

Before the
Federal Communications Commission
Washington, D.C.

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

TO: Chief Administrative Law Judge Richard L. Sippel

**CABLEVISION SYSTEMS CORPORATION'S REPLY
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
SUMMARY OF REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW	1
REPLY FINDINGS OF FACT	4
I. THERE IS NO DIRECT EVIDENCE OF DISCRIMINATION	4
A. Cablevision’s Alleged Favoritism of its Affiliated Networks Is Not Direct Evidence of Cablevision’s Discriminatory Intent.....	4
B. Post-Retiering Negotiations Between Rainbow and DIRECTV Are Not Direct Evidence of Discrimination	11
II. GSN IS NOT SIMILARLY SITUATED TO WE TV OR WEDDING CENTRAL.....	14
A. GSN and WE tv Targeted and Aired Different Programming.....	15
B. GSN and WE tv Targeted Different Audiences	18
C. GSN and WE tv Delivered Different Audiences	21
D. GSN and WE tv Targeted and Attracted Different Advertisers	24
E. GSN and WE tv’s Respective License Fees Are Not Probative	26
F. The Testimony of Cablevision’s Experts Is Reliable and Credible.....	27
G. The Testimony of GSN’s Expert Witnesses Is Not Credible.....	39
III. CABLEVISION RETIERED GSN FOR LEGITIMATE BUSINESS REASONS.....	42
A. GSN Has Not Proven that Cablevision’s Business Justifications for the Retiering Are “Pretextual”	42
B. GSN’s After-the-Fact Cost-Benefit Analysis Does Not Prove that Cablevision Acted With Discriminatory Intent	46

IV. GSN HAS NOT PROVEN THAT CABLEVISION’S RETIERING WAS AN UNREASONABLE RESTRAINT ON GSN’S ABILITY TO COMPETE FAIRLY	48
REPLY CONCLUSIONS OF LAW.....	51
V. GSN BEARS THE BURDEN OF PROOF	51
VI. GSN HAS NOT PROVEN THROUGH DIRECT EVIDENCE THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION.....	53
VII. GSN HAS NOT PROVEN THROUGH CIRCUMSTANTIAL EVIDENCE THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION.....	57
A. GSN Has Not Proven that It Is Similarly Situated to WE tv or Wedding Central.....	57
B. GSN Has Not Proven that Cablevision’s Non-Discriminatory Justification for the Retiering Decision Is “Pretextual”	60
C. GSN Has Not Established that an Inference of Discrimination Can Be Drawn from a Cost-Benefit Analysis of Cablevision’s Retiering Decision	63
VIII. GSN HAS NOT PROVEN THAT CABLEVISION’S CONDUCT UNREASONABLY RESTRAINED GSN’S ABILITY TO COMPETE FAIRLY	64
IX. GSN IS ENTITLED TO NO REMEDY, AND THE RELIEF IT SEEKS IS BARRED BY THE FIRST AMENDMENT.....	65
CONCLUSION	66

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Comcast Cable Communications, LLC v. FCC</i> , 717 F.3d 982 (D.C. Cir. 2013).....	31, 61, 62
<i>Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California</i> , 508 U.S. 602 (1993).....	52
<i>Goldhirsh Group, Inc. v. Alpert</i> , 107 F.3d 105 (2d Cir. 1997).....	52, 56
<i>Groobert v. President & Directors of Georgetown College</i> , 219 F. Supp. 2d 1 (D.D.C. 2002).....	36
<i>Hairston v. Vance-Cooks</i> , 773 F.3d 266 (D.C. Cir. 2014).....	61
<i>Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.</i> , 515 F. App'x 655 (9th Cir. 2013).....	29, 30
<i>Kumho Tire Co. v. Carmichael</i> , 526 U.S. 137 (2002).....	36
<i>TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.</i> , 679 F.3d 269 (4th Cir. 2012).....	31
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981).....	61
<i>Woodard v. Fanboy, L.L.C.</i> , 298 F.3d 1261 (11th Cir. 2002).....	61
<i>Young v. Dillon Companies, Inc.</i> , 468 F.3d 1243 (10th Cir. 2006).....	61
Administrative Decisions	
<i>Game Show Network, LLC v. Cablevision Sys. Corp.</i> , Hr'g Designation Order, 27 FCC Red. 5113 (MB 2012).....	54, 55, 56

Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.,
Recommended Decision, 24 FCC Rcd. 12967 (ALJ 2009)..... 52, 54, 58, 62

*Revision of the Commission’s Program Carriage Rules; Leased Commercial
Access; Development of Competition and Diversity in Video Programming
Distribution and Carriage*,
Second Report & Order 26 FCC Rcd. 11494 (2011)..... *passim*

Tennis Channel, Inc. v. Comcast Cable Communications, LLC,
26 FCC Rcd. 17160 (ALJ 2011)..... 51, 52, 53, 58

Other Authorities

Black’s Law Dictionary (14th ed)..... 61

Comcast Cable Communications, LLC v. FCC,
Brief of Respondent FCC, No. 12-1337, 2012 WL 546085 (Nov. 7, 2012)..... 62

Tennis Channel, Inc. v. Comcast Cable Communications, LLC,
Comments of the Enforcement Bureau, MB Docket No. 10-204, File No.
CSR-8258-P (July 8, 2011)..... 51

Tennis Channel, Inc. v. Comcast Cable Communications, LLC,
Post-Trial Brief of the Tennis Channel, Inc., MB Docket No. 10-204, File No.
CSR-8258-P (June 21, 2011)..... 52

Defendant Cablevision Systems Corporation (“Cablevision”) respectfully submits the following Reply Findings of Fact and Conclusions of Law in the above-captioned program carriage complaint proceeding brought by Complainant Game Show Network, LLC (“GSN”).

SUMMARY OF REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Cablevision’s Proposed Findings of Fact and Conclusions of Law draw from the comprehensive record and set forth a straightforward recitation of the applicable, accepted legal standards. GSN’s submission omits critical facts and misstates the law. GSN’s Proposed Findings of Fact and Conclusions of Law should be rejected, and Cablevision’s should be adopted, for the following reasons:

2. First, GSN asks the Presiding Judge to adopt unprecedented interpretations of Section 616 and the Commission’s rules and regulations. Contrary to the Presiding Judge’s and Commission’s past rulings, GSN attempts to shift the burden of proof, to recast the meaning of “direct evidence of discrimination,” and to eliminate probative factors expressly identified by the Commission, such as “programming genre,” from the analysis. The legal standards GSN asks the Presiding Judge to adopt are unsupportable. There is no reason to entertain GSN’s invitation to stretch Section 616 and the well-settled law of carriage discrimination cases beyond their limits.

3. Second, because the record does not reveal any “direct evidence” of discrimination on the basis of affiliation in Cablevision’s actual carriage decision, GSN erroneously contends that it nonetheless can meet this standard through a showing of Cablevision’s alleged favoritism of its affiliated networks, and post-retiering negotiations between Cablevision’s programming arm and GSN’s parent, DIRECTV. The law is to the

contrary. And even if it were not, the facts support no such finding of favoritism. GSN ignores record evidence showing that Cablevision carried its affiliated networks on market terms and at market rates, and that purported “giveaways” from Cablevision’s distribution arm to its programming arm reflected the resolution of good faith business disputes. GSN next ignores evidence that DIRECTV, not Cablevision, initiated discussions concerning DIRECTV’s carriage of Cablevision-affiliated Wedding Central, and that Cablevision continued to explore ways to restore the broader carriage of GSN even after DIRECTV made plain that it would not carry Wedding Central.

4. Third, GSN fails to address in a meaningful way the substantial record evidence clearly demonstrating that GSN and WE tv are not similarly situated. Although GSN asks the Presiding Judge to reject a genre analysis that he has credited before, it offers no competing analysis that would show that WE tv and GSN targeted or aired similar programming. That is because it cannot do so; the networks differed fundamentally in the programming they transmitted to their viewers. In the end, GSN’s “proof” of programming similarity boils down to a few cherry-picked shows, a number of which premiered years after Cablevision made its retiering decision.

5. GSN’s effort to show that the networks targeted similar audiences is also based on a selective recitation of the record. GSN cannot explain why, if it has always been a “women’s network,” it generated document upon document in the ordinary course of business describing itself as a network dedicated to game shows and the broad audience they attract. It has no answer as to why its carriage agreements with its MVPD partners guarantee

rather than promised to cable and satellite operators by WE tv. And GSN fails to come to grips with the reams of Nielsen data

demonstrating that WE tv consistently attracted an audience made up in majority by women between the ages of 18 and 54, while the same group comprised only a small minority of the GSN audience, which largely consisted of both women and men over the age of 55.

6. Nor is GSN's burden of proving similarity discharged by its shrill, *ad hominem*, and ultimately unjustifiable attacks on the qualifications, independence, and methodologies of Cablevision's experts. Such tactics—ironic as they are from a party whose experts have made their careers by testifying against cable operators in case after case—cannot conceal the fact that GSN has failed to prove, through expert testimony or otherwise, that it is similarly situated to WE tv.

7. Fourth, faced with overwhelming evidence that Cablevision decided to retier GSN to save programming costs incurred by broadly carrying a network that only a tiny fraction of Cablevision's subscribers watched, GSN resorts to dismissing such evidence as “pretextual.” The evidence does not come close to supporting GSN's claim. In the end, GSN has presented no reason to discredit the testimony of Cablevision's witnesses and the corroborating contemporaneous documents showing that Cablevision retiered GSN solely to save costs and without regard for GSN's affiliation or Cablevision's affiliated networks.

8. Finally, GSN persists in its claim that it has been “harmed” by the Cablevision retiering when all of the evidence at trial demonstrated precisely the opposite: since the retiering GSN has had a period of unprecedented success.

9. In sum, GSN has provided no grounds on which the Presiding Judge can fairly conclude that Cablevision discriminated on the basis of affiliation.

REPLY FINDINGS OF FACT¹

I. THERE IS NO DIRECT EVIDENCE OF DISCRIMINATION

10. GSN's alleged "direct evidence" of discrimination falls into two categories: (1) benefits that Cablevision purportedly provided to its affiliated networks but not to GSN; and (2) discussions between Cablevision's programming arm, Rainbow, and GSN's corporate parent, DIRECTV, that occurred after Cablevision made its decision to retier GSN. Neither is the type of evidence that the Commission or the Presiding Judge has recognized as direct evidence of discrimination in past carriage rulings.² In any event, the weight of the entire evidentiary record, rather than the snippets GSN presents in its Proposed Findings of Fact, shows that GSN's allegations of undue favoritism and an orchestrated scheme to gain carriage for Wedding Central are all unfounded.

A. Cablevision's Alleged Favoritism of its Affiliated Networks Is Not Direct Evidence of Cablevision's Discriminatory Intent

11. As set forth in Cablevision's Proposed Findings of Fact and Conclusions of Law, there is no evidence linking WE tv or Wedding Central to Cablevision's decision to retier GSN.³ GSN does not dispute this, nor could it. Instead, GSN presents a hodgepodge of documents and testimony suggesting that Cablevision provided its affiliated networks with preferential treatment, and argues that it constitutes "direct evidence" of discrimination.⁴ It does not.

¹ Throughout this Reply, Cablevision's Proposed Findings of Fact and Conclusions of Law are cited as "CV FOF & COL ¶ __," GSN's Proposed Findings of Fact are cited as "GSN FOF ¶ __," and GSN's Proposed Conclusions of Law are cited as "GSN COL ¶ __."

² See *infra*, ¶¶ 99-106.

³ See CV FOF & COL ¶¶ 55-56.

⁴ See GSN FOF ¶¶ 25-30, 56-73. GSN's further claim that Cablevision did not understand its legal obligations under Section 616 is unsupported by the record. As Mr. Dolan testified, Cablevision has

12. GSN highlights testimony from Mr. Montemagno indicating that Cablevision “could not walk away” from negotiations with its affiliated networks, WE tv and Wedding Central. Indeed, in its Proposed Findings of Fact and Conclusions of Law, GSN cites or quotes this testimony no fewer than six times.⁵ GSN asserts this is evidence that Cablevision favored its affiliates by negotiating with them at less than arms-length.⁶

13. The substantial record evidence, however, demonstrates that carriage negotiations between Rainbow and Cablevision resulted in terms of carriage for WE tv and Wedding Central that were consistent with the terms they reached with non-affiliated MVPDs.⁷ Cablevision carried Wedding Central, a start-up network, at the same level of penetration that _____, carried the network.⁸ Cablevision also paid the same license fees to Wedding Central that

9

14. Cablevision carried WE tv, a fully-distributed national cable network, at a high level of penetration, as did many other MVPDs.¹⁰ The plain terms of WE tv’s actual contracts with other MVPDs contradict GSN’s assertion that Cablevision granted WE tv “above market” rates and other favorable terms when the parties renewed their carriage agreement in

a “very capable legal team that monitors all of our negotiations” and “is in charge of making sure [Cablevision] is compliant with all parts of the Act,” including Section 616. Joint Exh. 3 at 48:4-9, 49:9-15 (Dolan). Mr. Broussard—who worked in a business role at Rainbow and was not involved in the decision to retier GSN—testified that he was “aware of the concept[s]” in Section 616. See Tr. 1959:8-10, 1959:16-19 (Broussard).

⁵ GSN FOF ¶¶ 6, 25, 57, 58, 72; GSN COL ¶ 4.

⁶ GSN FOF ¶¶ 25, 72.

⁷ CV FOF & COL ¶ 181.

⁸ *Id.*

⁹ *Id.*

¹⁰ CV Exh. 339 ¶¶ 11-13 (Broussard).

2011.¹¹ Mr. Montemagno testified that the 2011 WE tv deal included “market rate subscriber fees” and “represented a good value for Cablevision.”¹² WE tv’s 2011 carriage agreement with Cablevision provided a rate of _____ per subscriber per month in 2011, increasing to _____ in 2015.¹³ At that time, other major MVPDs, including _____ paid WE tv the same or higher rates under their carriage agreements with WE tv.¹⁴ All of these agreements are in evidence, but ignored by GSN.¹⁵

15. Similarly, Cablevision’s business decision to _____

_____ is not evidence of discrimination. To begin, Mr.

Montemagno and Mr. Broussard gave consistent testimony concerning the disagreement their respective divisions had over the proper interpretation of _____

Mr. Broussard testified to his good faith understanding that _____

¹¹ See GSN FOF ¶ 68.

¹² CV Exh. 337 ¶ 80 (Montemagno); *see also* Joint Exh. 3 at 133:4-9 (Dolan) (testifying that renewed affiliation agreements benefited the Rainbow networks and Cablevision).

¹³ CV Exh. 7 at 60.

¹⁴ See CV Exh. 14 at 39 (carriage agreement with _____, providing a rate of _____ in 2011, increasing to _____ in 2014); CV Exh. 26 at 7-8 (carriage agreement with _____, providing a rate of _____ starting in 2006, with _____ annual increases each year thereafter, for a rate of _____ in 2011); CV Exh. 8 at 22 (renewal of carriage with _____ providing a rate of _____ per subscriber for each month in 2012).

¹⁵ GSN also relies on one or two emails in which Mr. Montemagno evinced his frustration that Rainbow executives appeared to be bypassing him to negotiate carriage with more senior executives at Cablevision. GSN FOF ¶ 25. As one of those Rainbow executives, Mr. Sapan, testified, he frequently bypassed more junior executives to negotiate directly with senior distribution executives and CEOs at many MVPDs, not just Cablevision. Joint Exh. 7 at 45:2-46:12 (Sapan). *See also* CV Exh. 337 ¶ 89 (Montemagno).

¹⁶ Mr.

Montemagno in turn testified that, in his view,

¹⁸

Cablevision's contemporaneous written analyses of the reflect both parties' concerns, including

¹⁹

16. GSN suggests that it was a foregone conclusion that

²⁰ But GSN elides the critical fact that Mr.

