Exhibit E

Legend to Testimony of Timothy Brooks (GSN Exh. 300)

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	402 (Relevance)
	802 (Hearsay)

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GSN Exh. 300

June 2, 2015

Revised Direct Testimony of Timothy Brooks

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I. INTRODUCTION

1. I have been retained by Game Show Network, LLC to analyze data pertaining to its cable network, GSN, and competing networks affiliated with Cablevision Systems Corporation, namely WE tv and Wedding Central, as well as certain other networks.

2. Based on the data I have examined, I conclude that GSN is similar in audience appeal to WE tv, and a significant competitor to WE tv for audience and advertising, both in the New York market and nationally. I also conclude that WE tv benefited following the removal of its competitor from wide distribution on Cablevision systems. These conclusions are based on national and New York-area Nielsen ratings and demographic data, including data specific to the Cablevision coverage area, as well as on data obtained from other independent third-party measurement services, including Beta Research and Gfk MRI. The data indicate that GSN and WE tv both appeal strongly to women and are very competitive in terms of their performance in standard Nielsen demographic categories (based on gender and age). GSN performs comparably to WE tv in the New York area (as well as within Cablevision's coverage area within the New York market) notwithstanding that Cablevision provides its affiliated networks much more favorable channel positioning and promotion. Cablevision also gave more favorable treatment to Wedding Central, a new network it owned which appears to have attracted little audience and which was discontinued after less than two years.

3. Based on my analysis, I also conclude that GSN has already been harmed by Cablevision's negative repositioning of GSN to the sports tier a little-seen tier that is ill-suited for GSN. This harm extends to reduced audience levels, lack of exposure to important New York advertising professionals, and accompanying reduced revenue.

II. QUALIFICATIONS

4. I am an independent media consultant specializing in, among other things, television audience measurement. Since I began my private consultancy in January 2008, I have been engaged by a variety of private-sector firms and industry groups to advise them on research-related matters. Prior to 2008, I had 39 years of experience in the field of media research, most recently as Executive Vice President of Research for Lifetime Entertainment Services (2000-2007). Prior to that, I was Senior Vice President of Research for USA Networks, served as Senior Vice President/Media Research Director at NW Ayer advertising agency, and held several research positions at NBC-TV, the NBC Stations Division, and Westinghouse Broadcasting.

5. I have taken a leading role in industry associations, serving as chairman of the board of the Media Rating Council, which audits and accredits measurement services, including The Nielsen Company, serving as chairman of the board of the Advertising Research Foundation, which furthers the common research needs of media companies and advertisers, acting as a founding member of the Council for Research Excellence, and in leadership roles on boards and committees of other industry associations. I continue to serve on a number of research-related industry committees. I have been honored with awards from several of these organizations, including a Lifetime Achievement Award (ARF, 2008) and an award for Excellence and Integrity in Media Research (CAB, 1995). I taught media research as an adjunct professor at C.W. Post Center, Long Island University, for nine years. Also relevant to this case, I have authored or co-authored four books on television programming, including the award-winning *Complete Directory to Prime Time Network and Cable TV*

Shows, 1946-Present, a widely used encyclopedia of television programs.[1] I am often quoted in the press on research and programming matters. Recently I have served as an expert witness on media research and related issues, including providing testimony in *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC* (2011). My full *curriculum vitae* is attached.

III. ANALYSIS OF WHETHER GSN IS SIMILARLY SITUATED WITH CABLEVISION-OWNED WE tv AND WEDDING CENTRAL

A. Description of Programming on Networks Analyzed

6. I was asked to compare GSN with the Cablevision-affiliated WE tv and Wedding Central networks, as well as with several other networks that are within GSN's competitive frame and are carried widely by Cablevision.[2] I am familiar with the programming on these (and many other) networks due both to my professional work within the industry, and as co-author of *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present.* The following is a description of the programming of GSN, WE tv, and Wedding Central.

7. GSN was launched in 1994 as "Game Show Network." However since 2004 the network has been branded as "GSN," which is consistent with the network's move to broaden its programming to a wider range of women's entertainment.[3] Its programming

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[1] *The Complete Directory*, first published in 1979 and now in its 9th edition (2007), is a 1,832 page directory to more than 6,500 broadcast and cable series and also contains descriptions of the programming histories of more than 50 cable networks, including GSN and WE tv. In the course of compiling this book I personally have viewed virtually all of these series and networks. All entries were written by my co-author or myself, and I was principally responsible for the entries regarding cable networks and series. The book has been compiled and written over a more-than-30-year period and is intended for the mass audience as well as industry use. I have continued to view almost every new cable network series around the time of its premiere since the publication of the most recent edition of *The Complete Directory* in 2007.

[2] Wedding Central appears to have been quite similar to WE tv and GSN in terms of programming and target audience. However that network was not measured by Nielsen or most of the other sources I consulted.

[3] *See also* [redacted]

consists primarily of competition-based shows of various types, along with other reality-based programs, that, as discussed in additional detail below, appeal to an audience that is predominantly female. Currently, the games featured on GSN fall into four broad categories that are well recognized in the industry:

(1) "Relationship games," which focus on the contestants' relationships. These include "dating games," sexually charged games involving couples. GSN examples: *Baggage*, *The Newlywed Game*, *Love Triangle*. Each of the shows within GSN's "Love Block" of programming, which aired in the high-profile early prime time period, fell within this category.[4] Another recent example is the successful original series *It Takes a Church*. Another type of relationship games emphasizes families working together on challenges. GSN example: *Family Feud*.

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(2) "Celebrity games," in which celebrities playing either alone or alongside ordinary people are a major part of the appeal. GSN examples: *Match Game*, *$25,000 Pyramid*.

(3) "Big money games," often guessing games where a principal appeal is the potentially large prize and the focus is on money. GSN examples: *Deal or No Deal*, *1 Vs. 100*.

(4) "Quiz games," in which the main appeal is the game itself, and the contestant relies on factual knowledge and strategy. GSN examples: *Card Sharks*, *Lingo*, *Chain Reaction*, and the recent *American Bible Challenge* and *The Chase*.

8. In addition, GSN carries series that are not traditional "games." Over the years, GSN has programmed more than 150 different series ranging from competition reality shows such as *The Amazing Race*, *Dancing With The Stars*, and recently *Beat the Chefs* and *Skin*

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[4] *See* [redacted]

Rule 402

Wars, to reality shows focusing on celebrities (*Naturally Stoned, Carnie Wilson: Unstapled*) and weddings (*Vegas Weddings Unveiled*) and families (*Family Trade*).[5] Indeed, *Skin Wars*, a body painting competition hosted by Rebecca Romijn which premiered in the summer of 2014, is currently one of the marquee programs on GSN and was a focus of its most recent "upfront" presentation to the advertising community.[6] GSN has also recently announced a *Skin Wars* spinoff.[7] GSN also has aired documentaries and a Drew Carey improvisational comedy show There is variety in the appearance of GSN shows. Many of the hosts are celebrities (Sherri Shepherd, Wendy Williams, Jerry Springer, Alfonso Ribeiro).[8] The common theme is that the majority of GSN's programming is competition-based with a predominant focus on women. Given this focus on the female audience, it is not surprising that a number of core GSN programs overlap thematically with programming seen on other women's networks, including WE tv For example, *Love Triangle* and *Baggage* are essentially real-life talk/relationship shows, rather than traditional game shows. *It Takes a Church* shares core elements with WE tv's *Match Made in Heaven*.[9]

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9. WE tv was launched in 1997 as Romance Classics, dedicated to romantic movies and miniseries. In 2001 it was reformatted to include a broader range of women's

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[5] *See* [redacted]

[6] *GSN Announces Two New Original Series at its 2015 Upfront: "Steampunk'd" and "Lie Detectors,"* GSN (Mar. 10, 2015), http://corp.gsn.com/press/releases/gsn-announces-two-new-original-series-its-2015-upfront-steampunk-d-and-lie-detectors.

[7] *Id.*

[8] In particular, it appears that GSN specifically sought celebrity hosts that would attract female audiences. *See* GSN_CVC_00138405, Exh. 142 [redacted]}; *id.* [redacted]

[9] *See also* [redacted]

programming and relaunched as WE: Women's Entertainment. In 2006 its name was shortened to WE tv. Like GSN, WE tv targets women by airing a range of women-oriented programming. Its limited original programming consists primarily of documentary-style reality-based shows such as *Bridezillas*, *My Fair Wedding*, *The Cupcake Girls*, *Downsized*, and *Braxton Family Values*. Many of these touch upon the same themes as GSN's relationship games dating, romance, and family dynamics. As on GSN, celebrities have been featured on some WE tv series, among them Toni Braxton, gospel duo Mary Mary, Joan Rivers, Shannen Doherty, and comedian Sinbad.[10] The remainder of the schedule is filled largely with sitcom and drama reruns and a few movies. WE tv has also aired competition shows similar to those on GSN, including *Weight Loss Challenge*, *Style By Jury*, and *Skating's Next Star*, as well as at least one game show, *Most Popular*, which aired during WE tv's Thursday night prime-time schedule beginning in July 2009.[11]

10. In 2009, WE tv spun off a second women's-oriented network called Wedding Central, whose schedule consisted of reruns of wedding-themed programs that had originally aired on WE tv.[12] During its short existence, Wedding Central developed and considered wedding-themed game shows and competition programming, along with other wedding-themed programming.[13] Cablevision gave Wedding Central preferential treatment via wide

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[10] [redacted]

[11] [redacted] I viewed *Most Popular* at the time of its premiere.

[12] [redacted]

[13] *See* [redacted]

distribution on its iO digital cable service[14] but it achieved little carriage from other distributors. [redacted][15] The network was shut down in 2011.

11. I also considered GSN, WE tv, and Wedding Central within the context of other women-targeted networks that are within those networks' competitive frame and which are widely carried by Cablevision, including Bravo, E! Entertainment, Hallmark Channel, Lifetime, Oxygen and OWN.[16] The following are brief descriptions of those networks' programming in recent years.

Women's Networks: Programming[17]

Bravo: Female-oriented documentary-style reality shows, including *Kathy Griffin: My Life on the D-List*, *The Real Housewives* franchise, *Millionaire Matchmaker*, *The Rachel Zoe Project*, *Million Dollar Listing*, and an occasional movie. A significant portion of Bravo's schedule has been dedicated to competition-based shows such as *Top Chef*. Much of its success in the mid 2000s is attributed to the phenomenally popular competition show *Project Runway*, which Bravo aired from 2004 to 2008.

E! Entertainment: Primarily celebrity-oriented reality shows, including *Keeping Up with the Kardashians*, *Kendra*, *Chelsea Lately*, and *Fashion Police*, plus some female-oriented reruns (*e.g. Sex and the City*) and movies.

[redacted]

[14] Thomas Ulmstead, *AMC Networks Divorces Wedding Central*, Multichannel News (July 8, 2011), http://www.multichannel.com/content/amc-networks-divorces-wedding-central. Accessed 11 September 2011.

[15] [redacted]

[16] Other female-skewed networks with which GSN and WE tv might be considered competitive include [redacted]. *See* [redacted]; *see also* [redacted].

[17] Tim Brooks and Earle Marsh, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present* (9th ed. Ballantine Books 2007), individual network entries; www.tvguide.com (accessed 25 September 2011).

Hallmark Channel: Family-oriented reruns (*Golden Girls*, *I Love Lucy*, *Little House on the Prairie*, *The Waltons, The Middle*), family-friendly original series (*When Calls the Heart*) and movies.

Lifetime: General entertainment for women, including original drama and comedy (*Army Wives*, *Drop Dead Diva*, *Sherri*, *Rita Rocks*), as well as documentary and competition-based reality programs (*Project Runway*, *Dance Moms, Little Women*). It also features reruns (*Reba*, *Will & Grace*, *Desperate Housewives*, *Grey's Anatomy*) and original and theatrical movies, many dealing with women's issues. In the 1990s, Lifetime had a very successful afternoon game show block, and during my tenure at the network (2000-2007), we had many discussions about restoring traditional game shows to Lifetime's schedule.

