

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	MB Docket No. 08-214
Herring Broadcasting, Inc.)	
Complainant)	CSR-7829-P
)	
v.)	
)	
Cox Communications, Inc.)	
Defendant)	
To: Chief, Media Bureau		

**OPPOSITION TO WEALTH TV'S
MOTION TO REVOKE HEARING DESIGNATION**

Cox Communications, Inc. ("Cox"), by its attorneys and pursuant to 47 C.F.R. § 1.45(b), hereby opposes the Motion for Revocation of Hearing Designation filed by Herring Broadcasting, Inc. d/b/a Wealth TV ("Wealth TV") on November 24, 2008, as "supplemented" on December 3, 2008 (collectively, the "Motion"), in the above-captioned case.

Wealth TV's motion is procedurally and substantively improper and should be denied.

First and foremost, this case is now an adjudication before an ALJ,¹ and it would be improper to withdraw this disputed case from the midst of a judicial proceeding merely because the referring agency does not agree with the manner in which it is being handled. It is fundamental to the integrity of the adjudicatory system within a federal agency that policy makers and advocates within the agency cannot interfere with the independent adjudicatory process once a case is designated for hearing and jurisdiction of the matter passes to an ALJ.

¹ Once referred for hearing, the ALJ has plenary authority over the proceeding. *See* 47 C.F.R. § 1.243; *Industrial Business Corp.*, Decision, 47 FCC 2d 891, ¶ 6 (Rev. Bd. 1974).

Any other rule would undermine the system because agencies and their bureaus could control the outcome of “adjudications” by withdrawing them (or threatening to) whenever it appears that an ALJ’s rulings (procedural or substantive) might not be favorable to the agency. That is all the more so in this case, where the agency is actually a *represented party* – through the Enforcement Bureau – in the adjudication before the ALJ.

This is precisely the type of manipulation of the process and forum shopping that WealthTV is attempting to accomplish in this motion. Armed with the HDO and the Media Bureau’s finding of a *prima facie* case, WealthTV believes the Media Bureau is sympathetic to WealthTV’s views and, therefore, WealthTV naturally would like to have the Media Bureau decide the case immediately, with no further process. Never mind that WealthTV originally sought designation to an ALJ (before it saw the Media Bureau’s *HDO*); never mind that the Media Bureau itself has ruled that it cannot decide this case without fact finding by an ALJ²; and never mind that the ALJ has ruled that due process requires more than 60 days.³ WealthTV would like to skip all the inconvenient “process” that WealthTV itself requested, that the Media Bureau ruled was required, and that the ALJ held was necessary as a matter of constitutional law – and proceed to what WealthTV believes will be a favorable outcome. That is simply improper.

It is no answer for WealthTV to argue that (in WealthTV’s opinion) the ALJ allegedly is violating the Media Bureau’s order by exceeding the 60-day period and that therefore the Media Bureau can “take back” the case. Whether the ALJ could properly exceed 60 days under the

² Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al., *Memorandum Opinion and Hearing Designation Order*, MB Docket No. 08-214, DA 08-2269 (Med. Bur. rel. Oct. 10, 2008) (The Media Bureau is “unable to determine on the basis of the existing record[] whether we can grant relief based on these claims.”), *as modified by Erratum* (Med. Bur. rel. Oct. 15, 2008) (collectively, the “*HDO*”).

³ Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al., *Memorandum Opinion and Order*, FCC 08M-47 ¶ 7 (rel. Nov. 20, 2008).

circumstances of this case was a disputed issue before the ALJ that was briefed and decided. A party's remedy for an interlocutory ruling of an ALJ is through the usual discretionary request for an appeal to the Commission, if permitted at all (*see* 47 C.F.R. § 1.301(a) & (b)), not a motion asking the referring bureau to take back a case that is not going as well as one party had hoped. There is no basis in the rules or in the basic principles of administrative and jurisdictional law to grant WealthTV's motion.⁴

The only two cases WealthTV cites are not to the contrary. In *Mega Media*, the Mass Media Bureau revoked a hearing designation order because the case had been *settled* prior to the issuance of the order, and the Bureau simply had not been timely informed of that fact. *Mega Media, Ltd. et al., Order*, 5 FCC Rcd 2528 (1990). In *Caballero*, the Mass Media Bureau revoked a hearing designation order solely to permit it to issue another, accurate one. *Caballero Spanish Radio, Inc. et al., Order*, 1984 FCC LEXIS 1659 (1984). In neither of those cases did a bureau attempt to withdraw jurisdiction of an on-going, disputed hearing on the grounds that the ALJ was not ruling in a particular manner, and research has uncovered no such case.

Second, in addition to being fundamentally flawed as a matter of administrative and jurisdictional law, granting WealthTV's motion would violate Cox's right to a fair hearing.⁵ The ALJ's order was correct that a fair hearing cannot be accomplished within the 60-day timeframe described in the *HDO*. Frankly, WealthTV fails to explain how the Media Bureau could or should go about determining facts that it already ruled it could not decide without a hearing.

⁴ It is also no answer to complain that the process has already taken a many months before the Commission. That surely cannot justify curtailing fundamental rights to fair hearing procedures once a matter is designated for hearing. Defendants do not relinquish rights merely as a consequence of agency delay.

