BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

Herring Broadcasting Inc., d/b/a WealthTV,	)	
	)	
Complainant,	)	
	)	**MB Docket No. 08-214**
v.	)	**File No. CSR-7822-P**
	)	
Bright House Networks, LLC	)	
	)	
Defendant	)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Arthur I. Steinberg
Administrative Law Judge

REPLY TO OPPOSITION TO REQUEST FOR MODIFICATION AND CLARIFICATION OF HDO OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF APPLICATION FOR REVIEW

Bright House Networks, LLC ("Bright House"), by its counsel, hereby replies to the consolidated Opposition of Herring Broadcasting Inc., d/b/a WealthTV ("WealthTV") to, among other things, Bright House's "Request For Modification and Clarification of HDO or, in the Alternative, for Certification of Application for Review" filed on October 20, 2008 (the "Bright House Clarification Request").

The purpose of the Bright House Clarification Request was threefold: to assure that the issues to be addressed in the hearing include all of those set forth in the relevant FCC regulation,[1] regardless of whether they were specifically identified in the Hearing Designation Order

[1] Section 76.1301(c) of the Commission's Rules, 47 C.F.R. § 76.1301(c).

("HDO");[2] to confirm that the hearing's determination of all of those issues would be *de novo*, based solely on the evidence admitted at the hearing; and to correct the impossibly hasty 60-day timetable for decision provided for by the HDO. In the interest of avoiding repetitive sets of papers, Bright House adopts the position and arguments of Time Warner Cable in its "Reply" filed on this date and does not re-state them here.[3]

In addition to the arguments advanced by Time Warner Cable, however, Bright House wants to alert the Administrative Law Judge ("ALJ") to a special concern that Bright House has about being included in this case: that, thus far, Bright House appears to have been pulled along in the slipstream of the other defendants in the WealthTV cases, rather than had its particular facts and situation subjected to the detailed scrutiny that the law and principles of due process require.

Among other things, the statute and the Commission's regulation require that WealthTV show impairment, i.e., that the "effect of [the alleged refusal to carry] is to unreasonably restrain the ability of [WealthTV] to compete fairly."[4] Bright House serves approximately two percent of the multichannel television households in the United States, and neither of the media markets in which Bright House has most of its cable systems are in the Top Ten.[5] So, unless the statute and regulation are interpreted to mean that <u>every</u> partially vertically-integrated multichannel video programming distributor, no matter how small on a national scale, is required to carry a

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[2] *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, Hearing Designation Order*, DA 08-2269, released October 10, 2008, as modified by *Erratum* released October 15, 2008.

[3] *See* Time Warner Cable Inc., "Reply to Opposition to Motion for Modification and Clarification or, in the Alternative, for Certification of Questions," MB Docket No. 08-214, filed November 3, 2008, included herewith as Attachment 1.

[4] Section 616(a)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 536(a)(3) (the "Act"), and Section 76.1301(c) of the Commission's Rules, 47 C.F.R. § 76.1301(c).

[5] Multichannel households are those households that subscribe either to cable television or to one of the Direct Broadcast Satellite services, DirecTV or Dish Network.

program service by a non-related entity that is substantially similar to a program service that it carries from a related entity,[6] it would seem very unlikely that WealthTV could carry its burden on the impairment part of the case with respect to Bright House.

Despite this, the HDO is completely bereft of evidence to support this element of the case with respect to Bright House. Indeed, in support of the conclusion of impairment, the HDO (at note 118) cites an affidavit from WealthTV's expert that never once even mentions Bright House; and it cites some conclusory allegations and statements from Bright House's principals and its lawyers in their papers, neither of which alleges facts that show – or are claimed to show – that the non-carriage of WealthTV on Bright House's cable systems impairs WealthTV's ability to compete.[7] In short, starting with WealthTV's Complaint and continuing with the HDO, Bright House's accusers seem largely to have assumed – rather than alleged, much less proved – the existence of facts that satisfy the essential statutory requirement to show "unreasonable restraint" with respect to Bright House in order to find liability against it.

