

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: The Hon. Richard L. Sippel
Chief Administrative Law Judge

February 9, 2009

JOINT STATUS REPORT

In response to the Order dated February 2, 2009 issued by Chief Administrative Law Judge Richard L. Sippel (FCC 09M-11), defendants Time Warner Cable Inc. (“TWC”), Comcast Corporation (“Comcast”), Cox Communications, Inc. (“Cox”), and Bright House Networks, LLC (“BHN”) (collectively, “Defendants”), hereby submit this joint status report regarding Protective Order negotiations and outstanding discovery issues in the above-captioned proceedings involving complainant Herring Broadcasting, Inc., d/b/a WealthTV (“WealthTV” or “Complainant”).

I. STIPULATION

The parties have reached a joint stipulation regarding expert and other discovery, which is attached hereto. In addition, the parties have agreed that there is no need to produce a privilege log as it relates to documents withheld under a *bona fide* claim of privilege.

II. PROTECTIVE ORDER

The parties have made substantial progress in negotiating a Protective Order governing the use of Confidential and Highly Confidential Information in this proceeding. However, they have been unable to finalize an agreement due to two unresolved issues: (1) appropriate measures to ensure that Confidential Information offered in any oral testimony at the hearing or depositions, during any oral argument, or included in any transcript, is not disclosed to anyone other than an Authorized Representative; and (2) appropriate limitations to ensure that when an expert learns Confidential Information in this proceeding (which obviously cannot be “unlearned”), the expert cannot engage in commercial negotiations against the disclosing party for a reasonable period. Having reached an impasse on these issues, it is anticipated that each side will file a proposed protective order containing language consistent with their respective positions, along with a request that the ALJ consider the matter and rule on an appropriate resolution.

III. DOCUMENT PRODUCTION

The parties continue to work to resolve document request objections. Where an issue of contention has been resolved, we provide a brief explanation of the resolution. Where an issue remains unresolved, we provide the reasons for continued disagreement and indicate whether a Defendant expects to file a Motion to Compel with respect to the production of the subject documents, and without waiver of the right to file additional timely Motions to Compel after review of any documents actually produced by WealthTV.

A. Defendants' Requests to Complainant

WealthTV failed to interpose timely specific objections to any of Defendants' document production requests. Accordingly, Defendants expect WealthTV to conduct a reasonable search and produce all non-privileged responsive documents on or before February 13, 2009, and Defendants stand prepared to file Motions to Compel if WealthTV's production is in any way incomplete.

Despite WealthTV's failure to raise specific objections, in the course of discussions relating to document production, WealthTV has indicated that it does not intend to fully comply with Defendants' requests relating to WealthTV's affiliation agreements with other MVPDs or its unsuccessful attempts to gain carriage by various MVPDs that held no ownership interest in MOJO.¹ WealthTV claimed that it would be unduly burdensome to produce all affiliation agreements and related information with respect to all of the approximately 70 MVPDs that WealthTV claims currently carry its service. As an accommodation to WealthTV, Defendants have agreed to limit the scope of their request if WealthTV provides a list of all of its affiliates that Defendants can use to identify a sampling of affiliation agreements WealthTV should produce. WealthTV has refused to provide such list and has offered only to provide its

¹ See Cox Document Request No. 3, Comcast Document Request No. 3, and Time Warner Cable Document Request No. 7; BFN Document Request Nos. 2 and 3.

affiliation agreements with two MVPDs, which WealthTV has unilaterally selected: Verizon and Charter. As to the potentially hundreds of MVPDs with respect to which WealthTV has been unsuccessful in reaching an affiliation agreement, Defendants have again offered to limit the scope to a relative handful, *e.g.*, DirecTV, Dish, Cablevision, Mediacom, Suddenlink, Cable One and Insight. WealthTV continues to refuse to produce any documents responsive to this request. Defendants intend to file a Motion to Compel production of these critical documents promptly.

In addition to the foregoing dispute affecting all Defendants, recent discussions indicate that WealthTV may not comply fully with at least one specific document production request from TWC, which has requested that WealthTV produce copies of the programs provided to its San Antonio Division in connection with the limited trial distribution of such WealthTV programs on a video-on-demand (“VOD”) basis (see TWC Document Request No. 1). Because it appears that these materials are no longer readily accessible by WealthTV other than on “master” tapes, TWC has agreed to limit this aspect of the request to lists and descriptions of such programs provided during the six-month trial -- which presumably would require production of no more than twelve pages. TWC also is seeking to obtain copies of these programs through alternative sources at WealthTV’s suggestion.

