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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

TO: Chief Administrative Law Judge Richard L. Sippel

REPLY PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF GAME SHOW NETWORK, LLC

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September 30, 2015

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Game Show Network, LLC ("GSN") submits these Reply Proposed Findings of Fact and Conclusions of Law in response to the Proposed Findings of Fact and Conclusions of Law submitted by Cablevision Systems Corporation ("Cablevision").[1]

I. INTRODUCTION AND SUMMARY OF REPLY FINDINGS

1. Cablevision has pointed to no evidence that contradicts the plain facts established at trial: Cablevision discriminated against GSN on the basis of affiliation, by giving carriage benefits to its affiliated networks that it did not give to GSN and by demanding that GSN parent DIRECTV grant favorable carriage to Cablevision affiliate Wedding Central. Cablevision also has not overcome the clear evidence that GSN and WE tv are similarly situated women's networks, that they compete with each other, and that by tiering GSN in the No. 1 television market in the country, Cablevision unreasonably restrained GSN's ability to compete.

2. The evidentiary record refutes Cablevision's contention that its retiering of GSN was a "good faith, rational business decision" rather than the result of discrimination on the basis of affiliation. Cablevision singled out GSN for tiering based on application of a "must-have" programming test — a test that Cablevision admits it did not apply to its affiliates, and that it admits its affiliates likely would fail. (Joint Exh. 1, Bickham Dep. 107:14-19.) In support of its "good faith, rational business decision," Cablevision points to a memorandum analyzing carriage of GSN — a memorandum that, for reasons that Cablevision refuses to explain, relied on data from a non-representative sample that cast GSN in a worse light than the standard, representative sample Cablevision had at hand. (Montemagno Tr. 1565:17-21.) Cablevision asserts that this "good faith, rational business decision" was driven by the need to reduce

[1] The Proposed Findings of Fact and Conclusions of Law of Defendant Cablevision Systems Corporation (filed on Sept. 11, 2015) are referred to as "Cablevision Proposed Findings." The Proposed Findings of Fact and Conclusions of Law of Complainant Game Show Network, LLC (filed Sept. 11, 2015) are referred to as "GSN Proposed Findings."

programming costs — yet Cablevision could have achieved the same or greater savings simply by [redacted] And Cablevision cannot dispute that after it decided to tier GSN, it conditioned renewed carriage on the provision of benefits to its affiliated networks. (Joint Exh. 2, Chang Dep. 130:7-10.)

3. Substantial evidence also establishes that GSN, WE tv, and Wedding Central are similarly situated networks. Cablevision's focus on certain irrelevant details, such as a minor difference in the median age of the audiences, is overwhelmed by the weight of evidence showing that GSN and WE tv are similarly situated in terms of programming, audience, advertisers, ratings, and license fees. (GSN Proposed Findings ¶¶ 81-109.) GSN and WE tv have successfully targeted the same demographic groups (women 18 to 49 and women 25 to 54) and the advertisers who sought to reach them. In fact, expert Timothy Brooks, whose directory of TV programs Cablevision admitted to be a "leading resource in its field," (Cablevision Proposed Findings ¶ 97), concluded that GSN and WE tv are "similarly situated and they … compete with each other." (Brooks Tr. 1138:17-18.)

4. Finally, Cablevision cannot rebut the fact that GSN suffered substantial harm as a result of the tiering in the form of lost subscribers, revenue, and advertising. (GSN Proposed Findings ¶¶ 188-91.) Instead, Cablevision argues that because GSN has added subscribers since the tiering, it has not been unreasonably restrained. GSN's increase in subscribers, however, does not undercut GSN's proof of substantial harm. "There is nothing inconsistent about a network attracting viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater

success . . . due to discrimination by an MVPD." (*Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, 27 FCC Rcd. 8508, ¶ 67 (2012) [hereinafter "*Tennis Channel*"].)

II. REPLY FINDINGS REGARDING THE PARTIES

5. Cablevision concedes that at the time of the tiering, it was a vertically integrated MVPD that both distributed cable programming to subscribers in their homes and, through its Rainbow Holdings subsidiary, operated the national cable networks AMC, IFC, Sundance, WE tv, and Wedding Central. (Cablevision Proposed Findings ¶ 22.) Cablevision also states that Rainbow Holdings was spun off from Cablevision in July 2011 and is now known as AMC Networks. But Cablevision and AMC Networks remain affiliates under the control of the Dolan family. (GSN Exh. 343, at 6; AMC Networks' 2014 Proxy Statement, at 7 (stating that the Dolans own the majority of stock in both companies)[2].)

6. Cablevision also asserts that "the evidence shows that Cablevision engaged in arms-length negotiations with its affiliated networks regarding carriage." (Cablevision Proposed Findings ¶ 180.) In fact, Cablevision and its affiliated networks had an extraordinarily close relationship and operated as "one company," in the words of its CEO, James Dolan, to promote the best interests of both the distribution and programming arms. (Joint Exh. 3, Dolan Dep. 15:8-18.) The Rainbow networks received corporate-mandated favorable treatment from Cablevision's distribution arm [redacted], which was not provided to unaffiliated networks. (GSN Proposed Findings ¶¶ 27-29.)

7. The close corporate relationship also meant that Cablevision distribution and programming executives worked in concert. Josh Sapan, the CEO of Rainbow Networks,

[2] The Proxy Statement, of which this Court may take judicial notice, is available at http://files.shareholder.com/downloads/ABEA-66DSMZ/789213296x0xS1193125-14-167332/1514991/filing.pdf.

testified that "the proximity and being able to talk more easily is a benefit" the Rainbow networks received from Cablevision. (Joint Exh. 7, Sapan Dep. 84:14-16.) As Rainbow executives were developing the Wedding Central network, they met with Cablevision distribution officials to get feedback on the concept for the network and changed its focus as a result. (Montemagno Tr. 1540:10-15.) Tom Montemagno, Cablevision's distribution head, testified that he could not "walk away" from negotiations with the Rainbow networks over conditions and terms of carriage and he could not "stop talking to them" — which he could do, and did, to non-affiliated networks. (Montemagno Tr. 1544:23-1545:2, 1546:18-25.)

8. Throughout the relevant period, and continuing to today, Cablevision was a highly successful distributor and programmer. In 2011, the year that Cablevision tiered GSN, Cablevision reported net income of $426.7 million and cash on hand of $459.5 million. (GSN Exh. 401A.)

9. Cablevision's statement that "Sony and DIRECTV control GSN" vastly overstates DIRECTV's role in the management of GSN. (Cablevision Proposed Findings ¶ 18.) GSN CEO David Goldhill testified that DIRECTV inherited its stake in GSN due to the 2009 transaction in which it merged with Liberty Entertainment, Inc., thereby acquiring Liberty's interest in GSN. (Goldhill Tr. 185:20-21.) DIRECTV has continued to sell down pieces of its equity in GSN to Sony because, Mr. Goldhill testified, DIRECTV views its ownership of GSN as "passive" and not likely to continue for the long term. (*Id.* at 223:19-224:1, 225:13-15.) GSN therefore operates as an independent network. (*Id.* at 185:13-15.)

III. REPLY FINDINGS REGARDING CABLEVISION'S RELATIONSHIP WITH GSN

10. Cablevision states it could not reach a new deal with GSN after its contract with GSN expired [redacted] carriage agreement that were favorable to Cablevision." (Cablevision Proposed Findings ¶ 30.) However, the 1997 contract, negotiated when GSN was a new network and not in a strong bargaining position, was by Cablevision's admission "highly favorable to Cablevision" and provided for [redacted] (*Id.* ¶ 28.) Of course, a decade later, an established GSN would not agree to the same terms that a brand new network would agree to.

11. Cablevision stated that negotiations foundered because it was "important to Cablevision" that GSN agree to a [redacted] (*Id.* ¶ 30.) [redacted]

12. Cablevision states that following the expiration of Cablevision's carriage agreement with GSN [redacted] GSN launched "a series of shows" as part of "an effort to 'get more men in prime time.'" (Cablevision Proposed Findings ¶ 29.) The document Cablevision cites for this finding is from 2004, six years before Cablevision began considering tiering GSN.

Documents contemporaneous with Cablevision's decision — and that post-date the arrival of David Goldhill as GSN CEO in 2007 — reflect GSN's emphasis on targeting and attracting female viewers. For instance, a 2008 GSN document that summarizes its ratings and market position describes GSN as a "female-oriented network," compares it to networks such as WE tv, SOAPNet, Bravo, Oxygen and Style, and lists GSN's key demographics as women 25 to 54. (GSN Exh. 8, at 6-8.) A January 2011 GSN presentation states that the network "live[s] to entertain & serve Women 25-54," with a female/male audience split of 65/35. (GSN Exh. 108, at 2-3.) GSN Executive Vice President Dale Hopkins testified that GSN's "primary focus was on retaining and attracting female viewers." (GSN Exh. 303, Hopkins Supplemental Direct Test. ¶ 6 [hereinafter "Hopkins Written Direct"].)

13. Cablevision states that "it was not unusual in the cable industry" for a network to be carried by a distributor even though it was out of contract. (Cablevision Proposed Findings ¶ 31.) Mr. Goldhill testified, however, that he found it unusual for a network to be out of contract more than a few months. (Goldhill Tr. 214:2-5.) By the time of the tiering GSN had been out of contract with Cablevision for [redacted] even though it was in contract with "essentially everybody else." (Goldhill Tr. 212:11-14, 213:23-24.) Cablevision notes that Mr. Goldhill said he was not "very concerned" about this, but he also said it was "very unusual for a network as well established and well performing as GSN to lose a major distributor," and that had never happened in his two decades of experience in television. (*Id.* at 214:20-23, 173:20-22.)

14. Cablevision's attempt to minimize the risk for a network of being out of contract with a major MVPD does not square with testimony from Josh Sapan, head of Cablevision's programming arm, Rainbow Networks. Mr. Sapan testified that being out of

contract "is considered disadvantageous and hideously undesirable to a programmer." (Joint Exh. 7, Sapan Dep. 68:20-22.) That is because "there's no clarity of payment, there's no clarity of carriage" and carriage is "subject to termination any time." (*Id.* at 68:25-69:3.) In Mr. Sapan's experience as a programmer, being out of contract is "generally not a good thing." (*Id.* at 69:9.)

15. Cablevision seeks to downplay the suggestion that it "threatened" GSN by telling GSN that attempts to negotiate a new contract would lead to increased scrutiny and the possibility of Cablevision dropping GSN. (Cablevision Proposed Findings ¶ 33.) Cablevision, however, made it plain to GSN that it had no interest in negotiating a new contract, even though the prior contract had expired [redacted] (Goldhill Tr. 308:22-309:5.) Furthermore, Cablevision made it clear that it did not want to hear from GSN, and that if GSN reached out to open a discussion, it ran the risk of being dropped entirely. (*Id.*) Mr. Goldhill testified that Cablevision was the only MVPD that would not meet with him, and that Cablevision had told GSN's head of distribution, Dennis Gillespie, that if GSN did ask for meetings to negotiate a new contract, "our carriage could be at risk if we pushed it." (*Id.*)

IV. REPLY FINDINGS REGARDING DIRECT EVIDENCE OF DISCRIMINATION

16. GSN established through direct evidence that Cablevision discriminated against GSN and in favor of Cablevision's affiliated video programming vendors, on the basis of affiliation or non-affiliation, in the selection, terms, and conditions for carriage. Cablevision argues that GSN may only establish a violation of Section 616 by direct evidence constituting an admission that Cablevision initially targeted GSN to obtain benefits for Wedding Central or WE tv. (Cablevision Proposed Findings ¶ 34.) Cablevision is incorrect.

17. First, as to Cablevision's suggestion that direct evidence requires an admission that Cablevision tiered GSN on the basis of affiliation or non-affiliation, Cablevision

misstates the legal standard. (Cablevision Proposed Findings ¶ 34.) In the context of discrimination claims, "direct evidence" refers to evidence that, if true, requires no inferential leap in order for a court to find discrimination. (*See Bass v. Bd. of Cnty. Comm'rs, Orange Cnty., Fla*., 256 F.3d 1095, 1111 (11th Cir. 2001).) GSN may establish unlawful discrimination based on evidence of underlying facts that, if true, require "the conclusion that unlawful discrimination was at least a motivating factor" in the relevant decision. (*Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 394-95 (6th Cir. 2008).) Here, the evidence establishes, without resort to any inferential leaps, that Cablevision discriminated in favor of its affiliates and against GSN on the basis of affiliation and non-affiliation.

