

WORK

Cable TV
MB 08-214

ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

FILED/ACCEPTED

MAR 19 2008

Federal Communications Commission
Office of the Secretary

_____)
HERRING BROADCASTING, INC.,)
Complainant,)
)
v.)
)
Bright House NETWORKS, LLC)
Defendant)
_____)

File No. 7822-P

CARRIAGE AGREEMENT COMPLAINT

TO: The Commission:

Complainant, Herring Broadcasting, Inc., ("Herring Broadcasting") doing business as WealthTV, ("WealthTV"), as its Complaint against the defendant, Bright House Networks, LLC., ("Bright House") alleges as follows:

1. This Complaint is brought pursuant to Section 616 of the Communications Act of 1934 ("Section 616") and Section 76.1301(c) of the Commission's rules, 47 C.F.R. §76.1301(c), arising from Bright House's unreasonable, discriminatory, and ongoing refusal to carry WealthTV, or even to negotiate meaningfully and in good faith for carriage. During the period of such refusal, Bright House agreed to carry an affiliated programming service called MOJO that is substantially similar to WealthTV in all material respects, including programming content, branding, look and feel, target demographic, and target advertisers. Bright House owns MOJO along with three other cable industry partners and Bright House has informed WealthTV that its carriage decisions are not made independently, but

rather that Bright House rides the carriage agreements of its affiliate Time Warner Cable ("TWC"). TWC also has denied carriage to WealthTV in violation of applicable statutes and rules against discrimination in favor of affiliates, and that denial is the subject of a separate complaint before the Commission. Bright House's refusal to carry or even negotiate for carriage in good faith with WealthTV, while agreeing along with TWC, to carry a substantially similar affiliated programming service, MOJO, constitutes discrimination in the selection, terms, and conditions of carriage, in violation of the Commission's rules, and Bright House has thereby restrained WealthTV's ability to compete fairly.

2. WealthTV presents herein its prima facie case of Bright House's violation of the law and Commission regulations, specifically: (a) Bright House has denied carriage to WealthTV and refused to negotiate meaningfully and in good faith for carriage; (b) Bright House is a vertically integrated video programmer and video distributor and meets all of the applicable statutory and regulatory definitional elements; (c) WealthTV likewise meets the statutory and regulatory definitions as a vendor of video programming and is not affiliated with Bright House; (d) Bright House has afforded carriage to its programming affiliate, MOJO, a service that is substantially similar to WealthTV, while denying carriage to WealthTV because it prefers to favor its own affiliated programming service so as to maximize overall company revenues, thus illegally discriminating against WealthTV; and (e) the effect of this discriminatory conduct has been to restrain WealthTV's ability to compete fairly in the marketplace by (i) denying WealthTV access to Bright House's millions of subscribers, (ii) affording MOJO a preclusive first mover

advantage with respect to the common pool of viewers and advertisers to which both MOJO and WealthTV are targeted and do appeal and (iii) with its powerful partner, TWC, discouraging other MVPDs from affording WealthTV a fair opportunity for carriage.

PARTIES AND JURISDICTION

3. Bright House Networks, LLC, is a subsidiary of Advance Publications Inc. and Time Warner Inc. (NYSE: TWX)¹, has its principal office at 5000 Campuswood Drive, East Syracuse, NY 13057-4250. Bright House's main telephone number is 315-438-4100. Bright House, directly and through its affiliates, provides cable service over cable systems and is a cable operator and a multichannel video programming distributor, as defined in 47 C.F.R. §76.1300 (d).

4. Herring Broadcasting, a California corporation, has its principal office and place of business at 4757 Morena Blvd., San Diego, CA 92117. Herring Broadcasting does business as WealthTV. Herring Broadcasting's main telephone number is (858) 270-6900. Herring Broadcasting has been distributing WealthTV's twenty-four hours per day, seven days per week ("24/7") programming to cable operators and other multichannel video programming distributors since June 1, 2004, and is a video programming vendor as defined in 47 U.S.C. §536(b) and 47 C.F.R. §76.1300(e). WealthTV provides a 24/7 high definition ("HD") feed and a simulcast 24/7 standard digital feed for subscribers

¹ See: http://www.lightreading.com/cable/details.asp?sku_id=1774&skuitem_itemid=1031

not currently receiving high definition services. In addition, WealthTV has Video on Demand ("VOD") and HD VOD packages available.