B. Complainant’s Requests to Defendants

The Complainant’s requests were identical with respect to each Defendant with the exception of the information requested in WealthTV’s Document Request No. 2. As such, the information provided herein with respect to Complainant’s Document Request Nos. 1 and 3 - 10 applies to all Defendants, while that provided with respect to Document Request No. 2 is specific to each Defendant.

Document Request No. 1

WealthTV has requested that the Defendants produce all documents relating to their evaluation and consideration of WealthTV, which ostensibly would require each Defendant to search for responsive materials across its entire company, including each of the hundreds of cable system locations where they operate. Defendants objected to this request as, among other things, overbroad and unduly burdensome, but agreed to search for and produce responsive, non-privileged documents at the corporate level. Defendants and WealthTV continue to discuss whether they can reach an accommodation with regard to searching documents beyond the corporate level. WealthTV has agreed that the Defendants may limit their search to corporate, regional, and divisional communications and documents. WealthTV has also agreed to produce a list of locations visited by WealthTV representatives as well as a non-exhaustive list of Defendants' personnel involved in such discussions to aid in the search. Defendants have not accepted WealthTV's proposal and remain concerned that, even with additional guidance, this request is, among other things, unduly burdensome and overbroad. Nevertheless, upon receipt from WealthTV of the list of locations visited and individuals contacted, Defendants will consider whether a search so limited would be unduly burdensome.

Document Request No. 2

TWC. WealthTV has requested that TWC produce documents relating to its San Antonio Division's limited trial distribution of certain WealthTV programs on a VOD basis, including performance data and materials relating to WealthTV's radio and website marketing efforts in connection with such distribution. Subject to and without waiver of its timely-filed General and Specific Objections, TWC has agreed to produce responsive, non-privileged documents in its possession, custody or control in response to this Request.

BHN. WealthTV has requested "[a]ny direct affiliation agreements between Bright House and any national cable programming service that was not lead [*sic*] and signed by Time

Warner.” BHN has objected to this request on grounds that it would not lead to the discovery of any evidence relevant to the case. More specifically, because the complaint alleges only that BHN refused to negotiate a carriage agreement, and not that the parties disagreed with regard to the terms of any such agreement, evidence of terms of carriage reached with other services would not be relevant to any material issue in this case. BHN also noted that such agreements typically contain contractual confidentiality provisions prohibiting their disclosure. Because there have been no continued discussions regarding this request, BHN believes that WealthTV has accepted its position.

Cox. WealthTV has requested all documents relating to its potential carriage on a digital multicast stream of Las Vegas television station KLAS, including a copy of the retransmission consent agreement between KLAS and Cox. Among other things, Cox has objected to the request as irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, because Cox does not own KLAS, does not possess or control many of the documents requested, and because the retransmission agreement between Cox and KLAS is highly confidential and subject to a strict contractual confidentiality provision. Cox and WealthTV are currently engaged in efforts to resolve this issue, most likely through a limited production or a stipulation.

Comcast. WealthTV has requested all documents relating to the proposal and evaluation for carriage of WealthTV by Adelphia Communications Corporation as a replacement for Chronicle. Subject to certain limitations provided in its document request objections, Comcast has agreed to conduct a reasonable search and produce non-privileged documents responsive to the request.

Document Request No. 3

WealthTV has requested that all Defendants, including as participants in iN DEMAND, provide certain information relating to their creation and carriage of INHD, MOJO, Versus, The Outdoor Channel, E!, and Style. Defendants objected to this request as, among other things,

irrelevant and overbroad to the extent that it seeks documents related to Versus, The Outdoor Channel, E!, and Style. WealthTV's complaints allege that Defendants discriminated against WealthTV in favor of MOJO, and make no discrimination allegation with regard to Versus, The Outdoor Channel, E!, and Style. Defendants' objections were bolstered by the fact that the original language of WealthTV's document requests indicated that WealthTV was under the mistaken impression that Defendants all hold ownership interests in Versus, The Outdoor Channel, E! and Style.