18. Second, Cablevision argues that GSN has failed to establish that Cablevision's *initial* targeting GSN was not a pretextual tactic to obtain carriage of Wedding Central. (Cablevision Proposed Findings ¶ 55.) But that is not GSN's contention. Rather, the evidence shows that distribution on DIRECTV had always been a major part of Wedding Centrals business plan. (GSN Exh. 363, at 10.) Whatever Cablevision's original reasons for tiering GSN, when Derek Chang of DIRECTV, a parent of GSN, contacted Cablevision about that decision, Cablevision leapt at the potential opportunity and conditioned returning GSN to its prior level of carriage on agreement by DIRECTV to carry Wedding Central. (GSN Exh. 260, at 1; Joint Exh. 2, Chang Dep. 130:7-10.) That undisputed fact is direct evidence of discrimination.

A. Cablevision's Discrimination Was Not Based on Good Faith Business Judgment or a Proper Evaluation of GSN's Value.

19. Cablevision argues that the cost savings and ratings analysis set forth in Mr. Montemagno's July 2010 memorandum justified tiering GSN. (Cablevision Proposed Findings ¶¶ 42, 50.) The record does not support this finding.

20. First, Mr. Montemagno acknowledges that he did not have the authority to and did not actually make a final decision as to GSN's carriage on Cablevision systems. (Montemagno Tr. 1558:18-22.) Instead, Mr. Bickham had that authority, and made the ultimate tiering decision. (*Id*. at 1558:18-1559:5.) By Mr. Bickham's own admission, he decided to tier GSN because it was not, in his view, a "must-have" network, a view he reached by watching the network "periodically" for five-to-ten-minute intervals. (Joint Exh. 1, Bickham Dep. 24:23-25, 49:18-50:14, 60:1-21, 76:3-17.) But Mr. Bickham did not apply this "must-have" test to Cablevision's affiliated networks, and he admits that they likely would fail it. (*Id.* at 107:14-19.)

21. Cablevision's attempt to rely on Mr. Montemagno's July 2010 memorandum is pretextual, because the assessment had no impact on Mr. Bickham's thinking. (*Id*. at 60:1-21.) Specifically asked whether Mr. Montemagno's July analysis impacted his thinking "at all," Mr. Bickham answered, "[N]o." (*Id.* at 60:7-8.) Mr. Bickham explained that he knew GSN did not have "must-have" programming, "[s]o nothing about this changed my opinion about that." (*Id*. at 60:1-21.) This is consistent with Mr. Bickham's admission that there was no specific amount of savings Mr. Bickham was trying to achieve, (*Id*. at 45:8-10), and neither Mr. Dolan nor Mr. Rutledge had directed Mr. Bickham to scale back programming costs. (*Id*. at 40:1-9).

22. The evidence also establishes that Mr. Bickham's "must-have" programming test was itself pretextual, because Cablevision stood by its decision to tier GSN even though the fallout showed that GSN passed Mr. Bickham's test. Mr. Bickham defined a "must-have" programming as "the kind of programming that if you lose it, people will call and disconnect because you don't have it." (*Id*. at 75:2-6.) When Cablevision tiered GSN, [redacted] customers called to complain, and Cablevision was forced to offer a free upgrade to

the sports tier for [redacted] of them so they would not disconnect. (GSN Exh. 132, at 2; CV Exh. 337, Montemagno Direct Test. ¶ 73 [hereinafter "Montemagno Written Direct"].) Yet even then, Cablevision refused to return GSN to expanded basic [redacted] Cablevision's post-tiering conduct, in the face of proof that GSN met Mr. Bickham's "must-have" test, does not demonstrate good faith business judgment.

23. In addition, the evidence shows that the analysis contained in the July 2010 Montemagno memorandum was pretextual, because it relied on a non-standard, non-representative sample of data that no Cablevision witness could explain. [redacted]

24. Cablevision attempts to validate the non-standard, non-representative sample of data used in Mr. Montemagno's memorandum. (Cablevision Proposed Findings ¶ 51.) However, Cablevision's general discussion of the characteristics of STB data does not explain the use of a non-representative [redacted] sample cited in his July 2010 memorandum. In fact, neither Mr. Montemagno nor any Cablevision witness could explain the source of the

[redacted] As Cablevision noted, Mr. Montemagno explained that he "rel[ied] on the information that comes from others," and Mr. Montemagno actually reviewed other data runs for GSN. (Cablevision Proposed Findings ¶ 52, citing Montemagno Tr. 1574:2-8, 1652:4-1653:14).) However, Mr. Montemagno did not include any such data in the July 2010 memorandum on which Cablevision asserts it explicitly relies. (Montemagno Tr. 1575:2-6, 1575:19-24.)

25. Finally, Cablevision's claim that it repositioned GSN because of the cost savings it would achieve in its programming budget is not supported by the evidence. Instead, the evidence shows that Cablevision refused to apply the same cost-savings considerations to its affiliates, and instead chose to [redacted] (Montemagno Tr. 1594:12-15; GSN Exh. 398, at 2, 4.) This is direct evidence of discrimination, because there is no evidentiary basis to conclude that this give-away to its affiliates was based on anything other than affiliation.

26. This differential treatment also shows that Cablevision's claimed cost justification for tiering GSN was pretextual. If Cablevision had been motivated to identify cost savings for the programming budget, it could have the saved the same amount — and more — by enforcing rather than waiving its contractual [redacted] (*See* GSN Proposed Findings Part II.A.) [redacted]

[redacted] Moreover, Cablevision's focus on the industry-wide cost concerns merely undercuts its proposed cost savings rationale. Cablevision's alleged cost savings rationales applied equally to every MVPD and every video programming network. (Hopkins Tr. 599:9-20.) The industry-wide concerns offers no explanation for why Cablevision targeted GSN. Mr. Montemagno prepared an analysis of GSN alone. (Montemagno Tr. 1559:6-9.)

27. Cablevision's reliance on the [redacted] The evidence shows that Cablevision's carriage agreements with its affiliates were not the result of arm's-length negotiations, and that the distribution and programming arms of the Company operated as a single family. (Joint Exh. 3, Dolan Dep. 15:8-18.) Thus, the evidence supports a finding that the Cablevision could have changed the terms of its agreement with WE tv at will — and that the purported contractual bar to tiering WE tv itself resulted from the discrimination inherent in the lack of arm's-length dealings between Cablevision and its affiliates. Cablevision cannot discriminate in favor of its affiliates in establishing the terms of their carriage agreements, and then point to those terms as a defense against claims of discrimination.

28. Cablevision's assertion that the record evidence shows that Cablevision made carriage decisions without regard for the competition its affiliated networks might face is also false. Cablevision presents the Oprah Winfrey Network ("OWN") as an example: On January 1, 2011, it launched OWN, a women's network that WE tv considered a direct competitor and placed in its competitive set. (Cablevision Proposed Findings ¶ 57.) Cablevision

ignores that it was among the last MVPDs to launch OWN. And as the Presiding Judge observed, "nobody says 'no' to Oprah." (Tr. 138:7-19.)

B. After Informing GSN of the Tiering, Cablevision Sought to Condition Carriage of GSN on Expanded Basic on DIRECTV's Launch of Wedding Central.

29. Cablevision's actions after December 3, 2010, when it initially reported its tiering decision to GSN, provide direct evidence of discrimination. When GSN reached out to Cablevision in an attempt to negotiate a solution, Cablevision directed GSN to its programming arm, Rainbow Networks, and proposed that if DIRECTV would carry Wedding Central, then Cablevision would continue broad carriage of GSN. (GSN Exh. 260, at 1 (email from Rainbow's Robert Broussard to Rainbow's Ed Carroll and Josh Sapan, dated Dec. 18, 2010, stating that Mr. Broussard "made the proposal we discussed," involving DIRECTV carriage of Wedding Central and Cablevision carriage of GSN); Joint Exh. 2, Chang Dep. 129:14-21.)

30. Cablevision states that years before the tiering, former GSN distribution head Dennis Gillespie had considered linking carriage of GSN on Cablevision with Wedding Central on DIRECTV. (Cablevision Proposed Findings ¶ 59.) Cablevision states Mr. Gillespie considered this idea in 2009, citing documents created in 2005 and 2008. (*Id.*; CV Exh. 38, at 2, 6.) Cablevision, however, does not and cannot link Mr. Gillespie's idle musings in 2009 or earlier to what occurred in December 2010 and January 2011, *after* Cablevision informed GSN of the tiering. At that time, the record shows, Cablevision initiated the discussion regarding Wedding Central carriage on DIRECTV in exchange for keeping GSN on expanded basic. (GSN Exh. 260; Joint Exh. 2, Chang Dep. 129:14-21.)

31. Upon learning of the tiering decision on December 3, 2010, Mr. Goldhill emailed the GSN management committee to state that GSN should respond "immediately." (GSN Exh. 99.) Derek Chang, the DIRECTV representative on GSN's management committee,

contacted Mr. Rutledge. (*Id*.) Mr. Goldhill never suggested that Mr. Chang offer Wedding Central carriage on DIRECTV to solve the situation, and that was not his purpose in reaching out to Mr. Chang. (Goldhill Tr. 221:1-4.) Mr. Goldhill testified that he was reaching out to the entire management committee to "find somebody who might have a relationship at a level of Cablevision where we could actually start negotiations." (*Id*. at 220:3-6.) Mr. Chang had previously told Mr. Goldhill that DIRECTV was "never going to interfere in your negotiations." (*Id.* at 221:8-9.) And Mr. Chang testified that he did not and does not remember anyone from GSN ever suggesting DIRECTV would carry Wedding Central in exchange for Cablevision's reconsideration of the GSN tiering decision. (Joint Exh. 2, Chang Dep. 114:20-115:3.)

32. The evidence shows that that idea came only from Cablevision. As an initial matter, Mr. Rutledge did not send Mr. Chang to discuss the carriage decision with executives in the distribution group. Instead, he asked Mr. Chang to contact executives at Rainbow, the programming side of Cablevision, to discuss Cablevision's carriage of GSN. (GSN Exhs. 98, 99.) Mr. Rutledge, according to an internal Cablevision email, "tasked [Rainbow's Robert] Broussard to come up with a list of asks for Direct TV [sic] that would be worth our keeping GSN status quo." (GSN Exh. 98.) Mr. Broussard then made clear to Mr. Chang that if DIRECTV would carry Wedding Central, Cablevision would keep GSN on its digital basic tier. (GSN Exh. 297, Goldhill Written Direct Test. ¶ 19 [hereinafter "Goldhill Written Direct"]; GSN Exh. 260.) Mr. Chang testified that Wedding Central carriage on DIRECTV came up in his conversations with Mr. Broussard and Mr. Sapan and that it was Mr. Sapan who "initially" raised the idea. (Joint Exh. 2, Chang Dep. 129:14-21.) "Josh and Bob brought up Wedding Central as kind of the key to it all," Mr. Chang testified. (*Id.* at 119:13-15.)

In fact, Mr. Chang stated, "the only thing that was of interest from a Rainbow standpoint was for us to do some sort of a launch of Wedding Central." (*Id.* at 130:7-10.)

33. Mr. Chang informed Rainbow on January 31, 2011, that DIRECTV would not carry Wedding Central, and Cablevision moved GSN to the sports tier the following day. (Goldhill Tr. 231:3-15.)

34. In February 2011, after the tiering, representatives from GSN and Sony met with Cablevision officials in Bethpage, New York. Cablevision told GSN that Cablevision would accept nothing less than a [redacted]

V. REPLY FINDINGS THAT ESTABLISH THAT GSN AND WE TV ARE SIMILARLY SITUATED

A. GSN and WE tv Broadcast and Target Similar Programming.

35. Both GSN and WE tv create, acquire, and target programming to women 25 to 54 and women 18 to 49, with a focus on dating, romance, and family dynamics. The record establishes significant overlap in the themes and subjects of GSN's and WE tv's programming. For instance, GSN's relationship shows airing at the time of the tiering included *Baggage*, *The Newlywed Game*, *Love Triangle*, and *Match Game*, while similar WE tv shows included *Bridezillas*, *My Fair Wedding*, and *Match Made in Heaven*. (GSN Exh. 300, Brooks Revised Direct Test. ¶ 7-9 [hereinafter "Brooks Written Direct"].) Both networks aired programs documenting the experiences of women creating dessert businesses — *Carnie Wilson:*

Unstapled on GSN, and *The Cupcake Girls* on WE tv. (GSN Exh. 40; GSN Exh. 300, Brooks Written Direct ¶ 9.) And both networks have also broadcast game shows because they understand, as GSN expert Timothy Brooks testified, that "game shows are generally targeted at women." (GSN Exh. 300, Brooks Written Direct ¶ 86.)