5. On or about May 15, 2007, Herring Broadcasting furnished to Bright House written notice of its intent to file a complaint with the Commission, served as required by 47 C.F.R. § 76.1302(b). A copy of the notice is attached as Exhibit 1.

6. By approximately May 30, 2007, Bright House responded orally by telephone to the notice in a call to the undersigned counsel for WealthTV via its counsel. Bright House denied that it had violated the law and indicated that Bright House followed the programming decisions of TWC.

7. Attached hereto as Exhibit 2 is an affidavit executed by Charles Herring, Co-Founder and President of WealthTV, complainant, as required by 47 C.F.R. § 76.1302(c)(2).

8. Attached hereto as Exhibit 3 is an affidavit executed by Robert Herring, Sr., Co-Founder and Chief Executive Officer of WealthTV, complainant, in further support of the allegations herein.

FACTS

9. Herring Broadcasting produces WealthTV, a video programming service that focuses on inspirational and aspirational programming about prosperous and fulfilling lifestyles. WealthTV's programming themes focus on enjoyable aspects of financial success, including travel, fine wines, luxury transportation, studies of other cultures, and opportunities for philanthropy. WealthTV's programming

lineup includes *Wealth on Wheels*, a series on high end automobiles and other vehicles; *Taste! The Beverage Show*, a show on fine wines and spirits, with a travel and cooking component, and *Innov8*, a series on the latest and greatest gadgets and gizmos.

10. In contrast to many programming services, WealthTV is a truly independent stand-alone programming service, founded and solely owned by innovator and entrepreneurial businessman Robert Herring, Sr. and his two sons, Robert, Jr. and Charles, without support by any cable operators or other program distribution companies including broadcasters, telcos, or direct broadcast satellite companies. WealthTV is one of only a few truly independent programmers to have successfully launched a new network in recent years. Since its launch on June 1, 2004, WealthTV has secured carriage agreements on over 75 incumbent cable systems, cable overbuilders, and telco video systems, including GCI, Charter Communications, Verizon FiOS TV, WideOpenWest, Qwest, Armstrong Cable, Surewest, Metrocast, Grande Communications, Service Electric, Sunflower Cable, Western Broadband, AT&T U-Verse and OEN Fision.

11. Bright House LLC., a subsidiary of Advance Publications Inc. and Time Warner Inc. Advance Publications, Inc., is a privately held communications company that owns Condé Nast Publications, Parade Publications, Fairchild Publications, American City Business Journals, the Golf Digest Companies, and newspapers in more than twenty American cities; Advance Publications also has extensive interests in cable television, as well as in Internet sites which are related

to its print publications.² Time Warner, Inc. is the world's largest media and entertainment conglomerate.³ Bright House is the sixth largest cable operator in the United States.⁴ It provides cable service to in numerous cities across the United States including Indianapolis, Central Florida (Orlando area), Daytona Beach area, Tampa Bay area, Birmingham-Hoover area, west suburban Detroit and Bakersfield. Most of its business is concentrated in Central Florida, where Bright House is the dominant cable system in the Tampa and Orlando TV markets. The Tampa Bay Market is one of the largest cable clusters in the United States and Bright House's largest market with well over a million customers. Like New York, the Florida markets served by Bright House are well known for setting the trends in fashion, cuisine, and lifestyle across the nation, and thus are ideal markets for WealthTV's programming services. Systems owned, managed and controlled by Bright House control access to a total of 2,329,400 video subscribers.⁵ Bright House, along with its parents own in whole or in part a number of affiliated programming networks and therefore has incentives to favor these affiliates over competing unaffiliated programming networks. Among the programming affiliates of Bright House and its parents are: Animal Planet, BBC America, Discovery Channel, Discovery en Espanol, Discovery Health Channel, Discovery Home, Discovery Kids, FitTV, HD Theater, Investigation Discovery, The Military Channel, The Science Channel, TLC, Discovery Kids en Espanol,

² See: http://www.advance.net/index.ssf/?advance_publications/about_advance_publications.html

³ See: "The Biggest Media Merger Yet," New York Times Editorial, January 11, 2000, at: <http://query.nytimes.com/gst/fullpage.html?res=940DE4DA1F3BF932A25752C0A9669C8B63&n=Top/News/Business/Companies/Time%20Warner%20Inc>.