Oxygen: The edgiest of the women's networks. Among its signature series are *Bad Girls Club* (all-"cat fights"-all-the-time[18]), *Love Games: Bad Girls Need Love Too* (game show spin off of *Bad Girls Club*), and *Snapped* (women who killed men). It features reality, competition, and documentary programs (*Hair Battle Spectacular*, *Tori & Dean*, *Dance Your Ass Off*) along with female-oriented theatrical movies and reruns. Since being purchased by NBC, Oxygen has also aired reruns from its parent company (*The Sing-Off, Law & Order*).

OWN: Oprah Winfrey's recently launched network has focused primarily on documentary programming emphasizing self-improvement and spirituality for women. Among its series have been *Oprah Behind the Scenes*, *The Judds*, *Dr. Phil*, *Gayle King*, *Turning Point*, *Ask Oprah's All Stars*, *Celine Dion* and *Welcome to Sweetie Pie's*. It also airs a few female-oriented scripted series (some produced by Tyler Perry) and theatrical movies.

B. Comparison of GSN and WE tv Audiences

(1) Data Sources Used

12. In order to analyze the audiences of GSN, WE tv and the other specified networks, I first requested that GSN provide me with data from The Nielsen Company ("Nielsen"). Reliable audience data is in my view critically important to evaluate both the overall audience strength and the demographic skew of a network. This is a widely accepted premise in the television industry. Indeed, virtually all presentations to advertisers and to MVPDs with which I was involved during my 40 years in the industry included such data,

[18] *See, e.g.*, Reality Tea, *Bad Girls Club Preview* (Feb. 6, 2012), http://www.realitytea.com/tag/bad-girls-club-preview/ (describing reunion episode "cat fight").

generally from Nielsen. [redacted][19]

13. Nielsen is the industry standard for measurement of television audiences in the United States. It is audited and accredited by the Media Rating Council (MRC), an independent industry body consisting of buyers and sellers who use audience data. As a former chairman of the MRC, I am quite familiar with Nielsen procedures and believe its measurements to be impartial and accurate for the purposes for which I have used the data. Whether or not one shares that belief, it is clear that Nielsen is the dominant entity conducting television audience measurement in the U.S. and its data are the basic currency of trade in the television advertising marketplace.

14. Nielsen data in the form I required are available only to subscribing companies via specially installed computer access systems. I therefore specified to GSN research personnel exactly what raw data I wanted accessed, and in what form. I received from them the data as produced by the access systems (*e.g.* the Galaxy and Arianna systems), in spreadsheet form. I conducted the additional analysis and calculations to prepare this report and the tables included herein.

15. My analysis of viewing audiences begins with national Nielsen data, then drills down to available local data. In my view, national Nielsen data provides a valuable "big picture" to understand GSN and WE tv's relative performances. The large size of the national Nielsen sample ([redacted]) allows a more stable and in-depth analysis of audience demographics and a more accurate measure of the direction of ratings change and

[19] *See e.g.* [redacted]

network potential than is possible with the smaller samples on which DMA ratings are based.[20] In addition, when national networks such as GSN and WE tv sell advertising, they do so on the basis of national Nielsen data (which is not available for all cable networks, but is available for GSN and WE tv), rather than local Nielsen data. In my experience, a national cable network like GSN or WE tv likewise looks at national Nielsen demographic data when evaluating its own performance or that of other networks in its competitive frame and, in fact, [redacted].[21]

16. The Nielsen national ratings cited are network coverage area ratings, the number of homes that tuned to each network during an average minute as a percentage of homes that receive the network (*i.e.*, the network's "coverage area"). This is an accepted method of comparison for cable networks with different distribution and is widely used for national Nielsen comparisons. Next, I looked at Nielsen ratings for GSN and its competitors in the New York market, which is Cablevision's "home" market. I examined Nielsen ratings limited specifically to Cablevision's coverage area (or "footprint") and also on systems in the same market but outside the Cablevision service area ("non-Cablevision"). To do this, I requested local market ratings in the form of a cut-back of data from the national Nielsen system (*i.e.*, the Nielsen Television Index or "NTI"). This is distinct from the Nielsen Station Index, known as NSI, [redacted] For historical reasons NSI ratings are calculated differently and less precisely than ratings calculated by the NTI system. The NSI system

[20] A national vs. local analysis was valuable, for example, in establishing that [redacted]

[21] *See* [redacted]

assigns viewership in 15 minute increments, based on viewership of five minutes or more for each quarter hour. Thus a viewer viewing less than five minutes is not counted at all for that quarter hour, while one viewing five minutes is counted for the entire 15 minutes. In the NTI system, which I have used, each minute is assigned individually, producing data that is more representative of actual viewing patterns. I did, however, also look at ratings calculated by the NSI system to analyze its consistency with the data from the NTI system and evaluate the data on which Mr. Egan relied.

17. In addition, in order to see how GSN and WE tv performed in large urban markets similar to New York, I also looked at their performance in the top 10 U.S. television markets.

18. Localized Nielsen ratings provide a more objective and reliable measurement of GSN's popularity relative to WE tv and other cable networks than does the set-top box data cited by Cablevision, although I also have examined the set-top box data produced by Cablevision in this case.

19. In addition to Nielsen ratings, I used third-party data from Beta Research and Gfk MRI to shed light on the relative popularity of the television networks in question. Beta Research is the leading provider of syndicated data measuring viewer attitudes toward cable networks. MRI is another widely used syndicated service that reports, among other things, the broader attitudes of different networks' audiences. I also accessed certain publicly available information from the Internet and other sources.

(2) Nielsen National Ratings and Demographics

20. Turning to the data, [redacted]

National Audience Summary[22]

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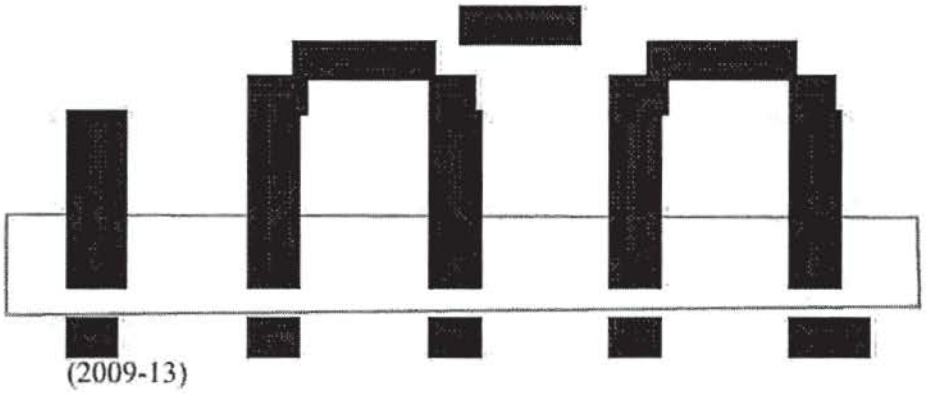

21.

[22]

[23]

2010 Total Day CVG Rating[24]
(Ranked on HH ratings)

[redacted]

Rule 402

2013 Total Day CVG Rating[25]
(Ranked on HH ratings)

[redacted]

22. Another way to compare networks is to examine their demographics. [redacted]

Rule 402

[redacted][26]

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[24] [redacted]

[25] [redacted]

[26] *See* [redacted]

Women as Percent of Total Day Adult Audience[27]

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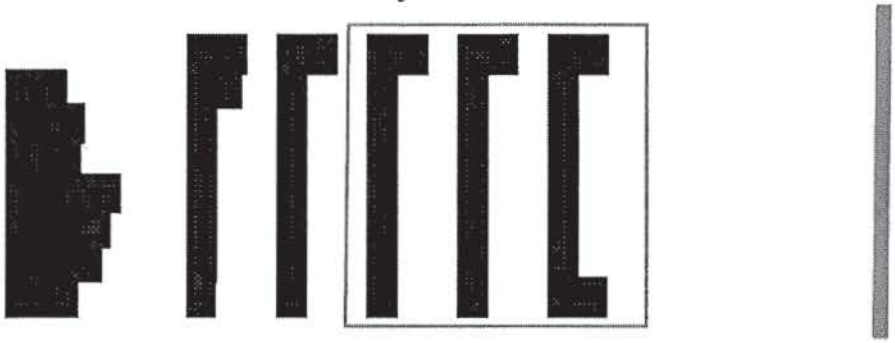

23. It is well understood in the business that there are female-targeted networks, male-targeted networks, and general audience networks. I have had personal experience in this regard, having among other things been head of research for Lifetime for eight years. [redacted][29]

24. Advertisers look at age information, depending on their products, using standard Nielsen demographic categories.[30] The four key categories for women's networks are

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[redacted]

[27] [redacted]

[28] For example, [redacted]

[29] [redacted]

[30] There are some unusual circumstances in which income is a factor, but generally only for upscale advertisers seeking networks that have high average income viewers. Such advertisers often use specialized services such as

women 25-54, persons 25-54, women 18-49 and persons 18-49. [redacted]

[redacted][31]

GSN Advertising Sales Revenue (2010)

[redacted]

25. [redacted]

[redacted][32]

26. [redacted]

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the Mendelsohn Survey of Affluent Homes (now known as the IPSOS Affluent Survey) to evaluate these networks. In my experience, income is not a factor generally used by advertisers in making purchases on other networks. To evaluate whether income is a factor in this case, I also have considered audience income data, which is available in different forms from Nielsen and MRI. According to the Nielsen and MRI data, [redacted] *See* *See* [redacted]

[31] [redacted]

[32] [redacted] Any suggestion by Cablevision experts that because GSN sold advertising on the basis of persons 25-54 and 18-49 (in addition to women 25-54 and 18-49) it is not a women-targeted network is belied by the fact that WE tv sells advertising the same way. In fact, most of the specific advertising accounts that WE tv was targeting in January through May 2011 were advertisers seeking to buy spots on the basis of persons (also known as "adults") 18-49 and 25-54, rather than women 18-49 and 25-54. [redacted]

Total Day Ratings[33]

27. [redacted]

28. [redacted] Actual time purchases made by advertisers are made on the basis of delivery in thousands (or its equivalent, total U.S. ratings[34]). Any small deficiencies in delivery can be accommodated by having a network provide an advertiser with somewhat more individual spots than its competitor, to make up any difference over the course of a full commercial schedule. Advertisers buy gross rating points (GRPs) for a desired demographic, so a network that has slightly lower ratings in a particular demographic can easily remain competitive by simply providing more spots in order

[33] [redacted]

[34] Total U.S. ratings are calculated on the basis of audience delivered divided by the total U.S. population in that demographic.

to deliver the desired GRPs in that demographic.[35] This is extremely common in the industry. In terms of the environment in which the advertisements would appear, [redacted]

29. Another Cablevision-owned network, Wedding Central, was also [redacted] While Nielsen demographic data is not available, Wedding Central's programming consisted of reruns from WE tv. The series that were rerun attracted a strongly adult and female-oriented audience when they aired on WE tv. Thus it is apparent that Wedding Central [redacted] (*See* Appendix No. 2).

30. In terms of overall audience acceptance, Wedding Central clearly did not perform well based on the fact that it was closed down less than two years after it was introduced and achieved minimal carriage outside of Cablevision systems.

(3) Shared Audience

31. [redacted]

[35] Gross ratings points (GRP) is the mathematical total of the ratings of the individual spots in a commercial schedule. Thus if a network averaged a .10 rating among Women 18-49 and an advertiser bought ten Women 18-49 GRPs, the network could deliver that by offering a schedule consisting of 100 announcements. A competing network that averaged a .09 rating among Women 18-49 could deliver the same ten GRPs by offering a schedule of 111 announcements. In fact, since ratings fluctuate over time, the first network might have to deliver more than 100 announcements if its Women 18-49 rating slipped below .10 at the time the schedule actually ran (these are called "make-goods" or "audience deficiency units," and are extremely common in the business).