36. Cablevision states that because GSN presented itself to affiliates as a "unique game show network," it cannot be similarly situated to WE tv. (Cablevision Proposed Findings ¶ 76.) Cablevision even reproduces in its proposed findings a slide from a GSN presentation to Comcast that puts GSN in a different box from other networks. (*Id.* ¶ 78.) As Mr. Goldhill testified in connection with that slide, however, when a network is selling itself to affiliates, it must make the case that it is different from other networks, to gain and maintain carriage. "You're always trying to differentiate yourself in any discussion with a customer, whether an affiliate, an advertiser or a viewer," Mr. Goldhill stated. (Goldhill Tr. 418:2-4.) "Nobody says, hey, we're one of eight networks that show[] the same thing. No one ever does that." (*Id.* at 418:4-6.) In fact, he said, of the women's networks identified in the Comcast presentation, GSN regards every one of those networks (Lifetime, SOAPnet, WE tv, and Oxygen) as a direct competitor. (*Id.* at 418:18-19.)

37. WE tv vice president Elizabeth Dorée testified that WE tv, as well, tried to differentiate itself from other networks, and that it was important for a network to be able to set itself apart to be able to compete for viewers and advertisers. (Dorée Tr. 1798:24-1799:5, 1800:17-20.) In fact, [redacted]

38. Cablevision acknowledges that GSN expert Timothy Brooks' book *The Complete Directory to Prime Time Network and Cable TV Shows* is "a leading resource in its field." (Cablevision Proposed Findings ¶ 97.) Cablevision also suggests that because Mr. Brooks' book uses the phrase "women's network" when referring to WE tv but not for GSN, the two networks are not similar. (*Id.*) But Mr. Brooks does not use the phrase "women's network" to describe many networks that [redacted] For instance, Mr. Brooks does not describe E! as a women's network, instead calling it a leading purveyor of "celebrity-driven 'reality' programming," [redacted] (CV Exh. 816, at 402; Dorée Tr. 1736:2-11.) Mr. Brooks does not describe SOAPnet as a "women's network," instead calling it a network "for busy fans of daytime soap operas," [redacted] (CV Exh. 816, at 1267; Dorée Tr. 1742:20-24.) Mr. Brooks does not call Style a "women's network," instead stating that it "focuse[s] on the world of style, fashion and design," [redacted] (CV Exh. 816, at 402; Dorée Tr. 1736:2-11.) Mr. Brooks does not call Bravo a "women's network," instead stating that it delivers "high-concept reality shows," [redacted] (CV Exh. 816, at 179; Dorée Tr. 1736:2-11.)

39. While Cablevision cites approvingly to Mr. Brooks' book, it ignores Mr. Brooks' expert testimony that GSN "appeal[s] to an audience that is predominantly female," with a "predominant focus on women." (GSN Exh. 300, Brooks Written Direct ¶¶ 7-8.) Mr. Brooks, who has done extensive program research in his career, found that "many of the elements of [GSN's] programming were very similar to the elements of WE tv" programming. (Brooks Tr. 1150:3-5.) He explained that both GSN and WE tv programs involved real people, were non-

scripted, were in real-time, and had to do with "family dynamics," including "romantic relationships." (*Id*. at 1150:7-13.)

40. Cablevision argues that GSN's overall programming is different from WE tv's because GSN aired poker programming. (Cablevision Proposed Findings ¶ 82.) However, Mr. Goldhill testified that poker was essentially an infomercial in which the advertiser paid for the program and also bought all the associated advertising, such that when Mr. Goldhill arrived at GSN in 2007, poker accounted for [redacted] (Goldhill Tr. 262:13-14; 421:15-16). When Mr. Goldhill arrived at GSN, he "doubled down" on the network's focus on women, so he put poker on Saturday and Sunday nights — the least watched nights of the week for GSN — but he could not immediately take it off the air "because we didn't feel we could afford to." (*Id*. at 262:18-23; 421:21-22.) Within a few years of Mr. Goldhill's arrival, GSN pulled all poker programming from the air. (*Id*. at 263:17-19.)

41. GSN was not the only network to air poker programming because it helped the network turn a profit. Other networks that target women, such as MTV and WGN America, also aired poker. (CV Exh. 138, at 11, 15.) Bravo, [redacted] aired *Celebrity Poker Showdown*. (CV Exh. 816, at 179.) Cablevision's focus on poker programming that aired on weekend nights from 9 p.m. to midnight ignores the vast majority of GSN's prime time programming, which was entirely focused on women's programming, including shows such as *Love Triangle* and *The Newlywed Game*. (GSN Exh. 300, Brooks Written Direct ¶ 7.)

42. Cablevision's attempts to differentiate GSN and WE tv based on genre are muddied by its own witnesses, whose testimony indicates genre is a fluid concept. (Cablevision Proposed Findings ¶¶ 88-94.) WE tv senior vice president Elizabeth Dorée testified that reality

television was "an umbrella genre under which subgenres fall." (Dorée Tr. 1827:20-21.) She testified that "wedding reality programming" is a subgenre within reality, but "I use it so colloquially that I'm not sure it's used beyond my network." (*Id.* at 1830:19-22.) Even WE tv and its expert, Michael Egan, could not agree on genre categories. Mr. Egan labeled 19 WE tv programs as "reality," but WE tv, in a submission to Nielsen, labeled only six of those shows as "reality," calling the other 13 "Documentary: Society" or "Documentary: Other." (GSN Exh. 300, Brooks Written Direct ¶ 95.)

43. Notably, *The Encyclopedia of TV* (1997), cited by Mr. Egan as an authority, states that "[r]eality programming is an expansive television industry label," and that "the corpus of programs grouped under this generic rubric is admittedly varied." (*Id.* ¶ 92.) The 2004 edition of that same book calls reality TV "a label that encompasses a wide range of nonfiction formats," including "gamedocs" and "dating shows." (*Id.*)

44. Mr. Brooks notes that the term "reality television" gained currency in 1999 and 2000 to describe shows such as *Who Wants to Be a Millionaire*, *Survivor*, and *Big Brother*. (*Id.* ¶ 90.) Since then, the term "reality" has been applied to an extremely wide range of programming that includes unscripted game shows and dating shows, both staples of GSN. (*Id.* ¶¶ 89-90.)

45. Finally, Cablevision states that WE tv spent more money on programming than GSN, and cites its expert Michael Egan for the proposition that "programming expenditures are helpful in distinguishing networks." (Cablevision Proposed Findings ¶¶ 103-04.) The Commission has already rejected this argument. In the *Tennis Channel* case, the Commission rejected Comcast's "purported distinctions" on programming expenditures as not "as significant as Comcast presents them to be." (*Tennis Channel* ¶ 58.) The Commission found that any

persuasive force of differences in programming expenditures was "overwhelmed by the much more powerful evidence in the record regarding the very similar ratings among the channels." (*Id.* ¶ 60.)

46. Cablevision suggests that its consumer survey analysis suggests that GSN and WE tv offer similar programming. However, Mr. Poret's testimony has no relevance to a determination of whether GSN and WE tv are similarly situated for purposes of Section 616. In addition, Mr. Poret's testimony is unreliable in several respects, and therefore it is not entitled to any weight. For example, Mr. Poret's testimony is unreliable because his survey failed to replicate the experience of viewing GSN and WE tv programming as consumers encounter it in the video programming marketplace. In other cases, Mr. Poret's surveys have been rejected as "fatally flawed" because they "bore no resemblance whatsoever to marketplace conditions." (*Fancaster v. Comcast*, 832 F. Supp. 2d 380, 405, 407 (D.N.J. 2011). *See also Kraft Food Group Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735 (7th Cir. 2013).)

47. The overwhelming record evidence here shows that GSN and WE tv are similarly situated in their focus on programming to women.

B. GSN and WE tv Target and Deliver Similar Audiences.

48. Although it argues that GSN and WE tv target and deliver different audiences, Cablevision concedes that GSN, like WE tv, has a significant female skew. WE tv's own documents show that GSN had a female skew of 70 percent. (*See, e.g.*, GSN Exh. 169). And Michael Egan, the Cablevision witness on whom Cablevision heavily relies for its assertions that the networks have different target and actual audiences, testified that such documents accurately reflect that GSN had a female skew of 70 percent during some periods, (Egan Tr. 2320:7-17; 2321:1-3), and testified that GSN's female skew was at least 66 percent to 68 percent female during 2009 to 2011 (*Id.* at 2319:6-10).

49. GSN expert Timothy Brooks testified that "GSN falls clearly within the definition of what constitutes a female-targeted network." (GSN Exh. 300, Brooks Written Direct ¶ 23.) While large general audience networks may skew female by a "moderate percent" (for example TBS skews 51 percent female and TNT skews 56 percent female), GSN's skew ranged from 69 to 71 percent in 2010 to 2014, which is similar to WE tv and other women's-oriented networks, such as Bravo, Hallmark, Lifetime, Oxygen, and OWN. (*Id.* at ¶ 22 & n 28-29; Brooks Tr. 1229:17-25).

50. Cablevision suggests that a small number of MRI studies used by GSN in presentations made for its distribution partners establishes that GSN is less female skewing than GSN claims. As Mr. Goldhill explained, MRI uses a different measure of audience than do traditional ratings and audience measurement services: It is a survey that reports viewing by any person who watches a network without regard to how long that person views the network. (Goldhill Tr. 314:25-315:15.) It therefore tends to produce viewing results that are "more male, younger, and richer." (*Id.*) Mr. Goldhill explained that GSN has on occasion reported MRI data to its cable distribution partners requesting the data for purposes of the partner's local sales efforts as an accommodation. (*Id*. at 318:4-20.) As Mr. Goldhill made clear, however, the data are not used by either GSN or cable distribution partners to guarantee demographics for advertising purposes, and it is common knowledge among those in the industry — including cable partners that have received MRI data — that GSN is a women's network with a significant female skew. (*Id*. at 315:11-15; 318:4-20.)

51. Ultimately, Cablevision itself acknowledges the degree to which GSN has "an adult viewership (over age 18) that is more female than male." (Cablevision Proposed Findings ¶ 135). In the face of the substantial evidence of GSN's strong female skew,

Cablevision instead resorts to mischaracterizing GSN's experts as relying solely on GSN's undisputed strong female skew among adults. (*Id.*) That ignores the examination by GSN expert Timothy Brooks of numerous additional metrics, including the networks' performance among the key advertising demographics of women 18 to 49 and women 25 to 54. Mr. Brooks found that GSN and WE tv perform comparably, and are competitive, in these key advertising categories, achieving ratings [redacted]. (GSN Exh. 300, Brooks Written Direct ¶¶ 26, 43.) Furthermore, Cablevision's own expert, Michael Egan, testified in a previous proceeding before the Presiding Judge that WE tv's audience demographic was women 18+ — the very same demographic that Cablevision, largely in reliance on Mr. Egan, says is "too general." (GSN Exh. 417, at ¶ 25.)

52. Cablevision rests its arguments that GSN and WE tv target and deliver different audiences on several additional fallacies. The first is that GSN should not be understood as targeting women 18 to 49 and women 25 to 54 because it sells advertising on the basis of both *women* sales demographics and *adult* sales demographics, and because it tracked and reported performance among both *women* and *adults*. However, the evidence establishes that all women's networks, including WE tv, sell advertising on the basis of both adult and women sales demographics. As Mr. Brooks explained, the top four sales categories for women's networks include not just women 25 to 54 and women 18 to 49, but also adults 25 to 54 and adults 18 to 49. (GSN Exh. 300, Brooks Written Direct ¶ 24.) WE tv is no exception. For example, a WE tv advertising "Target Account Master List" for fall 2009 and winter 2010 indicates that [redacted] (*Id.*)

53. Consistent with the purchase of advertising by key advertisers on the basis of adults (rather than women) delivered, WE tv executives tracked the network's advertising performance in adult sales demographics. Internal WE tv documents [redacted] Likewise, [redacted] (GSN Exh. 310, at 1.) As Ms. Dorée testified, selling adults and tracking ratings for men does not change the fact that *Bridezillas* was a show directed at women (Dorée Tr. 1764:10-14) or that WE tv was a women's network targeting women 25 to 54. (*Id*. at 1764:15-17.)

54. Cablevision also places significant weight on the fact that GSN's CAB profiles in 2011 and 2013 state that GSN's target viewers include both "women 25 to 54" and "persons 25 to 54." (Cablevision Proposed Findings ¶ 121.) Other women's networks that WE tv acknowledges are in its competitive set report similar target audiences that include both women and adult demographics. For instance, [redacted]

55. The second, related fallacy underlying Cablevision's argument is that GSN is not as "focused" as WE tv on targeting and delivering women 18 to 49 and women 25 to

54 because of how GSN sells itself to MVPDs (*e.g.*, as "family-friendly programming with wide audience appeal"). As Mr. Goldhill testified, GSN's distribution partners and others in the industry know that the network skews heavily female and that phrases like, "family friendly" and "Family Fun" are commonly used in the industry to refer to programing that "[m]om can watch with kids." (Goldhill Tr. 280:11-17; 313:3-15). Thus, GSN's characterization of itself as "family friendly" is merely a way to differentiate its programming from "other female-oriented networks [that] are much less family friendly." (*Id*. at 313:10-15.)

