

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	MB Docket No. 08-214
Herring Broadcasting, Inc. d/b/a Wealth TV,)	File No. CSR-7709-P
Complainant)	
v.)	
Time Warner Cable Inc.)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a Wealth TV,)	File No. CSR-7822-P
Complainant)	
v.)	
Bright House Networks, LLC,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a Wealth TV,)	File No. CSR-7829-P
Complainant)	
v.)	
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a Wealth TV,)	File No. CSR-7907-P
Complainant)	
v.)	
Comcast Corporation,)	
Defendant)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Richard Sippel
Chief Administrative Law Judge

Arthur Steinberg
Administrative Law Judge

HERRING BROADCASTING, INC., D/B/A WEALTHTV'S
DESIGNATION OF EXPERT WITNESSES

Pursuant to the procedures adopted in the Presiding Judge's case management Order of December 1, 2008,¹ Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV") hereby identifies

¹ Order, *Herring Broad., Inc. v. Time Warner Cable Inc., et al.*, FCC 08M-44, at 2 (rel. Dec. 1, 2008) ("Order").

the expert witnesses it intends to rely upon, with curricula vitae and summaries of expected testimony for the hearing in the above-captioned matters.

Gary Turner is a leading industry expert on the selling of advertising inventory. Mr. Turner has represented numerous MVPDs and networks in selling advertising inventory, such as EchoStar Satellite from 1998 to 2007. Mr. Turner also has significant experience operating transactional television channels. In 2007, Gary's The Media Group owned and operated eight transactional networks, including The Men's Channel, the Healthy Living Channel, and the Men's Outdoors & Recreation Channel. Mr. Turner has worked with WealthTV in its efforts to attract national advertisers since the beginning of 2008 and is therefore familiar with WealthTV's programming service.

Mr. Turner's testimony will address the importance of a network's achieving certain household coverage thresholds in order to attain long term viability and how each defendant's unlawful refusal of carriage damaged WealthTV. His testimony will address how advertisers treat household coverage thresholds and why advertisers strongly prefer to place advertisements with programming services that have achieved those thresholds. His testimony will address the practices of advertisers in choosing programming service partners. The thresholds that Mr. Turner will address are relevant to establishing that WealthTV has been injured within the meaning of the statute and regulations by defendants' refusal to carry it.

Mr. Turner's testimony will also address the process by which cable companies decide to offer carriage to programming services based on his experience.

Mr. Turner's testimony will also address the qualities and characteristics of WealthTV's programming that support WealthTV's assertion that MOJO's programming is substantially similar. His testimony will also address customs and practices in the cable and programming industries that are relevant to the terms and conditions of carriage, which is relevant to the appropriate remedy in this case. Mr. Turner's testimony will also address the reasonableness and other aspects of the terms and conditions of program carriage contracts that are produced in the course of discovery.

Mr. Turner's testimony will also rebut assertions in affidavits and declarations furnished by defendants in their answers, and in their answers and other pleadings, to WealthTV's complaints asserting that there are material or substantial differences between the programming of WealthTV and MOJO, differences in the audiences to which the programming is designed to appeal and does appeal, and other differences.

Jedd Palmer is a cable industry veteran with more than twenty-five years of experience in and around the cable television industry including as Senior Vice-

President of programming at Tele-Communications, Inc. (“TCI”), which, during his tenure was one of the largest cable companies in the United States. In that capacity, he negotiated dozens of agreements on behalf of TCI with programmers.

Mr. Palmer’s testimony will expound upon his affidavit offered in support of the complaints in this matter and will cover the same subject matter. It will explain the numerous and substantial similarities between MOJO and WealthTV. His testimony will rebut the testimony of defendants’ witnesses on this subject, if necessary. His testimony will explain how defendants’ refusal to carry WealthTV has injured WealthTV and put it at a competitive disadvantage in the video marketplace within the meaning of the statute and the regulations. His testimony will also address the appropriate remedy for defendants’ misconduct and support the reasonableness of the terms of carriage sought as part of the remedy. His testimony will address the reasonableness and other aspects of the terms of conditions of carriage agreements produced in the course of discovery and the appropriate terms and conditions to be included in a remedy.