⁴ See: <http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx>

⁵ See: <http://www.ncta.com/Statistic/Statistic/Top25MSOs.aspx>

Discovery Travel and Living, Adult Swim, Boomerang, Cartoon Network, Cinemax, CNN, Court TV, HBO, MOJO, Pogo, TBS, TCM, and TNT HD.

Additionally and specifically, Bright House is also part owner of MOJO according to the press release announcing its launch. (See Exhibit 4)

BRIGHT HOUSE HAS UNREASONABLY AND DISCRIMINATORILY REFUSED TO NEGOTIATE MEANINGFULLY AND IN GOOD FAITH WITH WEALTHTV DESPITE DEMONSTRATED MARKET DRIVEN INTEREST IN ITS LARGEST SYSTEM

12. WealthTV first approached Bright House to initiate carriage discussions in the summer of 2004. Since that time, WealthTV has visited numerous Bright House systems across the United States and has met in person with key divisional representatives of Bright House in leading markets, including the Tampa Bay Market. During the course of these meetings and other exchanges, WealthTV provided Bright House with detailed information about its service, including sample and complete episode programming, research, and periodic updates thereof. WealthTV also demonstrated that its programming, which has strong appeal to affluent viewers, brings higher advertising rates, which would be of direct financial benefit to Bright House because WealthTV offers its distribution partners two minutes of advertising time on the channel per hour.

13. Officials of several Bright House cable systems, including but not limited to those in its largest clustered Tampa Bay Market, have expressed interest in providing WealthTV to their customers. On or about July 18, 2006, Anne Stith, director of Product Marketing, Bright House – Tampa contacted WealthTV's VP of Affiliate Relations, John Scaro, expressing interest in launching WealthTV in standard digital and high definition. Upon a follow-up phone conversation with

Charles Herring on July 19, 2006, Ms. Stith expressed her interest in carrying WealthTV in standard digital and high definition. Ms. Stith said she was aware that WealthTV was being offered by Verizon FiOS TV in both standard digital and high definition formats in the local market. She expressed her concerns about having a competitor offer a differentiated service and stated her desire to carry WealthTV on Bright House. Ms. Stith informed Charles Herring that she would like to launch the service as soon as WealthTV completed a deal with Time Warner. Accordingly, Charles Herring emailed Mickey Carter, director of programming – Time Warner corporate programming, highlighting the interest expressed by Ms. Stith.

14. On or about February 9, 2007, John Scaro visited with Ann Stith and Michelle Stuart, senior director of marketing, Bright House. Ms. Stith and Ms. Stuart expressed their interest in carrying WealthTV and suggest that WealthTV contact Steve Miron, president of Bright House. On February 9, 2008, Charles Herring's assistant emailed Mr. Miron's assistant requesting a meeting among Mr. Miron and Messer. Scaro and Herring of WealthTV. The email stated, *"Brighthouse , Tampa Area has contacted WealthTV about carrying our digital and HD feeds. After a recent visit with Brighthouse Florida, it was suggested that our senior representatives visit with Mr. Miron."* Mr. Miron responded directly to the request via email stating, *"I would suggest either Charles or John give me a call first"* and he provided his contact number. (See Exhibit 5)

15. John Scaro contacted Mr. Miron via phone shortly thereafter and was informed by Mr. Miron that it was a waste of WealthTV's and Bright House's

time for WealthTV to call on Bright House locations until WealthTV concluded a carriage agreement with TWC. Mr. Miron informed Mr. Scaro that Bright House rides Time Warner agreements and does not negotiate its own carriage agreements. Thus Bright House completely refused to give WealthTV any consideration for a carriage agreement even though its largest system in Tampa marketing area, had expressed strong interest in carrying WealthTV's standard definition and high definition services because Bright House's telco competitor in that market was offering it.

