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FILED/ACCEPTED
JUN 26 2012
Federal Communications Commission
Office of the Secretary

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	)	

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HEARING DESIGNATION ORDER and

NOTICE OF OPPORTUNITY FOR HEARING FOR FORFEITURE

Adopted: May 9, 2012 **Released: May 9, 2012**

By the Chief, Media Bureau:

I. INTRODUCTION

1. By this *Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture* ("*Order*"), the Chief, Media Bureau ("Bureau"), pursuant to delegated authority,[1] hereby designates for hearing before an Administrative Law Judge ("ALJ") the above-captioned program carriage complaint filed by Game Show Network, LLC ("GSN") against Cablevision Systems Corporation ("Cablevision"). The complaint alleges that Cablevision, a vertically integrated multichannel video programming distributor ("MVPD"), discriminated against GSN, a video programming vendor, on the basis of affiliation, with the effect of unreasonably restraining GSN's ability to compete fairly, in violation of Section 616(a)(3) of the Communications Act of 1934, as amended ("the Act"), and Section 76.1301(c) of the Commission's Rules.[2] The complaint arises from Cablevision's decision to move GSN from a basic tier to a premium sports tier, resulting in a loss of Cablevision subscribers for GSN.[3]

2. After reviewing GSN's complaint, we find that GSN has put forth sufficient evidence supporting the elements of its program carriage discrimination claim to establish a *prima facie* case. Below, we review the evidence from GSN's complaint establishing a *prima facie* case.[4] While we rule on

[1] *See* 47 C.F.R. § 0.61.

[2] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[3] *See* Game Show Network, LLC, Program Carriage Complaint, File No. CSR-8529-P (filed Oct. 12, 2011), at ¶ 2 ("*GSN Complaint*").

[4] *See The Tennis Channel Inc. v. Comcast Cable Communications, LLC*, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149, 14149-50, ¶ 2 n.3 (MB 2010) ("*Tennis Channel HDO*"), *application for review pending*; *see also Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 26 FCC Rcd 11494, 11506, ¶ 17 (2011) ("We also clarify that the Media Bureau's determination of whether a complainant has established a *prima facie* case is based on a review of the complaint (including any attachments) only. If the Media Bureau determines that the complainant has established a *prima facie* case, the Media Bureau will then review the answer (including any attachments) and reply to determine whether there are procedural defenses that might warrant dismissal of the case

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a threshold procedural issue regarding application of the program carriage statute of limitations, we do not reach the merits on any of the other issues discussed below.[5] Rather, the existing record, including Cablevision's Answer and other pleadings,[6] makes clear that there are substantial and material questions of fact as to whether Cablevision has engaged in conduct that violates the program carriage provisions of the Act and the Commission's Rules. We therefore initiate this hearing proceeding.[7] We direct the Presiding Judge to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision.

(*e.g.*, arguments pertaining to the statute of limitations); whether there are any issues that the defendant MVPD concedes; whether there are substantial and material questions of fact as to whether the defendant MVPD has engaged in conduct that violates the program carriage rules; whether the case can be addressed by the Media Bureau on the merits based on the pleadings or whether further evidentiary proceedings are necessary; and whether the proceeding should be referred to an ALJ in light of the nature of the factual disputes.") ("*2011 Program Carriage Order*"), *appeal pending sub nom. Time Warner Cable Inc. et al. v. FCC*, No. 11-4138 (2nd Cir.). While we do not summarize each of Cablevision's counter-arguments below, our review of the existing record, including Cablevision's Answer and other pleadings, makes clear that there are substantial and material questions of fact as to whether Cablevision has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules.

[5] As set forth below, the following matters are not designated for the ALJ to resolve: (i) whether GSN has put forth evidence in its complaint sufficient to warrant designation of this matter for hearing; and (ii) whether GSN's complaint was filed in accordance with the program carriage statute of limitations. *See infra* n.71, n.193. As required by the Commission's Rules, to the extent Cablevision seeks Commission review of our decision on these issues, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 C.F.R. § 1.115(e)(3).

[6] *See* Cablevision Systems Corporation, Answer, File No. CSR-8529-P (filed Dec. 12, 2011) ("*Cablevision Answer*"); Game Show Network, LLC, Reply, File No. CSR-8529-P (filed Jan. 17, 2012) ("*GSN Reply*"); Cablevision Systems Corporation, Motion for Leave to File a Surreply, File No. CSR-8529-P (filed Feb. 9, 2012) ("*Cablevision Motion*"); Cablevision Systems Corporation, Surreply, File No. CSR-8529-P (filed Feb. 9, 2012) ("*Cablevision Surreply*"); Game Show Network, LLC, Opposition to Cablevision's Motion for Leave to File a Surreply and Alternative Motion for Leave to File Response to Surreply, File No. CSR-8529-P (filed Feb. 21, 2012) ("*GSN Opposition*"); Cablevision, Reply to Opposition to Motion for Leave to File a Surreply, File No. CSR-8529-P (filed Feb. 28, 2012) ("*Cablevision Reply*").

[7] In the *2011 Program Carriage Order*, the Commission adopted a rule directing the Chief, Media Bureau to release a decision determining whether the complainant has established a *prima facie* case within 60 calendar days after the complainant's reply to the defendant's answer is filed. *See 2011 Program Carriage Order*, 26 FCC Rcd at 11508, ¶ 20; *see also* 47 C.F.R. § 76.1302(g). The new procedures adopted in the *2011 Program Carriage Order*, however, do not apply to program carriage complaints that were filed before the effective date of the new procedures. *See 2011 Program Carriage Order*, 26 FCC Rcd at 11495-96, ¶ 2 n.8. The GSN complaint was filed on October 12, 2011, prior to the effective date of the new procedures. *See* Federal Communications Commission, 47 C.F.R. Parts 0, 1, and 76, Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage, 76 FR 60652 (Sept. 29, 2011) (announcing effective date of October 31, 2011 for rules adopted in the *2011 Program Carriage Order* that do not require approval from the Office of Management and Budget ("OMB") pursuant to the Paperwork Reduction Act of 1995 ("PRA")); *Notice of Effective Date of Program Carriage Complaint Rules: 47 C.F.R. §§ 1.221(h); 1.229(b)(3), (b)(4); 1.248(a), (b); 76.7(g)(2); 76.1302(c)(1), (d), (e)(1), (k)*, Public Notice, DA 12-169 (MB, Feb. 8, 2012) (announcing effective date of February 8, 2012 for rules adopted in the *2011 Program Carriage Order* requiring approval from OMB pursuant to the PRA).

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II. BACKGROUND

3. Section 616(a)(3) of the Act directs the Commission to establish rules governing program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors that, among other things:

> prevent [an MVPD] 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.[8]

In implementing this statutory provision, the Commission adopted Section 76.1301(c) of its rules, which closely tracks the language of Section 616(a)(3).[9]

4. The Commission has established specific procedures for the review of program carriage complaints.[10] While those procedures provide for resolution on the basis of a complaint, answer, and reply, the Commission expected that, in most cases, it would be unable to resolve carriage complaints solely on the basis of a written record.[11] Rather, it anticipated that the majority of complaints would require a hearing before an ALJ, given that alleged Section 616 violations typically involve contested facts and behavior related to program carriage negotiations.[12] In such cases, where the complainant is found to have established a *prima facie* case but disposition of the complaint[13] requires the resolution of factual disputes or extensive discovery, the parties can elect either Alternative Dispute Resolution ("ADR") or an adjudicatory hearing before an ALJ.[14] If the parties proceed to a hearing before an ALJ, any party aggrieved by the ALJ's Initial Decision may file an appeal directly with the Commission.[15] The appropriate relief for violation of the program carriage provisions is determined on a case-by-case basis.[16]

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[8] 47 U.S.C. § 536(a)(3).

[9] *See* 47 C.F.R. § 76.1301(c). Section 76.1301(c) of the Commission's Rules provides:

> 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 nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

Id.

[10] *See* 47 C.F.R. § 76.1302.

[11] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2652, ¶ 24 ("*1993 Program Carriage Order*").

[12] *See id.* at 2652, ¶¶ 23-24, 2656, ¶ 34.

[13] Pursuant to Section 76.7(g)(1) of the Commission's Rules, the Commission may refer to an ALJ entire proceedings or discrete issues arising from proceedings. *See* 47 C.F.R. § 76.7(g)(1); *see also 1998 Biennial Regulatory Review – Part 76 – Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd 418, 421 ¶ 11 (1999) ("[T]he Commission can refer discrete issues arising out of a proceeding for an adjudicatory hearing before an ALJ. . . . [T]he Commission is not limited to referring only entire proceedings for an adjudicatory hearing before an ALJ.").

[14] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2656, ¶ 34.

[15] *See id.* at 2652, ¶ 24.

[16] *See id.* at 2653, ¶ 26.

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Available sanctions and remedies include forfeiture and/or mandatory carriage and/or carriage on terms revised or specified by the Commission.[17] For purposes of our *prima facie* determination, we discuss below the factual bases for GSN's claim of program carriage discrimination.[18]

5. Cablevision is a cable operator that owns or manages cable systems serving more than 3.3 million subscribers, primarily in New York, New Jersey, and Connecticut.[19] Both prior to and after its repositioning of GSN to a premium sports tier in February 2011, Cablevision has been affiliated with the WE tv and Wedding Central national cable networks.[20] WE tv was launched in the 1990s as "Romance Classics," rebranded in 2001 as "WE: Women's Entertainment," and renamed WE tv in 2006.[21] Cablevision states that WE tv features programming on topics of interest to women, including high-profile, original series and specials, as well as off-network licensed dramas and comedies.[22] Cablevision states that Wedding Central, which was launched in August 2009 and subsequently closed in July 2011, featured series, specials, and movies related to weddings, dating, and relationships.[23] Cablevision has carried WE tv on an expanded basic tier since its launch and also carried Wedding Central on an expanded basic tier from its launch until its closing in July 2011.[24]

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[17] *See id.*

[18] GSN's complaint is supported by declarations from the following: David Goldhill, President and Chief Executive Officer ("CEO") of GSN (*see* Decl. of David Goldhill (Oct. 7, 2011) at ¶ 1 ("Goldhill Decl.")); Derek Chang, Executive Vice President of Content Strategy and Development, DIRECTV, Inc. ("DIRECTV") and representative of DIRECTV on GSN's board of directors (*see* Decl. of Derek Chang (Oct. 7, 2011) at ¶¶ 1-2 ("Chang Decl.")); Dennis Gillespie, Senior Vice President of Distribution, GSN, from February 2007 to February 2011 (*see* Decl. of Dennis Gillespie (Oct. 7, 2011) at ¶ 1 ("Gillespie Decl.")); Timothy Brooks, media consultant (*see* Decl. of Timothy Brooks (Oct. 10, 2011) at ¶ II.1 ("Brooks Decl.")); Hal J. Singer, Managing Director, Navigant Economics (*see* Decl. of Hal J. Singer (Oct. 11, 2011) at ¶ 8 ("Singer Decl.")).

