

**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	)	
	)	
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 Honorable Richard Sippel  
              Chief Administrative Law Judge

**JOINT OPPOSITION OF TCR SPORTS BROADCASTING HOLDING, L.L.P. D/B/A  
MID-ATLANTIC SPORTS NETWORK AND HERRING BROADCASTING, INC. D/B/A  
WEALTHTV TO DEFENDANTS' MOTION FOR REAFFIRMATION OF  
SCHEDULING ORDER OR, IN THE ALTERNATIVE, REQUEST FOR  
CERTIFICATION OF AN APPLICATION FOR REVIEW**

TCR Sports Broadcasting Holdings, L.L.P. d/b/a Mid-Atlantic Sports Network (“MASN”) and Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) oppose Defendants’ motion seeking reaffirmation of the scheduling order (“*Scheduling Order*”) previously entered by the ALJ or, in the alternative, requesting certification of an application for review.

Neither the expeditious resolution of these cases, to which Defendants’ motion professes commitment, nor the administration of justice would be served by Defendants’ provocative and baseless proposal that the ALJ battle with the Media Bureau (“Bureau”) by treating its order as a “nullity.”<sup>1</sup> Defendants’ motion invites the ALJ to launch a salvo of defiance at the Bureau, which did nothing more than observe that its October 10, 2008 order requesting assistance from the Office of Administrative Law Judges had expired by its express terms. Such a course, which would lead to chaos in these proceedings, would be unseemly as well as contrary to the public interest. While MASN and WealthTV maintain that the Bureau’s *Jurisdiction Order*<sup>2</sup> was lawful, proper and a prudent exercise of judgment in support of the fair and efficient administration of justice, the proper venue for arguing otherwise is before the Commission in a timely application for review (which Defendants have filed). Defendants cite no authority for the bold proposition that this tribunal should sit in judgment of a decision of the Bureau, which has the full force and effect of law. *See* 47 U.S.C. § 155(c); *see also* Opp’n to Emergency Application for Review at 6-13 (citing well-established precedent that an ALJ is bound by agency decisions).

The ALJ should likewise decline to certify the issue to the Commission; indeed, certification itself would be an act in defiance of the Bureau. When the Bureau issued its

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<sup>1</sup> *See* Separate Statement of Bright House Networks, LLC in Support of “Motion for Reaffirmation of Scheduling Order” at 2 (filed Dec. 31, 2008) (“Bright House Supplement”).

<sup>2</sup> *Memorandum Opinion and Order*, DA 08-2805 (MB Dec. 24, 2008) (“*Jurisdiction Order*”).

*Jurisdiction Order*, finding that the 60-day period specified in the *HDO*<sup>3</sup> had not been met and that the *HDO* had therefore expired, it ended the proceedings under the auspices of the ALJ.<sup>4</sup>

There no longer being any pending proceedings before the ALJ, there is no issue or question that can be legitimately certified to the Commission under the Commission's rules. Again, the proper venue for resolution of such issues is before the Commission in a properly framed and timely application for review.

The grounds asserted for the reaffirmation/certification motion, which overlap substantially with the grounds argued in defendants' emergency application for review, are essentially that (1) the Bureau's *HDO* was ambiguous about the nature of the 60-day deadline and unclear about what consequences would attend a failure to meet that deadline, and that the *Jurisdiction Order* should therefore be treated by the ALJ as a "nullity"; (2) the Bureau has no authority to undo even a conditional hearing designation once the designation has occurred; and (3) the Bureau has no authority or capacity to conduct the proceedings necessary to resolve the pending matters. None of these points has merit. Each is addressed below (as well as in MASN's and WealthTV's opposition to the emergency application for review).

First, the *HDO* was not ambiguous or unclear in any respect. The *HDO*'s ordering clause stated: "**IT IS FURTHER ORDERED**, that the Administrative Law Judge, within 60 days of this Order, *will* resolve all factual disputes and submit a recommended decision." *HDO* ¶ 140

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<sup>3</sup> *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (MB Oct. 10, 2008) ("*HDO*").

<sup>4</sup> The relevant ordering clause is as follows:

Accordingly, **IT IS ORDERED**, that the Hearing Designation Order for the above captioned matters has **EXPIRED**, the proceedings set for hearing before the Administrative Law Judge are **TERMINATED**, and the Media Bureau will proceed to resolve the above captioned program carriage disputes.

