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

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JAN -5 2009

In the Matter of)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	MB Docket No. 08-214
Complainant)	File No. CSR-7709-P
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.,)	
d/b/a Mid-Atlantic Sports Network,)	
Complainant)	
v.)	
Comcast Corporation,)	File No. CSR-8001-P
Defendant)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 2008

Released: December 24, 2008

By the Chief, Media Bureau:

I. INTRODUCTION

1. On October 10, 2008, the Media Bureau issued a *Memorandum Opinion and Hearing Designation Order* ("HDO") in the above captioned matters.¹ The HDO, among other things, referred certain program carriage disputes to an Administrative Law Judge ("ALJ") to resolve factual disputes as to whether the defendant cable operators had discriminated against the complainant video programmers in violation of the Commission's program carriage rules.² The HDO ordered the ALJ to make and return a recommended decision to the Commission within 60 days of the release date of the HDO, *i.e.*, by December 9, 2008. Unfortunately, the ALJ has not issued a recommended decision by the deadline but, instead, has set a date to begin a hearing more than three months past the HDO's deadline without indicating when a recommended decision will be released.³ Maintaining that administrative delay will cause harm to the programmers, complainant Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV") filed a motion to revoke the HDO and complainant TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network ("MASN") filed a motion to reconsider the HDO, requesting that the Commission or the Media Bureau reclaim jurisdiction over the matters.

2. For the reasons stated below, we find the ALJ exceeded his authority by setting a hearing date beyond the HDO's 60-day deadline for issuing a recommended decision. The ALJ's limited authority to consider these matters extended through December 9, 2008. That deadline has passed, and the ALJ's delegated authority over these hearing matters has thus expired under the terms of the HDO. Accordingly, the Media Bureau will proceed to resolve the above-captioned program carriage disputes without the benefit of a recommended decision from the ALJ.

II. BACKGROUND

3. *Program Carriage Provisions.* Section 616 of the Communications Act of 1934, as amended (the "Communications Act"), directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."⁴ Among other things, Congress directed that the regulations:

(3) contain provisions designed to prevent a [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.⁵

¹ *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, DA 08-2269, MB Docket 08-214 (rel. Oct. 10, 2008) ("HDO"), *as modified by Erratum* (rel. Oct. 15, 2008).

² HDO, at ¶¶ 58, 119.

³ *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Order, MB Docket No. 08-214, FCC 08M-50 (rel. Dec. 2, 2008).

⁴ 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁵ 47 U.S.C. § 536(a)(3). *See also* 47 C.F.R. § 76.1301(c) (implementing discrimination provision).

4. The Commission adopted rules in 1993 to implement Section 616.⁶ Specifically, Sections 76.1301(c) prohibits a cable operator or other MVPD from engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of its affiliation or nonaffiliation.⁷

5. *Delegated Authority.* Under the Commission's delegation rules, the person "to which functions are delegated shall, with respect to such functions, have all the jurisdiction, powers, and authority conferred by law upon the Commission," and "any action taken pursuant to delegated authority shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as actions of the Commission."⁸ The Media Bureau is granted authority to administer and enforce rules and policies regarding program carriage.⁹ The procedural rules for program carriage provide that disputes are to be resolved on the basis of a complaint, answer and reply.¹⁰ The general procedural rules set forth under Section 76.7 apply to program carriage proceedings unless specified otherwise under the program carriage rules.¹¹ Section 76.7(g)(1) authorizes the Media Bureau to refer matters to an administrative law judge ("ALJ"):

(1) After reviewing the pleadings, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any proceeding or discrete issues arising out of any proceeding for an adjudicatory hearing before an administrative law judge.¹²

The Commission recognized that "resolution of Section 616 complaints [would] necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."¹³ The Commission anticipated that the "staff would be unable to resolve most carriage agreement complaints on the sole basis of a written record...."¹⁴ In such cases, if the staff determines that the complainant has established a *prima facie* case but that the existing record is not sufficient to resolve the complaint and grant relief, the staff can either "determine and outline the appropriate procedures for discovery, or will refer the case to an ALJ for an administrative hearing."¹⁵ Thus, the decision to refer a case for resolution of factual disputes by an ALJ is discretionary.

