

**DOCKET FILE COPY ORIGINAL** Before the  
**Federal Communications Commission**  
**Washington, D.C. 20554**

In the Matter of	)	MB Docket No. 08-214	MAILED
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P	DEC - 2 2008
Complainant	)		FCC
v.	)		
Time Warner Cable Inc.	)		
Defendant	)		
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P	
Complainant	)		
v.	)		
Bright House Networks, LLC,	)		
Defendant	)		
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P	
Complainant	)		
v.	)		
Cox Communications, Inc.,	)		
Defendant	)		
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P	
Complainant	)		
v.	)		
Comcast Corporation,	)		
Defendant	)		
NFL Enterprises LLC,	)	File No. CSR-7876-P	
Complainant	)		
v.	)		
Comcast Cable Communications, LLC,	)		
Defendant	)		
TCR Sports Broadcasting Holding, L.L.P.,	)	File No. CSR-8001-P	
d/b/a Mid-Atlantic Sports Network,	)		
Complainant	)		
v.	)		
Comcast Corporation,	)		
Defendant	)		

MEMORANDUM OPINION AND ORDER

Issued: November 19, 2008

Released: November 20, 2008

1. Under consideration are: (a) a Motion for Modification and Clarification or, In the Alternative, for Certification of Questions, filed on October 20, 2008, by Time Warner Cable Inc. ("TWC"); (b) a revised page 1 to (a) above, filed on October 21, 2008, by TWC; (c) a letter, filed on October 20, 2008, to Chief Judge Richard L. Sippel from Arthur J. Steinhauer, counsel to Bright House Networks, LLC ("BHN"), entitled Request for Modification and Clarification [of]

HDO or, In the Alternative, for Certification of Application for Review;<sup>1</sup> (d) an Erratum to (c) above, filed on October 21, 2008, by BHN; (e) a Motion to Clarify Hearing Designation Order or In the Alternative to Certify Questions to the Commission, filed on October 20, 2008, by Cox Communications, Inc. ("Cox"); (f) a Request for Certification to the Commission, filed on October 21, 2008, by Comcast Corporation in connection with File No. CSR-7907-P; (g) a Request for Certification to the Commission, filed on October 21, 2008, by Comcast Cable Communications, LLC, in connection with File No. CSR-7876-P; (h) a Request for Certification to the Commission, filed on October 21, 2008, by Comcast Corporation<sup>2</sup> in connection with File No. CSR-8001-P;<sup>3</sup> (i) an Opposition to Comcast's Request for Certification to the Commission, to Time Warner Cable's Motion for Modification and Clarification or, In the Alternative, for Certification of Questions, to Cox Communications' Motion to Clarify Hearing Designation Order or In the Alternative to Certify Questions to the Commission, and to Bright House Networks' Request for Modification and Clarification [of] HDO or, In the Alternative, for Certification of Application for Review, filed on October 27, 2008, by Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV"); (j) an Erratum to (i) above, filed on October 28, 2008, by WealthTV; (k) an Opposition to Comcast's Request for Certification to the Commission and Request for Confirmation of Paragraph 140 of the Hearing Designation Order, filed on October 27, 2008, by NFL Enterprises LLC ("NFL"); (l) an Opposition to Comcast Corporation's Request for Certification to the Commission, filed on October 27, 2008, by TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN");<sup>4</sup> (m) the Enforcement Bureau's Comments on Issues Designated for Hearing, filed on October 27, 2008, by the Enforcement Bureau ("Bureau"); (n) the Enforcement Bureau's Consolidated Comments, filed on October 31, 2008, by the Bureau; (o) a Reply to Opposition to Motion for Modification and Clarification or, In the Alternative, for Certification of Questions, filed on November 3, 2008, by TWC; (p) a Reply to Opposition to Request for Modification and Clarification of HDO or, In the Alternative, for Certification of Application for Review, filed on November 3, 2008, by BHN; and (q) Cox's Reply in Support of Motion to Clarify HDO, filed on November 3, 2008, by Cox.

2. The Defendants seek the modification and clarification of the *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (Media Bur., October 10, 2008), *modified by Erratum* (Media Bur., October 15, 2008) (collectively "*HDO*"), which designated this proceeding for hearing. Specifically, the Defendants<sup>5</sup> seek a ruling that the *HDO* requires the *de novo* consideration of the factual and legal questions presented by the issues specified for hearing. The Defendants also request a ruling that the 60-day timeframe specified in the *HDO* is unrealistic, inconsistent with past practice, and insufficient. Finally, the Defendants request the modification of the issues designated for hearing in order to reflect more accurately the language of the Commission rule in question. Should it be determined that the Presiding Judge lacks the authority to rule on these matters, the Defendants alternatively request that these questions be certified to the Commission for resolution.