Rutledge, who oversaw both Rainbow and Cablevision's distribution division, made the ultimate decision to and did so as "part of a broader analysis."²¹ To credit GSN's view of the facts, the Presiding Judge would have to conclude that, when Mr. Rutledge performed his "broader analysis" of the issue, he understood that Mr. Montemagno's position was objectively correct, but resolved it in Rainbow's favor because of some

¹⁶ Tr. 1940:3-1943:14 (Broussard); *see also* CV Exh. 7 at 4

¹⁷ Tr. 1594:3-20 (Montemagno).

¹⁸ Tr. 1599:23-1600:20, 1651:9-1652:3 (Montemagno).

¹⁹ *See* GSN Exh. 398 at 2

GSN Exh. 239 at CV-GSN 0433042

²⁰ GSN FOF ¶¶ 61-64.

²¹ Tr. 1599:23-1600:20 (Montemagno); *see also* Tr. 1943:3-11, 2007:13-19 (Broussard).

discriminatory impulse. There is no evidence to support this inference. GSN did not call Mr. Rutledge as a trial witness and, in almost three years of discovery, did not even seek his deposition. Accordingly, GSN has not proven through direct evidence that Mr. Rutledge resolved this good-faith dispute with discriminatory intent.²²

17. GSN also contends that Cablevision was under an obligation to consider retiering WE tv, and that its failure to do so is direct evidence of discriminatory intent.²³ Not so. GSN does not address the record evidence showing that—unlike WE tv—GSN and the other networks for which Cablevision conducted carriage assessments in 2010 were either out of contract or nearly so, giving Cablevision the flexibility to drop or reposition them.²⁴ Mr. Bickham testified, with respect to GSN, that “it’s not possible generally to drop a network or to reposition a network that is in contract unless you have drop rights or repositioning rights. But in this case there was no contract so it was a fairly easy network to look at.”²⁵ According to Mr.

²² Furthermore, although GSN emphasizes that Cablevision “‘gave away’ _____ to its affiliated networks, the bulk of this purported “giveaway” arose from _____ In 2010, Cablevision valued its _____ *Compare GSN FOF ¶ 171 with GSN FOF ¶ 66; GSN Exh. 239 at CV-GSN 0433042; GSN Exh. 398 at 3. It is only by including*

GSN FOF ¶ 66.

²³ GSN FOF ¶¶ 58-60. Cablevision has described the thorough, well-documented process that Mr. Montemagno and other Cablevision executives followed in deciding to retier GSN, and need not recite those facts again here. CV FOF & COL ¶¶ 35-52.

²⁴ CV FOF & COL ¶ 42; *see also* Tr. 1662:15-24 (Montemagno).

²⁵ Joint Exh. 1 at 38:8-23 (Bickham); *see also id.* at 95:18-25 (Bickham) (“Q. Did you consider any networks that constituted a larger percentage of the Cablevision programming budget for either elimination or retiering in this? A. Certainly, if we had the rights to eliminate it or retier it, we would have looked at it and thought about it. Game Show was out of contract so the way we looked at it, we had those rights.”).

Bickham, “I don’t think I would have asked for an assessment if it was a network that was in contract because it would be futile.”²⁶

18. Cablevision’s ordinary course business documents show that Cablevision had “Total Packaging/Carriage Flexibility” with respect to GSN.²⁷ These same documents reflect a number of limitations on Cablevision’s right to reposition WE tv, including a

²⁸ This is consistent with carriage agreements Cablevision had with any number of non-affiliated networks that constrained its ability to drop or reposition them to Cablevision’s Sports & Entertainment tier.²⁹ Although GSN implies that Cablevision could have simply ignored its contractual obligations with WE tv, no record evidence supports this.³⁰ And even though Cablevision and WE tv entered into a new agreement months later, GSN has provided no proof that it would have made good business sense to re-tier WE tv.

19. GSN also complains that Cablevision placed WE tv in a more favorable channel location than GSN, and that “[t]he benefits of favorable channel placement and a good neighborhood were substantiated and well understood.”³¹ It is a complaint raised for the first time in this proceeding; there is no evidence that GSN ever complained about its channel

²⁶ *Id.* at 38:16-18 (Bickham).

²⁷ CV Exh. 99 at 6; CV Exh. 337 ¶ 46 n.2 (Montemagno).

²⁸ CV Exh. 99 at 8. Cablevision’s carriage agreement with WE tv sets out these limitations in more detail. CV Exh. 7 at 27-30, 32.

²⁹ *See* Tr. 1680:9-20 (Montemagno); *see generally* CV Exh. 99 (describing “Packaging/Contractual Benchmark Requirements” for dozens of networks carried by Cablevision).

³⁰ GSN FOF ¶ 71.

³¹ *Id.* ¶ 29.

position to Cablevision in any of their years of negotiations about a new carriage agreement.³² In any case, GSN made no effort to measure the effects of channel placement on the networks in this specific case. Mr. Brooks testified that he did not compare GSN's ratings on Cablevision to its ratings on other MVPDs in the New York DMA where GSN has allegedly better channel placement.³³ Moreover, GSN has failed to prove that the Rainbow networks received their channel placement due to Cablevision's favoritism. Mr. Sapan testified that other MVPDs, including _____, provided WE tv with beneficial channel placement similar to the channel placement WE tv received from Cablevision.³⁴ Ms. Martin testified that she asked Cablevision to place Wedding Central in a favorable channel position and neighborhood, but that it was "not placed in any of those neighborhoods or anywhere near where we wanted, we were placed in a much less desirable area."³⁵

20. Indeed, GSN offered scant evidence that Cablevision treated Wedding Central favorably in any material respect. Cablevision paid _____ both of which were benefits to Cablevision.³⁶ Cablevision provided Wedding Central with a nominal amount of promotional support on launch.³⁷ Ultimately, Cablevision did not merely reter, or even drop,

³² CV FOF & COL ¶ 184.

³³ Tr. 1318:25-1321:15 (Brooks).

³⁴ Joint Exh. 7 at 179:22-180:13 (Sapan).

³⁵ Joint Exh. 6 at 294:25-295:10 (Martin). Likewise, other Cablevision affiliates, such as IFC, did not receive favorable channel placement on Cablevision. CV FOF & COL ¶ 184.

³⁶ CV FOF & COL ¶ 181.

³⁷ See, e.g., GSN Exh. 242 (showing that Cablevision provided Wedding Central with approximately _____ in analog and digital banner promotion on launch, compared to _____ in banner

Wedding Central, but in the spring of 2011 decided to shut down Wedding Central altogether because it had not proven viable.³⁸ This is not proof of favorable treatment.

B. Post-Retiering Negotiations Between Rainbow and DIRECTV Are Not Direct Evidence of Discrimination

21. GSN's second category of "direct evidence" of discrimination concerns discussions that took place between representatives of GSN's parent company, DIRECTV, and WE tv's parent company, Rainbow, after Cablevision made its retiering decision. GSN's presentation omits critical facts and asks the Presiding Judge to draw unfounded inferences from the evidentiary record. When viewed in their entirety, Rainbow's post-retiering discussions with DIRECTV do not constitute direct evidence of discrimination.³⁹

22. GSN begins its argument by suggesting that, because Rainbow's early business plans for Wedding Central incorporated a forecast for DIRECTV carriage

Rainbow and Cablevision had the incentive to retier GSN in order to obtain Wedding Central carriage on DIRECTV.⁴⁰ This stretches the evidence beyond any permissible inference. What the evidence shows is simply that, by the time Cablevision was making its decision to retier GSN in the fall of 2010, Wedding Central's business plans predicted that

ads in June 2011 announcing that Wedding Central would be shut down). GSN also argues that Cablevision's distribution arm favored Rainbow with feedback on Wedding Central's content and format before the network launched. GSN FOF ¶ 25. But GSN ignores evidence that which is not affiliated with Cablevision or Rainbow, provided similar feedback to Rainbow in the form of "specific points of view about some of the content" on Wedding Central. Joint Exh. 7 at 31:4-32:5 (Sapan).

³⁸ Joint Exh. 3 at 22:9-22 (Dolan).

³⁹ GSN's statement that these discussions constitute "*per se* discrimination" are indefensible, given that the Media Bureau rejected this very argument in its 2012 Hearing Designation Order. *See infra* ¶¶ 105-06.

⁴⁰ GSN FOF ¶¶ 23, 75.

Rainbow “had moved on.”⁴¹

Moreover, Mr. Chang testified that, during extensive negotiations with Rainbow in 2009 and thereafter in which Rainbow was seeking carriage of Wedding Central, he did not recall anyone at Rainbow ever mentioning Cablevision’s carriage agreement with GSN.⁴² Mr. Chang did not remember anyone employed by Cablevision or Rainbow linking GSN carriage to Wedding Central carriage at any point before the retiering decision was made.⁴³ Nor is there any evidence even suggesting that anyone at Rainbow asked Cablevision for assistance in obtaining Wedding Central carriage on DIRECTV. To the contrary, the record reflects that if anyone made that linkage it was GSN executives Mr. Gillespie—who conceived the idea in 2009—and Mr. Goldhill—who shared it with Mr. Chang.⁴⁴

23. GSN also emphasizes the fact that, when Mr. Chang contacted Mr. Rutledge after the retiering decision had been made and communicated to GSN, Mr. Rutledge responded by putting Mr. Chang in touch with Rainbow’s Mr. Sapan and Mr. Broussard to discuss a possible solution.⁴⁵ GSN, however, ignores Mr. Chang’s actual testimony. He testified that he told Mr. Rutledge, in their initial call, “well, look, there is—obviously we’ve got a lot of different touch points between the companies, other things we can do to, you know, have a discussion around this.”⁴⁶ By “a lot of different touch points,” Mr. Chang clearly referred to DIRECTV’s carriage of Rainbow networks, including AMC, IFC, WE tv, and Sundance, as well

⁴¹ Tr. 2094:1-2096:4 (Broussard).

⁴² Joint Exh. 2 at 67:25-68:9, 70:2-9 (Chang).

⁴³ *Id.* at 90:15-91:9 (Chang).

⁴⁴ CV FOF & COL ¶¶ 59-60.

⁴⁵ GSN FOF ¶¶ 77-78.

⁴⁶ Joint Exh. 2 at 118:20-119:9 (Chang).

as Cablevision's broader relationship with Sony.⁴⁷ Mr. Chang reminded Mr. Rutledge that, "given the DTV relationship that there is a broader context they [Cablevision] may be missing."⁴⁸ The "broader context" he was describing was DIRECTV's "larger relationship with Rainbow."⁴⁹

24. In their subsequent discussions, Mr. Chang and Rainbow representatives discussed "touch points" other than Wedding Central, including

⁵⁰ Those discussions continued even after Mr. Chang informed Mr. Broussard that DIRECTV would not launch Wedding Central.⁵¹

25. Likewise, GSN avoids addressing any of the evidence about negotiations between Cablevision, GSN, and Sony that occurred after the GSN retiering decision took effect in February 2011 and after DIRECTV suspended any discussion of Wedding Central carriage.⁵²

⁴⁷ *Id.* at 119:16-120:1 (Chang).

⁴⁸ *Id.* at 123:1-124:3 (Chang).

⁴⁹ *Id.* at 124:11-16 (Chang). During their calls, Mr. Rutledge never told Mr. Chang that GSN's decision to retier GSN was linked in any way to WE tv or to DIRECTV's carriage of Wedding Central; Mr. Rutledge told Mr. Chang consistently that it was a cost-based decision. *Id.* at 126:15-127:15 (Chang).

⁵⁰ CV Exh. 339 ¶ 27 (Broussard).

⁵¹ *Id.* ¶¶ 28-29 (Broussard). GSN also states, without citing any record evidence, that Mr. Broussard and Mr. Sapan "retained authority for negotiating GSN's Cablevision carriage, provided they could extract value for Wedding Central." GSN FOF ¶ 78. This is wrong. Mr. Broussard gave unrebutted testimony that he did not have the authority to bind Cablevision to any deal with GSN, and he never told Mr. Chang that Cablevision would broaden GSN's carriage if DIRECTV agreed to carry Wedding Central. CV Exh. 339 ¶ 28 (Broussard). GSN's suggestion that Mr. Broussard regularly negotiated deals for Cablevision also misconstrues the record. GSN FOF ¶ 28. Mr. Broussard testified that GSN's evidence for such a claim, concerning Rainbow's carriage with _____ was "the only example I can think of where I was authorized to communicate Cablevision's position on their negotiations for their carriage of networks." Tr. 2137:7-10 (Broussard). In any event, Rainbow's negotiations with _____ have nothing to do with Cablevision's allegedly discriminatory treatment of GSN in this case.

⁵² CV FOF & COL ¶¶ 63-66.

Taken as a whole, the evidence of Rainbow's broad discussions with DIRECTV and Cablevision's willingness to negotiate with Sony directly contradicts GSN's claim that Cablevision "conditioned" broad carriage of GSN on DIRECTV's carriage of Wedding Central.⁵³

II. GSN IS NOT SIMILARLY SITUATED TO WE TV OR WEDDING CENTRAL

26. Cablevision's Proposed Findings of Fact set forth the substantial evidence that GSN and WE tv targeted and aired different programming, targeted and delivered different audiences, targeted and attracted different advertisers, and did not compete in any meaningful way for viewers or otherwise.⁵⁴ Faced with the extensive factual record showing that GSN and WE tv are different, GSN relies on bits and pieces of evidence that, it argues, suggest that the networks are similar. But GSN cannot prove that GSN and WE tv carried the same programming by comparing only a handful of shows from the hundreds that aired on the two networks. GSN cannot prove that GSN and WE tv targeted the same audience through testimony from its executives that is directly contradicted by GSN's ordinary course business documents. GSN cannot prove that GSN and WE tv delivered the same audience by relying on broad Nielsen ratings, when a more granular demographic analysis shows that the viewers of the networks were very different. It cannot prove that advertisers view GSN and WE tv as similar by ignoring the actual data that advertisers use in the real world. And it cannot prove its case solely by critiquing Cablevision's experts, all of whom gave testimony that was relevant, objective, credible, and reliable.

⁵³ GSN FOF ¶ 74.

⁵⁴ CV FOF & COL ¶¶ 69-176.

A. GSN and WE tv Targeted and Aired Different Programming

27. GSN claims that it and WE tv targeted and aired similar programming.⁵⁵

But in making that claim, GSN fails to address the carriage agreements it signed with MVPDs, year after year, in which it made binding commitments to air

⁵⁶ Nor does GSN address the markedly different service descriptions in WE tv's carriage agreements, in which WE tv stated explicitly that it would air

And nowhere does GSN address the testimony of its own executives and the numerous presentations it delivered to MVPDs, promotional partners, and advertisers describing GSN as “the only network dedicated to games,” and differentiating itself from “women’s entertainment” networks such as WE tv.⁵⁸

28. Notwithstanding these consistent admissions that it was a network dedicated to game shows and gaming, and not a women’s network, GSN rests its programming comparison on superficial characterizations of a handful of shows. Of the 66 unique titles that GSN broadcast between 2009 and 2011, GSN discusses only five in support of its claim that it aired programming similar to WE tv's.⁵⁹ Of the 260 unique titles that aired on WE tv during the

⁵⁵ GSN FOF ¶¶ 96-102.

⁵⁶ See, e.g., CV Exh. 27 at 2, 26; CV FOF & COL ¶¶ 71-75.

⁵⁷ See, e.g., CV Exh. 13 at 4; see also CV FOF & COL ¶¶ 71-75.

⁵⁸ CV FOF & COL ¶¶ 76-84.

⁵⁹ Compare GSN FOF ¶¶ 97-98 (mentioning *Baggage*, *The Newlywed Game*, *Love Triangle*, *Match Game*, and *Carnie Wilson: Unstapled*—programs that aired between 2009 and 2011) with CV Exh. 333 at 6, 14-16 (Egan); see CV FOF & COL ¶¶ 91-92. GSN makes no showing that these five shows are indicative of the rest of its programming schedule. While some—such as the game show *Match Game*—may reflect GSN's broader programming, others—such as *Carnie Wilson: Unstapled*, a reality show that aired for only a single season—certainly did not.

same time period, GSN discusses only six.⁶⁰ GSN takes its hand-picked programs from GSN and WE tv and invites the Presiding Judge to render sweeping conclusions about the general similarity in programming on both networks. For example, GSN asserts that WE tv's *The Cupcake Girls* bears some resemblance to GSN's *Carnie Wilson: Unstapled* because they both feature desserts, and without further explanation or support, that GSN's *Dancing With the Stars* and WE tv's *Skating's Next Star* had "strikingly similar concepts."⁶¹ Yet this anecdotal evidence, particularly without further testimony or detail about these programs, is wholly insufficient without placing these programs in the context of the overall network schedules over a course of years.