It is for that reason that Bright House views it to be imperative that no material issue – as defined by the statute and the Commission's regulations[8] – be overlooked in this hearing, that no conclusion asserted in the HDO be accepted *a priori* in this hearing and that the smashing together of three distinct cases, with a total of seven parties, into one breakneck-paced hearing – as suggested by the HDO – be avoided at all costs. Other than "because the HDO says so," WealthTV has advanced no argument that would justify such a hasty and ill-considered action on the part of the ALJ. The alternative to such an injustice is not to keep WealthTV's status

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[6] For purposes of argument in this paper only, Bright House assumes the substantial similarity of the WealthTV program service to the "MOJO" program service. In reality, there is a substantial distinction between the two, and the fact that Bright House does not carry the WealthTV service is unrelated to any aspect of the MOJO service.

[7] *See* HDO at ¶ 53, n.222.

[8] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

indeterminate by dragging this case on for years, but simply to set aside a reasonable amount of time – a matter of months –so that these cases will be tried with a due regard for the procedural rights of all of the parties.

For these reasons, and for all the reasons stated in the "Reply" of Time Warner Cable, Bright House Networks urges the ALJ to grant its "Clarification Request."

Respectfully submitted,

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Dated: November 3, 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 "Reply to Opposition to Request for Modification and Clarification of HDO or, in the Alternative, for Certification of Application for Review" were served this 3rd day of November, 2008, via email, upon the following:

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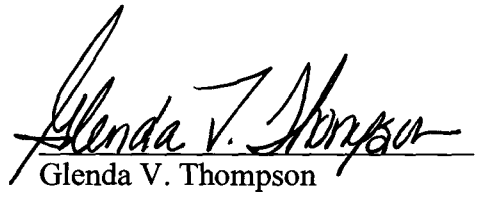

Glenda V. Thompson

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Attachment 1

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Arthur I. Steinberg
Administrative Law Judge

REPLY TO OPPOSITION TO MOTION FOR MODIFICATION AND CLARIFICATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF QUESTIONS

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Dated: November 3, 2008

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SUMMARY

Time Warner Cable Inc. ("TWC") has filed a motion (the "TWC Motion") requesting that the ALJ exercise his authority in this proceeding to: (1) modify and clarify the issues set forth in the HDO to ensure that they accurately reflect the statutory provisions on which WealthTV's complaint is based; (2) conduct the hearing based on a *de novo* review of all factual and legal issues; and (3) adjust the HDO's unreasonable 60-day timetable for resolving all factual matters and submitting decisions to the Commission relating to six separate complaints. While WealthTV has opposed the TWC Motion, its arguments fail to withstand scrutiny.

First, it is unquestioned that the hearing will center on whether WealthTV's alleged facts, if proven to be true, amount to a violation of the Communications Act and the Commission's Rules. Accordingly, it is essential that the ALJ not rely on the Media Bureau's mere "paraphrasing" of the standards. Second, *de novo* review is crucial in this case because the alleged *prima facie* case advanced by WealthTV is untested by witness cross examination and TWC's rebuttal evidence and, in any event, the HDO expressly directs the ALJ to "resolve all factual disputes." Third, the 60-day deadline plainly is unworkable, given that only 40 days would remain for the resolution of all pre-trial matters, the conducting of one or more trials, and the completion of post-trial items, including the issuance of written decisions relating to six separate complaints involving four separate cable operators and three separate cable networks. WealthTV is unable to demonstrate that the ALJ lacks the authority to modify the schedule as necessary, and moreover cannot justify the need for a precipitous rush to judgment.

The ALJ holds ample authority to grant the relief requested by TWC. However, if the ALJ is unsure, these matters warrant immediate certification for an Application for Review to be acted upon by the full Commission.

BEFORE THE

Federal Communications Commission

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Defendant	)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Arthur I. Steinberg
Administrative Law Judge

REPLY TO OPPOSITION TO MOTION FOR MODIFICATION AND CLARIFICATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF QUESTIONS

Time Warner Cable Inc. ("TWC"), by its counsel, hereby replies to the Opposition ("Opposition") filed by Herring Broadcasting Inc., d/b/a WealthTV ("WealthTV") to TWC's Motion for Modification and Clarification or, in the Alternative, for Certification of Questions ("TWC Motion"). The TWC Motion requests that the Administrative Law Judge assigned to preside over this proceeding ("ALJ" or "Presiding Officer"): (1) modify and clarify the issues that the Media Bureau designated for hearing pursuant to the Hearing Designation Order[1] to accurately reflect the statutory provisions on which WealthTV's complaint[2] is based; (2) confirm

[1] *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, Hearing Designation Order*, DA 08-2269, released October 10, 2008, as modified by *Erratum* released October 15, 2008 ("HDO").