32. It is important to base this type of analysis on *shared* viewing, not all viewing. Shared viewing is the percent of combined audience of two networks that watches both.

[36]

[37] As discussed in paragraph 74, Mr. Orszag's analysis is conducted using the inappropriate Cablevision "black box" set-top box data rather than Nielsen data. Wedding Central was never rated by Nielsen.

Top Networks With Which GSN Shares Audience (Persons 18+)[38]

Minimum one minute shared

	% Shared Audience
[redacted]	[redacted]

34. There has been little change in these duplication figures in recent years. Although ranks can change due to data variability, GSN and WE tv still share about [redacted] of their combined household audience overall, while about [redacted] of the combined persons audience watches both networks. The trend in prime time duplication is also shown in the following table, for reference. No matter how you run these shared audience tabulations, WE tv is one of the top networks in terms of shared audience with GSN.

Percent of Combined Audience Shared by GSN and WE tv[39]

[redacted]

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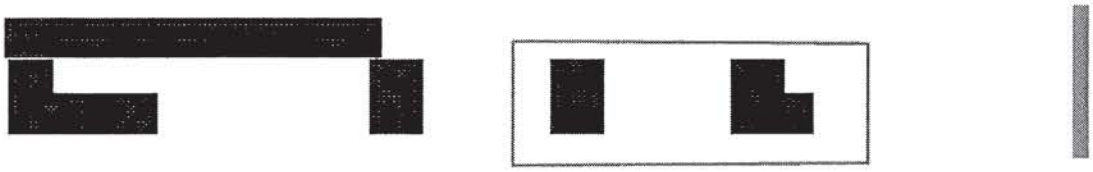
[redacted]

[38] [redacted]

[39] Same tabulation as for the previous chart, for the periods indicated. [redacted]

Rule 402



35. Not only is this a remarkable overlap in shared audience, but it was well understood at every network I ever worked for that if your viewers are spending a significant portion of their TV time watching a competing channel, then they are being constantly exposed to (and lured by) the promotional announcements, new shows, contests, etc. of that other channel. That channel is clearly more of a competitor to you than are channels seldom watched by *your* viewers.[40] In the television business, shared viewing very much denotes competition.

(4) GSN Ratings in the Top Ten Markets

36. Before turning to the New York market, I looked at GSN vs. WE tv ratings in other major urban markets, where GSN does not have the carriage and promotional constraints that have long been imposed on it by Cablevision (to be discussed later), in order to evaluate GSN's and WE tv's performance in large markets generally.

[40] As a corollary to this, it is also well understood that in most cases the most effective way to build your audience is to increase the amount of viewing of your network by current viewers, not to try to lure in new viewers who have previously rejected you. This means reducing the amount of time your current viewers spend viewing other channels, *i.e.* your competitors.

2010 Total Day Households: Top Ten Markets[41]

	GSN		WE	
	Rtg	(00)	Rtg	(00)
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Rule 402

2013 Total Day Households: Top Ten Markets

	GSN		WE	
	Rtg	(00)	Rtg	(00)
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[41] [redacted]

37. [redacted]

(5) **New York Market Ratings**

38. [redacted]

[42] [redacted]

[43] CV-GSN 0277395, GSN Exh. 311. For example, demographic ratings for Women 18-34 are based on samples of fewer than 200 women viewers in the New York market. Within the Cablevision coverage area, such ratings are based on a sample of fewer than 100 women. Ratings carried to hundredths of a rating point against samples this small are inherently unreliable.

39. With these limitations in mind, I looked at the Nielsen ratings for GSN and its competitors in the New York market, which is Cablevision's "home" Designated Market Area and where it repositioned GSN to a narrowly distributed tier.[46]

[44] When ratings are based on the entire cable universe, the numerator (number of homes viewing) will be larger for the more widely distributed network simply because it is available in more homes.

[45]

[46] As described below, local ratings performance within individual demographic categories is not a key metric that either national cable networks or MVPDs would normally care about, even though Mr. Egan has focused his demographic analysis on such data. That said, in light of Mr. Egan's emphasis on such data, I have reviewed GSN performance among women and in its key demographic categories in the New York DMA, and GSN performs well relative to WE tv. *See*

2010 Total Day: New York DMA[47]

	GSN Rtg	GSN (00)	WE tv Rtg	WE tv (00)
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

(6) Ratings Within Cablevision Households

40. [redacted]

41. The data I reviewed show that GSN and WE tv had comparable audiences within the Cablevision area, and one year prior to the retiering (same quarter) GSN in fact had a larger total female audience than WE tv.

Total Day 2Q2010: Cablevision Households in New York[50]

	GSN Rating	GSN (000)	WE tv Rating	WE tv (000)
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

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[47] [redacted]

[48] [redacted]

[49] An additional tabulation, among all Cablevision homes nationwide, was cited in my Direct Testimony. Since more than 90% of Cablevision's subscribers are in New York, the results are almost identical to those shown here.

[50] [redacted]

(7) Performance of GSN in Local Ad Sales Demographics

42. Much is made by Cablevision experts of the sales demographics of GSN and WE tv, which are in fact competitive in the principal Nielsen categories. In my view, this is largely a red herring. The reason to look at local demographic performance would be to evaluate the potential local advertising sales revenue that Cablevision would expect if it were carrying GSN broadly. Cable network affiliation agreements [redacted] Historically MVPDs have said that on average only about 5% of their revenue comes from advertising sales.[52] Also, local sales are usually done in packages of networks and sometimes are not based on ratings at all.[53] Thus, while demographic performance may be taken into consideration, it would not make business sense to base a carriage decision primarily on local sales demographics. In my 17 years of involvement with carriage negotiations, I do not recall an MVPD ever making a decision based on local ad sales or local audience demographic ratings. Overall size of audience (i.e. paying subscribers) rather than the size of narrow demographic subgroups is what really matters to the MVPD.

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[51] [redacted]

[52] The percentage for 2011 is slightly under 6 percent based on FCC statistics. *See* Fred B. Campbell, The Mission to Kill Broadcast Television Stations 4, Ctr. for Boundless Innovation in Tech. (May 1, 2014).

[53] Local sales are generally made in packages of networks and sometimes on the basis of buyer-seller relationships and perceived results rather than ratings. It should be noted that Cablevision runs the New York interconnect, which coordinates sales between various MVPDs in the market, and thus has a strong influence on how New York sales are made.

43. Although local ad inventory sales accounts for only about 5 percent of an MVPD's revenue, I have nevertheless considered here whether Cablevision would have expected increased ad sales revenues if it were to carry GSN broadly. As described below, GSN appears to perform [redacted] in the sales demographics that are the most saleable—namely, persons 18-49 and 25-54, and women 18-48 and 25-54. In the sales demographics of women 25-54 and 18-49, GSN and WE tv were [redacted] prior to the retiering. Even when [redacted]

Total Day Ratings 2Q 2010: Cablevision Households in New York[55]

[redacted]

44. [redacted]

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[54] [redacted]

[55] [redacted] Local sales are commonly made based on data from Nielsen's NSI service, which is drawn from the same sample but processed differently (NSI is optimized for broadcast stations and is less accurate for cable networks). For purposes of accuracy, stability and consistency with other data presented, the data reported here has been processed by national standards. [redacted] For further discussion see *supra* ¶ 16.

Total Day Ratings 2Q2010: Cablevision Households in New York[57]
(ranked on women 18+)

(8) Ratings on Non-Cablevision Systems in New York

45. It also is clear that GSN has among New York viewers generally. Perhaps the most direct evidence of this is seen in GSN's performance on other cable systems in Cablevision's own market. (These results are, of course, unpolluted by any discriminatory channel positioning, lack of promotion, or narrow tiering on Cablevision's systems, which will be discussed.) GSN was with WE tv in non-Cablevision New York homes even before the retiering in 2011. Since that time GSN has made in non-Cablevision New York, WE tv ratings have and, by 2013, GSN was WE tv by percent in households

Rule 402

[56] OWN took over the distribution of Discovery Health at the beginning of 2011.

[57]

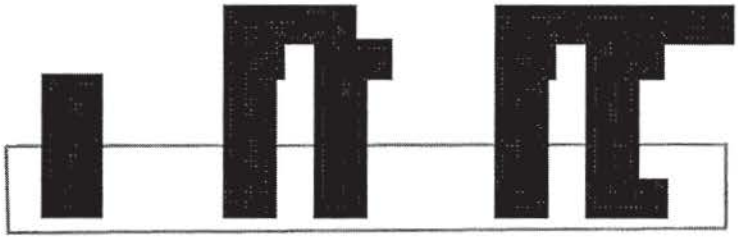
Rule 402

and by [redacted] percent in women viewers. Any suggestion that GSN does not do well or have strong audience appeal in the New York market is flatly contradicted by this data.

New York: Total Day Ratings in Non-Cablevision Homes[58]

[redacted]

Rule 402



(9) Effect on GSN Audience of Cablevision Repositioning in New York

46. It is possible to estimate from the New York audience data the approximate impact of Cablevision's downgrading of GSN from wide distribution to a narrowly distributed sports tier. Cablevision notified GSN in December 2010 that it intended to reposition the network to its sports tier; however, it did not actually make this change until February 2011. Because Nielsen requires a period of time to reflect lineup changes in its records, the full effect of the repositioning was not evident until the second quarter of 2011. [redacted] Homes still viewing after the move would be mostly subscribers to non-Cablevision distributors in the market (*e.g.,* Time-Warner Cable).

[58] [redacted]

Total Day Households: New York DMA[59]

Rtg (00)

47.

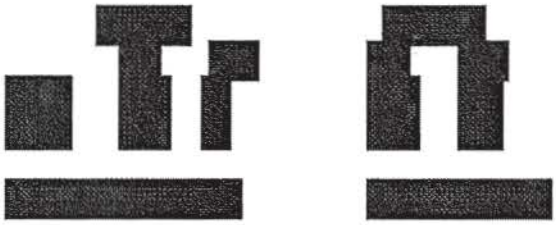
Total Day Households: New York DMA[61]

WE Rtg (00) Bravo Rtg (00) E! Rtg (00) Hallmark Rgt (00)

[59]

[60] Lifetime, the oldest of the women's networks, was launched in 1984 . Its strength was based on a combination of original dramas featuring empowered women and a steady diet of movies (original and off-network) showing women overcoming various perils.

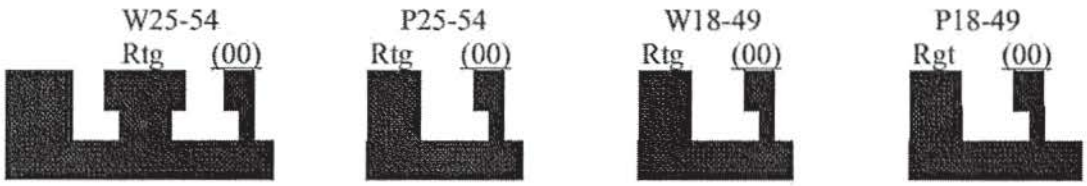
[61]



48.

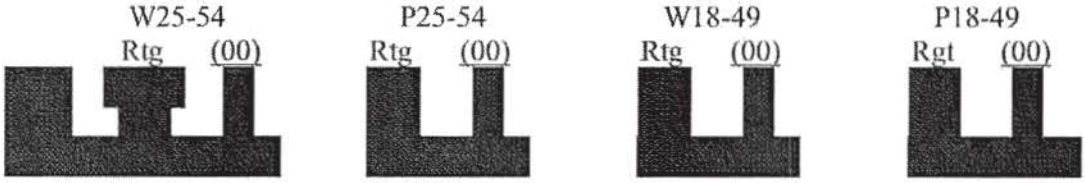
Total Day Demographics: New York DMA[62]

GSN



49.