29. Cablevision's proof provided that overall context. Cablevision presented testimony from an experienced industry expert, Mr. Egan, concerning 47 of the 66 programs that aired on GSN and 106 of the 260 programs that aired on WE tv.⁶² Mr. Egan reviewed publicly-available materials about these shows and viewed the shows themselves; using a well-accepted method of categorizing programs by genre, he concluded that the programming on GSN and WE tv was different.⁶³ Although GSN attempts to undermine Mr. Egan's opinions by nitpicking his methodology,⁶⁴ the fact remains that Mr. Egan conducted a comprehensive analysis of the shows on GSN and WE tv over a number of years in order to assist the Presiding Judge in understanding the programming on the two networks. GSN's experts did not. GSN has made no

⁶⁰ Compare GSN FOF ¶¶ 98-99 (mentioning *The Cupcake Girls*, *Bridezillas*, *My Fair Wedding*, *Braxton Family Values*, and *Most Popular*) with CV Exh. 333 at 6, 8-13 (Egan); see CV FOF & COL ¶¶ 91-92.

⁶¹ GSN FOF ¶¶ 98, 101.

⁶² CV FOF & COL ¶¶ 91-92; CV Exh. 333 at 6, 14-16 (Egan); CV Exh. 332 ¶¶ 16, 28-29 (Egan).

⁶³ CV Exh. 332 ¶¶ 20-23, 28-32; CV FOF & COL ¶¶ 90-93.

⁶⁴ GSN FOF ¶¶ 112-25.

showing that the Presiding Judge should credit its broad assertions—for example, that GSN and WE tv both aired “unscripted” programming, with elements of “reality” and “relationships”⁶⁵—rather than Mr. Egan’s thorough analysis of many weeks of programming.

30. For the same reasons, GSN’s emphasis on one failed game show aired by WE tv, *Most Popular*, should not be given any weight.⁶⁶ Unlike WE tv’s wedding-related programming and scripted acquisitions, which have been a great success on the network for years, unrebutted testimony from Ms. Dorée showed that *Most Popular* was an “experiment that failed pretty miserabl[y]” and that WE tv “didn’t make another game show after that.”⁶⁷ Ms. Dorée further testified that WE tv virtually never aired shows focused on competition, with less than one percent of its programming falling into this category.⁶⁸ That GSN attempts to prove similarity of programming on the basis of one failed show demonstrates just how short GSN is of proving the point.

31. Finally, the bulk of GSN’s argument addresses programming that premiered on GSN years after the retiring took place: *It Takes a Church* (2014), *Mind of a Man* (2014), *Dancing With the Stars* (2012), *Beat the Chefs* (2012), *Skin Wars* (2014), and *Family Trade* (2013).⁶⁹ GSN provides no factual or legal basis to explain how these programs, which

⁶⁵ GSN FOF ¶¶ 97, 99.

⁶⁶ *Id.* ¶ 99.

⁶⁷ Tr. 1713:3-4, 1713:15-17 (Dorée); *see* CV FOF & COL ¶ 94.

⁶⁸ Tr. 1712:20-23 (Dorée) (“Q: Q All right. How about game shows or reality based competition shows during this 2009 to early 2011 time period? Did WE tv air those type of programs? A. Virtually never. In looking at it, we aired less than one percent of our schedule in that time was game or competition shows.”); *see also* Tr. 2195:11-13 (Egan) (“GSN devoted 98 percent of its broadcast hours to its defining genres of game shows and poker gaming, while WE aired that content in less than 1 percent of its hours.”); CV FOF & COL ¶ 92.

⁶⁹ CV FOF & COL ¶¶ 140, 140 n.409; CV Exh. 260 at 17; CV Exh. 262 at 10.

had not even been developed or acquired when Cablevision made the decision to retier GSN, constitute proof that Cablevision discriminated against GSN. In any event, Mr. Egan's comprehensive analysis of GSN and WE tv in the period after the retiering—from 2012 through the first half of 2014—confirms that the programming on the two networks continued to be dramatically different.⁷⁰

B. GSN and WE tv Targeted Different Audiences

32. Substantial record evidence demonstrates that WE tv is a women's network: its programming, branding, marketing, and audience-tracking reflect its singular focus on its core audience of women 18 to 54.⁷¹ GSN acknowledges this but argues that the networks are similar because GSN designed its game shows to attract a female audience.⁷² The record does not support a conclusion that GSN is a women's network targeting the same audience.

33. First, although several current GSN witnesses described GSN as a women's network in their trial testimony, their testimony is contradicted both by the credible insights of GSN's former distribution head, Dennis Gillespie, and by contemporaneous documentary evidence.⁷³ Prior to bringing this lawsuit in 2011, GSN created document after document in which it told MVPDs, potential marketing partners, and advertisers that it targeted a "broad-based audience" consisting, not of women, but of "men and women of all ages."⁷⁴ Mr. Gillespie candidly acknowledged in his testimony that this was the targeting approach of

⁷⁰ CV FOF & COL ¶¶ 93, CV Exh. 332 ¶¶ 284-89.

⁷¹ CV FOF & COL ¶¶ 124-26.

⁷² GSN FOF ¶¶ 81, 100.

⁷³ *See id.* ¶¶ 81-84.

⁷⁴ CV FOF & COL ¶¶ 116-19.

GSN, which never held itself out as a women's network.⁷⁵ Indeed, in reporting GSN's demographic profile to its MVPD partners, GSN frequently described its audience as approximately ⁷⁶ GSN does not explain why it would have presented itself in the market as a gender-balanced network with broad appeal if, as it argues now, it is and always has been a women's network.

34. Second, GSN cannot sustain its claim that it targets the same audience as WE tv by relying on cherry-picked documents describing the female audience for a few of its programs.⁷⁷ The shows that GSN highlights—*Mind of a Man*, *It Takes a Church*, and *Skin Wars*—all premiered in 2014, years after Cablevision made the decision to retier GSN and indeed, years after GSN initiated this litigation.⁷⁸ The audience GSN targeted in 2014 has no relevance to GSN and WE tv's similarity in 2010, and hence no bearing on whether Cablevision discriminated.⁷⁹ Moreover, GSN's focus on these select few shows excludes the vast majority of GSN's programming, which consisted of game show reruns like *Family Feud*, *Deal Or No Deal*, and *Who Wants to Be a Millionaire*, as well as other game show programming like *Lingo* and *Chain Reaction*.⁸⁰ These shows did not target women, they targeted an adult audience interested in "engagement and participation."⁸¹ GSN likewise fails to mention programming that made up a

⁷⁵ *Id.* ¶ 116.

⁷⁶ *Id.* ¶ 117.

⁷⁷ See GSN FOF ¶¶ 83-84, 86 (citing documents discussing *Mind of a Man*, *It Takes a Church*, and *Skin Wars*).

⁷⁸ CV FOF & COL ¶ 140 n.409.

⁷⁹ *Id.* ¶¶ 244-46.

⁸⁰ CV Exh. 650 at 1; CV Exh. 332 ¶¶ 51-56 (Egan).

⁸¹ CV Exh. 332 ¶¶ 52-54, CV FOF & COL ¶¶ 83-84.

core part of GSN's schedule and advertising revenues in each year leading up to the retiring: poker programming that was undisputedly designed to attract, and did attract, a male audience.⁸²

35. Third, GSN's claim that GSN and WE tv targeted similar audiences because they both "tracked" the same audience ratings is not supported by the record.⁸³ On the one hand, WE tv routinely monitored its own performance and the performance of networks in its competitive set on the basis of ratings in the women 18 to 49 and women 25 to 54 demographics.⁸⁴ In these daily, weekly, and quarterly reports, WE tv compared itself to its competitors among women 18 to 49 and women 25 to 54 in terms of Nielsen data such as ratings points, actual audience delivery, VPVH, and median age.⁸⁵ To the extent that some of these reports also include charts showing WE tv's ratings in "adult" as well as women's demographics, it is only because the total adult audience, by definition, was larger than the audience of women.⁸⁶ GSN, on the other hand,

For WE tv, an audience of "adults" was incidental to its primary audience of women 18 to 49 and 25 to 54; for GSN, adults 18 to 49 and 25 to 54 were a core audience.

⁸² CV FOF & COL ¶¶ 81, 82, 122. Likewise, GSN told the market that the majority of its non-poker programming targeted an audience of "adults" as opposed to "women." *See id.* ¶ 118 n.329.

⁸³ GSN FOF ¶ 85.

⁸⁴ CV FOF & COL ¶¶ 159-61.

⁸⁵ *Id.*

⁸⁶ Tr. 1855:7-23 (Dorée).

⁸⁷ CV Exh. 143 at 39-41.

C. GSN and WE tv Delivered Different Audiences

36. To support its insistence that it delivers the same audience of women 18 to 49 and women 25 to 54 as WE tv, GSN steadfastly relies on Nielsen data showing that GSN and WE tv had similar ratings among women over the age of 18.⁸⁸ Yet this broad ratings metric obscures the issue. Television networks as a whole skew female, and WE tv's ability to deliver an audience in the core female demographics between 18 and 54 far outpaced GSN's.⁸⁹ Were Nielsen data in broad demographics the only measure of two networks' similarity, GSN and WE tv could be declared similarly situated to wildly dissimilar networks. For example, GSN had a primetime audience of [REDACTED] women 18 and older in 2009-2010; WE tv had an audience of [REDACTED].⁹⁰ Cartoon Network—which airs cartoons—had a primetime audience of [REDACTED] women over 18.⁹¹ Cartoon Network's audience of women 18 and older was closer to GSN's than to WE tv's, but it is obviously not similar to either network. Household ratings tell the same story. Both WE tv and Disney XD—a network that shows Disney programming—were viewed in [REDACTED] primetime households, but their similarly-sized audiences cannot possibly support a finding that the networks are similar.⁹² GSN was viewed in [REDACTED] primetime households, and National Geographic in [REDACTED].⁹³ These networks are not alike.

37. Complete Nielsen data in evidence show the dissimilarity of GSN and WE tv's audiences: WE tv consistently delivered an audience primarily made up of women in its

⁸⁸ GSN FOF ¶¶ 103-05.

⁸⁹ CV FOF & COL ¶¶ 133-36.

⁹⁰ See GSN Exh. 430 at 430.010, 430.013.

⁹¹ *Id.* at 430.011.

⁹² *Id.* at 430.002, 430.003.

⁹³ *Id.* at 430.005, 430.006.

target demographics; GSN consistently delivered an audience of women above the age of 55.⁹⁴ The networks' national Nielsen ratings bear out these demographic differences. For example, during the last quarter of 2010, WE tv had [REDACTED] women 25 to 54 viewers as GSN during primetime.⁹⁵ That same quarter, women between 25 and 54 comprised approximately [REDACTED] of WE tv's total audience, while only [REDACTED] of GSN's total audience fell within that demographic.⁹⁶ GSN regularly had more male viewers age 55 and over than it had female viewers within its so-called target demographic of women 25 to 54.⁹⁷ And within the 25 to 54 age range, GSN had [REDACTED] of male and female viewers.⁹⁸

38. These late 2010 ratings did not differ from those in prior periods in any significant way.⁹⁹ Moreover, the networks' local Nielsen ratings (in both the New York DMA and solely in Cablevision's footprint) illustrate the same demographic differences. According to Mr. Egan's analysis, [REDACTED] of WE tv's audience in the New York DMA consisted of women between 18 and 54.¹⁰⁰ For GSN, the applicable percentage was [REDACTED].¹⁰¹

⁹⁴ CV FOF & COL ¶¶ 127-36.

⁹⁵ Compare CV Exh. 156 at 3 with CV Exh. 314 at 11; see also CV FOF & COL ¶ 133.

⁹⁶ CV FOF & COL ¶¶ 128, 133.

⁹⁷ CV Exh. 314 at 11; see also CV FOF & COL ¶ 128 (noting that in the fourth quarter of 2010, for example, GSN had [REDACTED] male viewers aged 55 and over, compared to only [REDACTED] women 25 to 54).

⁹⁸ CV Exh. 314 at 11. In the fourth quarter of 2010 GSN had [REDACTED] 25 to 54 male viewers and [REDACTED] women 25 to 54 viewers.

⁹⁹ CV FOF & COL ¶¶ 128-29, 133. GSN relies on a single document generated by WE tv in 2009 showing that GSN and WE tv had comparable ratings in the women 25 to 54 demographic between 5:00 PM and 7:00 PM during the second quarter 2008 and second quarter 2009. GSN FOF ¶ 106. In the face of overwhelming evidence that GSN and WE tv had dissimilar audience characteristics, this snapshot of a two-hour time slot in two particular quarters is insufficient to show that GSN and WE tv delivered a similar audience.

¹⁰⁰ Tr. 2218:19-2219:20 (Egan); CV Exh. 652; CV Exh. 332 ¶¶ 193-97 (Egan); see also CV FOF & COL ¶ 136 n.395.

39. Although GSN attempts to dismiss the importance of viewer age, and insists that each woman over the age of 18 is equal in the eyes of programmers and advertisers, that is just not the case. Ms. Dorée testified that if WE tv were not delivering its target audience as the largest segment of its overall audience composition, it would be “doing something very wrong.”¹⁰² Mr. Blasius explained that advertisers seek “to maximize the concentration of the audience in your demographic which matches the profile of the product you’re looking to advertise.”¹⁰³

40. Finally, the Nielsen gender skew and duplication data GSN relies upon do not demonstrate that it targeted or delivered the same audience as WE tv.¹⁰⁴ Prior to and after the retiering, GSN consistently had a median viewer age in _____; during the same period, WE tv had a median age ranging between _____ among total day viewers and _____ among primetime viewers.¹⁰⁵ Although certain documents showed that networks in WE tv’s competitive set varied in median audience age, most had median ages within the target demographic of 18 to 54, as did WE tv, but GSN did not.¹⁰⁶ The “audience overlap” analyses GSN relies upon are based on minimal viewing of the two networks: one minute or six minutes of each over an entire ninety-day quarter.¹⁰⁷ And from among the multiple Nielsen duplication studies that the parties’ experts performed, GSN cites the

¹⁰¹ Tr. 2218:19-2219:20 (Egan); CV Exh. 652; CV Exh. 332 ¶¶ 193-97 (Egan); *see also* CV FOF & COL ¶ 136 n.395.

¹⁰² Tr. 1853:5-15 (Dorée).

¹⁰³ Tr. 2395:2-5 (Blasius).

¹⁰⁴ GSN FOF ¶¶ 86-87.

¹⁰⁵ CV FOF & COL ¶¶ 131-32, 134.

¹⁰⁶ *See* GSN FOF ¶ 87.

¹⁰⁷ *See* GSN FOF ¶ 86; Tr. 1278:21-1280:22 (Brooks).

only ones that show any meaningful duplication of audience between WE tv and GSN; the other duplication studies (20 out of 24) show that WE tv and GSN are quite far apart.¹⁰⁸ The data relied upon by GSN do not prove that GSN and WE tv had similar audiences.

D. GSN and WE tv Targeted and Attracted Different Advertisers

41. The record shows that GSN and WE tv differed significantly in their ability to deliver an audience in the core advertising demographic of women 25 to 54, leading advertising buyers to view them differently.¹⁰⁹ Publicly-available CPM data confirm the difference between the two networks: they show that real-world advertising buyers pay more than times as much to advertise on WE tv.¹¹⁰ And real-world unbiased, sellers of advertising time—the DBS operators DISH and DIRECTV—place GSN and WE tv in different “clusters” of networks designed for advertisers wishing to reach different audiences: in the case of WE tv, an audience of women; in the case of GSN, an audience of “adults” (men and women).¹¹¹

42. GSN’s claim that it is similar to WE tv from an advertising perspective largely rests on Mr. Goldhill and Mr. Zaccario’s testimony that GSN targeted women 25 to 54 with its programming and tried to sell advertising in that demographic.¹¹² But GSN does not have the demographic Nielsen data—which the parties agree is the “currency” of the advertising business—to back up its claim that GSN and WE tv compete for advertising. GSN makes no effort to grapple with the substantial Nielsen data showing that a high percentage of WE tv’s

¹⁰⁸ CV Exh. 334 ¶¶ 93-94 (Orszag).