[2] Carriage Agreement Complaint of Herring Broadcasting, Inc., d/b/a WealthTV Against Time Warner Cable Inc., MB Docket 08-214, filed December 20, 2007 (the "WealthTV Complaint").

that the hearing will involve a *de novo* review of all factual and legal issues, regardless of whether such issues have been addressed in the HDO; and (3) recognize that it is within the ALJ's sound discretion to adjust the 60-day deadline in the HDO for resolving all factual matters and submitting decisions to the Commission relating to six separate sets of circumstances and that it is unrealistic, unmanageable and infeasible to adhere to that deadline given the complexity of these cases.

ARGUMENT

WealthTV has summarily opposed TWC's Motion in this proceeding, adopting the "arguments, reasoning and authorities" in oppositions filed by NFL Enterprises, LLC ("NFL") and TCR Sports Broadcasting Holding, L.L.P. ("TCR") in response to requests for certification filed by Comcast with respect to those portions of the HDO that address complaints by NFL and TCR unrelated to WealthTV's Complaint against TWC.[3] Without citation to any authority of its own, WealthTV argues that the sixty-day time limit specified in the HBO is "fair, manageable and feasible," that there is no need to clarify the issues designated for hearing simply because they loosely (albeit incompletely) "paraphrase" the statutory standard, and that the determinations leading to the Media Bureau's *prima facie* case finding "should be adopted" by the ALJ, *i.e.,* that he should ignore the instruction in the HDO to "resolve all factual disputes." As demonstrated below, WealthTV's positions are without merit.

I. The Issues Designated For Hearing Must Be Modified To Track The Language Of The Communications Act And The Commission's Rules.

Section 616(a)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 536(a)(3) (the "Act"), and Section 76.1301(c) of the Commission's Rules, 47 C.F.R. § 76.1301(c), explicitly set forth the test that must be met for relief with respect to a program

[3] While WealthTV relies heavily on the "arguments, reasoning and authorities" cited by NFL and TCR, WealthTV neglected to attach those pleadings to its Opposition, nor did WealthTV, NFL or TCR serve them on TWC.

carriage complaint. Section 76.1302(g) of the Commission's Rules, 47 C.F.R. § 76.1302(g), establishes the remedies that may be awarded to aggrieved parties in the event that there is an adjudicated violation of Section 76.1301(c). It is unquestioned that Paragraph 122 of the HDO, as modified by the Erratum, does not re-state all of the elements specified in Sections 76.1301(c) and 76.1302(g) of the Commission's Rules. TWC's Motion, therefore, is designed to ensure that the issues framed for decision encompass all of the elements WealthTV must now prove under the relevant statutory and regulatory provisions in order to obtain relief.

Although WealthTV argues that a "paraphrasing" of the Commission's Rules should suffice, that argument is undermined by its acknowledgment that "the statute governs."[4] The NFL opposition that WealthTV adopts by reference makes a similar concession, asserting that the HDO has framed the issues in a manner that is not inconsistent with the statutory standard.[5] Both of these arguments miss the point: the question is one of completeness, not consistency. Even the Commission's own Enforcement Bureau recognized that Paragraph 122 of the HDO (as modified by the Erratum) may have "fail[ed] to precisely capture, track, or otherwise reflect the language contained in Section 76.1301(c) or inartfully emphasize[d] one remedy over another."[6] Accordingly, the Enforcement Bureau stipulated that the ALJ has the discretion to modify each of the issues to fully capture the language of the statute and regulations.[7]

In order to conduct an administratively efficient hearing that forestalls arguments regarding the scope of the issues to be litigated, it is crucial that the designated issues be

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[4] Opposition at 2.

[5] Opposition to Comcast Request for Certification to Commission, MB Docket 08-214, filed by NFL October 27, 2008 ("NFL Opposition"), at 4. TCR's opposition in this proceeding ("TCR Opposition") did not address the issue.

[6] Enforcement Bureau Comments on Issues Designated for Hearing, MB Docket 08-214, filed October 27, 2008 ("October 27 Enforcement Bureau Comments"), at 3.