*Jurisdiction Order* ¶ 20.

(emphasis added). The language is imperative and directive, not merely aspirational, in contrast to other occasions when the Commission, or Congress in delegating authority to the Commission, has specifically used aspirational language in a delegation.<sup>5</sup>

Moreover, it is unsurprising that the Bureau did not specify that it would reclaim authority over the matter if the 60-day deadline were not met. When it issued the *HDO*, the Bureau had no reason to expect that the Office of Administrative Law Judges, with the cooperation of the parties, could not meet the deadline; it justifiably anticipated that the terms of its *HDO* would be honored and met. Indeed, Congress made clear that program-carriage complaints alleging affiliation-based discrimination should be subject to an expedited review process. *See* 47 U.S.C. § 536(a)(4).

In any event, the Bureau is in the best position to interpret – and to determine the intent of – its own *HDO*. The *Jurisdiction Order*, which confirms the meaning of the 60-day deadline and the consequence of its lapsing, crystallizes the Bureau’s intent; it is and should be dispositive on the matter of what it meant by the language of the *HDO*.<sup>6</sup> It definitively removed any doubt,

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<sup>5</sup> *See, e.g.*, 47 U.S.C. § 155(d) (instructing the Commission to “expedite [its] business . . . *with the objective of rendering* a final decision within six months from the final date of the hearing in all hearing cases”) (emphasis added); 47 C.F.R. § 0.341(d) (presiding ALJs are to “make every effort” to issue initial decisions “within 90 days of the filing of the last responsive pleading”); 47 C.F.R. § 0.251(d) (instructing the General Counsel to “*make every effort* to submit a draft order or decision for Commission consideration within four months of the filing of the last responsive pleading” in adjudicatory proceedings) (emphasis added).

<sup>6</sup> Defendants assert that Claimants’ cooperation with the ALJ’s scheduling order up until December 24 signifies a kind of acquiescence in the scheduling order or waiver of the “expiration” argument. This is not so. Claimants moved to return the case to the authority of the Bureau contemporaneously with the November 25 hearing at which the ALJ outlined the intended schedule for the case. Until the Bureau confirmed that the ALJ’s authority had expired, Claimants observed the schedule to move the matters forward and out of respect for the ALJ’s apparent authority over the matters. Unilaterally disregarding the ALJ’s authority beginning on December 9th would have been inappropriate.

if there were any, that the 60-day period was a fundamental and material premise and condition of the *HDO*.

Second, there is precedent for a Bureau's rescinding a hearing designation order notwithstanding 47 C.F.R. § 0.341.<sup>7</sup> While ALJs undoubtedly have broad authority to manage cases assigned to them, this authority does not allow an ALJ to operate outside of the designation that gave him jurisdiction over a particular case or to manage such a case in a way that is materially and fundamentally inconsistent with the terms and conditions of the designation.<sup>8</sup>

In this case, the Bureau made dispositively clear in its *Jurisdiction Order* that the 60-day period was a fundamental and material aspect of the *HDO*, pointing to the damage that undue delay can cause to independent programmers and their would-be viewers.<sup>9</sup> The absence of a precedent for terminating a hearing designation order specifically in the context of a program discrimination complaint is unremarkable in light of the fact there is only one reported adjudicated carriage case.<sup>10</sup>

Moreover, the Bureau's request for assistance in the form of the *HDO* was entirely discretionary in the first place,<sup>11</sup> and for that additional reason, lawfully may be withdrawn upon the emergence of material new circumstances, such as a declaration by the ALJ that the request for help is impossible to fulfill on the terms requested. Bright House Networks argues that

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<sup>7</sup> See Order, *Mega Media, Ltd.*, 5 FCC Rcd 2528 (1990); Order, *Caballero Spanish Radio, Inc.*, MM Docket Nos. 84-967, et al., 1984 FCC LEXIS 1659 (Nov. 21, 1984).

<sup>8</sup> See *Anax Broadcasting Co.*, 87 F.C.C.2d 483 (1981).

<sup>9</sup> See *Jurisdiction Order* ¶ 15. In addition, § 0.204 of the Commission's rules makes clear that an ALJ's discretion is cabined by the extent of authority actually granted – here, the *HDO*. See 47 C.F.R. § 0.204(a).

