

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

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: Marlene H. Dortch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

ENFORCEMENT BUREAU'S COMMENTS

Pamela S. Kane
William Knowles-Kellett
Investigations and Hearings Division
Enforcement Bureau
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

October 15, 2015

TABLE OF CONTENTS

BACKGROUND.....1

LEGAL STANDARD.....3

DISCUSSION.....6

I. GSN Has Not Demonstrated Affiliation-Based Discrimination Through Direct Evidence.....6

II. GSN Has Not Shown That It is Similarly Situated to WE tv and Wedding Channel.....8

 A. Target Audience.....9

 B. Actual Audience Demographics.....11

 C. Programming.....12

CONCLUSION.....15

SUMMARY

The Presiding Judge directed the Enforcement Bureau (Bureau) to submit comments on the Proposed Findings of Fact and Conclusions of Law, the Reply Proposed Findings of Fact and Conclusions of Law, and the Post-Trial Briefs submitted by Game Show Network, LLC (GSN) and Cablevision Systems Corp. (Cablevision).

The Bureau submits that GSN has not demonstrated through direct evidence that Cablevision violated Section 76.1301(c) of the Commission's rules. In addition, the Bureau submits that GSN has not satisfied the burden of demonstrating through circumstantial evidence that WE tv and the now-defunct Wedding Channel networks are similarly situated with the GSN network for the purposes of Sections 76.1301 and 76.1302 of the Commission's rules. For that reason, GSN has not satisfied its burden of demonstrating that Cablevision discriminated against GSN in video programming distribution on the basis of affiliation or non-affiliation in the selection, terms, or conditions for carriage. Accordingly, the Bureau submits that the Presiding Judge issue a recommended decision concluding that: (a) Cablevision has not violated Section 76.1301(c) of the Commission's rules in this instance; and (b) there is no basis for mandating broader carriage of GSN on Cablevision's system or for imposing a forfeiture.

1. The Presiding Judge directed the Enforcement Bureau (Bureau) to submit comments by October 15, 2015 on the Proposed Findings of Fact and Conclusions of Law, the Reply Proposed Findings of Fact and Conclusions of Law, and the Post-Trial Briefs filed by Game Show Network, LLC (GSN) and Cablevision Systems Corp. (Cablevision).¹ The Chief, Enforcement Bureau, through his attorneys, hereby submits the following comments.²

BACKGROUND

2. The *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* (HDO)³ designated for hearing before the Presiding Administrative Law Judge the above-captioned program carriage complaint filed by GSN against Cablevision.

3. GSN is a cable television network that is owned by Sony Pictures Entertainment, Inc. and DIRECTV.⁴ It was originally launched as the Game Show Network and rebranded itself as GSN in 2004.⁵ Cablevision is a vertically integrated multichannel video programming distributor (MVPD) that provides cable television and related services to subscribers in their homes.⁶ Cablevision began carrying GSN in 1997, and until February 2011, Cablevision carried

¹ See *Order*, FCC 15M-25 (ALJ, rel. Jul. 28, 2015).

² Although the Bureau has, pursuant to Section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b), participated fully as a party in this proceeding, the Bureau's interests in this case differ from those of the captioned parties. Thus, while GSN and Cablevision have properly sought to serve their respective pecuniary and other *private* interests, the Bureau's role has been to ensure that the *public* interest is served and that the evidentiary record in this proceeding is full and complete in order that the Presiding Judge may have an adequate basis upon which to render a fair and reasoned recommended decision.

³ 27 FCC Rcd 5113 (MB 2012) (HDO).

⁴ See Proposed Findings of Fact and Conclusions of Law of Game Show Network, LLC, filed Sept. 11, 2015, at ¶ 31 (GSN's Proposed Findings); GSN Exh. 297 (Supplemental Direct Testimony of David Goldhill) at ¶ 4. See also Cablevision Systems Corporation's Proposed Findings of Fact and Conclusions of Law, filed Sept. 11, 2015, at ¶ 17 (Cablevision's Proposed Findings).

⁵ See GSN's Proposed Findings at ¶ 31.

⁶ See Cablevision's Proposed Findings at ¶ 22.