[7] *Id. See also, e.g., Rainbow Broadcasting Company For an Extension of Time to Construct and For an Assignment of its Construction Permit for Station WRBW(TV), Orlando, Florida, Erratum*, 1995 FCC LEXIS 8015, released December 15, 1995 (erratum issued by FCC Deputy General Counsel correcting certain designated issues to reflect the appropriate sections of the Commission's Rules).

established in advance with specificity. Therefore, as described in the TWC Motion, the ALJ should set forth the issues designated for hearing 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 conditions for carriage of video programming provided by complainant in violation of Section 76.1301(c); and

(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.

II. The ALJ's Determinations On The Questions Of Law And Findings Of Fact Must Be *De Novo*.

The TWC Motion sought confirmation from the ALJ that the HDO's instruction requiring the ALJ to "resolve all factual disputes" constituted a directive that the ALJ make *de novo* determinations as to both the legal and factual issues raised by WealthTV's Complaint. WealthTV, however, contends that the ALJ not only "may rely" on various preliminary findings made by the Media Bureau in the HDO, but also should formally adopt them. Apparently, WealthTV would have the ALJ deny TWC the opportunity to test any evidence offered to support the HDO's findings through cross-examination of WealthTV's declarants or the presentation of rebuttal evidence.[8] WealthTV's position not only misreads the HDO, but also is inconsistent with the ALJ's express ruling that WealthTV (and NFL and TCR) shall have the burden of proceeding with the introduction of evidence and the burden of proof with respect to the issues designated for hearing under the HDO.[9]

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[8] Opposition at 3.

[9] *Order of Arthur I. Steinberg*, FCC 08M-44, MB Docket 08-214, released October 23, 2008 ("October 23 Order"), at 2. TWC notes that on October 31, 2008, TCR filed a "Notice of Supplemental Authority" in its proceeding against Comcast, in an apparent attempt to convince the ALJ that his October 23 Order has improperly assigned the burden of proof. The non-final Media Bureau Order attached to TCR's filing has no impact on this proceeding.

The HDO merely reflects the Media Bureau's determination that, based on the untested allegations in the WealthTV Complaint, a *prima facie* case has been established sufficient to avoid summary dismissal by the Commission staff, but that resolution of the legal and factual disputes presented by the parties' pleadings requires referral of such questions to be tested in the crucible of an administrative hearing. Although TWC maintains that the Media Bureau misapprehended the degree of proof required to make out a *prima facie* case, the HDO correctly concludes that the ALJ must now "resolve all factual disputes," without regard to any preliminary discussion of such matters in the HDO. Accordingly, pursuant to the October 23 Order, it remains the task of the ALJ to determine *de novo* whether WealthTV's underlying claim is supported by a preponderance of the evidence. As aptly put at the October 27, 2008 Pre-Hearing Conference, the case is now an "empty box." WealthTV has the burden to introduce evidence in an effort to prove its claim for relief, with a full opportunity for TWC to present any rebuttal evidence. The fact that the Media Bureau concluded (erroneously) that WealthTV had made out a *prima facie* case is of no moment to the ALJ's *de novo* determination of all legal and factual issues.

WealthTV's Opposition demonstrates vividly the need for a *de novo* determination. The WealthTV Complaint rests almost entirely on its claim that its programming is "substantially similar" to programming offered on the MOJO network in which TWC holds a minority ownership interest (at least until MOJO ceases operations on December 1, 2008). TWC submitted extensive analysis and expert testimony to the Media Bureau demonstrating that these

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Indeed,, it must be noted that in any arbitration proceeding involving a Regional Sports Network that is conducted pursuant to the condition adopted in *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable Inc., et al.*, Memorandum Opinion and Order, MB Docket No. 05-192, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*"), TWC is entitled to *de novo* review of the arbitrator's decision by the full Commission, not the Media Bureau, and TWC intends vigorously to pursue all avenues of relief. In any event, if TCR objected to that portion of the ALJ's October 23 Order regarding the burden of evidence production and the burden of proof, it should have sought leave to file an interlocutory appeal pursuant to Section 1.301(b) of the Commission's Rules, 47 C.F.R. § 1.301(b). However, the time for filing such appeal has expired and thus TCR's objection is untimely.

two services are not "substantially similar" at all, and that even a demonstration of substantial similarity would not prove that TWC engaged in discrimination based on affiliation under Section 616(a)(3) of the Communications Act. The HDO dismissively mischaracterizes TWC's position as appearing "to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination."[10]

