon Network/Adult Swim. [redacted]

[redacted]

[redacted]

57. [redacted] In sum, my analysis of GSN, WE tv, and Wedding Channel viewership in April 2010 and April 2011 demonstrates that the retiering of GSN had no significant effect on subscribers' demand for WE tv and Wedding Channel. [redacted]

[redacted]

58. The direct test results are consistent with the Nielsen ratings data for the April 2010 and 2011 periods. Table 3 below shows the WE tv and GSN Nielsen household total day ratings for two groups of households: (1) all television households in the New York DMA; and (2) only Cablevision New York DMA subscriber households.[44] Table 3 shows the Nielsen ratings for both the April 2010 and April 2011 periods. Consistent with Cablevision's retiering of GSN in February 2011, GSN's total day household rating [redacted] by about [redacted] percent between April 2010 and 2011 among Cablevision New York DMA subscribers. Across all New York DMA television households, GSN's total day household rating [redacted] by about [redacted] percent between April 2010 and April 2011.[45] Over the same period, WE tv's total day household rating [redacted] by about [redacted] percent among Cablevision New York DMA subscribers, but [redacted] slightly among all of New York DMA television households. The [redacted] in WE tv's total day household rating over the April 2010 - April 2011 period does not support the hypothesis that GSN's retiering significantly increased WE tv's viewership among Cablevision's New York DMA subscribers. Therefore, the Nielsen ratings data support the results of the direct test of competition for viewership between WE tv and GSN. [redacted]

44 Ratings data for Wedding Central were not available.

45 [redacted]

[redacted]

Channel Switching Analysis

59. Another measure of competition for viewership between networks is the degree to which viewers switch between networks. Such a measure of competition is grounded in economic theory, as well as the practical application of those theories by economists and competition authorities around the world. There are many examples in the economics literature of the use of product switching as a measure of product competition.[46] There is a natural application of this notion to cable network competition: switching between cable networks is indicative of viewer choice between the networks.

[46] Glen L. Urban, Philip L. Johnson, and John R. Hauser, "Testing Competitive Market Structures," *Marketing Science* 3, pp. 83-112, 1984; and Randolph E. Bucklin, Gary J. Russell, and V. Srinivasan, "A Relationship Between Market Share Elasticities and Brand Switching Probabilities," *Journal of Marketing Research* 35, pp. 99-113, 1998; and Barton A. Weitz, "Introduction to Special Issue on Competition in Marketing," *Journal of Marketing Research* 22, pp. 229-236, 1985; and Gregory J. Werden, "A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products," *The Journal of Industrial Economics* 44, pp. 409-413, 1996; and Daniel O'Brien and Abraham Wickelgren, "A Critical Analysis of Critical Loss Analysis," *Antitrust Law Journal* 71, *pp.* 161, 2003-2004; and Carl Shapiro, "The 2010 Horizontal Merger Guidelines: from Hedgehog to Fox in Forty Years," *Antitrust Law Journal* 77, 2010; and Robert Willig, "Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions," *Review of Industrial Organization* 39, pp. 19–38, 2011.

[redacted]

60. [redacted]

61. Table 4 shows the average switching rates from WE tv to other networks during the April 2010 period. The switching rate from WE tv to a network is the rate at which any given WE tv viewership instance results in a switch to that network.[47] The set of networks included in Table 4 are the national cable and broadcast networks.[48] [redacted]

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47 [redacted]

48 The list of networks in Table 4 includes the networks from Table 2 as well as GSN.

[redacted] These numbers suggest that prior to Cablevision's retiering of GSN, WE tv faced only negligible competition for viewership from GSN.[49] Such a finding is consistent the results of the direct test of competition for viewers between WE tv and GSN.

62. Although Table 4 focused on the switching rates from WE tv to other networks, one may also examine the switching rates from other networks to WE tv. Such switching rates also provide a measure of competition for viewership between WE

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49 Some may argue that the [redacted] switching rate between WE tv and GSN is largely driven by the positions of WE tv and GSN in Cablevision's channel lineup rather than by the lack of competition between the networks for viewers' eyeballs. Although channel position, or so-called neighborhooding, likely affects viewership of networks, the switching rates nonetheless provide a relevant measure of competition for viewers among networks. For example, [redacted] My switching rate analysis measures the level of pre-retiering competition among networks, while taking all the factors that affect preferences and viewing habits as a given. The focus of the analysis is to assess retiering incentives given the pre-retiering level of competition among networks – no matter what factors are responsible for pre-retiering viewing habits and competition. Channel positioning is just one such factor. Others include network promotions, appeal of programming, and viewer demographics.

tv and other networks. Table 5 shows the average switching rates to WE tv from the set of national networks during the April 2010 period. [redacted]

50 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

51 [redacted]

52 [redacted]

53 [redacted]

[redacted]

[redacted]

65. [redacted] Another perspective on viewership competition between WE tv and GSN (and also on viewership competition between Wedding Central and GSN) is provided by GSN switching rates. Table 7 below shows the switching rates from GSN to other networks in April 2010.[54] Table 7 shows that in April 2010 the switching rate from GSN to WE tv was [redacted] percent and the switching rate from GSN to Wedding Central was [redacted] percent. Thus, a GSN to WE tv switch occurred, on average, in about [redacted] GSN viewing instances, and a GSN to Wedding Central switch occurred in about [redacted] GSN viewing instances. The GSN to WE tv and GSN to Wedding Central switching rates are [redacted]

66. [redacted] The switching rate from GSN to all the [redacted] in Table 7 with a higher switching rate from GSN than WE tv (taken as an aggregate) was approximately [redacted] percent or roughly [redacted] times larger than the GSN to WE tv switching rate. These

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[54] This is the rate at which any given instance of GSN viewership results in a switch to another network. *See supra* note 47 for definition of viewing instances and switching rates.

[55] The list of networks in Table 7 includes the national networks and consists of the same networks as those in Table 2.

findings further demonstrate the lack of significant competition for viewership between WE tv and GSN. [redacted]

[redacted]

[redacted]

68. I also observe that there are a number of important differences between the WE tv and GSN switching rates. First, GSN viewers [redacted]

69. [redacted]

[56] Out of the top 10 networks in Table 2, seven are among the top 10 networks in Table 7. Likewise, out of the top 10 networks in Table 7, seven are among the top 10 networks in Table 2.

[redacted] Tables 6 and 7 also show that there are significant differences between GSN and Wedding Central in terms of switching rates to [redacted]

70. Thus, it appears that WE tv and GSN viewers as well as Wedding Central and GSN viewers were quite *dissimilar* in terms of their viewing patterns. These results indicate that not only was there an absence of significant competition for viewership between WE tv and GSN or between Wedding Central and GSN, but that there was also relatively little overlap between the networks with which WE tv and GSN (or Wedding Central and GSN) competed with for viewership. Such differences between the WE tv and GSN switching rates and likewise between the Wedding Central and GSN switching rates suggest that there was a relatively low degree of viewer audience overlap between WE tv and GSN or between Wedding Central and GSN.

71. Additional perspective on the GSN – WE tv (and GSN – Wedding Central) switching rates may be gained by comparing these switching rates to benchmark switching rates between networks that appear to carry similar programming. [redacted]

57 [redacted]

58 [redacted]

[redacted] The results in Tables C1 – C10 show that the switching rates between WE tv and GSN are dwarfed by the switching rates between networks that carry apparently similar programming and appear to compete with each other for viewers. For example, [redacted]

72. There is another important aspect in which the WE tv – GSN (and Wedding Central – GSN) switching rates differ from those of benchmark networks. [redacted]

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59 [redacted]

[redacted] The disparity in switching rates between WE tv and GSN (and between Wedding Central and GSN) and those of the benchmark network pairs further demonstrates a lack of significant competition for viewership between WE tv and GSN (and between Wedding Central and GSN).

73. My final observation about the switching rate analysis concerns the asymmetry of switching rates between networks. For example, whereas the WE tv to GSN switching rate was [redacted] percent in April 2010, the GSN to WE tv switching rate was [redacted] percent in the same period. For other network pairs there are even bigger asymmetries in switching rates. For example, in April 2010, the [redacted] to [redacted] switching rate was [redacted] percent, but the [redacted] to [redacted] switching rate was only [redacted] percent. Likewise, the [redacted] to [redacted] switching rate was [redacted] percent, but the [redacted] to [redacted] switching rate was [redacted] percent. Such asymmetries in the switching rates are entirely plausible. [redacted] is more popular in terms of total viewership than [redacted], and therefore it is much more likely that an [redacted] viewer will switch to [redacted] than vice versa. Likewise, [redacted] is more popular in terms of total viewership than [redacted], and therefore it is more likely that a [redacted] viewer will switch to [redacted] than vice versa.

74. The asymmetric switching rates are also likely indicative of asymmetric competition for viewers between networks. The WE tv to GSN switching rate is indicative of competition for viewership that WE tv faces from GSN.[60] The GSN to WE tv switching rate is likewise indicative of competition for viewership that GSN faces from WE tv. Competition for viewership need not be symmetrical between networks. Thus, the fact that the switching rate from GSN to WE tv [redacted] Cablevision's incentive to engage in discriminatory conduct in carriage of GSN is related to the level of competition that WE tv faced from GSN. Therefore, the more relevant switching rate for the analysis of competition is the WE tv to GSN switching rate.

<u>Limited Degree of Viewer Audience Overlap between GSN and WE tv/Wedding Central Suggests an Absence of Significant Competition for Viewers between the Networks</u>

75. Additional information about the state of competition for viewership between networks may be gleaned by examining viewer audience overlap between networks. Viewer audience overlap measures the degree to which viewers of one network watch the other – potentially competing – network. It is important to point out that although viewer audience overlap measures may provide some insight into potential competition for viewers between networks, such measures are not dispositive. If viewers of network A never watch network B and vice versa, such a lack of viewer audience overlap suggests that there may be relatively little competition for viewership

60 If it were the case that the vast majority of viewers who switched from WE tv went to GSN, GSN's programming would likely be a significant competitive threat to WE tv's programming. Conversely, if a very small percentage of viewers who switched from WE tv went to GSN, GSN's programming would likely pose no competitive threat to WE tv's viewership.

between the two networks. However, if there were a significant population of viewers that spent considerable amount of time watching both networks A and B, one should not conclude on this basis alone that there is significant competition for viewership between these networks. The fact that viewers watch both networks A and B does not mean that viewers are *choosing* between watching the networks or even consider watching network A as a substitute for watching network B, and vice versa. Indeed, the fact that viewers watch both networks indicates that they do not need to choose between the networks but can watch both.

76. An example can show this: I watch The Daily Show with Jon Stewart and I watch Homeland (when there are new episodes). Does this mean that these shows compete for my business (i.e., my eyeballs)? No. I do not view the shows as substitutes. I will watch both shows. If I could not see The Daily Show with Jon Stewart (because I am working on this report, for example), it would not make me more likely to watch Homeland.[61] Likewise, watching some programs on GSN does not necessarily preclude the viewer from watching programs on WE tv, and viewer overlaps or similarities in the viewer demographics between GSN and WE tv (if such existed) do not necessarily imply competition between the networks for viewers as a matter of economic logic.[62] Competition for viewers must be demonstrated empirically by considering the substitution patterns between networks. My direct test and switching rate analyses that I present above address this very question. Thus, the analysis of viewer audience overlap

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61 This is in contrast to competition among airlines that provide service between Los Angeles and Washington, D.C. When I travel between Los Angeles and Washington, D.C., I choose one airline among the available options. Thus, I view the airlines that provide services between Los Angeles and Washington, D.C. as substitutes.

62 That is, viewer audience overlap and similarity in programming content may be consistent with competition for viewers, but need not imply such competition.

analysis is at most a way to gain additional insight into the behavior of viewers of GSN, WE tv, Wedding Central, but it is by no means an appropriate measure of the intensity of competition between the networks.

77. One source of information about viewer audience overlap comes from the Nielsen audience duplication reports. The Nielsen audience duplication reports measure the percentage of viewers of one network who also watch another network during a given quarter (or some other time period). The Nielsen audience duplication reports measure the degree of audience overlap between networks from the perspective of viewers of a particular network. I examine viewer audience duplication reports from the perspective of WE tv. I analyze for each network the percentage of WE tv viewers that watch the networks.[63] My analysis of the Nielsen WE tv audience duplication report data for the fourth quarter of 2010 (the last full quarter prior to Cablevision's retiering of GSN) shows that GSN ranks low on the list of networks watched by WE tv viewers.[64] Tables 8 and 9 below list networks in order of the percentage of WE tv viewers who viewed the networks in the fourth quarter of 2010.[65] Table 8 lists network viewership by *people* at least 18 years of age and Table 9 lists network viewership by *women* ages 25 to 54.

78. Tables 8 and 9 show that in the fourth quarter of 2010, GSN ranked [redacted] among the networks watched by WE tv viewers both for all those 18 and

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[63] Analyzing viewer audience overlaps from the perspective of WE tv viewers show which networks *may* be competing with WE tv for viewers.

[64] I analyze the Nielsen audience duplication reports for total day viewership.

[65] The audience duplication report data in Tables 8 and 9 consider a person to be a viewer of a network if the person watched the network for at least six minutes in the period under consideration – one quarter in case of Tables 8 and 9.

older and for women ages 25 to 54. According to the Nielsen WE tv audience duplication report data, in the fourth quarter of 2010, [redacted] percent of WE tv viewers who were 18 years of age or older watched GSN *at any time during the quarter* and [redacted] percent of WE tv women viewers (ages 25 to 54) watched GSN *at any time during the quarter*. Therefore, my analysis of the WE tv Nielsen audience duplication reports indicates a relatively low degree of overlap between GSN and WE tv viewer audiences. [redacted]

[redacted]

[redacted]

79. [redacted] The Nielsen audience duplication reports that I analyze are limited in a number of ways. The reports only include cable networks and exclude broadcast networks. The inclusion of broadcast networks in the audience duplication analysis would only lower GSN's rank among networks watched by WE tv viewers. Moreover, the Nielsen audience duplication report data should be viewed with caution because these reports apply a relatively low threshold for what constitutes viewership of a network. The Nielsen audience duplication reports that I analyze consider viewers as having watched a network if the viewer watched that network for at least six minutes during the period examined by the report.[66] The fourth quarter 2010 Nielsen audience duplication reports that I analyze in Tables 8 and 9 deem a viewer a WE tv – GSN overlap viewer if the viewer watched at least six minutes of WE tv and at least six minutes of GSN over the entire quarter. Considering that the Nielsen audience duplication reports apply a low threshold for network or program "viewership," applying a higher threshold for defining network viewership would reduce the magnitudes of viewer audience overlap in terms of the number of overlap viewers.[67] It should be noted that Dr. Singer analyzes some Nielsen audience duplication data that actually use a *one minute* viewership qualifier (where a person is considered to be a viewer of a network if the person watched the network for at least one minute over the entire quarter).[68]

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[66] Six minutes of viewing time is a common qualifier for defining program or network viewership. *See, e.g.,* www.allbusiness.com/glossaries/nielsen-rating/4964672-1 html#ixzz1gADV506j (downloaded on December 10, 2012).

[67] Applying a higher threshold for defining network viewership would also reduce the number of network "viewers" so that the overall effect of the higher threshold on the duplication percentages is unclear.

[68] The fourth quarter of 2010 Nielsen audience duplication data reported by Dr. Singer for total day viewership and the persons ages 18 or higher demographic are based on the one minute viewership qualifier. (*See* GSN_CVC_00153511.)

80. Nonetheless, the results of my analysis show that GSN ranks low relative to other networks in terms of the percentage of WE tv "viewers" that have "watched" other networks. That is, my analysis shows that out of the population of individuals who watch WE tv, a relatively small percentage also watch GSN.

81. [redacted]

82. I analyze viewer audience overlap between WE tv and GSN (and between Wedding Central and GSN) using the April 2010 STB data. Tables 10, 11 and 12 show (based on the STB data) network viewership shares for households that have watched WE tv, Wedding Central, and GSN for at least one hour in April 2010, respectively.[69] The lists of networks in these tables comprise the national networks that include both cable and broadcast networks. Table 10 ranks networks according to the average household viewership share in April 2010 for households that have watched WE tv for at least one hour in April 2010.[70] The results of this analysis do not change

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69 Tables 10, 11, and 12 provide an important perspective on competition facing WE tv, Wedding Central, and GSN. These tables show which networks were obtaining the most viewership among WE tv, Wedding Central, and GSN viewing households. Therefore, the more popular networks tend to have higher ranks in these tables.

70 [redacted]

significantly if I apply alternative time thresholds for defining network viewership.[71] GSN ranks [redacted] among the networks in Table 10. Table 10 shows that GSN accounted for only about [redacted] percent share of total viewership among households that watched WE tv for at least one hour in April 2010. Table 11 ranks networks according to the average household viewership share in April 2010 for households that have watched Wedding Central for at least one hour in April 2010.[72] GSN ranks [redacted] among the networks in Table 11. Table 11 shows that GSN accounted for only about [redacted] percent share of total viewership among households that watched Wedding Central for at least one hour in April 2010. Table 12 ranks networks according to the average household viewership share in April 2010 for households that have watched GSN for at least one hour in April 2010.[73] WE tv and Wedding Central rank [redacted] and [redacted] among the networks in Table 12. Table 12 shows that WE tv and Wedding Central accounted for only about [redacted] and [redacted] percent share, respectively, of total viewership among households that watched GSN for at least one hour in April 2010.

83. Tables 13, 14, and 15 show an alternative measure of viewer audience overlap between networks. Table 13 shows, for each national network, the network viewership share that is accounted for by households that watched WE tv for at

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[71] If I apply a 30-minute threshold for defining a network viewing household, then GSN would rank [redacted] among WE tv viewing households and [redacted] among Wedding Central viewing households; WE tv would rank [redacted] and Wedding Central would rank [redacted] among GSN viewing households. If I apply a two-hour threshold for defining a network viewing household, then GSN would rank [redacted] among WE tv viewing households and [redacted] among Wedding Central viewing households; WE tv would rank [redacted] and Wedding Central would rank [redacted] among GSN viewing households.

[72] [redacted]

[73] [redacted]

least an hour in April 2010. I refer to this share as WE tv viewers' share of network viewership. WE tv viewers' share of network viewership provides a useful alternative measure of viewer audience overlap between WE tv and other networks because more popular networks do not necessarily have higher ranks under this measure. Table 13 ranks networks by WE tv viewers' share of network viewership. The top ranked network in Table 13 is Wedding Central. Households that watched at least one hour of WE tv in April 2010 accounted for [redacted] percent of Wedding Central's viewership in the same month. GSN ranks [redacted] among the networks in Table 13. WE tv viewers' share of GSN viewership was only [redacted] in April 2010.

84. Table 14 shows Wedding Central viewers' share of network viewership for each national network.[74] The top ranked network in terms of Wedding Central viewers' share of network viewership was [redacted]: Wedding Central viewers' share of [redacted] viewership was [redacted] percent. GSN ranked [redacted] among the national networks in terms of Wedding Central viewers' share of viewership. Wedding Central viewers' share of GSN viewership was only [redacted] percent.

85. Table 15 shows GSN viewers' share of network viewership for each national network.[75] The top ranked network in terms of GSN viewers' share of network viewership was [redacted]: GSN viewers' share of [redacted] viewership was [redacted] percent. WE tv and Wedding Central ranked [redacted] and [redacted], respectively, among the national networks in terms of GSN viewers' share of viewership.

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[74] I define Wedding Central viewers' share of network viewership as the percentage of network viewership that was accounted for by households that watched Wedding Central for at least an hour in April 2010.

[75] I define GSN viewers' share of network viewership as the percentage of network viewership that was accounted for by households that watched GSN for at least an hour in April 2010.

GSN viewers' shares of WE tv and Wedding Central viewership were [redacted] and [redacted] percent, respectively.

86. To assess the magnitudes of the WE tv, Wedding Central, and GSN viewers' shares of network viewership, I calculate comparable measures for pairs of networks that offer apparently similar types of programming. These network pairs include: CNN – Fox News, MTV – VH1, Nickelodeon – Disney, ESPN – ESPN2, and TNT – USA. Tables D1 through D10 in CV Exh. 335, Appendix 1 at Appendix D show the network viewership shares accounted for by the viewers of these networks. Some highlights of the results include the following.[76]

- MSNBC and Fox News ranked [redacted] and [redacted] in terms of CNN viewers' share of network viewership: CNN viewers accounted for [redacted] percent of MSNBC viewership and [redacted] percent of Fox News viewership in April 2010.
- CNBC and CNN ranked [redacted] and [redacted] in terms of Fox News viewers' share of network viewership: Fox News viewers accounted for [redacted] percent of CNBC viewership and [redacted] percent of CNN viewership in April 2010.
- VH1 ranked [redacted] in terms of MTV viewers' share of network viewership: MTV viewers accounted for [redacted] percent of VH1 viewership in April 2010.
- BET and MTV ranked [redacted] and [redacted] in terms of VH1 viewers' share of network viewership: VH1 viewers accounted for

[76] A network viewer is defined as a household that watched a network for at least one hour in April 2010.