Upon being apprised of the facts relating to ownership of these four networks, WealthTV initially agreed that because TWC, Cox, and BHN have no ownership interest in Versus, The Outdoor Channel, E! and Style, and because Comcast has no ownership interest in The Outdoor Channel, they could respond to this request solely with respect to their affiliated networks (i.e., INHD and MOJO for all Defendants, and Versus, E!, and Style for Comcast, specifically). Although Defendants had not yet responded to WealthTV's proposal, WealthTV retracted it and renewed its request as to all of the listed services for all Defendants, apparently on the brand new theory that such documents may reveal a "pattern or practice" of favoritism for programming services that are owned by *other* cable companies.

Defendants maintain their objections to this document request and WealthTV has stated its intention to file a Motion to Compel. In response to WealthTV's stated intention, Defendants suggested that WealthTV first review the list of unaffiliated networks produced in response to WealthTV Request No. 8, which already seeks information about unaffiliated networks and which Defendants believe will conclusively rebut any inference of discrimination against unaffiliated programmers.

WealthTV also originally requested that all Defendants provide monthly payment records and detailed subscriber data by city and month, as well as the associated channel position and printouts of each channel lineup by system for all markets from June 1, 2004 until December 1,

2008 with respect to INHD and MOJO. In response to the Defendants' objections on overbreadth and other grounds, WealthTV has agreed to limit this request to the service tier and channel position of INHD and MOJO (as applicable) on May 1st of each year from 2005 through 2008 for Defendants' three largest pertinent cable systems on the applicable dates. Defendants stand on their objections regarding production of any INHD and MOJO revenue and subscriber figures.

Document Request No. 4

WealthTV has requested all documents relating to the terms of carriage for INHD, MOJO, Versus, The Outdoor Channel, E!, and Style by each Defendant or by any other multichannel video programming distributor ("MVPD"). The Defendants have agreed to conduct a reasonable search and produce non-privileged documents responsive to the Request as it relates to INHD and MOJO. As explained above, Defendants have objected to this Request as it relates to Versus, The Outdoor Channel, E!, and Style, *inter alia*, on relevance grounds and because TWC, BHN and Cox have no ownership interest in these four networks and Comcast has no ownership interest in The Outdoor Channel. As with Request No. 3 above, Defendants have suggested that WealthTV defer filing a Motion to Compel until it has reviewed materials being prepared in response to Document Request No. 8 to the extent that such information should diminish any perceived need for documents it seeks in connection with Document Request No. 4.

Document Request No. 5

WealthTV has requested various documents relating to the governance, financing, and marketing of iN DEMAND Networks, including certain materials received by Defendants as participants in iN DEMAND. Subject to and without waiver of their timely-filed General and Specific Objections, Defendants have agreed to produce responsive, non-privileged documents in their possession, custody or control in response to this Request.

Document Request No. 6

WealthTV has requested all programming schedules for INHD, MOJO, Versus, The Outdoor Channel, E!, and Style. Defendants have objected to this request as irrelevant, overbroad and unduly burdensome, and because the requested information is likely available from commercial sources, such as Tribune Media Services, or the websites for the affected networks. At WealthTV's request, Defendants are seeking to determine whether the requested INHD and MOJO programming schedules can be obtained from iN DEMAND Networks without undue burden.

Document Request No. 7

WealthTV has requested all documents relating to the Defendants' decision to cease carriage and/or operations of MOJO and/or iN DEMAND Networks' decision to cancel the service. Subject to and without waiver of their timely-filed General and Specific Objections, Defendants have agreed to produce responsive, non-privileged documents in their possession, custody or control in response to this Request.

Document Request No. 8

WealthTV has requested that the Defendants produce all carriage agreements and related documents with any unaffiliated networks entered into during the period of June 1, 2007 to the present. The parties have agreed that the scope of this Request be limited to carriage agreements executed from June 1, 2007 to the time of filing of each carriage complaint against each

respective Defendant with unaffiliated networks that had not secured carriage before such date, and that it exclude sports, news and foreign language programming networks. Furthermore, the Defendants have agreed to provide only a list of such networks rather than the agreements and related documents themselves.