[19] *See GSN Complaint* at ¶¶ 2, 14; *Cablevision Answer* at 73 (¶ 14). Cablevision is an MVPD as defined in Section 76.1300(d) of the Commission's Rules. *See* 47 C.F.R. § 76.1300(d); *GSN Complaint* at ¶ 13; *Cablevision Answer* at 72 (¶ 13). GSN notes that Cablevision acquired Bresnan Communications in December 2010, thereby obtaining additional subscribers. *See GSN Complaint* at ¶ 2 n.2. According to GSN, Cablevision has not yet integrated the channel lineups on the Bresnan systems, thus the *GSN Complaint* focuses only on Cablevision's conduct with regard to its subscribers in New York, New Jersey, and Connecticut. *See id.*

[20] *See GSN Complaint* at ¶ 14. Prior to July 2011, Cablevision wholly owned WE tv and Wedding Central. *See id.* at ¶ 14 n.15; Singer Decl. at n.1; *Cablevision Answer*, Expert Report of Jonathan Orszag (Dec. 11, 2011) at ¶ 11 ("Cablevision owned both WE tv and Wedding Central prior to July 2011, and specifically in the first quarter of 2011 when Cablevision re-tiered GSN and put it on the [sports tier].") ("Orszag Decl."). On June 30, 2011, Cablevision spun off WE tv and Wedding Central into a new company, AMC Networks, Inc. *See GSN Complaint* at ¶ 14 n.15; Singer Decl. at n.1; Orszag Decl. at ¶ 11. GSN notes that Cablevision and AMC Networks are "affiliated" pursuant to the cable attribution rules because they share a common controlling shareholder (the Dolan family) and thus are under common control. *See GSN Complaint* at ¶ 14 n.15; *see also Cablevision Answer*, Orszag Decl. at ¶ 11 n.6 ("Given the Commission's ownership attribution rules, I understand that WE tv is still considered an affiliate of Cablevision, even though Cablevision has spun it out.").

[21] *See Cablevision Answer* at 23; Decl. of Michael Egan (Dec. 12, 2011) at ¶ 24 ("Egan Decl."); *see also GSN Complaint* at ¶ 16.

[22] *See Cablevision Answer* at 2-3; Egan Decl. at ¶ 24; *see also GSN Complaint* at ¶ 16.

[23] *See Cablevision Answer* at 73 (¶ 17); *see also GSN Complaint* at ¶ 17.

[24] See *Cablevision Answer* at 76 (¶ 44); *see also GSN Complaint* at ¶¶ 28, 44.

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6. GSN is a national cable network launched on December 1, 1994 under the name "Game Show Network,"[25] which was subsequently rebranded in 2004 as "GSN."[26] GSN characterizes itself as a "general interest network that features extensive female-oriented original programming (much, but not all of it, consisting of games of skill and chance and reality programs of various kinds), which typically accounts for more than 80% of its primetime schedule."[27] GSN's predecessor and Cablevision entered into a affiliation agreement on **[REDACTED**][28] Cablevision claims that it did not believe that GSN's programming had the potential to add significant value to Cablevision's existing channel lineups, but it was willing to agree to a deal if GSN was willing to provide Cablevision certain favorable terms.[29] One of these favorable terms provided Cablevision with "carriage flexibility,"[30] **[REDACTED**

].[31] For almost 14 years (June 1997-February 2011), Cablevision distributed GSN on an expanded basic tier to approximately **[REDACTED**
] of Cablevision subscribers.[32]

7. On December 3, 2010, Cablevision notified GSN that Cablevision would reposition GSN from an expanded basic tier to a premium sports tier effective February 1, 2011.[33] Cablevision claims that

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[25] *See GSN Complaint* at ¶ 15; Gillespie Decl. at ¶ 3; Goldhill Decl. at ¶ 4. Sony Pictures Entertainment, Inc. and DIRECTV have ownership interests in GSN. *See GSN Complaint* at ¶ 12; Goldhill Decl. ¶ 6. GSN states that it is a video programming vendor as defined in Section 76.1300(e) of the Commission's Rules. *See GSN Complaint* at ¶ 10; *see also* 47 C.F.R. § 76.1300(e).

[26] *See GSN Complaint* at ¶ 15; Goldhill Decl. at ¶ 8.

[27] *GSN Complaint* at ¶ 15; *see* Goldhill Decl. at ¶ 7.

[28] *See GSN Complaint* at ¶ 22; Gillespie Decl. at ¶ 4; *see also Cablevision Answer* at 7; Decl. of Thomas Montemagno (Dec. 9, 2011) at ¶ 12 ("Montemagno Decl."). **[REDACTED**

] *See GSN Complaint* at ¶ 22; Gillespie Decl. at ¶ 4; *see also Cablevision Answer* at 7; Montemagno Decl. at ¶ 19. Since that date, Cablevision has carried GSN on an "at-will" basis, on the same terms contained in the written affiliation agreement. *See GSN Complaint* at ¶¶ 22-23; Gillespie Decl. at ¶ 7; Goldhill Decl. at ¶ 5; *see also Cablevision Answer* at 8; Montemagno Decl. at ¶ 28.

[29] *See Cablevision Answer* at 7; Montemagno Decl. at ¶¶ 9-11, 16-17.

[30] *See Cablevision Answer* at 7; Montemagno Decl. at ¶ 17 ("Specifically, Cablevision would not have agreed to carry the Game Show Network if it were not given this flexibility. During this time, Cablevision consistently sought carriage flexibility from programmers (and was often successful), particularly when negotiating with new networks that were seeking to grow subscribers in the New York DMA.").

[31] The agreement does not specify the tier on which Cablevision must carry GSN. *See* Montemagno Decl. at ¶ 15. Rather, the agreement provides that Cablevision **[REDACTED**

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[32] *See GSN Complaint* at ¶¶ 15, 22; Gillespie Decl. at ¶ 3; *Cablevision Answer* at 73 (¶ 15).

[33] *See GSN Complaint* at ¶ 25; Gillespie Decl. at ¶ 8; *see also Cablevision Answer* at 12; Montemagno Decl. at ¶ 50.

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its decision was based on its efforts to find programming cost savings[34] and that GSN was a good candidate for repositioning because (i) its affiliation agreement **[REDACTED** **]**;[35] (ii) GSN had historically received low viewership among Cablevision subscribers;[36] and (iii) GSN, as a general family entertainment network, did not offer anything unusual to attract a particular segment of viewers.[37] GSN's attempts to persuade Cablevision to reverse its decision were unsuccessful.[38] Cablevision moved GSN to the premium sports tier on February 1, 2011.[39] Prior to Cablevision's repositioning of GSN from an expanded basic tier to a premium sports tier, more than **[REDACTED** **]** subscribers nationwide received GSN.[40] As a result of the repositioning, GSN's Cablevision subscribers fell by **[REDACTED** **]**.[41] While Cablevision now distributes GSN to approximately **[REDACTED** **]** percent of Cablevision's subscribers,[42] other MVPDs with over two million basic subscribers distribute GSN to an average of **[REDACTED** **]** percent of their subscribers.[43]

8. Pursuant to Section 76.1302(b) of the Commission's Rules, GSN provided Cablevision with its pre-filing notice on September 26, 2011.[44] On October 12, 2011, GSN filed its Complaint[45] as well as a Petition for Temporary Relief asking the Commission to order Cablevision to restore GSN to basic tier carriage while GSN's program carriage complaint is pending.[46] On December 7, 2011, the

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[34] *See infra* ¶ 30 (explaining that the repositioning of GSN from an expanded basic tier to a premium sports tier reduced Cablevision's annual license fee payments to GSN by **[REDACTED** **]**); *Cablevision Answer* at 4, 10-11, 50; Montemagno Decl. at ¶¶ 40-41; *see also GSN Complaint* at ¶¶ 25, 47; Chang Decl. at ¶ 5; Gillespie Decl. at ¶ 8; Goldhill Decl. at ¶ 18.

[35] *See Cablevision Answer* at 11, 50; Montemagno Decl. at ¶¶ 40-41.

[36] *See Cablevision Answer* at 4, 11, 50; Montemagno Decl. at ¶¶ 22, 24, 27, 41-42.

[37] *See Cablevision Answer* at 4, 11, 50; Montemagno Decl. at ¶ 41.

[38] *See GSN Complaint* at ¶¶ 26-27, 29-30; Chang Decl. at ¶¶ 4-7; Gillespie Decl. at ¶ 9; Goldhill Decl. at ¶¶ 18-21.

[39] *See GSN Complaint* at ¶ 28; Gillespie Decl. at ¶ 9; *Cablevision Answer* at 13; Montemagno Decl. at ¶ 52. Specifically, Cablevision repositioned GSN to its "iO Sports and Entertainment Pak," for which subscribers must pay a fee of $6.95 per month in addition to the fees for purchasing an entry-level package of digital cable programming and a digital cable box. *See GSN Complaint* at ¶¶ 28, 45; Goldhill Decl. at ¶ 14; Singer Decl. at ¶ 3; *see also Cablevision Answer* at 13, 76 (¶ 45); Montemagno Decl. at ¶ 52. In addition to GSN, this premium sports tier includes the following networks: ESPN Classic, ESPN-U, MLB Network, NHL Network, TVG Network (horseracing), FUEL-TV (extreme sports), FCS Pacific (West Coast collegiate conferences), FCS Central (Midwest collegiate conferences), FCS Atlantic (East Coast collegiate conferences), Outdoor Channel, Versus, Go1TV (soccer), Golf Channel, MavTV, CBS College Sports, Big Ten, NBA TV, FOX Soccer Plus, Sportsman Channel, Neo Cricket, and Fight Now TV. *See GSN Complaint* at ¶ 45 n.87.

[40] *See GSN Complaint* at ¶ 11; Gillespie Decl. at ¶ 3; Goldhill Decl. at ¶ 7; Singer Decl. at ¶ 22.

[41] *See GSN Complaint* at ¶¶ 25, 59; Chang Decl. at ¶ 3; Goldhill Decl. at ¶ 15; Singer Decl. at ¶ 6.

[42] *See GSN Complaint* at ¶ 45; Goldhill Decl. at ¶ 14; Singer Decl. at ¶ 18.

