

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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| 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’ OPPOSITION TO CLAIMANT’S REQUEST FOR ISSUANCE OF
TESTIMONIAL SUBPOENA**

Defendants Time Warner Cable Inc., Comcast Corporation, Cox Communications, Inc. and Bright House Networks, L.L.C. (collectively, “Defendants”) hereby oppose the “Contingent Request for Issuance of Subpoena Ad Testificandum” filed by Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) on April 16. Even though the Defendants

already have submitted pre-filed testimony from David Asch, the Executive Vice President of iN DEMAND who was “directly involved in the development and launch of INHD and INHD2” and who “worked with the . . . management team that developed and implemented the strategies to combine INHD and INHD2 into INHD, to rename the INHD network to MOJO and, in 2008, to terminate the network,”¹ WealthTV now seeks the testimony of a second witness from iN DEMAND, its CEO Robert D. Jacobson. WealthTV’s 11th-hour addition to the witness list is tardy and unjustified. The addition of a new witness, whose direct testimony was not pre-filed, will prolong the proceeding without adding materially to the information in the case. Finally, the Presiding Judge should reject WealthTV’s offer to “trade,” limiting its founder’s testimony to the boundaries established by the Federal Rules of Evidence (as requested by Defendants’ April 10 Motion *In Limine*) in exchange for the testimony of a new, previously-unannounced witness at the hearing whose appearance will be compelled by the requested subpoena.

As an initial matter, this last-minute request is unfair to both the Defendants and to the witness. While the Commission’s Rule providing for a request to issue a subpoena does not have any time limit, it is noteworthy that the rule providing for issuances of notice of deposition under oral examination requires that such notice be served 21 days in advance, not only on the parties, but also on the person to be examined.² Thus, even a person subpoenaed for a deposition who is a third party to the proceeding (as is the case for Mr. Jacobson here) would have at least 21 days’ notice that his testimony was being sought, even if the subpoena were requested less than 21 days in advance. Such notice is clearly impossible here, with the hearing scheduled to begin two business days and five calendar days after WealthTV’s request.

¹ “Prefiled Direct Testimony of David Asch” at ¶4 (April 3, 2009).

² Section 1.315(a) of the Commission’s Rules; 47 C.F.R. §1.315(a).

For months, WealthTV has said repeatedly in numerous filings before the Presiding Judge and the Media Bureau that it is “ready for trial” and that it needs no discovery; indeed claiming that the material it submitted to the Media Bureau alone was sufficient to entitle it to a judgment as a matter of law.³ On February 6, it stipulated that there would be no depositions of persons other than the parties’ experts.⁴ And, on April 3, WealthTV failed to designate Mr. Jacobson as a witness, as was required by the Presiding Judge’s “Further Revised Procedural and Hearing Order” of January 30, 2009. It is abundantly clear that WealthTV passed up multiple opportunities to inform the parties and the Presiding Judge that it needed the testimony of this witness. It is unfair to the witness and to the parties to ask the Presiding Judge to drag Mr. Jacobson into this case on the eve of trial.

Moreover, the testimony that WealthTV expects to elicit from Mr. Jacobson will be cumulative of the testimony already elicited from Mr. Asch. With the exception of the irrelevant topic number three in WealthTV’s list – “the reasons and factual basis for the use of the MOJO tagline” – and corroboration of statements in the press attributed to Mr. Jacobson,⁵ Mr. Asch’s pre-filed direct testimony addresses every one of the topics that WealthTV has designated as a subject for its examination of Mr. Jacobson. Mr. Asch will be available to WealthTV for oral cross-examination on those topics. The addition of a second witness from iN DEMAND to

³ “Herring Broadcasting, Inc.’s Motion for Revocation of Hearing Designation” at FN 3 (November 24, 2008) (“WealthTV is currently of the view that discovery is not essential and that the matter may be resolved on the basis of the existing record”).

⁴ “Stipulation Regarding Experts and Other Discovery” at ¶6 (February 6, 2009).

⁵ To the extent that WealthTV wants to cross-examine Mr. Asch about press accounts of statements attributed to Mr. Jacobson or any other iN DEMAND executive, it is free to do so, although the use of such accounts in cross-examination does not, without more, make them admissible evidence in this case.

address the same topics – and who has not submitted pre-filed direct testimony – will simply add hours to the duration of the proceeding without providing a corresponding benefit.

Finally, the Presiding Judge should reject WealthTV’s apparent excuse that the very late request for this witness’s testimony is justified by the Defendant’s motion to exclude large amounts of the testimony of one of WealthTV’s founders and senior executives, Charles Herring. The simple reason this excuse should be rejected is that there is nothing in Mr. Herring’s background or experience that could conceivably make him a competent witness about matters such as “the business strategies, programming objectives, and perceived network demographics of iN DEMAND management in creating INHD and MOJO”⁶ or with respect to any other topic enumerated in WealthTV’s subpoena request. Indeed, this is one of the principal reasons why Defendants asked that much of his pre-filed testimony be stricken. It is undisputed that Mr. Herring was never a part of iN DEMAND’s management, so he could not have any first-hand knowledge about what it was thinking nor could he have first-hand knowledge about any of the other topics enumerated by WealthTV, all of which pertain to the knowledge, intentions and decisions of iN DEMAND’s management. Under no set of circumstances could Mr. Herring’s testimony be considered a substitute for that of Mr. Jacobson on these issues. He simply is not a competent witness in this regard. All that Mr. Herring could offer – and which Defendants have asked the Presiding Judge to strike from the record – is uninformed, self-serving speculation about these topics. By contrast, the Defendants already have produced a witness who is competent to testify about these issues – Mr. David Asch – and WealthTV has advanced no good reason why the testimony of a second witness to testify about them is necessary.

⁶ WealthTV “Contingent Request of Issuance of a Subpoena Ad Testificandum” at p.2; underscore added.

For these reasons, Defendants ask the Presiding Judge to deny WealthTV's request for issuance of a testimonial subpoena to Robert Jacobson.

Respectfully submitted,

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Dated: April 17, 2009

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CERTIFICATE OF SERVICE

I, Robert M. Nelson, hereby certify that, on this 17th day of April, 2009, copies of the foregoing "Opposition to Claimant's Request for Issuance of Testimonial Subpoena" were sent via email, to the following:

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