3. The Complainants oppose the Defendants' motions and requests. In support, the Complainants<sup>6</sup> maintain that the motions and requests for certification inappropriately seek

<sup>1</sup> Although letter pleadings are not countenanced by the Commission's Rules, *see, e.g., Action Radio, Inc.*, 37 FCC 2d 351, 353 (1972), in the interest of expedition, the Presiding Judge accepted this letter at the October 27, 2008, prehearing conference in this proceeding. Tr. 16-17.

<sup>2</sup> Comcast Corporation and Comcast Cable Communications, LLC, will collectively be referred to as "Comcast."

<sup>3</sup> TWC, BHN, Cox, and Comcast will collectively be referred to as "Defendants."

<sup>4</sup> WealthTV, NFL, and MASN will collectively be referred to as "Complainants."

<sup>5</sup> The primary arguments of the Defendants have been consolidated.

<sup>6</sup> The primary arguments of the Complainants have been consolidated.

interlocutory review of the *HDO*. In addition, the Complainants contend that, even if an interlocutory appeal of the *HDO* was permissible, the rigorous standard for certification under the Commission's Rules has not been met. In this regard, the Complainants assert that the Defendants have demonstrated no deficiency in the *HDO*'s legal reasoning or conclusions that would warrant review. Further, the Complainants aver that the Defendants have failed to advance any valid reason to depart from the *HDO*'s 60-day timeframe, and that this timeframe is more than adequate, and legally sufficient, to permit presentation and consideration of evidence on the specified issues. Replies to the Complainants' oppositions were filed by TWC, BHN, and Cox.<sup>7</sup>

4. In its comments on the Defendants' motions and requests, the Bureau states that the Presiding Judge has the authority to modify the designated issues "[t]o the extent the language of each issue . . . fails to precisely capture, track or otherwise reflect the language contained in Section 76.1301(c) [of the Commission's Rules,] or inartfully emphasizes one remedy over another." Bureau's October 27, 2008, Comments, at 3. Therefore, certification of this question to the Commission is not required. *Id.* Similarly, the Bureau does not believe that certification of the 60-day timeframe is warranted. Bureau's October 31, 2008, Consolidated Comments, at 2-3.

5. The Defendants' motions and requests will be granted to the extent discussed below. In all other respects, their motions and requests will be denied.

6. De Novo Consideration of the Facts. As stated at the prehearing conference, the evidence adduced at the hearing in this proceeding will be given *de novo* consideration. Tr. 47-49. That is, the "facts" and "conclusions" recited in the *HDO* will not be considered as binding on the Presiding Judge. Thus, the *HDO* reflects the Media Bureau's view that, based on the allegations contained in the complaints, a *prima facie* case has been made, and that substantial factual disputes exist which require resolution at a hearing. It is at the hearing that the Complainants will have the opportunity to present, and prove, their cases; the Defendants will have the opportunity to test those cases through cross-examination and the presentation of rebuttal evidence; and the Complainants, in turn, will be able to test the rebuttal evidence through cross-examination. Ultimately, a recommended decision will be made on the specified issues based *solely* on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*.

7. Sixty-Day Timeframe. The 60-day timeframe set forth in the *HDO* cannot be achieved. This is an extremely complex proceeding involving six separate program carriage complaints, three Complainants, and four Defendants. Each of these six cases presents its own peculiar facts and, as an examination of the *HDO* will reveal, each factual situation appears to be unique and intricate, and the complaints have been vigorously contested by the Defendants. In addition, the credibility of several witnesses will be at issue due to their differing recollections, and expert witnesses' statements are involved. Moreover, in order to expedite the cross-examination of the witnesses and avoid surprise, some limited discovery should be undertaken. See Tr. 51. Under all of these circumstances, it is the Presiding Judge's view that it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day timeframe contemplated in the *HDO*.<sup>8</sup> Thus, the public interest would be better served, and the scarce resources of the Commission would be better utilized, by allowing an

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<sup>7</sup> At the prehearing conference, the Presiding Judge ruled that Comcast was not entitled to file any replies. Tr. 21, 27, 47.