56. Indeed, WE tv is another female-oriented network that characterized its programming as "family" oriented. (*See, e.g.*, CV Exh. 333 at 49 (July 26, 2012 affiliate sales team presentation to Comcast with slide entitled, "EVERY kind of *family*. All kinds of DRAMA") (emphasis added).) As Mr. Egan explained, "WE tv sought to acquire and display content for and about women in their *family*-centered ages of 18-49 and 25-54 . . . ." (CV Exh. 332, Egan Written Direct ¶ 8) (emphasis added). And Cablevision's Proposed Findings echo that focus on *family*¸ noting that WE tv's creation of shows that appealed to women focused on shows about "babies/kids/teens" and "extended family." (Cablevision Proposed Findings ¶ 86.) It is no coincidence that both WE tv and GSN described their programming as "family"-oriented in their efforts to target and deliver female viewers.

57. The final fallacy on which Cablevision rests its argument that GSN and WE tv have different audiences is that GSN has more older viewers than WE tv. As a threshold issue, Cablevision overstates the difference in the ages of GSN and WE tv viewers and the import of those differences. During 2008 to 2011, Nielsen reported that GSN's prime time median age ranged from [redacted] depending on the quarter. (CV Exh. 314, at 12.) A separate Nielsen study found GSN had a median age of [redacted]. (Zaccario Tr. 780:10-781:10.)

This is similar to WE tv's median age: in 2009, WE tv's prime time median age according to Nielsen was [redacted] (CV Exh. 93, at 1.) More recently, a WE tv 2014 tracking document found that WE tv's prime time median age was [redacted] (GSN Exh. 285, at 3.) In any event, a difference of [redacted] in median age is typical among competitive networks. [redacted] Ms. Dorée testified that [redacted]

58. Furthermore, GSN's delivery of somewhat more women 55+ than WE tv does not undermine the competitiveness of the networks among its top two sales demographics: women 18-49 and women 25-54. GSN and WE tv achieve highly similar ratings in the key advertising categories of women 18-49 and 25-54 and adults 18-49 and 25-54. (GSN Exh. 300, Brooks Written Direct ¶¶ 26, 43.) To the extent that there is viewing of GSN by greater numbers of women 55+, an advertiser would consider those viewers to be a free, bonus audience. (Brooks Tr. 1253:5-8, 1333:7-14.)

59. Cablevision cites documents that show that GSN was targeting younger women (and women 25 to 54 and 18 to 49, in particular) for the proposition that GSN does not target these demographics. (*See, e.g.*, Cablevision Proposed Findings at ¶ 113, n.318 (citing CV Exh. 403, at 1 (GSN has "worked so hard to get younger").) As these and other documents make clear, GSN not only reached substantial numbers of women in the key demographic sales categories, but its programming and promotional strategies were focused on and targeted to achieving even greater numbers of women in the key ad sales categories of women 18 to 49 and women 25 to 54. (*See* Goldhill Tr. 351:22 (noting that GSN sought to be "female and younger").) Mr. Goldhill stated that "all of the original programming efforts since I've been

there, as I've testified, has been about increasing women 25 to 54 on the network." (*Id*. at 351:18-20.) Likewise, Ms. Hopkins testified that she and GSN's head of programming developed marketing and programming targeted to women 25 to 54 and 18 to 49. (GSN Exh. 303, Hopkins Written Direct ¶ 6.)

60. Cablevision claims that the distance analysis Mr. Orszag performed confirms that GSN is not similar to WE tv. However, Cablevision misstates the record evidence and ignores defects in Mr. Orszag's analysis. Dr. Singer found that, on average across 360 specifications, WE tv ranked as the [redacted] closest network to GSN among 101 networks. (GSN Exh. 301, Singer Written Direct Test. ¶ 51 & Table 6 [hereinafter "Singer Written Direct"].) Dr. Singer's analysis is more accurate than Mr. Orszag's because it studied the similarity of GSN and WE tv over time. Dr. Singer therefore used data measuring household age, because that data allowed him to conduct an analysis with a time dimension that Mr. Orszag ignores. (Singer Tr. 932:19-934:6.)

C. GSN and WE tv Compete Frequently for Advertisers.

61. Cablevision omits key facts in its discussion of GSN and WE tv's competition for advertisers. These facts undermine the conclusions of its experts, Lawrence Blasius and Jonathan Orszag, and prove that GSN and WE tv compete meaningfully for advertisers. That competition is borne out by evidence of significant advertiser overlap between the two networks: Advertising customers that advertise on GSN account for [redacted] percent of WE tv's revenue from its [redacted] advertising customers, and brands that advertise on GSN account for [redacted] percent of WE tv's revenue from its [redacted] advertising customers. (GSN Exh. 301, Singer Written Direct ¶¶ 53-54.)

62. Cablevision repeats the conclusions of its advertising expert Lawrence Blasius. (Cablevision Proposed Findings ¶¶ 141-42, 144-48.) For instance, Mr. Blasius asserted

that GSN and WE tv would be viewed differently by advertisers because of differences in Nielsen ratings and median age. (*Id.* ¶¶ 142, 148.) But Mr. Blasius failed to compare GSN and WE tv to WE tv's other alleged competitor networks, rendering his opinion baseless. When asked to make calculations regarding WE tv's alleged competitor networks on the stand, Mr. Blasius acknowledged that GSN was closer to WE on metrics including median age and demographic ratings than were other networks he defined as within WE tv's competitive set. (GSN Exh. 443; Blasius Tr. 2441:10-19, 2443:25-2444:4, 2486:22-2489:9.) In fact, Mr. Blasius admitted he had no objective methodology for any of his conclusions and failed to benchmark GSN against any of the networks he claims to be within WE tv's competitive set. (*See, e.g.*, Blasius Tr. 2431:7-17, 2432:8-2433:23, 2456:21-24, 2507:20-22.)

63. Cablevision also discusses Mr. Blasius's testimony regarding audience concentration, but that testimony is not probative of the similarity between GSN and WE tv. (Cablevision Proposed Findings ¶¶ 144-48.) As with his other metrics, Mr. Blasius admitted that, while he deemed the difference between GSN and Cablevision on audience concentration to be "significant," he had no objective basis by which he defined significance. (Blasius Tr. 2431:7-17.) He failed to present data regarding the other networks in WE tv's competitive set, making it impossible to determine whether GSN is closer to WE tv as to concentration than are the competitor networks. (*Id.* at 2431:18-2432:12.)

64. Cablevision ignores that GSN outperformed its internal budgets with respect to delivery of the women 25-54 demographic. Cable networks budget to under-deliver on promised demographics as a matter of course. (CV Exh. 763; Zaccario Tr. 796:24-797:25.) The networks later make up the under-delivery by providing advertisers with free "audience deficiency units" ("ADUs"). (CV Exh. 763; Zaccario Tr. 796:24-797:25.) Given this

background, Mr. Zaccario testified that GSN actually *over*-indexed on women 25-54 based upon its budgeted expectations for the year in which it was tiered. (CV Exh. 504; Zaccario Tr. 825:13-826:14 (noting that the "ADU liability actually went down over the course of the year from [redacted]".)). Mr. Blasius's view that GSN routinely under-indexed is therefore without support, both from the perspective of GSN's performance as compared to other cable networks and with respect to its internal budgets.

65. Cablevision next attacks GSN for attracting some older viewers, but again, it fails to demonstrate why these viewers would be of significance to advertisers comparing GSN to WE tv. (Cablevision Proposed Findings ¶ 147.) As Mr. Zaccario and Mr. Goldhill testified, general rate advertisers purchase ads on the basis of a guaranteed number of impressions in a given age demographic. (Goldhill Tr. 261:21-23; Zaccario Tr. 769:5-8.) Those advertisers may also reach viewers outside those demographics through those ads, but they do not pay for those impressions. (*See, e.g.*, Zaccario Tr. 778:9-12.) Cablevision presented no evidence as to why advertisers would care about viewers they did not purchase so long as they receive the guaranteed impressions they did purchase.

66. Nor do Cablevision's proposed findings as to GSN's median age demonstrate that WE tv and GSN were dissimilar from an advertising perspective. (Cablevision Proposed Findings ¶ 148.) First, as to Cablevision's claim that some Nielsen data showed GSN's median age to be in the low [redacted], GSN presented evidence establishing that the data were inaccurate. (*Id*. at 738:5-739:2.) Due to the Nielsen data's "inadequate sample size and methodology," GSN commissioned a custom Nielsen study, which showed that GSN in fact had a median age of [redacted]. (*Id.* at 738:5-739:2, 780:10-781:10.)

67. Contrary to Cablevision's assertions, the best evidence that advertisers viewed GSN as a women's network in competition with WE tv is that the largest percentage of GSN's advertising sold on the basis of a guaranteed demographic came from the women 25-54 and women 18-49 demographics. (Zaccario Tr. 738:21-739:2 (noting "[redacted] or more of the business that we sold we sold on demographics that were outside of the median age that Nielsen was publishing.").) Mr. Zaccario noted that he could not have delivered "significant numbers of women 25 to 54" if the viewers' median age "was actually 55 and above." (Zaccario Tr. 814:17-815:5.) Nor would advertisers have "continue[d] to increase" the ads they bought in the women 25-54 demographic had the median age been above 55. (*Id.* at 814:16-815:7)

68. Cablevision cites no facts to support its view that GSN's significant direct response advertising sales meant that advertisers did not view GSN as a women's network. In fact, there have been instances where advertisers, including [redacted] have run the same exact ads on GSN for the same brands via both direct response and guaranteed delivery advertisements. (*Id*. at 817:120-819:9.) As Mr. Goldhill and Mr. Zaccario testified, direct response advertisers had access to Nielsen demographic data about GSN and often purchased ads on GSN to reach the women 25-54 demographic even if that demographic was not guaranteed, because they knew they would reach it. (Goldhill Tr. 260:23-261:20, 497:18-23; Zaccario Tr. 768:8-13, 769:12-14, 810:13-811:11.) Cablevision's witnesses failed to explain *why* an advertiser would view GSN and WE tv differently because one sold a greater proportion of direct response advertisements than did the other.

69. The similarity between GSN and WE tv extends to the networks' advertiser and brand overlap. Cablevision points to testimony by Mr. Orszag stating that GSN

and WE tv had only [redacted] overlapping brands, based upon his unsubstantiated view that observed overlap at the brand level would be significant only if the brand is in the top 40 brands of both GSN and WE tv. (Cablevision Proposed Findings ¶ 149; *see also* CV Exh. 334, Orszag Direct Test. ¶¶ 127, 130 [hereinafter "Orszag Written Direct"].) Mr. Singer, however, showed that GSN and WE tv had significant brand overlap. Mr. Singer testified that brands that advertise on GSN account for [redacted] percent of WE tv's revenue from its top 40 advertising customers. (GSN Exh. 301, Singer Written Direct ¶ 54.) The WE tv-GSN brand overlap of [redacted] percent ranks [redacted] among [redacted] networks that Mr. Singer compared with WE tv. (*Id.*) And Mr. Singer's analysis showed that many more than [redacted] brands overlapped between GSN and WE tv: He specifically named [redacted] brands that not only overlapped, but also spent more than 10 percent of their total advertising budgets on each of GSN and WE tv. (*Id.* ¶ 55.) Those brands include [redacted]. (*Id.*) Cablevision's assertion that WE tv and GSN had little brand overlap is directly contradicted by record evidence and therefore entitled to no weight.

70. Likewise, Cablevision does not cite evidence to explain *why* advertisers would view a difference in the CPM (cost per thousand) viewers as a factor that makes two networks dissimilar from an advertising perspective, or what constitutes a significant difference in CPM. (Cablevision Proposed Findings ¶ 154.) The mere assertion that one data set—the SNL Kagan data—showed GSN had a lower CPM than WE tv does not, without more, permit an inferential leap to suggest that advertisers view differences in that data as significant. (*Id.*) Even Mr. Blasius, who claimed that CPM was a relevant factor based solely upon his personal

impression, testified that he "didn't take account of" CPM yet could nevertheless offer opinions as to the substantial similarity of GSN and WE tv from an advertising perspective. (Blasius Tr. 2422:8-2423:9.)

