

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,)	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)	

To: The Commission
December 30, 2008

JOINDER OF TIME WARNER CABLE INC., COX COMMUNICATIONS, INC. AND BRIGHT HOUSE NETWORKS, LLC IN EMERGENCY APPLICATION FOR REVIEW AND EMERGENCY MOTION FOR STAY

Defendants Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC (collectively, the “Joining Defendants”) hereby adopt and join in the Emergency Application for Review and the Emergency Motion For Stay, each filed on December 30, 2008. For all the reasons set forth below and in the emergency papers, which the Joining Defendants fully incorporate by reference herein, the Joining Defendants respectfully submit that the Commission should vacate the December 24, 2008 order (the “*Christmas Eve Order*”) of the Media Bureau and direct the ALJ to continue with the expedited hearing schedule governing this proceeding. Any further action by the Media Bureau under the Christmas Eve Order should be stayed pending the Commission’s resolution of the pending Emergency Application for Review.¹

By attempting to grab control of this proceeding from a properly designated ALJ that had exercised jurisdiction over the matter, issued numerous procedural and substantive orders and held several pre-hearing conferences with the parties, the Media Bureau has squarely violated the Commission’s rules. Section 0.341(a) of the Rules makes plain that once a proceeding is referred to an ALJ for a hearing, jurisdiction over matters relating to such hearing will remain solely with that ALJ:

[a]fter an administrative law judge has been designated to preside at a hearing and until he has issued an initial decision or certified the record to the Commission for decision, or the proceeding has been transferred to another administrative law judge, all motions, petitions and other pleadings shall be acted upon by such administrative law judge....²

¹ The Joining Defendants also note and incorporate by reference the Motion for Reaffirmation of Scheduling Order filed by all defendants before the ALJ in this proceeding on December 30, 2008. Although the ALJ has full authority to manage the hearing process in accordance with the set schedule, the defendants have asked the ALJ to certify the issue to the full Commission should he have any question regarding his authority. But whether the ALJ acts on his own accord to reaffirm the schedule, or the Commission requires it, in neither case does the Media Bureau have the authority to undo the ALJ’s decisions regarding the proper management of the designated hearing.

² 47 C.F.R. § 0.341(a).

In short, the Media Bureau's Christmas Eve Order purporting to terminate the designated hearing is *ultra vires* and should be vacated by the Commission.

Nor can the Media Bureau's action be justified by its assertion that somehow the ALJ's jurisdiction expired after sixty (60) days, after which the ALJ "no longer has delegated authority to conduct hearings" in the proceedings at issue.³ While the Media Bureau may have the "delegated authority" to refer a program carriage proceeding to an ALJ, it cannot define the scope of the ALJ's authority once such a delegation is made. Indeed, because the Commission has established clear regulations outlining the ALJ's authority to conduct hearings, the Media Bureau has no authority, delegated or otherwise, to modify such regulations or to direct the ALJ's conduct of the hearing once the case has been referred under Section 76.7(g) of the Commission's regulations. Similarly, under Section 5(c) of the Communications Act, only the full Commission has authority to delegate matters to a subordinate body within the agency; it cannot empower the Media Bureau to make its own delegations of authority to other bodies within the agency.⁴

Moreover, an ALJ does not derive its authority to control the course and conduct of designated hearings from a "delegation" from the Commission, let alone from the Media Bureau restricted by its own limited delegated powers. Rather, as the Commission's rules expressly note, the authority to control the course and conduct of a designated hearing "stems from section 7 of the Administrative Procedure Act and section 409 of the Communications Act rather than from delegations of authority made pursuant to section 5(c) of the Communications Act."⁵

³ *Memorandum Opinion and Order*, DA 08-2805 (Media Bureau, Dec. 24, 2008) at ¶ 14.

⁴ *See, e.g., Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977) (holding that the Communications Act precludes the Commission "from delegating authority to review actions taken under delegated authority").

⁵ 47 C.F.R. § 0.201(a)(2) [Note to Paragraph (a)(2)] (emphasis supplied). Consistent with this position, and unlike other provisions of Part 0, Subpart B of the Commission's rules, the provision addressing the jurisdiction of an ALJ is not entitled "authority delegated" but rather is entitled "authority of administrative law judge." *Compare* 47 C.F.R. §§ 0.231, 0.241, 0.251, 0.261, 0.283, 0.291, 0.311, 0.331 *with* 47 C.F.R. § 0.341. The transfer of jurisdiction to an ALJ pursuant to Section 76.7(g) of the Commission's regulations is not a delegation of authority, but rather a referral of a proceeding consistent with established Commission regulations.

