

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

In the Matters 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	)	File No. CSR-7822-P
WealthTV,	)	
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a	)	File No. CSR-7829-P
WealthTV,	)	
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a	)	File No. CSR-7907-P
WealthTV,	)	
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

TO:           Marlene H. Dortch  
              Secretary, Federal Communications Commission

ATTN:        The Honorable Richard Sippel  
              Chief Administrative Law Judge

**WEALTHTV’S SURREPLY WITH RESPECT TO DEFENDANTS’ JOINT MOTION  
FOR MODIFICATION OF COURT ROOM MEMORANDUM**

Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”), by its counsel,  
hereby respectfully submits this surreply in response to the Reply in Further Support of

Defendant's Joint Motion for Modification of Court Room Memorandum (the "Reply")

Defendants argue in the Reply that WealthTV, in its Opposition to Joint Motion for Modification of Court Room Memorandum (the "Opposition"), fails to provide a legal basis for exclusion of the DVDs attached as Exhibit D and E to the Expert Report of Michael Egan (the "DVDs") under Rule 403 of the Federal Rules of Evidence. Defendants' argument is misplaced.

Though WealthTV fully intends to challenge the admission of the DVDs into the record, admissibility is not the issue at hand. That issue will be addressed at the document admission session scheduled for April 20, 2009. The issue raised by Defendants' Joint Motion for Modification of Court Room Memorandum and by the Opposition is whether the Presiding Judge should alter the procedures set forth in the Court Room Memorandum designed to ensure the efficient and orderly conduct of the hearing scheduled in the above-captioned proceeding. On that point, WealthTV stands behind the arguments set forth in the Opposition that viewing the DVDs during the hearing would present obstacles to the efficient and orderly conduct of the hearing.

Furthermore, if there is any showing to be made on this issue, it is by Defendants, not WealthTV, since they are seeking to change the Presiding Judge's Court Room Memorandum. The parties have been on notice for some time of the rules contained in the Memorandum. WealthTV has planned accordingly as to time and budget, relying on the Memorandum's rule that video production and other expensive court room exhibitions would not be allowed, and therefore were not necessary investments of time or money. As a result, WealthTV would be prejudiced by the change in procedures at this late date. Defendants must, therefore, show that the benefits of changing the procedures to permit the showing of the DVDs during the hearing outweigh the prejudice it would cause WealthTV.

Finally, contrary to Defendants' Reply, WealthTV fully believes it used the term "prejudicial" advisedly in the Opposition. The videos are not merely adverse to WealthTV's position; they are prejudicial within the meaning of the Federal Rules of Evidence. They invite the Presiding Judge to substitute his own gut reaction as to the similarity of the programming services for that of the experts on the basis of a tiny amount of programming excerpts. The videos, because of the power of pictures, will be overweighted disproportionately to their probative value.

A decision on this motion is urgently needed no later than Friday morning April 3, 2009 because, if the DVDs are to be played during the hearing, WealthTV will also play DVDs at trial and needs time to produce and edit them. The direct testimony of the sponsoring witness is due on Monday April 6, 2009. WealthTV cannot be disadvantaged, if the Presiding Judge rules adversely to its position, by being without its own videos to exhibit. Conversely, if the Presiding Judge decides not to modify the Memorandum, WealthTV does not wish to incur video production expenses unnecessarily.

For the foregoing reasons, the Defendants' Joint Motion for Modification of Court Room Memorandum should be denied.

Respectfully submitted,

Herring Broadcasting, Inc., d/b/a WealthTV

By Its Attorneys

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Harold J. Feld

April 2, 2009

## CERTIFICATE OF SERVICE

I, Kathleen Wallman, hereby certify that, on April 2, 2009, copies of the foregoing

document were served via electronic mail on the following:

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