[redacted] percent of BET viewership and [redacted] percent of MTV viewership in April 2010.

- Teen Nick and Disney ranked [redacted] and [redacted] in terms of Nickelodeon viewers' share of network viewership: Nickelodeon viewers accounted for [redacted] percent of Teen Nick viewership and [redacted] percent of Disney viewership in April 2010.
- Teen Nick and Nickelodeon ranked [redacted] and [redacted] in terms of Disney viewers' share of network viewership: Disney viewers accounted for [redacted] percent of Teen Nick viewership and [redacted] percent of Nickelodeon viewership in April 2010.
- ESPNews and ESPN2 ranked [redacted] and [redacted] in terms of ESPN viewers' share of network viewership: ESPN viewers accounted for [redacted] percent of ESPNews viewership and [redacted] percent of ESPN2 viewership in April 2010.
- ESPNews and ESPN ranked [redacted] and [redacted] in terms of ESPN2 viewers' share of network viewership: ESPN2 viewers accounted for [redacted] percent of ESPNews viewership and [redacted] percent of ESPN viewership in April 2010.
- NBA TV and USA ranked [redacted] and [redacted] in terms of TNT viewers' share of network viewership: TNT viewers accounted for

[redacted] percent of NBA TV viewership and [redacted] percent of USA viewership in April 2010.[77]

- Sleuth and TNT ranked [redacted] and [redacted] in terms of USA viewers' share of network viewership: USA viewers accounted for [redacted] percent of Sleuth viewership and [redacted] percent of TNT viewership in April 2010.

These results are in stark contrast to the WE tv – GSN and Wedding Central – GSN viewer audience overlaps.

- GSN ranked [redacted] in terms of WE tv viewers' share of network viewership: WE tv viewers accounted for [redacted] percent of GSN's viewership in April 2010. WE tv ranked [redacted] in terms of GSN viewers' share of network viewership: GSN viewers accounted for [redacted] percent of WE tv's viewership in April 2010.
- GSN ranked [redacted] in terms of Wedding Central viewers' share of network viewership: Wedding Central viewers accounted for [redacted] percent of GSN's viewership in April 2010. Wedding Central tv ranked [redacted] in terms of GSN viewers' share of network viewership: GSN viewers accounted for [redacted] percent of Wedding Central's viewership in April 2010.

87. As my analysis demonstrates, the viewer audience overlap measures between WE tv and GSN are very small relative to the viewer audience overlap measures between benchmark networks that show similar types of programming. Viewer

[77] TNT and NBA TV both carried live NBA games and related content.

overlap measures between Wedding Central and GSN are likewise very small. Based on the foregoing discussion, I find that there was relatively little viewer audience overlap between WE tv and GSN (and also relatively little viewer audience overlap between Wedding Central and GSN) prior to GSN's retiering. Therefore, the viewer audience overlap analysis further supports my finding of no significant competition for viewership between WE tv and GSN (and between Wedding Central and GSN) prior to GSN's retiering. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Cablevision and GSN Documents Do Not Indicate Significant Competition Between GSN and WE tv/Wedding Central

88. My review of documents from GSN and Cablevision indicates no significant competition between either WE tv and GSN or between Wedding Central and GSN. [redacted]

89. [redacted]

78 [redacted]

79 For example, *see* GSN_CVC_00002998-3009, at 3002, 3006.

80 GSN_CVC_00016867-91, at 71.

[redacted]

Dr. Singer Offers No Reliable Evidence of Competition for Viewers Between GSN and WE tv/Wedding Central

90. Dr. Singer claims that his analysis indicates that WE tv and GSN are "similarly situated from the perspective of consumers."[83] Dr. Singer argues that viewers perceive WE tv and GSN as "similarly situated" because GSN carries a significant amount of "relationship-based programming."[84] There are three major problems with this argument.

- *First*, determining whether or not a given program can be considered "relationship-based programming" is not economic analysis. Indeed, I am not aware what particular economic expertise Dr. Singer is

81 *See* [redacted]

82 [redacted]

83 Singer Report ¶ 29.

84 Singer Report ¶¶ 29-31.

bringing to bear on his classification that certain programs are "relationship-based."[85]

- *Second*, Dr. Singer has no basis for reaching any conclusions about what the viewers "perceive." Dr. Singer does not present any evidence that sheds light on how viewers *perceive* WE tv and GSN. He presents no survey results or viewer testimonials about whether viewers perceive programming on WE tv to be similar to programming on GSN.[86]
- *Third*, even assuming that GSN and WE tv both carry what some viewers perceive as "relationship-based programming," the viewers may not consider the programs on GSN and WE tv to be close alternatives or economic substitutes. Dr. Singer's discussion of "relationship-based programming" actually has nothing to say about whether viewers consider the programs on GSN and WE tv to be economic substitutes.

91. Dr. Singer also argues that viewer audience overlap between GSN and WE tv suggests that viewers "perceive GSN and WE tv as competitive alternatives."[87] As I explain above, this argument is a fallacy. Just because some viewers watch two different networks does not mean that the viewers consider the two networks

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85 I understand that Cablevision's programming expert, Michael Egan, refutes Dr. Singer's characterization of the programming of GSN and WE tv as similar.

86 I understand that Cablevision's survey expert, Hal Poret, has conducted a survey that confirms that viewers familiar with GSN and WE tv view the two as carrying different types of programming content.

87 Singer Report ¶ 32.

to be close alternatives. For example, the [redacted] and [redacted] both have a high share of male viewership.[88] But the fact that the two networks skew male in their viewership and may have some overlapping viewer audience does not in any way imply that the viewers consider watching the [redacted] to be a close substitute to watching [redacted]. Therefore, Dr. Singer's viewer audience overlap analysis does not in fact show that viewers consider WE tv and GSN to be close alternatives.[89]

92. Moreover, Dr. Singer's analysis of viewer audience overlap is flawed. Dr. Singer's viewer audience overlap analysis uses the Nielsen audience duplication reports for the fourth quarter of 2010.[90] In reaching his conclusion that there is a [redacted] [redacted][92] There is no compelling reason why the both duplication measure would be at all relevant to assessing the degree of competition between networks. Both duplication does not measure the percentage of WE

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88 *See* CV Exh. 335, Appendix 1 at Appendix E.

89 It is worth noting that Dr. Singer explains that "a reasonable approximation" for assessing whether WE tv and GSN are "economic substitutes" is "an analysis of where GSN viewers turn after watching GSN." (Singer Report ¶ 32.) However, Dr. Singer does not perform such an analysis. In fact, this is the question addressed by my switching analysis that I discuss above. Dr. Singer's highly flawed viewer overlap analysis does not assess "where GSN viewers turn after watching GSN."

90 I examine the same data in my viewer audience overlap analysis.

91 Dr. Singer examines "both duplication" measures for total day and prime-time viewership. (Singer Report ¶¶ 33-34.)

92 Singer Report ¶ 33.

tv viewers who also watch GSN; nor does it measure the percentage of GSN viewers who also watch WE tv. Both duplication between WE tv and GSN does not measure the competition for viewers that WE tv faces from GSN.[93] There does not seem to be a clear intuition for what both duplication measures. Dr. Singer does not provide a clear explanation for why both duplication is an appropriate measure of viewer audience overlap for assessing competition between networks.

93. Dr. Singer finds that in the fourth quarter of 2010 for persons 18 or older the GSN - WE tv both duplication percentages were [redacted] percent for total day and [redacted] percent for prime-time.[94] These numbers indicate, based on Dr. Singer's data, that WE tv ranked [redacted] in terms of total day both duplication with GSN and [redacted] in terms of prime time both duplication with GSN (for people 18 years and older in the fourth quarter of 2010). However, alternative measures of viewer audience overlap provide additional perspective and show that there is relatively small viewer audience overlap between WE tv and GSN. My analysis of the Nielsen audience duplication reports for Q4 2010 (total day viewing) yields the following results.[95]

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93 If one assumes, *arguendo,* that the WE tv – GSN overlap or "duplication" viewers represent the set of viewers for which WE tv and GSN are competing, the relevant measure of competition facing WE tv from GSN is the overlap viewers' share of total WE tv viewers. "Both duplication" provides a completely different measure and is an inaccurate gauge of competition facing WE tv.

94 Singer Report ¶ 33.

95 [redacted]

- GSN's primary duplication rank from the perspective of WE tv (i.e., the percentage of WE tv viewers who also watched GSN in the fourth quarter of 2010):
  - [redacted] **out of 96** for the persons 18+ demographic.
  - **out of 96** for the female 18+ demographic.
  - **out of 96** for the persons 25-54 demographic.
  - **out of 96** for the female 25-54 demographic.
- GSN's secondary duplication rank from the perspective of WE tv (i.e., the percentage of the other (secondary) network's viewers who also watched WE tv in the fourth quarter of 2010):
  - [redacted] **out of 96** for the persons 18+ demographic.
  - **out of 96** for the female 18+ demographic.
  - **out of 96** for the persons 25-54 demographic.
  - **out of 96** for the female 25-54 demographic.
- GSN's both duplication rank from the perspective of WE tv:
  - [redacted] **out of 96** for the persons 18+ demographic.
  - **out of 96** for the female 18+ demographic.
  - **out of 96** for the persons 25-54 demographic.
  - **out of 96** for the female 25-54 demographic.
- WE tv's primary duplication rank from the perspective of GSN (i.e., the percentage of GSN viewers who also watched WE tv in the fourth quarter of 2010):
  - [redacted] **out of 96** for the persons 18+ demographic.
  - **out of 96** for the female 18+ demographic.
  - **out of 96** for the persons 25-54 demographic.
  - **out of 96** for the female 25-54 demographic.

- WE tv's secondary duplication rank from the perspective of GSN (i.e., the percentage of the other (secondary) network's viewers who also watched GSN in the fourth quarter of 2010) :
  - [redacted] **out of 96** for the persons 18+ demographic.
  - [redacted] **out of 96** for the female 18+ demographic.
  - [redacted] **out of 96** for the persons 25-54 demographic.
  - [redacted] **out of 96** for the female 25-54 demographic.
- WE tv's both duplication rank from the perspective of GSN :
  - [redacted] **out of 96** for the persons 18+ demographic.
  - [redacted] **out of 96** for the female 18+ demographic.
  - [redacted] **out of 96** for the persons 25-54 demographic.
  - [redacted] **out of 96** for the female 25-54 demographic.

94. [redacted]

96 [redacted]

[redacted]

95. [redacted] Further, as I discuss earlier, the Nielsen duplication report data should be viewed with caution because these reports apply a relatively low threshold for what constitutes viewership of a network. As I already noted above, the Nielsen duplication reports that I analyze consider viewers as having watched a network if the viewer watched that network for at least six minutes during the period examined by the report. Thus, the Nielsen duplication reports provide a very weak measure of viewer audience overlap. [redacted]

96. [redacted]

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97 The same critique applies to the viewer audience duplication analysis presented by Mr. Brooks in his report.

98 [redacted]

[redacted]

97. Dr. Singer also examines viewer audience overlap for seven GSN programs: *Baggage*, *The Newlywed Game*, *Love Triangle*, *Deal or No Deal*, *Family Feud*, *Match Game*, and *Catch 21*.[99] Dr. Singer's analysis of the viewer audience overlap for the seven GSN programs suffers an additional methodological flaw (besides those already identified above) in that Dr. Singer limits his audience duplication analysis to only 16 networks. That is, Dr. Singer examines viewer audience duplication between the seven GSN programs and only 16 other networks (and only 15 for his analysis of 2010 data).[100] In contrast, Dr. Singer's analysis of overall GSN viewer audience duplication examined 85 networks besides GSN.[101] Thus, Dr. Singer excludes dozens of networks from his analysis of viewer overlap with these seven programs. WE tv's duplication rank with respect to these programs would likely be lower if all the networks were included. Furthermore, Dr. Singer's audience duplication analysis of the seven GSN programs considers viewership over a two-quarter period (in contrast to the one quarter period for his analysis of overall GSN viewership). Examining viewer audience duplication over a two-quarter period further weakens the standard for what constitutes viewership overlap.[102] Finally, confining the analysis of viewer audience overlap to a subset of

[99] Singer Report ¶ 33.

[100] Singer Report ¶ 37.

[101] Singer Report ¶ 33.

[102] I understand that the Nielsen duplication report data that Dr. Singer uses in his analysis of the seven GSN programs count instances of viewer "duplication" (or overlap) where a viewer watched a GSN program for at least six minutes over a six-month period and watched another networks for at least six minutes over the same six-month period. Such a test is an extremely low standard for what constitutes viewership overlap.

programs shown on a network (rather than analyzing the networks' overall viewership) may yield a biased assessment of the network's audience and further diminishes the value of an already weak test of competition for viewers between networks.

98. In sum, Dr. Singer's viewership overlap analysis is unreliable and by no means indicates that WE tv and GSN competed for viewers in any significant way.

There Was No Significant Competition for Advertisers between GSN and WE tv[103]

99. If GSN and WE tv competed significantly for advertisers, advertisers would view the two networks as substitutes and reducing the supply of advertising on GSN would increase the demand for advertising on WE tv. Such significant competition between WE tv and GSN for advertisers would also likely be reflected in WE tv's advertising rates, which would be significantly constrained by GSN's advertising rates, and vice versa. The degree to which WE tv's advertising rates face a pricing constraint from GSN may be relevant to assessing Cablevision's incentives to discriminate against GSN. If WE tv's advertising faced a significant pricing constraint from GSN, then restraining GSN's ability to provide advertising services may benefit WE tv by enabling WE tv to charge higher advertising rates. For this reason, I analyze competition for advertisers between WE tv and GSN from the perspective of constraints facing WE tv's advertising prices.[104] The analyses I present show an absence of any significant competition for advertisers between WE tv and GSN, from an economic

[103] As neither Dr. Singer nor Mr. Brooks presents any evidence of competition for advertising customers between GSN and Wedding Central, I focus my discussion in this section on WE tv and GSN.

[104] Nonetheless, I reach similar conclusions if I analyze competition for advertising from the perspective of constraints facing GSN's advertising pricing.

perspective. Below, I describe my analyses and the foundations for my conclusion regarding competition for advertisers between WE tv and GSN.

Significant Differences in Viewer Demographics Between WE tv and GSN Are Inconsistent with Significant Competition for Advertisers Between the Two Networks

100. A key feature of competition between networks for advertisers is the degree to which networks have similar viewer demographics. Companies that look to reach a certain audience demographic are likely to view networks with very similar viewer demographics as close substitutes for their advertising expenditures. Likewise, such advertisers are likely to view networks with dissimilar viewer demographics as not particularly close substitutes. The degree to which advertisers view networks as substitutes for advertising expenditures is an indicator of competition for advertisers between the networks. My analysis shows WE tv and GSN were quite dissimilar in their viewer demographics. The significant differences in viewer demographics between WE tv and GSN suggest that advertisers were unlikely to view the two networks as close substitutes for advertising expenditures. Consequently, the differences in viewer demographics indicate an absence of significant competition for advertisers between WE tv and GSN.

101. I analyze network viewer demographics using the Nielsen full-day national network market breaks data for the fourth quarter of 2010 (the last full quarter prior to GSN's retiering).[105] The Nielsen dataset breaks down the viewership of national cable networks by viewer demographics, such as age, gender, occupation type, education level, race, labor force participation, type of residence, and residence location. I use this

105 Nielsen Total Day Marketbreaks 4Q 2010 (9/10/2010 – 12/26/2010, Live+SD, all cable networks) ("TDMarketbreaks_4QTR10_All_Cable.xls").

dataset to calculate, for each demographic group and network, the percentage of the network's total viewership that the demographic group represents. I analyze these statistics to measure the differences in networks' viewer demographics.

102. Table 16 below compares the viewer demographics statistics for WE tv and GSN. The analysis only considers viewership by persons who are at least 18 years old. Table 16 indicates that in the fourth quarter of 2010 there were significant differences in viewer demographics between WE tv and GSN. [redacted]

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106 [redacted]

107 I measure the female viewership share as the female viewers' share of total network viewership.

[redacted] [redacted]

103. [redacted] [redacted]

104. [redacted]

108 [redacted]

109 [redacted]

[redacted]

105. [redacted]

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110 [redacted]

111 [redacted]

[redacted]

106. [redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

- [redacted]

[redacted]

These differences in viewer demographics between WE tv and GSN highlighted by my analysis indicate that these two networks appeal to different viewer audiences and thus different advertisers.

107. Another useful way to examine networks' viewer demographics is by depicting networks in a scatter plot that shows two demographic attributes at the same time. I present such scatter plots in Figures E20 through E29 in CV Exh. 335, Appendix 1 at Appendix E. [redacted]

[redacted][112]

108. The distances between networks depicted in the two-dimensional scatter plots can be extended to multiple dimensions of viewer demographic attributes. That is, one can calculate distances between networks in viewer demographics based on multiple viewer demographic attributes. I calculate such distances between networks' viewer demographics by applying the method used by Dr. Singer in his report to make similar calculations.[113] This method uses the Mahalanobis distance to calculate the differences between networks' viewer demographics for any given set of viewer demographic attributes. I calculate the Mahalanobis distance between networks based on the following ten viewer demographic attributes: (1) viewer median age; (2) female share of viewership; (3) median viewer income; (4) viewer household home ownership share;

112 [redacted]

113 Singer Report ¶¶ 43- 45.

(5) viewer head of household white collar occupation share; (6) viewer head of household not in labor force share; (7) viewer head of household with at least four years of college share; (8) share of viewers who reside in counties of size A; (9) share of viewership by viewer households with at least three people; and (10) viewer head of household white share. I chose these attributes to cover a wide range of viewer demographic statistics that may be applied to cable networks.[114] Tables 17 and 18 below show the Mahalanobis distances for viewer demographics from WE tv and GSN, respectively. [redacted]

109. [redacted]

[114] The results of my analysis do not significantly change when I calculate distances for alternative sets of viewer demographic attributes.

[115] [redacted]

[redacted]

110. My analysis also shows that benchmark network pairs are relatively close to each other in terms of the Mahalanobis distance (based on the same 10 viewer demographic attributes), as one would expect:

- The Mahalanobis distance between CNN and Fox News was [redacted]. CNN ranked [redacted] in distance from Fox News, and Fox News ranked [redacted] in distance from CNN.
- The Mahalanobis distance between VH1 and MTV was [redacted]. VH1 ranked [redacted] in distance from MTV, and MTV ranked [redacted] in distance from VH1.
- The Mahalanobis distance between Nickelodeon and Disney was [redacted]. Disney ranked [redacted] in distance from Nickelodeon, and Nickelodeon ranked [redacted] in distance from Disney.
- The Mahalanobis distance between ESPN and ESPN2 was [redacted]. ESPN2 ranked [redacted] in distance from ESPN, and ESPN ranked [redacted] in distance from ESPN2.
- The Mahalanobis distance between TNT and USA was [redacted]. TNT ranked [redacted] in distance from USA, and USA ranked [redacted] in distance from TNT.

- In contrast, the Mahalanobis distance between WE tv and GSN was [redacted]. GSN ranked [redacted] in distance from WE tv, and WE tv ranked [redacted] in distance from GSN.

111. [redacted] These results corroborate my overall finding of significant differences between WE tv and GSN in terms of viewer demographics. The relatively large differences in viewer demographics between WE tv and GSN further indicate that WE tv and GSN did not likely compete for advertisers in a significant way prior to GSN's retiering.

112. Dr. Singer also calculates the Mahalanobis distance between WE tv's and GSN's viewer demographics.[116] Dr. Singer finds that WE tv ranked [redacted] in terms of viewer demographic distance from GSN.[117] In contrast, my analysis shows that WE tv ranked [redacted] in terms of distance from GSN. There are several reasons for the differences between our results. Dr. Singer considers only 38 networks out of 95 networks for which demographic data are available in the fourth quarter of 2011.[118] My analysis examines the demographics for all 95 networks. Many of the networks excluded from Dr. Singer's demographic distance analysis are the very networks that my analysis shows are closer to GSN in terms of viewer demographics than WE tv. Such networks include: [redacted]

[116] Singer Report ¶¶ 41 - 45.