THE PROVEN CONSUMER APPEAL OF WEALTHTV'S PROGRAMMING

16. WealthTV's programming service has proven consumer appeal, as evidenced by the large number of carriage deals it has already secured.⁶ To date, WealthTV has secured linear carriage (that is, on a tier where it is available for full time viewing 24/7 by cable subscribers) with over 75 cable operators, overbuilders, and telcos. WealthTV airs on-going interstitials soliciting viewers to provide feedback via WealthTV's website. The compiled data show overwhelming support for the channel. Additional proof of the market appeal comes from the reactions to WealthTV's service by officials of Bright House's largest system, as described in the above section.

⁶ Further evidence of the consumer appeal and popularity of WealthTV is evidenced by the strongly positive viewer feedback it has received. A small sampling of emails from viewers reflecting the channel's popularity is attached as Exhibit 6.

LAUNCH OF MOJO

17. The launch of MOJO was announced on March 19, 2007. (See Exhibit 4)

It was created by taking the bandwidth used by an existing channel, INHD, and turning it into the new channel called MOJO as of May 1, 2007. The new channel, MOJO, is substantially similar to WealthTV. The old channel, INHD, was completely different from what MOJO is today. INHD was a *general* entertainment high definition programming service that had no unifying theme other than that all of its programming was in high definition format. Thus, viewers might see children's programming such as *Santa vs. The Snowman*, a children's cartoon, as equally likely as they might see programming for adults, such as *The Twilight Zone*.⁷

18. MOJO is wholly owned by four cable MSOs: Bright House, Cox Cable, Comcast and Time Warner.

19. The new channel, MOJO, presented itself as a well-defined themed programming service aimed at "*active affluents*", ages 25 to 49.⁸ In the press release announcing its launch, MOJO described its programming as being characterized by "*new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys*" and "*diverse shows includ[ing] an eclectic mix of witty and urbane comedy, sports, adventurous travel, music and the finer pleasures of food and drink.*"⁹ (See Exhibit 4)

⁷ In TWC's answer to WealthTV's complaint it argued that MOJO and WealthTV were not substantially similar and appended the affidavit of Michael Egan. In its reply, WealthTV rebutted this argument and offered the rebuttal affidavit of Jedd Palmer. (See Exhibit 7)

⁸ See Exhibit 4; See also Exhibit 8; "INHD's New Moniker: MOJO," Mike Reynolds, Multichannel News, March 19, 2007 (www.multichannel.com/article/CA6425787.html)

⁹ "MOJO is rising!! IN DEMAND prepares for a May 1 Lightswitch when the hi-def cable channel becomes MOJO" MOJO Press Release, March 19, 2007.

20. MOJO's definitive programming transformation caused an increase in advertising by 37% according to Robert D. Jacobson, president and CEO of iN DEMAND Networks as reported in a March 22, 2007 TV Week article entitled "Q&A: Robert D. Jacobson, iN DEMAND Networks."¹⁰ (See Exhibit 9) Upon the launch of MOJO, Bright House agreed to offer the channel across all its systems carrying high definition throughout the United States.

21. By the time of MOJO's launch announcement on March 19, 2007, Bright House had engaged in numerous discussions with WealthTV over several years and was intimately familiar with WealthTV. Bright House by then had access to WealthTV's programming samples and marketing materials that Bright House had requested and was able to view WealthTV's product where it was launched on non-Bright House MVPD systems, some of which directly competed with Bright House's systems. Bright House also had access to information available publicly and through industry sources about WealthTV's success, viewer appeal and appeal to advertisers. Bright House also had access to materials provided to Bright House during presentations and follow-up visits, including marketing materials, presentations, and sample programming DVDs.

22. Thus, Bright House had the opportunity, knowledge and motivation to launch a WealthTV-like programming service. More than that, Bright House acted on that opportunity, knowledge and motivation to favor MOJO over WealthTV in precisely the discriminatory way that the law forbids because it benefited financially more from launching its own MOJO service than it would

¹⁰ For full text of this article see:
www.tvweek.com/news/2007/03/qa_robert_d_jacobson_in_demand.php

have by launching the substantially similar and established independent programming services of WealthTV. Bright House thus launched MOJO, while using the lack of a Time Warner corporate programming agreement as the excuse for not carrying WealthTV while it readied its own affiliated programming service based on WealthTV's proven successful model. Claimed deference to the decisions of a distribution partner that is also part owner of MOJO does not exculpate Bright House.