¹⁰⁹ CV FOF & COL ¶¶ 127-48.

¹¹⁰ *Id.* ¶ 154.

¹¹¹ *Id.* ¶ 155.

¹¹² GSN FOF ¶¶ 88, 90.

audience is composed of women 25 to 54, while the vast majority of GSN's audience is women and men above the age of 55.¹¹³ Although Mr. Brooks claims that GSN and WE tv were

, that difference translates into

more viewers in the target demographics for WE tv than GSN.¹¹⁴ And Mr. Brooks's further testimony that advertisers do not care if a network is "skewing older" or "skewing younger," cannot be credited.¹¹⁵ This is precisely the type of data advertisers consider when making purchasing decisions.¹¹⁶

43. GSN's other evidentiary contentions are similarly misleading. Although GSN highlights its purported success in selling upfront advertising in the women 25 to 54 demographic, these sales represented only a small fraction—approximately —of GSN's overall advertising sales revenue in 2010.¹¹⁷ As for overlapping advertisers, GSN does no more than parrot Dr. Singer's written direct testimony.¹¹⁸ At trial, Dr. Singer admitted that his overlap analysis did not account for the amount of money advertisers spent on GSN and WE tv: Dr. Singer would consider an advertiser who spent \$10 million on WE tv and \$1000 on GSN to

¹¹³ CV FOF & COL ¶¶ 144-47.

¹¹⁴ GSN FOF ¶ 91; CV FOF & COL ¶ 142.

¹¹⁵ GSN FOF ¶ 93.

¹¹⁶ CV FOF & COL ¶¶ 144-48. GSN also asserts that unspecified advertisers "have told GSN executives that they viewed WE tv and GSN as competitors." GSN FOF ¶ 92. But Mr. Zaccario's hearsay testimony is not a substitute for evidence from these ad buyers themselves, none of whom testified at trial. Set against the extensive evidence that GSN and WE tv target and deliver different audience demographics and are viewed differently by advertisers, GSN's claim is entitled to no weight.

¹¹⁷ CV FOF & COL ¶¶ 150-52. Likewise, in 2010 GSN's total "general rate" (upfront and "scatter") advertising sales guaranteed in the women 25 to 54 demographic accounted for less than of GSN's overall advertising revenue; between 2008 and 2012 only of GSN's general rate advertising sales could be attributed to this demographic. *Id.* ¶ 151.

¹¹⁸ GSN FOF ¶¶ 94-95.

be “overlapping.”¹¹⁹ Under even this standard, there were networks that had a greater advertiser overlap with WE tv than GSN did.¹²⁰ As Mr. Orszag and Mr. Blasius testified, the company-level and brand-level advertising data they reviewed do not show any meaningful competition between GSN and WE tv for advertising.¹²¹

44. Finally, GSN asserts that “[t]he fact that GSN and WE tv both sell adult demographics does not mean they are not women’s networks.”¹²² This is a non sequitur. WE tv is a women’s network because of its singular focus on women’s programming and women-oriented marketing and branding, and its ability to deliver a core audience of women between the ages of 18 and 54.¹²³ GSN is not a women’s network because it airs programming targeted to all adult viewers (men and women), presents itself to the marketplace as a network for men and women of all ages, and delivers the vast majority of its audience outside of the core female demographics served by women’s networks such as WE tv.¹²⁴

E. GSN and WE tv’s Respective License Fees Are Not Probative

45. GSN claims that it is similarly situated to WE tv because the license fees of the two networks are similar.¹²⁵ Although this may be true, the Commission has indicated that

¹¹⁹ Tr. 991:19-23 (Singer).

¹²⁰ Tr. 991:24-992:19 (Singer).

¹²¹ CV FOF & COL ¶ 149. In support of its claim, GSN also cites a “Target Account Master List” from WE tv listing potential advertisers and their “buying demos,” many of which are for “Adults” and many of which are for “Women.” GSN FOF ¶¶ 88-89 (citing GSN Exh. 354). GSN’s statement that this list identifies “key advertisers” of WE tv has no testimonial or other basis in the record. Indeed, none of these advertisers, save one, appears among WE tv’s top 40 advertisers identified in Dr. Singer’s written testimony. GSN Exh. 301 ¶ 52 (Singer).

¹²² GSN FOF ¶ 89.

¹²³ See CV FOF & COL ¶¶ 124-26, 133, 136.

¹²⁴ See *id.* ¶¶ 115-23, 127-32.

¹²⁵ GSN FOF ¶ 107.

the license fees of two networks need be considered only when two networks are otherwise shown to be similar based on programming genre, target audience, actual audience, and other factors.¹²⁶ GSN has made no showing that this “tiebreaker” factor should be used here, where all of the evidence demonstrates that GSN and WE tv are starkly different according to the other factors the Commission and the Presiding Judge have used to compare networks in past cases.

F. The Testimony of Cablevision’s Experts Is Reliable and Credible

46. Cablevision presented testimony from four expert witnesses. Mr. Egan, the only expert who testified at the hearing concerning the comprehensive programming genre and look and feel analyses the Presiding Judge and the Commission have credited in past cases, concluded that GSN and WE tv targeted and aired different programming. Mr. Orszag, the only expert who testified at the hearing who could offer reliable opinions about the effects of the GSN retiering, concluded that GSN and WE tv did not compete in any meaningful way for viewers or advertisers and that Cablevision’s decision to retier GSN was a profitable one. Mr. Blasius, the only expert who testified at the hearing with any meaningful experience purchasing cable television advertising, concluded that advertisers would view GSN and WE tv as dissimilar. And Mr. Poret, the only expert who testified at the hearing who conducted a scientific survey of television viewers, concluded that viewers perceive GSN and WE tv to be dramatically different.

47. Much of GSN’s Proposed Findings of Fact are devoted to baseless attacks on the qualifications, methodologies, and purported biases of Cablevision’s experts.¹²⁷ None of

¹²⁶ *Revision of the Commission’s Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order 26 FCC Rcd. 11494, 11504-11505 (2011) (hereinafter “Second Report and Order”); *see also* CV FOF & COL ¶ 223 n.683.

¹²⁷ GSN’s suggestion of bias rings particularly hollow given that its only two experts, Dr. Singer and Mr. Brooks, have made careers of testifying against cable operators in Section 616 and other proceedings.

these arguments provides any supportable basis for excluding the opinions of any of Cablevision's experts.

48. Nor does GSN's claim that—in this case about GSN and WE tv—Cablevision's experts did not sufficiently analyze the differences between GSN and other networks WE tv viewed as competitors. GSN provides no legal basis for its purported requirement that Cablevision's experts compare GSN to any network other than WE tv. There is good reason for this: evidence concerning WE tv and GSN's view of the competition might be probative of some matters—for example, that WE tv never viewed GSN as a competitor is compelling evidence that Cablevision did not seek to favor WE tv by retiering GSN¹²⁸—but an analysis of WE tv and GSN's "competitive sets" cannot substitute for the disciplined, multi-factor similarly situated inquiry the Commission mandates. Because this case is fundamentally about the similarity of WE tv and GSN, *none* of the experts—Cablevision's or GSN's—performed the type of irrelevant comparisons that GSN now suggests should have been conducted.

1. Michael Egan's Expert Conclusions Are Objective and Reliable: They Corroborate the Record Evidence that GSNs and WE tv's Programming and Audience Are Different

49. GSN focuses much of its criticism on Mr. Egan, apparently on the theory that the Presiding Judge disagreed with Mr. Egan in *Tennis Channel*, while completely disregarding the fact that the Presiding Judge credited and adopted Mr. Egan's testimony in

If the test for admissibility of expert opinion were that the expert had not testified consistently on one side of the issue—which it is not—both of GSN's experts would have been excluded before trial.

¹²⁸ CV FOF & COL ¶¶ 157-65.

WealthTV.¹²⁹ What the record reveals in this case—the only one before the Presiding Judge—is that Mr. Egan conducted comprehensive analyses of the programming genres of GSN and WE tv, their target programming and relative programming expenditures, and the networks' target and actual audiences which fully support his conclusion that the GSN and WE tv programming and audiences are not similar.¹³⁰

50. GSN's more specific criticisms of Mr. Egan's testimony are unfounded. The Commission itself explicitly identifies "genre" as a critical component of the programming similarity analysis.¹³¹ Unlike Mr. Brooks, who rejects the Commission's genre factor, Mr. Egan employs a rigorous approach to identifying genres and categorizing shows by genre that the Court and Commission have found reliable. The fact that there might, hypothetically, be another way of performing a genre analysis, or that programming executives in the ordinary course of their work might analyze genre in a slightly different manner, provides no reason to reject Mr. Egan's conclusions, particularly when GSN offered no analysis of its own in response. And despite the vigor with which GSN assails Mr. Egan's work, there is little doubt that his conclusion is correct: the programming on GSN and WE tv falls into completely different genres.¹³²

51. Mr. Egan's look and feel analysis is similarly probative and well-grounded in the record. Network executives throughout the television industry make plain that the "look and feel" of a network and its programming is a product of deliberate and conscious choice on

¹²⁹ See CV FOF & COL ¶ 238 n.715; *Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, 515 F. App'x 655, 656-57 (9th Cir. 2013) (hereinafter "*WealthTV*").

¹³⁰ CV FOF & COL ¶¶ 88-104, 126, 136 n.395; Tr. 2181:13-2182:13 (Egan).

¹³¹ CV FOF & COL ¶ 223.

¹³² *Id.* ¶¶ 89-97.

how to convey the personality of a network.¹³³ And while GSN resorts to an *ad hominen* attack on Mr. Egan observing that WE tv uses a “stereotypical” pastel color scheme in its branding and network look, his observations are entirely consistent with those of WE tv executives Kim Martin and Elizabeth Dorée, both of whom testified that this approach was quite intentional in conveying that WE tv was a women’s network.¹³⁴ This Court, the Commission and the Ninth Circuit all recognized that Mr. Egan’s “look and feel” analysis in the *WealthTV* case was probative evidence of dissimilarity between networks.¹³⁵ The same holds true here.

52. Finally, GSN’s critique of Mr. Egan’s audience analysis is unfounded and obscures his primary findings. Nothing GSN identifies—minor differences in NSI and NTI local rating characteristics, channel placement, neighborhooding, or channel cross-promotion—alters Mr. Egan’s fundamental conclusion: the ratings data demonstrate that GSN’s audience is far older than WE tv’s, and Mr. Brooks’s reliance on ratings in households and women over the age of 18 purposefully obfuscates that critical demographic difference.¹³⁶

53. Mr. Egan’s expert analysis and testimony here is disciplined, exhaustive, and the reliable product of a veteran cable industry executive and consultant whose opinions have been credited and found important by the Court and Commission in a past proceeding. Having failed to conduct a comparable comprehensive analysis of the programming and audience factors the Commission has identified as relevant, GSN’s critique of Mr. Egan’s work is not persuasive.

¹³³ *Id.* ¶ 100.

¹³⁴ *Id.* ¶ 102; Tr. 2331:19-233:21, 2338:22-2341:7 (Egan).

¹³⁵ *See* CV FOF & COL ¶ 238 n.715; *WealthTV*, 515 F. App’x at 656-57.

¹³⁶ CV FOF & COL ¶ 136, ¶ 136 n.395. GSN also quibbles with Mr. Egan’s programming expenditure analysis. As detailed in Cablevision’s Proposed Findings of Fact, GSN’s critiques have no merit. CV FOF & COL ¶¶ 103-04.

2. Jonathan Orszag's Expert Conclusions Are Unbiased and Reliable

54. Mr. Orszag testified in detail to the thorough analyses he conducted supporting his conclusion that GSN and WE tv did not compete for viewers, audience and advertising, and to the profitability of Cablevision's decision that confirmed it was grounded on legitimate business considerations. GSN's assertion that Mr. Orszag's testimony is unreliable is meritless.¹³⁷

55. First, although Mr. Orszag has testified on behalf of MVPDs in past carriage discrimination cases, and concluded that they did not discriminate, this is no basis for concluding that Mr. Orszag is biased or unreliable. Indeed, in each Section 616 case in which Mr. Orszag has testified that ended in a final ruling, the MVPD on whose behalf he testified was found not liable.¹³⁸ The Presiding Judge has never questioned Mr. Orszag's credibility or his credentials.¹³⁹

56. Second, the record does not support GSN's assertion that Mr. Orszag lacks "independence" because he applied a different analysis in this case than he did in past cases.¹⁴⁰ Specifically, GSN suggests that Mr. Orszag did not analyze GSN's carriage on other MVPDs to determine if Cablevision's carriage was an outlier.¹⁴¹ But Mr. Orszag did conduct this analysis: he testified that GSN's purported peer group was improperly skewed to larger MVPDs and that Cablevision's carriage of GSN on its Sports & Entertainment tier is in line with the carriage GSN

¹³⁷ GSN FOF ¶¶ 148-53.

¹³⁸ *See, e.g., Comcast Cable Commc'n, LLC v. FCC*, 717 F.3d 982, 987 (D.C. Cir. 2013) (hereinafter "Tennis Channel"); *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 679 F.3d 269, 277 (4th Cir. 2012).

¹³⁹ GSN FOF ¶ 148 (citing *NFL* and *Tennis Channel*).

¹⁴⁰ *Id.*; CV Exh. 334 ¶ 156 n.193 (Orszag).

¹⁴¹ GSN FOF ¶ 148.

has received from other similarly-sized MVPDs, such as Suddenlink and Mediacom.¹⁴²

Mr. Orszag's conclusions are also supported by record evidence showing that Time Warner carried GSN on its own sports tier in many major markets until 2010.¹⁴³

57. Moreover, Mr. Orszag explained why this comparative analysis was not as important a determinant in this case as in other prior cases. Here, the Cablevision STB data to which he had access for the first time permitted him to perform a "direct test" showing how many customers churned away from Cablevision and which networks gained viewership after customers lost access to GSN.¹⁴⁴ Mr. Orszag observed that viewers did not tune to WE tv at high rates when they lost access to GSN, and therefore concluded that retiering GSN did not benefit WE tv in any statistically or economically significant way.¹⁴⁵ Based on this direct test of discrimination—as opposed to the indirect test of looking at MVPD peer carriage—it is clear that Cablevision would not have any rational motivation to retier GSN in order to benefit WE tv.¹⁴⁶ Mr. Orszag had no reason to study peer MVPD carriage as his primary analysis.

58. Third, GSN's criticisms of Mr. Orszag's switching and duplication analyses are unfounded. Mr. Orszag concluded that GSN's switching and duplication rates with WE tv were exceedingly low. Mr. Orszag's switching analysis showed that, both objectively and when compared to benchmark similar networks, WE tv viewers did not switch to GSN at a high

¹⁴² CV FOF & COL ¶¶ 200-02; CV Exh. 334 ¶¶ 156-59; Tr. 2549:11-2550:18, 2684:21-2685:7 (Orszag).

¹⁴³ CV FOF & COL ¶¶ 201-02.

¹⁴⁴ Tr. 2629:23-2632:1, 2551:1-12 (Orszag); CV Exh. 334 ¶¶ 40-46, 52-58, 144-50, 157-59 (Orszag).

¹⁴⁵ Tr. 2525:13-2528:1, 2551:1-2552:5 (Orszag).