GSN on its expanded basic tier of service, which reached approximately 2.7 million subscribers (roughly 90 percent of Cablevision subscribers).⁷ In December 2010, Cablevision disclosed its decision to move GSN to a sports tier.⁸ Cablevision repositioned GSN to the sports tier on February 1, 2011.⁹ GSN is widely distributed by other major cable system operators in the United States.¹⁰

4. At the time of GSN's retiering to the sports tier, Cablevision, through a separate subsidiary then known as Rainbow Holdings (and now known as AMC Networks), operated and distributed several national cable networks, including WE tv and Wedding Central.¹¹ WE tv originally launched in 1997 as "Romance Classics" and then relaunched in 2001 as "WE: Women's Entertainment."¹² It shortened its name to WE tv in 2006.¹³ Wedding Central launched in 2009 as a spin-off of WE tv's wedding-themed programming.¹⁴ Cablevision shut down the network in 2011.¹⁵

5. The HDO requires the Presiding Judge to submit a recommended decision to the Commission based on his determination of the following issues:

- (a) To determine whether Cablevision has engaged in conduct the effect of which is to unreasonably restrain the ability of GSN to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by GSN, in violation of Section 616(a)(3) of the Act and/or Section 76.1301(c) of the

⁷ See GSN's Proposed Findings at ¶ 32.

⁸ See *id.* at ¶ 45.

⁹ See *id.* at ¶ 48.

¹⁰ See *id.* at ¶ 55.

¹¹ See Cablevision's Proposed Findings at ¶ 22.

¹² See *id.* at ¶ 23.

¹³ See *id.*

¹⁴ See *id.* at ¶ 24.

¹⁵ See *id.*

Commission's Rules;¹⁶

- (b) In light of the evidence adduced pursuant to the foregoing issue, to determine whether Cablevision should be required to carry GSN on its cable systems on a specific tier or to a specific number or percentage of Cablevision subscribers and, if so, the price, terms, and conditions thereof; and/or whether Cablevision should be required to implement such other carriage-related remedial measures as are deemed appropriate;¹⁷ and
- (c) In light of the evidence adduced pursuant to the foregoing issues, to determine whether a forfeiture should be imposed on Cablevision.¹⁸

6. Hearing sessions were held at the Commission's headquarters in Washington, D.C. from July 7, 2015 through July 20, 2015. During the nearly two-week long hearing, GSN presented the testimony of five (5) witnesses, including two expert witnesses, and Cablevision presented seven (7) witnesses, including four expert witnesses.

LEGAL STANDARD

7. The Cable Television Consumer Protection and Competition Act of 1992¹⁹ added Section 616 to the Communications Act of 1934, as amended, which required the Commission to adopt regulations governing program carriage agreements between cable operators and other multichannel video programming distributors and video programming vendors. Among other things, Section 616 ordered the Commission to establish rules that:

contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.²⁰

¹⁶ HDO at ¶ 39(a).

¹⁷ HDO at ¶ 39(b).

¹⁸ See HDO at ¶ 44.

¹⁹ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (*1992 Cable Act*).

²⁰ 47 U.S.C. § 536(a)(3).

In adopting these provisions, Congress observed “that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems.”²¹

8. The Commission recognized that an unaffiliated program vendor that competes with programmers affiliated with MVPDs²² may suffer harm to the extent that it does not receive the same favorable terms and conditions of carriage.²³ To deter discriminatory conduct in the carriage of programming, the Commission adopted Section 76.1301(c) of the Commission’s rules, which closely tracks the statute:

Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.²⁴

9. In adopting Section 76.1301(c), the Commission specifically attempted to strike a balance between proscribing certain anticompetitive activities while preserving the ability of the parties to engage in “legitimate, aggressive negotiations.”²⁵ The Commission also sought to implement Congress’ stated policy to “rely on the marketplace, to the maximum extent feasible, to achieve greater availability’ of the relevant programming.”²⁶ At no point did Congress or the Commission state an intention to deny vertically-integrated MVPDs the ability to exercise

²¹ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2643, ¶ 2 (1993) (*1993 Program Carriage Order*).

²² MVPDs include cable operators (such as Cablevision), telephone companies that distribute video programs to subscribers (such as Verizon FIOS and AT&T), and satellite video program distributors (such as DIRECTV and DISH Network).