**MOJO IS A SUBSTANTIALLY SIMILAR PROGRAMMING SERVICE
TO WEALTHTV**

23. MOJO is substantially similar to WealthTV in numerous material respects as detailed below.

24. **Programming:** A comparison of programming on MOJO and WealthTV reveals numerous examples of MOJO's program offerings that mirror WealthTV's programming:

- a. In June, 2004, upon launch of its network, WealthTV launched *Taste! The Beverage Show*, a male hosted series with a travel and fine food component that focuses on educating viewers about wines and spirits. The goal of *Taste!* is to democratize wines and spirits so that all viewers can enjoy them without feeling overwhelmed by what they do not know. Roughly three years later, MOJO aired its first episode of *Uncorked* in April of 2007. *Uncorked* is described on the MOJO website as a travel, foods, and spirits show whose host will "ask the dumb question so you don't have to." WealthTV's *Taste, The*

Beverage Show offers more than six times as many episodes as *Uncorked*.

- b. In June 2004, upon launch of its network, WealthTV launched *Wealth on Wheels*, which focuses on the latest trends in automotive technology and hottest cars. Episodes have included automotive factory tours, automotive shows and test drives in some of the most sought after vehicles on the road. WealthTV has aired more than 50 episodes of this series and its predecessor. In August of 2007 MOJO announced a series called *Test Drive*, an automotive technology show with highlights of some of the most sought after cars. For example, one of the four episodes is entitled "*Ultimate Test Drive*" and the description from MOJO's web site is as follows, "*They're powerful, luxurious and carry a heavy price tag. Can you handle it? Craig J. Jackson takes a fast ride in the exotic automobile lane and uncovers an economical way to put the pedal to the Bentley, Lamborghini and Ferrari metal.*" (Emphasis supplied) Most importantly, both WealthTV's *Wealth on Wheels* and *Test Drive* target the identical demographics with similar programming.
- c. In November 2004, WealthTV produced its first *Charlie Jones, Live to Tape* show. This series is a hosted one-on-one talk show that features legendary football sportscaster and one of the first voices of the American Football League, Charlie Jones, who interviews remarkable athletes, coaches, and celebrities of yesteryear and features their untold

stories. MOJO features *Timeless*, which apparently debuted in 2006 on ESPN2, then migrated to MOJO. *Timeless* is a one-on-one style talk show in which the NFL Linebacker and host, Dhani Jones, “*taps into the classic themes of sports and competition, the plight of the underdog, the impossible play, the unlikely hero and their remarkable talent. Their stories are off-beat, inspiring and, of course ... timeless*”, according to MOJO’s website. (Emphasis supplied)

- d. In mid-2004, WealthTV launched *Taste of Life*, which focuses on educating viewers about the behind the scenes experiences associated with travel, spirits and especially food. Viewer interest in this series generated so many inquiries that WealthTV devoted a section of its website to posting over 180 recipes that have been featured on the show. In June 2006, MOJO launched *After Hours*, a series that gives viewers a behind the scenes look at Los Angeles restaurants, claiming that “*Some of life’s best lessons are learned after hours.*” Celebrity Chef Daniel Boulud hosts the show and “*...takes his exclusive dinner parties to SoCal, feting celebrities from shows such as Boston Legal, the Office and Crash. The guests are as interesting as the menu, the conversation flows as easy as the wine, and the vibe is distinctly After Hours.*” (Emphasis supplied) MOJO has also copied WealthTV’s practice of posting series-related recipes to its website; as of December 18, approximately a dozen recipes have appeared.

e. In April 2005, WealthTV launched *Innov8*, in which each episode features the latest “*gadgets and gizmos*” from around the world, according to WealthTV’s website. WealthTV has also produced a special show on the 2007 CES show in Las Vegas highlighting the best of CES from the latest gadgets to the biggest TVs. WealthTV has 14 shows on gadgets of all types. In December 2006, MOJO premiered *Geared Up*, which is described on its website as follows: “*MOJO plugs in and shows off the latest and greatest from the world of high-end electronics on Geared Up, the ultimate guide to the ultimate in technology.*” (Emphasis supplied) Shortly after its initial airing, MOJO’s *Geared Up* copied WealthTV in airing a special focused around CES 2007.