¹⁴⁶ Tr. 2527:10-14 (Orszag).

rate and switched to other networks much more frequently than they switched to GSN.¹⁴⁷

Mr. Orszag's duplication analysis showed that GSN accounted for less than [REDACTED] of total viewership among households that watched WE tv or Wedding Central for at least an hour in April 2010.¹⁴⁸

59. GSN argues that because certain networks in WE tv's competitive set had switching or duplication rates with WE tv that were lower than GSN's, Mr. Orszag's conclusion that GSN did not compete with WE tv for viewers should be discarded.¹⁴⁹ But Mr. Orszag's objective was not to affirm WE tv's judgments about which networks to place in its competitive set; Mr. Orszag's objective was to analyze whether WE tv and GSN competed for viewers.¹⁵⁰ And GSN overlooks the fact that a number of networks in WE tv's competitive set in fact had much higher switching and duplication rankings than GSN.¹⁵¹ Moreover, GSN ignores the fact that Mr. Orszag's conclusions that WE tv and GSN are dissimilar were based on multiple analyses using both STB and Nielsen demographic data.¹⁵² Thus, GSN's nitpicking cannot undermine Mr. Orszag's overarching conclusion that WE tv and GSN are not meaningful competitors, especially in light of the limited expert evidence GSN presented in response.¹⁵³

¹⁴⁷ CV FOF & COL ¶¶ 169-70. Mr. Orszag explained at trial that a high switching rate does not necessarily indicate that two networks compete for viewers, but a low switching rate indicates that they do not. Tr. 2532:16-2533:6 (Orszag).

¹⁴⁸ CV FOF & COL ¶ 171.

¹⁴⁹ GSN FOF ¶ 150.

¹⁵⁰ CV Exh. 334 ¶¶ 38-41 (Orszag).

¹⁵¹ Tr. 2619:7-17 (Orszag). *See also* CV Exh. 334, Table 4 at 40, Table 5 at 41.

¹⁵² *See, e.g.*, CV Exh. 334 ¶ 106 (Orszag); CV Exh. 335 at 37-65 (Orszag Appendices); CV FOF & COL ¶¶ 137-38.

¹⁵³ CV FOF & COL ¶¶ 172-76 (discussing flaws in Singer's duplication analyses and modifications to Mr. Orszag's direct test).

60. Finally, GSN argues that Mr. Orszag's testimony is unreliable because he did not analyze the costs of retooling WE tv or Wedding Central.¹⁵⁴ This argument does not grapple with Mr. Orszag's testimony that such an analysis could not be conducted using economic modeling in any reliable way.¹⁵⁵ Instead, GSN merely states that Mr. Orszag's testimony is unreliable because he did not perform an analysis that he testified an economist cannot reliably perform.

3. Larry Blasius's Expert Conclusions Are Reliable and Sound: They Establish that GSN and WE tv Attract Different Advertisers

61. Based on his thirty-year career as a television advertising buyer, Mr. Blasius testified that meaningful demographic differences in WE tv and GSN's audiences would distinguish the networks in the eyes of advertising buyers.¹⁵⁶ Rather than present any contrary testimony from an advertising industry expert of its own, GSN resorts to labeling Mr. Blasius's testimony "unreliable."¹⁵⁷ The evidence shows otherwise.

62. For good reason, GSN does not challenge Mr. Blasius's experience or credentials. Unlike any of GSN's experts, Mr. Blasius spent his entire career buying advertising time on cable and broadcast television networks, spending billions of dollars on his clients' behalf over three decades.¹⁵⁸ In comparing GSN to WE tv, Mr. Blasius used the same tools and analyzed the same data he and other advertisers use every day in evaluating television networks: Nielsen ratings, median age, and audience concentration in the advertisers' target

¹⁵⁴ GSN FOF ¶ 153.

¹⁵⁵ Tr. 2563:5-2564:19 (Orszag).

¹⁵⁶ CV FOF & COL ¶¶ 141-48.

¹⁵⁷ GSN FOF ¶¶ 126-38.

¹⁵⁸ CV FOF & COL ¶ 141.

demographic.¹⁵⁹ GSN does not argue that Mr. Blasius should have looked at additional demographic data from GSN or WE tv or that the data Mr. Blasius relied upon is inaccurate.¹⁶⁰

63. Instead, GSN purports to challenge Mr. Blasius’s “methodology.” GSN argues primarily that Mr. Blasius’s opinions are flawed because he did not compare GSN to networks in WE tv’s competitive set.¹⁶¹ But Mr. Blasius’s assignment was to determine whether, from an advertiser’s perspective, WE tv and GSN are similar.¹⁶² To perform that analysis, one which will aid the Presiding Judge in answering the most relevant question in this case—whether GSN and WE tv are similarly situated—there would have been no reason to compare WE tv to any network other than GSN.

64. In any case, in reaching his conclusions concerning audience concentration, Mr. Blasius did calculate the concentration of audience in various demographics (including women 18 to 49 and women 25 to 54) for 77 cable networks.¹⁶³ GSN ranked

in concentration of women 25 to 54 viewers and WE tv ranked , a meaningful difference from an advertiser’s perspective.¹⁶⁴ The 77 networks included competitors of WE tv such as Lifetime, Style, Oxygen, Soapnet, and TLC, each of which had a substantially greater

¹⁵⁹ Tr. 2417:2-2418:1 (Blasius); *see also* CV FOF & COL ¶¶ 141-48.

¹⁶⁰ GSN does make the strange assertion that Mr. Blasius “failed to consider the effects of a custom Nielsen study commissioned by GSN that showed its median age to be ” (GSN FOF ¶ 133),—strange because GSN neither questioned Mr. Blasius about this study nor even entered it into evidence. Mr. Zaccario testified that an advertising buyer relying on publicly-available Nielsen data would not have had access to this study when making advertising purchasing decisions. Tr. 831:2-17 (Zaccario). Mr. Blasius evaluated WE tv and GSN on the basis of public Nielsen data, not on the basis of a self-serving study commissioned by GSN.

¹⁶¹ GSN FOF ¶¶ 129, 131, 135-38.

¹⁶² CV Exh. 228 ¶ 1 (describing his assignment) (Blasius).

¹⁶³ CV Exh. 764; Tr. 2493:14-20 (Blasius).

¹⁶⁴ CV Exh. 764; Tr. 2505:16-2506:2 (Blasius); CV FOF & COL ¶¶ 146-47.

concentration of women viewers between 25 and 54 than did GSN.¹⁶⁵ Mr. Blasius also reviewed data on median age for all Nielsen-rated cable networks, including those he placed in WE tv's competitive set, and concluded that GSN had the median age of any network.¹⁶⁶

65. GSN further asserts that Mr. Blasius's opinions are unreliable because he could not express, with mathematical certainty, the point at which demographic differences between two networks would become meaningful to an advertiser.¹⁶⁷ GSN mischaracterizes the nature of Mr. Blasius's testimony, which was not intended to be a formal statistical analysis of the data he reviewed. Instead, Mr. Blasius evaluated WE tv and GSN as he would have during his career, from the perspective of a real-world advertising buyer seeking to purchase advertising time on one or more networks.¹⁶⁸ When asked a hypothetical question about "another experienced ad buyer [reaching] a different conclusion," Mr. Blasius testified that he "would be

¹⁶⁵ The data Mr. Blasius relied upon show that, like WE tv, the networks Mr. Blasius identified as WE tv's competitors had approximately of their total audience in the target demographics of women 18 to 49 and 25 to 54. See GSN Exh. 430 at 430.26, 430.029, 430.031, 430.034, 430.037, 430.039 (showing "comp%" for various networks). For example, of WE tv's primetime audience was women 18 to 49, compared to of Lifetime's primetime audience and of Style's. *Id.* at 430.26, 430.029, 430.031. WE tv's primetime audience was women 25 to 54, compared to for Lifetime and for Style. *Id.* at 430.034, 430.037, 430.039. In contrast, only of GSN's primetime audience was women 18 to 49, and only of GSN's audience was women 25 to 54. *Id.* at 430.029, 430.037.

¹⁶⁶ CV Exh. 228 ¶ 32 (Blasius).

¹⁶⁷ GSN FOF ¶¶ 128, 131, 134.

¹⁶⁸ CV FOF & COL ¶¶ 141, 147; Tr. 2416:23-2418:2 (Blasius); see also Tr. 2405:4-7 (the Presiding Judge acknowledging that "significance, if it's coming from Mr. Blasius, is not that I mean it in the economic sense. It's in the trade sense.") The standard for admission of expert testimony is a liberal and "flexible" one; personal, industry experience, like Mr. Blasius's, is a reliable and valid basis for expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149-50 (2002). Courts in the D.C. Circuit have confirmed that in many instances "[p]ersonal experience is . . . the proper method for assessing the reliability of . . . expert testimony." *Groobert v. President & Dir. of Georgetown College*, 219 F. Supp. 2d 1, 7 (D.D.C. 2002) (finding that the expert testimony of photographers who testified based on their experience in the industry was reliable). Mr. Blasius's decades of experience make him uniquely qualified to testify about how advertisers would perceive WE tv and GSN.

surprised if there were a different opinion than mine.”¹⁶⁹ Of course, GSN did not offer any testimony from “another experienced ad buyer” at trial, and GSN has provided no reason why Mr. Blasius’s conclusions should not be credited.¹⁷⁰

4. Hal Poret’s Expert Conclusions Are Reliable and Relevant: They Demonstrate that Viewers Perceive GSN and WE tv to Be Different

66. GSN also asks the Court to disregard the extensive viewer survey conducted by consumer survey expert Hal Poret on the grounds that it has no relevance to the proceeding. But the Commission has made clear that the inquiry into the similarity of the networks is a flexible one and that the Court is free to assess “other factors” in addition to those the Commission has expressly identified.¹⁷¹ Moreover, GSN itself relied at trial on consumer survey evidence from Beta that, unlike Mr. Poret’s work, was not tested through cross-examination.¹⁷²

67. GSN’s specific critiques of Mr. Poret’s work are misplaced. First, although the survey was conducted in 2012, the participants relied on their understanding of the programming based upon experience that was not limited in time.¹⁷³

68. Second, Mr. Poret’s experience is extensive. He has designed and conducted hundreds of surveys in all areas, not just trademark controversies.¹⁷⁴ His surveys have

¹⁶⁹ Tr. 2507:23-2508:3 (Blasius).

¹⁷⁰ Although GSN criticizes Mr. Blasius for failing to consider the CPMs of WE tv and GSN, the dramatic difference in the networks’ CPMs indicates that such an analysis would have further supported, rather than undermined, Mr. Blasius’s conclusion that advertisers view WE tv and GSN differently. CV FOF & COL ¶ 154.

¹⁷¹ *Id.* ¶ 223; Second Report and Order, 26 FCC Rcd. at 11504.

¹⁷² *See, e.g.*, Tr. 1308:15-20 (Brooks).

¹⁷³ *See* Tr. 1462:15-1463:2 (Poret).

¹⁷⁴ CV Exh. 233 ¶ 4 (Poret).

been accepted by courts in over a dozen trials.¹⁷⁵ Indeed, although GSN attempted to show on cross-examination that Mr. Poret's work was rejected in the *Fancaster* and *Kraft* cases, in fact his surveys were accepted and relied upon by the trial courts in both cases, and nothing that Judge Posner wrote in his *Kraft* opinion challenged any particular aspect of Mr. Poret's work there.¹⁷⁶ In any case, the fact that courts have criticized a small fraction of his work is no reason to exclude his opinions here.

69. Third, like Mr. Blasius, Mr. Poret was neither asked to conduct a survey of similarities between networks other than GSN and WE tv, nor was he required to do so in this proceeding. Nonetheless, the survey results confirmed that viewers perceived the women's networks Lifetime, Oxygen, and WE tv to all offer similar programming, while GSN did not.¹⁷⁷

70. Finally, GSN's assertion that the survey should be disregarded because it measured the impressions of some participants who had not watched the programming is misleading. Mr. Poret explained that showing participants cherry-picked programming snippets would itself raise methodological weaknesses in the survey.¹⁷⁸ To avoid that result, Mr. Poret explicitly measured the results of viewers who were familiar with and watched both networks, results that conclusively demonstrated viewers' fundamentally different perceptions of GSN and WE tv.¹⁷⁹

¹⁷⁵ Tr. 1464:16-25 (Poret).

¹⁷⁶ Tr. 1444:9-1445:11, 1448:7-18, 1449:13-24 (Poret).

¹⁷⁷ CV FOF & COL ¶ 109.

¹⁷⁸ Tr. 1465:8-20 (Poret).

¹⁷⁹ CV FOF & COL ¶¶ 107-09; Tr. 1414:18-1416:14 (Poret).

G. The Testimony of GSN's Expert Witnesses Is Not Credible

71. Following its attempt to undermine Cablevision's experts, GSN makes an effort to buttress the testimony of its own. That effort fails. Neither Dr. Singer nor Mr. Brooks has provided the Presiding Judge with reliable opinions that will assist his resolution of this matter.

1. Dr. Hal Singer's Conclusions Are Biased, Based in Unreliable Methodologies, and Contradicted by the Record

72. GSN's discussion of Dr. Singer's expert opinions focuses on the data he used to reach his conclusions.¹⁸⁰ But the problem with Dr. Singer's opinions is not the data, it is that he employed unreliable and untested methodologies to support results that should not be credited by the Presiding Judge. For example, GSN argues that Dr. Singer's testimony should be credited because he uses "*Cablevision's own data*" in his cost-benefit analysis.¹⁸¹ Although true, putting this statement in italics does not validate Dr. Singer's testimony, because the evidence shows that Dr. Singer could not predict the effects of the retiering at any level of generally-accepted statistical significance, notwithstanding the fact that his analysis used data generated by Cablevision.¹⁸² Therefore, Dr. Singer could not say with any certainty that the GSN retiering caused *any* Cablevision subscriber churn.¹⁸³

73. Dr. Singer's calculation of Cablevision's "goodwill losses" is similarly unreliable.¹⁸⁴ Dr. Singer conceded that he did not apply a generally accepted methodology to

¹⁸⁰ GSN FOF ¶¶ 157-58.

¹⁸¹ *Id.* ¶ 157 (emphasis in original).

¹⁸² CV FOF & COL ¶¶ 54 n.126, 193, 259; Tr. 2562:10-2563:4 (Orszag).

¹⁸³ CV FOF ¶ 193; GSN Exh. 301 ¶ 82 n.156 (Singer) (Dr. Singer testifying that he "takes no opinion" on the statistical significance of his results).

¹⁸⁴ GSN FOF ¶ 157.

conclude that Cablevision suffered a loss in goodwill.¹⁸⁵ That concession, in and of itself, should be sufficient to exclude his testimony on goodwill, particularly in light of his testimony in a prior matter that goodwill losses could not be quantified.¹⁸⁶

74. As for Dr. Singer's testimony concerning the costs Cablevision would have incurred from retiering WE tv, that testimony, too, should be rejected because his calculation is based on the same statistically unreliable churn analysis that infected his testimony concerning the costs of retiering GSN. As Mr. Orszag showed, without contradiction, Dr. Singer's model cannot predict, at an acceptable level, the subscriber churn that would be associated with a hypothetical WE tv retiering.¹⁸⁷

2. Timothy Brooks's Conclusions Are Unreliable and Irrelevant

75. As for Mr. Brooks, GSN asserts that his testimony is reliable because he reviewed various sets of Nielsen data and compared GSN's performance to that of other women's networks. GSN also states that Mr. Brooks's testimony about programming should be credited because he is the author of *The Complete Directory to Primetime Network and Cable TV Shows*.¹⁸⁸ Neither point is sufficient to transform Mr. Brooks's flawed and unsupported opinions into reliable expert testimony.

76. Although the Nielsen data set out in Mr. Brooks's report may be accurate, he conducted a superficial analysis focused largely on ratings outside of the women 18 to 49 and

¹⁸⁵ CV FOF & COL ¶¶ 197.

¹⁸⁶ *Id.*

¹⁸⁷ The only methodological issue GSN does address, concerning the purportedly consistent testimony Mr. Orszag and Dr. Singer gave about "lift" in WE tv viewership following the GSN retiering, also misses the point. GSN FOF ¶ 155. Mr. Orszag testified that Dr. Singer made several inappropriate modifications to Mr. Orszag's "lift" model; consequently, any conclusions Dr. Singer draws from such an analysis cannot be relied upon. CV Exh. 334 ¶¶ 190-93.

