

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

**Herring Broadcasting Inc., d/b/a WealthTV,** )  
 )  
 **Complainant,** )  
 )  
 v. ) **MB Docket No. 08-214**  
 ) **File No. CSR-7709-P**  
 )  
 **Time Warner Cable Inc.,** )  
 )  
 **Defendant** )

TO: Hon. Richard L. Sippel  
Chief Administrative Law Judge

**MOTION FOR MODIFICATION AND CLARIFICATION OR, IN THE  
ALTERNATIVE, FOR CERTIFICATION OF QUESTIONS**

Time Warner Cable Inc. (“TWC”), by its attorneys and pursuant to Section 1.229(b)(3) of the Commission’s rules, hereby moves for a modification and clarification of the Hearing Designation Order (“HDO”)<sup>1</sup> adopted by the Media Bureau (“Bureau”) in the above-referenced proceeding, as discussed below. TWC believes that the Administrative Law Judge (“ALJ”)<sup>2</sup> has authority to consider and grant this request. However, if the ALJ determines that he is without authority to consider, in whole or in part, the requested modification and clarification, TWC respectfully requests that the affected questions presented be certified to the Commission for review pursuant to Section 1.115(e)(3) of the Commission’s rules.

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<sup>1</sup> *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (Med. Bur., rel. Oct. 10, 2008) (“HDO”), modified by *Erratum* (Med. Bur., rel. Oct. 15, 2008) (“Erratum”).

<sup>2</sup> As of the time of filing, the Commission had not given public notice of the designation of a presiding officer for the instant proceeding. Consequently, TWC is directing this request for relief to the Chief Administrative Law Judge. See 47 C.F.R. § 0.351(e). Because the issues raised in this motion go to the very heart of the future conduct of this proceeding, TWC suggests that its request be held in abeyance until such time as a presiding officer is designated and the parties have had the opportunity to discuss the issues raised herein at a pre-hearing conference called at the earliest convenience of the presiding officer.

## DISCUSSION

### **I. BACKGROUND.**

In the HDO, the Bureau concluded that Complainant Herring Broadcasting Inc., d/b/a WealthTV (“WealthTV”) had established a *prima facie* showing that TWC has discriminated against WealthTV in violation of the Commission’s program carriage rules and ordered WealthTV’s complaint designated for hearing before an ALJ.<sup>3</sup> As modified by a subsequent Erratum,<sup>4</sup> the HDO identifies the following issues on which an ALJ is to make a recommended “determination”:<sup>5</sup>

- (a) whether the defendant has discriminated against the complainant’s programming in favor of its own programming, with the effect of unreasonably restraining the complainant’s ability to compete fairly in violation of Section 76.1301(c);
- (b) if the Administrative Law Judge determines that the defendant has discriminated against complainant’s programming in violation of Section 76.1301(c), the appropriate price, terms and conditions on which the complainant’s programming should be carried on defendant’s systems and such other remedies as the Administrative Law Judge recommends.

The HDO further directs that the ALJ to whom the matter is referred, within 60 days, “resolve all factual disputes and submit a recommended decision and remedy, if appropriate.”<sup>6</sup>

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<sup>3</sup> HDO at ¶¶ 24, 122.

<sup>4</sup> Erratum at ¶ 5.

<sup>5</sup> TWC notes that paragraph 124 of the HDO directs the ALJ to “resolve all factual disputes and submit a recommended decision and remedy, if appropriate,” whereas paragraph 122 (as modified by the October 15, 2008 Erratum), directs the ALJ to conduct a hearing “for a recommended determination.” TWC assumes that the use of the different terms “decision” and “determination” in the foregoing paragraphs was not intended to affect any party’s substantive rights, *e.g.*, the right under Section 1.276 of the Commission’s rules to file exceptions to any “initial decision.” TWC requests that the ALJ confirm our understanding on this point or, in the alternative, certify an Application for Review on this question in accordance with Section 1.115(e)(3) of the Commission’s rules.

<sup>6</sup> HDO at ¶ 124. The HDO also addresses five other program carriage complaints filed against other cable operators. Three of these complaints involve WealthTV; two involve other networks.

