

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Herring Broadcasting, Inc. d/b/a)	MB Docket No. 08-214
WealthTV,)	
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)	
)	
To: Marlene H. Dortch, Secretary		
Federal Communications Commission		

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

**COMPLAINANT’S OPPOSITION TO JOINT MOTION FOR MODIFICATION OF
COURT ROOM MEMORANDUM**

Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”), by its counsel, hereby submits this opposition to the motion filed jointly by defendants Time Warner Cable Inc.

(“TWC”), Comcast Corporation, Cox Communications, Inc., and Bright House Networks, LLC (“Defendants”) seeking modification of the Court Room Memorandum. Specifically, Defendants are requesting that visual aid equipment or disc/tape players be permitted at the hearing in the above-captioned proceeding for the purpose of allowing the DVDs attached as Exhibits D and E to the Expert Report of Michael Egan (“the Egan DVDs”) to be played during the hearing. For the reasons set forth below, WealthTV, through its counsel, hereby opposes Defendants’ joint motion.

1. The DVDs Contain Highly Selective Samples of a Limited Number of Episodes and Do Not Constitute a Fair Picture of the Two Programming Services and Their Similarities

Defendants seek to modify the Court Room Memorandum to permit Defendants to show the Egan DVDs, which Defendants assert compare WealthTV and MOJO programming.

Defendants claim that viewing these DVDs will aid the Presiding Judge in the understanding and appreciation of the issues involved in this case.¹ WealthTV vigorously disagrees.

To understand and appreciate the overall nature of a programming service and whether it is like or not like another programming service, one must view a substantial number of episodes of that program. That is why experts were retained by both sides in this case who have viewed dozens of hours of programming. In fact, as Defendants acknowledge in their joint motion, Mr. Egan himself viewed “numerous DVDs containing hours of WealthTV and MOJO programming” before forming the opinions contained in his Expert Report.² A casual viewer – such as Defendants intend the Presiding Judge to become at the trial if they prevail on this motion – who views a single episode of the program or short portions of one or more episodes could not possibly thereby gather enough information upon which to develop a fair opinion about the overall nature of the programming services at issue.

¹ Defendants Joint Motion for Modification of Court Room Memorandum, at 3 [hereafter Joint Motion].

² Joint Motion, at 4.

The DVDs proffered by Mr. Egan invite the viewer – the Presiding Judge -- to form personal impressions concerning the production quality, look and feel, and similarity of WealthTV and MOJO programming through the use of short clips of episodes of certain WealthTV and MOJO programs. The total combined runtime of these DVDs is clocked by Defendants at 25 minutes. Naturally, the clips are selected and presented in a way that reflects a biased view of the programming that supports Mr. Egan’s report offered on behalf of TWC and perhaps, eventually, other defendants in this proceeding.³ This condensation of Mr. Egan’s work is anything but representative of the two programming services and their similarities.

The viewing of these DVDs at trial, or for that matter, by the Presiding Judge at any time, would be highly prejudicial to WealthTV. WealthTV vigorously contests the conclusions and opinions of Mr. Egan’s Expert Report, and will continue to do so throughout the proceeding. But Defendants’ motion attempts to gain undue advantage by leveraging the proposition that “a picture is worth a thousand words” with these DVDs, and once this slanted visual abbreviation of Mr. Egan’s work is aired for or by the Presiding Judge, WealthTV’s burden of overcoming the unfair and prejudicial impressions it creates will be enlarged unreasonably. As stated above, evaluating the look and feel, production quality, and similarity of a network’s programming by presenting a few minutes of clips and excerpts does not present the viewer with a fair and accurate representation of the programming being evaluated. As a result, viewing the DVDs provided by Mr. Egan in connection with his Expert Report would be misleading as to the true nature of the programs depicted on the DVDs and as to the similarity between WealthTV and MOJO programming.

³ Mr. Egan’s report was presented by TWC. The other defendants have indicated that they might later adopt Mr. Egan’s work, but have so far not disclosed to WealthTV whether they will do so.

2. The Use of Videos During the Hearing Would be Unwieldy and Inefficient

In addition to being an incomplete and unfair representation of WealthTV and MOJO programming, the DVDs, if aired at trial, present obstacles to the efficient and orderly conduct of the hearing. As Defendants acknowledge in their joint motion, they intend to present Mr. Egan's testimony, as well as seek to admit into the record in this case Mr. Egan's Expert Report and related exhibits, including Exhibits D and E.⁴ WealthTV intends to examine Mr. Egan at the hearing regarding his Expert Report and the opinions contained therein, and to counter Mr. Egan's testimony, as well as the testimony of any other witness presented by the Defendants, through the presentation of its own witnesses. Thus, the viewing of the Egan DVDs at trial would cover ground already covered by Mr. Egan's Expert Report and his cross-examination at trial.