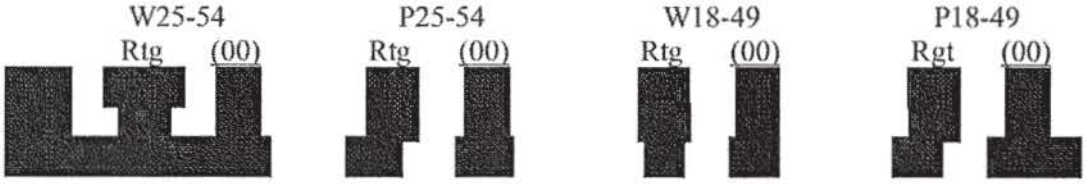
WE tv



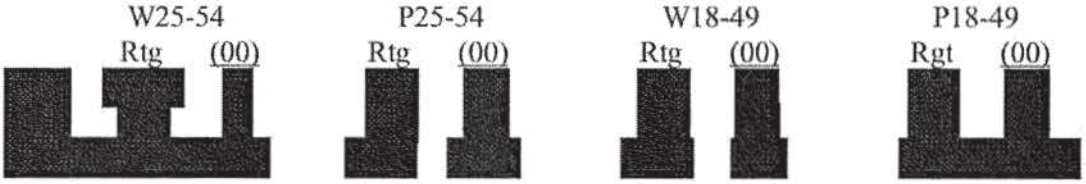
50.

[62] *Id.*

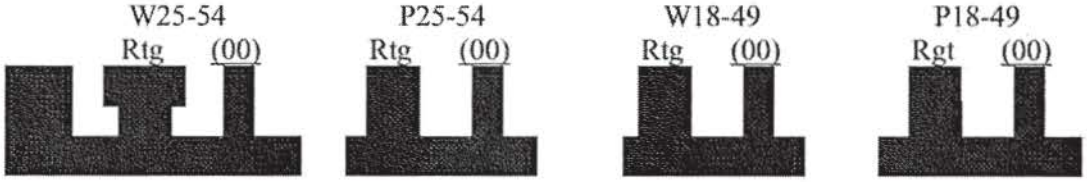
Bravo



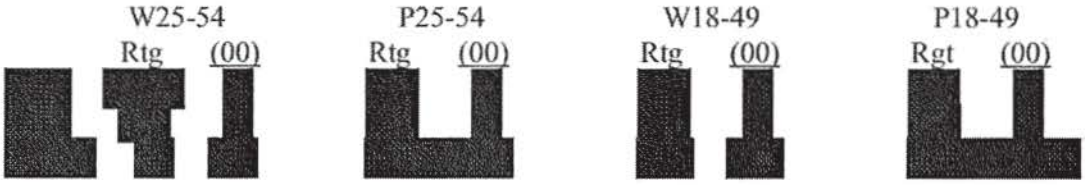
E! Entertainment



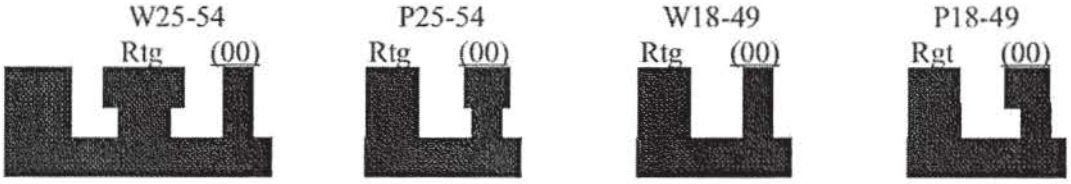
Hallmark



Oxygen



Lifetime



51. [redacted]

[redacted]

Total Day Households: National Ratings[63]

	2Q10	2Q11	Change
[redacted]	[redacted]	[redacted]	[redacted]

52. [redacted]

(10) Problems With Cablevision Proprietary Set-top Box Data

53. Mr. Egan and Mr. Orszag each spend a considerable amount of time presenting selected data from an internal Cablevision set-top box ("STB") reporting system, which generates ABN ("Audience By Network") reports. Unlike Nielsen data, which is compiled under strict and publicly disclosed methodological standards (and accredited by the Media Rating Council), this set top box data has not been shared with or vetted by anyone in the broader industry. As I pointed out in an earlier declaration, issued when Cablevision first cited such data, set-top box data does hold promise as part of a larger measurement system, but it is

[63] [redacted]

unreliable in its raw form due to a host of well-known methodological problems. Certainly, the reports and analyses that Mr. Orszag performs based on set-top box data are infected by these well-known methodological problems.[64]

54. STB data is not accredited as a media measurement tool by the Media Rating Council (the "MRC"), and despite [redacted] it is not currently used as currency in buying or selling television time.[65] STB data has been widely discussed within the industry, and multiple problems with it have been identified and are well-understood by those in the industry. The following is a non-exclusive list of some of the serious issues that have been identified with the use of STB data for audience measurement purposes:

a. There is no way that STB data can identify who if anyone in a household is watching. Cablevision consistently mischaracterizes this as "viewing" data, but in fact it reflects *set tuning*, not *persons viewing*. Among other things, this means that STB data cannot provide reliable information about viewer overlap since it cannot distinguish who within a household is watching which programs.

b. Many STBs remain turned on even when the TV set is turned off, returning false readings of tuning.

c. Most STBs cannot detect delayed viewing, especially if the DVR or VCR is an external unit.

d. There is virtually no uniformity in terms of data obtained or processing rules.[66]

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[64] I have had considerable experience with the issues surrounding set-top box data due to my employment and consulting work, which includes co-authorship of *The State of Set-Top Box Viewing Data as of December 2009* (Feb. 24, 2010), *available at* http://www.researchexcellence.com/files/pdf/2015-02/id90 set top box study 2 24 10.pdf, an in-depth study commissioned by the Council for Research Excellence.

[65] *See* [redacted]

[66] Processing rules are the rules by which raw data is accepted or discarded, and by which ratings and other metrics are calculated. Small changes in these rules can have a considerable and potentially differential effect on the reported performance of individual networks, and they are a primary focus of the auditors of the Media Rating Council when a measurement service applies for accreditation.

e. Different STBs even those deployed by the same MVPD may be configured differently, returning different types of data (or no data at all). Therefore, it has proven very difficult to aggregate data over a large footprint. Set-top boxes (including Cablevision's) were not designed as audience measurement devices and retrofitting them to gather this data often proves problematic.

f. STBs typically identify only the channel tuned, not the programming or program source, and are therefore subject to erroneous readings if a network is relocated to a different channel on any individual head-end or is part of a more complex feed pattern such as a "mosaic" channel.

g. Information about whether an STB belongs to a residential or commercial entity is often unknown and unreported, and this can differentially affect networks. Also often unknown is important information about households, such as whether they are seasonal (*e.g.* a summer home).

55. This is a non-exclusive list of several general problems that are inherent in the use of STB data. In addition to these general problems, there may be issues that raise questions about the reliability of a particular MVPD's STB data. Nielsen addresses these reliability problems in its sample-based measurement system. It has said that it is willing to incorporate STB data into its national measurement system, but ONLY once it meets the rigorous research standards required of reliable measurement and accreditation by the MRC.

56. I also have reviewed the [redacted]

[67] [redacted]

57. Compounding the methodological concerns is the extreme secrecy with which Cablevision has historically shrouded this STB data, which raises the possibility of hidden biases in the data and the release of selective and potentially misleading results.[68] (With the Nielsen system, everything is available to all subscribers.) It was not possible for me to validate this STB data in the course of my examination based on a small subset of outputs produced from the system and limited information about the system; it generally takes the MRC auditors several years to do so.

58. These inherent reliability problems potentially are compounded by Cablevision's processing of the data. [redacted]

[68] Cablevision has refused to share its data, or disclose its procedures for processing the data, with neutral associations of research professionals who wished to examine it, such as the Council for Research Excellence, even when offered Non-Disclosure Agreements. It has recently refused to work with the MRC to develop best practices for processing STB data, even though many other stakeholders in the industry (including other MVPDs) have done so. Its data has not been vetted by any third party, and is not accredited by the Media Rating Council (as are Nielsen and virtually all research services that are used as "currency" in the television industry). Note: In 2012 the MRC announced that it had been working with "a very large group of media industry stakeholders, including NCC Media, Multi-Channel Video Programming Distributors, data processing and measurement services as well as advertisers, agencies, and general media organizations to develop guidelines intended to foster greater consistency in collecting, accumulating and processing multi-channel digital video tuning data, otherwise often referred to as Set-Top-Box (STB) or Return-Path data." *See* Media Rating Council Inc., *Multi-Channel Digital Video Data Capture, Accumulation and Processing Guidelines* (June 1, 2012), http://mediaratingcouncil.org/stb guidelines.htm. [redacted] *See* [redacted]

[69] [redacted]

[redacted]

59. In summary, unvetted "black box" data is simply not accepted in the world of professional television research. I urge that its accuracy and the conclusions and analyses put forward by Mr. Egan and Mr. Orszag based on this data be viewed with strong skepticism here, at least until Cablevision is willing to submit its secret procedures to generally accepted third-party verification (*e.g.* the MRC). Until this is done, it cannot, in my opinion, be viewed as reliable in this case.

(11) Problems with Set-top Box Reach Analysis

60. In addition to inherent problems with the reliability of the STB data, a "reach" analysis along the lines of what Mr. Egan has presented in the context of this litigation is not a particularly useful measure of the popularity of a channel.[71] Household reach (or "cumulative households") is the percentage of unique households that tuned to a given channel for a specified minimum number of minutes during a particular period of time. For example, if the minimum number of minutes is set at one minute, and the time span is one month, then reach would reflect the number of unique households that tuned to the channel for at least one minute during that month. Reach can vary widely depending on the parameters set. Accumulating reach over a very long period of time (*e.g.* a year, [redacted]

[70] For example, if a STB cannot adequately detect when the STB remains on but the set is turned off, then a network that people typically watch right before bedtime may get false credit for tuning late into the night or even all night long. [redacted]

[71] Egan Decl. §V.B.2. ¶¶93-95.

[redacted]) is virtually meaningless. If the period is long enough, and the bar set low enough, every channel is most likely tuned to at some point.

(a) Impact of Channel Position and Promotion

61. In addition, simply being positioned next to popular channels can drive up reach due to "drive-by tuning," and in fact WE tv appears to have benefited from exactly that phenomenon due to its preferential channel placement. Cablevision carries WE tv on Channel 42, in the midst of a high traffic channel neighborhood that includes some of the [redacted] networks on cable (TNT, USA, TBS) and also near several [redacted] women's oriented networks (Lifetime, Bravo).[72] This high-traffic neighborhood gave WE tv excellent exposure to potential women viewers. Despite this advantage, [redacted]

[72] *See Islip/Woodbury April 2015 Channel Lineup*, Optimum, https://www.optimum.net/cdn/static.tvlistings.optimum.net/ool/static/prod/documents/channel-listings/april2015/2363_CLU_LIW_p5-IslipWoodbury-0415.pdf (accessed May 29, 2015) ; *See also* [redacted]

[73] *See* GSN Exh. 152.

[74] *Id.*

[75] *Id.* A similar relationship is seen in STB data provided for a sample week in November 2009, provided by Cablevision during the discovery process and cited in my Direct Testimony.

Cablevision Set-Top Box Tuning Data:
Cumulative Households by Neighborhood[76]

(January-December 2010)

For comparison purposes,

Rule 402

[76]

[77] *See also*

[78] CV-GSN 0434077, GSN Exh. 284.

62. Cablevision documents indicate that its executives were well aware of the importance of channel position. In June 2011, WE tv executives appear to have been concerned that set-top box data from Comcast failed to reflect the potential of WE tv since WE tv had bad channel placement in certain large Comcast markets.[79] [redacted][80] Indeed, [redacted][82]

63. A second advantage enjoyed by WE tv and Wedding Central was the heavy promotion given them by Cablevision. According to documents produced by Cablevision,

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[79] *See* [redacted]

[80] [redacted]

[81] [redacted]

[82] *See* [redacted]

Rule 402

Whereas Cablevision was able to give its affiliated networks substantial promotion, it appears to have offered very little, if any, to GSN. It is my understanding that Cablevision has not conducted any significant promotion of GSN in recent years, notwithstanding the fact that other distributors have done so.[89] Cablevision even had available to it local commercial spots on GSN itself.