71. Lastly, Cablevision's proposed findings regarding satellite advertising clusters omit key facts rendering the findings meaningless. Cablevision argues that that because satellite providers DISH Network and DIRECTV placed GSN in the "adult" advertising cluster of networks sold to advertisers and WE tv in a "female cluster," that WE and GSN were dissimilar. (Cablevision Proposed Findings ¶¶ 155-56.) Cablevision fails to mention that its own exhibit demonstrates that other female-skewing networks — including some of WE tv's admitted competitors — were also placed outside the "female" cluster in order to encourage advertisers to buy multiple clusters and thus increase DISH and DIRECTV's ad sales. (CV Exh. 405; Hopkins Tr. 653:23-654:10.) Ms. Hopkins specifically identified Cooking Channel, Hallmark, Food Network, HGTV, Bravo, CMT, ID, and USA as female-skewing networks that were not placed in the female cluster. (CV Exh. 405; Hopkins Tr. 653:23-654:10.) Ms. Hopkins testified that, as a former marketing director for GSN, she herself "would buy multiple clusters if I were looking for women" on DISH or DIRECTV. (Hopkins Tr. 649:14-15.) The positioning of GSN and WE tv in different clusters is irrelevant to the similarity of those networks.

D. GSN and WE tv Have Consistently Been Part of Each Other's Competitive Set.

72. Cablevision wrongly suggests that WE tv must have viewed GSN as a competitor in order for the Presiding Judge to find that the two networks were similarly situated. (Cablevision Proposed Findings ¶¶ 157, 165.) In reality, WE tv's view of GSN is only mildly probative — and certainly not requisite proof — of whether GSN and WE tv are similarly

situated. The preponderance of the evidence demonstrates that GSN was and is a member of WE tv's competitive set, and that advertisers understand that to be the case.

73. The views of the advertisers themselves prove that GSN and WE tv competed for advertisers. GSN presented uncontested testimony that "buyers and advertisers identify the competitive set all the time in the course of ordinary business" and told GSN executives that they viewed GSN to be within WE tv's competitive set. (Zaccario Tr. 720:9-20, 724:1-18.) In fact, as early as July 2008 GSN executives reported that GSN competed most frequently with WE tv and several of the networks WE tv maintains are within its competitive set, such as [redacted]. (Joint Exh. 6, Martin Dep. 32:3-11, 32:18-24 (identifying WE tv's competitor networks); GSN Exh. 11; Zaccario Tr. 720:21-722:2.)

74. These views undermine Cablevision's assertion that WE tv did not view GSN to be within its competitive set. Contrary to Cablevision's assertion, GSN presented evidence well beyond the PowerPoint presentation by WE tv's president, Ms. Martin, to demonstrate that WE tv viewed GSN as a competitor. (Cablevision Proposed Findings ¶ 164.) Mr. Zaccario testified that, given his 20-plus years in the advertising business, he would "expect that the other members of [a network's] competitive set would also know from advertisers that those advertisers view you as part of their competitive set." (Zaccario Tr. 722:3-7, 723:10-14.) The "competitive set comes out during the course of the negotiations" with advertisers because network sales representatives ask "where are the other networks being priced." (*Id*. at 724:1-725:2.) Any WE tv network sales representative "doing their job" would know that advertisers viewed GSN to be one of WE tv's competitors. (*Id*. at 724:13-18.)

75. This testimony is further bolstered by [redacted]. Thus, while an MVPD's perception that its affiliated network competed with an unaffiliated network is not necessary to a finding of substantial similarity, it strains credulity for WE tv to argue that its executives did not realize that GSN was a competitor.

76. In addition to the anecdotal views of advertising buyers, GSN's sales data demonstrates that it sold advertising to the same women 25-54 demographic as did WE tv. That data showed that each year since 2008 women 25-54 made up the largest single demographic of GSN's advertising sales sold on a particular demographic. (GSN Exhs. 65, 174; Zaccario Tr. 726:14-24, 812:15-813:19.) In fact, GSN's female 25-54 advertising sales have grown substantially, from roughly [redacted] of GSN's upfront advertising sales at the time of the tiering in February 2011 to "at or above" [redacted] of GSN's guaranteed-demographic advertising sales today. (GSN Exh. 65, Zaccario Tr. 726:25-727:6, 812:15-813:19.)

E. GSN and WE tv Consistently Compete for Viewers and Have Similar Ratings.

77. Cablevision does not rebut the strong evidence that GSN and WE tv achieved markedly similar ratings on both the national and local level, overall and among women. [redacted]

[redacted]

78. Moreover, the parties and their experts agree that measuring the lift in WE tv viewership following the tiering event is a reasonable test of whether WE tv and GSN are similarly situated. (GSN Exh. 301, Singer Written Direct ¶ 38.) And the data Cablevision has provided, while subject to certain limitations, show that WE tv [redacted]. (*Id.*)

79. Mr. Orszag presents a regression analysis, which he styles as "a direct test of competition for viewership" between GSN and WE tv. Mr. Orszag claims that the effect of tiering — [redacted]. Mr. Orszag's econometric analysis is flawed, and his conclusions are not supported by the data. The results of Mr. Orszag's "direct test" hinge on the extent to which households in the treatment group viewed WE tv at higher levels after the tiering than did households in the control group. Mr. Orszag's "direct test" is fundamentally contaminated, because households in his control group are disproportionately likely to be avid viewers of GSN ("GSN Loyalists"), while those in his treatment group are disproportionately likely to be non-GSN Loyalists. In other words, the "treatment" is applied to precisely those households that are least likely to respond to it because they are not regular GSN viewers. Even setting aside this fundamental problem of contamination, Mr. Orszag's analysis suffers from additional econometric shortcomings; when they are corrected, the analysis shows that WE tv enjoyed a statistically significant increase in viewing among Cablevision subscribers after the tiering of GSN. (*Id.* ¶ 39.) After correcting for technical mistakes in Mr. Orszag's econometric model, the data demonstrate that the more a

household's viewership share of GSN declined from 2010 to 2011, the more its viewership share of WE tv tended to increase, suggesting that households did, in fact, tend to replace GSN viewership with WE tv viewership. (*Id*. ¶¶ 38-42.)

80. Cablevision also highlights Mr. Orszag's analysis of viewer switching patterns and overlap in support of its conclusion that GSN was not a significant competitor of WE tv. Yet Cablevision omits important context, specifically the comparative performance of other networks in WE tv's competitive set, which Mr. Orszag identified as including [redacted] (CV Exh. 334, Orszag Written Direct ¶ 89.) Cablevision completely ignores that GSN outperformed several of these networks.

81. GSN was closer to WE tv in switching rates than [redacted]. It also performed better than [redacted] on both analyses. (*Id*. at Table 4, Table 5; Orszag Tr. 2615:1-21, 2617:5-24, 2618:18-2619:2.) GSN was closer than [redacted] in terms of duplication with WE tv's viewership by persons at least 18 years of age. (CV Exh. 334, Orszag Written Direct Table 8; Orszag Tr. 2620:15-24.)

82. In fact, WE tv ranked *closest* to GSN among 85 networks in terms of audience overlap as measured by Nielsen's "both duplication" metric during total-day in the fourth quarter of 2010, and WE tv ranked *second* closest to GSN among 85 networks in terms of audience overlap during primetime in same quarter. (GSN Exh. 301, Singer Written Direct ¶ 35.) Rather than addressing this data, Cablevision dismisses the both duplication metric. Cablevision's dismissal is unfounded. "Both duplication" measures the likelihood of a viewer's watching *both* networks conditional on her watching *either* network. [redacted]

[redacted]. By shrinking the size of the denominator in the ratio — the numerator is the same in all three statistics — the primary duplication metric tends to overstate the overlap with popular networks (a large-network bias); similarly, by shrinking the size of the denominator, the secondary duplication metric tends to overstate the overlap with unpopular networks (a small-network bias). In contrast, the "both duplication" metric is not sensitive to these biases, as the denominator — which combines the reach of two networks — is less prone to wild swings in a single network's reach by construction. (*Id*. ¶ 34. *See also* GSN Exh. 300, Brooks Written Direct ¶ 32.)

VI. THE BENEFITS AND FAVORABLE TREATMENT THAT CABLEVISION PROVIDED ITS AFFILIATES ARE EVIDENCE OF AFFILIATION-BASED DISCRIMINATION

83. In the face of substantial evidence that Cablevision's distribution business systematically provided benefits and favorable treatment to its affiliated networks, Cablevision seeks to argue that this evidence is not relevant. (Cablevision Proposed Findings ¶ 177.) However, as set out in the Reply Proposed Conclusions of Law, below, the myriad examples of Cablevision protecting and favoring its affiliated networks are themselves evidence of unlawful affiliation-based discrimination under Section 616 and Commission rules. (*See* Part X.A, *infra*.)

84. In addition, Cablevision's culture of providing its affiliated networks with benefits on the basis of affiliation is important evidence for this court to consider in evaluating whether Cablevision has offered a reasonable — and non-pretextual — business justification for its carriage decisions. [redacted]

[redacted]

85. [redacted]

86. [redacted]

87.

88. Cablevision's suggestion that Rainbow's carriage negotiations with Cablevision were "arms' length, hard core negotiations," is contradicted by its own witnesses' testimony. (Cablevision Proposed Findings ¶ 180.) Cablevision's Chief Executive Officer, James Dolan, admitted that Cablevision renewed deals with the Rainbow networks in based on the affiliation of the networks. As Mr. Dolan explained,

[redacted] (Joint Exh. 3, Dolan Dep. Tr. 132:3-133:9; *see also* GSN Exhs. 199, 202.)

89. A striking example of the absence of arms' length negotiations between Cablevision's distribution business and Rainbow is Cablevision's launch of Wedding Central. Cablevision agreed to launch Wedding Central [redacted] (Montemagno Tr. 1550:14-16; 1550:23-1551:3.) Mr. Montemagno admitted that [redacted]. (GSN Exh. 33; Montemagno Tr. 1545:2 ("What I couldn't do is stop talking to them."); GSN Exh. 28 [redacted]

90. Mr. Montemagno explained that the Cablevision distribution business ordinarily can walk away and stop talking to a programmer with which it is not affiliated, but Cablevision's distribution business did not [redacted]). (Montemagno Tr. 1546:1-25.) Consistent with that position, [redacted]

91. Cablevision suggests that its carriage of Wedding Central to and that Mr. Broussard has acknowledged that he tried unsuccessfully to secure launch and carriage of Wedding Central from Comcast, Cox, and other major distributors. (Broussard Tr. 2023:3-11.)

92. In defense of its position that its negotiations with Rainbow were "arms-length," Cablevision claims that (Cablevision Proposed Findings ¶ 181.) That simply is not the case: Cablevision documents show that Cablevision paid per subscriber for WE tv in 2010. (GSN Exh. 199, at 6.), (GSN Exh. 398, at 3.)

93. Cablevision seeks to discount the favorable channel placement that it provided WE tv by arguing that it has not provided another Rainbow network — Sundance Channel — with comparable favorable channel placement. (Cablevision Proposed Findings, ¶¶ 182, 184.) That Cablevision has not granted every favor to Rainbow that Rainbow executives

have appealed for is no answer to the fact that it does WE tv favorable channel placement — in a neighborhood of highly rated women's networks, such as Lifetime and Bravo, the benefits of which were substantiated and well understood. [redacted]

94. Finally, Cablevision argues that Cablevision's provision of marketing support to Wedding Central was common and that [redacted] (Cablevision Proposed Findings, ¶ 185 (quoting Broussard Tr. 2102:5-11).) Of course, that is what Cablevision made unaffiliated networks do — requiring GSN, for example, to pay Cablevision up to [redacted] for "launch support" when Cablevision first launched GSN in 1997. (CV Exh. 4, at 4.) In contrast, Cablevision provided substantial [redacted] marketing support to its affiliated network, Wedding Central, to promote the launch of the channel. (GSN Exh. 31. *See also* GSN Exhs. 184-192 (listing [redacted]); GSN Exhs. 240-244 ([redacted]).)

VII. AN INFERENCE OF DISCRIMINATION THAT CAN BE DRAWN FROM A COST-BENEFIT ANALYSIS OF CABLEVISION'S TIERING DECISION

95. The record establishes that Cablevision's differential treatment was based on affiliation — and not "a reasonable business purpose" — because Cablevision elected limited distribution of GSN when (i) a net loss incurred from broader distribution would have been the same as or less than Cablevision incurred in distributing its affiliated, similarly-situated network on the broader basis and (ii) broader distribution of GSN would have resulted in a net benefit to Cablevision's distribution business. As described in Section IV above, GSN has also established that Cablevision's cost justifications are pretextual. (*See Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 985-87 (D.C. Cir. 2013.) Cablevision ignores the mandate of the D.C. Circuit, and ignores the evidence concerning the costs to Cablevision of tiering GSN.

