

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters 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

Attn: The Honorable Richard L. Sippel
Chief Administrative Law Judge

**RESPONSE TO MOTION FOR LEAVE TO SUBSTITUTE
A NEWLY DESIGNATED EXPERT WITNESS**

Comcast Corporation, by its attorneys and on behalf of Time Warner Cable Inc., Bright House Networks, LLC and Cox Communications, Inc. (collectively, "Defendants"), hereby

responds to WealthTV's request to substitute a newly designated expert witness, Ms. Sandy McGovern, for its previously-designated expert witness.¹

The Defendants note that WealthTV designated Mr. Jedd Palmer, whom it now seeks to replace as an expert witness, on October 31, 2008 and reaffirmed that designation on December 12.² WealthTV acknowledges that Mr. Palmer's condition "was known to WealthTV at the time of his designation," but now says that the "uncertainty about whether Mr. Palmer can deliver testimony has increased."³ While the Defendants do not object to the substitution of Ms. McGovern for Mr. Palmer in light of Mr. Palmer's health, the fact remains that substituting Ms. McGovern at this late date could subject Defendants to a substantial risk of unfair prejudice.

For over two months, the Defendants have been preparing for hearings in which Mr. Palmer would be WealthTV's expert witness, based on the summaries of his expected testimony and his previous declaration, which WealthTV indicated it would be submitting in the record of the hearing.⁴ The Defendants have employed their own experts who have been preparing to address and rebut the expected testimony of Mr. Palmer. Accordingly, the Defendants respectfully request the Presiding Judge to take reasonable steps to minimize the prejudice that

¹ See Herring Broadcasting, Inc., d/b/a WealthTV's Motion for Leave to Substitute a Newly Designated Expert Witness for One Already Designated (Feb. 9, 2009) ("Motion").

² See Herring Broadcasting, Inc. d/b/a WealthTV's First Designation of Witnesses and Exhibits (Oct. 31, 2008); Herring Broadcasting, Inc. d/b/a WealthTV's Designation of Expert Witnesses (Dec. 12, 2008).

³ Motion at 2.

⁴ See Herring Broadcasting, Inc., d/b/a WealthTV's Designation of Expert Witnesses (Dec. 12, 2008) at 2-3; see also Herring Broadcasting, Inc., d/b/a WealthTV's First Designation Of Witnesses And Exhibits (Oct. 31, 2008) at 2 ("As a part of its affirmative case, WealthTV intends to offer the affidavits/declarations of Charles Herring, Jedd Palmer, Mark Kersey and John Ghiorzi which affidavits and declarations were submitted in support of WealthTV's pleadings.").

would be caused by the late substitution should Ms. McGovern attempt to disavow or materially expand Mr. Palmer's prior opinions in her written or oral testimony.

In particular, the Presiding Judge should issue the accompanying proposed order limiting the scope of Ms. McGovern's testimony to matters about which WealthTV has previously indicated Mr. Palmer would testify. WealthTV's motion is unclear on this point – stating that Ms. McGovern would be “*essentially* stepping into the same role with the same testimonial scope as Mr. Palmer,”⁵ and that Ms. McGovern “is in a position to shed *additional light* ... regarding defendants' argument that MOJO was merely a rebranding of INHD,”⁶ and that it “does not *foresee* that Ms. McGovern would delve into areas other than those as to which WealthTV has already provided notice to the defendants in its designation of Mr. Palmer.”⁷ The quoted language leaves the door open for Ms. McGovern's testimony to exceed the scope of matters on which Mr. Palmer could and would have testified. Defendants therefore believe it to be necessary for the Presiding Judge to set clear boundaries on the substitute expert's testimony to ensure that WealthTV gains no advantage from the emergency replacement of its originally-designated expert witness.

The Defendants note further that the original scheduling order in this case provided for *sequential* designation of experts, with WealthTV going first and the Defendants going second.⁸ The Defendants urge the Presiding Judge to ensure that this element of the case schedule has continuing vitality by not permitting WealthTV's late-substituted expert witness's testimony to exceed the scope already defined for the witness she is replacing – Mr. Palmer.

⁵ Motion at 3 (emphasis added).

⁶ *Id.* at 2 (emphasis added).

⁷ *Id.* (emphasis added).

⁸ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc. et al.*, MB Docket No. 08-214, *Revised Procedural and Hearing Order*, FCC 08M-53 (ALJ rel. Dec. 15, 2008).

For the foregoing reasons, the Presiding Judge should issue the proposed order accompanying this Response.

Respectfully submitted,

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Date: February 11, 2009

CERTIFICATE OF SERVICE

I, Marc D. Knox, hereby certify that, on February 11, 2009, copies of the attached Response to Motion for Leave to Substitute a Newly Designated Expert Witness were served by email to the following:

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