<sup>8</sup> This opinion is based on more than 32 years of experience as both a Trial Attorney and an Administrative Law Judge.

adequate period of time, *ab initio*, to litigate these cases fully and properly. See Tr. 36, 38.<sup>9</sup> To rule otherwise would raise the distinct possibility of a remand for additional evidentiary hearings resulting, ultimately, in an unnecessary and undue delay in the final resolution of this complicated proceeding.<sup>10</sup>

8. Modification of the Issues. The issues will be modified as requested by the Defendants. The crux of this proceeding is a determination of whether the Defendants have violated Section 76.1301(c) of the Commission's Rules and, if so, to fashion an appropriate remedy. However, as correctly noted by the Bureau, the text of the issues designated for hearing does not accurately reflect the language of the rule, and appears to emphasize one remedy over another. To clarify this situation, the issues specified at paragraphs 122 (a) and (b), 126 (a) and (b), 130 (a) and (b), 134 (a) and (b), 138 (a) and (c), and 142 (a) and (b) of the *HDO* will be modified to read 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 the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c);

(b) / (c) 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 the complainant's programming on the defendant's system is necessary to remedy the violation and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends.

9. Certification. Given that the major questions raised by the Defendants have been ruled on, certification of these matters to the Commission is not warranted.<sup>11</sup>

Accordingly, IT IS ORDERED that the Motion for Modification and Clarification or, In the Alternative, for Certification of Questions, filed by TWC on October 20, 2008, the letter Request for Modification and Clarification [of] *HDO* or, In the Alternative, for Certification of

<sup>9</sup> Nevertheless, this proceeding will be expedited to the extent possible.

<sup>10</sup> The Presiding Judge has ample authority to proceed in this manner. See Sections 1.243(f) of the Commission's Rules; *Broadcast Data Corp.*, 97 FCC 2d 650, 652 (Rev. Bd. 1984) (ALJ's power to regulate hearing is "plenary" and "invests [him] with great latitude"); *Industrial Business Corp.*, 47 FCC 2d 891, 894 (Rev. Bd. 1974) (ALJ "has plenary authority to regulate the course of the hearing"); and cases cited at note 22 of Cox's Reply in Support of Motion to Clarify *HDO*, filed on November 3, 2008. See also Sections 1.205, 1.248(b)(2), and 1.253(b) of the Rules.

<sup>11</sup> In its Request for Certification relating to File No. CSR-7876-P (*NFL v. Comcast*), Comcast argues that no hearing should be held because the NFL filed its complaint outside of the applicable statute of limitations, and the NFL's complaint should have been dismissed pending the completion of ongoing contract litigation in state court. Similarly, in its Request relating to File No. CSR-8001-P (*MASN v. Comcast*), Comcast claims that no hearing should be held because MASN filed its complaint outside of the applicable statute of limitations, and MASN's instant claim is barred by the doctrine of *res judicata*. These matters will not be certified to the Commission. Comcast has not met the stringent test required by the Commission's rules. Thus, it has not demonstrated "that the matter[s] involve[ ] a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question[s] would materially expedite the ultimate resolution of the litigation." Section 1.115(e)(3) of the Rules.

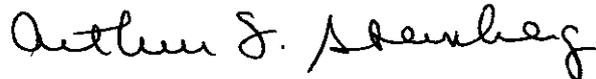
Application for Review, filed by BHN on October 20, 2008, the Motion to Clarify Hearing Designation Order or In the Alternative to Certify Questions to the Commission, filed by Cox on October 20, 2008, the Request for Certification to the Commission, filed by Comcast Corporation on October 21, 2008 (re File No. CSR-7907-P), the Request for Certification to the Commission, filed by Comcast Cable Communications, LLC, on October 21, 2008 (re File No. CSR-7876-P), and the Request for Certification to the Commission, filed by Comcast Corporation on October 21, 2008 (re File No. CSR-8001-P), ARE GRANTED to the extent discussed above, and ARE DENIED in all other respects.

IT IS FURTHER ORDERED that the issues specified at paragraphs 122 (a) and (b), 126 (a) and (b), 130 (a) and (b), 134 (a) and (b), 138 (a) and (c), and 142 (a) and (b) of the *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (Media Bur., October 10, 2008), *modified by Erratum* (Media Bur., October 15, 2008), ARE MODIFIED to read 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 the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c);

(b) / (c) 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 the complainant's programming on the defendant's system is necessary to remedy the violation and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg  
Administrative Law Judge