[117] Singer Report ¶¶ 45.

[118] See "GSN_CVC_00154869 - HIGHLY CONFIDENTIAL.xlsx."

[redacted] Thus, Dr. Singer's limiting his distance analysis to the 38 networks causes WE tv and GSN to appear much closer to each other in terms of viewer demographics than they really are.

113. Another reason for the difference between Dr. Singer's and my viewer demographic distance results is Dr. Singer's treatment of viewer age. Dr. Singer does not consider viewer age in his distance calculations, but instead looks at a combination of head of household age and size of household. Head of household age is not the same as viewer age. As Dr. Singer himself suggests, advertisers are likely to focus on specific age/gender groups in choosing networks for their advertisements.[119] It is therefore puzzling why Dr. Singer would exclude viewer age from the Mahalanobis distance calculations. Moreover, Dr. Singer's analysis does not even consider head of household age as a standalone demographic attribute but instead combines it with household size. This has the effect of further reducing the effect of viewer age in the comparison of viewer demographics. [redacted]

114. Dr. Singer also excludes other relevant demographic attributes from his distance calculations. Such demographic attributes include viewer household home ownership share, median viewer income, viewer head of household not in labor

[119] Singer Report ¶ 41.

force share, and the share of viewers who reside in urban (or rural) counties. [redacted]

115. Finally, Dr. Singer's analysis ranks networks in terms of demographic distance from GSN rather than from WE tv. [redacted]

[redacted]

[redacted]

[redacted]

Large Differences in Average Advertising Rates between WE tv and GSN Indicate Significant Difference in Viewer Demographics Between the Two Networks

116. The differences in the viewer demographics are also likely reflected in the average advertising rates on the two networks. Table 19 shows the average advertising rates for cable networks in 2010. The data source for the average advertising rates is SNL Kagan.[120] The advertising rates in Table 19 are measured in terms of cost per one thousand viewers reached (CPM).[121] The data in Table 19 indicate that WE tv's average CPM was [redacted] and that WE tv ranked [redacted] among cable networks in CPM in 2010. The data also indicate that GSN's average CPM was [redacted] and that GSN ranked [redacted] among cable networks in CPM in 2010. Thus, according to the SNL Kagan data, WE tv's average advertising rate in 2010 [redacted][122]

[redacted]

120 Dr. Singer has relied on SNL Kagan data for his previous analyses. In my analysis, I assume that SNL Kagan applies a consistent methodology for estimating network attributes across programming channels, so that, to the extent there exists a bias in the SNL Kagan's estimates of network attributes, the bias is consistent across networks.

121 SNL Kagan TV Networks Summary Definitions.

122 [redacted]

[redacted]

WE tv's Advertising Rates Constrained by Networks Other than GSN

117. Another important factor to consider in analyzing potential competition for advertisers between WE tv and GSN is whether WE tv and GSN face significant competition from other networks. If WE tv's advertising rates are already effectively constrained by networks other than GSN, GSN's presence would have an insignificant effect on the overall level of competition for advertisers facing WE tv. WE tv's advertising rates may face a significant pricing constraint from GSN if there is a sufficiently large population of advertisers who are looking to target WE tv viewers with their advertising messages *and* if there are also very few economic alternatives to reaching these viewers other than through advertising on GSN. The analysis that I present above shows that there was relatively little viewer audience overlap between WE tv and GSN. Therefore, by advertising on WE tv and GSN, advertisers largely reached different audiences.[123] For this reason, among others, advertisers were unlikely to have viewed advertising on GSN as a substitute for advertising on WE tv.[124] The absence of significant economic substitutability between WE tv and GSN advertising implies that WE tv's advertising rates were unlikely to have been constrained by GSN's advertising.[125]

118. The analysis I present above shows why advertising on GSN was unlikely to have been an effective substitute for reaching WE tv viewers compared with

[123] *See supra*, ¶¶ 75-87.

[124] Because of the limited viewer audience overlap between WE tv and GSN, an increase in GSN advertising rates is unlikely to increase the marginal value of advertising on WE tv. Whether or not a particular company advertises on GSN is unlikely to affect the value to that company of advertising on WE tv.

[125] I assume that advertisers do not generally face binding budget constraints.

advertising directly on WE tv. [redacted] Thus, advertising on GSN was unlikely to have been an effective means of reaching a large share of WE tv viewers.

119. [redacted][127]

120. Although it is useful to consider advertisers' options for reaching WE tv viewers, advertisers are likely to target a wider audience of viewers, which may include both WE tv and GSN viewers. Advertisers may consider a broad set of networks for reaching the target viewers. Such networks may include WE tv, GSN, and many

126 *See* Table 10.

127 It is also important to note that certain advertisers may also view print, radio, direct mail, online, product placement, event sponsorship, naming rights, and other media as substitutes for advertising on television. If these additional advertising options are reasonable substitutes for advertising expenditures, it is even more unlikely that GSN did, or could reasonably have, a significant effect on the prices or quantities of advertising purchased on WE tv.

other networks. [redacted][128] WE tv's and GSN's small shares of total industry advertising suggest that GSN's advertising is unlikely to provide a significant constraint on WE tv's advertising rates. Given all of these facts, it is unlikely that WE tv and GSN competed for advertisers in any significant way prior to GSN's retiering by Cablevision.

<u>WE tv Documents Indicate Absence of Significant Competition for Advertisers Between GSN and WE tv</u>

121. [redacted]

[128] Source: SNL Kagan data.

[129] [redacted]

[130] Declaration of Carole Smith ¶ 3 (footnote omitted).

[redacted]

Dr. Singer's Advertiser Overlap Analysis Offers No Reliable Evidence of Significant Competition for Advertisers Between WE tv and GSN

122. Dr. Singer also claims that his analysis demonstrates that "a significant percentage of WE tv's largest advertising customers overlap with GSN's advertising customers."[131] [redacted][133] Dr. Singer argues that such advertising "overlaps" imply significant competition for advertisers between WE tv and GSN. As I explain below, such advertising "overlaps" are not at all indicative of significant competition for advertising customers.

123. When two networks compete for advertisers, the advertisers view the networks as substitute suppliers of advertising services and are choosing between the networks in making their decisions about which networks to display their advertising. The fact that networks have common advertisers is not indicative of whether advertisers are choosing between the networks for their advertising messages. The WE tv–GSN overlap advertisers identified by Dr. Singer include [redacted]

[131] Singer Report ¶ 46.

[132] Singer Report ¶ 46.

[133] Singer Report ¶ 46.

[redacted] These advertisers have very large advertising budgets for many different products and advertise extensively on numerous cable networks, broadcast networks, and other advertising media.[134] The notion that these advertisers are choosing solely (or even primarily) between WE tv and GSN for their advertisements is simply implausible.

124. I examine companies' advertising expenditures on cable networks using the Nielsen Ad*Views 2010 data. The Ad*Views data track companies' purchases of advertising on individual cable networks. My analysis of companies' advertising expenditures on cable networks shows that companies generally purchase advertising across a large number of networks. Further, my analysis shows that WE tv and GSN accounted for very small shares of advertising expenditures, even among the largest advertisers on the two networks. Thus, the fact that companies advertise on both WE tv and GSN in no way implies that WE tv and GSN are significant competitors for advertisers.

125. My analysis of the Ad*Views firm-level advertising data is summarized in Tables 20 and 21 below. Table 20 shows WE tv's [redacted] advertisers by advertising expenditure in 2010.[135] Consistent with Dr. Singer's analysis, Table 20

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[134] [redacted]

[135] The table shows advertising by parent company advertisers rather than subsidiaries to be consistent with Dr. Singer's analysis. (Singer Report ¶ 46.) For example, Table 5 of Dr. Singer's Report lists Berkshire Hathaway rather than its subsidiary Geico as the advertiser.

shows that [redacted] of WE tv's [redacted] advertisers also advertised on GSN in 2010. Out of the [redacted] WE tv advertisers, [redacted] had some advertising expenditures on GSN in 2010. However, several of the [redacted] "overlap" advertisers have very modest GSN advertising expenditures. For example, [redacted] In fact, out of the top 40 WE tv advertisers in 2010, only [redacted] spent more than [redacted] in advertising on GSN in 2010.

126. Table 20 also shows that companies spread their advertising dollars across many cable networks. For example, [redacted] 2010 advertising expenditures were [redacted] on WE tv, [redacted] on GSN, and about [redacted] across all the 99 cable networks in the Ad*Views data. [redacted] was WE tv's top advertiser in 2010 in terms of total advertising expenditure, but [redacted] purchased advertising on [redacted] cable networks in 2010 (out of the 99 cable networks in the Ad*Views data). WE tv and GSN accounted for only [redacted] and [redacted] percent shares, respectively, of [redacted] 2010 cable network advertising expenditures.[136] The overall WE tv and GSN shares of cable network advertising revenue in 2010 (for the 99 networks in Ad*Views data) were [redacted] and [redacted], respectively. Thus, the fact that [redacted] advertised on both WE tv and GSN in 2010 does not in any way suggest a significant level of competition between WE tv and GSN for [redacted] advertising expenditures. The [redacted] WE tv advertisers on average purchased advertising on

136 [redacted]

about [redacted] networks in 2010 (out of the 99 cable networks in the Ad*Views data).[137] WE tv and GSN accounted for only [redacted] and [redacted] percent shares, respectively, of the 2010 cable network expenditures of the [redacted] WE tv advertisers in Table 20.[138]

127. My analysis of GSN's [redacted] advertisers likewise shows that companies spread their advertising dollars across many cable networks. Table 21 shows that the [redacted] GSN advertisers (based on the 2010 advertising expenditure) on average purchased advertising on about [redacted] networks in 2010 (out of the 99 cable networks in the Ad*Views data).[139] GSN and WE tv also accounted for only [redacted] and [redacted] percent shares, respectively, of the 2010 cable network expenditures of the [redacted] GSN advertisers in Table 21.[140] Thus, the advertising expenditures data of both the [redacted] WE tv advertisers and [redacted] GSN advertisers provide no evidence of significant competition for advertisers between WE tv and GSN.

128. The above discussion demonstrates that Dr. Singer's reliance on advertising overlaps between networks to infer competition for advertisers is likely to lead to unreliable conclusions and numerous false positives in identifying networks that compete for advertising dollars. The likelihood of such false positives is apparent from the advertiser overlaps calculated using the 2010 Ad*Views data and Dr. Singer's methodology. In 2010, of the [redacted] GSN advertisers by revenue, [redacted] percent

137 [redacted]

138 Based on the 99 cable networks in the Ad*Views 2010 data.

139 [redacted]

140 Based on the 99 cable networks in the Ad*Views 2010 data.

(based on revenue shares) also advertised on WE tv.[141] However, this measure of advertiser overlap with GSN exceeded [redacted] percent for [redacted] other networks, including [redacted][142] These networks have a wide range of programming content, popularity, and viewer demographics. Some of these networks, including [redacted] skew male.[143] [redacted] viewership is split evenly between men and women.[144] [redacted][145] Considering the differences in viewer demographics between GSN and networks that have high shares of advertiser overlap with GSN, advertiser overlap appears to be unreliable indicator of competition for advertisers. Likewise, the 2010 WE tv [redacted] advertiser overlap share (based on revenue shares) was [redacted] percent for GSN and exceeded [redacted] percent for [redacted] other networks, including [redacted]

141 This measure of advertiser overlap is based on Dr. Singer's methodology, which calculates the overlap percentage based on the overlap advertisers' revenue share of the total [redacted] advertisers.

142 The 2010 WE tv [redacted] advertiser overlap share exceeded (based on revenue shares) [redacted] percent for [redacted] networks and exceeded [redacted] percent for [redacted] networks.

143 *See* Table E3 in CV Exh. 335, Appendix 1 at Appendix E (based on fourth quarter of 2010 ratings).

144 *See id*.

145 *See id*.

[redacted][146] The wide diversity of networks that have high shares of advertiser overlap with WE tv provides a further indication of why advertiser overlap is an unreliable measure of competition for advertisers.

129. Dr. Singer also examines overlap between WE tv and GSN based on advertising expenditure on brands. Companies may own multiple brands so that a firm that advertises on both WE tv and GSN may not advertise the same brands on the two networks. Thus, brand-level advertising overlap may be lower than the firm-level advertising overlap. Dr. Singer finds that "Brands that advertise on GSN account for [redacted] percent of WE tv's revenue from its [redacted] advertising customers."[147] Based on this finding, Dr. Singer concludes that "This significant overlap at the brand level suggests that advertisers perceive that they are reaching a similar demographic on both networks."[148]

130. Dr. Singer's analysis of brand-level overlaps between WE tv and GSN is misleading. In fact, my analysis of the Ad*Views brand-level advertising data indicates that there is relatively little overlap between top brands advertised on WE tv and GSN. I analyze the Ad*Views brand-level advertising data for the 2010 period.[149] My analysis shows that there are only [redacted] brands that are on both the [redacted] WE tv and GSN list of brands, ranked by advertising expenditure on the networks during 2010. The five WE tv – GSN [redacted] overlap brands are: [redacted]

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[146] The 2010 GSN [redacted] advertiser overlap share exceeded (based on revenue shares) exceeded [redacted] percent for [redacted] networks and exceeded [redacted] percent for [redacted] networks.

[147] Singer Report ¶ 47.

[148] Singer Report ¶ 47.

[149] Dr. Singer's advertiser overlap analysis is based on the July 2010-July 2011 period. The selection of the period for the analysis does not appear to have a significant effect on the results.

[redacted] The limited overlap of the [redacted] brand lists suggests that top brands advertised on WE tv have relatively little advertising on GSN, and vice-versa. My analysis shows that the median advertising expenditure by a [redacted] WE tv brand in 2010 was [redacted] in advertising purchased on WE tv and only [redacted] in advertising purchased on GSN. Likewise, my analysis shows that the median advertising expenditure in 2010 by a [redacted] GSN brand was [redacted] in advertising purchased on GSN and only [redacted] in advertising purchased on WE tv. Thus, there does not appear to be significant brand-level advertising overlap between WE tv and GSN.

131. My analysis of Ad*Views brand-level advertising data also shows that brands spread their advertising dollars across many cable networks. [redacted] was WE tv's top brand in 2010 in terms of total advertising expenditure. But [redacted] also advertised on [redacted] other cable networks in 2010 (out of the 99 cable networks in the Ad*Views data), including [redacted] WE tv and GSN accounted for only [redacted] and [redacted] percent shares, respectively, of total 2010 cable network

advertising purchases for the [redacted] brand.[150] Thus, the fact that [redacted] advertising was purchased on both WE tv and GSN in 2010 does not in any way indicate a significant level of competition between WE tv and GSN for [redacted] advertising; indeed, it is highly unlikely to be the case that advertisers viewed all these networks as "reaching a similar demographic."

132. Moreover, the [redacted] WE tv advertising brands had, on average, advertising purchases on about [redacted] cable networks in 2010 (out of the 99 cable networks in the Ad*Views data).[151] WE tv and GSN accounted for only [redacted] and [redacted] percent shares, respectively, of 2010 cable network advertising purchases by WE tv's [redacted] advertising brands.[152]

133. Dr. Singer also claims that eight brands [redacted] "dedicated more than 10 percent of their respective total advertising budgets on *both* WE tv and GSN in 2010."[153] However, these brands appear to be insignificant purchasers of advertising on cable networks. For example, [redacted] purchased about [redacted] in advertising in 2010 across *all* cable networks. [redacted]

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150 Based on the 99 cable networks in the Ad*Views 2010 data.

151 [redacted]

152 Based on the 99 cable networks in the Ad*Views 2010 data.

153 Singer Report ¶ 48.

[redacted] had about [redacted] in advertising purchases in 2010 across *all* cable networks. [redacted] had about [redacted] in advertising purchases in 2010 across all cable networks and spread those purchases across [redacted] cable networks (including [redacted]

Thus, the eight brands discussed by Dr. Singer do not provide evidence of significant competition for advertisers between WE tv and GSN. If anything, the brands illustrate an absence of significant competition for advertisers between WE tv and GSN.

[redacted]

[redacted]

[redacted]

There Was No Significant Competition for Programming Rights Between GSN and WE tv[154]

134. There may be significant competition between WE tv and GSN for programming rights if WE tv and GSN seek to acquire the same programming *and* if GSN's efforts to acquire programming rights cause WE tv to pay significantly higher prices for the programming content. If there were significant competition between WE tv and GSN for programming rights, Cablevision may have an incentive to discriminate against GSN as restraining GSN's ability to compete for programming rights may benefit WE tv.

Dr. Singer's Analysis Provides No Reliable Evidence of Significant Competition for Programming Rights Between WE tv and GSN

135. Dr. Singer claims that "WE tv has competed directly with GSN for programming rights…."[155] However, Dr. Singer's evidence in support of this claim in no way demonstrates significant competition between WE tv and GSN for programming rights.

- Dr. Singer states that "GSN was optioning a project from author John Gray called *Divorce Rehab* that was pitched to WE tv and to GSN."[156] But Dr. Singer does not offer any evidence that WE tv and GSN actually competed for the John Gray project or that WE tv even expressed any interest in the project. [redacted][157] Moreover,

[154] As neither Dr. Singer nor Mr. Brooks presents any evidence of competition for programming rights between GSN and Wedding Central, I focus my discussion in this section on WE tv and GSN.

[155] Singer Report ¶ 7.

[156] Singer Report ¶ 50 (footnote omitted, emphasis in original).

[157] Declaration of Didi O'Hearn ¶ 6.

Dr. Singer's statement about *Divorce Rehab* suggests that GSN is no longer pursuing the project.

- Dr. Singer claims that [redacted][158] However, Dr. Singer offers no evidence that any of these shows were developed by either WE tv or GSN or that either network expressed any interest in developing the shows. He also does not present any evidence of the universe of shows pitched to WE tv – the few shows apparently pitched to both WE tv and GSN may represent a tiny fraction of the overall shows pitched to WE tv.
- Another example of "competition" for the "same programming rights" between WE tv and GSN cited by Dr. Singer is that Tammy Pescatelli appeared on a program shown on WE tv and that she also "pitched" a project to GSN.[159] Again, this is not an example of competition between WE tv and GSN for the same programming content.

136. The evidence presented by Dr. Singer does not demonstrate *any* competition between WE tv and GSN for programming rights and certainly demonstrates no significant competition for those rights. In any case, Dr. Singer's examples of "competition" between GSN and WE tv for the "same programming rights" appear to be inconsequential in terms of the value of such programming rights. The notion that Cablevision decided to carry GSN on a less penetrated tier just so that it could prevent GSN from purchasing projects with Tammy Pescatelli or John Gray is utterly implausible. In the end, there is no reliable basis whatsoever offered by Dr. Singer for

[158] Singer Report ¶ 50.

[159] Singer Report ¶¶ 49-50.

concluding that WE tv and GSN competed in any significant way for the same programming rights.

Cablevision Did Not Have Any Incentive To Engage in Discriminatory Carriage Conduct Against GSN

137. Under standard economic theory, Cablevision could only plausibly have an incentive to discriminate against GSN in favor of its affiliated networks, WE tv and Wedding Central, if WE tv and Wedding Central faced significant pricing constraints by GSN. Thus, if the prices charged by WE tv or Wedding Central were not significantly constrained by GSN, WE tv or Wedding Central would obtain no benefit from reducing GSN's ability to compete. Such pricing constraints could only exist if WE tv and Wedding Central faced significant competition for viewers, advertisers, and/or programming content from GSN and no other network (or few other networks).[160] Therefore, if WE tv and GSN (or Wedding Central and GSN) did not significantly compete for viewers, advertisers, and/or programming content, and thus, the prices charged by WE tv and Wedding Central were not significantly constrained by GSN, WE tv and Wedding Central would have obtained no benefit from Cablevision's retiering GSN, and Cablevision would have had no incentive to discriminate against GSN in the carriage of the network.

138. The analysis I present above indicates that there was no significant competition between WE tv/Wedding Central and GSN for viewers, advertisers, or programming rights. Moreover, the analyses indicate that there were numerous networks that were closer competitors to WE tv than GSN. Thus, to the extent there was any

[160] Dennis Carlton, "A General Analysis of Exclusionary Conduct and Refusal to Deal--Why Aspen and Kodak Are Misguided," *Antitrust Law Journal* 68, pp. 659-683, 2001; and Michael Whinston, "Tying, Foreclosure, and Exclusion," *American Economic Review* 80, pp. 837-859, 1990.

pricing constraint imposed by GSN, the degree of that pricing constraint would be negligible relative to the pricing constraint provided by other networks.