Thus, since the “plenary authority” vested in an ALJ to regulate the course of a designated hearing is based on the Commission’s regulations and precedent and not the product of a delegation of authority from the subdivision of the agency that originated the designation order, that subdivision cannot take unfettered steps to circumscribe that plenary authority. Consequently, just as an ALJ has the undisputed authority to depart from the terms of an HDO by granting motions to modify designated hearing issues, so too does it have the clear authority to depart from any arbitrary, non-binding “deadline” for completing action in a proceeding unless a deadline is established by statute.⁶ The Media Bureau lacks the authority to usurp the ALJ’s discretion to manage the hearing in a reasonable manner designed to accommodate all due process considerations.⁷

A stay of any further Media Bureau action pending a decision by the Commission is also necessary and wholly warranted in these circumstances. The Media Bureau’s actions are plainly inconsistent with the Commission’s regulations and precedent with respect to an ALJ’s authority. Because the Media Bureau has provided no cogent analysis justifying its unprecedented action, there is no lawful rationale for the Media Bureau’s action and the defendants are likely to prevail on the merits of the Emergency Application for Review. Further, absent a stay, the balance of

⁶ See, e.g., 47 C.F.R. § 1.205 (authorizing ALJ 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”). See also 47 C.F.R. § 1.243(f) (granting ALJ authority to “regulate the course of the hearing”). The “good cause shown” for the ALJ’s scheduling decisions was the due process concerns raised by the provision in the HDO setting a 60-day deadline for the adjudication of six distinct cases (the four separate WTV 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 the proceeding be completed within 60 days.

⁷ Even assuming the Bureau had the power to terminate an on-going hearing (which it does not), the *Christmas Eve Order* still would fail. Any such Commission (or bureau) action must be supported by a reasonable explanation and record facts. See, e.g., *Motor Vehicles Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (citations omitted). Here, the Bureau failed to offer any explanation that withstands even the slightest scrutiny — no evidence supports the Bureau’s assertion that WealthTV might suffer irreparable harm from delay; no Commission precedent or record facts support the conclusion that these six cases could be heard and decided in sixty days consistent with due process; and the Bureau offers no explanation for how its alternative procedures will lead to a more expeditious or fair conclusion consistent with the parties’ First Amendment and due process rights. In short, even if the Bureau had discretion to seize jurisdiction from the ALJ, its decision to do so in this case fails to meet the bar of reasoned decision-making that all agency actions must satisfy.

harm weighs heavily against the defendants. The ALJ has already decided that any attempt to resolve multiple and highly contested carriage disputes in 60 days is “ludicrous” and that the matter could not, consistent with the requirements of due process, be adjudicated in that time frame.⁸ By extinguishing the procedural safeguards established by the ALJ, the Media Bureau’s action thus subjects defendants to irreparable harm by threatening to impose upon defendants an order of mandatory carriage without a full and fair evidentiary hearing (which the Media Bureau previously ruled was necessary and beyond the capacity of the Bureau’s own procedures) in violation of defendants’ due process and First Amendment rights.

In contrast, imposing a stay would have little effect on Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”). For example, the Media Bureau took eight (8) full months to render its original HDO in the Time Warner Cable case; neither it nor WealthTV can credibly assert that an immediate ruling now by the Media Bureau is somehow critical to WealthTV’s business prospects.⁹ WealthTV has not claimed, nor could it, that it has a First Amendment right or entitlement to full carriage on defendants’ respective systems. And there is no evidence in the record that it requires full linear carriage by defendants in order to be financially viable. It is important to note that the four cases WealthTV filed against cable operators must be assessed on their own merits and cannot be swept in with the cases filed by the NFL Networks and MASN. Here, there is no evidence that WealthTV would suffer irreparable

⁸ Hearing Tr. at 36, 38. *See also Memorandum Opinion and Order*, FCC 08M-47 ¶ 7 (ALJ rel. Nov. 20, 2008) (citations omitted), *amended by Erratum* (rel. Nov. 21, 2008). The Media Bureau does not even attempt to explain how it could replicate the hearing process, with all of its procedural safeguards, live testimony and credibility determinations, among other things, or how its process could comply with the Commission’s directive that cases involving complex factual disputes (which the Bureau ruled was the case here) should be designated for ALJ hearing.