[43] *See* Singer Decl. at ¶ 44 and Table 7; *see also GSN Complaint* at ¶ 24; Gillespie Decl. at ¶ 3.

[44] *See GSN Complaint*, Exhibit 9.

[45] *See generally GSN Complaint.* The parties mutually agreed to extend the deadline for filing an Answer and a Reply to December 12, 2011 and January 17, 2012, respectively.

[46] *See* Game Show Network, LLC, Petition for Temporary Relief Pending Resolution of Program Carriage Complaint, File No. CSR-8529-P (filed Oct. 12, 2011).

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Bureau denied the Petition, finding that GSN had failed to satisfy its burden of demonstrating that interim relief was warranted.[47]

III. DISCUSSION

9. Based on our review of the complaint and as explained more fully below, we conclude that GSN has established a *prima facie* case of program carriage discrimination pursuant to Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules.[48] When filing a program carriage complaint, the video programming vendor carries the burden of proof to establish a *prima facie* case that the defendant MVPD has engaged in behavior prohibited by Section 616 and the Commission's implementing rules.[49] In previous cases assessing whether a complainant has established a *prima facie* case of program carriage discrimination, the Bureau has considered whether the complaint contains sufficient evidence to support the elements of a program carriage discrimination claim.[50]

10. As an initial matter, all complaints alleging a violation of any of the program carriage rules must contain evidence that (i) the complainant is a video programming vendor as defined in Section 616(b) of the Act and Section 76.1300(e) of the Commission's Rules or an MVPD as defined in Section 602(13) of the Act and Section 76.1300(d) of the Commission's Rules;[51] and (ii) the defendant is an MVPD as defined in Section 602(13) of the Act and Section 76.1300(d) of the Commission's Rules.[52] A *prima facie* case of discrimination "on the basis of affiliation or nonaffiliation" can be based on direct evidence or circumstantial evidence or both.[53] A complaint relying on direct evidence requires documentary evidence or testimonial evidence (supported by an affidavit from a representative of the

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[47] *See Game Show Network, LLC v. Cablevision Sys. Corp.*, Order, 26 FCC Rcd 16471, 16475-76, ¶ 11 (MB 2011) ("We question the urgency of the relief requested and the irreparability of these alleged harms, however, given GSN's lengthy delay in pursuing interim relief. Although GSN was aware of Cablevision's plan to reposition GSN two months *before* the repositioning occurred, it did not seek relief until almost nine months *after* the repositioning occurred.") (emphasis in original).

[48] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[49] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29.

[50] *See Tennis Channel HDO*, 25 FCC Rcd at 14153-62, ¶¶ 9-21; *Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14792-814, ¶¶ 8-58 (MB 2008) ("*WealthTV HDO*"); *NFL Enters. LLC v. Comcast Cable Communications, LLC*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14814-29, ¶¶ 59-89 (MB 2008) ("*NFL Enterprises HDO*"); *TCR Sports Broadcasting Holding, LLP v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14829-42, ¶¶ 90-119 (MB 2008) ("*MASN II HDO*"); *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8993-95, ¶¶ 11-12 (2006) ("*MASN I HDO*"); *Hutchens Communications, Inc. v. TCI Cablevision of Georgia, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 4849, ¶ 27 (CSB 1994); *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11501-06, ¶¶ 9-17; *1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29.

[51] *See* 47 U.S.C. §§ 522(13), 536(b); 47 C.F.R. § 76.1300(d), (e); *Tennis Channel HDO*, 25 FCC Rcd at 14154, ¶ 10; *WealthTV HDO*, 23 FCC Rcd at 14792, ¶ 8; *NFL Enterprises HDO*, 23 FCC Rcd at 14814-15, ¶ 59; *MASN II HDO*, 23 FCC Rcd at 14829, ¶ 90; *MASN I HDO*, 21 FCC Rcd at 8989, ¶ 1; *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11502-03, ¶ 11; *1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29.

[52] *See* 47 U.S.C. § 522(13); 47 C.F.R. § 76.1300(d); *Tennis Channel HDO*, 25 FCC Rcd at 14154, ¶ 10; *WealthTV HDO*, 23 FCC Rcd at 14793, ¶ 10, 14799-800, ¶ 25, 14804-05, ¶ 36, 14809-10, ¶ 47; *NFL Enterprises HDO*, 23 FCC Rcd at 14814-15, ¶ 59; *MASN II HDO*, 23 FCC Rcd at 14829, ¶ 90; *MASN I HDO*, 21 FCC Rcd at 8989, ¶ 1; *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11502-03, ¶ 11; *1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29.

[53] *See 2011 Program Carriage Order*, 26 FCC Rcd at 11503-05, ¶¶ 13-14.

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complainant) that supports the claim that the defendant discriminated on the basis of affiliation or non-affiliation of vendors.[54] A complaint relying on circumstantial evidence requires (i) evidence that the complainant provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors;[55] and (ii) evidence that the defendant MVPD has treated the video programming provided by the complainant differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.[56] Regardless of whether the complaint relies on direct or circumstantial evidence of discrimination "on the basis of affiliation or nonaffiliation," the complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant to compete fairly.[57]

11. The parties do not dispute that GSN is a video programming vendor[58] and that Cablevision is an MVPD as defined in the Act and the Commission's Rules.[59] In addition, Cablevision does not contest that it was affiliated with the WE tv and Wedding Central cable networks pursuant to the Commission's attribution rules when it repositioned GSN to a premium sports tier in February 2011.[60] With respect to the remaining factors, we conclude that GSN has put forth sufficient circumstantial evidence in its complaint to establish a *prima facie* case that Cablevision has engaged in unlawful

[54] *See id.* at 11503-04, ¶ 13; *1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29. In the *2011 Program Carriage Order*, the Commission provided the following examples of direct evidence of discrimination "on the basis of affiliation or nonaffiliation": (i) an email from the defendant MVPD stating that the MVPD took an adverse carriage action against the complainant programmer because it is not affiliated with the MVPD; and (ii) an affidavit from a representative of the complainant programmer involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the complainant programmer that the MVPD took an adverse carriage action because the complainant programmer is not affiliated with the MVPD. *See 2011 Program Carriage Order*, 26 FCC Rcd at 11503-04, ¶ 13.

[55] *See Tennis Channel HDO*, 25 FCC Rcd at 14159-60, ¶¶ 17-18; *WealthTV HDO*, 23 FCC Rcd at 14795-97, ¶¶ 12-17, 14801, ¶ 27, 14806, ¶ 39, 14811-12, ¶ 51; *NFL Enterprises HDO*, 23 FCC Rcd at 14822-23, ¶ 75; *MASN II HDO*, 23 FCC Rcd at 14835-36, ¶ 108; *MASN I HDO*, 21 FCC Rcd at 8993-94, ¶ 11; *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11504-05, ¶ 14; *1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29.

[56] *See Tennis Channel HDO*, 25 FCC Rcd at 14160-61, ¶ 19; *WealthTV HDO*, 23 FCC Rcd at 14797, ¶ 18, 14801, ¶ 28, 14806, ¶ 40, 14812, ¶ 52; *NFL Enterprises HDO*, 23 FCC Rcd at 14823, ¶ 76; *MASN II HDO*, 23 FCC Rcd at 14836, ¶ 109; *MASN I HDO*, 21 FCC Rcd at 8993-94, ¶ 11; *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11504-05, ¶ 14; *1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29; *but see Hutchens*, 9 FCC Rcd at 4853, ¶ 27 (finding that complainant programming vendor did not make a *prima facie* showing of discrimination on the basis of affiliation or nonaffiliation because it failed to demonstrate that it was offered different price, terms, or conditions as compared to that offered to an affiliated programming vendor).

[57] In previous cases, the Media Bureau has made this assessment based on the impact of the defendant MVPD's adverse carriage action on the programming vendor's subscribership, licensee fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale. *See Tennis Channel HDO*, 25 FCC Rcd at 14161-62, ¶¶ 20-21; *WealthTV HDO*, 23 FCC Rcd at 14798, ¶ 19, 14802, ¶¶ 29-31, 14807-08, ¶¶ 41-42, 14812-13, ¶¶ 53-54; *NFL Enterprises HDO*, 23 FCC Rcd at 14823-25, ¶¶ 77-78; *MASN II HDO*, 23 FCC Rcd at 14836, ¶ 110; *MASN I HDO*, 21 FCC Rcd at 8993-94, ¶ 11; *see also 2011 Program Carriage Order*, 26 FCC Rcd at 11505, ¶ 15; *1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 14.

[58] *See* 47 U.S.C. § 536(b) (defining "video programming vendor"); 47 C.F.R. § 76.1300(e) (same); *GSN Complaint* at ¶ 10; *Cablevision Answer* at 72 (¶ 10).

[59] *See* 47 U.S.C. § 522(13) (defining "MVPD"); 47 C.F.R. § 76.1300(d) (same); *GSN Complaint* at ¶ 13; *Cablevision Answer* at 72 (¶ 13).

[60] *See supra* n.20.

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discrimination in the "selection of . . . video programming" by repositioning GSN to a premium sports tier, while carrying comparable affiliated networks on a more widely distributed tier.[61] We do not reach the merits of this claim. Rather, we find that the existing record, including Cablevision's Answer, makes clear that there are significant and material questions of fact warranting resolution at hearing.[62]

A. Procedural Issues

12. As a threshold matter, we reject Cablevision's contention that GSN's complaint is foreclosed as untimely filed under the program carriage statute of limitations.[63] Pursuant to Section 76.1302(f) of the Commission's Rules, an aggrieved programmer has a one-year period in which to file a program carriage complaint that commences upon the occurrence of one of three specified events.[64] We find that the third of those triggering events – the provision of an aggrieved programmer's pre-filing notification pursuant to Section 76.1302(b) of the Commission's Rules – is present in this case.[65] The plain language of the rule allows a program carriage complaint to be filed within one year of the pre-filing notice.[66] As the Commission and the Bureau have recognized previously, Section 76.1302(f)(3) could be

[61] 47 U.S.C. § 536(a)(3) (requiring the Commission to adopt regulations that prevent an MVPD "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") (emphasis added). As discussed below, GSN does not contend that its affiliation agreement with Cablevision contains discriminatory "terms" or "conditions." *See infra* ¶ 13. Rather, GSN claims that Cablevision has impermissibly discriminated in its "selection" of GSN for placement on a premium sports tier while selecting its affiliated networks for placement on a more widely distributed programming tier. *See Tennis Channel HDO*, 25 FCC Rcd 14149 (MB 2010) (program carriage complaint alleging that defendant impermissibly discriminated by selecting complainant for placement on sports tier while selecting affiliated networks for placement on a more widely distributed programming tier); *NFL Enterprises HDO*, 23 FCC Rcd 14787 (MB 2008) (same).