[90] In

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[83]

[84]

[85]

[86]

[87]

[88]

[89] *See*

[90] *See*

contrast, GSN could presumably not buy local ad spots from Cablevision to insert in WE tv's programming feed. As noted above, [redacted]

64. Experienced researchers always evaluate ratings data in context. In this case Cablevision's own data demonstrates that [redacted]

65. Another factor that Cablevision was able to use to advantage its own channels was the ability to "force-tune" set top boxes, so that, when the box was turned on, it automatically defaulted to a designated channel. [redacted] Cablevision's affiliated networks also had access directly to this data.[92] In my experience, these factors likely had a significant impact on GSN viewing within Cablevision's footprint. Based on this data, it is reasonable to assume that had GSN been given channel placement and marketing comparable to that of WE tv, it would have performed at least as well as the Cablevision-owned network, and possibly better.

[redacted]

[91] *See* [redacted]

[92] *See* [redacted]

(b) Amount of Tuning

66. In any event, in a carriage evaluation, cumulative households is potentially a less useful metric than quantity of tuning. The latter reflects loyalty, or "passion," an important factor for MVPDs in carriage decisions. In fact this is in some ways as important as the size of its audience. Loyalty is a proxy for satisfied customers. It is often why subscribers subscribe in the first place to be able to watch the channels they passionately like. Keeping subscribers satisfied is paramount for any MVPD, in a world where telephone company video providers and satellite providers are aggressively trying to woo customers away. Cablevision's own documents [redacted][95]

67. [redacted]

[93] *See* [redacted]

[94] [redacted]

[95] As will be discussed later, [redacted]

Cablevision Set-Top Box Tuning Data: Week of November 2, 2009[96]

	Cumulative Households	Hours Tuned	Hours/ Household
[redacted]	[redacted]	[redacted]	[redacted]

[redacted][97]

Cablevision Set-Top Box Tuning Data: January-December 2010[98]

	Cumulative Households	Hours Tuned	Hours/ Household
[redacted]	[redacted]	[redacted]	[redacted]

69. [redacted]

70. Finally, it is worth noting that Cablevision seems to have been somewhat selective in its citation of STB data relevant to GSN. Mr. Orszag [redacted]

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[96] [redacted]

[97] [redacted]

[98] [redacted]

[99] [redacted]

[100] *See* [redacted]

[redacted]

[redacted]

[101] [redacted] *see also* [redacted]

[102] [redacted]

Cumulative Households (Rank)[103]						
	Nov. 2009	Jan. 2010 Dec. 2010	Feb. June 2010	Feb June 2010	June 2010	August 2010
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

71. Despite Cablevision's claimed reliance on STB cumulative audience figures in its GSN decision, the MVPD gave and continues to give wide distribution to at least 45 networks which had [redacted] figures than GSN in 2010.[104] Among these networks are IFC and Sundance, which, like WE tv, are owned by Cablevision. Likewise, Cablevision carried Wedding Central broadly notwithstanding that it had [redacted] figures in 2010.

(12) Problems With Set-top Box Duplication Analysis

72. [redacted]

[103] *See* [redacted]

[104] CV-GSN 0434295, GSN Exh. 286 (2010 STB report), compared to the current Cablevision Woodbury lineup, *Islip/Woodbury April 2015 Channel Lineup, supra* . [redacted]

[redacted]

73. [redacted]

74. [redacted]

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105 [redacted]

106 [redacted]

[107]

75. There are also other methodological problems with Mr. Orszag's analyses.

C. Viewer Attitudes Toward GSN and WE tv

76. Viewer satisfaction with networks is another key measure that, in my experience, is considered by distributors in carriage decisions since it reflects subscribers' presumed willingness to remain subscribers and potentially buy enhanced services. [108] One dramatic indication of Cablevision subscriber attitudes toward GSN is found in subscriber reaction in February 2011 when Cablevision executed its plan to relegate GSN to a limited distribution paid sports tier, depriving many subscribers of the network they had paid to receive.

[107]

[108] *See*

[109]

Rule 802

It was suggested at the time that Cablevision might

77. In addition, virtually all distributors conduct private surveys measuring subscriber satisfaction.[111] I requested and was provided with the best known and most widely used impartial, third-party survey of cable subscriber satisfaction, which is conducted annually by the Beta Research Corp. The Beta Basic Cable Subscriber Study has been used throughout the industry for many years as an impartial "benchmark" on viewer attitudes.[112]

78. Both GSN and WE tv are included in the Beta Basic Cable Subscriber Study, which gives us a good picture of how much viewers value these two networks. Among the five principal measures provided by Beta,

[110] *See*

[111]

[112] I was involved in carriage negotiations with MVPDs (from the network side) for nearly twenty years. In those negotiations, MVPDs sometimes dismissed the value of impartial, third-party data (including Nielsen and Beta Research) that a network might bring to the table. This is a negotiating tactic. I strongly suggest considering what MVPDs do, not what they say, when it comes to judging what they consider important in carriage decisions. Networks that do well in Beta are almost always given carriage, irrespective of other factors. Examples are and which historically ranked higher in Beta "liking" scores than in ratings, and are relatively expensive, but based on my experience in the industry are considered "must carrys" because of intense viewer interest.

Beta Viewer Satisfaction Measures: 2008-2010 Average[113]
(Among viewers of each network)

[redacted]

79. A Cablevision expert witness has said [redacted][114] however the Beta Basic Cable Subscriber Study has been used throughout the industry for many years as an impartial "benchmark" on viewer attitudes, and [redacted]

80. Beta also includes reported viewing over the past 12 months, and GSN and WE tv [redacted]

[113] *November 2010 Beta Research Cable Subscriber Study - Evaluation of Basic Cable Networks*. According to Beta the difference in perceived value is statistically significant; the differences in Average Satisfaction, Very Satisfied, High Program Quality and Importance to Enjoyment of Cable are not. The margin of error for the last three are ±5%. Beta notes that it changed its methodology in 2010 (from a telephone survey to an online survey) and that for some measures scores were significantly lower or higher across the board; however "rankings of networks were generally similar." *Id.* at 1. It should also be noted that Beta scores frequently "bounce" from year to year; therefore, unless there have been significant programming changes, a multi-year average is in my opinion most appropriate. Year-by-year detail was cited in my March 2013 Direct Testimony.

[114] Egan Expert Report § VI.D.4 ¶¶ 214-221, Dec. 14, 2012; Egan Supp. Expert Report ¶ 42, Dec. 19, 2014. *See also* Brooks Direct Test. § III.C., ¶ 69, n.87, Mar. 12, 2013.

[115] *See e.g.* [redacted]

Beta: Viewed Network in Last 12 Months (± 3%)[116]

2010	2009	2008	3 Yr Avg
[redacted]	[redacted]	[redacted]	[redacted]

81. I also looked at a separate Beta Brand Identity Study in which respondents indicate how well they believe various adjectives describe a network. [redacted] The data is contained in Appendix No. 1.

82. Finally, I also examined attitudinal data provided by the widely used MRI service to compare the audiences of GSN and WE tv. The [redacted] *See* Appendix no. 3.

D. Target Audience

83. One element suggested in FCC guidelines for determining network similarity is "target audience." In my experience the target audience of a network is best defined by the demographic orientation of the programming it purchases and airs, and the audience that is attracted to that programming. Here, it is clear that [redacted] Game shows, wedding shows, dating shows, and family dynamic shows all appeal primarily to women.

84. I have reviewed Mr. Egan's "look and feel" evaluation of the networks in this case, but I do not find it credible. While it might be appropriate to rely on subjective

[116] Beta Research Corporation, *November 2010 Beta Research Cable Subscriber Study - Evaluation of Basic Cable Networks* (2010).

assessments of target audience for networks that do not receive ratings sufficient to measure viewing, there is no need to rely on subjective and impressionistic judgments where independent, quantitative measures of audience exist. Nor are slogans and promotional verbiage necessarily a valid way to judge the "target" of a network. To cite one example, Lifetime Television is the iconic women's network and for many years, it used the slogan "television for women." It dropped that slogan in 2005 in favor of the tagline "Connect. Play. Share." Does this mean that it no longer targeted women, because the tagline no longer explicitly said so? Of course not. Lifetime continued to make programming and other decisions with the goal of attracting women viewers.[117] WE tv documents reflect the belief that its "look cannot alienate men," but it too was clearly focused on building its women audience.[118]

85. Similarly, the fact that GSN schedules a type of programming that appeals predominantly to women, attracts a predominantly ([redacted]) female audience, and sells women demographics to advertisers and has done so for its entire history in itself provides sufficient evidence that it "targets" the women's audience.[119] Consistent with this conclusion, a volume of GSN's programming and research documents reflects that it was in fact making programming choices designed to appeal to women.[120]

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[117] I was the head of research for Lifetime during this period, and our research efforts were focused exclusively on women.

[118] [redacted]

[119] While these objective criteria provide sufficient evidence that GSN targets a women's audience, it is clear [redacted] *See* [redacted] *See* [redacted]

[120] *See, e.g.*, [redacted]

86. While these are the key factors and themselves sufficient in evaluating whether GSN "targets" a women's audience, it is worth noting that GSN's performance with women is consistent with the widespread understanding in the industry that game shows are generally targeted at women. During the 1960s, '70s and '80s, game shows were mainstays of the broadcast network daytime lineups, a female-oriented daypart.[121] During the 1990s the Lifetime cable network ("Television for Women"), as well as USA Network, carried daytime blocks of game shows.[122] I was in charge of testing game shows for NBC in the 1980s and for USA Network in the 1990s, and our target audience was always women. I supervised hundreds of focus groups, dial tests, and surveys during that period and our game show studies focused on women. This is because our goal was to strengthen the appeal of such shows among women audiences. Game show producers often cast couples, relatives or even whole families as contestants and/or featured female-oriented prizes, such as household goods,

[redacted]

[121] David Schwartz, Steve Ryan, & Fred Wostbrock, *The Encyclopedia of TV Game Shows* 549-563 (1987),; second edition (1995), xx-xxv.

[122] I worked at both of these networks and personally analyzed these schedules.

because they perceived that those elements would appeal to women. The notion that game shows cater primarily to women also is noted in the literature.[123]

87. To quantify the degree to which quiz shows appeal to women, I requested a tabulation of the Nielsen demographic ratings for broadcast network or syndicated programs coded by Nielsen as "quiz-giveaway" or "quiz-panel" during 2010. Nine such programs were identified, all of which skewed female. [redacted][124]

Broadcast Network and Syndicated Quiz Shows (2010)[125]

Women
(% of adults)

[redacted]

[123] Edd Applegate, *Journalism in the United States: Concepts and Issues* 90 (2011) ("This is certainly one reason for there being so many programs that cater to women. During the day, for instance, networks broadcast network- or syndicate-created or -packaged game shows, talk shows, and soap operas"). Anne Cooper-Chenn, *Games in the Global Village: A 50-Nation Study of Entertainment Television* 18 (1994) ("Game Shows (mind sports) function for female viewers in much the same way that TV athletic contests function for males"). Morris B. Holbrook, *Daytime Television Game Shows and the Celebration of Merchandise: The Price Is Right* 84 (1993) ("The target audience for the audience on daytime soaps and game shows is assumed to consist largely of women").

[124] According to another source, the industry reference book *TV Dimensions*, the adult audience for daytime TV game shows averages 67% female, and for syndicated early fringe game shows, 60% female. 281 (2005). The percentages were the same in the edition published in 2000 (264), an era from which GSN draws much of its daytime schedule.

