

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)	
)	

To: Marlene H. Dortch, Secretary, Federal Communications Commission
Attn: The Hon. Richard L. Sippel – Chief Administrative Law Judge

February 9, 2009

DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Pursuant to 47 C.F.R. § 1.325, defendants Time Warner Cable Inc. (“TWC”), Comcast Corporation, Cox Communications, Inc. and Bright House Networks, LLC (collectively, the “Defendants”), hereby move to compel Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) to produce certain documents in response to TWC’s December 5, 2008 Request for Production of Documents.¹

Preliminary Statement

At each conference before the Chief Administrative Law Judge, the parties in this proceeding have pledged to work together to accomplish targeted discovery that would allow this case to proceed expeditiously to hearing. WealthTV has broken that pledge, refusing to produce the most basic and centrally relevant documents relating to its claim, to fundamental defenses to that claim, and to the appropriate remedy (if any) for that claim. WealthTV contends that Defendants’ independent determinations not to carry it had to be the result of discrimination on the basis of Defendants’ affiliation with MOJO, but it refuses to give Defendants documents that would provide a window into either the decisions made by those multichannel video program distributors (“MVPDs”) that have determined to carry its network, or by the larger group that have declined to do so notwithstanding their lack of affiliation with MOJO. Specifically, WealthTV refuses to provide: (1) documents reflecting the terms of carriage WealthTV has secured with other MVPDs (other than two that it has handpicked), and (2) documents relating to the communications WealthTV had with other MVPDs that made the same determination as Defendants not to afford carriage.

¹ In all material respects, the underlying facts surrounding the dispute of each Defendant with WealthTV are the same, and each Defendant incorporates and adopts the arguments set forth herein. *See* TWC Document Request No. 7, Cox Document Request No. 3, Comcast Document Request No. 3, BHN Document Request Nos. 2 and 3.

Defendants seek these relevant categories of documents for obvious reasons. As to the first, Defendants need to be able to put into evidence the terms of carriage that WealthTV has actually secured from other MVPDs in the marketplace. Such proof will bear on the legitimacy of terms sought by WealthTV in negotiations with Defendants in this proceeding, as well as on the reasonableness of the terms various Defendants may have proposed to WealthTV.

The relevance of the second category of information — documents relating to WealthTV's unsuccessful attempts at securing carriage from other MVPDs — also is self-evident. Each of the Defendants maintains that its negotiation with WealthTV was not infected by discrimination or some nefarious intent to benefit MOJO; each of the Defendants makes its programming decisions based on years of industry editorial experience, sound business judgment and objective data, and their individual approaches to WealthTV were no exception. If other MVPDs — particularly major competitors like DirecTV or DISH Network *that had no ownership interest in MOJO* — came to the same editorial and business judgments about WealthTV as did Defendants, WealthTV's discrimination claim collapses. At a minimum, such evidence would contradict WealthTV's assertion that the decision not to enter into an affiliation agreement with it could have been made only on the basis of affiliation.

Defendants are entitled to develop their defenses through document discovery from WealthTV. Particularly in light of Defendants' expressed willingness to minimize the discovery burden on WealthTV, WealthTV's refusal even to make a colorable proffer of these relevant documents is wholly improper. Because Defendants have agreed to expedite this matter by forgoing fact witness depositions, the need for them to be able to examine the documents that contain this information is even more crucial. Defendants' motion to compel should be granted.

Statement of Facts

I. WealthTV's Claims and Defendants' Defenses

WealthTV has brought a claim pursuant to Section 616 of the Communications Act of 1934 and 47 C.F.R. § 76.1301(c) against each of the Defendants, alleging that each discriminated against WealthTV because it was not an affiliated programmer. WealthTV further asserts that Defendants discriminated against WealthTV in favor of the programming network MOJO, owned and operated by iN DEMAND Networks (“iN DEMAND”), in which Defendants each have an ownership stake. WealthTV argues that it is “substantially similar” to MOJO, and that the only reason each Defendant could possibly have agreed to carry MOJO and not WealthTV is that the former is its affiliate and the latter is not. Indeed, WealthTV has asserted not only that MOJO was “substantially similar” to WealthTV, but that it was, in essence, a deliberate duplication of WealthTV by iN DEMAND and the Defendants that owned it.