²³ See *1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 2.

²⁴ 47 C.F.R. § 76.1301(c).

²⁵ *1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 14.

²⁶ See *1992 Cable Act*, Section 2(b)(2), cited in *1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 15.

legitimate business and editorial discretion over their carriage decisions.

10. Under the Commission’s rules, a complainant may prove unlawful discrimination in one of two ways: direct evidence or circumstantial evidence.²⁷

11. To make a *prima facie* case of discrimination through direct evidence, a complainant may rely, for example, on “[a]n 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.”²⁸ Likewise, a complainant may rely on “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.”²⁹

12. Because “direct evidence of affiliation-based discrimination will seldom be available,” a complainant may also rely on circumstantial evidence to demonstrate affiliation-based discrimination.³⁰ When making a circumstantial case, the complainant must establish that (1) the networks are similarly situated based on a combination of factors such as genre, ratings, license fee, target audience, target advertisers, and target programming;³¹ and (2) the defendant MVPD treated the unaffiliated network differently than an affiliated network with respect to the selection, terms, or conditions of carriage because of its affiliation.³² The complainant must then

²⁷ See HDO at ¶ 10.

²⁸ *In re Revision of the Commission’s Program Carriage Rules*, Second Report and Order, 26 FCC Rcd 11494, 11503, ¶ 13 (2011) (*Second Report and Order*).

²⁹ *Id.* at 11504, ¶ 13.

³⁰ *Id.* (citation omitted).

³¹ See HDO at ¶ 10 (citations omitted); see also 47 C.F.R. § 76.1302(d)(3)(B)(iii).

³² See HDO at ¶ 10 (citations omitted).

prove that any such discrimination unreasonably restrained the complainant's ability to compete fairly and that this harm (or discrimination) was based on affiliation and not on "a reasonable business purpose."³³

13. Although Section 76.1301(c) was adopted in 1993, there is a scarcity of guidance and case law on the specific subject of program carriage discrimination. Nevertheless, it is reasonable, based on a plain reading of Section 76.1301(c) to employ a multi-pronged analysis that essentially tracks the required elements of the rule.

DISCUSSION

14. The Bureau submits that GSN has not produced any direct evidence of unlawful affiliation-based discrimination by Cablevision. The Bureau further submits that GSN has not satisfied the first prong of the circumstantial evidence test by showing that GSN and Cablevision's affiliated networks, WE tv and Wedding Channel, are similarly situated. Because resolution of those two issues will dispose of this case, the Bureau submits that it is not necessary for the Presiding Judge to address the second prong of the circumstantial evidence test.

I. GSN Has Not Demonstrated Affiliation-Based Discrimination Through Direct Evidence

15. As the Commission recently explained in its *Second Report and Order*, direct evidence of affiliation-based discrimination usually consists of specific evidence clearly showing that an MVPD took an adverse carriage action against a programming vendor because it is not affiliated with the MVPD or to benefit affiliated networks, such as an email or other documents reflecting the relevant carriage negotiations.³⁴ Although GSN suggests that much of the

³³ *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, 717 F.3d 982, 985 (D.C. Cir. 2013) (*Tennis Channel*).

³⁴ See, e.g., *Second Report and Order* at 11503-04, ¶ 13.

evidence it has put forward constitutes such “direct” evidence, the Bureau submits that GSN has not presented any direct evidence of the type contemplated by the Commission.

16. In particular, Cablevision’s offer to reinstate GSN’s broad carriage in exchange for GSN’s parent, DIRECTV, agreeing to carry Cablevision’s affiliate, Wedding Channel, does not constitute direct evidence of discrimination. GSN argues that Cablevision’s attempt to leverage GSN’s carriage for the purpose of advantaging its affiliated network “is the essence of what Section 616 [of the Act] prohibits.”³⁵ However, there does not appear to be any evidence in the record – and GSN cites none – indicating that Cablevision made the decision to retier GSN in order to obtain favorable coverage for Wedding Channel on DIRECTV.³⁶ Rather, the evidence reflects that Cablevision made the offer to reinstate GSN’s coverage on a broader tier if DIRECTV carried Wedding Channel only after it communicated the retiering decision to GSN in December 2010 and only in response to discussions that GSN and DIRECTV initiated.³⁷ In addition, it appears that it was GSN’s executives – and not Cablevision’s – who originally had the idea of DIRECTV offering to carry Wedding Channel in exchange for broader carriage for GSN.³⁸ The record further reflects that when DIRECTV reached out to Cablevision’s Chief Operating Officer, Mr. Rutledge, to discuss Cablevision’s retiering decision,³⁹ Mr. Rutledge was not aware that DIRECTV held an ownership interest in GSN.⁴⁰