## **II. REQUEST FOR MODIFICATION AND CLARIFICATION OF ISSUES TO BE RESOLVED.**

The HDO, as modified by the Erratum, broadly directs the ALJ to decide whether TWC has engaged in conduct violating Section 76.1301 of the Commission's rules and to recommend an appropriate remedy should such a violation be found. TWC firmly believes that WealthTV's complaint falls far short of the *prima facie* showing that the Commission intended be made and that the Bureau's contrary conclusion is not supported by the factual evidence submitted on the record thus far, is based on an incorrect application of statutory standards, would lead to a violation of TWC's First Amendment and other constitutional rights, and is otherwise arbitrary, capricious and contrary to law. TWC understands that it will have an opportunity to fully challenge the HDO in its post-hearing Findings of Fact and Conclusions of Law, and if an adverse ruling is issued by the ALJ, such matters will continue to be subject to review by the full Commission and, ultimately, the courts.<sup>7</sup> If TWC is mistaken as to any of the above and is required to file an Application for Review at this stage to preserve all its rights to challenge the HDO, TWC respectfully requests certification in accordance with the process articulated in Section 1.115(e)(3) of the Commission's rules to allow TWC to submit such an Application for Review prior to the hearing.

In addition, the Bureau, in designating the issues to be resolved by the ALJ, has failed to track with precision the governing statute and the Commission's rules.<sup>8</sup> In order to avoid potential confusion and disputes that might delay resolution of this proceeding, TWC requests that the ALJ modify the issues to reflect the language of Section 76.1301 of the Commission's rules as follows:

- (a) whether the defendant engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of complainant's affiliation or non-affiliation in the selection, terms, or

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<sup>7</sup> See 47 C.F.R. §1.115(e)(3).

<sup>8</sup> See 47 C.F.R. § 76.1301, 47 U.S.C. § 536(a)(3).

conditions for carriage of video programming provided by complainant in violation of Section 76.1301(c);

- (b) if the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), whether mandatory carriage of complainant's programming by TWC is necessary to remedy the violation and, if so, the prices, terms, and conditions of such carriage and such other appropriate remedies as the Administrative Law Judge recommends.

TWC further requests that the ALJ confirm that the HDO's express instruction that the ALJ "resolve all factual disputes" constitutes a directive that the ALJ make *de novo* determinations not only as to the ultimate questions of law presented, but also as to any and all factual issues relevant to the resolution of those questions. The Bureau's conclusion that WealthTV has made out a *prima facie* case for relief under Section 76.1301(c) of the Commission's rules means only that, in the eyes of the Bureau, WealthTV's complaint contains factual allegations that, if proven to be true, could support a finding of a violation of Section 76.1301(c).<sup>9</sup> TWC's Answer denies the material allegations of fact on which WealthTV relies and is supported by sworn statements that directly contradict the assertions in WealthTV's pleadings. It therefore remains the task of the ALJ, after the parties have had a full opportunity to test WealthTV's allegations in the crucible of discovery and a hearing, to determine *de novo* whether WealthTV's claim is supported by a preponderance of the evidence.<sup>10</sup>

### **III. REQUEST FOR CLARIFICATION OR MODIFICATION OF SCHEDULE.**

As indicated above, the HDO requires that, within 60 days of the HDO's release (October 10, 2008), all factual disputes must be resolved, and decisions must be submitted to the Commission, in each of the six separate cases that have been designated for hearing. TWC

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<sup>9</sup> As discussed above, TWC disputes the Bureau's conclusion that WealthTV has made out a *prima facie* case.

<sup>10</sup> See, e.g., *Ramon Rodriguez and Assoc., Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2633 (1992) at ¶ 6 (direct conflicts in submitted statements can best be resolved by examination of the affiants in the hearing process). Published reports indicate that four of the Commissioners have signaled their expectation that resolution of WealthTV's complaint will receive a full administrative hearing on not just the remedy issue, but also on the underlying issue of whether a violation of the program carriage rules has occurred. See Amy Schatz and Matthew Futterman, "Decision on NFL's Battle With Comcast Hits a Snag," *Wall Street Journal*, Oct. 11, 2008.

submits that, in light of the nature of these cases and the need for extensive discovery to develop fully the factual record upon which the decisions must rest, the 60-day deadline suggested in the HDO is not merely daunting, it is unrealistic.<sup>11</sup>