The HDO misstates TWC's argument entirely. More significantly, however, WealthTV has the burden at the hearing to demonstrate actual discrimination on the basis of affiliation. If WealthTV seeks to introduce evidence relating to alleged similarities between the WealthTV and MOJO programming in an effort raise an inference that TWC might have had an incentive to discriminate, TWC will be prepared to introduce rebuttal evidence. If, as was the case in the WealthTV Complaint, WealthTV is left with nothing more than a mere inference of a possible motive for discrimination -- without even a scintilla of evidence of discrimination based on affiliation -- it will be up to the ALJ to reach the legal conclusion that WealthTV is not entitled to relief. The Media Bureau's observations about the pleadings, made solely in the context of determining whether WealthTV made out a *prima facie* case, simply are not relevant to the ALJ's determination on the ultimate issue of whether TWC discriminated on the basis of affiliation, and if so, whether WealthTV's ability to compete fairly has been unreasonably restrained thereby.

WealthTV also quotes the HDO's distorted characterization of TWC's arguments in its response to WealthTV's Complaint relating to competitive harm.[11] Nevertheless, WealthTV does not dispute that, despite the inaccurate "paraphrasing" of the statutory standard in the HDO, WealthTV must prove all elements of its case in order to obtain relief.[12] In other words,

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[10] HDO at ¶ 17.

[11] Opposition at 2, *citing* HDO at ¶ 19.

[12] *Id.* at 2.

WealthTV now has the burden under the HDO to prove that TWC discriminated against WealthTV based solely on its lack of an ownership interest, and that any such discrimination has unreasonably restrained WealthTV's ability to compete fairly.[13] To the extent that WealthTV seeks to address its purported "competitive harm" by attempting to show that a new programming service must attract 20 million subscribers to achieve competitive viability, TWC must be allowed to submit rebuttal evidence, for example, to show that WealthTV could obtain 20 million customers without carriage from TWC (or, for that matter, without any of the other cable operators that are a part of this proceeding), that other programmers are viable with less than 20 million customers, and that a 20 million subscriber threshold makes no sense for a high-definition programming service like WealthTV because the universe of multichannel video programming distributor ("MVPD") customers subscribing to high-definition service is only a fraction of all MVPD subscribers.

In short, as is apparent from WealthTV's strained view of the legal import of the HDO's *prima facie* case determination, it is essential for the ALJ to conclusively confirm that the hearing will involve a *de novo* review of all factual and legal issues, regardless of whether or how any such issues may have been addressed in the HDO.

III. The Sixty-Day Time Limit Is Unworkable.

WealthTV (directly and through its adoption of arguments made by NFL and TCR) opposes any modification in the 60-day deadline for the complete resolution of the issues addressed in the HDO, including a recommendation as to remedy. WealthTV argues that the 60-day time period for resolving this proceeding (one-third of which had run as of the date that the ALJ suspended all procedural deadlines in this proceeding)[14] is "fair, manageable and feasible"

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[13] *See* 47 U.S.C. § 536(a)(3).

[14] *Order of Arthur I. Steinberg*, FCC 08M-45, MB Docket No. 08-214, released October 30, 2008 ("October 30 Order").

and that any extension of that deadline would have an "adverse consequence" for WealthTV.[15] WealthTV's Opposition fails to rebut the showing made by the TWC Motion that the ALJ is free to control the course of this proceeding consistent with the ends of justice and due process, and without regard to the arbitrary 60-day timeframe suggested in the HDO.

First, WealthTV has failed to proffer any direct authority to refute the proposition that a Commission ALJ holds ample discretion to modify the schedule of a proceeding if necessary to ensure a complete presentation of the evidence and a full consideration of the record.[16] As the TWC Motion demonstrated, the Commission's Rules grant an ALJ broad authority to "regulate the course of the hearing"[17] and allow 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."[18] The "good cause shown" here is the necessity of adjudicating six distinct cases (the four separate WealthTV complaints against four cable operators, and the separate NFL and TCR complaints against Comcast), each of which has its own peculiar facts and which do not have all parties in common. It is beyond dispute that there is no statutory requirement that this proceeding be completed within 60 days. Nor is WealthTV able to demonstrate that the Commission itself has delegated authority to the Bureau

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[15] Opposition at 2. *See also,* NFL Opposition at 13; TCR Opposition at 8.