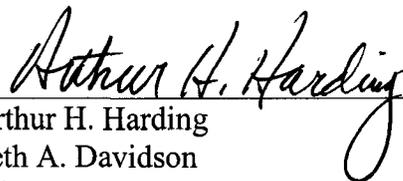
⁹ Indeed, the question of “irreparable harm” is relevant only in the situation where a party is seeking interim relief pending a final determination on the merits; and the assumption is that the relief will be granted, but only on a provisional, interim basis. If such relief is granted, it has no bearing on the final outcome of the proceeding. However, the Bureau’s “irreparable harm” analysis here assumes the final outcome of the proceeding – that the defendants will be found to have violated the statute and that carriage will be ordered. Such an analysis is flawed from the outset, because if one assumes the final outcome, then any delay in reaching that outcome could be characterized as “irreparable” and therefore, as the Bureau has done here, considerations of procedural fairness necessarily get swept aside in the interest of reaching a foreordained outcome as quickly as possible.

harm absent enforcement of the Media Bureau's *Christmas Eve Order* pending review of its efficacy, and therefore no evidence that could justify curtailing the defendants' due process rights. In short, there is no plausible rationale that can justify endangering defendants' constitutional rights simply because the Complainant would like to avoid a comprehensive hearing on its allegations.¹⁰

The Media Bureau's action has undermined the integrity of the Commission's rules and procedures. The Joining Defendants accordingly request that the Commission take immediate steps to stay any further action by the Media Bureau and then vacate the Bureau's *Christmas Eve Order* so that the parties can continue to proceed in an orderly manner before the ALJ.

Respectfully submitted,

TIME WARNER CABLE INC.



Arthur H. Harding
Seth A. Davidson
Micah M. Caldwell
FLEISCHMAN AND HARDING LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

Jay Cohen
Henk Brands
Gary R. Carney
Samuel E. Bonderoff
PAUL WEISS RIFKIND WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

COX COMMUNICATIONS, INC.



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

¹⁰ The Media Bureau's Hearing Designation Order ("HDO") in this proceeding only determined that Wealth TV's allegations presented a *prima facie* case against the Joining Defendants. The Media Bureau, however, did not resolve the highly contested factual issues that the Media Bureau initially recognized it could not resolve. HDO at ¶ 7. Thus, the allegations in Wealth TV's Complaints against the Joining Defendants are at best contested allegations that cannot justify endangering defendants' constitutional rights.

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

BRIGHT HOUSE NETWORKS, LLC



R. Bruce Beckner

Mark B. Denbo

Rebecca E. Jacobs

FLEISCHMAN AND HARDING LLP

1255 23rd Street, NW

Eighth Floor

Washington, D.C. 20037

(202) 939-7900

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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 “Joinder of Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC In Emergency Application For Review And Emergency Motion For Stay” were served this 31st day of December, 2008, via first class mail, postage prepaid, upon the following:

The Honorable Judge Arthur L. Steinberg
Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Room 1-C861
Washington, DC 20054

Kris Anne Monteith
Gary P. Schonmann
Elizabeth Mumaw
Federal Communications Commission
Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Matthew Berry
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Monica Desai
Chief, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Kathleen Wallman
Kathleen Wallman, PLLC
9332 Ramey Lane
Great Falls, VA 22066
*Counsel for Herring Broadcasting, Inc.,
d/b/a WealthTV*

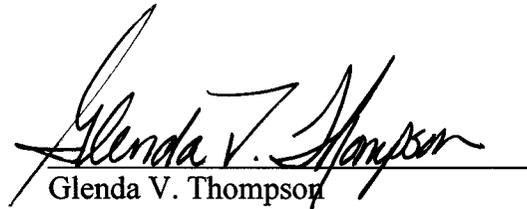
David H. Solomon
L. Andrew Tollin
Wade Lindsay
Wilkinson Barker Knauer, LLP
2300 N Street, N.W.
Suite 700
Washington, DC 20037
Counsel for Comcast Cable Communications, LLC

James L. Casserly
Michael H. Hammer
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006-1238
*Counsel for Comcast Cable Communications,
LLC*

David C. Frederick
Evan T. Leo
Kelly P. Dunbar
David F. Engstrom
Kellogg, Huber, Hansen, Todd, Evans &
Figel, P.L.L.C.
1615 M Street, N.W. – Suite 400
Washington, DC 20036-3209
*Counsel for TCR Sports Broadcasting Holding,
L.L.P. d/b/a Mid-Atlantic Sports Network*

Geoffrey M. Klineberg
Priya R. Aiyar
Derek T. Ho
Kellogg, Huber, Hansen, Todd, Evans &
Figel, P.L.L.C.
1615 M Street, N.W. – Suite 400
Washington, DC 20036-3209
*Counsel for Herring Broadcasting, Inc.,
d/b/a WealthTV*

Jonathan D. Blake
Gregg H. Levy
James M. Garland
Sarah L. Wilson
Robert M. Sherman
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004-2401
Counsel for NFL Enterprises LLC


Glenda V. Thompson