

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant*,
Memorandum Opinion and Order, MB Docket No. 12-122

It clearly states on our agency's website, that the job of the FCC's Administrative Law Judge (ALJ), is to "preside[] at the hearing during which documents and sworn testimony are received in evidence, and witnesses are cross-examined." Such evidentiary hearings are quite familiar to me as a former state commissioner, and I have remarked in the past that the FCC could benefit from conducting similar hearings during its own rulemaking process.

The reality is that our agency is not structured to undertake such an extensive examination, and therefore relies on the ALJ to conduct evidentiary hearings. The office functions like a trial court, reviewing thousands of documents, hearing witness testimony, and rendering a decision based on a preponderance of the evidence. This process can take years, and it should come as no surprise that reversing an ALJ's decision is quite infrequent. Research by my staff found a few examples from the 1980s and early 90s where the Commission reversed ALJ decisions, involving individual broadcast applications. And while some may point to the Tennis Channel case as a recent example, the Commission's reversal of the ALJ decision came only after the D.C. Circuit's decision.

In this case however, the ALJ reached its decision after cross-examination of a dozen witnesses and a review of approximately 1,000 documentary exhibits. Fast forward to just over a month ago, when I was asked to consider an order reversing the expert findings of an impartial ALJ.

After due consideration, I dissent from today's order, because I conclude that the Commission improperly overruled the ALJ's decision. The Commission reviews questions of law de novo, but accords deference to the ALJ on issues of fact. In the instant Order, the Commission dives deep into the underlying record, dredging up issues of fact around the evidence of discrimination, that should have remained undisturbed if it correctly followed the standard of review. Today we set a dangerous precedent, one that I hope will not become a trend.

Allow me to also take this opportunity to highlight a related issue. My views on the plight of independent programmers is widely known, and while GSN may have owners with deep pockets, this case demonstrates the inherent challenges facing programmers who are not vertically integrated with a pay-TV distributor. This is why I believe the time is now, for us to move to a final order, that ensures independent and diverse voices, have a place in a vibrant media landscape.