⁵ *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (Due process under the U.S. Constitution requires a reasonable opportunity, "at a meaningful time and in a meaningful

Surely WealthTV is not suggesting that this case be withdrawn from the ALJ only to have the Media Bureau hold adjudicatory hearings itself.

Wealth TV argues that “proper observance . . . [of due process] . . . is not always automatically honored by extending the time for action . . . more time simply affords large defendants the refuge of delay.”⁶ That observation is of no moment here. The question before the ALJ was whether some reasonable period of time is required to hold a hearing consistent with due process, and he ruled that it was. It was not a question of an “automatic” or unreasonable delay. Moreover, the fact that Wealth TV is a “small business” that elected to sue four cable companies to force them to carry programming against their editorial judgment cannot negate the right of a defendant to a fair and impartial hearing. To the contrary, the fact that the remedy WealthTV seeks implicates fundamental First Amendment rights⁷ requires *more* procedural protections, not fewer. Indeed, even as WealthTV concedes in yesterday’s “Supplement,” due process rights are “paramount.” Motion (Dec. 3) at 3.

Third, it is worth noting that WealthTV’s motion is procedurally improper. If considered a petition for reconsideration, it is time-barred because it was not filed within 30 days of the *HDO*.⁸ If considered an interlocutory appeal of the ALJ Steinberg’s pre-hearing order, it violates the Commission’s rules because it was filed without leave from the presiding judge.⁹ WealthTV

manner, for [a] hearing appropriate to the nature of the case”) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950)).

⁶ Motion (Dec. 3) at 2-3.

⁷ See *Herring Broadcasting, Inc. v. Cox Communications, Inc.*, Answer, CSR-7829-P, at 35-40.

⁸ See 47 U.S.C. § 405(a) (petitions for reconsideration must be filed within 30 days of public notice of the contested order); 47 C.F.R. § 1.106(a). Moreover, the Bureau is beyond the time during which it may reconsider the *HDO* on its own motion. See 47 C.F.R. § 1.113 (the Bureau may reconsider an order on its own motion within 30 days of public notice of the order).

⁹ See 47 C.F.R. § 1.301(b).

argues that no procedural hurdles should derail its motion because it was filed as soon as it became clear that the ALJ would not adhere to the 60-day timeframe laid out in the *HDO*.¹⁰ That is simply false. ALJ Steinberg stated in a pre-hearing conference that took place just 17 days after the *HDO* was released that “it is not possible to do this within the 60 days.”¹¹ Wealth TV had ample time to seek the requested relief within the 30-day period for review prescribed by the Communications Act and the Commission’s rules.¹²

Finally, WealthTV’s motion is illogical and impractical. Chief ALJ Sippel has now set an aggressive schedule for extremely limited discovery and established the earliest practical hearing date.¹³ Withdrawing the hearing now would do nothing but cause further delay.

For the foregoing reasons, the WealthTV’s motion should be denied.

Respectfully submitted,

COX COMMUNICATIONS, INC.



David E. Mills
J. Christopher Redding
Jason E. Rademacher

Its Attorneys

DOW LOHNES PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 776-2000

¹⁰ See Motion (November 24) at 4.

¹¹ See Prehearing Conference Transcript of Record at 38 (Oct. 27, 2008).

¹² For the same reasons, Wealth TV’s waiver argument is unavailing. Wealth TV claims that good cause exists to waive the time limits included in the Commission’s rules because the hearing proceeding will not be completed in 60 days as contemplated by the *HDO*. Motion (November 24) at 4. That fact has been clear for weeks and cannot supply good cause for a waiver of rules that all parties had more than enough time to follow.

¹³ Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al., *Procedural and Hearing Order*, FCC 08M-50 (rel. Dec. 2, 2008).

CERTIFICATE OF SERVICE

I, Ruby Brown, hereby certify that a true and correct copy of the foregoing Opposition was sent by first class U.S. mail, postage prepaid, except where hand-delivery is indicated, on this 4th day of December 2008 to the following:

Marlene H. Dortch, Esq.*
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Kathleen Wallman, Esq.
Kathleen Wallman, PLLC
9332 Ramey Lane
Great Falls, VA 22066

The Honorable Richard L. Sippel*
Chief Administrative Law Judge
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

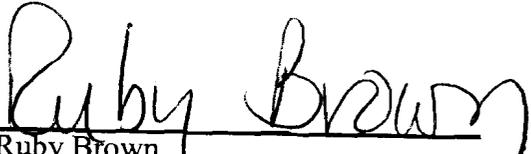
Monica Shah Desai, Esq.*
Chief, Media Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

The Honorable Arthur I. Steinberg*
Administrative Law Judge
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Geoffrey M. Klineburg
Priya R. Aiyar
Derek T. Ho
Kellogg, Huber, Hansen, Todd, Evans &
Figel, P.L.L.C.
1615 M Street, NW, Suite 400
Washington, D.C. 20036

Kris Monteith, Esq.*
Chief, Enforcement Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Ms. Mary L. Gosse*
Administrative Officer
Office of Administrative Law Judges
Federal Communications Commission
445 12th Street St., S.W.
Washington, D.C. 20554


Ruby Brown

* By hand delivery