Defendants reject all of these claims. For example, as set forth in TWC's Answer (“Answer”), TWC made programming decisions “without regard to WealthTV's lack of affiliation with TWC” and “offered a carriage deal to WealthTV on terms that are similar to those offered to dozens of other programming services, including some affiliated with TWC[.]” (Answer at 2.) TWC further stated in its Answer that its “dealings with WealthTV ... demonstrate unequivocally that TWC's conduct was based solely on sound business judgment and editorial judgment, and had nothing whatsoever to do with TWC's ownership interests in any other service, including MOJO, or TWC's lack of ownership interest in WealthTV.” (*Id.* at 4.) Each of the Defendants provided similar denials.

II. The Parties' Requests for Documents and Negotiations Regarding Production

On December 5, 2008, pursuant to the Procedural and Hearing Order issued by the Presiding Judge on December 2, 2008, WealthTV and Defendants each served ten document

requests. Among the documents requested by Defendants were those called for in TWC's Request for Production of Documents was Request No. 7:

All documents relating to proposed or actual carriage of WealthTV by DirecTV, DISH Network, or any other MVPD other than Time Warner Cable, including, but not limited to, communications regarding proposed, actual or rejected carriage, proposed, draft, or executed affiliate agreements, and/or documents relating or reflecting any strategy, analysis, failure or success of WealthTV in connection with securing carriage.

Each of the Defendants propounded document requests seeking these or comparable documents.

On December 16, 2008, WealthTV served its Objections to Defendants' Document Requests, stating that it objected to all four Defendants' document requests "on the same grounds identified in Comcast's December 15, 2008 objections to WealthTV's document requests on pages 1-2 of its responses and objections and in paragraphs 1 through 7 and 9 through 11 ... of the same." WealthTV made no specific objection with respect to Request No. 7 or to the other comparable requests made by the other Defendants.

Counsel for Defendants and WealthTV engaged in several teleconferences to discuss compromises that might be reached with respect to a number of requests made by both sides. In the course of these discussions, counsel for WealthTV stated that it does not intend to produce all the requested affiliation agreements despite failing to make a timely specific objection. Wealth2TV advised Defendants that it would produce carriage agreements for only two of the more than 75 MVPDs with which it claims to have agreements: Charter and Verizon. It refused to produce any documents with respect to negotiations with other MVPDs from which it had failed to secure carriage.

In an effort to obviate this motion, Defendants requested that WealthTV provide a list of its affiliates so that Defendants could determine if it were possible to narrow their requests. WealthTV advised Defendants that, although it maintained a list of all of its affiliates, it would not produce that list to Defendants. Similarly, Defendants offered to restrict their

requests for documents concerning failed carriage negotiations to a specific list of MVPDs; WealthTV stood on its untenable objection that negotiations with MVPDs from which it has not secured carriage are not relevant. This motion followed.

Argument

WealthTV has no basis for withholding pertinent affiliation agreements and documents reflecting failed carriage negotiations with MVPDs that are not affiliated with MOJO. Section 1.311(b) of the FCC Rules of Practice and Procedure, which espouses a broad view of discovery consistent with the Federal Rules of Civil Procedure, states in relevant part:

Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection to use of these procedures that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

47 C.F.R. § 1.311(b). Section 1.325(a) further provides that a party “may request any other party ... to produce ... documents ... within the scope of the examination permitted by Sec. 1.311(b)[.]” 47 C.F.R. § 1.325(a). The documents sought by TWC’s Request No. 7 and the other Defendants’ requests are squarely “relevant to the hearing issues” of Defendants’ good faith negotiations and to the potential remedy should liability be established. WealthTV is obligated to produce them.

