

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 12, 2009

DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Defendants Time Warner Cable Inc. (“TWC”), Comcast Corporation, Cox Communications, Inc. and Bright House Networks, LLC (collectively, the “Defendants”), hereby respectively submit this reply memorandum in further support of their Motion 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. WealthTV’s Opposition to Defendants’ Motion to Compel (the “Opposition”) fails to provide any legitimate rationale for withholding the critical documents Defendants seek.

First, WealthTV misleadingly describes Defendants’ position regarding WealthTV’s affiliation agreements and related documents. Contrary to WealthTV’s statement in its Opposition, Defendants told WealthTV they did not want all 120 affiliation agreements and related documents; instead, they requested a list of affiliate agreements so that Defendants could identify a subset that would give them a sufficient sampling upon which to make an analysis of WealthTV’s marketplace positions on carriage. WealthTV informed Defendants that it had such a list — but flatly refused to produce even that. Rather, despite its acknowledgement of Defendants’ “legitimate need” for these agreements,¹ WealthTV unilaterally chose 2 out the 120 agreements for production and now pronounces that this will fulfill Defendants’ objectives.²

Given WealthTV’s concession regarding the relevance of these documents, its offer of two agreements is plainly insufficient. In the Carriage Complaints it has filed against each of the Defendants, WealthTV trumpets its agreements with other MVPDs such as GCI, WideOpen West, Qwest, Armstrong Cable, Surewest, Metrocast, Grande Communications,

¹ See Opposition at 1.

² *Id.*

Service Electric, Sunflower Cable and others.³ Defendants have identified other potential agreements, such as those with NCTC and Insight Communications, in which they are interested.⁴ Moreover, although WealthTV protests that production of affiliation agreements will require consultation from counterparties, it has not hesitated in requesting that Defendants produce their wholly unrelated agreements with many other programmers, all of which will require the same inconvenience.⁵ WealthTV cannot engage in a one-way discovery process.

As set forth in the Motion to Compel, Defendants need a representative sample of agreements in order to develop respective comprehensive defenses to WealthTV's discrimination claim and proposed remedy.⁶ These documents are essential to the Defendants' preparation of their defenses. In order to accommodate WealthTV's burden objection, Defendants would accept the immediate production of a list of all WealthTV affiliate agreements and commit to inform WealthTV promptly of the identities of a smaller subset for which final agreements should be produced as soon as possible.

Second, Defendants' request for documents pertaining to WealthTV's failed carriage negotiations with other MVPDs not affiliated with MOJO is not premised on a "false construct" but on compelling evidentiary grounds. WealthTV asserts that Defendants did not carry WealthTV for discriminatory reasons. WealthTV has provided no direct evidence of discrimination and instead asks the Court to infer discrimination from the Defendants' decisions

³ See Carriage Agreement Complaint against Time Warner Cable ¶ 9; Carriage Agreement Complaint against Bright House Networks ¶ 10; Carriage Agreement Complaint against Comcast Corporation ¶ 10; Carriage Agreement Complaint against Cox Communications ¶ 10.

⁴ See Motion to Compel at 6.

⁵ Unlike WealthTV, Defendants have offered to provide lists of new entertainment program services signed after June 2007 from which WealthTV can select a subset of agreements.

⁶ See Motion to Compel at 6-7.

to carry MOJO and not to carry WealthTV. The record will reflect that each Defendant chose not to carry WealthTV for good and *bona fide* reasons concerning WealthTV's lack of demonstrable appeal, the absence of a track record, inexperienced management and high price, among others. WealthTV presumably will deny that legitimate business reasons underlied Defendants' decisions, and ask the Court instead to infer that Defendants' justifications for non-carriage are pretextual and to find that Defendants' real motivation was to benefit MOJO. Part of WealthTV's case on this point will be that other MVPDs chose to carry WealthTV. Yet, evidence that other MVPDs not affiliated with MOJO chose not to carry WealthTV for similar reasons to those offered by the Defendants directly rebuts any inference that Defendants' actions must have been motivated by discriminatory intent, and will squarely support the *bona fides* of Defendants' decision-making.⁷ Accordingly, Defendants are not trying to bootstrap into the decision-making of other MVPDs but to support their respective important defenses that each Defendant's decision not to carry was made in good faith and not on the basis of affiliation.

Further, Defendants are not requesting relevant documents respecting communications between WealthTV and all MVPDs. To the contrary, Defendants will agree to limit their requests to documents relating to or reflecting communications and draft agreements between WealthTV and the following MVPDs: DirecTV, DISH Network, Cablevision, Mediacom, Suddenlink, CableOne, Insight Communications (if no agreement has been reached), RCN, Bresnan Communications, Atlantic Broadband, Knology, Midcontinent Communications, Blue Ridge Communications and Broadstripe. This proposed compromise will significantly

⁷ In order for WealthTV to argue that each Defendant's rationale for not carrying WealthTV was pretextual it will have to show that each Defendant's reasoning is completely implausible. *See, e.g., Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (to establish discrimination, plaintiff must show that proffered reason is so "weak, implausible, inconsistent or incoherent that a reasonable fact finder could conclude that it was not an honestly held belief but rather was subterfuge for discrimination"). Evidence that the Defendants were acting commensurately with other MVPDs will be highly relevant to this inquiry.

relieve WealthTV of any unnecessary burden while still affording Defendants with a range of extremely important evidence to support their defenses.

Conclusion

For the foregoing reasons, and subject to the proposals included herein, Defendants respectfully request that WealthTV be ordered to produce carriage agreements and documents relating to proposed or rejected carriage 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 12, 2009

CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that copies of the foregoing “Reply in Further Support of Motion to Compel Production of Documents” were served this 12th day of February, 2009, via email, upon the following:

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