6. *Program Carriage Complaints.* WealthTV a video programming vendor, filed program carriage complaints against multichannel video programming distributors ("MVPDs") Time Warner Cable Inc. ("TWC"), Bright House Networks, LLC ("BHN"), Cox Communications, Inc. ("Cox"), and Comcast Corporation ("Comcast"),¹⁶ alleging that they violated Section 76.1301(c) of the Commission's rules by

⁶ See 47 C.F.R. §§ 76.1300 – 76.1302; *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642 (1993) ("Second Report and Order").

⁷ 47 C.F.R. § 76.1301(c).

⁸ 47 C.F.R. § 0.203.

⁹ 47 C.F.R. § 0.61(f)(7).

¹⁰ See 47 C.F.R. § 76.1302(c), (d), (e).

¹¹ 47 C.F.R. § 76.1302(a).

¹² 47 C.F.R. § 76.7(g).

¹³ *Second Report and Order*, 9 FCC Rcd at 2648.

¹⁴ *Id.* at 2652.

¹⁵ *Id.* at 2655.

¹⁶ See Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007) ("WealthTV Complaint Against TWC"); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008) ("WealthTV Complaint

discriminating against WealthTV's programming in favor of a similarly situated video programming vendor, MOJO, which is affiliated with TWC, BHN, Cox, and Comcast.¹⁷

7. MASN, a regional sports network ("RSN") which owns the rights to produce and exhibit the games of the Baltimore Orioles and Washington Nationals as well as other sporting events,¹⁸ filed a program carriage complaint against Comcast,¹⁹ the nation's largest MVPD, which holds an attributable ownership interest in two RSNs, Comcast SportsNet Philadelphia ("CSN-P") and Comcast SportsNet Mid-Atlantic ("CSN-MA"), among other networks.²⁰ MASN alleged that Comcast discriminated against MASN in favor of its affiliated video programming vendors in violation of Section 76.1301(c) of the Commission's rules.²¹

8. *Hearing Designation Order*. On October 10, 2008, after reviewing the pleadings and supporting documentation filed by the parties in each case, the Media Bureau released a consolidated *Memorandum Opinion and Hearing Designation Order* ("HDO").²² The HDO determined that each of the complainants had established a *prima facie* showing of discrimination by the MVPDs in violation of Section 76.1301(c) of the program carriage rules.²³ The HDO set forth findings of fact in support of the determinations that a *prima facie* showing had been made,²⁴ and resolved other procedural issues.²⁵ The HDO further found that the pleadings and supporting documentation presented factual disputes as to whether the MVPDs discriminated against the video programmers in favor of their affiliated services.²⁶ Accordingly, the HDO designated the matters for hearing before an ALJ, ordering the ALJ to make and return a recommended decision and a recommended remedy, if necessary, to the Commission within 60 days of the release date of the HDO.²⁷ The HDO stated that upon receipt of the ALJ's recommended decision and remedy, the Commission would make the requisite legal determinations as to whether the MVPDs discriminated against the complainants' programming in favor of their own programming, with the effect of unreasonably restraining the complainants' ability to compete fairly in violation of Section

Against BHN"); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File No. CSR-7829-P (filed March 27, 2008) ("WealthTV Complaint Against Cox"); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008) ("WealthTV Complaint Against Comcast").

¹⁷ MOJO is owned by iN DEMAND L.L.C., which is owned 54.1% by Comcast iN DEMAND Holdings, Inc.; 15.6% by Cox Communications Holdings, Inc.; and 30.3% by Time Warner Entertainment-Advance/Newhouse Partnership ("TWE-A/N").

¹⁸ See MASN Complaint Against Comcast at ¶¶ 3, 68.

¹⁹ See TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Program Carriage Complaint, File No. CSR-8001-P (filed July 1, 2008) ("MASN Complaint Against Comcast").

²⁰ Comcast Corporation, Answer, File No. CSR-8001-P (July 31, 2008), at 48 (¶ 67) ("Comcast Answer to MASN").

²¹ 47 C.F.R. § 76.1301(c).

²² *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, DA 08-2269, MB Docket 08-214 (rel. Oct. 10, 2008) ("HDO"), as modified by Erratum (rel. Oct. 15, 2008).

²³ HDO, at ¶¶ 24 (WealthTV/TWC); 35 (WealthTV/BHN); 46 (WealthTV/Cox); 57 (WealthTV/Comcast); 119 (MASN/Comcast).

²⁴ HDO, at ¶¶ 11-23 (WealthTV/TWC); 26-34 (WealthTV/BHN); 37-45 (WealthTV/Cox); 48-56 (WealthTV/Comcast).