17. Moreover, the negotiations did not bear any fruit. Nothing changed as a result.

³⁵ See Trial Brief of Game Show Network, LLC, filed June 2, 2015, at 35 (GSN’s Trial Brief).

³⁶ See, e.g., Cablevision’s Proposed Findings at ¶¶ 55-56.

³⁷ See, e.g., Cablevision Systems Corporation’s Post-Trial Brief, filed Sept. 30, 2015, at 9 (Cablevision’s Post-Trial Brief); Cablevision’s Proposed Findings at ¶¶ 59-61; GSN’s Trial Brief at 11; GSN’s Proposed Findings at ¶ 76.

³⁸ See Cablevision’s Post-Trial Brief at 8, 9; Cablevision’s Proposed Findings at ¶¶ 59-60.

³⁹ See GSN’s Trial Brief at 11; see also GSN Exh. 297 at ¶ 17.

⁴⁰ See Cablevision’s Proposed Findings at ¶ 62.

Consequently, this evidence proves nothing. Even viewed in a light most favorable to GSN, the evidence could at most give rise to a thin inference that Cablevision retaliated GSN to pressure DIRECTV to carry Wedding Central. But by GSN's own admission, inferences do not constitute direct evidence.⁴¹ The Bureau submits, therefore, that Cablevision's proposal to reconsider its GSN tiering decision if DIRECTV agreed to carry Wedding Channel – made in the context of after-the-fact negotiations between Cablevision and DIRECTV in an effort to resolve the carriage dispute between Cablevision and GSN – does not rise to the level of direct evidence of discrimination contemplated by the Commission.

18. The Bureau further submits that the remainder of GSN's evidence is more accurately characterized as circumstantial evidence, not direct evidence. There is no smoking gun in the record. GSN has adduced no evidence that shows, on its face, that Cablevision discriminated against GSN based on affiliation. Accordingly, the Bureau recommends to the Presiding Judge that he find that GSN has not demonstrated affiliation-based discrimination through direct evidence.

II. GSN Has Not Shown That It is Similarly Situated to WE tv and Wedding Channel

19. To make a circumstantial case of affiliation-based discrimination under Section 76.1301 of the Commission's rules, GSN must first demonstrate that it provides "video programming that is similarly situated to video programming provided by a video programming vendor affiliated...with [Cablevision], based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."⁴² Thus, GSN must establish that it provides video programming that is similarly situated to the video

⁴¹ See Post-Trial Brief of Game Show Network, LLC, filed Sept. 30, 2015, at 3-4.

⁴² 47 C.F.R. § 76.1302(d)(3)(iii)(B)(2)(i); see also *Second Report and Order*, 26 FCC Rcd at 11504, ¶ 14.

programming provided by WE tv and Wedding Channel – each of which are affiliated with Cablevision.

20. Recognizing that both parties presented substantial evidence in support of their respective positions, the Bureau submits that GSN has not satisfied the burden of demonstrating that WE tv and the now-defunct Wedding Channel networks are similarly situated with GSN for the purposes of Section 76.1301(c). The record shows that GSN targets (and attracts) a different audience than WE tv and Wedding Channel and that GSN's programming is not comparable to the programming available on WE tv and Wedding Channel.