139. Because there is no credible evidence of meaningful competition between GSN and WE tv for viewers, advertisers, and/or programming content (and likewise, because there is no evidence that GSN and Wedding Central competed in a significant way for viewers, advertisers, and/or programming content prior to Wedding Central's demise), Cablevision's affiliated networks were highly unlikely to reap any benefits from Cablevision's retiering of GSN. This conclusion is validated by all of the analyses presented above. Furthermore, as I discuss below, the effect of the retiering on GSN's ability to compete was too minimal to generate any significant benefits for WE tv and Wedding Central. Thus, even if WE tv and Wedding Central competed significantly against GSN for viewers, advertisers, or programming (and they did not), it is unlikely that Cablevision's decision to retier GSN was motivated by any potential benefits to Cablevision's affiliated networks.

CABLEVISION'S DECISION TO RETIER GSN WAS CONSISTENT WITH SOUND BUSINESS JUDGMENT

GSN's Retiering Was a Reasonable Business Strategy Unrelated to GSN's Affiliation

140. Cablevision's distribution of GSN on the S&E Tier was consistent with rational business conduct based on considerations unrelated to GSN's affiliation. Sound business analysis of network carriage by an MVPD must consider both the costs and benefits of distributing the network to subscribers. Broad distribution of GSN would

lead to higher licensing costs for Cablevision.[161] The value to Cablevision from carrying GSN on more highly penetrated tiers is a function of a variety of factors, in particular whether the carriage can help Cablevision attract and retain subscribers. It would only be rational for Cablevision to incur the additional license fees to distribute GSN on highly penetrated tiers if the carriage generated significant net subscriber additions for Cablevision.

141. My review of Cablevision's decision to retier GSN indicates that Cablevision's analysis appeared to be reasonable and consistent with sound economic analysis.[162] Contemporaneous documents shed light on factors considered by Cablevision's management in making the decision to retier GSN. My review of those documents indicates that a number of factors entered into the GSN retiering decision, including [redacted]

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161 [redacted]

162 For background on the Cablevision analysis, see Declaration of Thomas Montemagno ¶¶ 40-50.

163 *See* CV-GSN 0293351.

164 *See*, for example, CV-GSN 0294003.

[redacted]

142. [redacted]

143. [redacted]

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165 *See* CV-GSN 0375808.

166 *See* CV-GSN 0375808 and CV-GSN 0367735.

167 CV-GSN 0367735.

168 [redacted]

[redacted] [redacted] [redacted] [redacted][172]

Post-Retiering Outcomes Validate Cablevision's Retiering Decision

144. [redacted] [redacted]

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169 *See infra*, ¶¶ 151-155.

170 [redacted]

171 CV-GSN 0367735.

172 [redacted]

[redacted]

145. [redacted]

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173 [redacted]

174 [redacted]

175 [redacted]

176 [redacted]

177 [redacted]

[redacted]

146. [redacted]

147. [redacted]

[redacted]

148. [redacted]

[redacted]

178 [redacted]

149. [redacted] [redacted]

[redacted] [redacted]

[redacted]

150. [redacted] [redacted] [redacted]

[redacted]

179 [redacted]

180 [redacted] [redacted]

[redacted]

Carriage of GSN on Less Penetrated Tiers is Consistent with Economic Efficiency

151. [redacted] I measure network viewer concentration as the network's share of

[181] [redacted]

[182] *See* GSN_CVC_00154095 and GSN_CVC_00154096.

viewership by top viewing households.[183] Thus, if a network is watched primarily by a relatively small number of high-intensity viewers of the network, the network is likely to have a relatively high viewer concentration. Conversely, if a network is watched by a relatively wide viewer audience, the viewer concentration for the network is likely relatively low. Network viewer concentration is a relevant measure for examining the most efficient way to distribute a network because network viewer concentration gauges the degree to which a network carries niche programming. Niche programming content appeals to a relatively narrow viewer audience so that networks that carry niche programming are likely to have high viewer concentration.

152. The economics of cable network distribution implies that MVPDs are likely to distribute niche programming networks on less penetrated tiers (or tiers that reach fewer viewers), all else being equal. Networks with niche programming appeal to a relatively narrow audience. Distributing networks with niche programming on highly penetrated tiers is unlikely to be economic for MVPDs. Distributing networks to more

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183 My viewer concentration measure is closely related to the concept of reach. Nielsen defines reach (in media ratings) as "the unduplicated number of individuals or households exposed to an advertising medium at least once during the average week for a reported time period." (*See* www.nielsenmedia.com/glossary.) Thus, high viewer concentration corresponds roughly to low reach. [redacted]

subscribers tends to be more costly for MVPDs in terms of license fees. Moreover, distributing niche programming networks on a highly penetrated tier is likely to generate relatively little value for the MVPD because the network would appeal to a relatively small share of the total audience on the tier. Therefore, MVPDs are likely to distribute niche programming networks on tiers that reach relatively few subscribers. There are numerous examples of this in the cable industry. For example, according to the data from SNL Kagan, in 2011, CNN had about [redacted] subscribers, but niche programming networks such as Blackbelt TV and TV Colombia only had about [redacted] and [redacted], respectively.[184] Thus, network viewer concentration, which measures the width of network programming appeal, provides useful information about whether wide distribution of a network is likely to be economical.

153. [redacted]

[184] Blackbelt TV is dedicated to martial-arts entertainment. TV Colombia primarily carries Colombian-interest programming. (SNL Kagan) [redacted]

[185] [redacted]

[redacted]

154. [redacted]

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186 [redacted]

[redacted]

155. GSN's relatively high viewer concentration is indicative of relatively narrow viewership appeal. That is, relatively few households watched GSN but those that did watched GSN in high quantities. Therefore, the high degree of viewer concentration for GSN indicates that the distribution of GSN on less penetrated tiers, like the S&E tier, is consistent with economic efficiency and was a plausible business strategy for Cablevision.

Carriages of GSN by Other MVPDs Do Not Invalidate Cablevision's Retiering Decision

156. According to the data presented by Dr. Singer, Cablevision carries GSN to a significantly smaller share of basic subscribers than do other major MVPDs, including [redacted]

187 [redacted]

[redacted][188] However, I understand that Cablevision was not the only MVPD carrying WE tv on a more highly penetrated tier than GSN around the time of GSN's retiering: Time Warner and Verizon carried WE tv on their expanded basic service tiers, but carried GSN on a less penetrated tier, and Insight Communications carried WE tv on its Digital Channel Lineup but does not appear to have carried GSN at all.[189] I also understand that distributors such as DISH Network and Cox, in addition to Time Warner and Verizon, offered GSN on a less penetrated tier than the expanded basic service tier.[190] Moreover, Mediacom, an MVPD with more than one million subscribers,[191] [redacted][192] In fact, expanding Dr. Singer's analysis of GSN's carriage to include the top 15 MVPDs indicates that there is significant variability among MVPDs in how they carry GSN, especially among smaller MVPDs which are closer in size to Cablevision than the biggest MVPDs.[193]

157. If networks were similarly situated (which they are not in this case), and in cases where you do not have direct evidence about the economic effects of a retiering (which we do in this case), I have testified that the "most direct and compelling

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188 Singer Report ¶ 55.

189 *See* Exhibit B to Opp. Of Cablevision System Corp. to Petition for Temporary Relief (submitted Nov. 2, 2011).

190 *Id.*

191 *See* Mediacom Communications Corporation 2010 10-K at 4.

192 *See* [redacted]; and mediacomtoday-lineup.com/lineup/76/altoona_ankeny_bondurant_carlisle_clive_des_m.aspx (accessed December 13, 2012).

193 Table 7 of Dr. Singer's Report shows GSN's basic subscriber penetration rates for the top 10 MVPDs, as of June 2011. GSN's basic subscriber penetration rates as of June 2011for MVPDs ranked 11 through 15 are: [redacted] (*See* GSN_CVC_00147140; GSN_CVC_00154867, and web.archive.org/web/20111224060753 /http:/www.ncta.com/Stats/TopMSOs.aspx.)

evidence" of discrimination can be found in the carriage decisions of other MVPDs.[194] But I have also noted in previous testimony that the carriage decisions of other MVPDs are just one criterion for assessing the reasonableness of carriage.[195]

158. The analysis of economic evidence on the potential carriage discrimination must be evaluated in its totality and must consider factors that account for differences in carriage of a network across MVPDs. It is reasonable for MVPDs to do their own assessment of the benefits of broad distribution of a network. It is also reasonable for MVPDs to reach different conclusions regarding the optimal carriage of a network. The fact that MVPDs reach different conclusions about the value of broad distribution of a network may be explained by the differences in the subjective assessments of the effects of network carriage on an MVPDs' ability to attract and retain subscribers, but may also be a function of the regional variations in viewership preferences by subscribers, as well as contractual obligations.

159. One factor that may explain the difference between Cablevision's carriage of GSN and that of other major MVPDs is that GSN's viewer audience tends to skew [redacted]

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[194] See, for example, Direct Testimony of Jonathan Orszag, *In the Matter of NFL Enterprises LLC v. Comcast Cable Communications, LLC,* MB Docket No 08-214, File No. CSR-7876-P at ¶ 7 ("Orszag NFL Testimony").

[195] *Id,* ¶ 8.

[196] *See supra*, ¶ 105.

Dr. Singer's Analysis Offers No Reliable Evidence of Discrimination on the Basis of Affiliation

160. Dr. Singer claims that Cablevision's decision to retier GSN lacked an "efficiency justification" based on Dr. Singer's comparison of GSN's and WE tv's "price per rating point" measures.[197] Dr. Singer calculates the "price per rating point" measure for both networks as the ratio of the network's average license fee per subscriber per month and average all-day Nielsen rating in 2009 (using SNL Kagan data). Based on SNL Kagan data (as reported by Dr. Singer), GSN's 2009 average license fee per subscriber per month and average all-day Nielsen rating were [redacted], and WE tv's 2009 average license fee per subscriber per month and average all-day Nielsen rating were [redacted][198] Using these numbers, Dr. Singer calculates a "price per rating point" of [redacted] for GSN and [redacted] for WE tv.[199] Dr. Singer then argues that because the "price per rating point" is higher for WE tv than for GSN, Cablevision lacks the "efficiency justification" for carrying GSN on the S&E tier.

161. Dr. Singer's "efficiency justification" analysis based on the "price per rating point" measure is deeply flawed. Ratings alone do not explain network carriage by MVPDs. For example, ratings do not capture the value of carriage to the MVPD because ratings measure only the viewership of a program, and not the *intensity* of viewership or the viewers' loyalty to the network carrying the programming.

162. The fact that ratings do not measure the intensity of viewership also helps to explain the absence of a direct relationship between ratings and license fees

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[197] Singer Report at 26, ¶¶ 52-54.

[198] Singer Report ¶ 52.

[199] Singer Report, Table 6.

for networks. [redacted][201]

163. My analysis of the SNL Kagan data (the data that Dr. Singer used for "price per rating point" measure) shows that the "price per rating point" measure is unrelated to how MVPDs carry the network. Figure 1 depicts a relationship between networks' "price per rating point" measure and their total number of subscribers in 2010 for the networks in the SNL Kagan data that had ratings data for 2010.[202] The graph shows a lack of any clear relationship between the "price per rating point" measure and the number of subscribers. My analysis also confirms a lack of any statistically significant relationship between the "price per rating point" measure and the number of subscribers for the networks in the SNL Kagan data. [redacted]

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200 SNL Kagan 2011 Economics of Basic Cable.

201 *Id.*

202 The graph depicts WE tv as a red point and GSN as an orange point. All other networks are depicted as blue points.

[redacted]

164. Another important flaw in Dr. Singer's analysis is that the average all-day Nielsen rating used by Dr. Singer's "price per rating point" calculation is for a national viewer audience. As demonstrated by the data presented in Mr. Brooks's Report, all-day Nielsen ratings were significantly lower in the New York DMA than nationwide. Thus, Dr. Singer's calculations significantly understate GSN's "price per rating point" measure in the New York DMA, where the vast majority of Cablevision's subscribers are actually located.

165. In contrast to Dr. Singer's "price per rating point" measure, programming expenditure to affiliate fee per subscriber ratio does predict the number of

network subscribers. Networks with higher programming expenditure to affiliate fee per subscriber ratio tend to have more subscribers.[203] Figure 2 depicts the relationship between programming expenditure to affiliate fee per subscriber ratio and the total number of subscribers for networks in 2010 based on SNL Kagan data. The x-axis of the graph is the total number of subscribers. The y-axis of the graph is the annual programming expenditure to affiliate fee per subscriber per month ratio. Figure 2 depicts 131 networks in the SNL Kagan data with at least 10 million subscribers and positive affiliate fees in 2010. The graph depicts WE tv as a red point and GSN as an orange point. All other networks are depicted as blue points. The graph shows a clear positive relationship between the two variables: higher programming expenditure to affiliate fee per subscriber ratio is associated with a higher number of subscribers. [redacted]

166. The positive relationship between programming expenditure to affiliate fee per subscriber ratio and total number of subscribers does not mean that MVPDs explicitly consider the programming expenditure to affiliate fee per subscriber ratio in making their carriage decisions. However, the programming expenditure to affiliate fee per subscriber ratio is a measure of the value of a network relative to its cost. Thus, to the extent that MVPDs make carriage decisions for networks based on the networks' value to subscribers (reasonably measured by programming expenditure) and the cost of carrying the network (measured by the affiliate fee per subscriber), the

[203] Other studies of cable networks have analyzed programming expenditures. *See* Austan Goolsbee, "Vertical Integration and the Market for Broadcast and Cable Television Programming," *FCC Media Ownership Study*, 2007.

MVPDs' carriage decisions are linked to the programming expenditure to affiliate fee per subscriber ratio even if the MVPDs do not explicitly consider this measure in deciding how to carry a network. [redacted]

167. [redacted]

[redacted]

168. Dr. Singer also presents a table ("for illustrative purposes") that "compares the placement of Cablevision's affiliated networks with the placement of GSN as of September 2011."[204] This table shows four Cablevision-affiliated networks being carried on the Family tier (Cablevision's highly penetrated tier) and 23 Cablevision-unaffiliated networks being carried on the S&E tier. Dr. Singer's table shows that the four Cablevision-affiliated networks carried on the Family tier as of September 2011 were WE tv, MSG, AMC, and Fuse.[205] Dr. Singer's suggested implication of the table is that Cablevision discriminates against unaffiliated networks in favor of affiliated networks. But the table is extremely misleading because it excludes all the Cablevision-unaffiliated networks carried on the Family tier. In fact, out of the 67 cable networks carried on Cablevision's Optimum Value tier (Cablevision's highly penetrated tier), all but four are unaffiliated with Cablevision.[206] It is therefore not appropriate to reach a conclusion of discrimination based solely on Cablevision's carriage of networks listed in Dr. Singer's table.

169. For the reasons I explain above, Dr. Singer lacks any valid basis for claiming that Cablevision's decision to distribute GSN on the S&E Tier lacks an "efficiency justification" and amounts to discrimination on the basis of affiliation. Thus,

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204 Singer Report ¶ 24 (footnote omitted).

205 Singer Report Table 1.

206 The Cablevision-affiliated networks carried on the Optimum Value tier include: AMC, WE tv, MSG, and MSG Plus (AMC Networks Inc. 2014 10-K, MSG Co. 10-K for the period ending 6/30/14). (Optimum Value Channel lineup: www.optimum.com/digitalcable-tv/pricing, accessed on May 29. 2015)

there is no basis for concluding that Cablevision's decision to retier GSN was motivated by anything but sound business judgment that did not consider any effect of carriage of GSN on Cablevision's affiliated networks, WE tv and Wedding Central.

CABLEVISION'S DECISION TO RETIER GSN HAD NO SIGNIFICANT EFFECT ON GSN'S ABILITY TO COMPETE FOR VIEWERS, ADVERTISERS, AND CARRIAGE RIGHTS

170. Dr. Singer claims that Cablevision's decision to carry GSN on the S&E Tier has unreasonably restrained GSN's ability to compete fairly. This claim has no valid economic basis. [redacted][207] According to the data cited by Dr. Singer in his Report, after Cablevision began distributing GSN on the S&E Tier, GSN still had [redacted] Neither Dr. Singer nor Mr. Brooks provide evidence that such a modest change in the number of GSN subscribers had a significant effect on GSN's ability to compete for advertising customers or programming rights. They do not claim that GSN suffered any advertising price erosion as a result of the retiering of GSN (and they do not provide any evidence that would suggest that there was such advertising price erosion). [redacted]

207 Singer Report ¶ 59.

208 Singer Report ¶ 27.

209 [redacted]

[redacted][210]

171. Dr. Singer argues that Cablevision's decision to retier GSN could impair GSN's ability to secure carriage arrangements.[211] Dr. Singer claims that "it is reasonable to conclude that Cablevision's decision to limit GSN's distribution might negatively influence the decisions of other cable operators with which GSN does business."[212] Dr. Singer makes a number of arguments for why GSN's retiering by Cablevision may have a negative effect on carriage of GSN by other MVPDs.[213] These arguments are highly speculative and lack any basis in either sound economics or facts. However, Dr. Singer's arguments about the effect GSN's retiering are irrelevant. As Dr. Singer concedes, GSN's carriage by other MVPDs has not declined since GSN's retiering. Although Dr. Singer attempts to ignore this fact by arguing that "Cablevision's repositioning of GSN happened relatively recently" and that "unrealistic to expect the rest of the industry to change its carriage arrangements overnight," GSN's retiering occurred four years ago. In a nutshell, Dr. Singer's view about the effects of GSN's retiering is just not grounded in reality.

172. Dr. Singer and Mr. Brooks also do not offer any evidence to suggest that GSN's ability to acquire programming rights has been weakened as a result of Cablevision's retiering of GSN. The reason: Such a reduction in the number of

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[210] Source: SNL Kagan.

[211] Singer Report ¶¶ 61 – 63.

[212] Singer Report ¶ 61.

[213] Singer Report ¶¶ 61 – 62.

subscribers is unlikely to have any significant effect on GSN's ability to compete for viewers, advertisers, or programming content, especially in light of the fact that GSN is already carried by major MVPDs. According to the data from SNL Kagan, [redacted] In comparison, the SNL Kagan data show that [redacted] Furthermore, GSN's own financial statements show that [redacted][215] Thus, any assertion that Cablevision's retiering of GSN had a significant negative effect on GSN's financial performance is not borne out by evidence.

173. Dr. Singer finds that GSN's retiering resulted in a loss for GSN of about [redacted] million per year in license fees and [redacted] million per year in advertising revenue in just the "New York-New Jersey-Connecticut area."[216] However, GSN's retiering does not appear to have had a significant negative effect of GSN's overall financial performance. [redacted]

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214 [redacted] (SNL Kagan.)

215 Game Show Network, LLC and Subsidiaries, Consolidated Financial Statements, December 31, 2011 and 2010. (GSN_CVC_00133595-616, at 597.

216 Singer Report ¶¶ 59 – 60.

[redacted][217]

174. Dr. Singer further claims that because of GSN's retiering "GSN is restrained in its ability to compete effectively for viewers and advertisers."[218] He does not provide any support for his claim regarding GSN's "restrained" ability to compete for viewers. Regarding advertising, Dr. Singer claims that because of "a hole [in GSN's footprint] in the coveted New York market, GSN is restrained in its ability to compete effectively for advertisers, many of which view coverage in the New York market as a prerequisite for making a network a 'meaningful contender.'"[219] Dr. Singer also cites an economic article to support his assertion that "economic research has shown that gaps in a network's coverage area have grave consequences for advertising revenues."[220] However, the cited article offers no support for Dr. Singer's "grave consequences" claim.[221] Dr. Singer's claims regarding the effect of the retiering on GSN's ability to compete for advertisers are also not supported by the evidence of actual post-retiering outcomes. As I discuss earlier, [redacted]

[217] Game Show Network, LLC and Subsidiaries, Consolidated Financial Statements, December 31, 2011 and 2010. (GSN_CVC_00133595-616, at 598.

[218] Singer Report ¶ 64.

[219] Singer Report ¶ 65, citing the Goldhill Declaration, footnote omitted. It is worthwhile to note that Dr. Singer's assertion is based on his understanding of Mr. Goldhill's (President and CEO of GSN) understanding of advertisers' perceptions of the value of advertising on GSN. This kind of evidence hardly rises to the level of economic analysis.