²⁵ HDO, at ¶¶ 102-105 (statute of limitations); 106-107 (res judicata).

²⁶ HDO, at ¶¶ 58, 119.

²⁷ HDO, at ¶¶ 58, 119-121, 124.

76.1302(c) and, if necessary would then decide upon appropriate remedies.²⁸ Under the terms of the grant of authority under the HDO, the ALJ's recommended decision was required to be made within 60 days of the October 10, 2008 release date of the HDO, *i.e.*, by December 9, 2008.²⁹

9. *Proceedings Before the ALJ.* On October 23, 2008, Administrative Law Judge Steinberg issued an order stating that complainants will have the burden of proof with respect to specific issues identified in the Erratum to the HDO and setting a procedural schedule providing for the exchange of direct case exhibits, stipulations, and a list of witnesses, if any, to be called for oral testimony; a date for the commencement of the hearing; and the filing of proposed findings of fact and conclusions of law, as well as any replies thereto.³⁰ The order established December 10 as the deadline for the filing of post-hearing briefs.³¹ The order further determined that "due to the time constraints imposed in the HDO discovery would not be practicable and WILL NOT BE PERMITTED."³²

10. On November 20, 2008, Judge Steinberg issued a second order that reversed each of these determinations.³³ In response to motions for modification and clarification of the HDO filed by the cable operators, the ALJ indicated that, rather than limit the hearing to a resolution of factual disputes that the HDO designated for hearing, the ALJ would require re-litigation of all disputes in the case and review all evidence *de novo*.³⁴ In addition, the ALJ ruled that the 60-day timeframe set forth in the HDO "cannot be achieved."³⁵ The ALJ further determined that some limited discovery should be undertaken.³⁶

11. On November 24, 2008, Chief Administrative Law Judge Richard Sippel released an order announcing that Judge Steinberg would be retiring on January 3, 2009, and that Judge Sippel would be taking control of the case.³⁷ On November 25, the parties held a status conference with Judge Sippel, where the ALJ indicated that he would not adhere to the 60-day time frame specified in the HDO and that he would not give weight to the Bureau's findings of a *prima facie* case of discrimination in the HDO.³⁸ Judge

²⁸ HDO, at ¶ 121.

²⁹ HDO, at ¶ 124.

³⁰ *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Order, MB Docket No. 08-214, FCC 08M-44 (rel. Oct. 23, 2008).

³¹ *Id.*

³² *Id.* at ¶ 3 (emphasis in original).

³³ *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Memorandum Opinion and Order, MB Docket No. 08-214, FCC 08M-47 (rel. Nov. 20, 2008).

³⁴ *Id.* at ¶ 6.

³⁵ *Id.* at ¶ 7 & n. 10.

³⁶ *Id.*

³⁷ *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Order, MB Docket No. 08-214, FCC 08M-48 (rel. Nov. 24, 2008).

³⁸ See *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Transcript of Proceedings, MB Docket No. 08-214 (Nov. 25, 2008), at 97 (indicating the cases will be decided *de novo*); 104 (same); 141 (establishing March 17, 2009 as the date for commencement of the hearing). See also TCR's Motion for Reconsideration of Hearing Designation Order, filed Nov. 26, 2008, at 2.

Sippel thereafter set a date of March 17, 2009, to begin a hearing, but did not indicate how long the hearing would take or when his recommended decision would be released.³⁹

12. *Requested Relief.* On November 24, 2008, WealthTV filed a Motion for Revocation of Hearing Designation, requesting that the Media Bureau resolve the program carriage matters on the basis of the existing record since administrative delay in resolving the program carriage matter would result in irrevocable harm to the programmer.⁴⁰ On November 26, 2008, MASN filed a Motion for Reconsideration of the Hearing Designation Order, requesting that the Commission or the Media Bureau reclaim jurisdiction over the matter.⁴¹ MASN contended that relief is necessary to resolve MASN's program carriage complaint expeditiously, as the Commission and Congress intended.

13. TWC, BHN, Comcast and Cox filed oppositions to WealthTV's Motion for Revocation, arguing that WealthTV has offered no basis for revoking the HDO and has chosen a procedurally improper means to remove the hearing from the ALJ. The cable operators request the Bureau to deny WealthTV's Motion for Revocation. Comcast filed a similar opposition to MASN's Motion for Reconsideration, arguing that reconsideration at this stage of the proceeding would be procedurally improper and outside the delegated authority of the Bureau. For these reasons, Comcast maintains the motion should be summarily dismissed or denied.

