REDACTED – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, D.C.

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

TO: Chief Administrative Law Judge Richard L. Sippel

CABLEVISION SYSTEMS CORPORATION'S OMNIBUS MOTION *IN LIMINE* TO EXCLUDE INADMISSIBLE EXHIBITS AND TESTIMONY

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INTRODUCTION

Cablevision Systems Corporation ("Cablevision") moves *in limine* to exclude four categories of inadmissible evidence offered by complainant Game Show Network, LLC.[1]

First, Cablevision moves to exclude evidence concerning the purported similarity of GSN and Cablevision's affiliated networks WE tv and Wedding Central (together, the "Affiliated Networks") during the period subsequent to the communication and implementation of Cablevision's decision to retier GSN. Such evidence, including the identity and performance of programming, target audience and actual audience, and advertising or promotional overlap, has no bearing on Cablevision's decision to change GSN's level of carriage, a decision that Cablevision made in December of 2010 and implemented on February 1, 2011. Evidence of GSN or WE tv programming, audience data, or advertising characteristics months or years after Cablevision's decision will shed no light on whether Cablevision's decision improperly took into account affiliation in violation of Section 616. The introduction of such after-the-fact evidence will only create confusion and impede the orderly presentation of evidence that is relevant to the issues before the Presiding Judge.

Second, Cablevision moves to exclude certain hearsay testimony from GSN's witnesses. GSN's attempt to use its witnesses as conduits for out-of-court statements by third-party advertisers and distributors violates the hearsay rule and would frustrate Cablevision's ability to cross-examine GSN's witnesses at the hearing. There is no persuasive argument as to

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[1] As used herein, "GSN" refers to both Game Show Network, LLC and/or the programming network owned by that entity. For the convenience of the Presiding Judge, attached to this motion as Exhibits A–E are color-coded, annotated versions of the written direct testimony of David Goldhill, John Zaccario, Dale Hopkins, Dr. Hal J. Singer, and Timothy Brooks identifying the inadmissible portions of testimony and the grounds supporting the objections. Cablevision is also providing a separate chart of objections to individual GSN trial exhibits.

why the Presiding Judge should depart from the ordinary rule that the Federal Rules of Evidence govern this trial.

Third, Cablevision moves to exclude written testimony from GSN fact witnesses that is not based on personal knowledge. Testimony that is not based on the witness's own knowledge should be stricken.

Fourth, Cablevision moves to exclude GSN exhibits that are not proper subjects of official notice. Rather than asking the Presiding Judge to take official notice of "legislative facts" within his expertise such as Commission findings or rulemaking processes, GSN asks the Presiding Judge to receive otherwise inadmissible academic articles, news articles, and web site snippets cited by GSN's experts. These documents should not be admitted as subjects of official notice. Such evidence may be relied upon by experts but such reliance does not render them admissible, either through an evidentiary submission or by official notice.

ARGUMENT

I. Applicable Legal Standards

The Federal Rules of Evidence govern this proceeding.[2] The Presiding Judge may relax the Rules only if "the ends of justice will be better served by so doing."[3]

A. Irrelevant Evidence

Under Rule 401, evidence is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in

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[2] *See* 47 C.F.R. § 1.351 ("Except as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings.").

[3] *Id.*

determining the action." Irrelevant evidence is not admissible, whether offered by a fact or expert witness.[4]

B. Hearsay

Under Rule 801, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement.[5] Hearsay is inadmissible unless it falls within a Rule 802 exception. While an expert witness may consider hearsay evidence if "experts in the particular field would reasonably rely on [such evidence] in forming an opinion," an expert cannot serve "as a conduit for introducing hearsay under the guise that the . . . expert used the hearsay as the basis of his testimony."[6]

C. Speculative Evidence

Under Rule 602, a witness cannot testify about a subject unless "evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."[7] Although personal knowledge may include reasonable inferences, "those inferences must be grounded in observation or other first-hand personal experience . . . not . . . flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience."[8]

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[4] *See* FED. R. EVID. 402.

[5] FED. R. EVID. 801.

[6] FED. R. EVID. 703; *Marvel Characters* v. *Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (internal citation omitted).

[7] FED. R. EVID. 602.

[8] *Payne* v. *Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) (internal quotations and citations omitted); *see also Olivas* v. *ITT Hartford Life & Annuity Ins. Co.*, 57 F.3d 1077, Nos. 94-553335, 94-55342, 1995 WL 349855, at *2 (9th Cir. June 9, 1995) (upholding exclusion of evidence based on witness's speculation rather than personal knowledge); *Schertz* v. *Waupaca Cnty.*, 875 F.2d 578, 582 (7th Cir. 1989) (same).