Mr. Palmer’s testimony will also address the process by which cable companies decide to offer carriage to programming services based on his experience.

Mr. Palmer’s testimony will also rebut assertions in affidavits and declarations furnished by defendants in their answers, and in their answers and other pleadings, to WealthTV’s complaints asserting that there are material or substantial differences between the programming of WealthTV and MOJO, differences in the audiences to which the programming is designed to appeal and does appeal, and other differences.

In his previously submitted affidavit offered in support of the complaints in these cases, Mr. Palmer recited his curriculum vitae. The first several pages of his affidavit are attached hereto.

Mark Kersey is President of Kersey Research Strategies which focuses on cable and telecommunications analytical research services. His testimony will expound upon his prior declarations filed in connection with the complaints and replies in the above-captioned matters and document the demographic profile of WealthTV’s viewers and explain the ways in which WealthTV appeals to the same demographic as MOJO. His testimony will address the appeal of WealthTV’s programming to viewers. His testimony will rebut the testimony of defendants’ expert witnesses and assertions in the defendants’ answers and other pleadings to the extent necessary. To the extent that material relevant to demographics and audience appeal or related matters is produced by defendants’ in discovery, Mr.

Kersey's testimony will include opinions and analyses on such materials.

Mr. Kersey's curriculum vitae is attached.

Respectfully submitted,

//signed//

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*Counsel for Herring Broadcasting, Inc. d/b/a
WealthTV*

December 12, 2008

CERTIFICATE OF SERVICE

I, Kathleen Wallman, certify that I caused the foregoing Second Designation of Witnesses, dated December 12, 2008, to be served on the following parties as indicated.

Art Steinhauer, (via email at asteinhauer@sbandg.com)
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//signed//

Kathleen Wallman

thousands of hours working for Tele-Communications, Inc. ("TCI"), then the largest cable company in the United States. (Although I am admitted to practice law in California, Colorado and Nebraska, I do not engage in the practice of law and have not and do not represent WealthTV as counsel.) My work included rendering tax advice on current transactions and defending TCI in Internal Revenue Service audits of TCI's tax returns. In July 1990, I resigned my partnership with the law firm of Mayer, Brown & Platt and became employed directly by TCI as the lawyer for the company's programming function. In November 1990, I was promoted to head of the programming department, first as a Director but eventually as Senior Vice-President of Programming. I held this position until December 1997.

3. In my capacity as head of programming at TCI, I was part of the company's senior management team. As such, I was involved in all facets of the company's business, including the creation of or investing in new programming services. I was involved in the start-up of Starz!, TV! and others. I was also consulted by other companies or individuals regarding new programming services; the Sundance Channel and Toon Disney were my ideas.

4. Although precise numbers are hard to remember, I believe it to be accurate to say that I negotiated over a hundred long-term affiliation agreements, and many more retransmission consent, pay-per-view licensing and other agreements. I also oversaw the negotiation of hundreds more agreements, as well as the administration of approximately a thousand agreements. During my tenure at TCI, the company's annual cost of programming went from \$500 million to over \$1.5 billion, reflecting the proliferation of programming, the increased cost of programming and the growth in the company's subscriber base. I also served on the boards of directors or had personal direct oversight of approximately ten to twelve programming

services, subscriber guide producers and other affiliated vendors, including Request TV, TVSM, Kaleidoscope, the Faith and Values Channel and others.

5. From January 1998 to November 1998, I served as Senior Vice-President of Programming for MediaOne Cable, Inc. ("M1"), the third or fourth largest cable company in the United States. My duties and responsibilities at M1 were similar to those at TCI, including serving on approximately six boards of directors of programming services, including New England Cable News, Viewer's Choice, E! Entertainment Television, Outdoor Life/Speedvision and Music Choice.

