

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	)	

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR MOTION *IN LIMINE* TO  
EXCLUDE PORTIONS OF THE TESTIMONY OF CHARLES HERRING**

Defendants Time Warner Cable Inc., Comcast Corporation, Cox Communications, Inc. and Bright House Networks, LLC (collectively, “Defendants”) submit this reply to Complainant Herring Broadcasting, Inc. d/b/a WealthTV’s (“WealthTV”) Motion in Opposition to Defendants’ Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring (“Opp.”). WealthTV advances five arguments in favor of admitting the improper testimony of Charles Herring. None of these arguments is persuasive.<sup>1</sup>

First, WealthTV argues that the disputed portions of Mr. Herring’s testimony “are nothing new and are already part of the record in this proceeding” because “these matters were verified under an attestation from Charles Herring[.]” and thus have already been admitted by virtue of “the referral of this matter by the Media Bureau to an Administrative Law Judge.”<sup>2</sup> Not surprisingly, WealthTV cites no legal authority for this proposition. In fact, there is none.

As WealthTV acknowledges, this is “a de novo trial[.]”<sup>3</sup> The Presiding Judge’s November 20, 2008 Order plainly stated that “the evidence adduced at this hearing will be given *de novo* consideration.”<sup>4</sup> The Presiding Judge further stated that “a recommended decision will be made on the specified issues based *solely* on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*.”<sup>5</sup> Thus,

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<sup>1</sup> As indicated in Defendants’ motion *in limine*, their objections are limited only to those aspects of Mr. Herring’s testimony that are inadmissible as improper expert testimony, hearsay, or on other grounds, and are not intended to preclude any appropriate fact witness testimony provided.

<sup>2</sup> Opp. at 5-6.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV, et al.*, Mem. Op. and Order, FCC 08M-47, MB Docket 08-214, (rel. Nov. 20, 2008) at ¶ 6.

<sup>5</sup> *Id.* (emphasis in original).

materials submitted to the Media Bureau do not constitute evidence in this proceeding.<sup>6</sup> As the Supreme Court has stated, “[t]he phrase ‘de novo determination’ has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy.”<sup>7</sup>

Second, WealthTV argues that the opinions of Mr. Herring regarding the similarities between the programming of WealthTV and MOJO, the threshold number of subscribers that a network like WealthTV needs to attract national advertisers, and his analysis of the results of data survey purporting to reflect the demographics of WealthTV’s viewership are lay rather than expert opinions and are thus admissible under Federal Rule of Evidence 701.<sup>8</sup> Indeed, WealthTV argues that these opinions are nothing more than “business views” based on Mr. Herring’s “perceptions as the head of the business, not from any process of reasoning that requires expert training and qualification.”<sup>9</sup>

The argument is undermined entirely by Wealth’s submission of expert testimony on precisely these subjects. The “lay opinion” proffered by Mr. Herring covers the same issues to be addressed by WealthTV’s experts, Sandy McGovern, Gary Turner, and Mark Kersey.<sup>10</sup> And if there were any doubt that Mr. Herring is attempting to offer expert testimony for which he is not qualified and which would be untimely even if he were, that doubt is resolved by Mr.

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<sup>6</sup> Indeed, it was made clear during the first pre-hearing conference that the hearing record in these proceedings was an “empty box,” and that none of the underlying Complaints or other papers before the Media Bureau were part of the evidentiary record. *See* Transcript of Oct. 27, 2008 Pre-Hearing Conference at 48-49.

<sup>7</sup> *United States v. Raddatz*, 447 U.S. 667, 690 (1980).

<sup>8</sup> *Id.* at 10-13.

<sup>9</sup> *Id.* at 10, 12.

<sup>10</sup> Mot. at 8-9.

Herring's testimony criticizing and purporting to rebut the testimony of Defendants' expert witnesses Larry Gerbrandt and Michael Egan.<sup>11</sup>

Third, WealthTV argues, apparently in the alternative, that Mr. Herring's opinions are not impermissible expert opinions, but rather are mixed lay opinions of fact and law permissible under Rule 704 of the Federal Rules of Evidence.<sup>12</sup> This argument is a straw man; Defendants have not argued that Mr. Herring's testimony constitutes impermissible legal conclusions and, thus, WealthTV's citation to Rule 704 is entirely beside the point.

Fourth, WealthTV responds to Defendants' objections concerning Mr. Herring's lack of personal knowledge by claiming that he is merely acting "as the collective spokesperson for a corporation" and is providing "what is, in essence, corporate knowledge."<sup>13</sup> Such a novel proposition fails to cure the shortcomings of Mr. Herring's testimony under Rule 602 which recites the core principle of evidence that witnesses may only testify about those matters about which they have personal knowledge. The only authority WealthTV cites for the admissibility of such testimony is a case concerning Federal Rule of Civil Procedure 30(b)(6).<sup>14</sup> Rule 30(b)(6) governs the discovery process, specifically the right of a party to depose the "collective spokesperson" of an organization or entity.<sup>15</sup> It has nothing to do with the Federal Rule of

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<sup>11</sup> *Id.* at 6 (citing Herring Testimony at 28, 36-40, 50-51, 53-54). WealthTV's reliance on *Lideres Entm't Group, Inc. v. Valdovinos*, No. 03-21044-CIV, 2005 WL 5960939 (S.D. Fla. Sept. 16, 2005) is misplaced to say the least. In that case, the witness in question was to testify as to the dates on which certain statements were made. *Id.* at \*1. The court rightly determined that such testimony was straightforward document summary with no analysis involved and thus was not expert testimony. *Id.* Mr. Herring, in contrast, purports to do considerable analysis that goes well beyond mere summary.