[125] [redacted]

E. Program Genres on GSN and WE tv

88. The subject of program genres is complex, and often misunderstood. I have had an unusual amount of experience analyzing and categorizing television programming, both as part of my employment at several networks and, beginning in 1979, with the publication of my book *The Complete Directory to Prime Time Network and Cable TV Shows*. This book is extensively used by the industry and by the public and is widely acknowledged as the leading resource of its type.[126] Over the past 36 years my co-author and I have been required to classify more than 6,500 series described in this book, and as a result we have had to develop an appropriate categorization schema that was understood and accepted by the industry and the public at large. The following comments are informed by this experience.

89. Although the genre descriptor "reality programming" was asserted as a key differentiator of WE tv and GSN programming in earlier Cablevision expert reports,[127] genre labels are not widely used as a decision metric in the television industry. Moreover, almost all genres overlap with other genres. For example, "science fiction" and "adventure" programming are closely related, as I learned while conducting research for the Sci-Fi Channel.[128] Comedies often include dramatic elements, and vice versa, leading to hybrid forms such as "dramedies." Further, some genre labels are less precise than others. For example, some long-established genres such as "situation comedy" and "sports" are relatively well defined, however "reality" is a recently invented label that has been applied to, and

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[126] Tim Brooks & Earle Marsh, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present* (1st Ed. 1979, 9th Ed. 2007). The book is now in its ninth edition, with more than 500,000 copies in print.

[127] Egan Expert Report §§ V.A.1 and V.A.2 ¶¶ 12-31, Dec. 14, 2012; Egan Supp. Expert Report ¶¶ 17-19, Dec. 19, 2014.

[128] Indeed, some of our test subjects affirmatively rejected "science fiction," but then embraced genre films such as *Star Wars* and *ET*, calling them simply "good movies."

overlaps with, a multitude of programming types. Unlike more well-established labels, it is not a distinct "genre" of programming, and is probably the least well-defined label in television. Significantly, the types of programming with which it overlaps include similarly unscripted game shows and dating shows, both staples of GSN.

90. The term "reality show" was rarely used by either the industry or the public before the year 2000, when the press adopted it to describe the breakout series *Survivor, Big Brother*, and others. Indeed, the vanguard of this new wave of programming was the quiz show *Who Wants to Be A Millionaire* in the late summer of 1999, which reminded networks of the value of audience participation (anyone could get on the show by calling in and taking some tests) and of showing ordinary people on the screen.[129] During the next few years, unscripted reality programs were closely intermixed on the prime time schedule with game shows (almost exclusively, unscripted) like *Greed, Twenty-One, The Weakest Link*, and *Elimidate*. Since that time, "reality" has been applied, inconsistently, to an extremely wide range of programming having little in common other than that the programs in some sense reflect "real life" and/or involve "real people."

91. Faced with this inconsistency, in *The Complete Directory* we found it necessary to qualify the term, when used at all, by the better understood program type to which it is attached, *e.g.* "Reality/Competition," "Romance/Reality," "Reality/Adventure," etc. "Reality" was rarely used alone used to describe a program.

92. Several other books also comment on the vagueness of the term "reality." *The Encyclopedia of TV* (1997), cited by Mr. Egan as an authority, begins its entry on reality programming by emphasizing that "Reality programming is an expansive television industry

[129] Brooks (9th ed.), supra, xx.

label," and that "the corpus of programs grouped under this generic rubric is admittedly varied." Later it adds that "'the real' in reality programming is a highly flexible concept."[130] The updated 2004 edition of the same publication is even more specific, calling Reality Television "a label that encompasses a wide range of nonfiction formats", including both "gamedocs" and "dating shows."[131] Similarly, *Media Programming: Strategies and Practices* (2009), which Mr. Egan cites, emphasizes that programs sometimes referred to as reality programming are in fact closely intertwined with other genres. Similar to my *Complete Directory*, it explains that by the turn of this century so-called reality shows "had resurfaced on a wave of game shows (*Who Wants to Be a Millionaire?*), which was soon overtaken by other types of reality programs (*Dancing with the Stars* and *American Idol*) and one more hit game show (*Deal or No Deal*)."[132] In early 2012, GSN began airing "Dancing with the Stars."

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93. The Emmy Awards apparently have reached a similar conclusion about the flexible nature of the term, "reality programming." In 2010 the primetime Emmy winner in the "reality-competition" category was *Top Chef*, a program whose format is nearly identical to that of GSN's *Beat the Chefs*.[133] In 2014 the Emmy Awards introduced still another definition, "structured" vs. "non-structured" reality. The "structured reality" winner was a

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[130] Beth Seaton, *Reality Programming*, The Museum of Broadcast Communications, http://www.museum.tv/eotv/realityprogr.htm. I am using here the website provided by Mr. Egan (Egan Decl. §IV.A. ¶13 fn 9), although I note that the entries found there seem to have been written in the 1990s and thus have marginal relevance to the present discussion.

[131] *Encyclopedia of Television* 1900 (Horace Newcomb ed. 2004).

[132] Susan Tyler Eastman & Douglas A. Ferguson, *Media Programming: Strategies and Practices* 6 (2009).

[133] *62nd Primetime Emmys Nominees and Winners, Outstanding Reality - Competition Program - 2010*, http://www.emmys.com/awards/nominees-winners/2010/reality-program.

Rule 402

competition-based show, *Shark Tank*.[134] Much GSN programming involves competition of some sort.

94. The public also appears to consider "game shows" and "reality shows" closely related. Citing various books and MSNBC among other sources, the Wikipedia entry for "Reality Television" has bluntly stated that "The [Reality] genre covers a wide range of television programming formats, from game show or quiz shows . . . to surveillance- or voyeurism-focused productions such as *Big Brother*."[135] Later it stated that "Modern game shows like *Weakest Link, Greed, Who Wants to Be a Millionaire?, American Gladiators, Dog Eat Dog* and *Deal or No Deal* also lie in a gray area...these factors, as well as these shows' rise in global popularity at the same time as the arrival of the reality craze, lead many people to group them under the reality TV umbrella as well as the traditional game show one." Similarly, it describes "Dating Shows" including *The Dating Game, Blind Date, Matchmaker, Room Raiders, Elimidate, Next* and *Parental Control* under reality television. Note that several of the specific shows cited (*The Dating Game, Deal or No Deal, Dog Eat Dog, Greed, Weakest Link, Who Wants to Be a Millionaire?*) are either running now or have run on GSN.

95. Perhaps the most glaring example of the vagueness of this "genre" comes from WE tv itself. Every network that subscribes to the Nielsen rating service is required to regularly submit its program schedule and to categorize each of the programs therein

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[134] *66th Primetime Emmys Nominees and Winners, Outstanding Structured Reality Program, 2014*, http://www.emmys.com/awards/nominees-winners/2014/reality-program-structured.

[135] Wikipedia, "Reality Television." *Available at* http://en.wikipedia.org/wiki/Reality television. Accessed 17 Dec. 2011. The exact wording of this and other websites changes constantly; however, the Wikipedia entry has consistently indicated that game shows and "reality shows" share many elements and have been closely intertwined in popularity.

[136] One of the category options provided in Nielsen's standard list is

96. Program genre can indeed be a useful point of differentiation when comparing networks with well-defined types of programming or programming types that clearly appeal to different audiences. (Although, even then, genre is not widely used as a decision metric within the industry.) However in this case, with a term as fuzzy and ill-defined as "reality," genre is not as persuasive as audience measurement data in establishing whether networks compete for audience and potentially other factors. More important, in my experience, is whether viewers find the programs on two networks to be By the excessive use of artificial, self-defined labels Cablevision obscures the fact that game shows as a class, both today and historically, have

[136]

[137]

[redacted]

[redacted][138]

IV. THREE TESTS ENUNCIATED BY THE U.S COURT OF APPEALS

97. I understand that the U.S. Court of Appeals for the D.C. Circuit in *Comcast v. FCC*, 717 F.3d 982 (D.C. Cir. 2013) articulated three specific evidentiary tests that may be relevant to a determination of program carriage discrimination.

(1) The court said that evidence that an MVPD made a carriage decision notwithstanding an "affirmative net benefit" to the MVPD of carrying the unaffiliated network broadly is evidence in support of a finding of discrimination.

(2) Second, the court said that, even in the absence of evidence of an "affirmative net benefit" to an MVPD of carrying an unaffiliated network broadly, evidence of discrimination can be found when the incremental losses incurred by the MVPD from carrying the unaffiliated network broadly would be the same as, or less than, the incremental losses the MVPD incurred from carrying its similarly situated affiliated networks broadly.

(3) Third, the court said that evidence that the carriage decision was motivated by "some deeper discriminatory purpose" rather than by an "otherwise valid business consideration" is evidence of discrimination.

98. I therefore have evaluated the evidence that broad carriage of GSN would provide an affirmative benefit (or relative value) to Cablevision. In my experience, the key

[138] Some of Mr. Egan's statements regarding game shows simply do not make sense. He makes the unsupported assertion that "virtually all of the game show programs on GSN will typically be of interest to *either* men or women" (Egan Decl. §IV.B.1. ¶31). [redacted] Later in the same paragraph he retreats from gender characterization, saying that game shows appeal to those with an "interest in game shows," which is circular logic.

factors that MVPDs making carriage decisions consider (besides price[139]) are audience size and loyalty.

99. In this case, it is clear that GSN performed well in terms of audience size and loyalty, and so it is reasonable to infer that broad carriage of GSN would have been valuable to Cablevision's distribution business:

100. On a national total audience basis [redacted]

[139] Per-subscriber fees and other considerations often are also considerations with respect to carriage decisions but only after an MVPD has determined that it wishes to carry a network based on audience size and loyalty. Many networks with a minimal carriage fee, or no carriage fee at all, nevertheless struggle to get distribution. (*See* SNL Kagan, *Economics of Basic Cable Networks* 72-76 (2013), for a ranking of networks by carriage fee.) Fees are also negotiable. It is my understanding, from SNL Kagan and other sources, that [redacted] however I have not sought to address in depth the impact of carriage fees in this case (either direct or absorbed in the case of the owned networks) since I understand that they will be addressed by another GSN expert witness. For purposes of this report, [redacted]

2010 Total Day Ratings

	GSN	WE
National Ratings[140]		
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]		
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]

101. Cablevision's own data demonstrate that GSN in fact performed [redacted] relative to WE tv and Wedding Central considering its highly disadvantageous placement on the dial and limited marketing. Even looking to Cablevision's own set-top box data, GSN is a much stronger performer on Cablevision systems than Cablevision asserts. [redacted] Furthermore, WE tv benefited from being placed near to some [redacted] female-oriented networks on cable, while GSN was surrounded by premium movie networks with which it shared little in common.

102. In light of GSN's strong performance on non-Cablevision New York cable systems, it is reasonable to infer that had GSN been given channel placement and marketing comparable to that of WE tv, it would have [redacted] the Cablevision-owned WE tv on Cablevision's own systems, thus providing [redacted] to Cablevision than did WE tv. It almost certainly would have outperformed Wedding Central.

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140 [redacted]

141 [redacted]

103. Another important factor, which Cablevision researchers pointed out to Cablevision management, is the loyalty of GSN viewers; [redacted]. This is a measure of subscriber satisfaction that MVPDs typically find important. Paragraphs 66 - 69 discuss at great length various types of evidence that GSN attracted a very loyal audience. [redacted]

104. When all of these factors are taken into consideration it is clear that GSN and WE tv [redacted] In addition, GSN was far more valuable and advantageous financially to Cablevision than the ill-fated Wedding Central, whose audiences were apparently very small.

105. There also is the obvious fact that most other MVPDs across the country, including Cablevision's direct competitors in New York, carry GSN broadly, indicating that other MVPDs find that broad carriage of GSN provides a positive value proposition for them. Cablevision relegated GSN to a narrowly penetrated and ill-suited tier notwithstanding the clear benefits to Cablevision of broadly carrying a network with GSN's audience appeal and popularity.