A. Target Audience

21. There does not seem to be any dispute between the parties that, during the relevant time period, WE tv and Wedding Channel (when it existed) targeted women in the 18 to 49 and 25 to 54 demographics.⁴³ At hearing, for example, Ms. Dorée, WE tv's head of programming and acquisitions, testified that WE tv consistently represented the network to viewers, distributors, and advertisers as a women's network with a target audience of women in the 18 to 49 and 25 to 54 age groups.⁴⁴

22. GSN did not show that it specifically targeted the 18 to 49 and 25 to 54 demographics. Although GSN established that after the arrival of Mr. Goldhill, GSN's President and Chief Executive Officer, in 2007, the network focused on developing original programming designed to target this 18 to 49 and 25 to 54 demographic, such as *Mind of a Man* and *It Takes a*

⁴³ See Cablevision's Proposed Findings at ¶¶ 124-126; see also Cablevision Trial Brief at 29; Cablevision's Post-Trial Brief at 12.

⁴⁴ See, e.g., CVH Exh 338 (Direct Testimony of Elizabeth T. Dorée) at ¶¶ 16-17; Hearing Transcript (7/15/15) at 1699:4-7, 14-19; 1700:16-21, 1732:23-1733:1.

Church,⁴⁵ those programs did not premiere on GSN until several years after Cablevision made its retiering decision.⁴⁶ [REDACTED]

[REDACTED] Even now, those original programs account for only a small slice of GSN's programming.

23. Although GSN characterized itself as a women's network,⁴⁸ and presented evidence that its network predominantly attracts women,⁴⁹ GSN also repeatedly distinguished itself from women's networks and held itself out as a network targeting a wider audience.⁵⁰ For example, in a presentation to Comcast, GSN segregated itself from the "women's entertainment" category and stated that GSN offered "family-friendly programming with wide-audience appeal" that delivered a "loyal, broad-based audience."⁵¹ GSN similarly presented itself as delivering a "broad-based" audience to, for example, Brighthouse, DISH, and the New York Interconnect.⁵² GSN's former distribution chief, Mr. Gillespie, conceded that GSN marketed itself to these MVPDs as a "broad-based, family oriented service that appealed to an adult audience" – defining "broad-based audience" to include both "men and women of all ages."⁵³

24. In *WealthTV*, the Commission considered whether two networks, WealthTV and

⁴⁵ See, e.g., GSN's Proposed Findings at ¶ 84.

⁴⁶ See Cablevision Systems Corporation's Reply Findings of Fact and Conclusions of Law, filed Sept. 30, 2015, at ¶ 31 (Cablevision's Proposed Reply Findings); GSN Exh. 227 at GSN_CVC_00165271; CV Exh. 291.

⁴⁷ [REDACTED]

⁴⁸ See, e.g., GSN's Proposed Findings at ¶¶ 81-83.

⁴⁹ See, e.g., GSN Exh. 297 at ¶ 5; GSN Exh. 300 (Revised Direct Testimony of Timothy Brooks) at ¶¶ 85-87.

⁵⁰ See, e.g., Cablevision's Proposed Findings at ¶¶ 79, 80, 116.

⁵¹ See, e.g., *id.* at ¶ 116, CV Exh. 50 at 3, 4, 16.

⁵² See, e.g., Cablevision's Proposed Findings at ¶ 116; see also CV Exh. 39 at 32 (Brighthouse); CV Exh. 48 at 30 (Comcast Spotlight); CV Exh. 109 at 15 (DISH); CV Exh. 96 at 19 (NY Interconnect).

⁵³ See Cablevision's Proposed Findings at ¶ 116; Joint Exh. 4 at 72:19-73:4; 76:12-77:7.

MOJO, were similarly situated.⁵⁴ WealthTV characterized its programming and MOJO's programming as targeting wealthy, young, male-dominated audiences.⁵⁵ Specifically, WealthTV argued that it targeted a male skewed audience, aged 25 to 49.⁵⁶ In WealthTV's marketing presentations to MVPDs and other public statements, however, it consistently described itself as having a "broad appeal" without any reference to a specific appeal to affluent men aged 25 to 49.⁵⁷ Relying on these statements, the Presiding Judge concluded (and the Commission agreed) that the "overwhelming weight of the record evidence...show[ed] that WealthTV targeted a much broader audience than" the affluent adult males aged 25 to 49 targeted by MOJO.⁵⁸ The Bureau submits that GSN's marketing statements that it could deliver a "broad-based" audience or programming with a "wide-audience appeal" likewise warrant a finding that GSN is not similarly situated to WE tv and Wedding Channel.