[62] Because we are not ruling on the merits of GSN's claims at this *prima facie* stage, we find it premature to address Cablevision's argument that requiring Cablevision to reposition GSN back to an expanded basic tier would infringe upon Cablevision's First Amendment rights. *See Cablevision Answer* at 61-69.

[63] *See id.* at 69-71.

[64] 47 C.F.R. § 76.1302(f). Section 76.1302(f) of the Commission's Rules provides that:

> Any complaint filed pursuant to [Section 76.1302] must be filed within one year of the date on which one of the following events occurs:
>
> (1) The [MVPD] enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or
>
> (2) The [MVPD] offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or
>
> (3) A party has notified a [MVPD] that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

Id.

[65] *See* 47 C.F.R. § 76.1302(f)(3). We agree with Cablevision that the limitations period in Section 76.1302(f)(2) of the Commission's Rules, which governs carriage offers unrelated to existing affiliation agreements, is inapplicable in this case. *See Cablevision Answer* at 70.

[66] *See Tennis Channel HDO*, 25 FCC Rcd 14149, 14154-56, ¶ 11 (MB 2010); *see also WealthTV HDO*, 23 FCC Rcd 14787, 14806, ¶ 38 (MB 2008) ("the plain language of the Commission's rules provides that the statute of limitations is satisfied if the program carriage complaint is filed within one year of the pre-filing notice").

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read to allow a complainant to file a program carriage complaint based on allegedly unlawful conduct that occurred years before the submission of the pre-filing notice provided the complaint was filed within one year of the pre-filing notice.[67] We are not presented with such a case here. Cablevision informed GSN on December 3, 2010 that it would reposition the network to a premium sports tier and it subsequently took this allegedly impermissible discriminatory action on February 1, 2011.[68] GSN filed its program carriage complaint on October 12, 2011, within one year of these dates, as well as within one year of its pre-filing notice.[69] Accordingly, we conclude that the complaint was timely filed pursuant to Section 76.1302(f)(3) of the Commission's Rules.[70]

13. We disagree with Cablevision that GSN's complaint is barred by Section 76.1302(f)(1) of the Rules, which establishes a one-year period for the filing of a program carriage complaint that commences with the "[execution of] a contract with [an MVPD] that a party alleges to violate one or more of the [program carriage] rules."[71] Although the parties executed and extended their existing carriage agreement well over one year ago in **[REDACTED** **]**,[72] respectively, GSN does not claim that this agreement contains unlawfully discriminatory prices, terms, or conditions. Nor do the parties dispute that Cablevision has abided by the explicit terms of the agreement.[73] The agreement at issue does not specify the tier on which Cablevision must carry GSN[74] and instead grants Cablevision the **[REDACTED**

[67] *See Revision of the Commission's Program Carriage Rules*, Notice of Proposed Rulemaking, 26 FCC Rcd 11494, 11522-23, ¶ 38 (2011) ("*Program Carriage NPRM*"); *Tennis Channel HDO*, 25 FCC Rcd at 14154-56, ¶ 11 (MB 2010).

[68] *See supra* ¶ 7.

[69] *See supra* ¶ 8.

[70] Similarly, in the *Tennis Channel HDO*, *NFL Enterprises HDO*, and *MASN II HDO*, the complainant filed its complaint within one year of the pre-filing notice as well as within one year of the allegedly impermissible discriminatory act. *See infra* n.78; *Tennis Channel HDO*, 25 FCC Rcd 14149, 14154-56, ¶ 11 (MB 2010); *NFL Enterprises HDO*, 23 FCC Rcd at 14819-20, ¶¶ 69-70 (MB 2008); *MASN II HDO*, 23 FCC Rcd at 14833-35, ¶¶ 102-105 (MB 2008). In the *2011 Program Carriage NPRM*, the Commission acknowledged that Section 76.1302(f)(3) could be read to provide that a complaint is timely filed even if the allegedly discriminatory act occurred many years before the filing of the complaint and that, based on such a reading, "Section 76.1302(f)(3) undermines the fundamental purpose of a statute of limitations 'to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed.'" *2011 Program Carriage NPRM*, 26 FCC Rcd at 11522-23, ¶ 38 (quoting *Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, ¶ 12 (Review Board 1971)); *see also Cablevision Answer* at 70-71. To address this concern, the Commission "propose[d] to revise our program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the program carriage rules." *2011 Program Carriage NPRM*, 26 FCC Rcd at 11523, ¶ 39. GSN's complaint would be timely even under the Commission's proposed revised program carriage statute of limitations.

[71] 47 C.F.R. § 76.1302(f)(1). The timeliness of GSN's complaint is not an issue designated for resolution by the Presiding Judge. As required by the Commission's Rules, to the extent Cablevision seeks Commission review of our decision on this issue, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 C.F.R. § 1.115(e)(3).

[72] *See supra* n.28.

[73] *See Cablevision Answer* at 11, 50; Montemagno Decl. at ¶ 41; *GSN Reply* at 49-50.

[74] *See* Montemagno Decl. at ¶ 15.

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].[75] The gravamen of GSN's complaint is that Cablevision exercised this discretion in an impermissibly discriminatory manner by repositioning GSN to a premium sports tier while at the same time continuing to carry its allegedly similarly situated affiliated networks on a more widely distributed tier, and has thus failed to meet its obligation under Section 616(a)(3) of the Act and Section 76.1301(c) of the Commission's Rules to avoid discrimination on the basis of affiliation.[76] It is this allegedly discriminatory act of repositioning of GSN, not the terms of the contract, which forms the basis for GSN's complaint.[77]

14. This interpretation is consistent with Bureau precedent establishing that, despite the execution of a carriage contract more than one year prior to the filing of a program carriage complaint, the complaint may nonetheless be timely if the basis for the claim is an allegedly discriminatory decision made by the MVPD, such as tier placement, that the contract left to the MVPD's discretion.[78] The exercise of such discretion is subject to the MVPD's obligations under the program carriage statute, which prohibits an MVPD from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage . . . ."[79] As the Bureau explained in the *NFL Enterprises HDO*, "[w]hether or not [an MVPD] had the right to [make a tiering decision] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves

[75] Gillespie Decl., Exhibit A, 1997 Affiliation Agreement at § 4; *see also Cablevision Answer* at 7; Montemagno Decl. at ¶ 15.

[76] *See GSN Complaint* at ¶ 2; *GSN Reply* at 49.

[77] *See GSN Complaint* at ¶ 2; *GSN Reply* at 49.

[78] *See Tennis Channel HDO*, 25 FCC Rcd at 14154-59, ¶¶ 11-16 (MB 2010) (the contract at issue did not specify the tier on which the defendant/MVPD would carry the complainant/programmer and provided the defendant/MVPD with the discretion to carry the complainant/programmer on a more widely distributed tier than the premium sports tier on which the complainant/programmer had been carried since its launch; the Bureau rejected claims that the basis for the dispute was the contract and that the complaint should have been filed within one year from the contract execution date; rather, the Bureau found the complaint was timely filed within one year of the pre-filing notice as well as within one year of the defendant/MVPD's allegedly discriminatory act of refusing to exercise its discretion to carry the complainant/programmer on a more widely distributed tier), *application for review pending*; *NFL Enterprises HDO,* 23 FCC Rcd at 14819-20, ¶¶ 69-70 (MB 2008) (the defendant/MVPD exercised its contractual right to move the complainant/programmer to a premium sports tier after certain events occurred; the Bureau rejected claims that the basis for the dispute was the contract and that the complaint should have been filed within one year from the contract execution date; rather, the Bureau found the complaint was timely filed within one year of the pre-filing notice as well as within one year of the defendant/MVPD's allegedly discriminatory act of moving the complainant/programmer to a premium sports tier); *MASN II HDO*, 23 FCC Rcd at 14833-35, ¶¶ 102-105 (MB 2008) (the contract at issue left it to the defendant/MVPD's discretion to carry the complainant/ programmer on systems not specified in the contract, but the defendant/MVPD declined to exercise this discretion; the Bureau rejected claims that the basis for the dispute was the contract and that the complaint should have been filed within one year from the contract execution date; rather, the Bureau found the complaint was timely filed within one year of the pre-filing notice as well as within one year of the defendant/MVPD's allegedly discriminatory refusal to carry the complainant/programmer on systems not specified in the contract).

We note that Comcast has filed an Application for Review of the *Tennis Chanel HDO* challenging the Bureau's ruling that the complaint was filed in compliance with the program carriage statute of limitations. *See* Comcast Cable Communications, LLC, Application for Review, MB Docket No. 10-204, File No. CSR-8258-P (filed Jan. 19, 2012). Comcast's Application for Review is pending.

[79] 47 U.S.C. § 536(a)(3).

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from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules."[80] As in the *Tennis Channel HDO*, *NFL Enterprises HDO*, and *MASN II HDO*, we designate the present case for a hearing to determine whether Cablevision exercised its discretion consistent with its obligations under the program carriage statute and rules when it repositioned GSN to a premium sports tier.

15. This precedent is consistent with the decision of the Cable Services Bureau in *EchoStar* dismissing a program access case on procedural grounds.[81] The contract at issue in *EchoStar* specified the rate the complainant would pay for the defendant's programming.[82] Over one year after the parties entered into the contract, however, the complainant sought to renegotiate the rate set forth in the contract.[83] The Bureau found that the complaint was barred by the applicable statute of limitations, which requires that program access complaints be brought within one year of the date of execution of an affiliation agreement that allegedly violates the Commission's program access requirements.[84] Thus, unlike the present case where the contract at issue does not specify the tier on which Cablevision will carry GSN and instead leaves tier placement to Cablevision's discretion, *EchoStar* involved a complainant's attempt to renegotiate a rate set forth in the contract more than one year after the contract's execution date. Here, GSN's complaint does not relate to any of the specific rates, terms, or conditions set forth in the parties' contract, but rather, Cablevision's allegedly discriminatory tiering decision that occurred subsequent to the contract's execution.[85]

16. Notwithstanding this clear Bureau precedent, Cablevision argues that the contractual provision **[REDACTED**

] and

that, if GSN believed this provision violated the program carriage rules, it should have filed its complaint within one year.[86] We disagree. Under Cablevision's interpretation of the program carriage statute of limitations, a programmer would be forever barred from bringing a discrimination claim unless the claim is brought within one year from the date the contract was executed.[87] Such an interpretation would preclude programmers from bringing program carriage discrimination claims after the first year of a contract even if the MVPD exercises its discretion pursuant to the contract by moving the programmer to

[80] *NFL Enterprises HDO,* 23 FCC Rcd at 14821, ¶ 72 (MB 2008). Subsequent to the Bureau's decision in *NFL Enterprises HDO*, the Chief ALJ supported this view in denying a motion for a ruling on judicial estoppel and laches issues. *See NFL Enters. LLC v. Comcast Cable Communications, LLC*, Memorandum Opinion and Order, FCC 09M-36 (Chief ALJ 2009), at ¶ 3 (denying motion that program carriage case should be dismissed because complainant was also pursuing a contract-based claim in state court, explaining that "NFL Enterprises seeks to vindicate its alleged private contractual rights in the New York litigation and its alleged federal and regulatory rights in this case. . . . The statutory and regulation issues in this case are separate and distinct from the contractual issues in the New York action.").