106. The court's third test asks if it can be reasonably inferred that Cablevision's move to severely limit carriage of GSN was motivated by a deeper discriminatory purpose,

rather than by an otherwise valid business consideration. I will look at this from several perspectives, including the history of Cablevision's treatment of GSN, whether GSN competes with WE tv for audience, and whether the programming on the two networks is becoming more or less similar in appeal over time.

A. A History of Discrimination

107. First, I think it is important to understand that the 2011 decision to severely limit distribution of GSN was not taken in isolation. It represented the culmination of a long history of unfavorable treatment of the independently-owned GSN relative to Cablevision's own WE tv and Wedding Central.[142]

108. As early as 2005, Cablevision positioned GSN on higher channel numbers, and surrounded by generally lower-rated channels such as C-Span, public access and Fit-TV. In some geographic areas nearby channels contained lower-rated women's networks such as SoapNet and Food Network, but often they were networks appealing to very different audiences, such as Speed Channel (racing) and YES Network (baseball). The most common channel placements for GSN in 2005 were channels 67 (Long Island, Westchester) and 76 (New York City). WE tv, on the other hand, was in prime territory on channel 42 throughout the Cablevision systems, near top-rated TNT, USA and TBS, as well as top female-oriented networks Bravo and Lifetime.[143]

109. By 2010 Cablevision had moved GSN to channel 88, surrounded by premium movie channels (for which subscribers had to pay extra), while WE tv remained in the

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[142] [redacted] *See* [redacted]

[143] *See* [redacted]

desirable channel 42 neighborhood, surrounded by high rated general entertainment and women's channels. In sharp contrast, on Time Warner Cable's Manhattan system GSN and WE tv are located close together, with Lifetime, Oxygen and OWN slotted nearby.[144]

110. Then, by the end of 2010, Cablevision made the decision to severely limit distribution of GSN by relegating the network to its narrowly penetrated sports tier. There was no significant marketing of this move (other than a notice to subscribers), and Cablevision

111. One possible incentive for Cablevision's of GSN relative to WE tv is that GSN is a significant competitor to WE tv and Wedding Central, including for audience and advertising.[145] This has previously been discussed.

Rule 402

This recent data shows that Cablevision continues to engage in discriminatory conduct towards GSN.

[144] *Channel Lineup Finder*, Time Warner Cable, http://www.timewarnercable.com/en/tv/channels-lineup.html, (ollow "See What's On Now with TV Listings" hyperlink; last visited May 29, 2015), which shows all of these networks in the channel 170-177 range.

[145] There also is

[146] *See* § IV.C, *infra*.

B. Duplication of Audience Between GSN and WE tv

Rule 402

112. [redacted]

113. [redacted]

114. Taken together, all of the foregoing data indicates that GSN and WE tv are indeed competing for audience.

C. Broadening of Programming

Rule 402

115. Changes in programming are bringing GSN and WE tv even closer together, as we predicted might happen. This serves as an additional reason why Cablevision would wish to avoid competition from GSN.

(1) [redacted][148]

[147] Egan Expert Report § V.E.1 ¶¶ 89-93, Dec. 14, 2012; Egan Supp. Expert Report ¶ 71, Dec. 19, 2014.

[148] *See* supra,§ III.D.

Rule 402

(2) GSN already competes with WE tv [redacted] but a concern for Cablevision going forward could be that GSN has been pursuing an audience that is [redacted].[149] A major success in this regard has been the program *Skin Wars*, a body painting competition hosted by Rebecca Romijn which premiered in the summer of 2014. It has attracted a strong audience overall, and [redacted], many of whom view on a delayed basis on DVRs. [redacted]

Skin Wars vs. WE tv Prime Time Average[151]

[redacted]

(3) GSN has recently introduced several other non-quiz formats as well, demonstrating the diversity of its program development.

- *It Takes a Church* (2014), hosted by singer Natalie Grant, is an unusual dating show in which an entire congregation and its pastor help find a appropriate suitor for a single member of the church. It has been renewed for a second season.

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[149] In my experience MVPDs often take into account a network's plans for future program development, particularly if enabled by adequate financing and competent management, in making carriage decisions. *See* [redacted] *See also* [redacted]

[150] See [redacted]

[151] [redacted]

Rule 402

- *Family Trade* (2013) follows the relationships and activities of a family-run car dealership in Middlebury, Vermont, which uses the barter system to sell automobiles, often taking in unusual items such as pigs or quantities of maple syrup.

- *Beat the Chefs* (2012) is a cooking competition in which three home cooks prepare their specialty in competition with three professional chefs, who attempt to prepare an upscale restaurant version of the same dish. A panel of food critics chooses the winner.

Rule 402

(4) GSN has also introduced other successful series that have broad appeal.

- *The American Bible Challenge*, a lively and humorous competition based on knowledge of the Bible, and hosted by Jeff Foxworthy, has been very successful. Its premiere on August 21, 2012, drew 1.7 million viewers, breaking all previous GSN viewing records.[152] In 2014 it completed its third season, averaging a [redacted] HH rating.[153] It was also nominated for two daytime Emmy Awards.

- *The Chase*, which premiered in 2013, is hosted by Brooke Burns and features three contests matching wits with an information genius known as "The Chaser." It averaged a [redacted] rating in its third season, and has also been nominated for an Emmy Award.[154]

Rule 402

As pointed out in my previous testimony,[155] even programs that might casually be thought of as classic game shows often have strong elements of family (and other) relationships, much like programming on WE tv. Recent evidence of this is the new production of *Family Feud*, starring comedian Steve Harvey, which has been bought by BET,

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[152] Sara Bibel, *GSN's "The American Bible Challenge" Debuts as the Network's Number 1 Program of All Time Delivering 2.3 Million Total Viewers*, Zap2it, (Aug. 24, 2012), http://tvbythenumbers.zap2it.com/2012/08/24/gsns-the-american-bible-challenge-debuts-as-the-networks-number-1-program-of-all-time-delivering-2-3-million-total-viewers/146227/

[153] [redacted]

[154] [redacted] *The National Academy of Television Arts & Sciences Announces the 41st Annual Daytime Emmy Award Nominations* (May 1, 2014), http://emmyonline.org/day 41st nominations.

[155] Brooks Direct Test., § III.A ¶¶ 7-8.

Rule 402

TV Land and Centric to run in a sitcom block concurrently with its run on GSN (it also airs in syndication).[156]

116. Meanwhile WE tv has remained female-oriented [redacted]

(1) WE tv continues to feature dating shows (*Mystery Millionaire, Match Made in Heaven*) which are similar in concept to GSN's *It Takes a Church* and *Baggage*.

(2) WE tv has introduced its first original scripted drama, *The Divide*, which features a strong female lead and which has an audience that is [redacted] female.[157] Like GSN, the network appears to be broadening its programming mix while remaining oriented toward women.

117. In summary, Cablevision has reason to be concerned that whatever the relationship of GSN and WE tv programming in the past, as both networks broaden their palettes they will inevitably draw even closer to each other in appeal.

D. Effect of Being Independently Owned

118. GSN is only one of several women-oriented networks that compete with WE tv and (formerly) Wedding Central, but Cablevision may have targeted GSN specifically because it is independently owned, while targeting other networks would raise the risk of retaliation from multi-network providers. Most networks competing with WE tv are owned by a large multi-network providers such as NBC Universal (Bravo, Oxygen), A&E Networks (Lifetime) and Discovery Communications (OWN). These conglomerates can leverage their large suites of networks, including some of the most powerful networks on cable, to ensure that their

[156] GSNN Admin, *Steve Harvey's "Family Feud" to BET, TV Land and Centric*, GameShowNetwork News, (Sep. 18, 2014, 7:25 PM), http://gameshownetworknews.blogspot.com/2014/09/steve-harveys-family-feud-to-bet-tv.html.

[157] [redacted]

lesser channels are also given favorable treatment and protected against being dropped or tiered. In the industry this is called "bundling." [redacted] [158] Cablevision is in fact locked in a lawsuit with Viacom over this very practice, which has been widely reported in the trade press.[159]

119. GSN, however, is an independently owned network and not protected by a large multi-network supplier. [redacted]

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[158] [redacted]

[159] *See, e.g.*,Amy Chozick & Brian Stelter, *Cablevision Sues Viacom in Battle Over Bundling of Channels*, Media Decoder (Feb. 26, 2013), http://mediadecoder.blogs.nytimes.com/2013/02/26/cablevision-sues-viacom-over-bundling-of-little-watched-channels/? php=true& type=blogs& r=0.

[160] *See* [redacted]

[161] SNL Kagan, *Economics of Basic Cable Networks* 78 (2013).

120. All of the above motivations, plus a long history of adverse treatment of GSN and then using the audience suppression resulting from that treatment as a rationale for further discrimination--speak to a "deeper discriminatory purpose" rather than a valid business decision based on the relative merits of GSN, WE tv, and Wedding Central.

121. Based on all of the data examined, assuming they had comparable distribution GSN and WE tv should at a minimum be able to attract comparable audiences, provide comparable audience satisfaction, and generate comparable sales revenue. [redacted] However, with respect to Cablevision this is not currently the case.

V. HARM DONE

122. Based on my analysis and my experience in the industry, I believe that Cablevision has significantly harmed GSN by repositioning it from wide distribution on its New York systems to a little-seen, extra-cost sports tier, and, in my experience, these harms will become even more material over time. Extra-cost tiers are considered the "Siberia" of cable. Uptake is generally low; in the case of Cablevision the tier in question appears to reach [redacted] versus the [redacted] that GSN reached previously via basic distribution.[162] [redacted][163] Here, there was a nearly [redacted]. Further, networks do not want to be perceived by

[162] [redacted]

[163] [redacted]

others in the cable ecosystem, including cable and satellite operators, advertisers, and the press, as a "tiered" network. Being perceived as a "basic network" (versus a "tiered" network) is important to the long-term distribution strategies of most networks. [redacted].[164] Likewise, networks that are viewed as "tiered" rather than "basic" are not favored by advertisers.

123. In addition, positioning on a tier reduces or eliminates the opportunity for a network to benefit from casual viewers (or "surfers"). This is an important means by which networks gain viewers, by attracting viewers who happen upon the network or who tune to it for a special event or premiere. The network can then attempt to convert them to more regular viewership by that programming and/or by promotional advertisements for other shows. It is almost impossible for a network to attract new viewers in this manner on a limited-distribution extra-cost tier.

124. The Cablevision downgrade is particularly harmful because of the wholly inappropriate nature of the "Sports & Entertainment Pak" tier on which it was placed. All of the other networks on the tier are sports and/or male oriented. They include major league baseball, hockey, horse racing, golf, basketball, soccer, and wrestling channels. This will virtually guarantee that those few subscribers who buy this tier will be males looking for

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164 [redacted] *see also* [redacted]

additional sports programming.[165] The full list of channels with which GSN is now placed is as follows:

Networks on Cablevision's iO Sports & Entertainment Pak[166]

GSN
ESPN Classic (reruns)
ESPNU (college sports)
NFL Network
NFL Redzone
ESPN Goal Line/ESPN Buzzer Beater (college sports)
MLB Network
NHL Network
TVG Network (horseracing)
Fuel TV (extreme sports)
FCS Pacific (college sports)
FCS Central (college sports)
FCS Atlantic (college sports)
Outdoor Channel
NBC Sports Network
Versus (now NBC Sports Network)
Gol TV (soccer)
The Golf Channel
MavTV ("covers all the hot-button topics guys care about")
Big Ten Network (college sports)
NBA TV
Fox Soccer Plus
Sportsman Channel
Neo Cricket
Fight Now TV (wrestling, mixed martial arts, boxing)
World Fishing Network

125. In the New York market the effect of the GSN downgrade has been dramatic, with declines of about [redacted] in households tuned and [redacted] in GSN's principal demographics. This is only part of the story, however. Simultaneously, [redacted]

[165] MVPDs sometimes assert that they want to put a popular channel on a tier in order to drive viewers to that tier. However this only works if the popular channel so placed is appropriate to the tier; for example placing ESPN in the "Sports & Entertainment Pak" might drive subscribership to the tier. Placing GSN amid channels with which it has nothing in common will not accomplish that goal.