III. DISCUSSION

14. For the reasons stated below, we find that the Administrative Law Judge's limited grant of authority under the HDO to issue a recommended decision by December 9, 2008, has expired under the terms of the HDO, and the ALJ thus no longer has delegated authority to conduct hearings in the above-captioned proceedings. Accordingly, the Media Bureau will proceed to resolve the above-captioned program carriage disputes and will conduct any further discovery as may be necessary for it to resolve any factual disputes.

15. The HDO resolved procedural issues and set forth factual findings based on a review of the pleadings and supporting documentation.⁴² The HDO directed the ALJ to resolve factual disputes concerning whether the cable operators discriminated against the complainant programmers in favor of their affiliated programming service.⁴³ The HDO ordered the ALJ to issue a recommended decision within 60 days of the release date of the HDO.⁴⁴ The HDO was released on October 10, 2008, and under the terms of the HDO, the ALJ's recommended decision was to be issued by December 9, 2008. The expedited deadline for issuing the recommended decision was a critical component of the HDO. As complainants point out in their requests for relief, administrative delay in resolving program carriage disputes could result in irrevocable harm to an independent programmer (*e.g.*, a competing cable operator could use Commission

³⁹ *Herring Broadcasting, Inc. v. Time Warner Cable Inc et al.*, Order, MB Docket No. 08-214, FCC 08M-50 (rel. Dec. 2, 2008); *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Revised Procedural and Hearing Order, MB Docket No. 08-214, FCC 08M-53 (rel. Dec. 15, 2008).

⁴⁰ See *Herring Broadcasting, Inc.*'s Motion for Revocation of Hearing Designation, filed Nov. 24, 2008. See also Supplement to *Herring Broadcasting, Inc.*'s Motion for Revocation of Hearing Designation, filed Dec. 3, 2008.

⁴¹ See TCR's Motion for Reconsideration of Hearing Designation Order, filed Nov. 26, 2008. See also TCR's Reply in Support of Motion for Reconsideration of Hearing Designation Order, filed Dec. 15, 2008.

⁴² HDO, at ¶¶ 11-23; 26-34; 37-45; 48-56; 102-105; 106-107.

⁴³ HDO, at ¶¶ 58, 119.

⁴⁴ HDO, at ¶¶ 58, 119-121, 124.

procedures to delay a carriage remedy and thus potentially drive a competing unaffiliated programmer out of business) and potentially deprive viewers of access to desired programming.⁴⁵

16. Unfortunately, rather than set an expedited hearing schedule consistent with the HDO deadline, the ALJ greatly expanded the designated issues for hearing, then determined that the 60-day deadline for a recommended decision could not be achieved.⁴⁶ The ALJ did not issue a recommended decision by December 9, 2008. Indeed, the hearing in these proceedings is not even scheduled to begin until March 17, 2009, more than three months past the HDO's December 9th deadline.⁴⁷ The ALJ had no authority to act inconsistently with the terms of the HDO from which he derived his authority.⁴⁸ Commission case law makes clear that an Administrative Law Judge has no authority to act inconsistently with the terms of a Hearing Designation Order.⁴⁹ Thus, by the express terms of the HDO, the ALJ's authority to issue a recommended decision in these proceedings expired after December 9, 2008. The Media Bureau will thus proceed to resolve the carriage disputes in the above-captioned matters.

17. We reject the cable operators' argument that a fair hearing could not be accomplished within the 60-day timeframe described in the HDO.⁵⁰ The HDO defined the issues designated for hearing: whether the cable operators discriminated against the complainant programmers in favor of their affiliated programming service. A 60-day deadline provided adequate time for the parties to present their case on this issue so that the ALJ could meet the December 9 deadline.⁵¹ It was not until the ALJ decided to disregard the facts and conclusions recited in the HDO, and instead give *de novo* consideration to *all* issues in the

⁴⁵ Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, filed Nov. 24, 2008, at 2-3 ("The HDO's 60 day deadline reasonably and fairly took into account the harms that administrative delays can inflict, particularly on small businesses such as WealthTV. The deadline reflects congressional concern that holders of bottleneck power could utilize FCC procedures to delay a remedy, and thereby potentially drive competitors out of business"); TCR Sports Broadcasting Holding, L.L.P.'s Motion for Reconsideration of Hearing Designation Order, filed Nov. 26, 2008, at 6 ("under the [expedited deadline of] the HDO, a decision favorable to MASN would have been made well in advance of the next Major League Baseball ("MLB") season (which begins April 6, 2009); under the ALJ's schedule, a decision by this Commission would not be possible until well into the next MLB season, thereby depriving hundreds of thousands of consumers of an opportunity to watch the Washington National and Baltimore Orioles baseball games in those markets where Comcast has discriminatorily refused to carry MASN"). See also Supplement to Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, filed Dec. 3, 2008.