[16] Indeed, by the October 30 Order, the ALJ already has exercised his authority to regulate the course of the hearing, pursuant to Section 1.243(f) of the Commission's Rules, by suspending the previously-announced schedule for these cases. An ALJ clearly has discretion to suspend procedural dates established in an HDO. *See Robert D. Jenecek*, Decision, 8 FCC Rcd 8423 (Rev. Bd. 1993), at ¶ 4 (describing ALJ Order suspending a requirement, provided in the HDO, that a party submit a curative amendment to its broadcast application within 30 days following the HDO, while the parties discussed a possible settlement). *See also, T.M. Raburn, Jr.*, Memorandum Opinion and Order, 22 FCC 2d 267 (Rev. Bd. 1970) (ALJ determinations on scheduling matters cannot be overturned in the absence of a clear abuse of discretion by arbitrary and capricious action); *WMOZ, Inc.*, Memorandum Opinion and Order, 5 RR 2d 732 (Rev. Bd. 1965).

[17] 47 C.F.R. § 1.243(f). Similarly, the Commission's Rules provide that, while the Commission may specify the day on which "any hearing is to commence," the presiding officer thereafter has absolute discretion to "specify the days on which subsequent hearing sessions are to be held." 47 C.F.R. §§ 1.253(a), (b). *See also, Industrial Business Corp.*, Decision, 47 FCC 2d 891 at ¶ 6 (Rev. Bd. 1974) (ALJ "has plenary authority to regulate the course of the hearing..."); *Selma Television, Inc.*, Memorandum Opinion and Order, 3 FCC 2d 63 (1966).

[18] 47 C.F.R. § 1.205.

to bind the ALJ with such a short deadline.[19] Simply put, there are no impediments to the ALJ extending the 60-day deadline and every reason not to embark upon such a precipitous rush to judgment.

Second, in contending that the 60-day deadline is "fair, manageable and feasible," WealthTV would have the ALJ ignore the size and complexity of the hearing proceeding mandated by the Media Bureau involving four different cable operators and three different cable networks. The NFL and TCR complaints do not involve TWC, Bright House Networks, LLC or Cox Communications, Inc. at all. Likewise, the NFL and TCR complaints have nothing to do with the facts of the WealthTV Complaint. If the ALJ allocated a total of eight eight-hour days for trial, as was indicated at the Pre-Hearing Conference held on October 27, 2008, then only about five hours could be allotted to each party in each complaint to introduce exhibits and conduct direct and cross examinations of witnesses and experts. Additional time doubtless would be necessary to address objections, admission of documentary evidence, witness scheduling issues and related matters. There simply would not be enough time for each party to put forth its case in a manner satisfying fundamental due process standards.

As the TWC Motion indicated, adhering to the Media Bureau's disastrously short timeframe for resolving this proceeding (at least 20 days of which already have run) would raise substantial due process issues, particularly in light of the sensitive First Amendment considerations implicated by the program carriage rules (which, as the TWC Motion demonstrated, on their face contemplate the issuance of a government mandate forcing a cable

[19] TWC notes that in "Consolidated Comments" filed on October 31, 2008, the Enforcement Bureau claims that the Media Bureau has the delegated authority to establish a 60-day deadline for this proceeding, citing *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989 (2006) ("*Comcast/MASN HDO*"). As the October 27 Enforcement Bureau Comments conceded, comments in response to the TWC Motion were due on October 30, 2008, and thus its October 31, 2008 "Consolidated Comments" were untimely and should be disregarded. In any event, as TWC explains at n. 24 *infra*, the *Comcast/MASN HDO* provides no authority for the Bureau to impose an arbitrary and unreasonable hearing schedule on the ALJ.

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).[20] Even without discovery, the schedule for this proceeding must provide sufficient time for, *inter alia*, entries of protective orders, requests for admission of facts and genuineness of documents, introduction of exhibits, exchanges of witness lists, the trial(s) itself/themselves (each of which is likely to involve direct testimony and cross-examination of up to ten or more witnesses), post-trial briefs, preparation of trial transcripts, and issuance of written decisions by the ALJ.[21]

In this regard, special note must be taken of the contention by NFL and TCR that a program carriage complaint arbitration proceeding between TWC and MASN was concluded within 75 days after the appointment of an arbitrator.[22] That argument misstates the circumstances surrounding the TWC/MASN proceeding. First, that matter involved an arbitration under the auspices of the *Adelphia Order*, which procedure was intended to be more expeditious than the full-blown trial-type hearing under the Administrative Procedure Act that is required here.[23] Second, the arbitration demand in that matter was filed on June 5, 2006 and an order on only the first phase of the bifurcated proceeding (limited to the issue of liability) was