[81] *See EchoStar Communications Corp. v. Fox/Liberty Networks, LLC*, 13 FCC Rcd 21841 (CSB 1998), *recon. denied, EchoStar Communications Corp. v. Fox/Liberty Networks, LLC,* 14 FCC Rcd 10480 (CSB 1999).

[82] *See EchoStar*, 13 FCC Rcd at 21845, ¶ 10.

[83] *See id.* at 21844-45, ¶¶ 9-10.

[84] *See id.* at 21848, ¶ 17.

[85] Citing *EchoStar*, the Commission later explained that "an offer to amend an existing contract that has been in effect for more than one year does not reopen the existing contract to complaints that the provisions thereof are discriminatory." *1998 Biennial Regulatory Review – Part 76*, Report and Order, 14 FCC Rcd 418, 424, ¶ 18 (1999). As discussed above, GSN does not allege that the contract at issue contains discriminatory provisions and does not seek to amend its contract. *See supra* ¶ 13.

[86] *Cablevision Answer* at 69-70 and n.278.

[87] *See Tennis Channel HDO*, 25 FCC Rcd at 14158, ¶ 15 (MB 2010).

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a less-distributed tier in order to favor its own affiliated network.[88] Such an interpretation would allow even blatant affiliation-based discrimination to go unremediated, provided the defendant waits at least one year before taking the discriminatory action.[89] Moreover, we note that Cablevision characterizes the **[REDACTED**] term of the contract as "favorable" to Cablevision and that it sought such terms in particular from "new networks that were seeking to grow subscribers in the New York DMA."[90] Under Cablevision's interpretation of the program carriage statute of limitations, MVPDs could use their leverage over "new networks" to extract "favorable" terms that circumvent the protections provided by the program carriage statute. Indeed, one of the other "favorable" terms in the **[REDACTED**].[91] Under Cablevision's view of the program carriage statute of limitations, an MVPD could delete an unaffiliated network from all of its systems one year after the execution of the contract in order to favor its affiliated network and then claim that such conduct cannot be challenged under the program carriage rules because it occurred outside of the one-year window for filing a complaint. We find this view untenable as it would eviscerate the protections provided by the program carriage statute.

B. Discrimination Claim

1. Circumstantial Evidence

a. Similarly Situated

17. We find that GSN has provided evidence sufficient to demonstrate for purposes of establishing a *prima facie* case of program carriage discrimination that it is similarly situated with Cablevision-affiliated networks – WE tv and Wedding Central.[92] As discussed above, a complaint relying on circumstantial evidence of discrimination "on the basis of affiliation or nonaffiliation" requires evidence that the complainant provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors.[93] As discussed below, GSN provides evidence with respect to these factors, as well as additional factors.

18. *Genre.* GSN provides evidence that GSN, WE tv, and Wedding Central are similarly situated with respect to genre. GSN provides a declaration from its CEO and experts opining that GSN, WE tv, and Wedding Central all feature female-oriented reality and competition-based programming,

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[88] *See id.*

[89] Moreover, GSN notes that Cablevision's interpretation would discourage MVPDs from signing contracts with unaffiliated programmers to avoid triggering the one-year period during which program carriage complaints could be filed. *See GSN Reply* at 48-49.

[90] *Cablevision Answer* at 7; Montemagno Decl. at ¶¶ 9-11, 16-17 ("Specifically, Cablevision would not have agreed to carry the Game Show Network if it were not given this flexibility. During this time, Cablevision consistently sought carriage flexibility from programmers (and was often successful), particularly when negotiating with new networks that were seeking to grow subscribers in the New York DMA.").

[91] *See* Gillespie Decl., Exhibit A, 1997 Affiliation Agreement at § 5(a).

[92] Cablevision disputes that GSN is similarly situated to WE tv and Wedding Central. *See, e.g., Cablevision Answer* at 14-48.

[93] *See supra* ¶ 10. The Commission has also emphasized that "[a]lthough no single factor is necessarily dispositive, the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming." *2011 Program Carriage Order*, 26 FCC Rcd at 11504-05, ¶ 14.

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often with a focus on relationships, dating, or marriage.[94] GSN puts forth dating-based game shows appearing on GSN that feature romantic relationships (*Baggage, The Newlywed Game,* and *Love Triangle*) as similar to wedding-based reality shows on WE tv that touch upon the same themes of dating, romance, and family dynamics (such as *Bridezillas*, *Rich Bride, Poor Bride*, and *I Do Over*).[95] In addition, GSN states that a reality show on GSN (*Carnie Wilson: Unstapled*) was similar to a reality show on WE tv (*The Cupcake Girls*) in that both shows dealt with women starting dessert businesses.[96] Moreover, while the programming on GSN consists primarily of game shows,[97] GSN's expert, Mr. Brooks, opines that game shows are comparable to reality programming[98] and that game shows appeal predominantly to women, similar to the female-oriented reality programming on WE tv.[99]

19. *Ratings.* GSN provides evidence that GSN and WE tv are similarly situated with respect to ratings on a national basis and within the New York DMA, as well as among specific demographic groups.[100] GSN provides national ratings data from 2009, 2010, and 2011 indicating that GSN and WE tv were **[REDACTED**] on a total-day (household)[101] basis and **[REDACTED**] on a total-day (persons) basis.[102] Based on total-day (household) national ratings in 2010, GSN ranked **[REDACTED**] national networks, whereas WE tv ranked **[REDACTED**].[103] With respect to national prime time ratings, GSN and WE tv were **[REDACTED**

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[94] *See* Brooks Decl. at ¶ III.1; Goldhill Decl. at ¶¶ 7-8; Singer Decl. at ¶¶ 4, 23-26; *see also GSN Complaint* at ¶¶ 15-18, 36. According to GSN's expert, Mr. Brooks, the programming on Wedding Central consisted of reruns of female-oriented programming that had originally aired on WE tv. *See* Brooks Decl. at ¶¶ III.1.g, III.2.h; *see also GSN Complaint* at ¶ 17.

[95] *See* Brooks Decl. at ¶¶ III.1.e-f; Goldhill Decl. at ¶¶ 7-8; *see also GSN Complaint* at ¶ 18; Singer Decl. at ¶ 25. GSN's expert, Dr. Singer, states that two of these shows, *Baggage* and *The Newlywed Game*, account for **[REDACTED**] of GSN's weekday programming between 6:30 pm and midnight. *See* Singer Decl. at ¶ 25.

[96] *See* Goldhill Decl. at ¶¶ 7-8; *see also GSN Complaint* at ¶ 18; Singer Decl. at ¶ 26. The GSN show *Carnie Wilson: Unstapled* followed the singer Carnie Wilson as she built a dessert business. *See GSN Complaint* at ¶ 18; Goldhill Decl. at ¶ 7; Singer Decl. at ¶ 26. The WE tv show *The Cupcake Girls* follows a group of women entrepreneurs who start a cupcake company. *See GSN Complaint* at ¶ 18; Goldhill Decl. at ¶ 8; Singer Decl. at ¶ 26.

[97] *See* Brooks Decl. at ¶ III.1.a.

[98] *See id.* at ¶ III.1.c.

[99] *See id.*; *see also GSN Complaint* at ¶ 36.

[100] GSN's expert, Mr. Brooks, states that ratings data **[REDACTED**] while Mr. Gillespie states that Wedding Central's ratings were far inferior to GSN's ratings. *See* Brooks Decl. at ¶¶ III.1.a (n.1), III.2.h; Gillespie Decl. at ¶ 8. Wedding Central was shut down in July 2011. *See supra* ¶ 5.

[101] The total-day (household) national ratings were as follows in 2010: **[REDACTED**]. *See* Brooks Decl. at ¶ III.2.a; *see also GSN Complaint* at ¶¶ 45, 48.

[102] The total-day (persons) national ratings were as follows in 2010: **[REDACTED**]. *See* Brooks Decl. at ¶ III.2.a; *see also GSN Complaint* at ¶¶ 45, 48.

[103] *See* Brooks Decl. at ¶ III.2.b; *see also GSN Complaint* at ¶ 48.

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].[104] Within the New York DMA, GSN and WE tv were **[REDACTED**] on a total-day (household) basis using 2010 data.[105]

20. With respect to specific demographics, GSN provides total-day national ratings data from 2009 and 2010 indicating that WE tv and GSN were **[REDACTED**] among Women 25-54 and Women 18-49;[106] and (ii) **[REDACTED**] among Persons 25-54 and Persons 18-49.[107] In his declaration, GSN's expert, Mr. Brooks, states that **[REDACTED**].[108] Based on total-day national ratings in 2010, (i) GSN ranked **[REDACTED**] national networks among Women 25-54, whereas WE tv ranked **[REDACTED**];[109] and (ii) GSN ranked **[REDACTED**] national networks among Women 18-49, whereas WE tv ranked **[REDACTED**].[110] In his declaration, GSN's expert, Mr. Brooks, states that these rankings put **[REDACTED**].[111] Within the New York DMA, GSN provides total-day ratings data from the second quarter of 2010 indicating that WE tv and GSN were **[REDACTED**] among

[104] The prime time national ratings were as follows: **[REDACTED**]. *See* Singer Decl. at ¶ 43.

[105] The total-day (household) ratings in the New York DMA in 2010 were as follows: **[REDACTED**]. *See* Brooks Decl. at ¶¶ III.2.k, III.2.l, III.5.b.

[106] *See id.* at ¶ III.2.e; *see also GSN Complaint* at ¶ 38. Among Women 25-54, the total-day national ratings were as follows: **[REDACTED**]. *See* Brooks Decl. at ¶ III.2.e. Among Women 18-49, the total-day national ratings were as follows: **[REDACTED**]. *See id.*

[107] *See* Brooks Decl. at ¶ III.2.e; *see also GSN Complaint* at ¶ 38. Among Persons 25-54, the total-day national ratings were as follows: **[REDACTED**]. *See* Brooks Decl. at ¶ III.2.e. Among Persons 18-49, the total-day national ratings data were as follows: **[REDACTED**]. *See id.*

[108] *See* Brooks Decl. at ¶ III.2.f.