6. Commencing in November 1998 and through the current day (except as noted below), I work as an independent consultant in the television and related industries. My clients have included Charter Cable Communications, DirecTV, Dish Network, Cablevision Systems Corporation, the MTV Networks, the Odyssey and Hallmark channels, Discovery Communications, Telemundo, Stormcellar Productions, the Public Broadcasting Service, the Scripps-Howard Networks, U.S. Digital Television, Clearband Communications Corporation, 3DH Corporation, Liberty Media Corporation, the National Interfaith Cable Coalition, InterMall Media, Inc. and WealthTV. (I was also employed directly as Vice-President of Programming for Echostar Corporation for four or five months in 2000. I had to resign due to a serious but temporary illness.) My consulting assignments have included the negotiation of dozens of affiliation agreements, the review of approximately a thousand affiliation agreements, the preparation to provide expert witness testimony in several cases (all settled before trial), general business advice to film and video programmers and distributors and to many high technology ventures (including several totally unrelated to television), the review and preparation of approximately a dozen business plans and, in several instances, work on getting content for video

businesses in technologies that had never carried video signals before. (Fees from WealthTV have represented less than two per cent of my aggregate billings as a consultant.)

7. **MOJO and INHD were only similar in that both channels scheduled high definition programming.** As stated in WealthTV's complaint, MOJO was nested on the channel called INHD prior to MOJO's launch as a separate, stand-alone channel. Even with MOJO nesting therein, INHD held itself out to be a general entertainment service and appears to have programmed a wide variety of unrelated programming, as long as it was in high definition ("HD"). MOJO is not a general entertainment service, but rather a highly targeted niche programming service.

8. **Upon MOJO's launch as a stand-alone service, it became strikingly similar to WealthTV.** The launch of MOJO amounted to the launch of a new channel, not simply a rebranding of INHD. Once INHD was terminated and MOJO was launched, MOJO's press releases, marketing materials, website and programming schedule all stated (and continue to state) that MOJO is an HD channel that holds itself out as targeted to 25-to-49 year old affluent male viewers. A review of MOJO's website (www.mojohd.com), which includes its daily program schedule, lists 18 so-called "MOJO Series", all of which appear targeted to MOJO's self-targeted demographic. Marketing materials, press releases, a review of the channel's schedules and programming indicate that WealthTV targets the same audience, and a review of the MOJO Series and WealthTV's signature programming confirms that the shows programmed on both channels are strikingly similar, if not all but identical, in format and theme.

9. **The comparison of MOJO and WealthTV included as TWC's Exhibit 11 is not borne out by a review of MOJO's published schedules.** TWC's Exhibit 11 makes a comparison of MOJO and WealthTV for two calendar weeks, one in July 2007 and one

Mark Kersey Bio

Mark Kersey is the founder of and principal analyst at Kersey Strategies, an independent research and consulting firm in Solana Beach, Calif. that focuses on the telecommunications, IPTV, cable and HDTV sectors. In addition to his research work, he also publishes 1080eyes.com, an HDTV news and information resource that was named to the CNET Blog 100, a listing of the top 100 tech blogs.

Kersey has spent his entire professional career as an analyst in the broadband, telecom, cable and HDTV industries, and has appeared as an industry expert on CNN Financial News, the CBS MarketWatch program, the Fox News Channel and National Public Radio. He has also been widely quoted in media outlets such as The Wall Street Journal, The New York Times, Business Week, Forbes, Bloomberg News, MSNBC, the Associated Press, The Los Angeles Times and The San Diego Union-Tribune. Kersey has testified before the Public Utilities Commission of Ohio regarding the regulation of advanced telecom services and has also moderated sessions at the Consumer Electronics Show and broadband industry conferences.