D. Official Notice

The Presiding Judge has the authority to take official notice of "'legislative facts' within [his] special knowledge."[9] Where a decision "rests on official notice of a material fact not appearing in the record, any party shall on timely request be afforded an opportunity to show the contrary."[10]

II. Evidence That GSN, WE tv, and Wedding Central Were Similarly Situated After the Retiering is Irrelevant

A central issue in this case is whether GSN can show that Cablevision made its retiering decision for the benefit of the Affiliated Networks. The evidence, we are confident, will show that Cablevision did not. The question to be decided is whether Cablevision acted in a discriminatory fashion to protect similarly situated networks in making its decision, which was reached in December of 2010 and implemented in February of 2011.

Although much of the evidence to be presented by both parties will compare the programming, target audience, actual audience and advertising and promotional overlap between GSN and the Affiliated Networks—WE tv and Wedding Central—prior to and at the time of Cablevision's decision, GSN seeks to introduce considerable evidence of similarity for the period after (sometimes well after) Cablevision's decision. For example, two GSN fact witnesses, Mr. Goldhill and Mr. Zaccario, testify about GSN programming that premiered *after* the retiering, as well as audience target and advertising strategies in 2011 and in later years. And GSN's proffered experts, Dr. Singer and Mr. Brooks, rely on programming, ratings, and viewership data from *after* the retiering to challenge Cablevision's decision-making process

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[9] *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 298 (2000) (citing *FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978)); *see also City of N.Y. Mun. Broad. Sys.* v. *FCC*, 744 F.2d 827, 840 n.17 (D.C. Cir. 1984).

[10] 47 C.F.R. § 1.203.

before the retiering.[11] Such evidence is not relevant to any of the issues to be decided by the Presiding Justice and will not assist in the determination of whether Cablevision's late 2010 decision was discriminatory. As a result, all such evidence should be excluded under Rules 401 and 402 of the Federal Rules of Evidence.[12]

GSN itself previously took the position that such proof is irrelevant when it objected to producing such evidence during supplemental discovery. Then, it asserted that "programs aired on GSN in 2012 and 2013 have no bearing on a Complaint that was filed in 2011."[13] Aside from a conclusory assertion that Cablevision's decision to retier GSN is an "ongoing violation" of Section 616—a theory GSN did not plead in its carriage complaint—GSN offers no explanation for why such evidence would now be relevant.

Courts in analogous discrimination cases routinely exclude the kind of evidence that GSN seeks to inject here. The "general rule" in employment discrimination cases is to "exclud[e] post-complaint evidence."[14] Such evidence is inadmissible because it has no bearing

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[11] For example, Mr. Brooks cites [redacted], as evidence that GSN [redacted] in 2010. *See* GSN Exh. 300 (Brooks Direct Test.) ¶ 85 & n.120. GSN also seeks to admit an internal GSN document from February 2014 concerning the same show. *See* GSN Exh. 227 [redacted]. None of this has anything to do with Cablevision's 2010 decision-making.

[12] Certain post-retiering information, such as GSN's ratings data, is relevant for the limited purpose of showing that GSN cannot establish that it has been unreasonably restrained in its ability to compete fairly, a required element of its Section 616 claim.

[13] *See* Responses & Objections of Game Show Network, LLC to Cablevision's Second Request for Production of Documents, June 6, 2014, at 17 (objecting to the production of programming documents from 2012 and 2013) (emphasis added); *see also id.* at 12–15 (arguing that post-retiering evidence "would, by virtue of [its] date, have no bearing on the factual and legal issues in this case"). Cablevision's request did not constitute an endorsement of the relevance of such information; rather the request was motivated by our concern that GSN would do exactly what it is doing now—seek to use irrelevant post-retiering evidence to show purported similarity between GSN and the Affiliated Networks.

[14] *Smith* v. *United Bhd. of Carpenters & Joiners of Am., A.F.K.*, 685 F.2d 164, 168 (6th Cir. 1982); *see also Chuang* v. *Univ. of Cal. Davis, Bd. Of Trs.*, 225 F.3d 1115, 1130 (9th Cir. 2000) ("[a defendant employer's] subsequent hiring practices are therefore irrelevant to the question whether [the plaintiff] was subjected to

on whether the defendant's earlier actions or policies violated the law.[15] The same principle applies here. Although evidence regarding the similarity of GSN and the Affiliated Networks *at the time* of the carriage decision may be relevant, evidence of the similarity of the networks at any time thereafter is not "probative or relevant to the issue of whether [ ] discrimination occurred before the complaint was filed."[16]

Post-retiering evidence will also impede the orderly presentation of relevant evidence at the hearing. GSN's exhibit list includes dozens of exhibits that post-date the retiering, and GSN fact and expert witnesses uniformly address post-retiering comparative factors such as programming and audience composition.[17] This evidence raises the risk that the hearing will be turned into "a series of collateral 'trial[s] within the trial' which would result in confusion and undue delay."[18] Admission of post-decision evidence will require the parties to litigate satellite issues concerning five years of programming, audience composition and