[109] *See id.*

[110] *See id.*

[111] *See id.*

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Women 25-54 and Women 18-49;[112] and (ii) **[REDACTED**] among Persons 25-54 and Persons 18-49.[113]

21. In addition to this ratings evidence, GSN's expert, Mr. Brooks, presents viewer satisfaction data for GSN and WE tv.[114] Averaging the results from the **[REDACTED**[115]

[116]

[117]

[118]

[119]

].[120]

22. *License fee.* GSN provides evidence that GSN, WE tv, and Wedding Central are similarly situated with respect to the license fees they charge to MVPDs: **[REDACTED**[121]

[122]

].[123] GSN's evidence also shows that, on a price-per-

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[112] *See id.* at ¶ III.3.d-e. Among Women 25-54, the total-day ratings in the New York DMA in the second quarter of 2010 were as follows: **[REDACTED**]. *See id.* Among Women 18-49, the total-day ratings in the New York DMA in the second quarter of 2010 were as follows: **[REDACTED**]. *See id.*

[113] *See id.* Among Persons 25-54, the total-day ratings in the New York DMA in the second quarter of 2010 were as follows: **[REDACTED**]. *See id.* Among Persons 18-49, the total-day ratings in the New York DMA in the second quarter of 2010 were as follows: **[REDACTED**]. *See id.*

[114] *See id.* at ¶ III.4.a-d, III.5.c, and Appendix 1. According to Mr. Brooks, viewer satisfaction is considered by distributors because it "reflects subscribers' presumed willingness to remain subscribers and potentially buy enhanced services." *Id.* at ¶ III.4.a.

[115] According to Mr. Brooks, Beta Research Corp. provides the "best known and most widely used impartial, third-party survey of cable subscriber satisfaction," and the Beta Research Cable Subscriber Study "has been used throughout the industry for many years as an impartial 'benchmark' on viewer attitudes." *Id.*

[116] *See id.* at ¶ III.5.c.

[117] *See id.* at ¶ III.4.b.

[118] *See id.* **[REDACTED**

]. *See id.*

[119] *See id.* at ¶ III.4.c. **[REDACTED**

]. *See id.*

[120] *See id.* at ¶¶ III.4.d, III.5.c, and Appendix 1.

[121] *See* Singer Decl. at ¶¶ 6, 22, 43, and Table 6.

[122] *See id.*

[123] *See id.* at ¶ 22.

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rating point basis using 2009 total-day national ratings and 2009 license fee data, GSN is **[REDACTED**

].[124] Moreover, GSN provides evidence that, on a price-per-rating point basis using 2010 total-day ratings in the New York DMA and 2009 licensee fee data, GSN **[REDACTED**

].[125]

23. *Target Audience.* GSN provides evidence that GSN, WE tv, and Wedding Central are similarly situated with respect to target audience. GSN states that GSN, WE tv, and Wedding Central are in a core group of networks (along with Bravo, E!, Hallmark Channel, Lifetime, and Oxygen) that appeal predominantly to women and that they primarily target women ages 25 to 54.[126] In support, GSN notes total-day national ratings data from 2010 indicating that GSN, WE tv, and Wedding Central are viewed primarily by women: GSN (**[REDACTED**
]);[127] WE tv (**[REDACTED**
]);[128] Wedding Central (**[REDACTED**
]).[129] Citing the ratings data detailed above,[130] GSN states that GSN and WE tv have **[REDACTED**
].[131] GSN also provides advertising sales revenue broken down by demographic, which reflects that **[REDACTED**

].[132] Moreover, GSN states that the audiences of GSN and WE tv are sufficiently similar that the networks have developed "crossovers" with respect to their programming: (i) three couples from the WE tv show *Bridezillas* appeared on GSN's *The Newlywed Game*; and (ii) WE tv showed promotions for *The Newlywed Game* on WE tv.[133] In addition, GSN submits that **[REDACTED**

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[124] *See id.* at ¶ 43 and Table 6; *see also GSN Complaint* at ¶ 49.

[125] *See* Singer Decl. at ¶ 43 n.47.

[126] *See GSN Complaint* at ¶¶ 19, 36; Goldhill Decl. at ¶¶ 7-9; Brooks Decl. at ¶¶ I.2, III.5.e; Singer Decl. at ¶ 32.

[127] *See* Brooks Decl. at ¶¶ III.2.c, III.5.a; Goldhill Decl. at ¶ 7; Singer Decl. at ¶ 32.

[128] *See* Brooks Decl. at ¶ III.2.c; Singer Decl. at ¶ 32.

[129] *See* Brooks Decl. at ¶ III.1.h.

[130] *See supra* ¶¶ 19-20.

[131] *See* Brooks Decl. at ¶¶ III.2.e-h, III.5.a; *GSN Complaint* at ¶ 38.

[132] *See* Brooks Decl. at ¶ III.2.d.

[133] *See* Goldhill Decl. at ¶ 9; *see also GSN Complaint* at ¶¶ 20, 37.

[134] *See* Brooks Decl. at ¶¶ III.4.e-f, III.5.d.

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24. *Competition for Viewers.* GSN provides evidence that GSN, WE tv, and Wedding Central compete for the same viewers. First, GSN's expert, Mr. Brooks, provides Nielsen data which ranked WE tv as **[REDACTED**] among all cable networks in terms of shared audience with GSN during the fourth quarter of 2010:[135] **[REDACTED**[136]

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25. Second, GSN's expert, Dr. Singer, analyzes Nielsen audience duplication data for four dating-related shows airing on GSN[138] and finds that **[REDACTED**

]:[139] (i) more than **[REDACTED**] of all viewers who watched the GSN show *Baggage* also watched WE tv within the same quarter;[140] (ii) **[REDACTED**] of WE tv viewers watched *Baggage* within the same period;[141] and (iii) the combined shared audience of both *Baggage* and WE tv against the total number of unique viewers reached over the same quarter was **[REDACTED**].[142] Dr. Singer finds that, when ranked according to Both Duplication percentage, *Baggage* is **[REDACTED**].[143] In addition, Dr. Singer notes that GSN's *The Newlywed Game* is **[REDACTED**

].[144] Based on this data, Dr. Singer concludes that **[REDACTED**

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[135] *See GSN Complaint* at ¶¶ 19, 37; Brooks Decl. at ¶ III.2.g.

[136] *See GSN Complaint* at ¶ 19; Brooks Decl. at ¶ III.2.g.

[137] *See GSN Complaint* at ¶ 19; Brooks Decl. at ¶ III.2.g.

[138] Dr. Singer states that two of these four shows, *Baggage* and *The Newlywed Game*, account for **[REDACTED**] of GSN's weekday programming between 6:30 pm and midnight. *See* Singer Decl. at ¶ 25.

[139] *See GSN Complaint* at ¶ 37; Singer Decl. at ¶¶ 27-30.

[140] *See GSN Complaint* at ¶ 37; Singer Decl. at ¶ 29 and Table 2. This figure, referred to as the "Primary Duplication" percentage, reflects the percentage of viewers of a particular GSN show (in this case, *Baggage*) who also watched the alternative network analyzed (in this case, WE tv). *See* Singer Decl. at ¶ 29.

[141] *See* Singer Decl. at ¶ 29 and Table 2. This figure, referred to as the "Secondary Duplication" percentage, reflects the percentage of viewers of the alternative network analyzed (in this case, WE tv) who also watched the particular GSN show analyzed (in this case, *Baggage*). *See id.* at ¶ 29.

[142] *See id.* at ¶ 29 and Table 2. This figure, referred to as the "Both Duplication" percentage, reflects the combined shared audience of both the alternative network analyzed (in this case, WE tv) and the particular GSN show analyzed (in this case, *Baggage*) divided by the total number of unique viewers of both. *See id.* at ¶ 29.

[143] *See id.* at ¶ 29 and Table 2.

[144] *See id.* at ¶ 29 and Table 3-3. Dr. Singer also analyzed **[REDACTED**

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] and that the four GSN shows he analyzed are **[REDACTED**] in product space to WE tv and other women's programming networks (**[REDACTED**]) than they are to **[REDACTED**], and even other networks that skew toward women, such as **[REDACTED**].[145] In summary, Dr. Singer states that "there appears to be a special relationship between the dating-related programs on GSN and WE tv."[146]

26. Third, GSN's expert, Mr. Brooks, concludes that the extent of competition and audience overlap between GSN, WE tv, and other female-oriented networks is evidenced by the fact that **[REDACTED**].[147] Comparing the second quarter of 2010 (before repositioning of GSN) with the second quarter of 2011 (after the repositioning of GSN), Mr. Brooks finds that (i) GSN's total-day (households) rating in the New York DMA **[REDACTED**];[148] and (ii) WE tv's total-day (households) rating in the New York DMA **[REDACTED** .[149]

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[145] *See id.* at ¶ 30

[146] *Id.*

[147] *See GSN Complaint* at ¶ 40; Brooks Decl. at ¶ III.3.

[148] *See* Brooks Decl. at ¶ III.3.a.

[149] *See id.* at ¶ III.3.b. **[REDACTED**]

[150] *See id.* at ¶ III.3.c.

[151] *See id.* at ¶ III.3.d-e.

[152] *See id.* at ¶ III.3.d.

[153] *See id.*

[154] *See id.* at ¶ III.3.e.

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27. *Competition for Advertisers*. GSN provides evidence that GSN and WE tv compete for the same advertisers.[156] GSN's expert, Dr. Singer, provides evidence of substantial overlap among advertisers for GSN and WE tv:[157] (i) **[REDACTED**] of WE tv's top 40 advertising accounts (weighted by expenditures on WE tv commercials)[158] also advertise on GSN;[159] (ii) **[REDACTED**] of GSN's top 40 advertising accounts (weighted by expenditures on GSN commercials) also advertise on WE tv;[160] (iii) **[REDACTED**] of all of WE tv's advertising accounts (weighted by expenditures on WE tv commercials) also advertise on GSN;[161] and (iv) **[REDACTED**] of all of GSN's advertising accounts (weighted by expenditures on WE tv commercials) also advertise on WE tv.[162] In addition, Dr. Singer provides a "multivariate measure of distance" study whereby various networks were analyzed based on several characteristics of their viewers, such as household size/age, gender, education, race, occupation, and presence of children.[163] Based on these viewer characteristics, Dr. Singer measured the relative distance between GSN and WE tv as compared to the relative distance between GSN and a number of other cable networks.[164] WE tv was closer to GSN than **[REDACTED**] networks analyzed, leading Dr. Singer to conclude that "viewers of GSN and viewers of WE tv are relatively close in product space."[165]

b. Differential Treatment

28. We also find that GSN has put forth evidence sufficient to demonstrate for purposes of establishing a *prima facie* case of program carriage discrimination that Cablevision has treated GSN differently "on the basis of affiliation or nonaffiliation" from Cablevision's similarly situated, affiliated networks.[166] Cablevision distributes its affiliated WE tv network on an expanded basic tier to approximately **[REDACTED**] of its subscribers, and

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[155] *See id.*

[156] *See* Singer Decl. at ¶ 31 ("Because rival cable networks are competing for advertising dollars, the perception of advertisers informs Cablevision's tiering policy. If Cablevision perceives GSN to be a threat to WE tv's advertising revenues, then Cablevision has an incentive to discriminate against GSN.").