I. WealthTV’s Carriage Agreements Are Relevant To WealthTV’s Discrimination Claim And To Potential Remedies

Defendants must have access to a range of WealthTV’s affiliation agreements to prepare adequately to meet the claim of discrimination. WealthTV claims that the fact that it is carried by MVPDs not affiliated with MOJO demonstrates that the decision by Defendants not to carry the network had to be the product of discrimination on the basis of affiliation. That claim

cannot be sustained for any number of reasons, but it certainly cannot be tested without examination of the terms on which other MVPDs granted carriage to WealthTV. If WealthTV's carriage agreements with other MVPDs reflect terms materially different than those proposed to Defendants, the agreements would provide further proof that Defendants' decisions not to carry the network on the terms they were offered were grounded in their sound business judgment and not made for discriminatory reasons.

Moreover, discovery into the terms of carriage agreements that WealthTV has previously found acceptable will enable Defendants to ascertain the degree to which their individual carriage offers (if any) were reasonably similar to WealthTV's other carriage arrangements. For example, TWC offered WealthTV a hunting license. TWC believes that WealthTV has entered into hunting license-type deals with the National Cable Television Cooperative and Insight Communications (as well as Charter Communications) (*see* Answer at 34), and therefore should be afforded discovery to determine which WealthTV agreements are comparable to that offered by TWC. Evidence of similar agreements would bolster TWC's contention that its dealings with WealthTV were in good faith and support its industry expert's opinion that hunting licenses are common tools for fledgling networks such as WealthTV.

In addition, production of the requested agreements is necessary to any reasonable evaluation of the proper remedy if liability is established in this case. WealthTV has purportedly secured carriage under terms of affiliation agreements it has signed with more than 75 MVPDs. Yet, it seeks a remedy in this case that is not linked to the scope of those agreements it has accepted in the market. Rather, WealthTV would impose an obligation upon Defendants to provide carriage to WealthTV on every single Defendant system on terms "similar" to those governing each Defendant's carriage of MOJO. Defendants maintain that they are perfectly within their rights to not to carry WealthTV at all. Should the FCC disagree, however, there is no basis for requiring Defendants to carry WealthTV on terms more onerous than those

WealthTV has secured from other MVPDs in the marketplace. WealthTV is not entitled to a carriage windfall simply because it chose to litigate instead of negotiate.

Thus, in order to develop their remedy defense, Defendants need access to these agreements to evaluate the terms of carriage that WealthTV has been able to obtain through arms-length negotiations. The best source for relevant evidence of the market price for WealthTV and other material commercial terms will be found in these carriage agreements. For example, if discovery reveals that WealthTV is only able to charge prices to other MVPDs that are materially below what it is seeking in this proceeding, Defendants must be able to counter WealthTV's proposed excessive remedy by demonstrating the far lower actual benchmarks for the value of WealthTV's programming. WealthTV can offer no rationale for denying Defendants this opportunity.

In view of the relevance of these agreements to the fundamental issues of Defendants' good faith negotiations and any potential remedy, WealthTV's proposed compromise — to cherry-pick two out of “over 75” carriage agreements for production — does not suffice. A party is not permitted to engage in self-serving, selective document production; if a document is responsive to a request, is not subject to privilege, and its production does not impose undue burden, it must be produced. *See Jewish War Veterans of the U.S.A. v. Gates*, 506 F. Supp. 2d 30, 58 (D.D.C. 2007) (ordering production of all documents responsive to a particular discovery request). In the parties' discussions, WealthTV did not complain of burden. Indeed, it could not, as Defendants had expressed their willingness to limit their request to only a subset of the more important WealthTV carriage agreements. WealthTV's agreement to produce two agreements is an acknowledgement that these agreements are relevant; accordingly, Defendants should be afforded a reasonable range of agreements in order to permit them to undertake a meaningful analysis for the hearing.