25. **Target Demographic:** Robert D. Jacobson, Chief Executive Officer of iN DEMAND, has explained to reporters that MOJO is for “...men making more than \$100,000 per year...” (See Exhibit 9; emphasis supplied). Multichannel News reported in a March 19, 2007 article that MOJO is designed to appeal to **25 to 49 year old** (see Exhibit 8) “*active affluents*” who are “...*dynamic, intelligent, and adventurous*” with a skew towards **men**. (Emphasis supplied). MOJO’s own press release reiterates that the channel was “created exclusively for the discerning male, with attitude, wit and style” (see Exhibit 4). A summary comparison of WealthTV’s Target Audience provided in WealthTV’s standard presentation to potential distribution partners, including Bright House, dating back to 2004 (See relevant excerpt at Exhibit 10) compared to MOJO’s target

audience, announced three years later, clearly indicates that MOJO is targeting the exact audience as WealthTV.¹¹

26. **Target Audience:** The following table summarizes the close similarities between WealthTV's and MOJO's target audiences:

	WealthTV	MOJO
Age	<i>25 to 49</i>	<i>25 to 49</i>
Sex	<i>Skewed Male</i>	<i>Males</i>
Education	<i>Skewed Educated</i>	<i>Intelligent</i>
Income	<i>Above \$100,000</i>	<i>"more than \$100,000"</i>

27. **Look and Feel:** The non-themed, general entertainment service INHD was transformed into a themed service offering original programming in high definition similar to WealthTV. Robert D. Jacobson, Chief Executive Officer of IN DEMAND, talking about the transformation of INHD to MOJO states, "*We know we wouldn't compete with ESPN on sports, or USA and TNT as general entertainment programming.*" (See Exhibit 8; emphasis supplied). In effect, the "*general entertainment programming*" offered by channel INHD was failing and was morphed directly into the path of the proven WealthTV lifestyle and entertainment theme, serving a near identical demographic with similar programming.

¹¹ In TWC's answer to WealthTV's complaint, it argued that MOJO and WealthTV did not appeal to the same demographic, asserting in essence that MOJO appealed to males and WealthTV had broader cross-gender appeal. WealthTV offered in its reply the rebuttal affidavit of Mark Kersey, documenting that the two programming services do appeal to the same target male demographic. (See Exhibit 11).

28. Uniqueness of WealthTV's Programming Theme Copied by MOJO:

MOJO's targeted programming theme is directly from WealthTV's 2004 playbook described in presentations to Bright House. Prior to the launch of MOJO, Mr. Jacobson of iN DEMAND acknowledged that a high definition channel can no longer be just a showcase for the new HD format and must be appealing to viewers for other, additional features. (See Exhibit 9) By March 2007, iN DEMAND executives expected that the market for high-definition programming would grow, but believed that there would be a lack of themed dedicated channels. As of March 2007, iN DEMAND viewed the market for original programming aimed at affluent males ages 25 to 49 as underserved. Thus, as iN DEMAND was "...evaluating the programming landscape to make sure (it) had a programming landscape that was sustainable", (see Exhibit 9) it struck upon and copied WealthTV's successful model.

29. In the March 19, 2007 press release, announcing MOJO's launch, significant similarities between WealthTV and MOJO were highlighted.

- a. In the release, MOJO defined its brand as comprised of "...new series spanning adventure travel, comedy, finance, music, cuisine and spirits and high tech toys." WealthTV had been featuring programming in each of these categories years before MOJO launched its programming service.
- b. MOJO used the term "*active affluents*" in its press release to describe its targeted audience. WealthTV, with its well defined and targeted

programming, comprised of among other things adventure travel, had become synonymous with “active affluents”.