[220] Singer Report ¶ 65, footnote omitted.

[221] *See* Singer Report fn. 83. Also, *see* David Chen & David Waterman, *Vertical Ownership, Program Network Carriage and Tier Positioning in Cable Television: An Empirical Study*, 30(3) REVIEW OF INDUSTRIAL ORGANIZATION at 230.

[redacted][223]

175. Dr. Singer also presents a model that predicts GSN's future General Rate (GR) advertising revenues. Based on this model, Dr. Singer finds that [redacted] Dr. Singer concludes that the "impact of Cablevision's retiering appears to have been felt beyond the New York market."[224]

176. However, Dr. Singer's conclusion about the effect of the retiering on GSN's advertising is incorrect. There are a number of serious problems with Dr. Singer's advertising revenue analysis. First, Dr. Singer uses a flawed model for predicting GSN's general rate revenue.[225] The key assumption of Dr. Singer's model is that there is a time trend in GSN's general rate advertising revenues that causes the revenues to grow at an accelerating rate even, if GSN's ratings do not change. This is an inappropriate assumption that causes the model to overestimate by a substantial amount

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222 SNL Kagan.

223 Game Show Network, LLC and Subsidiaries, Consolidated Financial Statements, December 31, 2011 and 2010. (GSN_CVC_00133595-616, at 598.

224 Singer Report ¶ 66.

225 [redacted]

the growth in GSN's general rate revenue over time. [redacted]

177. Moreover, Dr. Singer's previous testimony suggests that GSN's ability to compete has not been impaired by Cablevision's retiering. First, Dr. Singer has testified previously that a firm must be foreclosed from 20 percent of a market for an action to be "presumptively anticompetitive."[227] Here, the allegation is that Cablevision's retiering reduced the number of GSN subscribers by less than [redacted]. Dr. Singer has not explained why he used 20 percent as the threshold for

[226] *See* GSN_CVC_00154473 and GSN_CVC_00134774.

[227] *See* Direct Testimony of Dr. Hal J. Singer, *In the Matter of NFL Enterprises LLC vs. Comcast Cable Communications*, MB Docket No. 08-214, File No. CSR-7876-P, April 6, 2009, fn. 68. Dr. Singer cited legal literature for this threshold; the economics literature does not support a 20-percent threshold.

presumptive anticompetitive conduct in the *NFL v. Comcast* case and simply assumes, without empirical evidence, that a [redacted] reduction in the number of GSN subscribers had the effect of restraining unreasonably GSN's ability to compete fairly. Second, Dr. Singer's previous testimony suggests that a network with more than 40 million subscribers can "compete effectively for advertisers and programmers."[228] Here, GSN still has [redacted] million subscribers,[229] so presumably Dr. Singer's past testimony would suggest that GSN can "compete effectively for advertisers and programmers."

178. However, notwithstanding his previous testimony, Dr. Singer now claims that Cablevision's carriage of GSN on the S&E Tier has "impaired" the ability by GSN to reach carriage agreements with other MVPDs.[230] In particular, Dr. Singer claims that:[231]

> Other vertically integrated cable operators carry GSN and WE tv on highly penetrated tiers (most likely pursuant to formal or informal reciprocal carriage arrangements), and it is reasonable to conclude that Cablevision's decision to limit GSN's distribution might negatively influence the decisions of other cable operators with which GSN does business.

179. However, Dr. Singer does not offer a shred of evidence to support his claim of "reciprocal carriage arrangements" between vertically integrated cable

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[228] Dr. Singer testified that, "As long as Tennis Channel's reach remains substantially below 40 million national subscribers, Tennis Channel is restrained in its ability to compete effectively for advertisers and programmers, many of which view national distribution (defined by thresholds in the range of 40 million subscribers) as a prerequisite for making a network a meaningful contender." A fair reading of this statement is that Dr. Singer suggests that networks with more than 40 million subscribers are not restrained in their ability "to compete effectively for advertisers and programmers." Declaration of Hal J. Singer, Before the Federal Communications Commission, *In the Matter of The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Docket No. CSR-8258-P, January 4, 2010, ¶ 31.

[229] Singer Report ¶ 27.

[230] Singer Report at 33.

[231] Singer Report ¶ 61 (footnote omitted).

operators.[232] Dr. Singer does not explain how the presence of the purported "reciprocal carriage arrangements" would lead other cable operators to reduce carriage of GSN as a result of Cablevision's decision to distribute GSN on the S&E Tier. Dr. Singer's logic simply makes no sense. More importantly, Dr. Singer offers no evidence of a decline in the carriage of GSN by other MVPDs since Cablevision's decision to carry GSN on the S&E Tier. Dr. Singer's claim that Cablevision's decision "impaired" the ability by GSN to reach carriage agreements with other MVPDs is completely baseless.

180. Dr. Singer does not demonstrate that Cablevision's decision to carry GSN on the S&E tier had any negative effects on GSN's advertising prices or any positive effects on WE tv's advertising prices. Dr. Singer also offers no evidence that GSN was restrained unreasonably in its ability compete for viewers as a result of Cablevision's carriage of GSN on the S&E Tier. Thus, Dr. Singer's conclusion that Cablevision's carriage of GSN on the S&E Tier has "restrained" GSN's ability to compete for viewers and advertisers lacks any basis in economic analysis.

CONCLUSION (PART I)

181. Based on my work, I conclude that, from an economic perspective, GSN was not "similarly situated" with the Cablevision-affiliated networks. The empirical evidence shows no significant competition between WE tv and GSN for viewers, advertisers, or programming content. There was, likewise, no significant competition between Wedding Central and GSN for viewers, advertisers, or programming content.

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[232] Dr. Singer cites an unpublished paper from six years ago written by a graduate student as evidence of such arrangements. However, Dr. Singer misinterprets the paper's findings and its relevance to this case is not at all clear.

182. I also conclude that Cablevision's decision to distribute GSN on the S&E Tier was consistent with rational business conduct, unmotivated by Cablevision's affiliation with WE tv and Wedding Central. The logic is clear: WE tv and GSN did not compete for viewers, advertisers, and programming content in a significant way. Therefore, Cablevision did not, and does not, have an incentive to discriminate against GSN on the basis of affiliation in the carriage of the network.

183. Finally, I conclude that Cablevision's distribution of GSN on the S&E Tier did not restrain GSN's ability to compete for viewers, advertisers, or programming content.

V. PART TWO: SUPPLEMENTAL WRITTEN DIRECT TESTIMONY

184. Following the submission of my March 12, 2013 Written Direct Testimony, I received the opportunity to respond to the Written Direct Testimony of Dr. Singer, filed concurrently with my testimony, in which he offered new and revised opinions that had not appeared in his original expert report. This Part Two (Paragraphs 184-225) consists of my response, originally filed as my Supplemental Direct Testimony on March 19, 2013.

DR. SINGER'S CRITICISM OF MY DIRECT TEST IS FLAWED

185. In Part One, I set out the basis for my "direct test" that demonstrates that the retiering [redacted] in WE tv's and Wedding Central's viewership.[233] Dr. Singer argues that my direct test model yields inaccurate results. To examine Dr. Singer's assertions in proper context, I explain briefly my direct test model. My model essentially divides households into two groups: a

[233] *See supra*, ¶¶ 41-58.

control group and a treatment group. The control group is comprised of households that had access to GSN during the pre-retiering period (April 2010) and continued to have access to GSN in the post-retiering period (April 2011) because the households were S&E Tier subscribers. The treatment group is comprised of households that had access to GSN during the pre-retiering period, but did not have access to GSN in the post-retiering period because they were not S&E Tier subscribers. My direct test compares WE tv viewership of the treatment and control group households and finds that there is [redacted] in WE tv viewership between the two groups of households. I include control variables in the model to ensure that I compare WE tv viewership between similar sets of control and treatment group households. My direct test therefore essentially asks the following question: if you took two households, A and B, that in the pre-retiering period had identical viewership of GSN, had identical viewership of WE tv, and were identical to each other in all other respects captured by the data but in the post-retiering period household A had access to GSN and household B did not, do we observe differences in WE tv viewership between households A and B in the post-retiering period? My results show that on average we [redacted] in viewership of WE tv between pairs of households like A and B in the post-retiering period. Therefore, my direct test analysis shows that the lack of access to GSN [redacted]

186. Dr. Singer argues that the results of my direct test are unreliable because the selection of households into the control and treatment groups was not

completely random.[234] Specifically, Dr. Singer argues that the control group households had [redacted] for watching GSN compared to the treatment group. He claims that this difference between the control and treatment group households in the propensity for GSN viewership contaminates the comparison of WE tv viewership between control and treatment group households in the post-retiering period.

187. Dr. Singer's criticism of the direct test model suggests that he does not understand how the model works. The model does not measure the retiering effect by comparing average WE tv viewership between *all* control and treatment group households. Rather, the model compares WE tv viewership between individual control and treatment group households after accounting for the differences in the individual household characteristics.[235] I account for differences in the propensity for GSN viewership between the control and treatment group households by including in the direct test model variables that measure individual households' viewership of networks in the pre-retiering period, thus ensuring that only households with similar levels of GSN viewership are compared.[236] Thus, Dr. Singer's suggestion that the direct test yields inaccurate results because the test does not account for pre-retiering differences in GSN viewership between the control and treatment group households is factually incorrect.

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234 Singer Direct Testimony Appendix 2 ¶¶ 3-4.

235 Econometric analysis, economists' principal tool for analyzing data, has developed methods to address the very issues that Dr. Singer raises regarding the differences between the control and treatment group households. Standard econometric models account for differences in populations by including control variables for specific attributes within the populations. The inclusion of control variables is what enables economists to analyze, within a single model, data on populations with different characteristics (e.g., in different countries and/or populations that have different ages, incomes, and education levels).

236 In particular, the model includes a control variable for viewership of GSN in April 2010. To the extent there are differences between control and treatment group households in the propensity for viewership of GSN, those differences are accounted for by the April 2010 GSN viewership control variable.

188. Dr. Singer also criticizes my direct test model for including "endogenous" explanatory variables.[237] Specifically, Dr. Singer claims that it is inappropriate for the direct test model to include information about households' WE tv viewership in 2010 to predict households' WE tv viewership in 2011.[238] Dr. Singer essentially says that it is inappropriate to use past information about a variable to predict the variable's future value.[239] Thus, Dr. Singer's argument suggests that it would be inappropriate to use information about a city's 2012 crime rate to predict the city's 2013 crime rate or that it would be inappropriate to use past real estate prices in an area to predict future real estate prices in the area. Dr. Singer's argument misapplies economic logic and is at odds with econometric literature: there are numerous economic studies that use past information about variables to predict future values of the variables.[240]

189. Dr. Singer makes an incorrect modification to my direct test model by excluding the variables that measure households' WE tv viewership in April 2010.[241] Unsurprisingly, because Dr. Singer's modification of the model excludes the most important factor explaining the 2011 viewership of WE tv (i.e., the 2010 WE tv viewership variables), the explanatory power of Dr. Singer's version of model is worse

237 Singer Direct Testimony Appendix 2 ¶ 5.

238 Singer Direct Testimony Appendix 2 ¶ 5.

239 In classic cases of endogenous explanatory variables, the dependent variable causes changes in the explanatory variable (e.g., if one were to estimate the effect of the number of police officers on crime rates, one has to understand that higher levels of crime will also likely lead to higher numbers of police officers). But Dr. Singer does not provide any evidence that such a concern applies in this case.

240 See, *for example*, Alesina, Alberto et al., "Political Instability and Economic Growth," *Journal of Economic Growth* Vol. 1, No. 2, June 1996, pp. 189-211; Card, David, "Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage," *Industrial and Labor Relations Review*, Vol. 46, No. 1, October 1992, pp. 22-37; and Taylor, John B., "The Lack of an Empirical Rationale for a Revival of Discretionary Fiscal Policy," *American Economic Review*, Vol. 99, No. 2, May 2009, pp. 550-555.

241 He refers to these variables as "potentially endogenous regressors." *See* Singer Direct Testimony Appendix 2 ¶ 6.

than the explanatory power of my version of the model (which appropriately includes the April 2010 WE tv viewership variables).[242] Dr. Singer's exclusion of the 2010 WE tv viewership variable is erroneous and reduces the reliability of the direct test. Nonetheless, even under Dr. Singer's inappropriate modification of the direct test, the model continues to show that retiering of GSN had a negligible effect on WE tv's viewership.[243]

190. Dr. Singer makes yet another modification of the direct test model. The modified model predicts the change in households' WE tv viewership shares between April 2010 and April 2011 using all the explanatory variables in my direct test model and two other variables: the change in households' GSN viewership shares between 2010 and 2011 and an indicator for whether a household received GSN in April 2011. I refer to this model as Dr. Singer's share change model. Dr. Singer concludes, based on his estimation of this model, that [redacted] Dr. Singer argues that this

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[242] The R-squared statistic measures the explanatory power of the model (or percentage of variation in WE tv 2011 viewership that is explained by the model's explanatory variables). Under Dr. Singer's modification of the direct test model, the R-squared value declines from 21 percent (my baseline direct model specification) to 15 percent (the model without the 2010 WE tv viewership variables). *See* Table A-1, Singer Direct Testimony.

[243] Under Dr. Singer's modification, the direct test shows that GSN's retiering [redacted] WE tv's viewership by only about 2.5 seconds per household per day for Cablevision subscribers in the New York DMA. To put that [redacted] in context, 2.5 seconds per household per day represented about one percent of WE tv viewership by Cablevision subscribers in the New York DMA in April 2011 and a negligible fraction of WE tv's nationwide viewership. Note that Cablevision's New York DMA WE tv subscribers in April 2011 (about three million) represented less than [redacted] of WE tv's nationwide subscribers at the time. At the end of March 2011, WE tv had about 77 million subscribers nationwide. (*See* Cablevision 10-Q, March 31, 2011.)

[244] Singer Direct Testimony Appendix 2 ¶ 8.

result "suggests that households do, in fact, [redacted]

191. I offer several comments in response to Dr. Singer's share change model and his interpretation of the results. Dr. Singer's share change model is highly inappropriate because it *does* introduce endogeneity and thereby yields biased estimates of the effect of households' changes in GSN viewership on changes in WE tv viewership.[246] Moreover, Dr. Singer incorrectly interprets the results of his estimation of the model. Because of the endogeneity in Dr. Singer's share change model, his results do not demonstrate substitution between GSN and WE tv viewership. To see this, consider a household that increases its viewership of WE tv (e.g., they become fans of the "Bridezillas" program) but does not change its viewership of GSN or any other network. The increase in the household's viewership of WE tv results in an increase in WE tv's share of viewership for the household. But because the household's total viewership time increases and its viewership of GSN remains the same, there is a decrease in GSN's share of viewership for the household.[247] Thus, the household's WE tv's viewership share increases as GSN's viewership share decreases. Dr. Singer interprets this event (based on his share change model) as an instance of [redacted]

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245 Singer Direct Testimony Appendix 2 ¶ 8.

246 The endogeneity problems lead to biased estimates of the model's parameters and wrong inferences about the direction of causation. Dr. Singer assumes that the changes in GSN's share of viewership cause changes in WE tv's share of viewership. However, the direction of causality may be the reverse. In this case, the change in GSN's share of viewership would be an *endogenous* variable. The incorrect assumption about the direction of causality between changes in GSN's share of viewership and changes in WE tv's share of viewership would lead to errors in estimating the parameters of the model.

247 Note that WE tv's and GSN's shares of viewership for a household are percentages of the household's total viewership time.

[redacted]

192. Dr. Singer's share change model also does not show any retiering effects for viewership of WE tv. The coefficient of the model that Dr. Singer interprets as indicating [redacted] ($\Delta GSNShare$) applies to both the control and treatment group households. This coefficient yields no information about whether the retiering caused an [redacted] in WE tv's viewership. However, the model's coefficients that do speak to potential substitution patterns indicate that changes in WE tv's share of viewership [redacted] between the control and treatment group households.[249]

193. In sum, Dr. Singer's modifications of my direct test confirm my conclusion that GSN's retiering [redacted] on WE tv viewership.

DR. SINGER'S AUDIENCE DUPLICATION ANALYSIS FAILS TO DEMONSTRATE [redacted] BETWEEN WE tv AND GSN

194. Dr. Singer continues to rely erroneously on the "both duplication" viewer audience overlap measure to gauge the level of competition between networks.[250] As I have explained in Part One, both duplication is an extremely poor indicator of viewer audience overlap for the purpose of assessing the level of competition between

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[248] Dr. Singer's analysis makes a classic mistake of inferring causation from correlation.

[249] The differences in WE tv's viewership share changes between the treatment and control group households are captured by the coefficients of variables GSN_{2011} and $GSN_{2011}*GSNShare_{2010}$. Dr. Singer's results indicate that [redacted]

[250] Singer Direct Testimony ¶¶ 36-39.

networks.[251] However, Dr. Singer's discussion of both duplication just confuses the issue.[252] Below I attempt to clarify some of the confusion created by Dr. Singer's discussion.

195. As I explain in Part One of my testimony, the Nielsen audience duplication reports include primary, secondary, and both duplication measures.[253] Primary duplication is the number of overlap viewers between a pair of networks ("both reach" in the Nielsen audience duplication reports) divided by the number viewers of the first network ("primary reach" in the Nielsen audience duplication reports).[254] Secondary duplication is the number of overlap viewers between a pair of networks divided by the number viewers of the second network ("secondary reach" in the Nielsen audience duplication reports).[255] Both duplication is the number of overlap viewers between a pair of networks divided by the combined number viewers of both networks ("combined reach" in the Nielsen audience duplication reports).[256]

196. Rather than just considering the ratios of viewer audience overlap to the number of network viewers, it is also important to examine the total number of overlap subscribers (or both reach) between a pair of networks so as to have a more reliable gauge of competition that WE tv faces from other networks. Tables 26 and 27 below show the numbers of overlap viewers for WE tv and GSN, respectively. Table 26

[251] *See supra*, ¶ 92.

[252] For example, it is unclear how one should interpret Table 3 of the Singer Direct Testimony.

[253] *See supra*, Orszag Direct Testimony ¶ 93. *See supra*, ¶ 79 for a discussion of caveats and limitations of the Nielsen audience duplication reports data.

[254] *See supra*, ¶ 93.

[255] *See supra*, ¶ 93.

[256] *See supra*, ¶ 15.

shows the viewer audience overlap (in millions of viewers) between WE tv and other networks in the fourth quarter of 2010.[257] Likewise, Table 27 shows the viewer audience overlap (in millions of viewers) between GSN and other networks in the fourth quarter of 2010.[258] Tables 26 and 27 rank networks according to the number of overlap viewers. As one can see from Tables 26 and 27, the number of overlap viewers between WE tv and GSN was [redacted]

197. In the fourth quarter of 2010, WE tv had reach (total number of viewers) of about [redacted] and GSN about [redacted][259] The overlap viewer audience between WE tv and GSN was about [redacted][260] Table 26 indicates the level of viewer audience overlap between WE tv and GSN was [redacted] relative to viewer audience overlap between WE tv and other networks. For example, Lifetime (reach of about [redacted] viewers) had a viewer audience overlap with WE tv of about [redacted] among networks in Table 26 in terms of viewer overlap with WE tv) – about [redacted] times the viewer audience overlap between WE tv and GSN.[261] Oxygen (reach of about [redacted] viewers) had a viewer audience overlap with WE tv of about [redacted] among networks in Table 26 in terms of viewer overlap with WE tv) – more than [redacted] the viewer audience overlap between

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[257] Total Day ratings, persons 18+ demographic.

[258] Total Day ratings, persons 18+ demographic.

[259] Total Day ratings, persons 18+ demographic. Source: "4Q10 Tot Day Dup Rpt WE v All Cab 18 Plus & 25-54.xlsx."

[260] Total Day ratings, persons 18+ demographic. Source: "4Q10 Tot Day Dup Rpt WE v All Cab 18 Plus & 25-54.xlsx."

[261] Total Day ratings, persons 18+ demographic, fourth quarter of 2010. Source: "4Q10 Tot Day Dup Rpt WE v All Cab 18 Plus & 25-54.xlsx."