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discrimination from 1982 to 1997"); *Gonzales* v. *Police Dep't, City of San Jose*, 901 F.2d 758, 762 (9th Cir. 1990) ("Subsequent hiring or promotion practices are clearly not relevant to the question of whether discrimination occurred prior to the commencement of a [discrimination action]."); *Rice* v. *Gates Rubber Co.*, 521 F.2d 782, 785 (6th Cir. 1975) ("[T]he crucial issue in a lawsuit of this kind is whether the plaintiff establishes . . . bias at the time of his . . . employment and subsequent complaint to the EEOC, not the employment practices utilized two years later.").

15 *Smith*, 685 F.2d at 169 (Keith, J., concurring).

16 *Id.*

17 *See, e.g.*. GSN Exh. 297 (Goldhill Direct Test.) ¶ 8 (discussing post-retiering programming); GSN Exh. 298 (Zaccario Direct Test.) ¶ 5 (same); GSN Exh. 300 (Brooks Direct Test.) ¶¶ 20–30 (discussing GSN and WE tv audience composition from 2009–14).

18 *Stopka* v. *Alliance of Am. Ins.*, 141 F.3d 681, 687 (7th Cir. 1998) (affirming exclusion of evidence under Rule 403) (internal citation omitted).

advertising overlap—among other issues—that Cablevision, by definition, could not have taken into account when it determined to retier GSN.[19]

III. GSN Witnesses Cannot Offer Inadmissible Hearsay Statements

The Presiding Judge should also strike certain hearsay statements from the testimony of GSN's fact witnesses. These statements reflecting third-party comments and observations, offered for the truth of the matter asserted, do not fall within any recognized hearsay exception, and must be excluded:

- **Mr. Goldhill** testifies about matters relayed to him by Mr. Gillespie of GSN and Mr. Chang of DIRECTV in conversations and meetings regarding potential carriage of Wedding Central that Mr. Goldhill did not attend. Although statements by Cablevision to Mr. Gillespie or Mr. Chang arguably constitute party admissions if relayed at trial by Gillespie or Chang, neither of those witnesses will be testifying live at the hearing. Such statements may not be introduced into evidence through Mr. Goldhill because the recitation of a Cablevision statement by Mr. Gillespie or Mr. Chang to Mr. Goldhill is inadmissible double hearsay.[20]

- **Ms. Hopkins** testifies about statements allegedly made by [redacted] representatives during GSN carriage negotiations. Testimony that these third parties allegedly [redacted] is textbook hearsay.

- **Mr. Zaccario** testifies about hearsay statements allegedly made by advertisers and by his team. Mr. Zaccario's testimony about statements by other members of GSN's advertising team is inadmissible hearsay. If GSN wished to introduce such testimony it needed to call those individuals at trial. Mr. Zaccario similarly may not testify as to statements made by third-party advertisers. Moreover, any statements made

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[19] If the Presiding Judge excludes GSN's improper post-retiering evidence, Cablevision will withdraw the portions of Mr. Egan's expert testimony discussing post-retiering similarity, as well as exhibits Cablevision has offered to rebut GSN's efforts to show post-retiering similarity. This evidence is intended merely to be protective.

[20] *See, e.g.*, *Gilligan* v. *Moreau*, 234 F.3d 1261, No. 00-7109, 2000 WL 1608907, at *3 n.4 (2d Cir. Oct. 25, 2000) ("The testimony of witnesses as to what the witness heard a party say is admissible as a party admission. The testimony of witnesses as to what someone else told them a party said is inadmissible double hearsay."); *Keenan* v. *Allan*, 889 F. Supp. 1320, 1339 n.5 (E.D. Wash. 1995) (evaluating double hearsay statement and noting that while the initial statement from an opposing party to a clerk may be considered a party-admission, the reiteration of that statement from the clerk to another party is hearsay not falling within an exception and thus not admissible).

by advertisers that were reported back to him by his team members constitute double- or triple-hearsay.

Nor can GSN avoid the prohibition on hearsay evidence by using its experts as conduits for inadmissible documents. That GSN's experts considered hearsay in forming their opinions does not make that hearsay admissible.[21] To take one particularly egregious example, Mr. Brooks quotes FCC filings from networks opposing the since-abandoned merger of Comcast and Time Warner Cable, neither of which are parties in this case.[22] These filings are not relevant and cannot be offered for the truth of assertions by third parties about the New York DMA. And, in all events, Mr. Brooks does not actually analyze these filings. Instead, he simply states "[f]ollowing is testimony from several companies regarding the importance of distribution in the New York market" and then quotes various filings without comment.[23] Sticking such information into an expert opinion does not make the hearsay admissible.