A. Lesser Incremental Loss: Cablevision Ignores the Comparative Savings from Tiering WE tv.

96. The evidence shows that any incremental losses to Cablevision from keeping GSN on a broader tier — in the form of increased subscriber fees — were no greater, and in fact less, than the losses to Cablevision from continuing to carry its similarly-situated affiliated networks on the broader tier. Cablevision rejects the evidence on the basis that it is "impossible to quantify reliability a WE tv retiering on an *ex post* basis." (Cablevision Proposed Findings ¶ 199.) This position is contradicted by reliable record evidence and the D.C. Circuit's mandate. (*See Comcast Cable*, 717 F.3d at 985-87.)

97. [redacted]

[redacted] Cablevision, however, never considered tiering WE tv or any of its affiliated networks. (Joint Exh. 1, Bickham Dep. 104:4-105:6.)

98. Cablevision suggests that these comparative savings are not relevant without an analysis of the potential churn that would result from tiering WE tv. Cablevision's assertion that it is impossible to conduct this analysis is contradicted by the record, showing that Cablevision likely would not have incurred sufficient churn among WE tv households to offset the savings on license fees. Cablevision has acknowledged the intensity with which GSN's viewers watch GSN. (GSN Exh. 301, Singer Written Direct ¶ 88.) Given the relatively greater intensity of viewership among GSN viewers, and given the finding that viewership time shares are positively correlated with churn, [redacted]. (*Id.* ¶ 91; CV Exh. 334, Orszag Direct Test. ¶¶ 152-155 [hereinafter "Orszag Written Direct"] (showing that GSN has a [redacted] than WE tv, and that viewing concentration is correlated with viewing intensity).)

B. Net Benefit: Cablevision Ignores Short-Term Losses Associated with Tiering GSN.

99. Overall, even with highly conservative assumptions, by tiering GSN, Cablevision would have incurred monthly distribution losses of [redacted] in the absence of the subsidy. (GSN Proposed Findings ¶¶ 179-180.) Cablevision argues that its decision to retier GSN was designed to be a profitable one, and emphasizes that it saved [redacted] per month in carriage fees as a result of the retiering. But the record establishes that Cablevision incurred short-term losses due to tiering GSN.

100. First, Cablevision ignores the short-term losses associated with tiering GSN. Cablevision lost [redacted] per month due to the tiering, which exceeds the [redacted] in license fees payable to GSN per month prior to the tiering. (GSN Exh. 301, Singer Written Direct ¶ 83.) Cablevision attacks Dr. Singer's estimation of the loss of goodwill from the retiering, claiming that he arbitrarily values the harm to Cablevision associated with non-churning customers at [redacted]. Cablevision ignores the record evidence underpinning Dr. Singer's analysis. Dr. Singer's valuation of the loss to Cablevision comes directly from Cablevision's own documents. [redacted] is the amount Cablevision pays in license fees each month per subscriber on the Sports & Entertainment Tier, and is a "reasonable measure of the diminution of goodwill" because it is the effective amount Cablevision was willing to offer as a subsidy to keep those customers happy. (*Id*. at ¶ 75 (citing GSN Exh. 294, a document produced by Cablevision).)

101. Dr. Singer has reliably measured Cablevision's intangible harm from the tiering event. (Singer Tr. 904:19-24.) By offering the sports tier subsidy to certain complaining customers, Cablevision converted intangible harm to its consumer relationships to a tangible loss. This is analogous to a restaurant offering a free dessert or drink to a disgruntled patron. (Singer Tr. 904:11-905:6.) Dr. Singer has substantial experience valuing intangible harm, including scholarly writing and previous engagement on the issue. (*Id*. at 906:6-11.)

102. Cablevision focuses on the benefits Mr. Orszag testified that Cablevision enjoyed by placing GSN on the sports tier. But it is undisputed that Cablevision would have had to attract more than [redacted] as many [redacted] sports tier subscribers as it lost from churn in order for the tiering to be profitable. (GSN Exh. 301, Singer Written Direct ¶¶ 77-78.) There is no evidence that Cablevision did so.

103. Second, Cablevision argues that analysis of post-tiering outcomes is unnecessary. But it ignores the D.C. Circuit's holding that a video programming service, such as GSN, can establish that the differential treatment was based on affiliation — and not "a reasonable business purpose" — by showing that an MVPD limited distribution when broader distribution of the service would have resulted in a net benefit to the MVPD's distribution business. *See Comcast Cable*, 717 F.3d at 985-87.

104. Moreover, Cablevision's stated value justifications are implausible. Had Cablevision actually considered the "value" of GSN by reference to the criteria that its own executives identify as relevant, it would have been self-evident that GSN presented a strong value to Cablevision and its iO Family package of programming. According to Cablevision's executives, the uniqueness of a network's content, the loyalty of its viewers, and the frequency with which those viewers "visit" the network, are key considerations in assessing value. (Joint Exh. 3, Dolan Dep. 118:24-119:12, 122:7-25; *see also* GSN Exh. 300, Brooks Written Direct, ¶¶ 66, 69, 103.)

105. According to James Dolan, [redacted]. (Joint Exh. 3, Dolan Dep. 118:24-119:12, 122:7-25.) In assessing networks for carriage, [redacted]. (*Id*. at 113:18-116:2.)

106. GSN performs well on each of these metrics. [redacted] (GSN

Exh. 300, Brooks Written Direct ¶¶ 67-68.) Indeed, Cablevision has observed that GSN's viewers [redacted]. (GSN Exh. 69, at CV-GSN 0410934; Joint Exh. 1, Bickham Dep. 88:8-14; GSN Exh. 45 (reflecting in sample week in November 2009 that [redacted]).) And Cablevision tiered GSN notwithstanding warnings by its own research personnel about the extreme loyalty shown by GSN viewers. (GSN Exh. 296.)

107. In addition, GSN [redacted]. (*See* Joint Exh. 3, Dolan Dep. 122:18-25; GSN Exh. 60 [redacted].) [redacted] are about [redacted] than those of WE tv. (GSN Exh. 300, Brooks Written Direct ¶ 100.)

108. Within the New York market and Cablevision's footprint specifically (where Cablevision inflates WE tv's performance by offering it favorable channel positioning and free marketing support), GSN and WE tv perform very closely in overall audience size. (*Id.* at ¶¶ 44-45.) And, of course, Wedding Central was never even rated by Nielsen and did not achieve strong performance on any metric. (*Id.* at ¶ 100.)

C. Evidence of How Other MVPDs Carry GSN Is Proof of Discrimination by Cablevision.

109. Cablevision's expert Mr. Orszag testified in the *NFL Network* and *Tennis Channel* litigations that peer carriage analysis, which he referred to as the "revealed preferences" analysis, was the "most direct and compelling evidence" of whether an MVPD's carriage of an unaffiliated network was discriminatory. (Hr'g Tr. 1291:7-18, *Tennis Channel, Inc. v. Comcast Cable Commc'ns, LLC*, MB Docket No. 10-204 (Apr. 27, 2011); *see also* Orszag Tr. 2628:24-2629:12; Direct Test. of Jonathan Orszag, Comcast Hr'g Exh. 24, *NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, MB Docket No. 08-214) (Apr. 6, 2009).) In this case, the revealed preferences of every major MVPD except Cablevision reflect that broad distribution of GSN offers value to an MVPD. Cablevision is a clear outlier compared to GSN's other affiliates. Its decision to place GSN on a tier reaching less than [redacted] of its New York subscribers in 2011 placed it [redacted] GSN's average carriage level in the 2011 marketplace of approximately [redacted] percent. (GSN Exh. 301, Singer Written Direct ¶ 71. *See also* GSN Exh. 303, Hopkins Written Direct ¶¶ 17, 20.)

110. Cablevision argues that the evidence of how other major distributors carry GSN is irrelevant to this case because certain smaller MVPDs have carried GSN on a narrowly penetrated tier in some cases and not carried it at all. (Cablevision Proposed Findings ¶ 200.) But this cherry picks data and ignores Cablevision's assessment of its place in the video programming distribution market.

111. First, the record reflects that Cablevision's carriage of GSN was significantly below the average carriage levels across *all* MVPDs. According to SNL Kagan, GSN's penetration across *all* MVPDs was projected to be [redacted] by 2011. (GSN Exh.

301, Singer Written Direct ¶ 71). Following the tiering, GSN reached approximately [redacted] of Cablevision's [redacted] basic subscribers. (*Id.*)

112. Second, Cablevision considers itself to be a peer of MVPDs with greater distribution. For example, Cablevision demands [redacted] in its distribution agreements with video programming services such as GSN. (CV Exh. 337, Montemagno Written Direct ¶¶ 21-22; Montemagno Tr. 1503:9023.) That is, Cablevision thinks it merits the same rates and other benefits as Comcast and other larger distributors. This is consistent with the testimony of Cablevision CEO James Dolan that "being the largest operator in the largest market … gives you market power" and "gives you more size than probably you actually have." (Joint Exh. 3, Dolan Dep. 11:3-18.)

VIII. REPLY FINDINGS REGARDING THE UNREASONABLE RESTRAINT ON GSN'S ABILITY TO COMPETE CAUSED BY THE TIERING

A. GSN's Increased Distribution and Revenue Are Consistent with Cablevision Imposing An Unreasonable Restraint On GSN's Ability to Compete Fairly.

113. Cablevision repeats its unsuccessful arguments from its Motion for Summary Decision in stating that because GSN has not vanished as a network, it has not been harmed and cannot prevail in this action. (Cablevision Proposed Findings ¶ 204.) Cablevision is incorrect in both its legal and factual arguments. First, the legal standard requires harm to an unaffiliated network's ability to compete fairly in an MVPD's local market — specifically, the communities that it serves. The record shows that GSN was harmed in its ability to compete fairly in the New York communities served by Cablevision in several significant respects. Second, even evaluating harms to GSN through the perspective of a national marketplace, GSN unquestionably was harmed in a substantial loss of affiliate and advertising revenue as a result of the tiering.

114. The Second Circuit has made clear that the relevant market for a harm analysis is local: "If a vertically integrated cable operator . . . has the ability to prevent an unaffiliated network from reaching a substantial portion of consumers in [the local MVPD] market[,] [i]t thereby may significantly inhibit the unaffiliated network's ability to compete fairly in *that area's* video programming market." *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 162-63 (2d Cir. 2013) (emphasis added). Cablevision has [redacted] of the market for video programming in Cablevision's footprint, which gives Cablevision substantial market power in its local market. (GSN Exh. 103, at 6.) GSN ratings in the broader New York DMA fell by [redacted] following the tiering, a loss that presumably was even more significant within Cablevision's communities and that reflects the power Cablevision exerts in its local market. (GSN Exh. 300, Brooks Written Direct ¶ 46.)

115. The tiering also reduced GSN's subscriber base by 2.5 million, leading to a loss of [redacted] in annual license fees. (GSN Exh. 297, Goldhill Written Direct ¶ 31.) GSN estimates an additional advertising loss between [redacted] annually, and provided evidence of advertising executives who did not purchase time on GSN or reduced their purchase because they could not see GSN in their homes. (GSN Proposed Findings ¶ 188.)

116. Cablevision argues that because GSN has added subscribers since the tiering, it has not been unreasonably restrained. (Cablevision Proposed Findings ¶ 207.) That is not the standard. "There is nothing inconsistent about a network attracting viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater success . . . due to discrimination by an MVPD." (*Tennis Channel* ¶ 67.) The record shows that Cablevision's discriminatory conduct has unreasonably restrained GSN from finding greater success. As a result of the tiering, GSN has

suffered lost revenues, lost subscribers, and lost standing in the marketplace. (GSN Proposed Findings ¶¶ 188-91.) The tiering delayed GSN's ability to reach 80 million subscribers, a critical threshold for advertisers, and it deprived GSN of funding needed to create and market new, original programs. (*Id.* ¶¶ 191, 196.)

117. Cablevision does not, and cannot, rebut the fact that GSN suffered substantial harm as a result of the tiering, and that such harm unreasonably restrained its ability to compete. GSN has worked hard since the tiering to minimize the impact, as any business would, but that does not obviate the harm that occurred. (*See* Goldhill Tr. 238:20-21 (stating that "we've done a lot of things to try to mitigate that harm").)

B. Cablevision Has Sufficient Market Power in the New York Communities It Serves to Unreasonably Restrain GSN.

118. Cablevision claims that it lacks sufficient market power to restrain GSN from competing within its New York footprint. (Cablevision Proposed Findings ¶ 218.) Cablevision ignores record evidence.