<sup>12</sup> Opp. at 13-14.

<sup>13</sup> Opp. at 14.

<sup>14</sup> *Id.* at 15 (quoting *Brazos River Authority v. GE Ionics Inc.*, 469 F.3d 416, 434 (5th Cir. 2006)).

<sup>15</sup> Fed. R. Civ. P. 30(b)(6).

Evidence 602's foundation requirements for opinion testimony. Mr. Herring cannot summarize and testify to that which is known to others at WealthTV – let alone by cable companies or iN DEMAND – without laying a legally sufficient foundation for his direct, personal knowledge of the underlying information.<sup>16</sup> WealthTV's claim notwithstanding, "personal knowledge" does not include "collective knowledge."<sup>17</sup>

Finally, WealthTV argues that, because the rule against hearsay is sometimes relaxed in administrative proceedings, all of Mr. Herring's hearsay statements are admissible. Although under certain limited circumstances hearsay evidence is permitted in administrative proceedings, the party proffering the hearsay must still demonstrate that the hearsay "bears satisfactory indicia of reliability[.]"<sup>18</sup> These indicia include:

whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.<sup>19</sup>

WealthTV has made no effort to satisfy any of the above conditions.<sup>20</sup> Even if it had, they would not be in its favor. WealthTV, had it acted in a timely way, could have subpoenaed any of the

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<sup>16</sup> See, e.g., *Travelers Cas. and Surety Co. of Am. v. Telstar Constr. Co., Inc.*, 252 F. Supp. 2d 917, 924 (D. Ariz. 2003). That WealthTV has requested a subpoena for Robert Jacobson to testify about no fewer than eight subjects at issue in this proceeding amply demonstrates that Mr. Herring lacks such knowledge. See Contingent Request for Issuance of Subpoena Ad Testificandum, dated Apr. 16, 2009 ("Contingent Request") at 3. Defendants will separately address WealthTV's untimely and unwarranted subpoena request, which should be denied.

<sup>17</sup> Opp. at 15.

<sup>18</sup> *EchoStar Comm'cns Corp. v. F.C.C.*, 292 F.3d 749, 753 (D.C. Cir. 2002) (quoting *Crawford v. U.S. Dep't of Agriculture*, 50 F.3d 46, 49 (D.C. Cir. 1995)) (internal quotation marks and brackets omitted).

<sup>19</sup> *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1354 (11th Cir. 2000) (citations omitted).

<sup>20</sup> WealthTV likewise made no effort to demonstrate that Mr. Herring's hearsay statements were actually subject to exemption as business records or commercial market reports.

declarants whose out-of-court statements it now seeks to offer. A number of them are former and current WealthTV employees.<sup>21</sup> Much of the hearsay contained within Mr. Herring's testimony simply recites newspaper articles and the like which have repeatedly been excluded on hearsay grounds.<sup>22</sup> WealthTV has not made even the most rudimentary showing as to why it needs to rely on hearsay rather than firsthand statements of witnesses who can be cross-examined and whose credibility can be assessed.<sup>23</sup> "The *primary* justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence."<sup>24</sup> Mr. Herring may prefer to be the sole fact witness rather than expose others with actual firsthand knowledge to cross-examination, but that preference is not a substitute for the application of well-established rules of evidence that govern this proceeding.

For the foregoing reasons and the reasons set forth in their moving brief, Defendants respectfully request that their motion *in limine* regarding the testimony of Charles Herring be granted.

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<sup>21</sup> The out-of-court statements of WealthTV employees are unlikely to be free from bias and thus even less reliable, especially the double- and sometimes triple-hearsay statements in Mr. Herring's testimony.

<sup>22</sup> *American Mobile Radio Corp.*, Order and Authorization, 13 FCC Rcd. 8829, ¶ 21 (1997) (stating that "newspaper and magazine articles are the equivalent of hearsay and do not meet the specificity and personal knowledge requirements" required to evaluate a license application); *Mr. Lawrence E. Steelman, Capstar TX Ltd. P'ship, Mr. Stanley Daniels*, Letter, 22 FCC Rcd. 4866, 4869 (Med. Bur. 2007) (same).

<sup>23</sup> *See Cardinal Maint. Serv., Inc. v. United States*, 63 Fed. Cl. 98, 105 (Fed. Cl. 2004) (excluding hearsay evidence in APA proceeding where sufficient indicia of reliability for the out-of-court statements did not exist); *see also In re Applications of Janice Fay Surber; Fate Lamont McNally*, 5 FCC Rcd. 6155, 6158 (Rev. Bd. 1990) (cited by WealthTV, Opp. at 8) (excluding hearsay evidence that was "self-serving" and "absolutely uncorroborated").

<sup>24</sup> *Anderson v. United States*, 417 U.S. 211, 220 (1974) (emphasis added).

Respectfully submitted,

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Dated: April 17, 2009  
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CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that, on this 17th day of April, 2009, copies of the foregoing "Defendants' Reply in Further Support of Their Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring" were sent via email, to the following:

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