IV. GSN Witnesses Cannot Testify About Subjects on Which They Lack Personal Knowledge

The Presiding Judge should also strike certain testimony from GSN's fact witnesses that is not based on personal knowledge:

- **Mr. Goldhill** is CEO of GSN. He has never worked at Cablevision or Rainbow Media and yet he purports to testify on: (i) WE tv's internal business strategies, actual and target audience, and programming objectives; (ii) the performance of WE tv and Wedding Central as networks; (iii) Cablevision's decision-making process with respect to the carriage and re-tiering of GSN; (iv) the thoughts and reasoning of

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[21] *See Kirby*, 726 F.3d at 136 (holding that an expert cannot serve "as a conduit for introducing hearsay under the guise that the . . . expert used the hearsay as the basis of his testimony") (internal citation omitted).

[22] *See* GSN Exh. 300 (Brooks Direct Test.) ¶ 128.

[23] *Id.*

Cablevision executives with respect to their negotiations with GSN, Sony and DIRECTV; and (v) the opinions of DIRECTV executive Derek Chang.[24]

- **Ms. Hopkins** was chief marketing officer of GSN from 2009 to 2011. She has never worked for Cablevision, and only became a distribution executive in 2011. Yet she testifies about: (i) WE tv's perceptions of GSN; (ii) Cablevision's launch of GSN in 1997 and subsequent negotiations between the parties, which took place long before her tenure as Senior Vice President of distribution; (iii) Cablevision executives' thought processes with respect to re-tiering GSN and subsequent negotiations with DIRECTV and Sony; and (v) "every major distributor's" perception of GSN.

- **Mr. Zaccario** is senior vice president of Advertising Sales at GSN and lacks the personal knowledge to testify about: (i) the programming objectives, target audiences, and performance of every network in GSN's competitive set; (ii) the business objectives, negotiating tactics, and rationales of advertising executives; or (iii) advertising executives' ability to access and evaluate GSN's programming initiatives.

V. GSN Should Not Be Permitted to Use Official Notice to Cure Evidentiary Problems for Its Experts

GSN purports to offer 18 official notice exhibits, including contested academic and advocacy publications on disputed policy issues in this case, news articles that are hearsay, and printouts of Cablevision and GSN websites. To the extent GSN's experts have considered these documents in connection with their testimony, the experts can so testify. These documents are not, however, proper subjects of official notice. They are not within the "special knowledge" of the Commission or the Presiding Judge; rather, each category of document should be subject to normal evidentiary requirements and not independently admitted.[25]

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[24] GSN argued in 2013 that Mr. Goldhill could testify about WE tv's programming schedule and target audience "[b]ased on his monitoring of GSN's competitors and review of the trade press." Opp. of GSN to Def.'s Obj. to GSN's Trial Exhibits and Mot. *In Limine* to Exclude Portions of GSN's Written Testimony, Mar. 20, 2013, at 13. Not so. The relevant issue in this case is whether Cablevision considered GSN and the Affiliated Networks to be similarly situated when Cablevision decided to retier GSN, not Mr. Goldhill's view of WE tv at that time. GSN's suggestion that Mr. Goldhill can testify about why Cablevision asked GSN for [redacted] because Mr. Montemagno testifies about the same subject is equally without merit. Mr. Montemagno has personal knowledge of why Cablevision made that request. Mr. Goldhill does not.

[25] *City of Erie*, 529 U.S. at 298.

For example, GSN asks the Presiding Judge to take official notice of a publication by Fred Campbell entitled "The Mission to Kill Broadcast Television Stations: Analyzing Pay-TV's Bid to Control the Video Marketplace."[26] Mr. Brooks cites this publication once, as support for a statement about the average portion of MVPD revenue that comes from advertising sales.[27] To the extent that Cablevision's advertising revenue is an issue in this case, the best source for such information is the discovery record in this case. The Presiding Judge should decline GSN's invitation to endorse Mr. Campbell's one-sided arguments about a "regulatory war" between MVPDs and TV stations in order to bolster the testimony offered by Mr. Brooks. Accordingly, Cablevision objects to GSN Official Notice Exhibits 1–10 and 12–18.

CONCLUSION

For the foregoing reasons, Cablevision respectfully requests (1) that the testimony of David Goldhill, John Zaccario, and Dale Hopkins be excluded to the extent identified in Exhibits A through C, (2) that the testimony of Timothy Brooks and Hal Singer be excluded to the extent identified in Exhibits D and E, and (3) that the Presiding Judge not take official notice of GSN Official Notice Exhibits 1–10 and 12–18.

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[26] *See* GSN Notice Exh. 18.

[27] *See* GSN Exh. 300 (Brooks Direct Test.) ¶ 42 & n.52.

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