¹⁸⁸ GSN FOF ¶¶ 160-61.

25 to 54 demographics.¹⁸⁹ He made no effort to analyze the entirety of GSN's or WE tv's audience; when confronted with evidence that WE tv and GSN attracted different numbers of women in the target demographics, and that GSN's audience consisted largely of viewers older than 25 to 54, he simply declared the data irrelevant.¹⁹⁰ But that bit of *ipse dixit* is contradicted by the evidence demonstrating that advertisers and programming networks themselves rely on such granular data and use it to make real-world business decisions.¹⁹¹

77. Likewise, Mr. Brooks's testimony concerning programming provided no assistance to the Presiding Judge. Undoubtedly Mr. Brooks has watched a lot of television over the course of his career, but that does not excuse the fact that he did not conduct any systematic or empirical analysis of WE tv or GSN programming in connection with this case.¹⁹² There is no reason to credit his broad characterizations of GSN and WE tv programming—for example, that both had “elements” of “family dynamics” and “romantic relationships”—in the face of the rigorous effort made by Mr. Egan to view, characterize, and catalogue an extensive amount of programming that aired on both networks during the relevant time period.¹⁹³ Indeed, when

¹⁸⁹ GSN Exh. 300 ¶¶ 20-21, 39, 45 (discussing GSN's rating among women over the age of 18 and households, generally).

¹⁹⁰ Tr. 1227:6-15, 1243:19-1244:15 (Brooks).

¹⁹¹ CV Exh. 228 ¶¶ 21-23, 30-31 (Blasius); CV Exh. 338 ¶¶ 16-18 (Doreé); Tr. 1728:24-1729:13 (Doreé); CV Exh. 193 at 50, 53 (a

, CV Exh. 93 (WE tv tracked its performance in VPVH in target women demographics); CV Exh. 815 at 1, CV Exh. 615 at 11.

¹⁹² CV FOF & COL ¶¶ 96-97; Tr. 1165:15-1166:20 (Brooks).

¹⁹³ CV Exh. 332 ¶¶ 15-17, 28-32.

Mr. Brooks did conduct a thorough programming analysis, in connection with writing the entries in *The Complete Directory*, he described WE tv, but not GSN, as a “women’s network.”¹⁹⁴

III. CABLEVISION RETIERED GSN FOR LEGITIMATE BUSINESS REASONS

78. The record does not sustain GSN’s argument that Cablevision’s legitimate business justifications for the GSN retiering are pretextual or that the decision proved to be unprofitable. Rather, the evidence shows that Cablevision decided to move GSN to its Sports & Entertainment tier because GSN was out of contract, unpopular with Cablevision subscribers, and cost Cablevision over _____ per year to distribute broadly, including to millions of subscribers who did not watch the network. Cablevision’s decision emerged from a good-faith process that accounted for all of these considerations at a time when Cablevision and all MVPDs were subject to substantial programming cost pressures. Moreover, the weight of the evidence shows that Cablevision profited from its decision to retier GSN, confirming the legitimate business factors that led to the retiering decision.

A. GSN Has Not Proven that Cablevision’s Business Justifications for the Retiering Are “Pretextual”

79. No witness testified that Cablevision’s decision to retier GSN had anything at all to do with Cablevision’s affiliated networks, much less a desire to give those networks an unfair advantage over GSN. Labeling that decision “pretextual” is not a substitute

¹⁹⁴ CV FOF & COL ¶ 97. Mr. Brooks described GSN as “TV’s home for those endless hours of *Match Game*, *Pyramid*, *Family Feud*, *Newlywed Game*, *Password*, *Card Sharks*, *Joker’s Wild*, *Wheel of Fortune* and all the rest that you thought had disappeared forever—but hadn’t.” CV Exh. 816 at 515.

for evidence.¹⁹⁵ There is no basis in the record at all to undermine the evidence demonstrating that Cablevision reduced GSN's carriage purely to save costs.¹⁹⁶

80. What the evidence shows is that GSN's characterization of Cablevision's decision-making is based on a selective misreading of the record. First, GSN claims that the detailed and thorough assessment Mr. Montemagno prepared at that time was pretextual because the memorandum had no impact on the thinking of the ultimate decision-maker, John Bickham.¹⁹⁷ No matter how many times GSN lodges that claim, it is simply not true. Mr. Montemagno prepared the carriage assessment in response to Mr. Bickham's specific request.¹⁹⁸ The July 22, 2010 memorandum discussed in detail the costs and benefits of changing GSN's carriage, including the fact that GSN was out of contract, the approximately Cablevision was paying GSN in annual license fees, and GSN's weak performance as reflected in Cablevision's STB data, which showed that GSN "performed poorly" and ranked out of all networks carried by Cablevision.¹⁹⁹

81. Mr. Bickham testified that, prior to receiving Mr. Montemagno's memorandum, he was already aware that GSN was "a very weak network . . . that we could drop

¹⁹⁵ GSN FOF ¶¶ 163-68.

¹⁹⁶ GSN does not dispute that 2010 presented difficult market conditions for the entire cable industry. CV FOF & COL ¶¶ 35-37.

¹⁹⁷ GSN FOF ¶ 164.

¹⁹⁸ CV FOF & COL ¶¶ 41-42.

¹⁹⁹ *Id.* ¶ 42. GSN further attempts to confuse the record by beginning its discussion of "Cablevision's Decision to Tier GSN" with a description of GSN's proprietary advertising sales revenue data from the 2010 upfront and Mr. Zaccario's testimony that GSN's modest increase in sales in the women 25 to 54 demographic would "come at [the] expense" of GSN's competitors. GSN FOF ¶¶ 38-39. GSN has not proven that any of this information was known to Cablevision, nor could it prove anything of the sort. And, Mr. Zaccario's self-serving testimony notwithstanding, advertising spending is not a zero-sum game. That GSN might have increased its sales to certain demographics does not demonstrate that WE tv or any other network lost sales in those demographics as a result.

. . . without losing customers . . .”²⁰⁰ Although GSN suggests that Mr. Bickham ignored Mr. Montemagno’s carriage assessment, in fact he considered it and testified specifically that the memorandum “reinforced” his initial views.²⁰¹ If Mr. Bickham had already decided to drop or reposition GSN based on his “periodic” viewing of the network he would not have asked Mr. Montemagno and his programming team to take the time and employ the resources necessary to review STB data and conduct further analysis.²⁰²

82. Moreover, the record shows that Mr. Bickham and his team continued to consider GSN’s carriage after Mr. Montemagno penned the July memorandum.²⁰³ Over the course of those discussions, which implicated not only GSN, but other networks that were out of contract with Cablevision, Mr. Bickham, Mr. Montemagno, and Mr. Rutledge further discussed reductions in Cablevision’s programming budget.²⁰⁴ Mr. Bickham participated in those meetings.²⁰⁵ Mr. Montemagno’s team obtained additional STB and Nielsen rating data for each network under consideration.²⁰⁶ As shown in a November 2010 analysis, the additional data on GSN confirmed the earlier conclusion that GSN performed poorly on Cablevision’s systems: it was ranked out of 56 channels.²⁰⁷

83. Against this record, GSN’s complaint about the purported infirmities in the July STB data incorporated in Mr. Montemagno’s memorandum falls far short of supporting

²⁰⁰ CV FOF & COL ¶ 50.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* ¶ 47.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* ¶¶ 47, 52.

an assertion of pretext. There is no evidence that anyone at Cablevision decided to use a non-standard STB report in order to gin up evidence that GSN did not perform well among Cablevision's subscribers. Mr. Montemagno himself had no awareness of the sample size in the STB data he presented.²⁰⁸ Rather, he believed the STB data he reviewed to be accurate.²⁰⁹ And there is no dispute that the evidence showed GSN to be ranked [REDACTED] in a sample of [REDACTED] Cablevision households and [REDACTED] in a sample of [REDACTED] households.²¹⁰ It was a poor performer under any metric.

84. Nor is Cablevision's failure to "change its mind" after the retiering evidence of pretext. GSN points to the [REDACTED] customer complaints received by Cablevision after the retiering, but ignores the fact that the complaints tailed off and then ceased within a brief, two-week window.²¹¹ Although a small number of GSN loyalists considered GSN to be "must-have" programming, the evidence shows that they signed up for the Sports & Entertainment tier, and did not churn.²¹² GSN's claim of pretext also ignores the business disruption that Cablevision would have faced once it notified its subscribers and retiered the network.²¹³ Given that disruption, Cablevision was understandably reluctant to change course unless it could secure [REDACTED] carriage that was consistent with its cost-saving objectives.²¹⁴

²⁰⁸ *Id.* ¶ 52.

²⁰⁹ Tr. 1653:4-14 (Montemagno).

²¹⁰ CV Exh. 119 at 3; GSN Exh. 68 at 11; CV FOF & COL ¶ 52. These rankings included all of the networks that were on Cablevision's Expanded Basic tier. CV Exh. 119 at 3.

²¹¹ CV FOF & COL ¶ 54, GSN Exh. 129.

²¹² CV FOF & COL ¶ 54.

²¹³ *Id.* ¶ 67.

²¹⁴ *Id.*

85. Finally, GSN claims that if Cablevision was actually motivated to save programming costs, it could have saved the same amount by enforcing its

²¹⁵ But Section 616 is not about second-guessing business decisions taken in good faith. Cablevision could have taken any number of steps to cut its programming budget more, including retiering or dropping any number of other networks under consideration, such as ²¹⁶; that Cablevision did not take any of these steps does not mean that Cablevision discriminated against GSN. Furthermore, GSN consistently overlooks the fact that the majority of the savings GSN says Cablevision could have accrued would have come from

219

B. GSN's After-the-Fact Cost-Benefit Analysis Does Not Prove that Cablevision Acted With Discriminatory Intent

86. Mr. Orszag conducted a comprehensive analysis of the costs that Cablevision incurred and benefits Cablevision accrued as a result of retiering GSN.²²⁰ Mr. Orszag concluded that Cablevision's good faith cost-savings justification for retiering GSN is confirmed by evidence showing that the retiering was profitable: Cablevision saved _____ in subscriber fees, added _____ of new customers to the Sports &

²¹⁵ GSN FOF ¶ 168.

²¹⁶ CV FOF & COL ¶ 47.

²¹⁷ GSN FOF ¶ 166.

²¹⁸ GSN Exh. 239 at CV-GSN 0433041-42; GSN FOF ¶ 171.

²¹⁹ GSN FOF ¶ 66.

²²⁰ CV FOF & COL ¶¶ 187-90; CV Exh. 334 ¶¶ 144-51, 210-12.

Entertainment tier at a rate of \$6.95 per month, and suffered no discernible increase in customer churn.²²¹

87. Cablevision has also addressed, at length, the shortcomings in the analysis conducted by Dr. Singer, who opined that Cablevision lost money as a result of retiering GSN (or would have saved more by retiering WE tv), and will not repeat those shortcomings in detail here.²²² GSN's Proposed Findings of Fact advance the issue no further than Dr. Singer's written direct testimony.

88. As Cablevision has previously shown, Dr. Singer's estimate of the customer churn resulting from the GSN retiering is unreliable because he cannot predict it at any acceptable level of statistical significance; the only reliable estimate of customer churn, based on Dr. Singer's model, is zero.²²³ Likewise, Dr. Singer has no basis to assume that all customers who called to complain about the retiering and received a

subsidy would have churned in the absence of the subsidy.²²⁴ Finally, GSN has no grounds for asserting that Cablevision suffered a loss of goodwill in connection with the retiering, especially given Dr. Singer's admission at trial that he was not qualified to give an opinion to that effect.²²⁵

²²¹ CV FOF & COL ¶¶ 187-90; CV Exh. 334 ¶¶ 145-47, 206, 234, 250.

²²² CV FOF & COL ¶¶ 191-99.

²²³ *Id.* ¶¶ 54, 54 n.126, 193, 259.

²²⁴ *Id.* ¶¶ 194-96.

²²⁵ *Id.* ¶ 197. Finally, it bears noting that GSN appears to have abandoned its claim that Cablevision lost per month per subscriber as a result of churn, and is instead relying on the figure of per month that appears on Dr. Singer's written direct testimony. GSN FOF ¶ 178. In any event, Dr. Singer could not explain why he used the lower figure for two years before abandoning it in favor of the higher figure at trial. CV FOF & COL ¶ 192.

89. As for GSN's alternative claim that Cablevision could have saved more money by retiering WE tv (and therefore suffered "incremental losses" by maintaining WE tv's broad carriage), GSN primarily repeats its argument that Cablevision acted in a discriminatory manner simply by conducting a carriage assessment of GSN, and not WE tv, and its argument that Cablevision could have saved a substantial amount of money by

²²⁶ GSN also recites

Dr. Singer's analysis of GSN and WE tv's respective "viewing intensity" as evidence that fewer Cablevision customers would have churned if WE tv were retiered²²⁷, but does not rebut (or even acknowledge) Mr. Orszag's opinion that the churn arising from a hypothetical retiering of WE tv cannot be predicted reliably using GSN's actual churn rates.²²⁸

IV. GSN HAS NOT PROVEN THAT CABLEVISION'S RETIERING WAS AN UNREASONABLE RESTRAINT ON GSN'S ABILITY TO COMPETE FAIRLY

90. In support of its claim that it has been unreasonably restrained by the Cablevision retiering, GSN once again asserts that it has lost significant revenue as a result of the retiering, that it saw its ratings decline in the New York DMA, that it has lost access to a meaningful number of advertisers, and that it has been constrained in its ability to develop original programming. The evidence shows GSN's claims of loss to be exaggerated and fall far short of impeding its ability to compete fairly as a programming network.

91. First, GSN cannot support its claim that its ability to reach viewers in New York has been unreasonably restrained. Although GSN points to a purported decline in ratings during the second quarter of 2011, in fact GSN's ratings in the New York DMA recovered to

²²⁶ GSN FOF ¶¶ 171, 173.

²²⁷ *Id.* ¶ 172.

²²⁸ CV FOF & COL ¶¶ 198-99.

pre-retiering levels by 2013.²²⁹ This is not evidence that GSN has been unreasonably restrained; it is evidence of a temporary ratings downturn. GSN's own executives attributed its declining ratings in 2011 to "disappointing originals" rather than any loss of carriage on Cablevision.²³⁰

92. Second, GSN claims that it is "losing approximately _____ per year every year it remains on the sports tier," a large portion of which it attributes to decreased subscriber revenue.²³¹ But GSN cannot claim that it has been unreasonably restrained in its ability to grow subscribers or subscriber revenue, when GSN has substantially more subscribers today than it did at the time of the retiering.²³²

93. Similarly, GSN increased its advertising revenue from _____ at the time of the retiering to _____ in 2013.²³³ And although GSN emphasizes that the retiering delayed GSN's ability to reach a purportedly-significant _____ subscriber benchmark,²³⁴ GSN's advertising chief, Mr. Zaccario, referred to the repositioning's effect on GSN's advertising as merely a "hiccup," and acknowledged that GSN's failure to reach

_____ subscribers was only harmful for a short period of time.²³⁵ GSN's claims that it lost specific advertisers because of the retiering are unsubstantiated. Such claims are either directly contradicted by the record evidence or are based solely on GSN's unsupported suggestion that

²²⁹ *Id.* ¶ 209; Tr. 1324:23-1325:14 (Brooks).

²³⁰ CV FOF & COL ¶ 209; CV Exh. 502 at 1 (Jan. 5, 2012 email from John Zaccario).

²³¹ GSN FOF ¶ 182.

²³² CV FOF & COL ¶¶ 207, 209-12.

²³³ *See* CV Exh. 256 at 10; CV FOF & COL ¶ 216.

²³⁴ GSN FOF ¶ 191.

²³⁵ Tr. 742:14-18 (Zaccario) ("[A]t the time of the repositioning, we were making a lot of progress and we were -- we were marketing a strong growth story, both on the output in original programming aimed at women 25 to 54, the growth in achieving that audience and distribution growth. *And this was a hiccup* that we had to explain."), 742:2-3 ("The delay in reaching that threshold harmed the company, you know, up until the time where we reached it.").

advertisers who reduced their spending on GSN between 2011 and 2012 must have done so because of the retiering.²³⁶

94. Third, GSN once again asserts that the retiering had a special impact on its advertising sales because Cablevision's footprint is in the New York DMA.²³⁷ GSN's sole affirmative evidence for this claim is hearsay testimony from Mr. Zaccario concerning ad buyers for companies that did not even advertise on GSN before it was retiered.²³⁸ The evidence further showed that these ad buyers could make any number of arrangements to view GSN programming at home or work, including with GSN's assistance.²³⁹

95. Finally, GSN contends that it has been constrained in its ability to develop original programming since the retiering.²⁴⁰ But the undisputed evidence at trial showed that GSN has invested more in original programming each year since the retiering.²⁴¹ Whatever choices GSN has made surrounding its programming initiatives are not driven by Cablevision's conduct and certainly do not rise to the level of unreasonable restraint.²⁴²

²³⁶ CV FOF & COL ¶ 216; GSN Exh. 298 ¶ 9 (Zaccario) (stating, without more, that "[a] number of long-term advertisers . . . reduced their advertising on GSN from 2011 to 2012").

²³⁷ GSN FOF ¶ 182.

²³⁸ *Id.* ¶ 194 (discussing _____); CV FOF & COL ¶ 216 (summarizing evidence showing that _____ did not advertise on GSN prior to 2011).

²³⁹ CV FOF & COL ¶ 216. Furthermore, although GSN previously advanced a flawed model created by Dr. Singer which purported to show that GSN's advertising declined nationally after the retiering (GSN Trial Br. 41), GSN has now abandoned this theory. *See* GSN FOF ¶¶ 188-95.

²⁴⁰ GSN FOF ¶¶ 182, 196.

²⁴¹ CV FOF & COL ¶ 214-15.

²⁴² GSN's further claim that Cablevision has market power in the New York DMA is irrelevant, given that GSN has shown its ability to flourish in the national video programming market since the retiering. In any event, GSN's experts did not do any analysis of the relevant market or market power at trial, and the evidence in the record in fact establishes that the New York DMA is an "intensely competitive environment" that constrains any market power Cablevision may otherwise have. *See id.* ¶ 218.

REPLY CONCLUSIONS OF LAW

96. The legal framework for this dispute, as set forth in past rulings from the Presiding Judge, the Commission, the D.C. Circuit, and other courts, is described in Cablevision's Proposed Findings of Fact and Conclusions of Law.²⁴³ GSN's Proposed Conclusions of Law invite the Presiding Judge to interpret and apply Section 616 in a novel manner that is inconsistent with the extensive precedent establishing the legal standards for carriage discrimination matters.

V. GSN BEARS THE BURDEN OF PROOF

97. GSN first departs from precedent by arguing that, because GSN made out a *prima facie* case before the Media Bureau, Cablevision bears the burden of proof.²⁴⁴ That is wrong as a matter of law. The Presiding Judge has heard this very argument in past carriage discrimination cases and rejected it. For example, in *Tennis Channel* the complainant (represented by GSN's counsel here) argued that defendant Comcast had the burden of proof, but the Presiding Judge held that "placing the burden of proof on Tennis Channel is consistent with the allocation of the burden of proof in previous carriage complaint cases."²⁴⁵ The Enforcement Bureau, representing the public interest, agreed.²⁴⁶ The Presiding Judge also rejected the complainant's burden-shifting argument in the *WealthTV* matter, "adher[ing] to the usual practice of requiring that the party seeking relief by Commission order . . . bear the burden of

²⁴³ *Id.* ¶¶ 219-74.

²⁴⁴ GSN COL ¶ 2.

²⁴⁵ *Tennis Channel, Inc. v. Comcast Cable Commc'n, LLC*, 26 FCC Rcd. 17160, 17204 (2011).

²⁴⁶ Comments of the Enforcement Bureau, *Tennis Channel, Inc. v. Comcast Cable Commc'n, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, at 2 (July 8, 2011) (stating that "the burdens of . . . the introduction of evidence and of proof are on Tennis Channel").

proving that the violations occurred.”²⁴⁷ GSN’s arguments to the contrary, which cite the same precedent the Presiding Judge found unpersuasive in the *Tennis Channel* case, are entitled to no weight.²⁴⁸

98. As the party with the burden of proof, GSN must prove its case by a preponderance of the evidence, a standard that requires the Presiding Judge “to believe that the existence of a fact is more probable than its non-existence.”²⁴⁹ GSN must come forward with affirmative proof of the essential facts of its claim; it is not enough to discredit the testimony or documentary evidence presented by Cablevision.²⁵⁰ Moreover, in the face of comprehensive record evidence showing the contrary, GSN may not rely on selective business documents or summaries of programming to prove that it “consistently” targeted the same audience demographics or aired the same programming as WE tv.²⁵¹ Finally, although GSN may rely on permissible inferences drawn from the record, it may not rely on “impermissible speculation,” where “the link between the facts and the conclusion becomes so tenuous” that it is unsustainable.²⁵² The burden of proof rests with GSN, and GSN has not sustained its burden.

²⁴⁷ *Herring Broadcast, Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Recommended Decision, 24 FCC Rcd. 12967, 12995 (ALJ 2009) (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (stating that the “ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims.”)).

²⁴⁸ GSN COL ¶ 2; see Post-Trial Brief of the Tennis Channel, Inc., *Tennis Channel, Inc. v. Comcast Cable Commc’n, LLC*, MB Docket No. 10-204, File No. CSR-8258-P, at 10-11 (June 21, 2011) (relying on the same case law cited by GSN); *Tennis Channel*, 26 FCC Rcd. at 17204.

²⁴⁹ *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993).

²⁵⁰ *Goldhirsh Grp., Inc. v. Alpert*, 107 F.3d 105, 109 (2d Cir. 1997).

²⁵¹ See *WealthTV*, 24 FCC Rcd. at 12979, 12982 n.117, 12983.

²⁵² *Goldhirsh*, 107 F.3d at 108-110 (holding that verdict resting on evidence of statements that “must have” been made was unsupported by the facts because “there was absolutely no evidence” that the statements were actually made).

VI. GSN HAS NOT PROVEN THROUGH DIRECT EVIDENCE THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION

99. GSN next asserts that it has presented “direct evidence” that Cablevision engaged in discrimination based on affiliation.²⁵³ GSN’s definition of direct evidence misconstrues what is required to meet its burden in this case.²⁵⁴

100. GSN primarily asserts that it has established direct evidence of discrimination through a showing that Cablevision gave its affiliated networks favorable treatment at GSN’s expense.²⁵⁵ GSN fundamentally misunderstands the definition of direct evidence in a case such as this. The touchstone of any carriage discrimination claim is discriminatory intent, which a party can prove through “direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence, such as disparate treatment of similarly situated entities.”²⁵⁶ The Commission has made clear that “direct” evidence is just that—documentary or testimonial evidence explicitly showing that the MVPD’s carriage decision itself is a product of unlawful discrimination on the basis of affiliation.²⁵⁷ A witness must testify that the carriage decision was predicated on affiliation, or documents must reflect this “directly.”

²⁵³ See GSN FOF ¶¶ 56-73; GSN COL ¶ 4.

²⁵⁴ See CV FOF & COL ¶¶ 229-235, *supra*, ¶¶ 11-20.

²⁵⁵ GSN COL ¶ 4.

²⁵⁶ *Tennis Channel, Inc.*, 26 FCC Rcd. at 17206 (citing *WealthTV*, 24 FCC Rcd. at 13398).

²⁵⁷ See CV FOF & COL ¶ 222. Specifically, the Commission has described direct evidence as “an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the programming vendor because it is not affiliated with the MVPD” or “an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD.” Second Report and Order, 26 FCC Rcd. at 11503-04.

101. Circumstantial evidence of discrimination is different. A complainant asserting a claim based on circumstantial evidence must prove the following: (1) that it is “similarly situated” to a network affiliated with the defendant MVPD, and (2) that the defendant MVPD treated its similarly situated affiliated network differently than the non-affiliated network “with respect to the selection, terms, or conditions for carriage.”²⁵⁸ Thus, in past carriage discrimination cases the Presiding Judge has held that the issue of whether two networks are similarly situated is a “threshold” matter that must be resolved before any issues of disparate treatment are considered.²⁵⁹ The Media Bureau applied the same standard in its Hearing Designation Order in this case.²⁶⁰

102. Because the record unequivocally demonstrates that Cablevision’s retiering decision itself had nothing to do with WE tv or Wedding Central, GSN asks the Presiding Judge to conclude that Cablevision’s differential treatment of GSN and its affiliated networks, standing alone, is “direct evidence of discrimination.”²⁶¹ But “the disparate treatment of two networks by itself does not establish violations of Section 616 and 76.1301(c).”²⁶² GSN provides no basis for the Presiding Judge to depart from this unambiguous precedent, and indeed, cites no case law in support of its interpretation of Section 616 and the Commission’s rules and regulations.²⁶³

²⁵⁸ Second Report & Order, 26 FCC Rcd. at 11504-05.

²⁵⁹ *WealthTV*, 24 FCC Rcd. at 12999-13000.

²⁶⁰ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Hr’g Designation Order & Notice for Opportunity for Hr’g for Forfeiture, 27 FCC Rcd. 5113, 5119-20 (MB 2012) (hereinafter “HDO”).

²⁶¹ See GSN FOF ¶¶ 56-73; GSN COL ¶ 4.

²⁶² *WealthTV*, 24 FCC Rcd. at 13000.

²⁶³ GSN COL ¶ 4. GSN purports to rely on the legal standard set forth in the HDO, but fails to come to grips with the fact that the Media Bureau cited and quoted the portion of the Second Report & Order

103. Moreover, the weight of the evidence shows that Cablevision did not unduly favor its affiliated networks. Cablevision carried WE tv and Wedding Central on the same terms and conditions as other MVPDs in the market.²⁶⁴ GSN's assertion that Cablevision paid WE tv "above market" rates when the parties renewed their carriage agreement in 2011 is contradicted by the terms of WE tv's agreements with other major MVPDs.²⁶⁵ GSN's assertion that Cablevision gave WE tv favorable channel placement is flatly inconsistent with the unrebutted testimony of Mr. Sapan describing WE tv's favorable channel placement on other MVPDs.²⁶⁶ And GSN's assertion that Cablevision was under an obligation to consider retiering WE tv, instead of GSN, is legally baseless given the lack of similarity between the networks.

104. Nor can Cablevision's decision to _____, which the evidence showed to be the resolution of a good-faith dispute between Cablevision's distribution and programming divisions.²⁶⁷ Executives from Rainbow and Cablevision's distribution arm—Mr. Broussard and Mr. Montemagno, respectively—gave testimony concerning both sides of the dispute; each side felt it was in the right.²⁶⁸ That Mr. Rutledge, who oversaw both the programming and distribution businesses, resolved the issue in Rainbow's favor does not prove that Cablevision favored its affiliated networks. Indeed, the Presiding Judge can infer nothing about Mr.

describing in precise detail the type of evidence constituting direct evidence of discrimination. Compare GSN COL ¶ 4 with HDO, 27 FCC Rcd. at 5119-20 n.54.

²⁶⁴ CV FOF & COL ¶¶ 177-185; *supra*, ¶¶ 11-14.

²⁶⁵ *Supra*, ¶¶ 13-14.

²⁶⁶ *Supra*, ¶¶ 19-20.

²⁶⁷ CV FOF & COL ¶¶ 177-185; *supra*, ¶¶ 15-16.

²⁶⁸ *Supra*, ¶¶ 15-16.

Rutledge's intent because GSN did not call Mr. Rutledge as a witness at any point during this proceeding.²⁶⁹

105. GSN's other purported direct evidence of discrimination consists of negotiations between Rainbow and DIRECTV concerning Wedding Central carriage, discussions that took place after Cablevision decided to reter GSN and communicated the decision to GSN and its customers.²⁷⁰ GSN's assertion that these discussions amount to "*per se* evidence of discrimination" disregards the Media Bureau's decision in this very case, which "question[ed] whether GSN's alleged direct evidence of discrimination, standing alone, is sufficient to establish a *prima facie* case."²⁷¹

106. Over the course of discovery and the parties' two week hearing, GSN did not come forward with any new evidence about these negotiations to support its claim that Cablevision "conditioned" its carriage of GSN on DIRECTV's carriage of Wedding Central. Nor did GSN present any evidence showing or even suggesting that Wedding Central played any role in the decision of Cablevision to reter GSN. To the contrary, the record reflects that, following Cablevision's good-faith decision to reter GSN without regard for any of its affiliated networks, GSN's parent, DIRECTV, approached Cablevision about a possible solution that, inevitably, implicated Rainbow because it was the only Cablevision division that had a relationship with DIRECTV.²⁷² The negotiations between DIRECTV and Rainbow were fruitless, but even after DIRECTV made it crystal clear that it would not carry Wedding Central,

²⁶⁹ *Supra*, ¶ 16; *see Goldhirsh*, 107 F.3d at 109-110 (commenting that a party's unexplained failure to present any witness to a critical conversation was "[t]he question that haunts this record like the ghost of Banquo").

²⁷⁰ GSN FOF ¶¶ 74-79; GSN COL ¶ 4.

²⁷¹ HDO, 27 FCC Rcd. at 5135; *see also* CV FOF & COL ¶¶ 232-35.

²⁷² CV FOF & COL ¶¶ 57-62; *supra*, ¶¶ 23-24.

Cablevision continued to engage in discussions with GSN and its parent company Sony to explore whether Sony could provide Cablevision with value sufficient to justify the restoration of broader carriage of GSN.²⁷³ The record thus is entirely inconsistent with GSN's theory that Cablevision orchestrated the retiering to secure carriage for Wedding Central on DIRECTV. GSN does not come close to satisfying its burden of proving by direct evidence that Cablevision had the intent to discriminate against GSN when it made the retiering decision.

VII. GSN HAS NOT PROVEN THROUGH CIRCUMSTANTIAL EVIDENCE THAT CABLEVISION DISCRIMINATED ON THE BASIS OF AFFILIATION

107. In order to make out a case of discrimination based on circumstantial evidence, GSN must prove that it is similarly situated to one of Cablevision's affiliated networks, WE tv or Wedding Central. GSN has not sustained its burden. Consequently, the Presiding Judge need not even reach GSN's remaining claims of indirect evidence—that Cablevision's retiering was "pretextual" or ultimately unprofitable. In any event, GSN also has failed to prove that Cablevision retiered GSN for other than its stated cost-savings reasons, and certainly has not proven that Cablevision's actions constitute "pretext" under established discrimination law. Nor does GSN proffer sufficient evidence, even with the benefit of hindsight, that Cablevision would have benefited from continuing to carry GSN on a broadly-distributed tier.

A. GSN Has Not Proven that It Is Similarly Situated to WE tv or Wedding Central

108. GSN asserts that it is similarly situated to WE tv and Wedding Central because GSN and Cablevision's affiliates "compete with each other" and have "generally comparable popularity."²⁷⁴ This is a superficial and inaccurate description of the standard the

²⁷³ CV FOF & COL ¶¶ 55-68, 232-35; *supra*, ¶¶ 24-25.

²⁷⁴ GSN COL ¶ 7.

Presiding Judge must apply in this case. As GSN itself recognizes, it is similarly situated to WE tv or Wedding Central only if it has similar target programming, programming genre, target audience, actual audience, target advertisers or other similar factors.²⁷⁵

109. Evidence concerning each of the relevant factors shows that GSN and WE tv are not similarly situated:

- **Target Programming:** GSN and WE tv targeted and aired starkly different programming.²⁷⁶ GSN, while WE tv²⁷⁷ GSN's effort to identify a few shows purportedly targeting women that did not air until 2014 does not stand up to the overwhelming evidence that GSN was and is a network dedicated to game shows and gaming.²⁷⁸
- **Programming Genre:** Mr. Egan's genre analysis, corroborated by testimony from GSN and WE tv fact witnesses and contemporaneous business documents, showed that GSN airs programming exclusively in the game show and gaming genres.²⁷⁹ WE tv airs a diverse mix of programming in the reality, movie, comedy, documentary, news, and other genres.²⁸⁰ GSN did not rebut this evidence or offer a genre analysis of its own.
- **Target Audience:** As its former distribution chief conceded, and GSN's internal documents, presentations to MVPDs, marketing partners, and advertisers all affirm, GSN targeted a "broad-based audience" of men and women.²⁸¹ WE tv consistently targeted an audience of women 18 to 54.²⁸² Putting aside the self-serving

²⁷⁵ See Second Report & Order, 26 FCC Rcd. at 11504; *WealthTV*, 24 FCC Rcd. at 12977-83; *Tennis Channel*, 26 FCC Rcd. at 17170-71; see also CV FOF & COL ¶¶ 223, 236-46; see generally GSN FOF ¶¶ 81-109 (identifying the Commission's "similarly situated" factors in paragraph headings).

²⁷⁶ *Supra*, ¶¶ 27-31; CV FOF & COL ¶¶ 70-87, 237.

²⁷⁷ *Supra*, ¶ 27; CV FOF & COL ¶¶ 72-75.

²⁷⁸ *Supra*, ¶ 28; CV FOF & COL ¶¶ 118 n.329, 246.

²⁷⁹ *Supra*, ¶ 29; CV FOF & COL ¶¶ 88-97.

²⁸⁰ CV FOF & COL ¶¶ 88-97.

²⁸¹ *Supra*, ¶¶ 13-14; CV FOF & COL ¶¶ 115-23.

²⁸² *Supra*, ¶¶ 32-35; CV FOF & COL ¶¶ 123-26.

testimony of GSN's current executives and a few misconstrued documents, the strong weight of the evidence demonstrates that GSN and WE tv did not target the same audience.

- **Actual Audience:** The majority of WE tv's viewers were in its target audience of women 18 to 49 and 25 to 54.²⁸³ Over _____ of GSN's audience was consistently outside the target demographic of women 25 to 54 and a majority of its audience was men and women 55 and older.²⁸⁴ GSN's expert, Mr. Brooks, tries to elide these differences by relying on superficial GSN ratings among women 18 and older, but these ratings obscure the dramatic demographic differences between WE tv and GSN.
- **Target and Actual Advertisers:** The differences in GSN and WE tv's audience made them different in the eyes of advertisers.²⁸⁵ Even GSN's owner, DIRECTV, placed the networks in advertising clusters that aimed to deliver different demographics.²⁸⁶ Only a small fraction of GSN's advertising sales were to women in the 25 to 54 demographic.²⁸⁷

110. Furthermore, GSN cannot overcome the weight of the evidence showing that it is not similar to WE tv simply by labeling the opinions of Cablevision's experts "unreliable." Each of Cablevision's experts is qualified based on training and experience. Each relied on supported methodologies and analyses in reaching well-founded conclusions.²⁸⁸ GSN has failed to identify any disqualifying weaknesses in the work of Cablevision's experts, and certainly none that can show that it is similarly situated to Cablevision's affiliated networks.

²⁸³ *Supra*, ¶¶ 36-40; CV FOF & COL ¶¶ 127-36.

²⁸⁴ *Supra*, ¶¶ 37-39; CV FOF & COL ¶ 242.

²⁸⁵ *Supra*, ¶¶ 41-44; CV FOF & COL ¶¶ 144-48.

²⁸⁶ *Supra*, ¶ 41; FOF & COL ¶¶ 155-56.

²⁸⁷ *Supra*, ¶ 43; CV FOF & COL ¶¶ 151-52.

²⁸⁸ *Supra*, ¶¶ 46-70.

B. GSN Has Not Proven that Cablevision’s Non-Discriminatory Justification for the Retiering Decision Is “Pretextual”

111. The evidence demonstrates that Cablevision made a rational, non-discriminatory business decision to retier GSN.²⁸⁹ GSN does not dispute that, at the time of the retiering, Cablevision and other MVPDs found themselves in a challenging programming cost environment.²⁹⁰ GSN does not dispute that Mr. Montemagno drafted a carriage assessment memorandum for Mr. Bickham setting forth considerations relevant to dropping or repositioning GSN, including GSN’s cost, relative unpopularity, terms of carriage, and the potential for subscriber loss if GSN were retiered—precisely the types of carriage considerations the Presiding Judge and the Commission have recognized in past cases as non-discriminatory.²⁹¹ GSN does not dispute that Mr. Montemagno, Mr. Bickham, and others on their team continued to discuss repositioning GSN and other networks throughout the autumn of 2010, and reviewed further GSN viewership data in connection with those discussions.²⁹² And GSN does not dispute that, when Mr. Montemagno—whom GSN witnesses described as “honest” and a “stand-up guy”—communicated Cablevision’s decision to GSN, he explained that it was “a move that [Cablevision] needed to do to save cost[s].”²⁹³

112. Because it cannot rebut these facts, GSN claims that Cablevision’s cost-saving justification for retiering GSN should be dismissed as a “pretext for discrimination.”²⁹⁴

²⁸⁹ *Supra*, ¶¶ 79-85; CV FOF & COL ¶¶ 35-54.

²⁹⁰ CV FOF & COL ¶¶ 36-40.

²⁹¹ *Id.* ¶¶ 250-51.

²⁹² *Id.* ¶¶ 47-50.

²⁹³ *Id.* ¶¶ 53, 53 n.122.

²⁹⁴ GSN FOF ¶¶ 163-68; GSN COL ¶ 8.

GSN, however, does not put its “pretext” label in context.²⁹⁵ As the D.C. Circuit explained in *Tennis Channel*, a pretextual decision is one in which an “otherwise valid business decision is . . . cover for some deeper discriminatory purpose.”²⁹⁶ Discrimination law, which forms the foundation of Section 616, is informative.²⁹⁷ The plaintiff bears the burden of proving that the defendant’s stated reasons were not honestly held and are so implausible that they were reasonably nothing more than a pretext for discrimination.²⁹⁸ “Showing pretext . . . requires more than simply criticizing the [defendant’s] decisionmaking process.”²⁹⁹

113. Against this legal standard, GSN’s claims of pretext are unsustainable. For example, GSN questions the accuracy of one piece of the STB data Mr. Montemagno and his team relied upon in determining to reduce GSN’s carriage, but there is no evidence that Cablevision manufactured this data to cover up the “deeper discriminatory purpose” of Cablevision’s executives; to the contrary, the evidence showed GSN to be a little-watched

²⁹⁵ GSN COL ¶ 8.

²⁹⁶ *Tennis Channel*, 717 F.3d at 987 (holding that allegations that a cost-benefit analysis that was insufficiently rigorous did not rise to the level of pretext). A “pretextual” decision is defined as a “false or weak reason or motive advanced to hide the actual or strong reason or motive.” *Black’s Law Dictionary* (14th ed).

²⁹⁷ In those cases, like carriage discrimination cases, if the defendant has articulated a valid rationale for its disparate treatment of the plaintiff, the plaintiff can prevail only if it “prove[s] by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Of course, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Id.*

²⁹⁸ See, e.g., *Young v. Dillon Companies, Inc.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (holding that the plaintiff “must demonstrate that the defendant’s proffered race-neutral reasons were so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude the reasons were unworthy of belief.”); *Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1265 (11th Cir. 2002) (“A plaintiff trying to show pretext . . . does not succeed by presenting evidence that the defendant was mistaken about the facts upon which he based his alleged non-discriminatory decision. Instead, a plaintiff must present evidence from which a reasonable jury could find that the defendant did not honestly believe the facts upon which he allegedly based his non-discriminatory decision.”).

²⁹⁹ *Hairston v. Vance-Cooks*, 773 F.3d 266, 272 (D.C. Cir. 2014).

network no matter which STB data Cablevision’s distribution team reviewed.³⁰⁰ Similarly, GSN challenges Mr. Bickham’s rationale for retiring GSN and asserts that in making the final decision he did not review the substantial work his team assembled (and that he requested specifically). But this is not “pretext” either. The weight of the evidence shows that Mr. Bickham reviewed and considered Mr. Montemagno’s carriage assessment memorandum and the further work performed by the distribution team, and that it reinforced his views that GSN could and should be retired.³⁰¹ Even if Mr. Bickham did ignore the substantial data indicating that GSN should be retired—and there is no evidence showing that he did—it would not amount to proof that he acted with discriminatory intent. Both the D.C. Circuit and the Presiding Judge have so held.³⁰²

114. Finally, the remaining evidence GSN cites does not show Cablevision’s cost-savings reasons for retiring GSN to be “pretextual.” Although it is true, as a matter of mathematics, that Cablevision could have saved money by not waiving its

, that resolution of a disagreement between Cablevision’s distribution and programming arms does not contradict in the least the evidence showing that the GSN decision was driven by cost concerns.³⁰³ Cablevision could have conceivably saved costs in

³⁰⁰ *Supra*, ¶ 83; CV FOF & COL ¶ 50.

³⁰¹ *Supra*, ¶¶ 80-82; CV FOF & COL ¶¶ 47-50.

³⁰² *WealthTV*, 24 FCC Rcd. at 12999-13000 (holding that MVPDs do not need to “employ identical criteria” in making carriage decisions); *Tennis Channel*, 717 F.3d at 987 (holding that allegation that a cost-benefit analysis was conducted hastily is not sufficient to prove a carriage decision was pretextual). On appeal in the *Tennis Channel* matter, the Commission argued that Comcast’s carriage decision “was not based on a good-faith cost-benefit analysis” because “Comcast subjected Tennis Channel to a ‘cost-benefit’ test for carriage that it concededly did not even apply to its own affiliates.” Brief of Respondent FCC, *Comcast Cable Comm’ns v. FCC*, No. 12-1337, 2012 WL 5460853, at *31-32 (Nov. 7, 2012). In its decision the D.C. Circuit could have held that applying a cost-benefit analysis “selectively” constitutes discrimination, but did not do so.

³⁰³ *Supra*, ¶ 85; CV FOF & COL ¶ 183.

any number of ways, including by dropping or repositioning other out-of-contract non-affiliated networks whose carriage it reviewed but, ultimately, decided to maintain.³⁰⁴ That Cablevision may have foregone other cost savings in its programming budget does not establish that Cablevision's desire to save costs by retiering GSN was driven by an affiliation-based discriminatory motive. Nor can discrimination be inferred from Cablevision's refusal to restore GSN's broader carriage unless it could do so on a _____ basis consistent with its cost-saving objectives.³⁰⁵ Rather, these were business decisions that, similar to Cablevision's decision to retier GSN, were made for the reasons articulated in contemporaneous documents and by Cablevision's witnesses at trial. They were not after-the-fact justifications designed to hide Cablevision's discriminatory motive; GSN has presented no affirmative evidence that Cablevision had such designs.

C. GSN Has Not Established that an Inference of Discrimination Can Be Drawn from a Cost-Benefit Analysis of Cablevision's Retiering Decision

115. GSN asserts that Cablevision would have benefited from maintaining GSN carriage on a broadly-penetrated tier, a claim that rests entirely on the testimony of its expert, Dr. Singer.³⁰⁶ Cablevision has established that Dr. Singer's testimony is unreliable because it is based on improper methodologies and unsupported speculation.³⁰⁷ Mr. Orszag's conclusion that Cablevision profited from the retiering by cutting programming costs and attracting additional Sports & Entertainment tier subscribers is reliable and should be credited in

³⁰⁴ *Supra*, ¶ 82; CV FOF & COL ¶¶ 42-49, 250.

³⁰⁵ *Supra*, ¶ 84; CV FOF & COL ¶¶ 64-68.

³⁰⁶ GSN FOF ¶¶ 174-81.

³⁰⁷ CV FOF & COL ¶¶ 191-99, 259-60.

full.³⁰⁸ Dr. Singer’s alternative theory, concerning the cost-savings Cablevision allegedly could have accrued by retiering WE tv, is, like his other opinions, deserving of little weight.³⁰⁹ Dr. Singer’s after-the-fact cost-benefit analyses provide the Presiding Judge with no basis to conclude that Cablevision acted with discriminatory intent.

VIII. GSN HAS NOT PROVEN THAT CABLEVISION’S CONDUCT UNREASONABLY RESTRAINED GSN’S ABILITY TO COMPETE FAIRLY

116. GSN alleges that the Cablevision retiering has restrained its ability to compete fairly.³¹⁰ GSN points out that it need not prove that its business has been decimated by the retiering³¹¹, but this is not a substitute for actual proof that GSN has been unreasonably restrained in its ability to compete. The undisputed record shows that GSN grew its advertising revenue from million in 2010 to million in 2013, that GSN grew its subscriber base from under million to almost million since the retiering, and that GSN has been able to invest more in original programming each year since the retiering.³¹² The evidence GSN identifies to show the harm it allegedly suffered—a temporary decrease in advertising revenue, a delayed ability to reach 80 million subscribers, and diminished spending from certain advertisers—reflects mere “hiccups” in GSN’s steady and sustained growth.³¹³ GSN has not met its burden of proving a “significant or material detrimental effect” stemming from the retiering.³¹⁴

³⁰⁸ *Id.* ¶¶ 187-90.

³⁰⁹ *Id.* ¶¶ 198-99; *supra*, ¶¶ 87-89.

³¹⁰ GSN COL ¶¶ 9-11.

³¹¹ *Id.* ¶ 9.

³¹² CV FOF & COL ¶ 263; *supra*, ¶ 93.

³¹³ *Supra*, ¶ 93; CV FOF & COL ¶¶ 206-14.

³¹⁴ *Supra*, ¶¶ 90-95; CV FOF & COL ¶¶ 262-66. Furthermore, although the parties’ arguments have focused on the national video programming market in which GSN competes, GSN has also failed to prove that it has been unreasonably restrained in the New York DMA, or that Cablevision even

IX. GSN IS ENTITLED TO NO REMEDY, AND THE RELIEF IT SEEKS IS BARRED BY THE FIRST AMENDMENT

117. GSN is not entitled to a remedy and forfeiture under Section 616 because it has not sustained its burden of proof.³¹⁵ Moreover, if Cablevision is forced to restore GSN to broad carriage, its First Amendment rights will be violated.³¹⁶ Intermediate scrutiny applies to Section 616 actions because a competitive market can be achieved and maintained without dictating Cablevision's actions, rendering the infringement of Cablevision's First Amendment rights unnecessary.³¹⁷ Should Cablevision be forced to carry GSN more broadly, it should have to pay GSN only a reasonable rate based on GSN's value, not the expired carriage agreement rate. Finally, GSN is not entitled to a remedy based on an ongoing violation.³¹⁸

exercises market power in the New York DMA sufficient to restrain GSN. CV FOF & COL ¶¶ 265-67.

³¹⁵ GSN FOF ¶¶ 13-19; *supra*, ¶¶ 97-98.

³¹⁶ CV FOF & COL ¶¶ 269-74.

³¹⁷ *Id.*

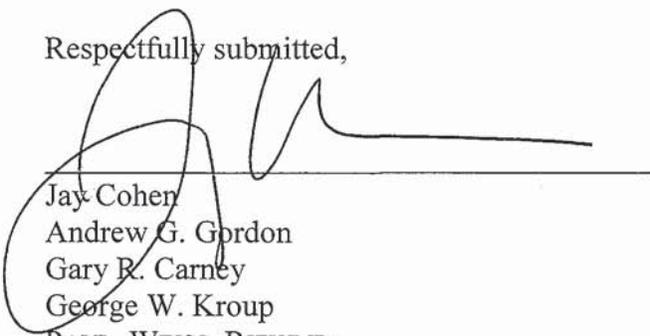
³¹⁸ At trial the Presiding Judge noted if a continuing violation was present it stopped as of the date of the trial (July 7, 2015). Tr. 21:19-22.

CONCLUSION

118. For the foregoing reasons, Cablevision respectfully requests that GSN's Proposed Findings of Fact and Conclusions of Law be rejected in full, and that Cablevision's Proposed Findings of Fact and Conclusions of Law and this Reply be adopted by the Presiding Judge in support of a recommended decision denying the relief sought by GSN in this carriage complaint proceeding.

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