WE tv and GSN.[262] The viewer overlaps between WE tv and GSN, between WE tv and Lifetime, and between WE tv and Oxygen are depicted graphically in Figures 3, 4, and 5. The sizes of the circles depicted in the Figures are proportional to the reach of the networks depicted in the circles.[263] Likewise, the overlap areas depicted in the Figures are proportional to the number of overlap viewers between the pairs of networks.[264] Figures 3, 4, and 5 provide a graphical illustration of just how much [redacted] are the viewer audience overlaps between WE tv and Lifetime or between WE tv and Oxygen than between WE tv and GSN. Note that Oxygen ranks [redacted] among the networks in Table 26 in terms of viewer audience overlap with WE tv. That is, there are [redacted] other networks that have a larger viewer audience overlap with WE tv than does Oxygen. Table 26 and Figures 3, 4, and 5 clearly show that the level of viewer audience overlap between WE tv and GSN is relatively [redacted] for viewers between WE tv and GSN.

198. Dr. Singer claims that the assessment of viewer audience overlap should be from GSN's perspective because it is "the more relevant orientation to consider in light of the allegations in this case."[265] Thus, Dr. Singer claims that the relevant ranking of the viewer audience overlap between WE tv and GSN is the one relative to the viewer overlap between GSN and other networks. Such a claim is wrong. Whether the size of the viewer audience overlap (however measured) between WE tv and GSN is large or small relative to the viewer audience overlap measures between GSN and other

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[262] Total Day ratings, persons 18+ demographic, fourth quarter of 2010. Source: "4Q10 Tot Day Dup Rpt WE v All Cab 18 Plus & 25-54.xlsx."

[263] Based on total day ratings and persons 18+ demographic, fourth quarter of 2010.

[264] Based on total day ratings and persons 18+ demographic, fourth quarter of 2010.

[265] Singer Direct Testimony ¶ 38.

networks is totally irrelevant to the question at issue, namely the level of competition that WE tv faces from GSN. Consider, for example, the networks in Table 27. The fact that WE tv's rank in Table 27 is [redacted] than CNN's is not relevant for the assessment of the level of competition facing WE tv. On the other hand, when viewed from WE tv's perspective, GSN's rank among networks in terms of viewer audience overlap with WE tv is more relevant because it shows whether or not networks other than GSN may be trying to lure viewers away from WE tv. Those are the networks that WE tv (or allegedly, Cablevision) would see as the competitive threat to WE tv. Thus, Dr. Singer's viewer audience overlap analysis does not properly assess the level of competition facing WE tv.

[redacted]

[redacted]

[redacted]

[redacted]

DR. SINGER'S MAHALANOBIS DISTANCE CALCULATIONS DO NOT SHOW THAT WE tv's AND GSN's VIEWER DEMOGRAPHICS ARE [redacted]

199. Dr. Singer argues that his updated Mahalanobis distance calculation shows that GSN and WE tv are [redacted] in terms of their viewer demographics and, hence, [redacted] that target this audience.[266] However, Dr. Singer's updated calculations do not fully address the problems I have already identified, including his refusal to build viewer age into his analysis.[267] Moreover, Dr. Singer provides no basis for the interpretation of his results and ignores results that are more relevant, although less helpful, in testing his hypothesis.

200. In response to my prior criticism, Dr. Singer now calculates the Mahalanobis distance between GSN and 101 other networks, including WE tv. He then compares the distance between WE tv and GSN relative to the distances between GSN and the remaining 100 networks. Dr. Singer concludes that because, on average, WE tv ranks [redacted] out of these 101 networks (down from [redacted] out of 38), WE tv is [redacted] to GSN.[268]

201. Even though Dr. Singer updates his Mahalanobis distance calculation to include comparisons with more networks – with the expected result that WE tv [redacted] – his update creates new problems and does not fully address the issues I raised with respect to his earlier calculations.

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[266] Singer Direct Testimony ¶¶ 47-52.

[267] *See supra*, ¶¶ 112 - 115.

[268] Singer Direct Testimony ¶52 and Singer Expert Report, November 19, 2012 ¶ 45.

202. First, Dr. Singer continues to omit demographics that could reveal significant differences between GSN and WE tv. Moreover, these are the precise demographics also considered by advertisers.[269] These demographics include viewer age, viewer household home ownership share, median viewer income, viewer head of household not in labor force share, and the share of viewers who reside in urban (or rural) counties.

203. Second, in adding more data to his calculations, Dr. Singer has used data that is "unbalanced" and inconsistent, rendering his calculations unreliable. Dr. Singer claims that he uses quarterly data from 2006 to 2010, suggesting that he has at least 20 observations for all his demographics (five years' worth of quarterly data). However, only [redacted] networks in Dr. Singer's calculations have 20 data points and [redacted] have fewer than 10; economists call this data sample "unbalanced" because certain observations have more data points than others.[270] The consequence of including these networks with few data points has the effect of [redacted] Dr. Singer's distance calculation between GSN and these networks.[271] I have simulated new demographic data maintaining the structure of Dr. Singer's original data and confirmed

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[269] *See supra*, ¶ 113.

[270] In fact, some of the networks Dr. Singer uses to compare against GSN have a single observation.

[271] Technically, when Dr. Singer compares GSN to a network with few data points, he is calculating the weights for each demographic based mainly (if not solely) on data for GSN. The direction in which this would bias Dr. Singer's calculations will depend on the data for the particular demographics. However, a simple look at Dr. Singer's calculations suggests that the bias might be towards [redacted] distance from GSN: the bottom [redacted] networks in terms of distance from GSN are those that have fewer than ten data points.

In addition, Dr. Singer's data does not name networks consistently over time. For example, Dr. Singer considers [redacted] Dr. Singer does not correct for these inconsistencies. Hence, not only is he comparing GSN to fewer networks than he claims, but his calculations are distorted in the manner described above.

that the calculated distance from GSN [redacted] In particular, Dr. Singer could be adding more networks that, with complete data, might reveal themselves to be [redacted] to GSN than WE tv. For example, [redacted] which rank in the top five [redacted] networks to GSN in my own calculations, have only one data point in Dr. Singer's data and, on average, rank [redacted] in distance from GSN in his calculations.[272]

204. Finally, as I have also stated in Part One, above,, because there are very few networks that are [redacted] to GSN and many more that are [redacted] to WE tv, the most relevant distance for determining WE tv's closeness to GSN is the distance from the perspective of WE tv – and not GSN.[273] Dr. Singer performs this calculation but omits reporting the results in his written testimony. Dr. Singer's own calculation shows that, on average, GSN ranked [redacted] (out of "101 networks") in distance from WE tv.[274]

205. Therefore, even if one accepts Dr. Singer's calculation of the Mahalanobis distance as correct, Dr. Singer's own calculations do not show that GSN and WE tv are [redacted] in terms of their viewer's demographics. Dr. Singer does not provide any criteria for determining what threshold would deem a network "sufficiently close" to another.[275] Based on his results, Dr. Singer claims that [redacted]

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272 Table 18, *supra*.

273 *See supra*, ¶¶ 109, 115.

274 Dr. Singer's code produces an output that contains the Mahalanobis distance calculated from the perspective of GSN and also from the perspective of WE tv with respect to 100 other networks (as identified by Dr. Singer). I have rerun Dr. Singer's code and I have been able to match the average distance between GSN and WE tv (1.91). However, I find that, on average, WE tv ranks [redacted] in distance from GSN as opposed to [redacted] reported by Dr. Singer. In this output, on average, GSN ranks [redacted] in distance from WE tv.

275 Singer Direct Testimony ¶ 52.

[redacted] than are other networks in" his sample; yet, he does not conclude that WE tv and GSN are [redacted] to each other in terms of viewer demographics "to be considered similarly situated for a discrimination analysis."[276] More importantly, under Dr. Singer's most relevant calculation, GSN ranked [redacted] in closeness to WE tv, which shows that GSN and WE tv are [redacted] as Dr. Singer claims them to be – and even that calculation is not done correctly for the reasons identified above.

DR. SINGER'S MODIFICATION OF MY SUBSCRIBER CHURN ANALYSIS DOES NOT CHANGE MY CONCLUSIONS

206. Dr. Singer argues that my analysis of subscriber churn following GSN's retiering is "fundamentally contaminated" by the fact that [redacted] Dr. Singer seems to be confused about the purpose of my churn analysis. My churn analysis estimates the number of subscribers who left Cablevision because of the retiering – not the number of subscribers who would have left Cablevision [redacted] Therefore, Dr. Singer's criticism of my churn analysis is wholly irrelevant. Moreover, Cablevision data indicate that subscribers who [redacted] left Cablevision at a [redacted] rate than the average Cablevision subscriber.[279] Thus, Dr. Singer's removal of the S&E tier

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276 *Id.*

277 Singer Direct Testimony Appendix 3 ¶ 8.

278 It would be inappropriate to exclude the effects of the [redacted] from the analysis. [redacted] are part of the arsenal of tools that MVPDs employ in persuading subscribers not to switch to other MVPDs. Dr. Singer does not explain why the effects of the [redacted] from the analysis.

279 Approximately [redacted] percent of the subscribers who received the [redacted] post-retiering left Cablevision by February 2013 or *about two years* after the retiering. (CV-GSN

[redacted] from my churn analysis is inappropriate and yields less reliable results than my analysis of churn. Nonetheless, even Dr. Singer's modifications of my churn analysis show that GSN's retiering [redacted] the number of subscribers who left Cablevision.[280]

DR. SINGER'S MODIFICATION OF MY ANALYSIS OF THE S&E TIER SUBSCRIBER GROWTH DOES NOT CHANGE MY CONCLUSIONS

207. Dr. Singer likewise criticizes my analysis of the post-retiering S&E Tier subscriber growth for ignoring the fact that some subscribers who called to complain about GSN's retiering [redacted] to the S&E tier. Specifically, Dr. Singer claims that:

> "The fundamental problem with Mr. Orszag's analysis is that Cablevision [redacted] Accordingly, Mr. Orszag's analysis cannot be used to infer (as he does) that GSN's retiering yielded an additional 24,400 S&E tier subscribers: [redacted]

208. Again, Dr. Singer seems to be confused about the purpose of my analysis. I estimate the effect of the retiering on the number of S&E Tier subscribers – not the effect of the retiering if [redacted] Dr. Singer's criticism of my S&E Tier subscriber growth analysis is also wholly irrelevant. The [redacted]

0431696.) In contrast, Table 1 of my written direct testimony shows that about [redacted] percent of New York DMA Cablevision subscribers present in April 2010 left Cablevision by April 2011 – just *one year* after. Table 1, *supra*.)

[280] The coefficients of variables $GSN{\geq}1hr_{2010}$, $GSNDur_{2010}$, and $GSNShare_{2010}$, the relevant coefficients for measuring subscriber churn effects in Dr. Singer's churn regressions, are not statistically different from zero in his model. (*See* Singer Direct Testimony Table A-3 at 81.)

[281] Singer Direct Testimony Appendix 3 ¶ 3.

[282] *See supra* note 278.

[redacted] was an effective strategy for Cablevision in terms of both retaining subscribers and convincing subscribers to purchase the tier after the expiration of the promotion.[283] Denying Cablevision an opportunity to [redacted] as Dr. Singer's analysis seeks to do, would yield a distorted view of MVPD competition.

209. Dr. Singer makes an inappropriate modification to my S&E Tier subscriber growth model by imposing a structure on the model that does not effectively capture the underlying data.[284] Nonetheless, Dr. Singer's modification still shows that about [redacted] Cablevision subscribers added the S&E Tier because of the retiering.[285] As I discuss below, Dr. Singer's estimate of the incremental S&E Tier subscribers does not alter the conclusion that retiering of GSN [redacted] to Cablevision's cable distribution division and that Cablevision's decision to distribute GSN on the S&E Tier was consistent with rational business conduct, unmotivated by Cablevision's affiliation with WE tv and Wedding Central.

DR. SINGER INCORRECTLY ASSESSES THE EFFECT OF GSN'S RETIERING ON CABLEVISION'S PROFITS

[283] See *supra* note 279. Of the subscribers who [redacted] post-retiering and who were still Cablevision subscribers as of February 2013, about [redacted] percent continued to receive the S&E Tier. (CV-GSN 0431696.)

[284] Dr. Singer modifies S&E Tier subscriber growth model by including a functional specification where a subscriber's likelihood of adding the S&E Tier is a linear function of the subscriber's GSN viewership duration (or share) in the pre-retiering period. However, the data indicate that the likelihood of adding the S&E Tier levels off beyond some threshold level of GSN viewership. Thus, by imposing a structure on the model that does not fit the underlying data, Dr. Singer reduces the reliability of his prediction of the number of subscribers who added the S&E Tier because of the retiering.

[285] Singer Direct Testimony ¶ 15.

210. Dr. Singer claims that my analysis failed to "demonstrate that Cablevision's distribution arm [redacted][286] To reach this conclusion, Dr. Singer inexplicably assumes that the license fee savings that Cablevision obtained from retiering GSN should be excluded from the profit calculations. In particular, Dr. Singer claims that "[a]lthough GSN's retiering saved approximately [redacted] per month in license fees, this is largely *irrelevant*, as it would have [redacted] However, if Dr. Singer actually included the license fee savings from retiering GSN in his profit calculations, the calculations would demonstrate beyond the shadow of a doubt that retiering GSN was [redacted] for Cablevision's distribution division. Conversely, Dr. Singer's calculations demonstrate that not retiering GSN and continuing to distribute it on highly penetrated tiers would have [redacted] for Cablevision's distribution division. Although Dr. Singer and I disagree on several elements of his profit calculations for GSN's retiering,[288] these disagreements do not alter the overall conclusion that, after accounting for the license fee savings, the retiering of GSN was clearly a profitable strategy for Cablevision's distribution division.

211. Dr. Singer's assertion that the license fee savings from retiering GSN are "irrelevant" is at odds with Cablevision's [redacted] for retiering GSN – and with the basic logic of any cost-benefit analysis. Cablevision's contemporaneous documents (i.e., documents at the time of Cablevision's decision to retier GSN) indicate that [redacted]

[286] Singer Direct Testimony ¶ 73.

[287] Singer Direct Testimony ¶ 74, footnotes omitted, emphasis added.

[288] I discuss Dr. Singer's profit calculations in more detail below.

[redacted] The license fee savings [redacted] Moreover, Dr. Singer's assertion that the license fee savings could have been obtained by retiering WE tv is inapposite. Regardless of whether retiering WE tv would have been a profitable strategy for Cablevision or that Cablevision had the contractual right to retier WE tv (and Dr. Singer does not [redacted] Dr. Singer's calculations show that broad distribution of GSN [redacted] to Cablevision's cable distribution division. Thus, Dr. Singer appears to be advocating a standard under which MVPDs would be unable to retier or drop carriage of non-performing networks as long as the MVPDs were distributing affiliated networks. Such a standard would be inconsistent with sound economic policy.

212. I now go through Dr. Singer's specific calculations of Cablevision profits from retiering GSN. He estimates that GSN's retiering resulted in [redacted] for Cablevision (although his estimate is statistically insignificant – i.e., no different from zero from a statistical perspective) and that each of the subscribers would have generated [redacted] per month in additional margins for Cablevision.[290] Based on these numbers, the subscriber losses would have reduced Cablevision's profits by [redacted] Dr. Singer also estimates that Cablevision [redacted]

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[289] *See supra*, ¶¶ 141-143.

[290] Singer Direct Testimony ¶¶ 75, 77.

[redacted] These numbers indicate that Cablevision [redacted] Dr. Singer argues that the number of Cablevision subscribers who upgraded to the S&E Tier because of the retiering and paid a monthly fee of [redacted] for the tier was [redacted] on Cablevision's profits.[292] Overall, Dr. Singer's calculations show that the retiering [redacted] which is [redacted] per month in license fee savings from the retiering.

213. My analysis shows that Dr. Singer's calculations underestimate Cablevision's profits from retiering GSN. As I discuss above, Dr. Singer's estimate of between [redacted] from the retiering (which he estimated was <u>not</u> statistically different from zero) was based on an inappropriate modification of my model of subscriber churn.[294] My own analysis finds no evidence of {{any subscriber losses}} for Cablevision from GSN's retiering. Dr. Singer also inappropriately assumes that Cablevision incurred a cost of [redacted] per month for every subscriber upgraded to the S&E Tier. Dr. Singer calculated the [redacted] per month per subscriber cost based on the list of networks carried on the S&E Tier and the per subscriber costs to

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291 Singer Direct Testimony ¶ 75.

292 *Id.* ¶¶ 76 - 77.

293 [redacted]

294 *See supra*, ¶ 206.

Cablevision from carrying those networks.[295] However, many of the networks carried on the S&E tier were also carried on other tiers so that there would be an incremental cost to Cablevision for distributing these networks to S&E subscribers only to the extent that the subscriber is not already receiving the networks on other tiers.[296] In addition, my experience in reviewing affiliation agreements between networks and MVPDs indicates that many, if not most, of the affiliation agreements have [redacted]

214. My analysis also indicates that GSN's retiering [redacted] According to Cablevision data, [redacted] However, Cablevision data indicate that many of the subscribers who [redacted] Thus, Cablevision earned positive margins on (i) the [redacted] and (ii) [redacted]

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[295] CV-GSN 0150595.xls.

[296] Networks that were carried on other tiers in addition to the S&E Tier include ESPNU, Gol TV, MLB Network, NBA TV, Golf Channel, and Versus/NBC Sports Network. (*See* CV-GSN 0150595.xls and http://www.optimum.com/optimum-prices.jsp.)

[297] *See supra*, ¶ 150.

[298] CV-GSN 0431696.

[299] CV-GSN 0431696. Of the subscribers who [redacted] post-retiering and who were still Cablevision subscribers as of February 2013, about [redacted] percent continued to receive the S&E Tier.

[redacted]

215. In sum, Dr. Singer's analysis [redacted] Cablevision's profits from retiering GSN, but still shows that retiering GSN was a good business strategy for Cablevision's cable distribution division.

DR. SINGER'S CRITICISM OF MY COMPETITION ANALYSIS IS MISGUIDED

216. Dr. Singer criticizes my analysis for seeking to "To Impose Standards Irrelevant to An Economic Determination of Whether Networks Are Similarly Situated."[301] Dr. Singer's critique misrepresents my testimony. I do not "impose" such a standard. I simply interpret the "similarly situated" criterion from an economic perspective as a test of whether the networks compete in a significant way for viewers, advertising, or programming content. I also analyze whether networks compete for viewers, advertising, or programming content in a significant way so as to assess whether Cablevision had any incentive to engage in discriminatory conduct.

217. It bears notice that Dr. Singer never articulates what is his similarly situated standard. Dr. Singer simply declares that "[t]o be similarly situated, two networks need not be economic substitutes."[302] He provides no support for this statement. Nor does he offer any explanation of how this view of what it means for networks to be "similarly situated" fits into *his* analysis. Remarkably, Dr. Singer's own

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[300] Assuming that subscribers paid [redacted] per month for the S&E Tier and Cablevision incurred no more than [redacted] per month in additional license fees for each S&E Tier customer, Cablevision's margins on [redacted] per month per subscriber.

[301] Singer Direct Testimony at 37.

[302] *Id.* ¶ 57.

analysis of whether networks are "similarly situated" appears to focus on whether the networks are economic substitutes.

218. Consider the following statements in Dr. Singer's testimony:

> "That these advertisers perceived GSN and WE tv to be [redacted] platforms for reaching target audiences informs the similarly-situated analysis."[303]
>
> "That these rightsholders perceived GSN and WE tv to be [redacted] platforms for their talents and relationship-based programming also informs the similarly-situated analysis."[304]
>
> "That several rightsholders perceive GSN and WE tv to be [redacted] outlets bolsters my prior conclusion that the networks are similarly situated."[305]

219. Thus, Dr. Singer's criticism of my similarly situated analysis is at the very least disingenuous. Dr. Singer never clearly articulates his interpretation of what it means for networks to be similarly situated and appears to be applying a similarly situated standard that is at least nominally based on the notion of economic substitution.

220. Dr. Singer also misinterprets my testimony regarding the incentives to engage in discriminatory conduct. In particular, Dr. Singer claims that

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303 Singer Direct Testimony ¶ 8.

304 Singer Direct Testimony ¶ 9.

305 Singer Direct Testimony ¶ 64.

under my "standard," the "non-discrimination obligation of the Cable Act would apply only to cable operators that have the ability to dictate carriage fees or advertising rates for their affiliated programming; if a vertically integrated cable operator's affiliated network lacks pricing power then, by Mr. Orszag's logic, it cannot be found to discriminate."[306] Dr. Singer supports this assertion by citing my statement that "[u]nder standard economic theory, Cablevision could only plausibly have an incentive to discriminate against GSN in favor of its affiliated networks, WE tv and Wedding Central, if the prices charged by the affiliated networks were effectively constrained by GSN."[307]

221. First, I should point out that my statement was a matter of economic logic – not discrimination standards. Second, Dr. Singer's assertion does not logically follow from my quoted statement. Although most firms, including cable networks, have some degree of market or pricing power, the presence of significant market power by the affiliated network is not a necessary condition for incentives to engage in discriminatory conduct. The affiliated network may lack significant market power because of competition from other networks, and to the extent that the MVPD can diminish that competition, it may have incentives to do so. Thus, Dr. Singer's characterization of my "standard" for analyzing competition between WE tv and GSN is simply incorrect.