[157] *See id.* at ¶ 33 and Table 3.

[158] According to Dr. Singer, "giving advertisers who advertise more heavily with WE tv more weight makes sense for the purposes of an overlap analysis; tapping one's largest client is more significant than tapping one's smallest client." *Id.* at ¶ 33 n.39.

[159] *See id.* at ¶ 33 and Table 3; *see also GSN Complaint* at ¶ 41.

[160] *See* Singer Decl. at ¶ 33 and Table 3; *see also GSN Complaint* at ¶ 41.

[161] *See* Singer Decl. at ¶ 33 and Table 3.

[162] *See id.*

[163] *See* Singer Decl. at ¶¶ 34-39 and Table 5; *see also GSN Complaint* at ¶ 39.

[164] *See* Singer Decl. at ¶¶ 34-39 and Table 5; *see also GSN Complaint* at ¶ 39.

[165] *See* Singer Decl. at ¶ 38; *see also GSN Complaint* at ¶ 39.

[166] Cablevision argues that its differential treatment of GSN is justified by various legitimate and non-discriminatory reasons. *See, e.g., Cablevision Answer* at 48-57.

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such subscribers need not pay an additional fee to receive this programming network.[167] Cablevision also distributed its affiliated Wedding Central network on an expanded basic tier,[168] although GSN states that no other major distributor provided Wedding Central with this level of distribution.[169] By contrast, Cablevision customers wishing to receive GSN must subscribe to the "iO Sports and Entertainment Pak," for which subscribers must pay a fee of $6.95 per month in addition to the fees for purchasing an entry-level package of digital cable programming and a digital cable box.[170] According to GSN, approximately **[REDACTED**] percent of Cablevision's **[REDACTED**] subscribers in New York, New Jersey, and Connecticut subscribe to this premium sports tier.[171] In addition, GSN claims that Cablevision places all of its affiliated cable networks (American Movie Classics (AMC), Fuse, Independent Film Channel, WE tv), including its affiliated sports network (MSG), on a highly penetrated tier, whereas Cablevision's premium sports tier is occupied only by unaffiliated networks.[172]

c. Harm to Ability to Compete Fairly

29. GSN has put forth evidence sufficient to demonstrate for purposes of establishing a *prima facie* case of program carriage discrimination that Cablevision's decision to reposition GSN to a premium sports tier and its disparate treatment of the network have unreasonably restrained GSN's ability to compete fairly.[173] GSN claims that all of the harms discussed below resulting from the repositioning of GSN to a premium sports tier have "constrain[ed] GSN's ability to continue to grow – to develop itself as a network, to make adequate investments in content, promotion, and marketing, and to engage staff and talent – making it more difficult for GSN to compete effectively against other networks, including its competitor WE tv."[174]

30. *Loss of subscribers from repositioning results in reduced license fee revenue.* GSN provides declarations from its CEO and expert stating that, as a result of the repositioning of GSN to a premium sports tier, GSN's Cablevision subscribers fell by **[REDACTED**], resulting in a loss of **[REDACTED**] in annual license fee revenue.[175]

31. *Loss of subscribers from repositioning results in reduced advertising revenue.* GSN provides declarations from its CEO and expert estimating that the loss of **[REDACTED**] Cablevision subscribers resulting from the repositioning of GSN to a premium sports tier causes the following reduction in GSN's annual advertising revenues: **[REDACTED**

[167] *See GSN Complaint* at ¶¶ 28, 44; Singer Decl. at ¶¶ 3, 18; *see also Cablevision Answer* at 76 (¶ 44).

[168] *See GSN Complaint* at ¶¶ 28, 44; Singer Decl. at ¶¶ 3, 18; *see also Cablevision Answer* at 76 (¶ 44).

[169] *See GSN Complaint* at ¶¶ 28, 44; Singer Decl. at ¶ 19.

[170] *See GSN Complaint* at ¶¶ 28, 45; Goldhill Decl. at ¶ 14; Singer Decl. at ¶ 3.

[171] *See GSN Complaint* at ¶ 45; Goldhill Decl. at ¶ 14; Singer Decl. at ¶ 18.

[172] *See GSN Complaint* at ¶ 45; Singer Decl. at ¶ 19 and Table 1.

[173] *See GSN Complaint* at ¶¶ 58-62; Brooks Decl. at ¶ IV; Goldhill Decl. at ¶¶ 15-17; Singer Decl. at ¶¶ 46-52. Cablevision disputes that GSN has been unreasonably restrained in its ability to compete fairly. *See, e.g., Cablevision Answer* at 57-61.

[174] *GSN Complaint* at ¶ 62.

[175] *See* Singer Decl. at ¶¶ 6, 47; *see also GSN Complaint* at ¶ 59; Goldhill Decl. at ¶ 15.

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].[176] Accordingly, as a result of the repositioning of GSN to a premium sports tier, GSN estimates it will lose a total of approximately **[REDACTED**] annually in license and advertising revenue.[177]

32. *Loss of subscribers from repositioning impairs GSN's ability to compete for advertisers.* GSN provides declarations from its CEO and experts stating that (i) the reduction in subscribers resulting from the repositioning of GSN to a premium sports tier has a negative impact on the audience GSN has to sell to national advertisers;[178] (ii) the repositioning was particularly harmful because it occurred in the New York market, where Cablevision is the dominant cable operator[179] and a large number of advertising executives are located;[180] and (iii) advertising buyers have expressed concern about the unavailability of GSN to Cablevision's expanded basic subscribers.[181]

33. *Placement on a premium sports tier impairs GSN's ability to compete for viewers.* GSN provides declarations from its experts stating that (i) the placement of GSN on a premium sports tier reduces the opportunity for GSN to benefit from casual viewers ("channel surfers");[182] and (ii) the placement of the female-oriented, non-sports GSN on a sports tier featuring male-oriented sports programming (major league baseball, hockey, horse racing, golf, basketball, soccer, and wrestling) means that no meaningful number of GSN's viewers would be sufficiently interested in this unrelated sports programming to pay an additional fee to receive GSN.[183]

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[176] *See* Goldhill Decl. at ¶ 16; *see also GSN Complaint* at ¶ 59; Singer Decl. at ¶ 48.

[177] *See GSN Complaint* at ¶ 60; *see also* Goldhill Decl. at ¶ 15.

[178] *See* Brooks Decl. at ¶ IV.5; *see also* Singer Decl. at ¶ 6.

[179] *See* Singer Decl. at ¶ 51 ([**REDACTED**

]).

[180] *See* Goldhill Decl. at ¶ 17 ("Cablevision's conduct has been particularly harmful because it is a dominant cable operator in the New York market, where a large number of advertising executives are based. These executives often treat a service's availability in their homes as a prerequisite to considering it as a meaningful contender for a share of their advertising budgets. Thus, GSN's loss of . . . Cablevision subscribers has damaged GSN even more than the harm that it would suffer from the loss of an equal number of subscribers in a different market."); Brooks Decl. at ¶ IV.5 ("New York is well known as the media capital of the U.S., the home base of many of the top advertising agencies and buying groups. Distribution in New York and its suburbs (where many executives live) is considered in the industry to be essential for a network to remain familiar to and front-of-mind among those making buying decisions. Thus, effectively being 'blacked out' in a large portion of New York homes will have a disproportionate effect on GSN's national viability as an advertising medium."); *see also GSN Complaint* at ¶ 61; Singer Decl. at ¶ 51.

[181] *See* Goldhill Decl. at ¶ 17 (stating that, during GSN's presentation to the lead advertising buyer for **[REDACTED**], the buyer questioned GSN about its lack of availability on Cablevision systems and, similarly, the lead advertising buyer for **[REDACTED**] expressed concern about the inaccessibility of GSN to Cablevision's basic service subscribers); *see also GSN Complaint* at ¶ 61.

[182] *See* Brooks Decl. at ¶ IV.2 (stating that the opportunity to attract "channel surfers" provides "an important means by which networks gain viewers, by attracting viewers who happen upon the network or who tune to it for a special event or premiere"); Singer Decl. at ¶ 52 ("[C]able programming is an 'experience good' that can best be learned about while surfing the channels. It is impossible to gain that experience if a network is available only on a sports tier, to which a consumer must affirmatively subscribe. In contrast, Cablevision subscribers can gain experience with WE tv casually, as that network is available to them without the need to subscribe to a sports tier.").

[183] *See* Brooks Decl. at ¶¶ I.2, IV.3; *see also GSN Complaint* at ¶¶ 45-46; Singer Decl. at ¶ 19.

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34. *Impaired ability to secure distribution agreements.* In his declaration, GSN's expert, Dr. Singer, states that vertically integrated cable operators other than Cablevision currently carry both GSN and WE tv on highly penetrated tiers and that these cable operators monitor Cablevision's carriage decisions.[184] Thus, according to Dr. Singer, Cablevision's decision to reposition GSN likely has a negative influence on the decisions of other cable operators with respect to carriage of GSN.[185]

2. Direct Evidence

35. In addition to circumstantial evidence, GSN also provides what it claims to be direct evidence of discrimination "on the basis of affiliation or nonaffiliation."[186] Specifically, GSN provides a declaration from Derek Chang, Executive Vice President of Content Strategy and Development at DIRECTV and representative of DIRECTV on GSN's board of directors, setting forth the following facts regarding carriage negotiations with Cablevision.[187] On December 3, 2010, Cablevision notified GSN that Cablevision would reposition GSN to a sports tier effective February 1, 2011.[188] After receiving this notification, GSN's CEO asked Mr. Chang to contact Cablevision's Chief Operating Officer ("COO") to persuade Cablevision to reconsider.[189] In response to Mr. Chang's inquiry, Cablevision's COO asked Mr. Chang to speak with Josh Sapan, President and COO of Cablevision's programming subsidiary, Rainbow Media Holdings ("Rainbow").[190] Mr. Chang states that, during his conversations with Mr. Sapan and other Rainbow staff, "it was made clear to me that Cablevision would consider continuing GSN's broad distribution on Cablevision's systems if DIRECTV would consider giving distribution to Cablevision's new service, Wedding Central."[191] Mr. Chang declined because DIRECTV had previously decided that Wedding Central did not merit distribution on DIRECTV.[192]

3. Conclusion

36. Based on the foregoing, we find it appropriate to designate the captioned complaint on the issues specified below for a hearing before an ALJ.[193] While we question whether GSN's alleged direct evidence of discrimination, standing alone, is sufficient to establish a *prima facie* case, we need not address this issue because GSN has put forth sufficient circumstantial evidence of discrimination "on the basis of affiliation or nonaffiliation" to warrant referral of this matter to an ALJ. We emphasize that our determination that GSN has offered sufficient evidence on each required element to meet the threshold for establishing a *prima facie* case does not mean that we have found each evidentiary proffer set forth above

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[184] *See* Singer Decl. at ¶¶ 6, 49.