⁴⁶ *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Memorandum Opinion and Order, MB Docket No. 08-214, FCC 08M-47 (rel. Nov. 20, 2008).

⁴⁷ *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Order, MB Docket No. 08-214, FCC 08M-50 (rel. Dec. 2, 2008).

⁴⁸ *Tequesta Television, Inc.*, 2 FCC Rcd 41, 42 ¶ 10 (1987) ("an ALJ may not countermand a designation order issued under delegated authority as to matters already considered by the delegating authority").

⁴⁹ *Anax Broadcasting, Inc.*, 87 FCC2d 483 ¶ 11 (1981) (ALJ has no authority to dismiss an application on grounds that were considered by an operating bureau in designating the application for hearing under delegated authority); *Frank H. Yemm*, 39 RR 2d 1657, 1659 (1977) (ALJ has no authority to dismiss as defective a show cause order issued by the Private Radio Bureau acting under delegated authority). See also *Algleg Cellular Engineering*, 9 FCC Rcd 5098 ¶ 75 (Rev.Bd. 1994) (ALJ has no authority to grant exceptors' request to confine the intervenors' participation to the Applicants where HDO accorded the intervenors full party status).

⁵⁰ See Cox's Opposition to WealthTV's Motion to Revoke Hearing Designation, at 3-4; Comcast's Opposition to Motion for Reconsideration, filed Dec. 8, 2008, at 3, 5-6; Comcast's Opposition to Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, filed Nov. 26, 2008, at 1-3.

⁵¹ Indeed, the ALJ's first scheduling order released October 23, 2008, established an expedited schedule more closely in line with the HDO deadline. See *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Order, MB Docket No. 08-214, FCC 08M-44 (rel. Oct. 23, 2008).

matter, that the ALJ determined that the 60-day deadline could not be achieved.⁵² Moreover, a 60-day deadline is consistent with Commission precedent for deciding program carriage disputes. In another program carriage complaint proceeding involving MASN and Comcast, the Commission directed the ALJ to hold a hearing to resolve factual disputes with respect to the programmer's claims and return a recommended decision and remedy to the Commission within 45 days.⁵³ For these reasons, we believe that the 60-day deadline imposed by the Bureau under the HDO was reasonable under Commission precedent and provided sufficient time to address these matters. In any event, as reviewed above, the ALJ had no authority to expand the designated issues for hearing in this manner or extend the deadline for issuing a recommended decision.

18. We also reject the cable operators' argument that resolving disputed issues of fact is a function reserved to the ALJ, and may not be conducted by Media Bureau staff.⁵⁴ To the contrary, the Bureau is delegated broad authority over program carriage disputes to administer and enforce rules and policies regarding program carriage.⁵⁵ The Bureau acts under delegated authority invested with the full powers of the Commission.⁵⁶ Nothing in the Commission's rules requires the Bureau to designate a program carriage dispute for hearing before an ALJ.⁵⁷ Rather, Commission rules authorize the Media Bureau to refer such matters to an ALJ "in its discretion."⁵⁸ Moreover, the HDO directed the ALJ to issue a *recommended* decision, but made clear that the Commission would render the ultimate decision, *i.e.*, make the requisite legal determination as to whether the defendants had discriminated against the complainants' programming

⁵² See *Herring Broadcasting, Inc. v. Time Warner Cable Inc. et al.*, Memorandum Opinion and Order, MB Docket No. 08-214, FCC 08M-47 (rel. Nov. 20, 2008). We note that under the *Adelphia Merger Order*, the program carriage condition required certain program carriage disputes to be resolved through arbitration and required the arbitrator to render a decision within 45 days of a request for arbitration. See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corp., Assignors to Time Warner Cable, Inc. et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8287-8288 Appendix B (2006). See also, *TCR Sports Broadcasting, LLP v. Time Warner Cable*, Order on Review, DA 08-2441 (MB rel. Oct. 30, 2008)).

