

October 20, 2008

**FILED/ACCEPTED**

**OCT 20 2008**

Federal Communications Commission  
Office of the Secretary

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: Herring Broadcasting, Inc. d/b/a WealthTV v. Cox Communications, Inc.  
FCC File No. CSR-7829-P, MB Docket No. 08-214

Dear Ms. Dortch:

Section 76.7(g)(2) of the Commission's regulations and Paragraph 131 of the Media Bureau's Hearing Designation Order<sup>1</sup> in the above referenced proceeding requires Cox Communications, Inc. ("Cox") to make an election to resolve the complaint proceeding "through alternative dispute resolution procedures or to proceed with an adjudicatory hearing." Although Cox certainly would entertain non-binding alternative dispute resolution ("ADR") to assist the parties in the resolution of this matter, Herring Broadcasting, Inc., d/b/a/ WealthTV ("WealthTV"), unfortunately has declined that opportunity and has elected to proceed with an adjudicatory hearing before an administrative law judge.<sup>2</sup> Consequently, Cox is prepared to proceed with an adjudicatory proceeding pursuant to a schedule to be established by the designated ALJ.

In addition to making an election, WealthTV's election letter in this proceeding made several improper requests to the Media Bureau: (i) to assign four separate WealthTV complaints against different cable operator defendants to one ALJ, (ii) to consolidate these multiple complaints into one proceeding, (iii) to order the cable operator defendants to preserve all discoverable materials; and (iv) to order the defendant cable operators "not to fill MOJO's channel position until resolution of these proceedings so as to preserve a comparable carriage remedy." WealthTV has provided no legal support for these requests, which are procedurally flawed and cannot be justified under Commission precedent or applicable law, including the United States Constitution.

WealthTV's procedural requests (e.g., assignment of cases to an ALJ, consolidation of WealthTV complaints, discovery procedures) are not properly directed to the Media Bureau because this proceeding is now within the jurisdiction of the Chief Administrative Law Judge.

<sup>1</sup> *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (October 10, 2008), as amended, Erratum (October 15, 2008) (collectively, the "HDO").

<sup>2</sup> See Letter to Monica Desai, Chief, Media Bureau from Kathleen Wallman, Esq., dated October 14, 2008, in FCC File No. CSR-7829-P.

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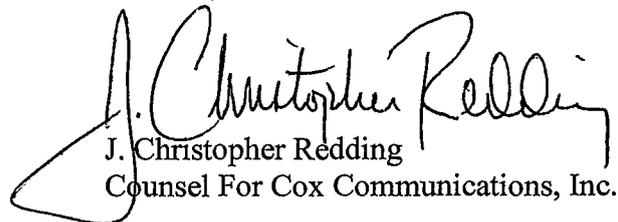
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The proceeding has been designated for hearing,<sup>3</sup> and there has not yet been a designation of an ALJ. Once an ALJ has been designated by the Chief Administrative Law Judge, the ALJ will have broad authority to, among other things, “[r]egulate the course of the hearing.”<sup>4</sup>

For the same reasons, WealthTV’s request to the Media Bureau that Cox be directed “not to fill MOJO’s channel position until resolution of these proceedings” is not properly before the Media Bureau or the Commission. We note in addition that this request finds no support whatsoever under the Commission’s regulations and policies, and it would violate the First Amendment to the United States Constitution. The HDO made clear that there has been no final determination that Cox violated any legal requirements or that WealthTV is entitled to any form of relief. There is no precedent, for the Commission, much less the Media Bureau, to require a cable operator to “reserve a channel,” blocking its use for other programming, before a final order is issued by the Commission definitively establishing a violation and remedy. In addition, such an action would constitute an unconstitutional prior restraint on the cable operator’s editorial discretion.<sup>5</sup>

Sincerely,



J. Christopher Redding  
Counsel For Cox Communications, Inc.

cc: Monica Desai, Esq. (via hand delivery)  
Kris A. Monteith, Esq. (via hand delivery)  
Steven Broeckaert, Esq. (via hand delivery)  
Kathleen Wallman, Esq.

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<sup>3</sup> See HDO, ¶ 130 (“**IT IS ORDERED** that Herring Broadcasting, Inc. d.b.a. WealthTV’s Complaint against Cox Communications, Inc. is **DESIGNATED FOR HEARING . . .**”).

<sup>4</sup> See 47 C.F.R. §§ 0.351(f), 1.243 (2007).

<sup>5</sup> See, e.g., *Near v. Minnesota*, 283 U.S. 697, 714 (1931) (any system of prior restraint of expression bears a heavy presumption against its constitutional validity, and the government carries a heavy burden to justify enforcing any system of prior restraint).