An ALJ retains authority to modify the schedule of a proceeding if necessary to ensure a complete presentation of the evidence and a full consideration of the record. Specifically, Section 1.205 of the Commission's rules grants authority to an ALJ, upon good cause shown, to grant continuances and extensions of time for "any act required or allowed to be done within a specified time" unless the time for performance "is limited by statute."<sup>12</sup> The Commission's rules also grant an ALJ broad authority to "regulate the course of the hearing."<sup>13</sup>

There is no statutory requirement that this proceeding be completed within 60 days. Nor has the Commission itself conferred authority on the Bureau to bind the ALJ with such a short deadline. Indeed, in the rulemaking implementing the program carriage rules, the Commission expressly rejected a proposal that it adopt a 90-day deadline for the resolution of a complaint under those rules, finding that such a proposal was not "practicable or advisable" in light of "the complexity of the issues that may be raised in [program carriage disputes]."<sup>14</sup>

The deadline proposed by the Bureau is both inconsistent with past practice and unreasonable.<sup>15</sup> Among other things, it would raise a substantial due process issue, particularly

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<sup>11</sup> One-sixth of the time specified in the HDO will have run as of the date of this motion and a presiding officer has not yet been designated, nor has a comprehensive schedule been established for this and the other cases addressed in the HDO.

<sup>12</sup> 47 C.F.R. § 1.205.

<sup>13</sup> 47 C.F.R. § 1.243(f).

<sup>14</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642 (1993) at ¶ 32, note 52.

<sup>15</sup> Leaving aside the time needed for discovery and other pre-trial procedures, the two most recent hearing proceedings identified on the FCC's website took more than six months to complete once the hearing began. See <http://www.fcc.gov/oalj/>.

in light of the sensitive First Amendment considerations implicated by the program carriage rules (which on their face contemplate the issuance of a government mandate forcing a cable operator to add programming it has otherwise chosen not to disseminate and, possibly, to drop programming that the operator, in the exercise of its editorial discretion, would rather carry).

For example, the schedule for this proceeding must provide sufficient time for, *inter alia*, the entry of a protective order, requests for admission of facts and genuineness of documents, document discovery and review, oral depositions and written interrogatories, evidentiary motions, an exchange of witness lists, the trial itself, post-trial briefs, the certification of the trial transcript, and the issuance of a written decision by the ALJ.<sup>16</sup> WealthTV's complaint is supported by four separate declarations, including two expert witness declarations, as well as by substantial documentary evidence. TWC's pleadings also rely on declarations from numerous individuals and on documentary evidence. A reasonable period of discovery is essential to sharpening the issues and determining whether there are additional documents or witnesses with information material to the resolution of the parties' conflicting allegations on the key disputed issues.<sup>17</sup>

Moreover, the efficient dispatch of this proceeding, not to mention fundamental due process, prevents many of the above-described steps from occurring simultaneously, but rather requires a sequential process. For example, it is customary for document discovery to be

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<sup>16</sup> TWC further expects that there will be a comparable need for extensive discovery in connection with the resolution of each of WealthTV's other complaints. Even if some of the discovery and witnesses in these cases overlap, each party will need to be given an independent opportunity to obtain discovery and to examine the witnesses relevant to their case, adding significantly to the burdens imposed on the parties and the ALJ or ALJs assigned to handle these cases.

<sup>17</sup> Just a few of the issues that TWC preliminarily anticipates will be subjects of discovery include the extent to which WealthTV and MOJO are similar and whether those similarities give rise to an inference of discrimination by defendant; the development of WealthTV and MOJO and their relative success as cable programming networks; the course of negotiations between TWC and WealthTV and other programmers; the agreements WealthTV has reached (or has not reached) with other MVPDs; the reasons other MVPDs, including the two major satellite providers, decided not to enter into affiliation agreements with WealthTV; the industry experience of WealthTV's principals; the quality of WealthTV's programming; and WealthTV's market research and its contentions regarding the level of subscribership necessary for it to be a viable service.

completed prior to the notice of depositions. A reasonable period must be afforded to sift through a potential mountain of documents, correspondence and emails, thereby allowing parties to target those individuals most necessary to depose, and ensuring that such depositions are properly focused and address all material questions known to the deponent. As to the depositions themselves, the potential witnesses are dispersed across the country and would likely require considerable travel. This issue is compounded by the fact that many of the witnesses are common to all four WealthTV cases, and administrative efficiency suggests that such witnesses be deposed once, not four separate times, thus requiring accommodation not only of the witnesses' schedules, but those of multiple outside counsel, not to mention several intervening holidays.