222. Dr. Singer further asserts that my "test for similarly situated networks is rigged to fail from the start because WE tv is assumed not to have market

306 Singer Direct Testimony ¶ 58.

307 Singer Direct Testimony footnote 89.

power."[308] My analysis does not *assume* that WE tv has no market power. I *demonstrate* with my empirical analyses that WE tv does not face significant competition from GSN and thus Cablevision has no incentive to engage in discriminatory conduct against GSN.

223. Moreover, Dr. Singer appears to claim that even if GSN did not constrain WE tv's advertising rates, WE tv could still benefit from GSN's retiering because WE tv could simply sell more advertising without raising its advertising rates.[309] Again, Dr. Singer applies flawed economic logic. The scenario postulated by Dr. Singer requires that advertising on WE tv be a close substitute for advertising on GSN.[310] However, Dr. Singer does not provide any evidence that advertising on WE tv is a close substitute for advertising on GSN. My analysis of Nielsen data also suggests that [redacted]

224. Moreover, because networks have an essentially fixed supply of advertising slots, an increase in the demand for advertising on WE tv would likely cause some increase in WE tv's advertising rates. Thus, in this case, substitutability between networks' advertising implies a pricing constraint. If WE tv faced significant competition from GSN in sales of advertising, a diminution in the supply of advertising on GSN would raise WE tv's advertising rates. An [redacted] further

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308 Singer Direct Testimony ¶ 58.

309 Singer Direct Testimony ¶¶ 59-61.

310 If advertising on WE tv and advertising on GSN were close economic substitutes, a significant reduction in the supply of advertising on GSN would cause a significant increase in the demand for advertising on WE tv.

demonstrates the lack of incentives on the part of Cablevision to engage in discriminatory conduct against GSN.

225. Finally, Dr. Singer argues that, just because WE tv and GSN account for a small share of overall advertising revenue, that does not mean that WE tv and GSN do not compete. Dr. Singer discusses the example of beef and chicken in a household's food budget. He argues that a household may view beef and chicken as economic substitutes even though they account for small shares of the household's overall food budget. However, given the [redacted] the more apt analogy may be chicken and ice cream: both constitute small shares of households' food budgets and are not viewed by the households as economic substitutes.

VI. PART THREE: REBUTTAL REPORT

226. Part Three of my testimony (Paragraphs 226-261) contains analyses I have conducted and conclusions I have reached in responding to the Singer Supplemental Report. [311]

227. Dr. Singer's report supplements his March 2013 direct testimony in this matter "in light of the D.C. Circuit's decision in *Comcast v. FCC*."[312] Dr. Singer states that he understands that under the D.C. Circuit decision, the "plaintiffs in Section 616 discrimination complaints may bear a new evidentiary burden, which may be met by establishing that either (a) the vertically integrated cable operator … sacrificed

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[311] Supplemental Report of Hal J. Singer, Before the Federal Communications Commission, *In the Matter of Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, File No. CSR-8529-P, October 29, 2014 ("Singer Supplemental Report").

[312] Singer Supplemental Report ¶ 1.

downstream distribution profits by deciding to tier the independent network…; or (b) that any incremental losses from carrying the independent network broadly would be the same as or less than the incremental losses the [vertically integrated cable operator] incurred from carrying its affiliated networks broadly…"[313]

228. Dr. Singer's analysis in his March 12, 2013 direct written testimony, which was completed prior to the D.C. Circuit decision, did not show that Cablevision incurred losses within its cable division in carrying GSN on the S&E Tier.[314] However, "in light of the D.C. Circuit's decision," Dr. Singer now seems to have discovered new profit losses for Cablevision from carrying GSN on the S&E Tier.[315] Indeed, Dr. Singer's updated analysis of Cablevision's profits in his Supplemental Report did not use any additional information or data that were not available to him at the time of his direct written testimony. The only factor that has changed is that the D.C. Circuit Court issued its opinion. To attempt to meet what Dr. Singer says is "a new evidentiary burden" for "plaintiffs in Section 616 discrimination complaints,"[316] Dr. Singer cherry-picks the components of his profit sacrifice test and simply posits new numbers to make the calculations support his desired conclusions. But, as I show throughout this Part Three of my testimony, Dr. Singer's new conclusions are based on conjecture, speculation, and unsupported (and flagrantly contradictory) assumptions. As shown in Parts One and Two, above, and here again, it is clear that carrying GSN on the S&E Tier

313 Singer Supplemental Report ¶ 1.

314 *See supra*, ¶¶ 210-215.

315 Throughout my report, I refer to Cablevision's carriage of GSN on the S&E Tier as "retiering" of GSN.

316 Singer Supplemental Report ¶ 1.

was profitable for Cablevision's cable distribution division, which is consistent with Cablevision's business analysis of the likely effects of retiering GSN.[317]

229. Next, Dr. Singer claims that the carriage of GSN on a widely penetrated tier would generate greater incremental profits (*i.e.*, compared to profits of carriage on a premium tier) for Cablevision's cable distribution division than the incremental profits of carrying WE tv and/or Wedding Central on a widely penetrated tier, and as such, Dr. Singer claims Cablevision's carriage of GSN on the S&E Tier was discriminatory. But nothing in Dr. Singer's Supplemental Report provides any economic basis or reliable analysis to show that carrying WE tv on the S&E Tier or a similarly penetrated tier would have been a more profitable strategy for Cablevision's cable distribution division than retiering GSN. With respect to Wedding Central, Dr. Singer's profitability analysis is erroneous and ultimately irrelevant since Cablevision's cable distribution division ceased carriage of Wedding Central on July 1, 2011.[318]

230. Moreover, Dr. Singer's whole discussion and comparison of GSN to WE tv and Wedding Central, respectively, are based on a flawed factual premise. As I demonstrate above, Cablevision subscribers did not tend to view WE tv and Wedding Central as close substitutes for GSN; there was relatively little overlap between WE tv viewers and GSN viewers; WE tv and GSN appealed to significantly different demographics; and GSN's advertising rates did not provide a significant constraint on WE tv's advertising rates. Thus, the evidence did not support a conclusion that GSN and WE tv and Wedding Central, respectively, competed significantly. Indeed, Dr. Singer

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[317] *See supra*, ¶¶ 140-169.

[318] See "AMC Networks Divorces Wedding Central," *Multichannel News*, July 8, 2011, *available at* http://www.multichannel.com/news/cable-operators/amc-networks-divorces-wedding-central/327564.

has not provided any reliable support for a conclusion that WE tv and/or Wedding Central benefitted from Cablevision's decision to carry GSN on the S&E Tier, which would provide the underlying economic incentive – according to Dr. Singer's theory – for the retiering of GSN.

231. Dr. Singer also claims that "Cablevision wields sufficient market power in the New York DMA to engender significant foreclosure of independent networks such as GSN."[319] Dr. Singer's market power claims are confusing. Despite claiming that "Cablevision wields sufficient market power in the New York DMA," Dr. Singer states that Cablevision's market share in that DMA is roughly 40 percent.[320] Dr. Singer fails to establish that Cablevision possessed significant market power in a relevant market or that there is any link between a market share of 40 percent and the alleged discriminatory conduct. As a result, Dr. Singer cannot possibly draw any reliable conclusions about Cablevision's incentives to engage in the alleged discriminatory conduct against GSN.

232. Finally, Dr. Singer appears to ignore an important fact: GSN has grown significantly, as measured by [redacted], since the network was retiered by Cablevision, which suggests that GSN was not harmed in its "ability… to compete fairly" for distribution, advertising, or viewership since it was retiered by Cablevision.[321]

233. A list of the materials I relied upon in my response to Dr. Singer's Supplemental Report is set forth in Appendix 2 to CV Exh. 335.

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319 Singer Supplemental Report ¶ 34.

320 Singer Supplemental Report ¶ 25.

321 *See supra*, ¶ 35.

DR. SINGER'S CONCLUSION THAT CABLEVISION SACRIFICED PROFITS IN CARRYING GSN ON THE S&E TIER LACKS ANY VALID ECONOMIC BASIS

234. In his March 12, 2013 direct written testimony, prepared before the D.C. Circuit decision, Dr. Singer does *not* demonstrate that Cablevision's decision to carry GSN on the S&E Tier sacrificed profits for Cablevision's cable distribution division.[322] In fact, as I explain in Part Two, Dr. Singer's direct testimony shows that carrying GSN on the S&E Tier increased the profits of Cablevision's cable distribution division. According to his direct testimony, Dr. Singer acknowledges that Cablevision saved approximately [redacted] per month in license fees by retiering GSN. His March 12, 2013 direct written testimony shows that Cablevision gained only between [redacted] and [redacted] per month in value from carrying GSN broadly (rather than on the S&E Tier).[323] Thus, the analysis that Dr. Singer presents in his March 12, 2013 direct written testimony indicated that Cablevision's cable distribution division did not sacrifice any profits in deciding to carry GSN on the S&E Tier.

235. However, "in light of the D.C. Circuit's decision,"[324] Dr. Singer has produced a new analysis with new components of profit losses for Cablevision (*i.e.*, analyses that he did not include in his pre-D.C. Circuit decision direct written testimony, even though the data and information that Dr. Singer used in his new analysis were available to him at the time of his earlier direct written testimony). As I explain below, these new profit loss assessments from carriage of GSN on the S&E Tier are inappropriate and are based on conjecture, speculation, and unsupported (and flagrantly

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322 *See* Singer Direct Testimony ¶ 73.

323 *See supra*, ¶ 212.

324 Singer Supplemental Report ¶ 1.

contradictory) assumptions.[325] Dr. Singer has searched in every nook and cranny for losses incurred by Cablevision's cable distribution division from carrying GSN on the S&E Tier, but he has simply ignored material profit benefits from such carriage. Putting a thumb on one side of the scale in such a way does not comport with sound economic analysis.

236. In his direct written testimony, Dr. Singer found that Cablevision's decision to carry GSN on the S&E Tier resulted in a loss for Cablevision's cable distribution division of between [redacted] and [redacted].[326] Dr. Singer calculates in his direct testimony that the loss of [redacted] to [redacted] subscribers reduced Cablevision's profits by about between [redacted] and [redacted] per month, based on Dr. Singer's assumption of [redacted] per subscriber per month in foregone margins for Cablevision. In addition, in his March 12, 2013 direct written testimony, Dr. Singer estimated that Cablevision incurred losses of [redacted] per subscriber per month for about [redacted] subscribers who received temporary free upgrades to the S&E Tier, resulting in a further profit loss of [redacted] per month.[327] Note that adding [redacted] and [redacted] totals [redacted] per month in losses from carriage of GSN on the S&E Tier, which is far

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325 I have also explained in my earlier testimony that Dr. Singer's original assessment of profits for Cablevision from carriage of GSN on the S&E Tier, as presented in his March 12, 2013 direct testimony, is inappropriate and unreliable. *See supra*, ¶¶ 210-215.

326 Singer Direct Testimony ¶ 15.

327 In his updated analysis, Dr. Singer now assumes that [redacted] Cablevision subscribers received a free S&E Tier upgrade after Cablevision retiered GSN. (Singer Supplemental Report ¶¶ 5-6.) Although Dr. Singer asserts that the subscribers received the free S&E Tier upgrade for a year (Singer Supplemental Report ¶ 5), Cablevision documents indicate that [redacted] (CV-GSN 0299281.)

below the [redacted] per month in license fee savings that Dr. Singer concludes Cablevision saved by carrying GSN on the S&E Tier.

237. In his updated and post-D.C. Circuit decision calculations, Dr. Singer no longer includes the [redacted] per month in costs of the free upgrade to the S&E Tier for [redacted] Cablevision subscribers. Instead, Dr. Singer makes the extreme and speculative assumption that all of the subscribers who received the free upgrade to the S&E Tier would have terminated service with Cablevision if they did not receive the free upgrade. As a result, he assumes in his most recent report that Cablevision's subscriber losses from carriage of GSN on the S&E Tier total [redacted] subscribers, rather than the [redacted] to [redacted] subscribers that Dr. Singer estimated in his original analysis in his March 12, 2013 direct written testimony.[328]

238. Dr. Singer asserts in his Supplemental Report that the appropriate measure of the Cablevision subscriber losses from retiering GSN is not the actual number of subscribers who left Cablevision because of the decision to carry GSN on the S&E Tier (which Dr. Singer still calculates to be in the [redacted] range), but the number of subscribers who would have left Cablevision in the absence of Cablevision's temporary free upgrades to the S&E Tier, which Cablevision provided to about [redacted] subscribers.[329] Dr. Singer provides two justifications for his new, post-D.C. Circuit analysis. First, Dr. Singer claims that "Cablevision presumably did not anticipate [redacted] customer phone calls" when it decided to re-tier GSN.[330] He argues that "it

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[328] Singer Supplemental Report ¶ 6. The [redacted] in Cablevision subscriber losses assumed by Dr. Singer's analysis is the sum of [redacted] and [redacted] (the halfway point between [redacted] and [redacted]

[329] *See supra*, ¶ 214.

[330] Singer Supplemental Report ¶ 6.

is doubtful that the subsidy was incorporated into Cablevision's original cost-benefit calculus."[331] Second, Dr. Singer argues that the "role of the costs to the [vertically integrated cable operator] of mitigation strategies seems to be outside the scope of the original test as contemplated by the D.C. Circuit."[332]

239. Dr. Singer's updated analysis of Cablevision subscriber losses from retiering GSN is fundamentally flawed on a number of levels, each of which is sufficient to render Dr. Singer's analysis wholly unreliable.

240. The consideration of any incentives to engage in discriminatory conduct would most appropriately be based on the *ex ante* analysis (*i.e.*, before retiering of GSN) by Cablevision's cable distribution division of what it *expected* to earn from retiering GSN.[333] Most importantly, Dr. Singer's own statements prove that Cablevision's cable distribution division made an *ex ante* profit-maximizing decision to retier GSN. If Cablevision did not anticipate significant subscriber defections from Cablevision in reaction to the retiering of GSN, as claimed by Dr. Singer, the executives would not have expected to incur any profit losses (for Cablevision's cable distribution division) from carrying GSN on the S&E Tier.[334] That is, if the Cablevision executives anticipated relatively few subscribers would leave (or want to leave) Cablevision as a

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331 Singer Supplemental Report ¶ 6.

332 Singer Supplemental Report ¶ 6.

333 A basic consequence of markets is that actions that firms expect to be profitable (*ex ante*) may wind up being unprofitable (*ex post*). Thus, just because a firm's action turned out to be unprofitable *ex post* does not mean that a firm knowingly sacrificed profits in taking that action. Instead, the firm could have expected that the action would have been, on average, profitable *ex ante*.

334 Although Dr. Singer claims that "Cablevision presumably did not anticipate [redacted] customer phone calls," he does not cite any evidence for this presumption. From an economic perspective, the key issue is that executives would expect some reaction from customers to the decision to carry GSN on the S&E Tier and would also consider strategies to address the customers' concerns.

result of the retiering of GSN, they would have concluded that the small anticipated reaction to the retiering of GSN would lead to no profit losses for Cablevision's cable distribution division. Indeed, Dr. Singer's own analysis shows that Cablevision's license fee savings of [redacted] per month would be greater than the *expected* subscriber losses to Cablevision from subscriber churn associated with the retiering of GSN. In such a case, Cablevision would clearly not be sacrificing profits for its cable distribution division by retiering GSN. The contradiction in Dr. Singer's report is thus obvious because he cannot have it both ways by claiming that Cablevision knowingly sacrificed profits for its cable distribution division in retiering GSN so as to benefit its affiliated networks (WE tv and Wedding Central) and then claim that Cablevision did not anticipate a significant negative reaction by subscribers to GSN's retiering.

241. As for his second justification, there is neither an economic rationale nor anything in the language of the D.C. Circuit decision to indicate that the appropriate profit sacrifice test must exclude the effect of free temporary upgrades to the S&E Tier.[335] From an economic perspective, ignoring mitigation strategies (or strategies of retaining subscribers by offering them discounts) makes no sense. If one is going to conduct an *ex post* analysis of conduct, one should assume that the firm is acting in a profit-maximizing manner, which would include mitigation strategies to keep subscribers. If one ignores choices available to the firm that enhance profits (*e.g.*, mitigation strategies), one is not getting a full picture of the outcome of a decision and one is effectively assuming that Cablevision does not seek to maximize profits, which is inconsistent with basic economics. Dr. Singer's profit analysis makes this error by

[335] Singer Supplemental Report ¶ 2.

assuming that Cablevision would adopt a suboptimal subscriber retention strategy (*i.e.*, by ignoring available subscriber retention strategies, such as offering free S&E Tier upgrades).

242. Another significant error in Dr. Singer's new analysis is that he assumes that *each* of the approximately [redacted] Cablevision subscribers who received a free subscription to the S&E Tier between February 2011 and November 2011 would have disconnected from Cablevision in the absence of the free S&E Tier subscription.[336] Dr. Singer lacks any plausible basis for this assumption. His only justification for the assumption is his speculation that the [redacted] subscribers "*presumably* threatened to leave Cablevision after the tiering to secure the subsidy" and that "*[p]resumably* to save those customers who threatened to leave, Cablevision was forced to subsidize the cost of the sports tier" for the [redacted] subscribers.[337] In other words, Dr. Singer does not conduct any economic analysis to reach this conclusion; he simply speculates. Dr. Singer has no basis to assume that *each* of the [redacted] subscribers would have disconnected from Cablevision in the absence of receiving the free temporary S&E Tier upgrade.

243. In fact, the flaw in this conclusion is both highlighted in Dr. Singer's own report and the actual data from Cablevision. Dr. Singer's own report shows that *at most* [redacted] subscribers actually disconnected from Cablevision because of GSN's retiering, but he notes that thousands more called Cablevision to

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336 It is also not clear that all of the [redacted] free S&E Tier subscription offers were in response to the complaints about GSN's retiering. Indeed, information cited by Dr. Singer suggests that [redacted] of the free subscriptions (out of the [redacted] were given to subscribers between May 2011 and November 2011, several months after GSN's retiering in February 2011. (Singer Supplemental Report fn. 7.)

337 Singer Supplemental Report ¶¶ 5-6 (emphasis added).

complain and did not terminate their service with Cablevision.[338] In addition, subscribers who received the free S&E Tier upgrade were less likely to disconnect from Cablevision (even after the free upgrade was over). As I discussed in Part Two, approximately [redacted] percent of the subscribers who received the free S&E Tier upgrade disconnected from Cablevision by February 2013 – *about two years* after the retiering.[339] In contrast, about [redacted] percent of New York DMA Cablevision subscribers present in April 2010 left Cablevision by April 2011 – just *one year* after.[340]

244. A further error in Dr. Singer's analysis is that he has no reliable basis for concluding that Cablevision had *any* net subscriber losses as a result of GSN's retiering. Dr. Singer claims that he estimates [redacted] to [redacted] subscribers disconnected Cablevision's cable service as a result of the retiering of GSN. But Dr. Singer only gets this result by excluding from the dataset the subscribers who added the S&E Tier post retiering. Dr. Singer justifies the exclusion of these subscribers from his analysis by claiming that one should consider subscriber losses that would have occurred in the absence of the free temporary S&E Tier upgrades by Cablevision (in response to subscribers' complaints) and that many of the subscribers who added the S&E Tier post retiering did so because of the free S&E Tier upgrades. As discussed above, it is inappropriate to exclude subscribers who added the S&E Tier post retiering from the analysis as it is inappropriate to assume that Cablevision could not use optimal mitigation strategies to retain subscribers.

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338 Singer Supplemental Report ¶ 6.

339 *See supra* note 279.

340 *See supra* note 279. I also showed in my direct written testimony that there is no discernable effect of Cablevision's retiering of GSN on Cablevision's subscriber churn. (*See supra*, ¶¶ 144-150.)