30. Mr. Jacobson of iN DEMAND addressed the viability and demographics of MOJO stating “...there are not many [channels] that speak to the active affluents – men making more than \$100,000 a year and who are active. It’s a sustainable channel option.” (See Exhibit 9; emphasis supplied) Mr. Jacobson also said, “Fortunately, we were right in our projections. We were confident that there would be strong appeal for exclusive content aimed at high-end males.” (See Exhibit 8; emphasis supplied) Though Mr. Jacobson correctly stated that there are not many other channels that speak to the “active affluent”, the obvious and prominent example of the one that does, well known to Mr. Jacobson and his partners at Bright House was WealthTV, which was established three years before MOJO morphed from iN DEMAND to a WealthTV like service with an identical target demographic.¹²

31. **Target Advertisers:** In a January 2004 interview, Charles Herring, president of WealthTV was reported to be “*optimistic that the channel will attract advertisers looking to reach an audience that can afford high-end luxury goods*”. (See Exhibit 12; emphasis supplied) With the same target audience and nearly identical programming, WealthTV and MOJO target the same advertising market. As an example, both programmers feature shows on wine and spirits and both companies have targeted the same advertising agency for Grey Goose Vodka.

¹² According to the March 19 press release announcing MOJO’s launch, its cable company owners were aware of and supportive of its transformation. (See Exhibit 4).

32. In view of their similarities, WealthTV has inquired of Bright House in its pre-filing notice why it was able to find room on its systems for MOJO, an affiliated channel similar to WealthTV, but not for the pioneer of the aspirational wealth lifestyle channel, WealthTV, even though WealthTV was offered on favorable carriage terms to Bright House years before the launch of MOJO. No satisfactory answer has been received.

**CONTACTS BY WEALTHTV TO BRIGHT HOUSE SUBSEQUENT TO
THE LAUNCH OF MOJO**

33. Within days of MOJO's launch, WealthTV notified Bright House of its intent to file a carriage agreement complaint. WealthTV voiced concerns that Bright House's refusal to negotiate or execute a carriage agreement with WealthTV while simultaneously finding room on its systems for a substantially similar service evidenced impermissible discrimination in Bright House's decision making.

34. Since WealthTV's pre-filing notice and the initial oral response from Bright House's counsel to WealthTV's counsel, there have been no substantive communications between WealthTV and Bright House.

**BRIGHT HOUSE'S PATTERN AND PRACTICE OF DISCRIMINATION
AGAINST INDEPENDENT PROGRAMMERS**

35. Bright House is a vertically integrated provider and distributor of programming. The Commission's attention has been directed to numerous studies documenting the opportunities and incentives that such vertically integrated programmer-distributors have to favor affiliated programming over non-affiliated

programming. Among these studies, adverted to in the Commission's prior and ongoing proceedings, such as in MB Dockets 05-192, 06-151 and 07-42 are:

- a. Chen, D., and D. Waterman (2007), "Vertical Ownership, Program Network Carriage and Tier Positioning in Cable Television: An Empirical Study," *Review of Industrial Organization*, Vol. 30, No. 3.
- b. Singer, H. & Sidak, G., "Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators," *Review of Network Economics*, Vol. 6, 2007, available at <http://ssrn.com/abstract=1004369>.
- c. Clements & Abramowitz, *Ownership Affiliation and the Programming Decisions of Cable Operators* (2004), <http://web.si.umich.edu/tprc/papers/2004/289/TPRC2004.pdf>

36. Studies also have demonstrated that vertically integrated programmer-distributors in fact favor affiliated programming over non-affiliated programming.

37. Bright House's own channel lineup demonstrates the inclination to disfavor independent programming. For example, Bright House's high definition channel lineup for subscribers in the City of Tampa, heavily favors networks that are affiliated with Bright House.¹³ Of the non broadcast, non PEG high definition channels found at channel numbers 700 to 734, 11 of the 25 channels are affiliated with Bright House representing 44%. Of the Digital Channel tier offered in high definition 9 of the 18 channels are affiliated with Bright House representing 50%.

38. The high improbability of an independent programmer gaining carriage on Bright House has significant financial consequences for an independent programmer seeking such carriage. Programming services that aren't available on

¹³ See:

http://apps.tampabay.mybriighthouse.com/channels/index.cfm?&RegionId=1&LineUpId=22&line_up_action=display_lineup

the leading cable provider in major markets such as the Tampa market area and Orlando are hindered when seeking national advertisers, upon whose revenues independent programmers rely for financial success. In addition, smaller cable companies tend to follow the programming lead of the top cable providers

39. In total, the inability of independent programmers to complete carriage agreements with MSOs like Bright House make it dramatically more difficult to for independents to reach the threshold of viewership that is required to make an independent channel financially viable – 20 million viewers.¹⁴

40. The high and usually impossible bar for independent programmers to gain carriage has significant consequences for the diversity of programming available to the public and raises costs for consumers by excluding lower cost independent programming.