⁵³ See *In the Matter of TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, Memorandum Opinion and Hearing Designation Order, 21 FCC Rcd 8989, 8995 (2006).

⁵⁴ See *Opposition of Bright House Networks, L.L.C. to Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation Order*, at 3 n. 7. See also *Comcast's Opposition to Motion for Reconsideration of Hearing Designation Order*, filed Dec. 8, 2008, at 8-9.

⁵⁵ 47 C.F.R. § 0.61(f)(7).

⁵⁶ 47 C.F.R. § 0.203(a).

⁵⁷ We reject Comcast's argument that the Bureau may not reclaim jurisdiction over the proceedings because in the HDO the Bureau found there were factual disputes that it was unable to determine on the basis of the existing records. See *Comcast's Opposition to Motion for Reconsideration of Hearing Designation Order*, filed Dec. 8, 2008, at 1-2. The Bureau is not confined to the existing record and has procedural tools at its disposal to have the parties supplement the existing record in order to resolve the factual disputes. See, e.g., 47 C.F.R. §§ 76.7(e)(1) ("The Commission may specify other procedures, such as oral argument or evidentiary hearing directed to particular aspects, as it deems appropriate"); 76.7(e)(2) ("The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits"); 76.7(f)(1) ("The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions or document production. As the ALJ's authority to resolve the factual disputes and return a recommended decision has expired, the Media Bureau will proceed to resolve the factual disputes using the tools at its disposal and render a decision.

⁵⁸ 47 C.F.R. § 76.7(g). See also *Second Report and Order*, 9 FCC Rcd at 2655 (contemplating resolution of factual disputes either by the staff or by referral to an ALJ, at the Bureau's discretion).

in favor of its own programming in violation of the program carriage rules.⁵⁹ Under Commission rules, the Media Bureau has broad authority to perform these functions.⁶⁰

19. The cable operators also argue that the period for seeking reconsideration under Section 405 of the Act⁶¹ has passed, and that a request for revocation of the hearing designation would be an improper appeal of an interlocutory ruling.⁶² We need not address these arguments because we are neither reconsidering nor revoking the HDO. As indicated above, the grant of authority in the instant matters was limited to the ALJ issuing a recommended decision by December 10, 2008. That date having passed, the ALJ has no further authority over these matters and revocation and reconsideration are unnecessary. Thus, the petitions to revoke or reconsider the HDO are moot.

IV. ORDERING CLAUSES

20. 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.

21. **IT IS FURTHER ORDERED** that all parties to the above-captioned proceedings will be served with a copy of this Memorandum Opinion and Order by e-mail and by certified mail, return receipt requested.

22. **IT IS FURTHER ORDERED** that a copy of this Memorandum Opinion and Order or a summary thereof **SHALL BE PUBLISHED** in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

⁵⁹ HDO at ¶¶ 120-121.

⁶⁰ 47 C.F.R. § 0.61. Likewise, we reject Comcast's argument that the Bureau cannot proceed here because it is "statutorily forbidden" under Section 5(c)(1) and (8) of the Communications Act from reviewing the rulings of the ALJ. See Comcast's Opposition to Motion for Reconsideration of Hearing Designation, filed Dec. 8, 2008, at 6 n.20. Section 5(c)(1) and (8) of the Act describe the employees to whom the Commission may delegate review functions in cases of adjudications. 47 U.S.C. §§ 155(c)(1), (8). These statutory provisions are inapplicable here because the Bureau is not reviewing any decision of the ALJ. Indeed, the ALJ has not issued any decision as required by the HDO so there is no ALJ recommended decision to review. The ALJ's authority under the HDO was limited to issuing a *recommended* decision within 60 days of the release date of the HDO. The HDO made clear that the Commission was to render the ultimate decision and nothing in the HDO divested the Commission (or the Media Bureau on delegated authority) from resolving the factual disputes and issuing a decision in the event that the ALJ failed to exercise its delegated authority under the HDO.

⁶¹ 47 U.S.C. § 405.

⁶² TWC's Opposition to Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, filed Dec. 4, 2008; Comcast's Opposition to Motion for Reconsideration of Hearing Designation Order, filed Dec. 8, 2008, at 7; Comcast's Opposition to Herring Broadcasting, Inc.'s Motion for Revocation of hearing Designation, filed Nov. 26, 2008, at 3-4.