In the event that Defendants are permitted to present the DVDs or any other similar video or audio tapes or discs during the hearing, WealthTV would expect to examine Mr. Egan, as well as any other relevant witness(es), not only regarding his Expert Report, but also on the production and content of the DVDs themselves.⁵ This would become an unwieldy cross-examination, necessitating significant manipulation of video equipment to stop and start the video at important points to conduct the questioning. It would also unnecessarily increase the amount of testimony required, as well as the length of time required to complete the hearing – all for the purpose of viewing video that, by its nature, is misleading.

Further, if the Defendants' DVDs are permitted to be played at the trial, WealthTV would be forced to seek permission to play its own DVDs of comparable length to mitigate the

⁴ Joint Motion. at 2n.2, and 4.

⁵ WealthTV is not waiving any right it may have to challenge the validity of the DVDs in the event the DVDs are admitted into the record. It is only opining on the added examination and presentation of witnesses that would result if the DVDs are allowed to be presented at trial.

prejudice necessarily entailed by the playing of Defendants' DVDs. This would further exacerbate, regrettably, the inefficient use of hearing time.

WealthTV notes that Defendants acknowledge in their joint motion that even if the use of visual aid equipment or disc/tape players is not permitted at the hearing, Defendants will still have the opportunity to present the DVDs or any other similar video or audio tapes or discs to the Presiding Judge for consideration.⁶ The Presiding Judge has scheduled a document admission session for April 20, 2009. At that time, the Defendants will have the opportunity to submit the DVDs or any other similar video or audio tapes or discs for consideration for admission into the record.⁷ WealthTV is presently inclined to oppose the admission of such DVDs on the grounds stated in this Opposition. If the Egan DVDs are admitted, WealthTV would expect to move the admission of its own videos of comparable length to mitigate the prejudice caused by the admission of the Egan DVDs.

3. Gross Telecasting Has Nothing to Do With this Case

Defendants cite in support of their motion *In re Gross Telecasting, Inc.*, a case in which video and audiotape materials were utilized by the parties⁸ and in which, Defendants argue, "programming material similarly was at issue..."⁹ That case, however, has nothing to do with the above-captioned proceedings.

In *Gross Telecasting*, the key issues concerned whether Gross Telecasting, Inc. ("Gross Telecasting"), through its affiliated television and radio stations, had slanted, distorted or suppressed news coverage in a manner designed to benefit the Gross Telecasting and its

⁶ Joint Motion, at 2 n.2.

⁷ WealthTV is inclined at the present moment to oppose the admission of these DVDs into the record for the reasons stated above. If the admission of the Egan DVDs is allowed, WealthTV intends to move for the admission of its own DVDs of comparable length to mitigate the prejudice that would result from the Presiding Judge's viewing of the highly selective, biased content on the Egan DVDs.

⁸ *In re Gross Telecasting, Inc., For Renewal of Licenses of Stations WJIM, WJIM-FM, WJIM-TV Lansing, Michigan*, 92 FCC 2d 248, 1981 WL 158414 (FCC) [hereinafter *Gross Telecasting*]

⁹ Joint Motion, at 4.

principals.¹⁰ In that situation, viewing or listening to a single newscast or short clips of several newscasts was likely informative as to whether the stations in question did or did not in fact cover a particular event or a particular newsmaker's statements or activities. In that case, there was no issue of comparing programming services, a task which cannot be accomplished by viewing clips – and as to which the viewing of mere clips is misleading and prejudicial.

* * *

¹⁰*Gross Telecasting*, 1981 WL 158414, at 1-2.

For the foregoing reasons, the Defendants' Joint Motion for Modification of Court Room Memorandum should be denied. In the alternative, in the event Defendants' motion is granted, WealthTV respectfully requests that the Court Room Memorandum be modified to permit both the Defendants and WealthTV to use visual aid equipment or disc/tape players at the hearing

Respectfully submitted,

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March 26, 2009

CERTIFICATE OF SERVICE

I, Kathleen Wallman hereby certify that, on March 26, 2009 copies of the foregoing document were served via electronic mail on the following:

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