In a case where WealthTV has alleged that it must have been discriminated against by Defendants because its “programming service has proven consumer appeal” and has carriage agreements with “over 75” MVPDs, WealthTV’s refusal to produce more than two of those carriage agreements should not be countenanced. Defendants are not required to accept WealthTV’s claims at face value; they are allowed to take discovery to test them. Indeed, it is precisely because WealthTV is given a wide berth to allege facts in its pleading that adequate discovery to test those pleadings must be allowed. *See, e.g., Youssef v. F.B.I.*, 541 F. Supp. 2d 121, 161-62 (D.D.C. 2008) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)). The simplest way for Defendants to test WealthTV’s allegations and proposed remedy is to obtain document discovery regarding the factual basis for them; the simplest source of that basis is the carriage agreements themselves.

II. Documents Regarding WealthTV’s Unsuccessful Or Pending Attempts At Carriage Are Relevant To The Issues In This Hearing

Defendants also are entitled to the production of documents relating to WealthTV’s failed attempts to secure carriage on other MVPDs, the relevance of which is even clearer than that of WealthTV’s affiliation agreements. WealthTV has alleged that each of the Defendants was motivated to conduct sham negotiations with WealthTV in an effort to learn its ideas about programming WealthTV and to give those ideas to MOJO. WealthTV also claims that Defendants must have discriminated against it, because those negotiations did not result in carriage. WealthTV has offered no direct evidence of discrimination; rather, it asks the Presiding Judge to infer discrimination from Defendants’ respective decisions not to provide full linear carriage of the network.

But this is precisely why WealthTV’s unsuccessful effort to obtain carriage on MVPDs not affiliated with MOJO is highly relevant. Contrary to WealthTV’s contention, there are many legitimate business reasons not to carry WealthTV, and they have nothing to do with

whether a carrier has an ownership interest in MOJO. DirecTV and DISH Network, for example, have no financial interest in MOJO; they rejected WealthTV all the same. Defendants are entitled to discover why and to present evidence as to how their decision-making compared with those MVPDs not affiliated with MOJO that reached the same conclusion on carriage as did each Defendant. To the extent that WealthTV is in possession of documents reflecting the sound editorial and business reasons why other large MVPDs — such as DirecTV, DISH Network, Cablevision, Suddenlink, and Mediacom — do not carry WealthTV, this is compelling evidence supporting each Defendant’s defense that its approach to WealthTV was based on similar good faith judgments and not discrimination.² Such documents should be produced.

* * * * *

WealthTV asserts that in light of the “overwhelming support for the channel,” Defendants must have been discriminating when they would not grant carriage to WealthTV on the terms it sought. But WealthTV refuses to provide evidence of this “overwhelming support” (its carriage agreements) or evidence that might contradict this assertion (documents relating to failed carriage attempts). Discovery is a two-way street. Defendants have agreed to provide documents relating to other non-affiliated networks so that WealthTV may challenge their defense that they do not engage in discrimination on the basis of affiliation. WealthTV’s claims should have to withstand the same scrutiny.

Conclusion

For the foregoing reasons, Defendants respectfully request that WealthTV be ordered to produce carriage agreements and documents relating to proposed or rejected carriage

² WealthTV’s counsel has suggested that there may not be any documents relating to unsuccessful carriage discussions with other MVPDs. This contention cannot be given any credence, given WealthTV’s aggressive, multi-year pursuit of carriage at TWC, for example (*see* Cmplt. at ¶¶ 12-14). Indeed, WealthTV’s carriage complaint against each of the other Defendants included emails and draft term sheets relating to its carriage discussions with Defendants.

in response to TWC's Request No. 7 in its Request for Production of Documents, dated December 5, 2008, and the other comparable requests from Defendants.

Respectfully submitted,

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Dated: February 9, 2009

CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that copies of the foregoing “Motion to Compel Production of Documents” were served this 9th day of February, 2009, via email, upon the following:

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