[166] "Optimum Sports & Entertainment Pak." *Accessed at* http://www.optimum.com/digital-cable-tv/sports/sports-pak.jsp, 22 Jan. 2013.

[redacted] In other words, Cablevision appears to have benefited its own WE tv network by removing a competitor from wide availability on its lineup.

126. In 2010 Cablevision's New York systems accounted for approximately [redacted] GSN homes. The repositioning will obviously have a negative impact on the audience GSN has to sell to national advertisers. To the extent that revenue is lost, it is likely to impact the ability of the network to develop and market programming. [redacted].[167] Of course, GSN's viewership decreased by [redacted] as a result of the retiering. In my experience, the first two areas that are cut when revenue is soft are marketing and program development.

127. Finally, based on my experience the impact may be greater than simply the number of viewers lost. New York is the media capital of the U.S., the home base of many of the top advertising agencies and buying groups. For example, [redacted][168] Distribution in New York and its suburbs (where many executives live) is considered in the industry to be important for a network to remain familiar

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[167] *See* [redacted]

[168] [redacted]

to and front-of-mind among those making buying decisions.[169] Accordingly, GSN's being effectively "blacked out" in a large portion of New York homes is likely to have a disproportionate effect on GSN's national viability as an advertising medium.

128. Following is testimony from several companies regarding the importance of distribution in the New York market.

(1) [redacted]

Rule 802

(2) Several entities submitting filings to the FCC regarding the proposed merger of Comcast and Time Warner have emphasized the impact that Comcast's new power in the New York market would have. The American Cable Association stated that "Comcast will have a greater degree of control in all aspects of the spot cable advertising market," citing its power in the New York DMA, "the largest media market in the country."[171] Back9Network called New York "critically important," and said that New York and Los Angeles were "markets which are disproportionately important to the ability of a cable network to attract advertisers and compete for programming rights."[172] Tennis Channel called New York and Los Angeles "the two most important markets for any cable channel seeking to attract advertisers and secure

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[169] [redacted] *See* [redacted]

[170] [redacted]

[171] Comments of The American Cable Association, MB Docket No. 14-57 (August 25, 2014), at 30, 37.

[172] Back9Network, Inc., Petition to Impose Conditions on Assignment and Transfer of Licenses, MB Docket No. 14-57 (August 25, 2014), at 1.

Rule 802

licenses for marquee content."[173] It then added, " As even Comcast's own economists have acknowledged, 'certain DMAs, such as New York, are more valuable to content providers and/or advertisers than other areas.' As a practical matter, New York and Los Angeles are home to studios, critics, and other 'tastemakers,' as well as important elements of the advertising community."[174]

(3) [redacted]

[173] Comments of The Tennis Channel, Inc., MB Docket No. 14-57 (August 25, 2014), at i.

[174] *Id.* at 16. See also [redacted]

[175] [redacted]

I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing is true and correct. Executed on June 2, 2015.

TIMOTHY BROOKS

Appendix #1

Beta issues a Brand Identity Study in which respondents indicate how well they believe various adjectives describe each network. This provides another impartial measure of how enthusiastic viewers are about a network. [redacted]

Beta Viewer Network Descriptors: 2009-2011[176]
(Among viewers of each network; very much describes network)

[176] [redacted]

Appendix #2

Wedding Central Programs
(Audience composition when these series aired on WE)[177]

	Adults (% of P2+)	Women (% of adults)
[redacted]	[redacted]	[redacted]

[177] [redacted]

Appendix #3

MRI Attitudinal Data

The following data is read as follows. "Vert%" indicates the percent of each network's viewers who agree with the statement. "Index" indicates how much this score is above (or below) the same score for all respondents. Thus for the first statement ("people ask me for advice"), [redacted] indicates that GSN viewers are [redacted] above average, and [redacted] indicates that WE tv viewers are [redacted] above average on this measure.

[redacted]

2010 MRI Attitudinal Data[178]

		All	GSN	WE tv
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[178] [redacted]

	All	GSN	WE tv
Index	100	111	114
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]

Appendix #4

WE tv Assigned Program Categories
(Programs coded Reality by Egan and also coded by WE for Nielsen)

Program	WE: Nielsen Summary Code	WE: Nielsen Detail Type Code	Egan
[redacted]	[redacted]	[redacted]	[redacted]

Appendix 5: CURRICULUM VITAE

TIM BROOKS
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Greenwich, CT 06831
203-531-1842
tim@timbrooks.net
www.timbrooks.net

Consultant, former television industry executive and award-winning author specializing in media research and the history of television and other media.

Professional Experience

Independent Consultant **2008 -**

- Engaged by a variety of private-sector firms and industry groups to advise them on media research-related matters.

Lifetime Entertainment Services **2000 - 2007**

Executive Vice President, Research
Senior Vice President, Research

- Member of senior management team, reporting to President/CEO. Headed research department, worked closely with programming, advertising sales, marketing, affiliate relations, finance, digital, corporate communications and other departments on current operations and new ventures. Lifetime became the number one rated cable network during this period.
- Participated in launch and distribution of Lifetime Real Women and relaunch of Lifetime Movie Network; launch of *Lifetime Magazine;* relaunch of successful women's internet site.

USA Networks **1991 - 1999**

Senior Vice President, Research
Vice President, Research

- Member of senior management team, reporting to President/CEO. Headed research department. Worked closely will all other departments on current operations and new ventures. Negotiated numerous supplier contracts, coordinated company-wide research contracts involving multiple divisions of USA Networks.
- Member of the three-person team that structured the programming and business plan for the highly successful Sci-Fi Channel (1992).
- Intimately involved in the launch and distribution of USA's Latin American and European networks in 1994 and 1995; conducted consumer research in nine countries in Europe, Latin America and Asia.

NW Ayer **1989 - 1990**

Senior Vice President/Media Research Director

- Headed research department.
- Member of core team that pitched and won the 1992 Olympics account for Ayer.
- Helped develop multi-media advertising plans, evaluated media plans of networks.

NBC-TV Network **1977 - 1988**

Director, Program and Advertising Research
Director, Television Network Research
Manager, Audience Measurement Analysis

- Middle manager and later senior manager in the NBC-TV research department, initially responsible for evaluating scheduling plans and estimating ratings for both programming and sales. Later advanced to director of East Coast program testing, primarily responsible for consumer testing of daytime programming, made-for-TV movies and promotional campaigns.

Television Advertising Representatives, Inc. (Group W) **1976 - 1977**

Assistant Director, Research & Marketing

Prior Positions **1970 - 1976**

Manager, Daytime/Nighttime Research, NBC-TV
Research Analyst, NBC Stations Division
Sales Research Analyst, WCBS-TV
Co-Founder, TV spot production company (while at Syracuse University)

Industry Leadership

Council for Research Excellence

- Founding member of this consortium of major media companies, agencies and advertisers; board of directors (2005-2007); member of the Media Engagement Committee (2005 to date) which fielded a groundbreaking observational study of video consumer behavior in the new media environment, and other studies focusing on consumer use of new technologies.
- Also conducted a study for the Set-Top Box Committee on that emerging field.

Advertising Research Foundation (ARF)

- Chairman of the Board (1998-1999), board of directors (1995-2000), chairman of Video Electronic Media Council (1995-2007).
- Promoted learning and dialogue between buyer and seller segments of the industry at numerous well-attended events I organized through the Video Electronic Media Council.

Media Rating Council (MRC)

- Chairman of the Board (1997-1999), chairman of cable committee (1993-1996), board of directors (1991-2007).
- I was the first representative of the cable industry to chair this influential organization, which audits and accredits syndicated research companies including television, radio and print measurement firms.

Cabletelevision Advertising Bureau (CAB)

- Member of the research committee (1991-2007), longtime member of the technical subcommittee which worked with Nielsen and others to maintain the quality of their research procedures and adapt to changing media requirements.

George Foster Peabody Awards

- Board of Directors (2007-2013). The board evaluates entries and determines winners of the Peabody Awards.

Cable and Telecommunications Association for Marketing (CTAM)

- Board of Directors (2006-2007), three-term chairman of the research committee (2003-2006), chairman of conference committee (2002).

Television Association of Programmers-Latin America

- Founding member of the industry trade group that now represents more than 30 pay television channels operating in Latin America (1994-1999).
- Helped structure first region-wide research documenting viewership of international channels in Central and South America.

Honors, Awards

2008 Advertising Research Foundation Lifetime Achievement Award
2007 CableFAX 100 Outstanding Service Award
2007 Advertising Research Foundation Outstanding Service Award
2007 Grammy Award for Best Historical Album, for CD ALost Sounds@
2006 Society for American Music Irving Lowens Award for Distinguished Scholarship in American Music, for book *Lost Sounds: Blacks and the Birth of the Recording Industry.*
2005 ASCAP Deems Taylor Award for *Lost Sounds*
2005 Association for Recorded Sound Collections Award for Excellence for *Lost Sounds*
2004 Association for Recorded Sound Collections Lifetime Achievement Award
2002 Cable and Telecommunications Association for Marketing TAMI Award
2000 Association for Recorded Sound Collections Award for Excellence for *The Columbia Master Book Discography.*
1995: CableTelevision Advertising Bureau Jack Hill Award for Excellence and Integrity in Media Research.
1981 San Francisco State University Broadcast Preceptor Award for *The Complete Directory to Prime Time Network and Cable TV Shows*
1980 American Book Award for *The Complete Directory to Prime Time Network and Cable TV Shows*
Biography has appeared annually in *Who=s Who in America* since 1990.

Selected Publications, Speeches

- *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present* (co-author). Ballantine Books: 1979; 9th Edition, 2007. A standard reference on U.S. television programming, used throughout the industry and by the public. Nine editions and more than half a million copies in print.
- *The Complete Directory to Prime Time TV Stars*. Ballantine Books, 1987.
- *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919.* University of Illinois Press, 2004. Widely praised, called by the *New York Times* "an act of cultural reclamation."
- *College Radio Days.* Glenville Press, 2013. History of college radio since the 1920s through a case study of the Dartmouth College stations.
- Numerous articles on television and the music industry in publications including *CASRO Journal, Mediafax* (online), *American Music, ARSC Journal, Popular Music & Society, Goldmine, High Fidelity, Grove, Notes*, others. Some of these articles are on my website.
- Speeches and panels at industry conferences, including those of the Advertising Research Foundation, Cable and Telecommunications Association for Marketing, Radio-TV Research Council, Association for Recorded Sound Collections, Society for American Music, others.

Other Professional Activities

- Adjunct Professor of Communications, C.W. Post Center, Long Island University (1979-1988). Designed courses in Audience Research and TV Program History in degree program.
- Extensively quoted in the trade and general press on television audience matters and on current and especially historical trends. Appearances on *60 Minutes, Good Morning America, CNN, Fox Business News, MSNBC,* etc. Quoted in *The New York Times, Wall Street Journal, Los Angeles Times, USA Today, Variety, Multichannel News, Broadcasting & Cable* (profiled in 5/15/00 issue), etc. Since 1979 I have appeared on more than 300 TV and radio talk shows, and conducted seven national media tours on behalf of my books.
- Longtime officer of the Association for Recorded Sound Collections (1979-date), including President, Conference Chair, committee chair.
- Director of the Historical Recording Coalition for Access and Preservation (2008-date). Active in copyright deliberations.
- President and Chairman, Coordinating Council of Audiovisual Archives Associations (2014-2015). UNESCO-sponsored international committee.
- Army Captain, served in U.S. and Vietnam.

Education

- **B.A.**, Economics, Dartmouth College
- **M.S.**, TV-Radio, Syracuse University
- Additional graduate level courses in sociology (degree program), business law, and computer programming.

3-3-15