<sup>10</sup> See *TCR Sports Broadcasting Holdings, L.L.P. v. Time Warner Cable Inc.*, DA 08-2441 (MB Oct. 30, 2008)

<sup>11</sup> See 47 C.F.R. §§ 76.1300 – 76.1302; 47 C.F.R. § 76.7(g); *Second Report and Order*, 9 FCC Rcd 2642, ¶ 31 (1993); see also Opp'n to Emergency Application for Review at 20-21.

paragraph 34 of the *Second Report and Order* requires the Bureau to refer a carriage access complaint to an ALJ in the event that it determines that a matter involves disputed issues of fact or requires “more extensive discovery.” To the contrary, paragraph 31 states as follows:

If the staff determines that the complainant has made a prima facie showing, the staff will so rule, and will determine whether it can grant relief on the basis of the existing record. If the record is not sufficient to resolve the complaint and grant relief, the staff will determine and outline the appropriate procedures for discovery, or will refer the case to an ALJ for an administrative hearing.<sup>12</sup>

This language leaves to the Bureau’s discretion whether to conduct fact-finding in the Bureau or to seek the assistance of the Office of Administrative Law Judges.

Third, contrary to the assertions of the defendants, the Bureau is fully capable of conducting fact-finding proceedings necessary to resolve the pending matters. Defendants state that a hearing before an ALJ is essential because of the need for discovery and the necessity of weighing witnesses’ credibility. But the Bureau is empowered to conduct discovery, to examine witnesses,<sup>13</sup> and to resolve carriage complaints. In so doing, it has conducted such proceedings in similar matters, including ordering and managing discovery, and weighing and assessing the credibility of witnesses.<sup>14</sup>

In this connection, a Commission decision involving renewal of a Fox television broadcast license is illustrative.<sup>15</sup> This matter involved Fox’s 1994 renewal application for its license to operate a television station in New York City. The NAACP filed a petition to deny the renewal application alleging that in 1985, when Fox sought approval to acquire the New York City station and five other major-market television stations, it concealed from the Commission

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<sup>12</sup> *Id.* ¶ 31.

<sup>13</sup> MASN and WealthTV maintain that the need for discovery, if any, is narrow and the factual issues to be resolved by assessment of credibility are minimal.

<sup>14</sup> *See Second Report and Order* ¶ 31.

<sup>15</sup> *See Memorandum Opinion and Order, Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995).

the extent of foreign ownership in its parent, News Corp. Credibility was the core issue in that case, far more than in these cases.

The Bureau decided to conduct an “informal investigation” of the circumstances surrounding the Commission’s approval of the application to acquire the six stations in order to supplement the record on the New York renewal application. Bureau personnel undertook an expeditious and thorough investigation. They took sworn testimony from 17 witnesses associated with Fox and related companies and interviewed and obtained written statements from 12 present and former Commission employees, all within the span of approximately 60 days. Based on that investigation, the full Commission determined that it was not necessary for a hearing to have been conducted and instead approved the Fox renewal application by memorandum opinion and order.<sup>16</sup> Subsequently, the Commission issued an opinion conditionally granting the renewal. In further opinions, it affirmed that decision and rejected all challenges to the Bureau’s procedures in the case.<sup>17</sup>

The Bureau’s demonstrated capability to conduct robust fact-finding in support of a recommended decision thus comprehensively rebuts Defendants’ assertion that a hearing before an ALJ is essential to protect their due process rights and to avoid future remands. And, in all events, the question of the appropriate process for resolving these complaints is no longer within this tribunal’s jurisdiction.

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<sup>16</sup> *See id.*; Second Memorandum Opinion and Order, *Fox Television Stations, Inc.*, 11 FCC Rcd 5714 (1995).

<sup>17</sup> Third Memorandum Opinion and Order, *Fox Television Stations, Inc.*, 11 FCC Rcd 7773 (1996).

## CONCLUSION

For the foregoing reasons, MASN and WealthTV urge the denial of the Defendants' motion for reaffirmation of the *Scheduling Order* and denial of their request in the alternative for certification of the issue to the Commission.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, David C. Frederick, hereby certify that, on January 6, 2009, copies of the foregoing

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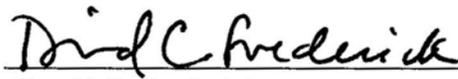
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