119. Cablevision's maintenance of its position as the dominant MVPD in the New York DMA and even more dominant within its own New York footprint, combined with numerous barriers to entry, imply that it has market power. And Cablevision may use that market power to engender significant foreclosure of independent networks in New York. Cablevision maintains a significant share of the market for video programming in New York — [redacted] within its footprint — that allows it to foreclose GSN from reaching millions of viewers within Cablevision's footprint. (GSN Exh. 301, Singer Written Direct ¶ 111.) This massive market share gives Cablevision ample ability to restrain GSN.

120. Cablevision executives admit the serious harms that result to a program service when it is tiered by a major distributor. In discussing a [redacted]

[redacted] (GSN Exh. 10.) She added that when other operators repositioned WE tv, the effect was [redacted] (*Id.*)

IX. GSN HAS PROVEN EACH ELEMENT OF ITS CLAIM

121. As Cablevision acknowledges, GSN may establish a violation of FCC rules implementing Section 616 through "either direct evidence of such discrimination or circumstantial evidence supporting an inference that such discrimination occurred." (Cablevision Proposed Findings ¶ 221.) However, Cablevision's articulation of the legal standard is rife with misunderstandings of the applicable legal framework. Among these errors, Cablevision takes the baseless position that Section 616 does not restrict it from discriminating against GSN or granting its affiliated networks more favorable treatment unless there is evidence that GSN is similarly situated to its affiliated networks. (*Id.* ¶ 252.) This confounds an evidentiary test created by the Commission to establish circumstantially an inference of discrimination with Section 616's broad prohibition of discrimination on the basis of either affiliation or non-affiliation.

122. Under the applicable legal standard, a vertically integrated MVPD is prohibited from treating unaffiliated programmers "differently" from affiliated programmers on the basis of either (1) non-affiliation, such as differential treatment that "results from" the "programmer's status as an unaffiliated entity," (*TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 12 (FCC 2010) [hereinafter "*TCR*"],) or (2) affiliation, such as the potential to produce competitive advantages or other benefits for its affiliated networks (47 C.F.R. § 76.1301(c)); *Tennis Channel* ¶ 44). Thus, to the extent that GSN establishes that either "affiliation or non-affiliation . . . 'actually played a role in th[e] process

and had a determinative influence on the outcome'" of Cablevision's carriage decisions, it will have established that discrimination Cablevision's conduct is discriminatory under the applicable standard. (*The Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C.*, 26 FCC Rcd. 17160, ¶ 105 & n. 321 (ALJ 2011) [hereinafter "*Tennis Channel Recommended Decision*"] (quoting *Herring Broad., Inc. v. Time Warner Cable Inc.*, Recommended Decision, 24 FCC Rcd. 12967, ¶ 63 (ALJ 2009) [hereinafter "*WealthTV Recommended Decision*"] and *Hazan Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).)

A. Direct Evidence of Discrimination

123. The Commission has stated that direct evidence of discrimination may include documentary or testimonial evidence that affiliation "played a role" and had a "determinative influence" on, for instance, Cablevision's inability to walk away from a deal to launch Wedding Central or on its grant to the Rainbow networks of favorable carriage terms. (*See In re Implementation of Sections 12 & 19 of the Cable Television Consumer Prot. Act*, 9 FCC Rcd. 2642, ¶ 13-17 (1993) (finding that these examples of discrimination "may be used by complainants to develop facts to support their complaints" and may "serv[e] as models for specific allegations pertaining to unfair program carriage agreements").) The question of whether GSN is "similarly situated" to Cablevision's affiliated networks is relevant only to the extent that GSN seeks to use circumstantial evidence, rather than direct evidence, to prove Cablevision's conduct was discriminatory.

124. Cablevision's unsupported suggestion that GSN's burden in establishing unlawful discrimination via direct evidence is to offer "conclusive direct evidence of discrimination" (Cablevision Proposed Findings, ¶ 223) has no basis in the statute, regulations, or case law. In the context of discrimination claims, "direct evidence" refers only to evidence that, if true, requires no inferential leap in order for a court to find discrimination. (*Bass*, 256

F.3d at 1111.) There is no basis for taking the position that direct evidence of discrimination requires an admission by Cablevision that it violated Section 616's legal framework, which is the burden that Cablevision would impose on GSN. Rather, the Court may find discrimination on the basis of evidence that, if true, requires no inferential leap in order for the Court to conclude that GSN made carriage decisions on the basis of affiliation and non-affiliation. (*Id.; see also Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 394-95 (6th Cir. 2008) (characterizing direct evidence of discrimination as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions").)

B. Circumstantial Evidence of Discrimination

125. Cablevision recognizes that the FCC permits complainants to establish a violation of FCC rules implementing Section 616 through "circumstantial evidence supporting an inference that such discrimination occurred." (Cablevision Proposed Findings ¶ 221.) The Commission has found that litigants may prove unlawful discrimination through circumstantial evidence by establishing that a defendant MVPD treated an unaffiliated network differently than an affiliated network with respect to the selection, terms, or conditions of carriage and that networks are "similarly situated," based on a combination of factors. (*Tennis Channel* ¶ 69; Hr'g Designation Order ¶¶ 10, 28, MB Docket No. 12-122, File No. CSR-8529-P (rel. May 9, 2012) [hereinafter "*HDO*"].) The networks need not be "identical"; instead, the goals of the similarly-situated test are to ensure that the networks have generally comparable popularity and program offerings. (*Tennis Channel* ¶ 51-55; *HDO* ¶¶ 10, 28.).

C. Burdens of Production and Persuasion

126. Cablevision asserts that the burden of proof in program carriage complaints rests entirely with GSN without mentioning that this is an open question of law as to "which party bears the burdens of production and persuasion after the complainant establishes a

prima facie case." (*In re Revision of the Commission's Program Carriage Rules*, 26 FCC Rcd. 11494, ¶ 79 (FCC 2011), *vacated in part on other grounds*, *Time Warner Cable*, 729 F.3d 137 [hereinafter "*Second Report and Order*"]; *see also TCR Sports Broad.*, 25 FCC Rcd. a18099, ¶ 4 (arbitrator determined that the burdens shift to the defendant after the complainant establishes a *prima facie* case).) Indeed, the Commission proposed to codify in its rules which party in a program carriage discrimination case bears the burdens of production and persuasion and sought comment on two potential frameworks, both of which shifted at least the burden of persuasion to a program carriage defendant. (*Second Report and Order*, ¶ 80.)

127. Under one alternative proposed by the Commission (the framework applied in the program access discrimination context), once a complainant establishes a *prima facie* case of discrimination based on either direct or circumstantial evidence, the burdens of production and persuasion shift to the defendant to establish legitimate and non-discriminatory reasons for its carriage decisions. (*Id.*). Under the other alternative, the shifting of burdens varies depending on whether the complainant alleges direct or circumstantial evidence to establish discrimination:

> If a complainant relies on direct evidence to establish a *prima facie* case of discrimination, the burdens of production and persuasion shift to the defendant to establish that the carriage decision would have been the same absent considerations of affiliation. If a complainant relies on circumstantial evidence to establish a *prima facie* case of discrimination, the burden of production (but not the burden of persuasion) shifts to the defendant to produce evidence of legitimate and non-discriminatory reasons for its carriage decision.

(*Id.*).

D. Harm to Ability to Compete

128. Prior to the commencement of the hearing in this case, Cablevision moved for summary decision on the question of whether Cablevision's discrimination harmed GSN's

ability to compete fairly in the communities that Cablevision serves, arguing that GSN should be required to show that Cablevision exercises nationwide market power under antitrust doctrine. (Cablevision Mot. Summ. Decision, at 13-14). Notwithstanding the unsuccessful nature of that motion, Cablevision continues to argue that the relevant market to evaluate whether GSN has been harmed is the "national market." (Cablevision Proposed Findings ¶ 227.) (It no longer explicitly takes the position that discrimination on the basis of affiliation violates Section 616 only if the harm amounts to an unreasonable restraint under antitrust law.)

129. Contrary to Cablevision's arguments, the key question is whether GSN is restrained in its ability to compete fairly within Cablevision's local coverage area (defined as, the "discrete geographic areas defined by the boundaries of [Cablevision's] individual [cable] systems." (*Time Warner Cable*, 729 F.3d at 144.) In upholding the FCC's program carriage rules against a facial challenge, the Second Circuit likewise has repudiated Cablevision's suggestion that Section 616 requires program carriage complainants to show that they are restrained from competing fairly in a *national* video programming market. The Second Circuit explained that Section 616 was motivated by Congress's concern that "a cable operator would be able to 'abuse its *locally-derived market power* to the detriment of programmers.'" (*Id.* at 146 (emphasis added (*quoting* S. Rep. No. 102-92, at 24 (1991), as reprinted in 1992 U.S.C.C.A.N. 1133, 1158).)

130. As the Presiding Judge has made clear, Section 616 should not be construed in a way that "would permit MVPDs to discriminate against unaffiliated video programming vendors . . . simply by showing that they have a relatively small percentage of overall subscribers or that a large proportion of viewers subscribe to MVPDs that are not

vertically integrated. Such a construction undermines the very purpose underlying Section 616 and 76.1301(c)." (*WealthTV Recommended Decision* ¶ 71.)

131. In evaluating whether a program carriage complainant is unreasonably restrained in its ability to compete fairly, the Commission looks to the impact of the vertically integrated MVPD's conduct "on the programming vendor's subscribership, license[] fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale." (*Second Report and Order* ¶ 60 n.60.) The Commission has specifically concluded that program carriage complainants are not required to show that a defendant MVPD holds a "bottleneck" monopoly or local market power. *(Tennis Channel* ¶ 40; *Time Warner Cable, Inc.*, 729 F.3d at 166).)

X. GSN HAS MET ITS BURDEN OF PROVING THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION

A. GSN Has Shown Probative Direct Evidence of Discrimination.

132. Cablevision's arguments that there is no direct evidence of discrimination falls flat. First, there is undisputed evidence that Cablevision applied a different standard to making carriage decisions for its affiliated networks than it applied to the unaffiliated GSN — conduct that is per se affiliation-based discrimination. (GSN Proposed Findings ¶¶ 56-79.)

133. Cablevision's principal argument is that there is no evidence that Cablevision initiated the decision to consider GSN for retiering as far back as July 2010, but that is a red herring. It is clear that Cablevision tied its final decision on whether to proceed with tiering GSN to Rainbows efforts to secure DIRECTV's launch of Wedding Central. Instead of a negotiation between Cablevision's distribution business and GSN about terms on which Cablevision might continue to distribute GSN broadly, Cablevision delegated the negotiations to Rainbow executives and tied the final carriage decision to whether the Rainbow executives were

successful in securing DIRECTV's launch of Wedding Central. (Joint Exh. 7, Sapan Dep. 238:3-240:13; GSN Exh. 260.)

134. Cablevision also argues that the "whole point" of the tiering cannot have been "to trade broader carriage of GSN for carriage of Wedding Central on DIRECTV," because, after the tiering decision was implemented, it also entertained another offer from GSN to restore broad carriage of GSN in exchange for a reduced net effective rate. (Cablevision Proposed Findings, ¶ 234.) This argument mistakes the applicable standard. It is clear that Rainbow's "ask" that DIRECTV launch GSN "actually played a role in th[e] process and had a determinative influence on the outcome" on Cablevision's decision to proceed with the tiering of GSN. (*Tennis Channel Recommended Decision* ¶ 105 & n. 321 (quoting *WealthTV Recommended Decision* ¶ 63).)

135. Finally, Cablevision contends that the Media Bureau, in its Hearing Designation Order in this proceeding, "declined to credit these allegations as direct evidence of discrimination." (Cablevision Proposed Findings ¶ 232.) It is true that the Media Bureau stated that there was a "question whether GSN's alleged direct evidence of discrimination, standing alone, is sufficient to establish a *prima facie* case." (*HDO ¶ 36.*). However, the Media Bureau never resolved that question. In any event, there no longer can be any such question in light of the substantial record evidence that emerged during discovery and at trial, as a result of which it is now clear that Cablevision delegated the final negotiations on carriage of GSN to Rainbow executives (Broussard Tr. 1947:1-8; 2044:12-22; GSN Exh. 111) — part of a practice of delegating carriage negotiations with vertically integrated MVPDs to Rainbow executives. (GSN Exh. 39; Broussard Tr. 2136:8-2137:12; Montemagno Tr. 1555:11-17; Joint Exh. 3, Dolan

Dep. 61:10-62:19). Affiliation (and the extraction of benefits for an affiliated network) by definition played a role in such negotiations.