[185] *See id.*

[186] *See GSN Complaint* at ¶¶ 52-53; Chang Decl. at ¶¶ 3-7; *see also supra* ¶ 10 (discussing requirements for establishing a *prima facie* case based on direct evidence of affiliation-based discrimination).

[187] *See* Chang Decl. at ¶ 1. As discussed above, DIRECTV has an ownership interest in GSN. *See supra* n.25.

[188] *See* Chang Decl. at ¶ 3; *see also GSN Complaint* at ¶ 25.

[189] *See* Chang Decl. at ¶ 4; *see also GSN Complaint* at ¶ 26; Goldhill Decl. at ¶ 12.

[190] *See* Chang Decl. at ¶ 5; *see also GSN Complaint* at ¶ 26.

[191] Chang Decl. at ¶ 6; *see also GSN Complaint* at ¶ 27; Goldhill Decl. at ¶ 13.

[192] *See* Chang Decl. at ¶ 6; *see also GSN Complaint* at ¶ 27.

[193] The question of whether GSN has put forth evidence sufficient to warrant designation of this matter for hearing is not an issue before the Presiding Judge. As required by the Commission's Rules, to the extent Cablevision seeks Commission review of our decision on this issue, such review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. *See* 47 C.F.R. § 1.115(e)(3).

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necessarily persuasive, nor have we weighed GSN's evidence in light of rebuttal evidence offered by Cablevision. At hearing, the ALJ will be able to fully weigh all evidence offered by the parties.

C. Referral to ALJ or ADR

37. Pursuant to Section 76.7(g)(2) of the Commission's Rules, each party will have ten days following release of this *Order* to notify the Chief, Enforcement Bureau and Chief ALJ, in writing, of its election to resolve this dispute through ADR. The hearing proceeding will be suspended during this ten-day period. In the event that both parties elect ADR, the hearing proceeding will remain suspended, and the parties shall update the Chief, Enforcement Bureau and Chief ALJ on the first of each month, in writing, on the status of the ADR process. If both parties elect ADR but fail to reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau and Chief ALJ in writing, and the proceeding before the ALJ will commence upon the receipt of such notification. If both parties elect ADR and reach a settlement, the parties shall promptly notify the Chief, Enforcement Bureau, Chief ALJ, and Chief, Media Bureau in writing, and the hearing designation will be terminated upon the Media Bureau's order dismissing the complaint becoming a final order. If only one party elects ADR and the other elects to proceed with an adjudicatory hearing, then the hearing proceeding will commence the day after the ten-day period has lapsed.

38. Notwithstanding our determination that GSN has made out a *prima facie* case of program carriage discrimination by Cablevision, we direct the Presiding Judge to develop a full and complete record in the instant hearing proceeding and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision on each of the outstanding factual and legal issues. In addition, we direct the Presiding Judge to make all reasonable efforts to issue his Initial Decision on an expedited basis.[194] In furtherance of this goal, the Presiding Judge may consider placing limitations on the extent of discovery to which the parties may avail themselves.

IV. ORDERING CLAUSES

39. Accordingly, **IT IS ORDERED**, that pursuant to Section 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 409(a), and Sections 76.7(g) and 1.221 of the Commission's Rules, 47 C.F.R. §§ 76.7(g), 1.221, the captioned program carriage complaint filed by Game Show Network, LLC against Cablevision Systems Corporation is **DESIGNATED FOR HEARING** at a date and place to be specified in a subsequent order by an Administrative Law Judge upon 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 Commission's Rules; and

(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

[194] In the *2011 Program Carriage Order*, the Commission adopted a rule directing the ALJ to release an initial decision within 240 calendar days after one of the parties informs the Chief ALJ that it elects not to pursue ADR or, if the parties have mutually elected to pursue ADR, within 240 calendar days after the parties inform the Chief ALJ that they have failed to resolve their dispute through ADR. *See 2011 Program Carriage Order*, 26 FCC Rcd at 11509-10, ¶ 21; *see also* 47 C.F.R. § 0.341(f). While this rule does not apply to this complaint (*see supra* n.7), we encourage the ALJ to make all reasonable efforts to comply with this deadline. Pursuant to Section 76.10(c)(2) of the Commission's Rules, a party aggrieved by the ALJ's decision on the merits may appeal such decision directly to the Commission in accordance with Sections 1.276(a) and 1.277(a) through (c) of the Commission's Rules. 47 C.F.R. § 76.10(c)(2).

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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.

40. **IT IS FURTHER ORDERED,** that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 76.7(g)(2) of the Commission's Rules, 47 C.F.R. § 76.(g)(2), GSN and Cablevision **SHALL EACH FILE** with the Chief, Enforcement Bureau and Chief ALJ, by **MAY 21, 2012,** its respective elections as to whether it wishes to proceed to Alternative Dispute Resolution. The hearing proceeding **IS HEREBY SUSPENDED** during this time. If only one party elects ADR and the other elects to proceed with an adjudicatory hearing, then the hearing proceeding will commence on **MAY 22, 2012**. If both parties elect ADR, the hearing proceeding will remain suspended, and GSN and Cablevision shall update the Chief, Enforcement Bureau and Chief ALJ on the first of each month, in writing, on the status of the ADR process.[195] Such updates shall be provided in writing and shall reference the MB docket number and file number assigned to this proceeding.

41. **IT IS FURTHER ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), in order to avail itself of the opportunity to be heard, GSN and Cablevision, in person or by their attorneys, **SHALL EACH FILE** with the Commission, by **MAY 29, 2012**, a written appearance stating that it will appear on the date fixed for hearing and present evidence on the issues specified herein, provided that, if both parties elect ADR, each party shall file such written appearance within five calendar days after notifying the Chief, Enforcement Bureau and Chief ALJ that it has failed to settle the dispute through ADR.[196]

42. **IT IS FURTHER ORDERED** that, if GSN fails to file a written appearance by the deadline specified above, or fails to file prior to the deadline either a petition to dismiss the above-captioned proceeding without prejudice, or a petition to accept, for good cause shown, a written appearance beyond such deadline, the Administrative Law Judge **SHALL DISMISS** the above-captioned program carriage complaint with prejudice for failure to prosecute and **SHALL TERMINATE** this proceeding.

43. **IT IS FURTHER ORDERED** that, if Cablevision fails to file a written appearance by the deadline specified above, or fails to file prior to the deadline a petition to accept, for good cause shown, a written appearance beyond such deadline, its opportunity to present evidence at hearing will be deemed to have been waived. If the hearing is so waived, the Presiding Judge expeditiously **SHALL TERMINATE** this hearing proceeding and certify to the Commission the above-captioned program carriage complaint for resolution based on the existing record.

44. **IT IS FURTHER ORDERED** that in addition to the resolution of issues (a) and (b) in paragraph 39 above, the Presiding Judge shall also determine, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an Order for Forfeiture shall be issued against

[195] *See supra* ¶ 37.

[196] In the *2011 Program Carriage Order*, the Commission adopted a specific deadline for filing written appearances in a program carriage complaint proceeding referred to an ALJ for an initial decision. *See 2011 Program Carriage Order*, 26 FCC Rcd at 11510-11, ¶ 22; *see also* 47 C.F.R. § 1.221(h)(1). As discussed above, this rule does not apply to this complaint. *See supra* n.7. Thus, the general rule in Section 1.221(c) applies. *See* 47 C.F.R. § 1.221(c). In light of the expedited basis of this hearing proceeding, the deadline for filing written appearances set forth in Section 1.221(c) of the Commission's Rules, 47 C.F.R. § 1.221(c), is waived and replaced with the deadlines set forth above. In addition, Section 1.221(f) of the Commission's Rules, 47 C.F.R. § 1.221(f), provides that a "fee must accompany each written appearance filed with the Commission in certain cases designated for hearing." However, neither the Act nor our rules specify a fee for hearings involving program carriage complaints. *See* 47 C.F.R. § 1.1104; *see also* 47 U.S.C. § 158. Accordingly, neither GSN nor Cablevision is required to pay a fee in connection with the filing of their respective appearances in this proceeding.

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Cablevision for each willful and/or repeated violation, except that the amount issued for any continuing violation shall not exceed the amount specified in Section 503(b)(2)(A), 47 U.S.C. § 503(b)(2)(A), for any single act or failure to act.

45. **IT IS FURTHER ORDERED** that for the purposes of issuing a forfeiture, this document constitutes notice, as required by Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503.

46. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by Certified Mail - Return Receipt Requested and regular first class mail to (i) Game Show Network, LLC, 2150 Colorado Avenue, Santa Monica, CA 90404, with a copy (including a copy via e-mail) to Stephen A. Weiswasser, Esq., Covington and Burling LLP, 1201 Pennsylvania Avenue, N.W., Washington, DC 20004-2401 (sweiswasser@cov.com); and (ii) Cablevision Systems Corporation, 1111 Stewart Avenue, Bethpage, NY 11714, with a copy (including a copy via e-mail) to Howard J. Symons, Esq., Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 701 Pennsylvania Avenue, N.W., Suite 900, Washington, D.C. 20004 (HJSymons@mintz.com).

47. **IT IS FURTHER ORDERED** that the Chief, Enforcement Bureau, is made a party to this proceeding without the need to file a written appearance, and she shall have the authority to determine the extent of her participation therein.

48. **IT IS FURTHER ORDERED** that a copy of this *Order* or a summary thereof **SHALL BE PUBLISHED** in the *Federal Register*.

49. This action is taken pursuant to authority delegated by Sections 0.61 and 0.283 of the Commission's Rules, 47 C.F.R. §§ 0.61, 0.283.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau