



6712-01

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 12-122; File No. CSR-8529-P; DA 12-739]

Game Show Network, LLC v. Cablevision Systems Corp.

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document designates a program carriage complaint for hearing before an Administrative Law Judge (“ALJ”) to resolve the factual disputes and to return an Initial Decision.

DATES: Game Show Network, LLC (“GSN”) and Cablevision Systems Corp. (“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 (“ADR”). The hearing proceeding is 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. 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.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact David Konczal, David.Konczal@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s document, DA 12-739, adopted and released on May 9, 2012. The full text is available for public inspection

and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis of the Order

I. Introduction

1. By the Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture ("Order"), the Chief, Media Bureau ("Bureau"), pursuant to delegated authority, hereby designates for hearing before an ALJ the above-captioned program carriage complaint filed by GSN against 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 § 76.1301(c) of the Commission's Rules. 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.

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. While we rule on 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.¹ 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. We therefore initiate this hearing proceeding. 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.

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." In implementing this statutory provision, the Commission adopted § 76.1301(c) of its rules, which closely tracks the language of section 616(a)(3).

4. The Commission has established specific procedures for the review of program carriage complaints. 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. Rather, it anticipated that the

¹ 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. As required by the Commission's Rules, to the extent Cablevision seeks Commission review of our decision on these issues, such

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. In such cases, where the complainant is found to have established a prima facie case but disposition of the complaint requires the resolution of factual disputes or extensive discovery, the parties can elect either ADR or an adjudicatory hearing before an ALJ. 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. The appropriate relief for violation of the program carriage provisions is determined on a case-by-case basis. Available sanctions and remedies include forfeiture and/or mandatory carriage and/or carriage on terms revised or specified by the Commission. For purposes of our prima facie determination, we discuss below the factual bases for GSN's claim of program carriage discrimination.

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.² 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.³ WE tv was launched in the 1990s as "Romance Classics," rebranded in 2001 as "WE: Women's Entertainment," and renamed WE tv in 2006. 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. 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. Cablevision has carried WE

review, if any, shall be deferred until exceptions to the Initial Decision in this proceeding are filed. See 47 CFR 1.115(e)(3).

² Cablevision is an MVPD as defined in § 76.1300(d) of the Commission's Rules. See 47 CFR 76.1300(d).

³ Prior to July 2011, Cablevision wholly owned WE tv and Wedding Central. On June 30, 2011, Cablevision spun off WE tv and Wedding Central into a new company, AMC Networks, Inc. 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.

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.

6. GSN is a national cable network launched on December 1, 1994 under the name “Game Show Network,”⁴ which was subsequently rebranded in 2004 as “GSN.” 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.” GSN’s predecessor and Cablevision entered into an affiliation agreement. 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. One of these favorable terms provided Cablevision with “carriage flexibility.” For almost 14 years (June 1997-February 2011), Cablevision distributed GSN on an expanded basic tier.

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. Cablevision claims that its decision was based on its efforts to find programming cost savings and that GSN was a good candidate for repositioning because, among other things, (i) GSN had historically received low viewership among Cablevision subscribers; and (ii) GSN, as a general family entertainment network, did not offer anything unusual to attract a particular segment of viewers. GSN’s attempts to persuade Cablevision to reverse its decision were unsuccessful. Cablevision moved GSN to the premium sports tier on February 1, 2011.⁵ As a result of the repositioning, GSN’s Cablevision subscribers fell.

⁴ Sony Pictures Entertainment, Inc. and DIRECTV have ownership interests in GSN. GSN states that it is a video programming vendor as defined in § 76.1300(e) of the Commission’s Rules.

⁵ 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

8. Pursuant to § 76.1302(b) of the Commission's rules, GSN provided Cablevision with its pre-filing notice on September 26, 2011. On October 12, 2011, GSN filed its Complaint 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. On December 7, 2011, the Bureau denied the Petition, finding that GSN had failed to satisfy its burden of demonstrating that interim relief was warranted.

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 § 76.1301(c) of the Commission's Rules. 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. 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.

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 § 76.1300(e) of the Commission's Rules or an MVPD as defined in section 602(13) of the Act and § 76.1300(d) of the Commission's Rules; and (ii) the defendant is an MVPD as defined in section 602(13) of the Act and § 76.1300(d) of the Commission's Rules. A prima facie case of discrimination "on the basis of affiliation or

programming and a digital cable box. 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

nonaffiliation” can be based on direct evidence or circumstantial evidence or both. A complaint relying on direct evidence requires documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated on the basis of affiliation or non-affiliation of vendors. 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; 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. 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.⁶

11. The parties do not dispute that GSN is a video programming vendor⁷ and that Cablevision is an MVPD as defined in the Act and the Commission’s Rules.⁸ 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. 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

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.

⁶ 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.

⁷ See 47 U.S.C. 536(b) (defining “video programming vendor”); 47 CFR 76.1300(e) (same).

Cablevision has engaged in unlawful 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.⁹ 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.¹⁰

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. Pursuant to § 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. We find that the third of those triggering events – the provision of an aggrieved programmer’s pre-filing notification pursuant to § 76.1302(b) of the Commission’s Rules – is present in this case.¹¹ The plain language of the rule allows a program carriage complaint to be filed within one year of the pre-filing notice. As the Commission and the Bureau have recognized previously, § 76.1302(f)(3) could be 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. 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

⁸ See 47 U.S.C. 522(13) (defining “MVPD”); 47 CFR 76.1300(d) (same).

⁹ 47 U.S.C. 536(a)(3). As discussed below, GSN does not contend that its affiliation agreement with Cablevision contains discriminatory “terms” or “conditions.” 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).

¹⁰ 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.

subsequently took this allegedly impermissible discriminatory action on February 1, 2011. 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. Accordingly, we conclude that the complaint was timely filed pursuant to § 76.1302(f)(3) of the Commission's Rules.¹²

13. We disagree with Cablevision that GSN's complaint is barred by § 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."¹³ Although the parties executed and extended their existing carriage agreement well over one year ago, 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. The agreement at issue does not specify the tier on which Cablevision must carry GSN. 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

¹¹ We agree with Cablevision that the limitations period in § 76.1302(f)(2) of the Commission's Rules, which governs carriage offers unrelated to existing affiliation agreements, is inapplicable in this case.

¹² 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. Tennis Channel HDO, 25 FCC Rcd 14149, 14154-56, para. 11 (MB 2010); NFL Enterprises HDO, 23 FCC Rcd at 14819-20, paras. 69-70 (MB 2008); MASN II HDO, 23 FCC Rcd at 14833-35, paras. 102-105 (MB 2008). In the 2011 Program Carriage NPRM, the Commission acknowledged that § 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.'" Revision of the Commission's Program Carriage Rules, Notice of Proposed Rulemaking, 26 FCC Rcd 11494, 11522-23, para. 38 (2011) ("2011 Program Carriage NPRM") (quoting Bunker Ramo Corp., Memorandum Opinion and Order, 31 FCC 2d 449, para. 12 (Review Board 1971)). 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, para. 39. GSN's complaint would be timely even under the Commission's proposed revised program carriage statute of limitations.

¹³ 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 CFR 1.115(e)(3).

failed to meet its obligation under section 616(a)(3) of the Act and § 76.1301(c) of the Commission's Rules to avoid discrimination on the basis of affiliation. It is this allegedly discriminatory act of repositioning of GSN, not the terms of the contract, which forms the basis for GSN's complaint.

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. 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" 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 from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules."¹⁴ 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.¹⁵ The contract at issue in EchoStar specified the rate the complainant would pay for the defendant's programming. Over

¹⁴ NFL Enterprises HDO, 23 FCC Rcd at 14821, para. 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 para. 3.

one year after the parties entered into the contract, however, the complainant sought to renegotiate the rate set forth in the contract. 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. 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.

16. Notwithstanding this clear Bureau precedent, Cablevision argues that GSN should have filed its complaint within one year of the contract execution date. 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. 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 a less-distributed tier in order to favor its own affiliated network. 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. Moreover, we note that Cablevision characterizes the pertinent term of the contract as "favorable" to Cablevision and that it sought such terms in particular from "new networks that

¹⁵ 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).

were seeking to grow subscribers in the New York DMA.” 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. 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. 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.¹⁶ In its complaint, GSN provides evidence with respect to the following factors: genre, ratings (on a national basis and within the New York DMA, as well as among specific demographic groups), license fee, target audience, competition for viewers (including audience duplication data), and competition for

advertisers. (Cablevision disputes that GSN is similarly situated to WE tv and Wedding Central.)

b. Differential Treatment

18. 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. Cablevision distributes its affiliated WE tv network on an expanded basic tier, and such subscribers need not pay an additional fee to receive this programming network. Cablevision also distributed its affiliated Wedding Central network on an expanded basic tier, although GSN states that no other major distributor provided Wedding Central with this level of distribution. 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. 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. (Cablevision argues that its differential treatment of GSN is justified by various legitimate and non-discriminatory reasons.)

c. Harm to Ability to Compete Fairly

19. 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

¹⁶ 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

restrained GSN's ability to compete fairly. GSN claims that all of the harms 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." In its complaint, GSN provides the following evidence of how Cablevision's repositioning of GSN to a premium sports tier and its disparate treatment of the network have unreasonably restrained GSN's ability to compete fairly: (i) loss of subscribers from repositioning results in reduced license fee revenue; (ii) loss of subscribers from repositioning results in reduced advertising revenue; (iii) loss of subscribers from repositioning impairs GSN's ability to compete for advertisers; (iv) placement on a premium sports tier impairs GSN's ability to compete for viewers; and (v) placement on a premium sports tier impairs GSN's ability to secure distribution agreements. (Cablevision disputes that GSN has been unreasonably restrained in its ability to compete fairly.)

2. Direct Evidence

20. In addition to circumstantial evidence, GSN also provides what it claims to be direct evidence of discrimination "on the basis of affiliation or nonaffiliation." 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. On December 3, 2010, Cablevision notified GSN that Cablevision would reposition GSN to a sports tier effective February 1, 2011. After receiving this notification, GSN's CEO asked Mr. Chang to contact Cablevision's Chief Operating Officer ("COO") to persuade Cablevision to reconsider. 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”). 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.” Mr. Chang declined because DIRECTV had previously decided that Wedding Central did not merit distribution on DIRECTV.

3. Conclusion

21. Based on the foregoing, we find it appropriate to designate the captioned complaint on the issues specified below for a hearing before an ALJ.¹⁷ 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 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.

4. Referral to ALJ or ADR

22. Pursuant to § 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

¹⁷ 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 CFR 1.115(e)(3).

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.

23. 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.¹⁸ 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

24. 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 §§ 76.7(g) and 1.221 of the Commission's Rules, 47 CFR 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

¹⁸ 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, para. 21; see also 47 CFR 0.341(f). While this rule does not apply to this complaint, we encourage the ALJ to make all reasonable efforts to comply with this deadline. Pursuant to § 76.10(c)(2) of the Commission's

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 § 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 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.

25. 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 § 76.7(g)(2) of the Commission's Rules, 47 CFR 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. Such

Rules, a party aggrieved by the ALJ's decision on the merits may appeal such decision directly to the Commission in accordance with §§ 1.276(a) and 1.277(a) through (c) of the Commission's Rules. 47 CFR 76.10(c)(2).

updates shall be provided in writing and shall reference the MB docket number and file number assigned to this proceeding.

26. 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.¹⁹

27. 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.

28. 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

¹⁹ 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, para. 22; see also 47 CFR 1.221(h)(1). This rule does not apply to this complaint. Thus, the general rule in § 1.221(c) applies. See 47 CFR 1.221(c). In light of the expedited basis of this hearing proceeding, the deadline for filing written appearances set forth in § 1.221(c) of the Commission's Rules, 47 CFR 1.221(c), is waived and replaced with the deadlines set forth above. In addition, § 1.221(f) of the Commission's Rules, 47 CFR 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 CFR 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.

expeditiously Shall Terminate this hearing proceeding and certify to the Commission the above-captioned program carriage complaint for resolution based on the existing record.

29. 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 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.

30. 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.

31. 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).

32. 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.

33. It is further ordered that a copy of this Order or a summary thereof Shall Be Published in the Federal Register.

34. This action is taken pursuant to authority delegated by §§ 0.61 and 0.283 of the Commission's Rules, 47 CFR 0.61, 0.283.

FEDERAL COMMUNICATIONS COMMISSION.

William T. Lake
Chief, Media Bureau

[FR Doc. 2012-12146 Filed 05/17/2012 at 8:45 am; Publication Date: 05/18/2012]