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[20] While WealthTV asserts it would suffer an "adverse consequence" if there is any delay in the 60-day timetable, it offers absolutely no support for that claim. For example, WealthTV does not contend, or offer any proof, that it will be unable to remain in business if this proceeding is not resolved by December 10, 2008. WealthTV's unsubstantiated assertion of harm is not sufficient to justify setting aside the important First and Fifth Amendment considerations that would be presented by a rush to judgment in this proceeding. In any event, WealthTV's Complaint was pending before the Media Bureau for nearly a year before the HDO was issued, indicating that the case was sufficiently complex to warrant lengthy staff review and not sufficiently urgent to require immediate action. Thus, it is irrational for the Media Bureau to have given ample consideration prior to issuance of the HDO, and then expect the ALJ to engage in an unreasonable rush to judgment.

[21] 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]." *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.

[22] NFL Opposition at 10; TCR Opposition at 11, note 9.

[23] *See Adelphia Order* at ¶ 191; *see also, Adelphia Order*, Statement of Commissioner Robert M. McDowell (expressing expectation that any arbitration required by the Adelphia Order "will be concluded swiftly and at minimal cost.").

not issued by the arbitrator until January 7, 2007 – some *seven months* after the commencement of the case. The arbitrator who rendered this initial decision subsequently was disqualified, and a new arbitrator was appointed to re-decide the proceeding. While the second arbitrator was able to issue a ruling on both liability and relief in 75 days, it was only because the parties had already taken discovery and presented their evidence on liability before the original arbitrator. In short, it is simply incorrect to assert that the TWC/MASN case provides any precedent for completing even a single program carriage hearing in 75 days. Here, the challenges involved in adjudicating six program carriage cases in a fraction of the more than nine months required to litigate the TWC/MASN matter are insurmountable.[24]

TCR and NFL also both misleadingly (and incorrectly) cite to the Commission's order in *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*.[25] In particular, TCR's assertion that the *1990 Hearing Expedition Order* stands for the proposition that "[t]ime limits on the ALJ are permissible,"[26] in an effort to imply that a Bureau-issued HDO can set any arbitrary deadline for the completion of a hearing, stretches the boundaries of legitimate advocacy. TCR fails to quote the entire relevant passage, or even to

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[24] TCR also cites to the fact that in a program carriage dispute involving Comcast and MASN, the full Commission (not the Media Bureau) ordered that an ALJ return a determination on the designated issues in 45 days. TCR Opposition at 10-11, citing *Comcast/MASN HDO, supra*. However, the 2006 Comcast/MASN proceeding never went to the ALJ – the parties elected to resolve it through private negotiations. Thus, there is no possible way to assess whether, had the proceeding been conducted before an ALJ, it could have been resolved in the specified time or whether the ALJ would have extended the deadline in order to ensure a full and fair presentation of evidence. Furthermore, the 2006 Comcast/MASN dispute (like the TWC/MASN dispute discussed above) involved only one complainant and one defendant, unlike the instant proceeding, which, as presently constituted, requires a single ALJ to decide six complaints involving three complainants and four defendants. A period that is just one-third longer than the time limit proposed by the Commission for resolution of the 2006 Comcast/MASN proceeding is insufficient and unmanageable in order for the ALJ to hear evidence and make decisions involving six separate sets of factual circumstances. In any event, the *Comcast/MASN HDO* was purely an interlocutory order that, due to settlement, never ripened into an actual decision, and thus has limited precedential value.

[25] 6 FCC Rcd 157 (1990) ("*1990 Hearing Expedition Order*"), which TCR incorrectly cites as 5 FCC Rcd 157 (1990) and NFL incorrectly cites as 6 FCC Rcd 157 (1991).