B. GSN Has Proven that It Is Similarly Situated to WE tv or Wedding Central.

136. The similarly situated standard averred by Cablevision — that GSN be identical to WE tv and Wedding Central — was rejected expressly by the Commission. For purposes of the inquiry under Section 616, the networks need not be "identical"; instead, it is sufficient that they compete with each other and have generally comparable popularity. (*Herring Broad., Inc. v. Time Warner Cable Inc.*, , 23 FCC Rcd. 14787, ¶ 75 (MB 2008); *Tennis Channel* ¶¶ 51-55; *HDO* ¶¶ 10, 28; *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 23 FCC Rcd. 15783, ¶¶ 27-28 (MB 2008) [hereinafter *TCR*], *rev 'd on other grounds*, 25 FCC Rcd. 18099, ¶ 11 (FCC 2010).)

137. In this case, the factors collectively establish that both GSN and WE tv (and, during its existence, Wedding Central) are strongly female-oriented networks that target women viewers and compete with each other, including for advertisers and audience. (*See* Part V, *supra*.) Likewise, it is clear that GSN was an even better value proposition than WE tv. It was [redacted], and yet it was comparable in terms of popularity. (*See* Part VI.A, *supra*.)

C. GSN Has Proven that Cablevision's Retiering Decision Lacked a Legitimate, Non-Discriminatory Justification.

138. GSN has established that Cablevision's differential treatment was based on affiliation — and not "a reasonable business purpose" — by showing that Cablevision's stated "value" rationale for tiering GSN was pretextual. (GSN Proposed Findings Part III.B.) GSN has shown that Mr. Bickham did not rely on Mr. Montemagno's memo in deciding to tier GSN but instead applied a "must-have" test that he did not apply to his own networks and that,

by his definition, GSN passed. (*Id.*) Even after [redacted] customers called to complain about the tiering of GSN, Cablevision still insisted on a [redacted] deal to return GSN to expanded basic. (Montemagno Tr. 1559:17-23.)

139. Cablevision argues that GSN has failed to establish that Cablevision's *initial* targeting GSN was not a pretextual tactic to obtain carriage of Wedding Central. But that is not GSN's contention. Rather, GSN has established that there are multiple acts of direct discrimination, each of which has significance. (GSN Proposed Findings Part II.) After deciding to tier GSN, Cablevision informed GSN that it would return GSN to its prior level of carriage only if GSN's parent, DIRECTV, agreed to carry the struggling Wedding Central network broadly. That, among other acts, constitutes direct evidence of discrimination.

D. Cablevision's Favorable Treatment of Its Affiliated Networks, Without Providing Similar Benefits to Unaffiliated Networks, Is Circumstantial Evidence of Discrimination.

140. Cablevision's position that it is permitted to provide its affiliated networks more favorable treatment so long as GSN is not similarly situated to its affiliated networks reflects a fundamental misunderstanding of the Section 616 framework. (Cablevision Proposed Findings ¶ 252.) This confounds an evidentiary test created by the Commission to establish circumstantially an inference of discrimination with Section 616's broad prohibition of discrimination on the basis of either affiliation or non-affiliation.

141. Cablevision is not permitted to make carriage decisions — whether they constitute favorable treatment for its affiliated networks or unfavorable treatment for a competing unaffiliated network — on the basis of affiliation or non-affiliation. (*See TCR* ¶ 24 (making clear that a vertically integrated MVPD is "precluded from treating unaffiliated programmers disparately from affiliates [unless] it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity").) Thus, the Commission

previously has recognized that conduct such as a vertically integrated MVPD's "willingness to sell . . . data useful in promotional activity only to affiliated programmers" or "requiring that unaffiliated services waiver rights not waived by any comparable affiliated . . . service" may serve as the basis for a program carriage complaint. (*In re Implementation of Sections 12 and 19 of the Cable Television Consumer Prot. Act*, 9 FCC Rcd. 2642, ¶ 13-17.) Such favorable treatment is itself discrimination.

E. GSN Has Established that an Inference of Discrimination Can Be Drawn from a Cost/Benefit Analysis of Cablevision's Retiering Decision.

142. GSN has established that Cablevision's differential treatment was based on affiliation — and not "a reasonable business purpose" — by showing that Cablevision elected limited distribution of GSN when (i) a net loss incurred from broader distribution would have been the same as or less than Cablevision incurred in distributing its affiliated, similarly-situated network on the broader basis and (ii) broader distribution of GSN would have resulted in a net benefit to Cablevision's distribution business. (GSN Proposed Findings Part III.B.2-3; *see also Comcast Cable*, 717 F.3d at 985-87.)

143. Cablevision would have saved more money by tiering its affiliated networks WE tv or Wedding Central. That is, Cablevision likely incurred a profit sacrifice by not tiering WE tv or Wedding Central. Yet there is no evidence that Cablevision considered the potential savings from repositioning its own networks. Maintaining GSN's carriage on the family tier would have cost Cablevision approximately [redacted] in 2011, a mere [redacted] of Cablevision's total programming budget. (GSN Exh. 80, at CV-GSN 0427144.) In contrast, had it opted to move WE tv to the sports tier, Cablevision would have saved [redacted] per month in avoided license fees —or [redacted] in 2011 alone, [redacted] than the cost savings it achieved by tiering GSN. Yet Cablevision [redacted]

[redacted]. (Joint Exh. 1, Bickham Dep. 64:1-8; 104:4-105:6; Joint Exh. 3, Dolan Dep. 133:10-15.)

XI. GSN HAS MET ITS BURDEN OF PROVING THAT CABLEVISION'S CONDUCT UNREASONABLY RESTRAINED GSN'S ABILITY TO COMPETE FAIRLY

144. GSN has shown that the significant loss of revenue and loss of subscribers due to the tiering has unreasonably restrained its ability to compete fairly in New York and nationally. In New York, GSN's substantial loss in ratings harmed GSN's ability to sell advertising and increase its advertising rates. (GSN Proposed Findings ¶¶ 183-187.) The tiering prevented advertising executives from being able to access GSN in their homes, and made it more difficult for GSN to compete for advertisers. (*Id.*)

145. GSN's direct loss in revenue due to the tiering totals [redacted] per year. The loss of 2.5 million Cablevision subscribers, at a monthly rate of [redacted] per subscriber, equals an annual loss of [redacted] in license fees. Just as importantly, the loss in advertising revenue attributable to the tiering is approximately [redacted] per year. This direct loss from the tiering is equal to approximately [redacted] of GSN's overall television profit. (Goldhill Tr. 234:9-21.) The loss harmed, and continues to harm, GSN's ability to create new shows, hire new talent, and market its programs. Networks rely on original programming to create buzz, sell advertising, and attract new audiences. The loss in revenue unreasonably restrained GSN's ability to compete by substantially reducing the money available to GSN for original programs to build and market itself. (*Id*. at 235:2-6, 11-15.)

146. Cablevision argues that it lacks "sufficient market power to restrain GSN." (Cablevision Proposed Findings ¶ 265.) And, as it unsuccessfully argued in its Motion for Summary Decision, Cablevision states that because its 2.8 million subscribers represent less than 3 percent of the national market, it does not have "national market power" under the test

articulated by Judge Kavanaugh in his *Tennis Channel* concurring opinion. (*Id.* ¶ 265.) In relying on the concurring opinion of one member of a three-judge panel, Cablevision fails to note that the majority of the D.C. Circuit panel declined to adopt Judge Kavanaugh's extreme position, which would have gutted the program carriage rules, and instead the majority left intact the Presiding Judge's and Commission's interpretation of the rules. (*Comcast Cable Commc'ns, LLC*, 717 F.3d.)

147. Cablevision argues that even if the relevant market is local, the competition that it faces from other MVPDs means that Cablevision cannot exercise market power. (Cablevision Proposed Findings, ¶¶ 267-68.) Cablevision does not rebut the evidence, provided by Cablevision, that at the end of 2010 it had a penetration of [redacted] in its market. (GSN Exh. 103, at 6.) Nor does Cablevision rebut the statement in its own 10-K reporting that at the end of 2010 it served 3.3 million video subscribers, 3 million of whom lived in the New York metropolitan area. (GSN Exh. 348, at 4.) Cablevision argues that it cannot exercise market power because AT&T, DIRECTV, DISH, and Verizon *combined* have over 2 million subscribers in New York, compared to 3 million for Cablevision *alone*. (Cablevision Proposed Findings ¶¶ 218, 267, 268.) Cablevision clearly has market power under the definition provided by the Second Circuit: "[A] vertically integrated cable operator with a *significant* share of an MVPD market will have the incentive and ability to prevent unaffiliated networks from competing fairly in a video programming market." (*Time Warner Cable, Inc.*, 729 F.3d at 163 (emphasis added).)

XII. CABLEVISION'S FIRST AMENDMENT ARGUMENT HAS BEEN REJECTED BY THE COMMISSION AND THE COURTS.

148. The Commission and the Courts have repeatedly rejected Cablevision's argument that the First Amendment bars the Commission from enforcing Section 616 against an

MVPD. This case in particular presents few concerns regarding compelled speech; Cablevision already carries GSN and has done so for nearly two decades. Any order issued by the Commission would merely affect the amounts Cablevision may charge its subscribers for access to GSN, not whether GSN will be carried at all.

149. Courts that have considered similar types of First Amendment arguments have agreed that they lack merit. The D.C. Circuit in its *Time Warner* decisions rejected a substantially similar First Amendment argument made by cable operators. The Court stated that there was "nothing to this" argument in part because the leased access provisions at issue in that case "do not favor or disfavor speech on the basis of the ideas contained in the speech or the views expressed." *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969, 977-78 (D.C. Cir. 1996). The Court found it significant that independent programmers' "qualification to lease time . . . depends not on the content of their speech, but on their lack of affiliation with the operator." *Id*. at 969. *See also Second Report and Order* ¶ 32 ("The program carriage rules, like the leased access requirements, promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs.").

150. The two opinions Cablevision cites do not lend authority to its First Amendment argument. It first cites a concurring opinion by Judge Kavanaugh in the D.C. Circuit's *Tennis Channel* decision that was not adopted by the full panel and therefore lacks the force of law. (*See Tennis Channel*, 717 F.3d at 993 (Kavanaugh, J., concurring)). The other opinion, the Second Circuit's *Time Warner* decision, acknowledges that, while "a day may well come when the anticompetitive concerns animating Congress's enactment of § 616(a)(3) and (5)

will so effectively be eliminated or reduced as to preclude government intrusion on MVPDs' carriage decisions . . . such a day has not yet arrived." (*Time Warner Cable*, 729 F.3d at 161.)

151. Even to the extent the enforcement of Section 616 implicates the First Amendment, the cable carriage rules are — as Cablevision now admits — content-neutral and subject to intermediate scrutiny. (Cablevision Proposed Findings ¶¶ 270, 271.) The application of these rules must therefore be sustained "if [they] advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to further those interests." (*Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997); s*ee also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994); *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, 26 FCC Rcd. 15849 ¶ 33 & n.160 (FCC 2011).) A showing that competition is affected in a relevant market satisfies the "important governmental interest" requirement. (*See Time Warner Cable*, at 161 (holding that a complainant "has no obligation to establish that vertically integrated cable companies retain a stranglehold on competition nationally," but rather, "it must show a reasonable basis for concluding that *some markets exist i*n which MVPDs have the incentive and ability to harm unaffiliated networks and that application of the program carriage regime will alleviate that harm" (emphasis added).).

152. Cablevision's argument that GSN cannot prove harm in the relevant market falls short. (*See* Cablevision Proposed Findings ¶ 271.) To satisfy the important governmental interest prong, GSN is required only to demonstrate that Cablevision's actions have effected competition in at least some relevant markets. GSN made this showing. GSN presented evidence that Cablevision has penetration of [redacted] of the market for video programming within its New York footprint, conferring significant market power and the ability to restrain GSN's competition. (GSN Proposed Findings ¶ 183.) GSN's ratings in New York

DMA fell by [redacted] from the second quarter of 2010 to the second quarter of 2011 as the result of the tiering. (GSN Proposed Findings ¶ 185.)

153. Even assuming that a showing of national market power is required, GSN satisfied this burden as well. For example, GSN presented evidence that Cablevision's unique position in the New York marketplace allowed it to cut off GSN's access to key advertising buyers and cause the direct loss of [redacted] in advertising buys from both existing and prospective advertisers as a result. (GSN Proposed Findings ¶¶ 187-195.)

154. Thus, Cablevision's First Amendment challenge is both facially deficient and fails even if the Court examines the important governmental interest here at issue — namely, the harm to GSN's ability to compete in the relevant marketplace.

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September 30, 2015

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