Prior to his current role, Kersey served as the Senior Analyst for Broadband and Cable Markets at Current Analysis, Inc. in La Jolla, where he led a team of analysts and researchers responsible for coverage of the cable, DSL, satellite and wireless broadband markets. He previously worked as a market analyst for Silicon Valley-based SmartPipes, Inc. and also worked as a telecom industry analyst for NPRG, Inc., a Chicago-based research and consulting firm. Kersey's other work experience includes stints on Capitol Hill with Congresswoman Deborah Pryce (R-OH), where his work included research on the Telecommunications Act of 1996, and with the Ohio Governor's Office of Economic Development.

Kersey is an alumnus of Northwestern University and the UCLA Anderson Graduate School of Management. He currently serves as a member of the San Diego County (CA) Cable Television Review Commission and is a past member of the City of Westerville (OH) Cable TV & Telecom Commission. He is a past chairman of the Solana Beach Chamber of Commerce and has served as both a Chamber board member and as Legislative Committee chairman. Kersey currently serves as co-chairman of the advisory board of First Book - San Diego, which promotes childhood literacy, and is a past board member at Casa de Amistad, a mentoring program for Hispanic children in north San Diego County.

Gary Turner ***Television Programming and Advertising Entrepreneur***

Gary Turner is a veteran television advertising sales executive and interactive TV entrepreneur who turned a TV production company in Denver in 1983 into the world's leading provider of transactional and interactive media for television advertising. As CEO and chairman of the privately held Turner Media Group (TMG), Gary drove a new era of growth in general market advertising, direct response programming, transactional TV networks and interactive TV advertising business. He created a core focus on "Integrated Transactional Media" – a term that describes how TMG bridges advertising and programming content with advanced technologies such as interactive TV.

By 2006, his company had expanded with offices in N.Y., L.A., Chicago, San Francisco, and Denver and represented more than 6 million ad avails annually, generating billions of dollars in ad revenue for its satellite TV partners. With more than 70 employees nationwide, his company was producing profits every quarter. He is responsible for generating a portfolio of highly-targeted television channels that use a flexible format to reach specific demographics and viewer enthusiasts. He made history by building eight channels into the nation's most prominent transactional TV channels with national cable and satellite TV distribution reaching more than 100 million viewers in aggregate. And he did so without third party investor capital or pursuing debt financing, a feat rarely



done in today's media environment. These channels included Men's Outdoors & Recreation, The Men's Channel, Healthy Living Channel, Beauty & Fashion Channel, Resorts & Residence, iDrive, America's Preview Channel and iShop TV.

Under Gary's leadership, TMG became the largest interactive television provider in the world and was the first company to launch interactive TV advertising applications nationally and the first to enhance network television with interactive TV.

These iTV applications combined targeted programming with interactive advertising and transactional shopping components, allowing viewers using their remote control to request information and get an in-depth look at products and services. When combining interactivity, branded long form video or programming block sponsorships, TMG's eight networks outperformed online results and more than tripled viewer response for catalogs and participation in surveys and sweepstakes. The ability to order a product from the TV screen finally became a reality through TMG's expertise.

One popular campaign orchestrated by TMG for Reebok let TV viewers watch a long form Reebok commercial, participate in a sweepstakes and order an NFL jersey, all using the remote control. Ultimately, TMG had created an iTV commerce application for the largest interactive TV platform in the world. No one in the television industry has more experience in iTV or created and delivered more iTV applications to more TV households than TMG.



Gary took his vision for transactional programming and development of entertaining TV networks in a new direction in 2008 by launching the Maximum Adventure Network (MAN). This new 24-hour outdoors adventure-focused television channel now reaches nearly 17 million DIRECTV television homes in the United States with further



distribution platforms to be announced this year. MAN targets the growing audiences interested in hunting, fishing, ATVs, four-wheeling, boating and other outdoor adventures and recreational activities, including extreme sports.

Gary, who started his in business with his wife Staci, has two children and enjoys the Rocky Mountain lifestyle in the Denver area.