[26] TCR Opposition at 7. In apparent recognition of the incomplete nature of its quoted language, TCR elaborated in a footnote that "the only exception was where deadlines 'unduly interfere' with a judge's independence." *Id.* at n. 10. Again, however, TCR failed to include the crucial point that deadlines are not permissible where they "unduly

indicate through ellipses that critical language has been dropped. The actual language is as follows:

> Time limits on the ALJs are permissible so long as they do not unduly interfere with a judge's independence to control the course of the proceeding, *Butz v. Economou*, 438 U.S. 478, 513 (1978) or subject the judge to performance appraisals.[27]

As shown in TWC's Motion and again herein, an arbitrary 60-day deadline would unquestionably interfere with the ALJ's independence to control the course of the six complex proceedings at issue here. More importantly, the *1990 Hearing Expedition Order* merely established non-binding time guidelines, not immutable deadlines. And even under the expedited process recommended therein, the Commission recognized that a "routine" hearing would require nine months from HDO to initial decision.[28] As should be readily apparent to the Presiding Officer even at this early stage, the six cases involved here are far from routine.

In light of the foregoing, the ALJ can and should make clear that he is not bound by the suggested deadline in the HDO. TWC remains prepared to discuss proposals for a detailed scheduling order that serves the ends of justice without causing undue delay. In the event that the ALJ is unsure whether he has the authority to revise the 60-day time limit, TWC respectfully requests, pursuant to Section 1.115(e)(3) of the Commission's Rules, 47 C.F.R. § 1.115(e)(3), that such question be certified for an immediate Application for Review to be resolved by the full Commission. As provided in the TWC Motion, the question of authority of the Media 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 may present a controlling question of law as to which

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interfere with a judge's independence <u>to control the course of the proceeding</u>" (emphasis supplied), which of course goes to the heart of the matter here.

[27] *1990 Hearing Expedition Order* at ¶ 40, n. 26.

[28] *Id.* at ¶ 39.

there is substantial ground for difference of opinion, immediate consideration of which would materially expedite the ultimate resolution of this proceeding.

CONCLUSION

For the foregoing reasons, the ALJ should: (1) clarify the issues designated for hearing by the Media Bureau to ensure that they track the language set forth in the statute and related Commission regulations; (2) undertake a *de novo* review of all factual and legal issues associated with those six proceedings, and (3) exercise authority to extend the 60-day time limit as necessary to resolve all factual matters and submitting decisions to the Commission relating to six separate sets of circumstances involved in these cases.

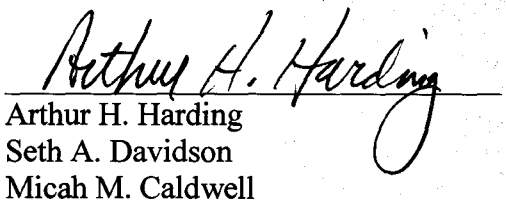
As demonstrated in the TWC Motion, the ALJ has full authority to take the actions recommended above. Indeed, there is no serious dispute that the ALJ may refine the two ultimate issues designated for hearing as proposed by TWC, and the actions taken in these proceedings to date demonstrate the ability and willingness of the Presiding Officer to extend any preliminary deadlines and to undertake a *de novo* examination of all legal and factual issues involved in these cases. Nevertheless, if the ALJ harbors any doubt as to his ability to grant the relief requested by TWC in full, this matter warrants immediate certification for an Application for Review to be acted upon by the full Commission (and not pursuant to delegated authority).

It is evident from the vociferous (albeit misguided) nature of the oppositions filed by WealthTV, NFL and TCR that there is a substantial difference of opinion as to the controlling legal issues involved. Moreover, as noted in the TWC Motion, immediate consideration of these questions would materially expedite the ultimate resolution of the instant proceeding. Indeed, if the ALJ fails to give *de novo* consideration to all legal and factual issues, or if an unreasonably truncated proceeding prevents parties from fully presenting and testing all relevant evidence and testimony, such error would necessitate an entirely new hearing. Thus, given the fundamental

nature of these questions, to the extent the ALJ determines that certification is necessary, all procedural deadlines in these proceedings should be further suspended pending a ruling from the full Commission.

Respectfully submitted,

TIME WARNER CABLE INC.



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Dated: November 3, 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 "Reply To Opposition To Motion For Modification And Clarification Or, In The Alternative, For Certification Of Questions" were served this 3rd day of November, 2008, via email, upon the following:

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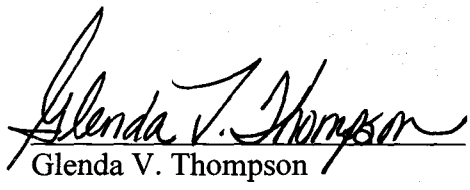

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