

Federal Communications Commission
Washington, DC 20554

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09606

In the Matter of)	MB Docket No. 12-122
)	
Game Show Network, LLC,)	File No. CSR-8529-P
Complainant,)	
)	
v.)	
)	
Cablevision Systems Corp.)	
Defendant)	
)	
Program Carriage Complaint)	

ORDER

Issued: March 15, 2013

Released: March 15, 2013

Background

On March 7, 2013, Cablevision Systems Corp. (Cablevision) submitted its Unopposed Motion to Permit the Introduction into Evidence of Limited Videotaped Deposition Testimony at Hearing (Motion). Cablevision seeks to introduce limited excerpts from the videotaped depositions of Cablevision’s CEO James Dolan and Game Show Network’s (GSN’s) former Senior Vice President of Distribution Dennis Gillespie in lieu of providing written deposition designations.¹ Cablevision believes that this approach will “streamline” the trial proceedings; avoid the issuance of a trial subpoena to Mr. Gillespie, who is no longer associated with GSN; and avert a potential dispute as to whether GSN can call Mr. Dolan as a trial witness.² GSN does not oppose the Motion.³

Notwithstanding the “unopposed” designation, the Enforcement Bureau (the Bureau) submitted its Opposition to Motion to Accept Videotaped Deposition Testimony on March 11, 2013. The Bureau informs that neither Cablevision nor GSN consulted with it before submitting the Motion.⁴ While the Bureau is generally supportive of Cablevision and GSN’s efforts to streamline the proceeding, the granting of the Motion would deny the Bureau the ability to cross-examine Mr. Gillespie and Mr. Dolan.⁵ The Bureau argues that Commission rules “provide for

¹ Cablevision’s Unopposed Motion at 1.

² *Id.* at 2-3.

³ *Id.* at 1.

⁴ Enforcement Bureau’s Opposition at 1.

⁵ *Id.* at 2.

only limited circumstances where a party may present deposition testimony without making the witness available for cross-examination” and that those circumstances do not exist here.⁶ Those circumstances are discussed below. The Bureau proposes that it be allowed five business days to review the videotaped deposition excerpts in question and report to the Presiding Judge as to whether it believes cross-examination will be necessary.⁷

On March 12, 2013, GSN informed the Presiding Judge by e-mail that all parties had reached an agreement on how to proceed. It is proposed that the Presiding Judge and the Enforcement Bureau receive “copies of the five designated deposition transcripts that the parties would propose to submit in lieu of live testimony at the hearing so that [the Bureau] may review the transcripts and assess whether it requires an opportunity to cross examine any relevant witnesses.”⁸

Discussion

Cablevision’s Motion is styled as a request that it be permitted to introduce into evidence segments of videotaped depositions rather than utilize the traditional written deposition at hearing.⁹ However, this Motion has wider implications than simply determining the medium through which the content of a deposition will be presented as Cablevision has suggested that the opportunity to introduce videotaped depositions would, in its view, eliminate the need to have Mr. Gillespie and Mr. Dolan testify at the hearing.¹⁰ It is in this context that Cablevision’s motion is closely examined.

Section 1.322(d)(3) of the Commission’s rules governs the permitted uses for witness depositions.¹¹ These depositions may be used for any purpose, including situations where a witness is not available to testify at a hearing, if the Presiding Judge finds:

- (i) that the witness is dead; or
- (ii) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or
- (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or
- (iv) upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony

⁶ *Id.* at 2 (citing 47 CFR § 1.321(d)(3)).

⁷ *Id.* at 2-3.

⁸ E-mail from Phyllis A. Jones, sent March 12, 2013.

⁹ Cablevision’s Unopposed Motion at 1.

¹⁰ *See id.* at 3, 4.

¹¹ 47 CFR § 1.322(d)(4).

of witnesses orally in open hearing, to allow the deposition to be used.¹²

Cablevision has failed to demonstrate the existence of any circumstances that cause either Mr. Gillespie or Mr. Dolan to be unavailable to testify at hearing, let alone circumstances that rise to the level of the above-presented standard. The opportunity for a witness to orally present testimony in an open court, for parties to cross-examine that witness, and for the Presiding Judge to observe demeanor in open court, ask questions of the witness, and evaluate a witness's credibility are all essential to seeking truth in the development of a complete evidentiary record. A videotaped deposition is not an adequate substitute for that opportunity. If it means some inconvenience for a witness to appear in court to testify, it is a burden to be borne in the interest of justice and the public interest.

As to admitting the videotaped deposition excerpts for use at hearing "rather than" utilizing written depositions,¹³ Cablevision's argument is unpersuasive. Cablevision points to the practices of state and federal courts, which routinely allow the presentation of witness testimony via videotaped deposition.¹⁴ Despite that increasing comfort with videotaped material, the Federal Rules of Civil Procedure require parties to provide the transcript of any deposition testimony that the party offers unless a court orders otherwise.¹⁵ Accordingly, it is expected that the parties in this proceeding will provide the written transcripts of depositions that they intend to use at hearing.¹⁶

Cablevision also has failed to persuade that allowing the use of videotaped deposition excerpts at hearing will assist the fact finder, i.e., the Presiding Judge. Cablevision merely asserts that this "important evidence is better heard and seen than read" in light of the substantial documentary evidence to be introduced at trial.¹⁷ If the evidence in question is "better heard and seen than read," then it's more rational that such evidence is the best evidence when it is presented through a witness's live testimony. Finally, Cablevision posits that the utilization of the video excerpts instead of live testimony would "streamline the proceedings and save trial time."¹⁸ While it may save time and resources at hearing to have fewer witnesses testify, this efficiency is outweighed by the need for a complete and accurate transcript diligently established through traditional live testimony. And it should be noted that, at this stage, these two appear to be important witnesses.

Ruling

Accordingly, **IT IS ORDERED** that Cablevision Systems Corp.'s Unopposed Motion to Permit the Introduction into Evidence of Limited Videotaped Deposition Testimony at Hearing, which was in part opposed by the Enforcement Bureau, **IS DENIED**.

¹² *Id.*

¹³ Cablevision's Unopposed Motion at 1.

¹⁴ *Id.* at 2.

¹⁵ Fed. R. Civ. P. 32(c).

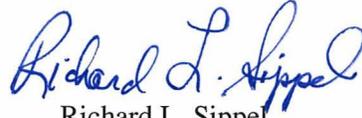
¹⁶ *Cf.* 47 CFR § 1.357 (mechanical reproductions as evidence requiring typewritten copy except for reproductions of sound waves).

¹⁷ Cablevision's Unopposed Motion at 2.

¹⁸ *Id.* at 4.

IT IS FURTHER ORDERED that under these circumstances the parties **SHALL NOT** seek to introduce into evidence, even if limited to demonstrative evidence, any videotaped deposition.

FEDERAL COMMUNICATIONS COMMISSION¹⁹



Richard L. Sippel
Chief Administrative Law Judge

¹⁹ Courtesy copies of this *Order* will be forwarded on issuance to counsel on the e-mail service list.