B. Actual Audience Demographics

25. In *Tennis Channel*, the Presiding Judge recognized that measurements of audience characteristics are useful in determining whether networks are similarly situated.⁵⁹ Here, GSN's actual audience demographics do not fit the profile of a network targeting women aged 18 to 49 and 25 to 54. Specifically, the Nielsen data in the record demonstrates that during every quarter between the first quarter of 2007 and the second quarter of 2011, the largest component of

⁵⁴ See, e.g., *Herring Broadcasting, Inc. d/b/a Wealth TV*, Order, FCC 09M-38 (ALJ, rel. May 4, 2009); see also *Herring Broadcasting, Inc. d/b/a Wealth TV*, Recommended Decision, 24 FCC Rcd 12697 (ALJ, rel. Oct. 14, 2009); *Herring Broadcasting, Inc. d/b/a Wealth TV*, Memorandum Opinion and Order, 26 FCC Rcd 8971 (2011).

⁵⁵ See, e.g., *WealthTV*, 24 FCC Rcd at 12980, ¶ 27.

⁵⁶ See *id.*

⁵⁷ See *id.* at 12980-81, ¶ 27, 29.

⁵⁸ *Id.* at 12980 at ¶ 27; see also *WealthTV*, 26 FCC Rcd at 8989, ¶¶ 25-26.

⁵⁹ See, e.g., *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, 26 FCC Rcd 17160, 17179-80, ¶¶ 43-44 (ALJ, rel. Dec. 20, 2011); see also *id.* at 17176-77 at ¶ 37; 17178-79 at ¶¶ 41-42.

GSN's primetime audience was women over the age of 55.⁶⁰ During the fourth quarter of 2010, for example, when Cablevision was making its retiering decision, [REDACTED] of GSN's primetime viewers were women 55 and older.⁶¹ The next largest component of GSN's primetime audience was men 55 and older.⁶² [REDACTED]

[REDACTED] In contrast, in the fourth quarter of 2010, WE tv consistently delivered audiences of women 18 to 49 and 25 to 54.⁶⁶

C. Programming

26. At hearing, GSN characterized its programming and that of WE tv and Wedding Central as unscripted programming, including game shows, relationship shows, and reality competition shows, targeted at female viewers and focused on dating, romance, and family dynamics.⁶⁷ In arguing that there was significant overlap in the themes and subjects of the networks' programming, GSN compared, for example, its *Baggage*, *The Newlywed Game*, *Love Triangle*, and *Match Game* to WE tv's *Bridezillas*, *My Fair Wedding*, and *Match Made in Heaven*.⁶⁸ GSN also compared the networks' programming documenting the experiences of

⁶⁰ See, e.g., Cablevision's Proposed Findings at ¶¶ 128-129, 131; CV Exh. 314 at 11; CV Exh. 186 at 21-22.

⁶¹ [REDACTED]

⁶² See Cablevision's Proposed Findings at ¶ 128; see also CV Exh. 314 at 11.

⁶³ [REDACTED]

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

⁶⁶ See Cablevision's Proposed Findings at ¶ 133.

⁶⁷ See GSN's Proposed Findings at ¶¶ 96-97; Reply Proposed Findings of Fact and Conclusions of Law of Game Show Network, filed Sept. 30, 2015, at ¶ 35 (2015 (GSN's Proposed Reply Findings)).

⁶⁸ See GSN's Proposed Findings at ¶¶ 97, 99; GSN's Proposed Reply Findings at ¶ 35; GSN Exh. 300 (Brooks) at ¶¶ 7, 9.

women creating dessert businesses – namely, GSN’s *Carnie Wilson: Unstapled* with WE tv’s *The Cupcake Girls*.⁶⁹

27. Cablevision provided reliable evidence effectively distinguishing GSN from WE tv and Wedding Central. Cablevision demonstrated that, while GSN concentrated on game shows as hallmarks of its overall programming, WE tv and Wedding Central emphasized scripted comedies, dramas and movies.⁷⁰ [REDACTED]

[REDACTED]

[REDACTED] GSN’s own documents classify GSN within a “game” genre.⁷⁴

28. Moreover, [REDACTED]

⁶⁹ See GSN’s Proposed Findings at ¶ 98, GSN’s Proposed Reply Findings at ¶ 35.