In light of the foregoing, the ALJ can and should make clear that he is not bound by the suggested deadline in the HDO. Rather, the ALJ should set a reasonable, realistic schedule in consultation with the parties at a pre-hearing conference. Because TWC is cognizant of, and sensitive to, the desire for expeditious resolution of this proceeding (and, indeed, it is TWC's rights that are burdened by the Bureau's decision to allow this proceeding to move forward), TWC will be prepared at that time to discuss proposals for a detailed scheduling order that serves the ends of justice without causing undue delay.

#### **IV. REQUEST FOR CERTIFICATION.**

As discussed above, TWC seeks the ALJ's confirmation of our understanding that, consistent with the Bureau's conclusion that WealthTV's complaint merely establishes an as-yet unproven *prima facie* case under Section 76.1301(c) of the Commission's rules, the HDO requires that this proceeding be resolved by the ALJ on the basis of his *de novo* consideration of any and all factual issues relevant to determining whether TWC has violated Section 76.1301(c) and to the establishment of an appropriate remedy for such violation, if one is found. To the extent that the ALJ concludes that this understanding is incorrect or that the HDO otherwise

precludes the ALJ from engaging in such *de novo* consideration of all factual disputes, TWC respectfully requests, pursuant to Section 1.115(e)(3) of the Commission's rules, that the question of the scope of the HDO be certified for an immediate Application for Review to be resolved by the Commission.

In support of this request, TWC submits that a ruling to the effect that the ALJ, in carrying out the HDO's instruction that the designated hearing resolve "all factual disputes" relevant to the ultimate questions of liability and remedy, is bound by any statements made by the Bureau in concluding that the allegations in the complaint were sufficient to meet WealthTV's *prima facie* case burden, presents a controlling question of law as to which there is substantial ground for difference of opinion.<sup>18</sup> Moreover, it is undeniable that immediate consideration of this question would materially expedite the ultimate resolution of the instant proceeding since an erroneous ruling on the question, resulting in a truncated hearing, would require a remand to permit a full exploration of the facts underlying WealthTV's complaint.<sup>19</sup>

Similarly, should the ALJ conclude that it is without authority to modify the 60-day deadline specified in the HDO, TWC respectfully requests certification of the issue for review by the Commission. Again, the question of the authority of the Bureau, in the absence of any statutory provision or supporting Commission rule, to override an ALJ's power to control and manage a case under the ALJ's jurisdiction and to establish a binding timeframe for the resolution of such case, presents a controlling question of law as to which there is substantial ground for difference of opinion, immediate consideration of which would materially expedite the ultimate resolution of this proceeding.

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<sup>18</sup> See 47 C.F.R. § 1.115(e)(3).

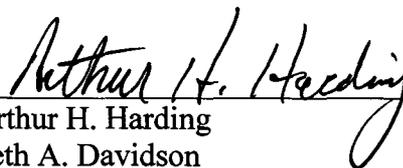
<sup>19</sup> See *id.*

**CONCLUSION**

For the foregoing reasons, TWC respectfully requests that the ALJ adopt the recommended clarifications and modifications to the HDO. However, given that the issues raised in this motion go to the very heart of the future conduct of this proceeding, TWC requests that the resolution of these issues be deferred until they can be addressed orally at a pre-hearing conference, which TWC's proposed scheduling order suggests be held on October 27, 2008, or sooner at the convenience of the ALJ.

Respectfully submitted,

**TIME WARNER CABLE INC.**



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Dated: October 20, 2008

**CERTIFICATE OF SERVICE**

I, Glenda V. Thompson, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Motion For Modification And Clarification Or, In The Alternative, For Certification Of Questions" were served this 20th day of October, 2008, via first-class mail, postage prepaid, as well as via email, upon the following:

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