

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

In the Matter of)	MB Docket No. 08-214
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7709-P
Complainant)	
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,)	
Complainant)	
v.)	File No. CSR-7829-P
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	
Complainant)	
v.)	
Comcast Corporation,)	File No. CSR-7907-P
Defendant)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Richard L. Sippel
Administrative Law Judge

**MOTION FOR PARTIAL MODIFICATION OF
PROCEDURAL AND HEARING ORDER**

Time Warner Cable Inc. (“TWC”), by its counsel, hereby moves that the Procedural and Hearing Order¹ be partially modified as set forth herein.² Although TWC does not object to the

¹ *Procedural and Hearing Order*, FCC 08M-50, MB Docket 08-214, released December 2, 2008.

² For purposes of administrative efficiency, TWC respectfully suggests that the Presiding Officer’s decision in this matter should apply equally to the four WealthTV proceedings associated with MB Docket No. 08-214.

December 5, 2008 deadline for the parties to serve document requests on each other, TWC believes that a requirement to identify testifying experts and exchange expert opinion summaries simultaneously is inconsistent with the Presiding Officer's determination at the Prehearing Conference held on November 25, 2008.³ Furthermore, TWC respectfully submits that the Procedural and Hearing Order be modified to establish staggered dates for the exchange of final expert reports in January, prior to the commencement of expert depositions, consistent with the discussion at the November 25, 2008 Prehearing Conference.⁴ TWC does not have any objection to any of the other deadlines set forth in the Procedural and Hearing Order, including the dates for the end of discovery, the filing of trial briefs and the commencement of the hearing, and thus the relief requested herein will not cause any delay to these proceedings.

There was considerable discussion at the November 25, 2008 Prehearing Conference regarding the need for sequencing of expert witness reports, and the rulings of the Presiding Officer were clear. For example, the following exchange appears at p. 149 of the transcript:

MR MILLS: But I also would ask that we get -- we have some form of expert disclosures and reports so that we get -- the WealthTV case, get the plaintiff's expert reports in advance of when we submit ours so that we know what our experts are going to be addressing. This is not just on remedy, it's on both parts of the case. And we would ask that that be staggered so that our experts know what to address. I think that would be much more efficient.

JUDGE SIPPEL: Well, that's a good point.⁵

³ The actual deadline for these submissions is not entirely clear from the Procedural and Hearing Order. No date is filled in opposite the requirement to identify experts, provide curriculum vitae and summaries of expected opinions. Footnote 2 indicates that the summaries are to be exchanged by 12:00 noon on December 12, 2008, and thus the deadline for identification of experts remains ambiguous. Mary Gosse, administrative assistant to Judge Sippel, stated in a telephone conversation on December 4, 2008 that she understood the intent of the Procedural and Hearing Order to be that expert identifications and curriculum vitae would be exchanged on December 5, 2008, with the summaries exchanged on December 12th. Nevertheless, counsel for WealthTV has agreed that no party to the WealthTV cases should be required to submit its expert list or summaries prior to December 12th.

⁴ TWC has endeavored to reach an accommodation with WealthTV on these matters. Although agreements have been reached relating to numerous procedural and discovery issues, including dates for production of documents and the time periods and scope of depositions, and we intend to enter into a stipulation memorializing all such agreements shortly, we have been unable to agree regarding sequencing of expert witness identification and exchange of final expert reports.

⁵ See Transcript of Prehearing Conference, November 25, 2008, Vol. 2, at 149.

Similarly, at p. 154 of the transcript, Judge Sippel stated as follows:

Now, you're going to have expert witnesses on both sides, and it does make sense that the party with the burden of proof go first, so that the expert on the other side can prepare to meet what that burden is, what that case is.⁶

Notwithstanding the foregoing discussion, the Procedural and Hearing Order did not include staggered dates for identification of expert witnesses. Moreover, the Procedural and Hearing Order did not specify when the expert reports should be delivered, even though no one at the Prehearing Conference disagreed with the proposition that such expert reports must be made available prior to depositions;⁷ and even though the Presiding Officer agreed that the plaintiff should first file its final expert reports, followed by the final expert reports of the defendants, and all within a reasonable time period to allow review of those reports before depositions of the expert witnesses.⁸

TWC recommends that the parties be ordered to adhere to a revised schedule, whereby the document requests would continue to be exchanged as of December 5, 2008 (with the expectation that all documents would be produced by December 31, 2008), for WealthTV to identify its testifying experts and provide summaries by December 12, 2008,⁹ and for TWC and the other defendants in the WealthTV cases to identify their testifying experts and provide summaries by December 23, 2008. Subsequently, to ensure a full opportunity for deposition of expert witnesses, all WealthTV final expert reports (including all documents relied upon by the expert in the preparation of such report) would be submitted by 12 noon on January 9, 2009, and

⁶ *Id.* at 154.

⁷ *Id.* at 150-151.

⁸ *Id.* at 154.

⁹ Counsel for WealthTV has confirmed that they are prepared to identify all their expert witnesses on December 12th, along with curriculum vitae and opinion summaries.

TWC and the other defendants in these cases would submit their final expert reports (including all documents relied upon by the expert in the preparation of such report) by 12 noon on January 16, 2009.¹⁰ This would allow four full weeks (from January 26, 2009 to February 20, 2009) to conduct depositions of expert witnesses, as well as a reasonable period to review expert reports before such depositions are scheduled.

TWC submits that the modification of the Procedural and Hearing Order provides a reasonable accommodation to each of the parties in this proceeding, by affording sufficient time for WealthTV to develop its expert testimony and for the defendants in the WealthTV cases to address that expert evidence fairly and efficiently. The proposed modification herein does not upset any of the other deadlines set forth in the Procedural and Hearing Order, including that discovery end by February 20, 2009, that trial briefs be filed by February 26, 2009, and that the hearing commence on March 17, 2009. Furthermore, the proposed modification does not disadvantage or prejudice any party, but rather affords an orderly process for discovery.

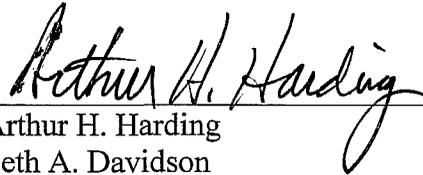
Based on the foregoing, TWC respectfully requests that the Presiding Judge in this proceeding modify the Procedural and Hearing Order to provide for the alternative schedule recommended herein. Given the parties' stipulation that identification of expert witnesses and exchange of summaries in the WealthTV cases will not be required prior to December 12, 2008, TWC respectfully requests that the Presiding Officer either rule on this motion prior to that date, or defer the procedural dates for identification of experts and submission of summaries of expected opinions pending resolution of this motion. TWC is authorized to represent that Cox

¹⁰ Counsel for WealthTV has agreed that, if the Presiding Officer declines to provide for staggered filing of final expert witness reports, all such final reports in the Wealth TV cases should be filed simultaneously at noon on January 16, 2009.

Communications, Inc., Bright House Networks, LLC and Comcast Corporation join in this motion as it applies to the WealthTV cases associated with this docket.

Respectfully submitted,

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Dated: December 5, 2008
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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 Partial Modification of Procedural and Hearing Order” were served this 5th day of December, 2008, via email, upon the following:

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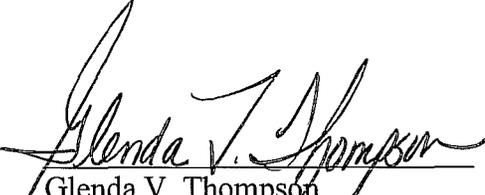
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