245. Even if one ignores the problems of Dr. Singer's biased analysis, Dr. Singer fails to find a statistically significant relationship between Cablevision subscribers' GSN viewership before retiering and the likelihood of disconnecting from Cablevision in the post retiering period. That is, Dr. Singer's analysis indicates that the extent to which a subscriber watched GSN before the retiering has *no* statistically significant effect on the likelihood that the subscriber disconnected from Cablevision post retiering.[341] Dr. Singer erroneously claims that he finds a statistically significant relationship between "a household's GSN viewership share" and "their tendency to churn" post retiering.[342] His claim is not statistically significant at any level normally used by economists; his claim of statistical significance is based on an 11 percent significance level. But such a significance level is not economically or statistically appropriate. The customary standard used by economists and statisticians is the five percent significance level.[343]

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341 Although there may be some effect on the likelihood of disconnecting from Cablevision post retiering, Dr. Singer's analysis indicates that the effect is so small that it cannot be statistically distinguished from no effect at all.

342 Singer Supplemental Report ¶ 13.

343 An estimated coefficient is commonly considered statistically significant if its statistical significance is less than five percent. Thus, Dr. Singer's 11 percent statistical significance level fails the test of statistical significance. One economics paper in a leading peer-reviewed journal stated, "Canonically speaking, if a coefficient clears the 95 percent hurdle [five percent significance level], it warrants additional scientific attention. If not, not." *See* Stephen T. Ziliak, 2008, "Retrospectives: Guinessometrics: The Economic Foundation of 'Student's' *t*." *Journal of Economic Perspectives*, 22(4): p. 199. Dr. Singer's analysis does not clear the five percent statistical significance level hurdle, so it does not "warrant[] additional scientific attention." The Federal Judicial Center's *Reference Manual on Scientific Evidence* similarly states, "In practice, statistical analysis typically use levels of 5% and 1%. The 5% level is the most common in social science, and an analyst who speaks of significant results without specifying the threshold probably is using this figure. An unexplained reference to highly significant results probably means that p is less than 1%. These levels of 5% and 1% have become icons of science and the legal process." David H. Kaye and David A. Freedman, "Reference Guide on Statistics," in *Reference Manual on Scientific Evidence*, Federal Judicial Center, Third Edition, 2011, pp. 251-252.

246. In sum, Dr. Singer's analysis provides no valid basis to conclude that Cablevision's retiering of GSN resulted in *any* subscriber losses for Cablevision.

247. In order to make his calculations support his conclusion, in his new, post-D.C. Circuit decision analysis Dr. Singer has also identified a new source of losses for Cablevision from GSN's retiering: "the loss in goodwill for the non-churning customers who called to complain about the tiering episode."[344] Dr. Singer calculates the goodwill loss as the product of [redacted] ("customers who did not churn (but whom Cablevision nevertheless stood ready to subsidize)") and [redacted] per month ("the subsidy offered by Cablevision to preserve customer relations").[345] Dr. Singer's inclusion of the goodwill loss in his assessment of Cablevision's profits from retiering GSN is inappropriate for a number of reasons.

248. First and foremost, Dr. Singer fails to connect his measure of goodwill loss to any actual losses by Cablevision or provide any valid support for the numbers underlying his goodwill loss calculations. Dr. Singer simply states that his [redacted] per month "measure of the diminution in goodwill" is "reasonable" without explaining why it is "reasonable."[346] But the value is entirely arbitrary, especially in light of the fact that he fails to explain why the estimated goodwill loss is recurring on a monthly basis, rather than being a one-time loss. Further, Dr. Singer claims that the loss of goodwill reflects the increased probability of churning as "a result of the tiering episode,"[347] but subscriber losses resulting from GSN's retiering are already part of

344 Singer Supplemental Report ¶ 7.

345 Singer Supplemental Report ¶ 7.

346 Singer Supplemental Report ¶ 7.

347 Singer Supplemental Report ¶ 7.

Dr. Singer's profit analysis. Thus, the inclusion of the goodwill loss in the profit analysis amounts to a double counting of alleged profit losses. Dr. Singer also claims that the goodwill loss reflects subscribers' reduced willingness to "tolerate a price increase."[348] But such a claim better reflects Dr. Singer's selective analysis because he fails to account for the fact that reducing Cablevision's programming costs by retiering GSN may actually reduce the likelihood of a price increase (relative to pricing changes that would other have occurred) for the vast majority of Cablevision subscribers who are not interested in watching GSN. Thus, Dr. Singer has no basis to claim that retiering GSN reduced Cablevision's goodwill (based on the definition of goodwill that Dr. Singer purports to measure), as retiering GSN could have actually enhanced Cablevision's goodwill.

249. Finally, Dr. Singer's analysis ignores Cablevision's benefits from distributing GSN on the S&E Tier. My analysis shows that carrying GSN on the S&E Tier resulted in a net gain of about [redacted] S&E Tier subscribers post retiering, which yields additional margins for Cablevision.[349] Even if [redacted] of these subscribers received the S&E Tier programming for free for a period, many of them continued to receive the S&E Tier after the promotional period was over – and the profits earned by Cablevision's cable distribution division on such subscribers should be included.[350] The evidence presented in my supplemental direct testimony shows that the subscribers who received the free S&E Tier upgrade were, if anything, *less* likely to disconnect from Cablevision than other subscribers – even after the free upgrade had

[348] Singer Supplemental Report ¶ 7.

[349] *See supra*, ¶ 150.

[350] *See supra*, ¶ 214.

expired.[351] Despite these obvious benefits to Cablevision's cable division, Dr. Singer ignores them in his profit calculations, which further biases his analysis.

250. For all of the reasons discussed, Dr. Singer's conclusion that Cablevision sacrificed profits in carrying GSN on the S&E Tier is unreliable and lacks any valid support. But, even including (incorrectly) every conceivable harm to Cablevision's profits and ignoring a number of benefits, Dr. Singer's analysis finds that the losses from retiering GSN [redacted] per month) just exceeds the license fee savings of retiering GSN ([redacted] per month). Such a difference suggests that Dr. Singer's conclusion is highly sensitive to small changes in assumptions underlying his analysis. For example, if Dr. Singer assumed that the "diminution in goodwill" per month per subscriber would be [redacted] instead of [redacted] (a number that appears to have been chosen by Dr. Singer without any valid basis), Dr. Singer would have concluded that Cablevision did not sacrifice profits by carrying GSN on the S&E Tier. Or, if Dr. Singer simply included the benefits to Cablevision of more subscribers choosing the S&E Tier, he would have found that retiering GSN was a profitable strategy. The lack of robustness of Dr. Singer's conclusion is yet another reason that his analysis is unreliable.

DR. SINGER'S CONCLUSION THAT CABLEVISION INCURRED GREATER LOSSES FROM BROAD CARRIAGE OF WE TV AND WEDDING CENTRAL THAN FROM BROAD CARRIAGE OF GSN LACKS A VALID ECONOMIC BASIS

251. Dr. Singer concludes that Cablevision incurred greater losses from broad carriage of WE tv and Wedding Central than it did from broad carriage of GSN.

[351] *See supra* note 279.

Such a conclusion largely relies on Dr. Singer's estimates of Cablevision's subscriber losses that would have occurred from "tiering" Wedding Central and WE tv. Dr. Singer's analysis of the effects of "tiering" Wedding Central and WE tv is deeply flawed for a number of reasons.[352]

252. In the case of Wedding Central, Dr. Singer decides to analyze only two factors: (1) license fee savings [redacted] and (2) the potential subscriber losses from retiering Wedding Central (which Dr. Singer *assumes* are [redacted]. Unlike his analysis with regard to GSN, Dr. Singer does not include any other effects, such as the effect of retiering on Cablevision's goodwill. He also does not perform any econometric or other analysis to estimate potential subscriber losses from retiering Wedding Central. He simply *assumes* retiering Wedding Central would result in [redacted] net losses of subscribers. While that dearth of analysis alone renders his opinions regarding Wedding Central unreliable, this whole section of Dr. Singer's report is a red herring: Cablevision ceased carrying Wedding Central on July 1, 2011.[353]

253. In the case of WE tv, Dr. Singer's supposed analysis is basically rank speculation. He seeks to estimate the number of subscribers that Cablevision would have lost if it retiered WE tv. But, because Cablevision continues to carry WE tv broadly, there is no real-world experience – from Cablevision or any other MVPD – to estimate the potential subscriber losses from retiering WE tv. Without any empirical

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[352] Dr. Singer does not explain what it means to "tier" WE tv and Wedding Central (*e.g.*, does he mean putting the channels on the S&E Tier?). Thus, it is somewhat unclear how to interpret Dr. Singer's predictions about the effects of "tiering" WE tv and Wedding Central.

[353] See "AMC Networks Divorces Wedding Central," *Multichannel News*, July 8, 2011, *available at* http://www.multichannel.com/news/cable-operators/amc-networks-divorces-wedding-central/327564.

evidence to support his analysis of subscriber losses if Cablevision retiered WE tv, Dr. Singer attempts to apply Cablevision's experience of retiering GSN as the benchmark for predicting what would happen if Cablevision retiered WE tv. In attempting to speculate about the effect of retiering WE tv, Dr. Singer ignores significant differences between GSN and WE tv in terms of content, viewer demographics, and viewership patterns.[354] Such differences would likely lead to differential effects in the way subscribers react to the retiering of each channel. Thus, Dr. Singer's conclusions that retiering WE tv would lead to smaller subscriber losses than retiering GSN are unfounded and not based on any real-world evidence.[355]

254. But, even if we take Dr. Singer's analysis at face value, his conclusions do not follow from his analysis. Let's assume that Dr. Singer is correct and subscribers are more "devoted" to GSN than to WE tv.[356] And we will assume, for the sake of argument, that Dr. Singer is correct that more subscribers will disconnect their service if Cablevision retiered GSN than if it retiered WE tv. That still is not sufficient to

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354 The analysis I present in Part One shows that GSN does not compete for viewers and advertisers in any significant way with either WE tv or Wedding Central (*See supra*, ¶¶ 40-133). In particular, my analysis shows, among other results showing an absence of significant competition between GSN and WE tv, on the one hand, and Wedding Central, on the other hand, that (1) retiering GSN has resulted in relatively few additional viewers for WE tv and Wedding Central (*See supra*, ¶¶ 52-74); (2) there was relatively little viewer audience overlap between GSN and WE tv (*See supra*, ¶¶ 75-87); and (3) there were significant differences in viewer demographics between GSN and WE tv (*See supra*, ¶¶ 100-115). For example, according to Nielsen data for the fourth quarter of 2010, [redacted] (Table 16, *supra*).

355 Furthermore, a standard under which a vertically integrated MVPD could be liable for engaging in discriminatory conduct if carriage of an affiliated network by the MVPD can be shown to be less profitable to the MVPD than the carriage of some unaffiliated network would impose burdensome and unreasonable obligations on the programming executives of the MVPD. The reason: Which networks are "similarly situated" is not defined by statute or promulgated by a regulator. Thus, programming executives would have to engage in these analyses on a continual basis for any network that may plausibly make a discrimination claim – even if there is little viewer overlap or significant differences in demographics between the networks. Such a standard would not be consistent with sound policy as it would impose excessive costs on the MVPD that would ultimately be passed on to consumers.

356 Singer Supplemental Report ¶¶ 12-14.

conclude Cablevision's cable division would have been more profitable if it retiered WE tv, instead of GSN. If GSN viewers are more loyal and devoted than WE tv viewers, as alleged by Dr. Singer, they would also be far more likely to subscribe to the S&E Tier, which generates incremental profits for Cablevision. That is, the benefits to Cablevision's cable division from growing the S&E Tier may swamp the incremental costs of some subscribers disconnecting. Dr. Singer completely ignores this factor in his analysis and thus cannot draw any reliable conclusions.

255. In addition, Dr. Singer's analysis treats WE tv and GSN inconsistently in predicting subscriber churn from retiering the network, which creates a downward bias in estimating subscriber loss associated with retiering WE tv. Dr. Singer predicts subscriber losses from retiering WE tv by applying a model that relates post retiering subscriber loss to the share of subscribers' viewership accounted for by WE tv viewership. However, in his analysis of WE tv, Dr. Singer imposes a condition: subscribers must have watched at least one hour per month of WE tv pre retiering. Dr. Singer inexplicably imposes no such condition in predicting the number of subscriber losses from retiering GSN. The inconsistent treatment of GSN and WE tv viewership in predicting churn leads Dr. Singer to underestimate subscriber losses from retiering WE tv (vis-à-vis retiering GSN).

256. Applying a consistent methodology for predicting subscriber losses would lead to significantly higher subscriber losses from retiering WE tv than from retiering GSN.[357] For example, Dr. Singer's "specification 4" estimates that retiering

[357] Dr. Singer estimates the churn likelihood attributable to GSN's retiering by predicting the likelihood that a subscriber will churn as a function of the subscriber's GSN viewership share (the share of total viewership time that is accounted for by GSN viewership pre retiering based on STB data) as well as

GSN would cause about [redacted] Cablevision subscribers to churn or disconnect from Cablevision.[358] If one assumes that the relationship between subscriber loss and viewership is the same across channels, Dr. Singer's "specification 4" model produces an estimated subscriber loss for WE tv that is [redacted] percent more than Dr. Singer's prediction of churn from retiering GSN. Likewise, applying exactly the same relationship for Wedding Central produces estimated churn of [redacted] Cablevision subscribers, in contrast to the [redacted] churn assumed by Dr. Singer's analysis.[359] Thus, the only way Dr. Singer can draw the conclusions that he does is by systematically engaging in inconsistent analyses for GSN, on the one hand, and WE tv and Wedding Central, on the other hand.[360]

257. Finally, Dr. Singer continues to claim that WE tv and GSN are "similarly situated."[361] The analyses I present in my direct written testimony show an absence of significant competition for viewers or advertisers between WE tv and GSN (and similarly between Wedding Central and GSN).[362] Thus, there is no valid basis to

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other available control variables. Dr. Singer's application of this churn model is deeply flawed for a number of reasons, as I explain above. However, if one were to apply Dr. Singer's churn methodology consistently to predict churn attributable to the retiering of WE tv and Wedding Central, one would have to apply Dr. Singer's (flawed) churn model to predict churn based on WE tv and Wedding Central viewership share calculated the same way as the GSN viewership share. Dr. Singer does not perform this analysis.

358 Singer Supplemental Report ¶ 15 and Singer Direct Testimony, Appendix B. Note that this estimate is unreliable for the reasons I discuss above.

359 Singer Supplemental Report ¶ 11.

360 Dr. Singer ignores one other issue: The ability of an MVPD to retier a channel may be guided by an affiliation agreement, which may either bar such retiering or impose significant penalties for retiering.

361 Singer Supplemental Report ¶¶ 16-19.

362 Dr. Singer's new comparison of shows on GSN and WE tv does not cause me to change the conclusions detailed in my March 12, 2013 direct written testimony about such anecdotal evidence, especially when presented by an economist rather than an expert on such content.

conclude that WE tv and Wedding Central significantly benefited from Cablevision's decision to carry GSN on the S&E Tier.

DR. SINGER'S MARKET POWER CLAIMS ARE BOTH BASELESS AND IRRELEVANT

258. Dr. Singer's Supplemental Report provides a further analysis that examines whether Cablevision possessed "market power in the supply of video programming in the New York metropolitan area."[363] Dr. Singer claims that his analysis shows that "Cablevision has sufficient market power to give rise to the discriminatory impulse."[364] But Dr. Singer fails to show that his "market power" analysis or "ability to engage profitably in substantial and sustained supra-competitive pricing" has any bearing on the incentives to engage in discriminatory conduct.[365] Dr. Singer does not explain how Cablevision's purported 40 percent share of the MVPD subscribers in the New York DMA or Dr. Singer's claimed high barriers to entry have any effect on Cablevision's carriage of GSN.

259. In any case, Dr. Singer does not perform an appropriate analysis of market power. Dr. Singer does not define relevant product and geographic markets. In particular, Dr. Singer does not provide any economic analysis to show whether the

363 Singer Supplemental Report ¶ 22. Dr. Singer explains that "market power is the ability to engage profitably in substantial and sustained supra-competitive pricing." (Singer Supplemental Report ¶ 26.)

364 Singer Supplemental Report ¶ 22.

365 Dr. Singer's citation of Dr. Austan Goolsbee's paper is inapposite, as Dr. Singer does not consider the same conditions outlined in Dr. Goolsbee's paper. For example, the Goolsbee paper considered DBS share (percentage of subscribers who purchase DBS service) in a DMA as an explanatory factor for network carriage; Dr. Singer's market power analysis does not include DBS share. Moreover, the Goolsbee paper analyzes network carriage during the 1997-2006 period, when incumbent cable companies had a much greater share of MVPD subscribers than in 2011. For example, cable companies served about 77 percent of total MVPD subscribers in 2001 (roughly the midpoint of the Goolsbee analysis) but only about 58 percent in 2011. (SNL Kagan U.S. Multichannel Industry Benchmarks.)

appropriate relevant geographic market *for this case* is the DMA or the MVPD's service footprint.[366] Thus, Dr. Singer's claims of "market power" lack any economic meaning. In addition, Dr. Singer does not establish any link between Cablevision's market share in either market and the alleged discriminatory conduct.

260. Dr. Singer also appears to ignore that Cablevision accounts for approximately [redacted] percent of total MVPD basic subscribers in the U.S.[367] Given the relatively small size of Cablevision (as an MVPD), Dr. Singer lacks any basis to claim that Cablevision has "market power" in any market that is relevant to the conduct at issue. Moreover, Dr. Singer's market power claims are also irrelevant to the conduct at issue because of the absence of significant competition for viewers and advertisers between GSN and WE tv or between GSN and Wedding Central, as I demonstrate in Part One of my testimony. Thus, Dr. Singer has not shown through any analysis that Cablevision had any incentives to discriminate against GSN in favor of its affiliated networks, WE tv and Wedding Central, regardless of whether or not Cablevision possessed any market power in any relevant market.

DR. SINGER FAILS TO DEMONSTRATE THE ALLEGED CONDUCT BY CABLEVISION HARMED GSN'S ABILITY TO COMPETE FAIRLY

261. Dr. Singer further claims that he "demonstrated empirically that the impact of Cablevision's retiering appears to have been felt beyond the New York

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[366] Dr. Singer appears to apply a "local market" composed of either the "New York metropolitan area" or "households with access to its cable infrastructure" in his market power analysis. (Singer Supplemental Report ¶ 22.) However, Dr. Singer never formally defines the relevant geographic and product markets or provides any analysis in support of his claimed "markets."

[367] Dr. Singer's claim that Cablevision is the fifth largest MVPD in the United States (by both subscribership and number of homes passed) is incorrect. In fact, Cablevision is the ninth largest MVPD in the U.S. by number of subscribers (after Comcast, DIRECTV, DISH, Time Warner, AT&T, Verizon, Charter, and Cox). (SNL Kagan Global Multichannel Top Operators; SNL Kagan U.S. Multichannel Industry Benchmarks.)

market."[368] In particular, Dr. Singer claims to have found "a significant decline in GSN's general-rate advertising attributable to tiering."[369] These claims are without any basis and appear to be contradicted by the available evidence. Data from SNL Kagan show that GSN's advertising rate, as measured by average CPM (a standard industry measure of advertising rates) increased by about [redacted] percent between 2010 (the year before GSN's retiering) and 2012 (the year after GSN retiering). During that same period, the average industry CPM increased by about [redacted] percent.[370] The number of GSN subscribers increased by about [redacted] percent between 2010 and 2012 (from [redacted] million in 2010 to [redacted] million in 2012).[371] GSN's operating revenue increased by about [redacted] percent from 2010 to 2012, from about [redacted] million in 2010 to about [redacted] million in 2012).[372] GSN's financial documents likewise show that GSN's financial performance improved significantly post retiering.[373] Thus, the notion that Cablevision's retiering of GSN impeded GSN's ability to grow nationwide (as claimed by Dr. Singer) appears to be incorrect. Furthermore, the approximately [redacted] million subscribers that Dr. Singer claims GSN lost as a result of Cablevision's retiering represent about [redacted] percent of GSN's total subscribers in 2012.[374] Thus, Dr. Singer's conclusion that "Cablevision wields sufficient market power in the New York DMA to

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368 Singer Supplemental Report ¶ 32.

369 Singer Supplemental Report ¶ 32.

370 SNL Kagan T.V. Network Summary.

371 SNL Kagan T.V. Network Summary.

372 SNL Kagan T.V. Network Summary.

373 *See supra*, ¶ 172.

374 Singer Direct Testimony ¶ 13.

engender significant foreclosure of independent networks such as GSN" is without any valid basis.

Dated: June 1, 2015
New York, NY

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