Document Request No. 9

WealthTV has requested Nielsen or similar ratings data by DMA for all entertainment-related programming networks carried on the Defendants' cable systems. The Defendants have objected to this request on the basis of irrelevance, that it is not likely to lead to the discovery of admissible evidence, that disclosure of the requested data will violate confidentiality provisions contained in Nielsen's license agreements, and because the data sought is commercially available from Nielsen and may be purchased at WealthTV's convenience. Moreover, Defendants have advised WealthTV that, based on prior experience, Nielsen is unlikely to agree to the release of any of its proprietary ratings data, and will aggressively litigate any unauthorized attempt to do so.

Defendants have suggested that ratings data for all networks that do not primarily broadcast sports, news, or shopping programs, derived from national ratings information reported by Nielsen, is published by SNL Kagan, and that such data is commercially available to WealthTV. WealthTV has conceded that it has access to SNL Kagan ratings data, but claimed that such data is "unsatisfactory" for its purposes without specifying any reasons. Defendants understand that WealthTV is still considering its position on this issue.

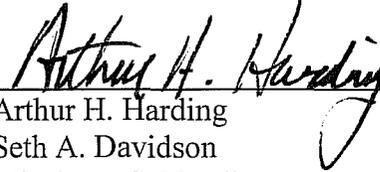
Document Request No. 10

WealthTV has requested from the Defendants all documents relating to the difference between the cost of programming and the price charged to viewers for each tier of service, including certain digital and high definition tiers, in each market as of June 1, 2007. In response to the Defendants' objections, *inter alia*, that the request calls for irrelevant and highly

competitively sensitive information, and is vague, ambiguous, overbroad, and unduly burdensome, WealthTV has withdrawn this Request.

Respectfully submitted,

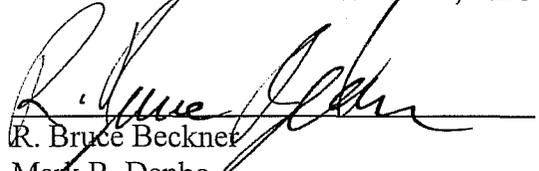
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Dated: February 9, 2009

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STIPULATION REGARDING EXPERT AND OTHER DISCOVERY

IT IS HEREBY STIPULATED AND AGREED by and between Complainant Herring Broadcasting Inc. d/b/a WealthTV, and defendants Time Warner Cable Inc., Bright House Networks, LLC, Cox Communications, Inc. and Comcast Corporation, through their undersigned counsel, that:

1. The parties shall be required to produce, at the time designated for disclosure of expert reports, any materials or data relied upon by a testifying expert in forming

the opinions about which he or she expects to testify at trial, but the parties shall not be required to produce materials or data which were reviewed by an expert but on which such expert did not rely in forming his or her opinions.

2. No expert will be subject to questioning – in a deposition or a trial – regarding materials or data developed in connection with opinions about which the experts do not expect to give at trial.

3. No party shall be required to produce communications between any attorney representing that party and any expert of that party, except to the extent any expert has relied upon such communications in forming an expert opinion in this proceeding.

4. No party shall be required to produce drafts of any report or summary submitted by an expert.

5. To the extent any expert is also a fact witness, Paragraphs 1-3 herein shall not apply to any such factual testimony of that witness.

6. Depositions shall be limited to expert witnesses designated by the parties.

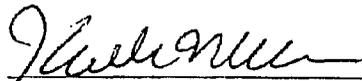
7. Any motion to compel the production of documents may be served by a party no later than ten (10) days after receipt by that party of the pertinent production of documents requested from the adverse party.

Dated: February 6, 2009



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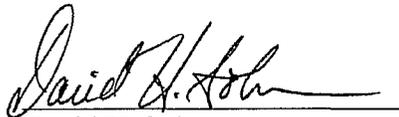
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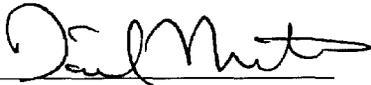
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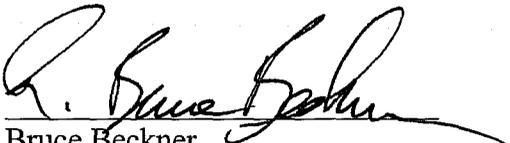
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CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that copies of the foregoing "Joint Status Report" were served this 9th day of February, 2009, via email, upon the following:

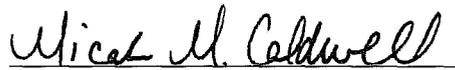
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