⁷⁰ See, e.g., Cablevision’s Proposed Findings at ¶¶ 85-87.

⁷¹ [REDACTED]

⁷² [REDACTED]

⁷³ [REDACTED]

⁷⁴ See Cablevision’s Proposed Findings at ¶ 95, CV Exh. 615 at 28 of 33; see also Cablevision’s Proposed Findings at ¶ 78 and CV Exh. 50 at 3.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] For these reasons, the Bureau submits

that GSN has not demonstrated that its programming is similar to that of WE tv and Wedding Central.

29. In sum, while there may be certain similarities between the networks – namely some commonality of ratings and advertisers – overall, the evidence does not support GSN’s contention that GSN is similarly situated with WE tv and Wedding Channel for purposes of Section 76.1302.

30. Under the Commission’s rules, a complainant network must demonstrate *both* that it is similarly situated to the defendant MVPDs’ affiliated networks and that the MVPD treated the complainant network differently than the similarly situated affiliated network in order to establish affiliation-based discrimination through circumstantial evidence.⁷⁹ For the foregoing reasons, the Bureau submits that GSN has failed to meet the first prong of this two-part test.

75 [REDACTED]

76 [REDACTED]

77 [REDACTED]

78 [REDACTED]

⁷⁹ See, e.g., 47 C.F.R. §§ 76.1301(c); 76.1302(d)(3)(iii)(B)(2).

Accordingly, the Bureau submits that the Presiding Judge need not consider the second prong – *i.e.*, whether Cablevision treated GSN differently than it treated WE tv and Wedding Channel or whether such treatment was based on affiliation.⁸⁰

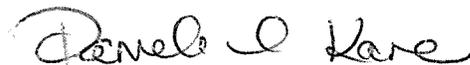
CONCLUSION

31. For the foregoing reasons, the Bureau submits that GSN has not satisfied its burden of demonstrating that Cablevision engaged in discrimination in the selection, terms, or conditions of carriage on the basis of GSN's non-affiliation. Accordingly, the Bureau recommends that the Presiding Judge issue a recommended decision finding that Cablevision has not violated Section 76.1301(c) of the Commission's rules in this instance and resolving that issue in Cablevision's favor. In addition, because GSN has failed to demonstrate that Cablevision violated Section 76.1301(c), the Presiding Judge should issue a recommended decision finding that there is no basis for mandating carriage of GSN on Cablevision on a specific tier or to a specific number or percentage of Cablevision subscribers or for imposing a forfeiture on Cablevision as those two issues are moot.

⁸⁰ In the event the Presiding Judge would find it helpful for the Bureau to submit further comments concerning (a) whether Cablevision treated GSN differently than it treated WE tv and Wedding Channel and (b) whether such different treatment, if any, was based on affiliation, the Bureau will do so upon request.

REDACTED PURSUANT TO
PROTECTIVE ORDER IN GAME SHOW NETWORK, LLC V. CABLEVISION SYSTEMS CORPORATION
FILE NO. CSR-8529-P

Respectfully submitted,
Travis LeBlanc
Chief, Enforcement Bureau



Pamela S. Kane
Special Counsel
Investigations and Hearings Division
Enforcement Bureau
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

William Knowles-Kellett
Attorney
Investigations and Hearings Division
Enforcement Bureau
445 12th Street SW, Room 4-C330
Washington, D.C. 20554
(202) 418-1420

October 15, 2015

CERTIFICATE OF SERVICE

Alicia McCannon, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 15th day of October, 2015, sent via email copies of the foregoing "ENFORCEMENT BUREAU'S COMMENTS" to:

Jay Cohen
Andrew G. Gordon
Gary R. Carney
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064

Howard J. Symons
Tara M. Corvo
Ernest C. Cooper
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Dominic J. Picca
Scott A. Rader
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
Chrysler Center
666 Third Avenue
New York, NY 10017

Counsel to Cablevision Systems Corp.

Stephen A. Weiswasser
Paul W. Schmidt
Elizabeth H. Canter
Neema D. Trivedi
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401

C. William Phillips
Laura Flahive Wu
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018-1405

Counsel to Game Show Network, LLC

Copies of the foregoing also were hand-delivered to:

Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554



Alicia McCannon