41. The recourse supplied by Section 616 of the Communications Act of 1934, as amended, and the Commission's rules for complaints against MVPDs that discriminate against independent programmers are seldom used. The open-ended nature of the complaint process, with no deadlines, and the inherent difficulties of litigating against wealthy incumbent MVPDs are often cited as the reasons for the procedures' underuse.

42. The Commission recently reportedly considered reforms to the carriage access complaint process to address these deficiencies, but contrary to the expectations and hopes of the independent programmer community did not act on these reforms at its November 2007 meeting.

¹⁴ In TWC's answer to WealthTV's complaint, it denied WealthTV's assertion that 20 million viewers was required to make an independent channel viable. In its reply, WealthTV rebutted this argument and offered in rebuttal the Supplemental Affidavit of Charles Herring. (See Exhibit 13).

43. WealthTV alleges that the evidence of a pattern and practice of discrimination by Bright House is substantial and should be duly considered by the Commission in its deliberations upon and disposition of this complaint.

FIRST COUNT: VIOLATION OF 47 C.F.R. § 76.1301(c)

44. Paragraphs 1 through 43 above are repeated and realleged as it fully set forth herein.

45. 47 C.F.R. § 76.1301(c) makes it unlawful to “engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.”

46. Insofar as Bright House has refused carriage to WealthTV and refused to give WealthTV any valid, meaningful or good faith consideration of carriage or negotiation for carriage, Bright House has violated Section 76.1301(c).

47. Separately and in addition, insofar as Bright House has refused carriage to WealthTV, an independent programming service, and granted carriage to its affiliate MOJO, a substantially similar programming service, Bright House has violated Section 76.1301(c).

CONCLUSION

48. WealthTV is unable to come to any agreement regarding carriage with Bright House. It is now clear that achieving such an agreement is impossible because of Bright House's policies and practices of discrimination against independent programmers in favor of its own affiliated programming. Claimed reliance on the decisions of TWC is not exculpatory. For all of the reasons set forth above, complainant seeks the Commission's relief, as described below.

RELIEF SOUGHT

WHEREFORE, WealthTV respectfully requests, pursuant to 47 C.F.R. § 76.1301 and 76.1302, that the Commission:

- (a) Order Bright House to provide WealthTV carriage on all Bright House systems, pursuant to the terms of a carriage agreement similar to MOJO;
- (b) Order that such carriage be implemented and effectuated without delay;
- (c) Order that if one or more Bright House systems claim to lack capacity to add carriage of WealthTV, such system delete a programming service affiliated with Bright House in order to accommodate addition of WealthTV;
- (d) Order the expedited handling of this complaint including prompt referral of this complaint to an Administrative Law Judge ("ALJ") of

the Commission, with instructions that the complaint shall be resolved no later than 120 days after the date of the filing of this complaint;

(e) Order the following procedural relief in furtherance of prompt and just resolution of this complaint:

a. Bright House's prompt compliance with such documentary and interrogatory discovery as may be reasonably necessary to illuminate the decisionmaking process by which Bright House elected to grant carriage to MOJO but not to WealthTV, and the extent to which, consistent with its apparent pattern and practice, Bright House rejected independent programming in favor of programming affiliated with itself and industry partners, including other cable companies and broadcasters, upon WealthTV's motion for such discovery;

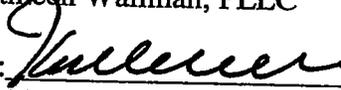
b. The ALJ's implementation of and adherence to so-called "baseball style arbitration" rules in resolution of the proceedings, and

(f) Grant such other and further relief as may be just and proper.

Dated: March 12, 2008

Respectfully submitted,

Herring Broadcasting, Inc.
d/b/a WealthTV
By Its Attorney
Kathleen Wallman, PLLC

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