

**Before the  
Federal Communications Commission  
Washington, D.C. 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

**SURREPLY OF COMPLAINANT HERRING BROADCASTING, INC. D/B/A  
WEALTHTV TO REPLY OF DEFENDANTS TO OPPOSITION OF COMPLAINANT  
TO MOTION IN LIMINE TO EXCLUDE TESTIMONY**

1) **De Novo Review Does Not Mean the Record Below is Stricken**

Defendants complain that Complainant cites no legal authority for the proposition that evidence admitted before the Media Board (including the complaints and exhibits thereto) should be considered in this *de novo* hearing without the need to re-admit each item through witnesses with first hand knowledge. Yet, Defendants cite no authority for the proposition that the record below is somehow expunged simply because the parties may now supplement it at a *de novo* hearing.

Nothing in the nature of a *de novo* review precludes consideration of evidence adduced in the proceeding being reviewed. To the contrary, while a *de novo* evidentiary hearing gives the parties the opportunity to supplement the record and requires findings of fact made without deference to rulings below, it does not mean that the evidence admitted below is stricken from the record. IN THE MATTER OF WASHOE COUNTY, NEVADA AND SPRINT NEXTEL AND CITY OF SPARKS, NEVADA AND SPRINT NEXTEL 23 F.C.C.R. 11695, 11697

2) **Summary Exhibits - FRE 1006**

Complainant notes that a number of the statements Defendants object to relate to Mr. Herring's efforts to summarize information from multiple exhibits. Such summaries are routinely admitted, even before juries, under FRE 1006. *S.E.C. v. Franklin* 265 Fed.Appx. 644, 646, 2008 WL 268069, 1 (9th Cir. 2008)(citing *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1516 (9th Cir.1985) (noting "[t]he purpose of the rule is to allow the use of summaries when the documents are unmanageable or when the summaries would be useful to the judge and jury").

3) **Hearsay and Foundation Objections Go to the Weight, Not the Admissibility of Evidence**

Defendants misrepresent the general rule that hearsay is admissible and can constitute

substantial evidence to support administrative findings of fact.<sup>1</sup> Far from establishing “conditions” for the admission of hearsay, the D.C. Circuit, commenting on FCC proceedings, has observed that:

There is no support for EchoStar's claims that uncorroborated and untested testimony and hearsay testimony cannot constitute substantial evidence.

*EchoStar Communications Corp. v. F.C.C.* 292 F.3d 749, 753, 352 U.S.App.D.C. 45, 49 (D.C. Cir.,2002).

Rather, the opinion points out that the challenged statement by an EchoStar executive was probative because it had the following indicia of reliability: a) it was made under oath; and b) the facts recited therein were not disputed by competent evidence. *Id.* Most of the challenged statements by Mr. Herring bear the same indicia of reliability: a) he has submitted his testimony under oath and will be cross examined; and b) much of the challenged “hearsay” will not be contradicted because it comes from the mouths of Defendants’ official spokespersons and executives.

The *Echostar* opinion also provides some guidance on the use of items such as news reports. While it does not find error in giving limited weight to a Vanity Fair article quoted in opposition to the executive’s statement, there is no suggestion that it was error to even consider such hearsay as evidence.

Data, such as census reports and reports from private information services are also routinely used in FCC proceedings without the need for the kind of formal authentication that

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<sup>1</sup> Defendants, on p. 3, simply misrepresent the authority Complainant cites for allowing a corporate spokesperson to testify as to corporate knowledge. The opinion clearly discusses testimony and objections under Rules 602 and 701. *Brazos River Authority v. GE Ionics, Inc.* 469 F.3d 416, 434 (C.A.5 (Tex.),2006)

might be required in Court. IN THE MATTER OF: BRIGHT HOUSE NETWORKS, LLC 22 F.C.C.R. 4169, 4172 (admitting census data and market/viewer survey data from the ‘SBCA’)

4) **Defendants Offer No Administrative Precedent Barring Lay Opinion**

Defendants have no answer to the well established rule that the rules of evidence distinguishing between lay and expert opinion are greatly relaxed in the administrative hearing context for the simple reason that there is no jury. There are two primary differences between the scope of admissible lay opinion under Rule 701 and opinions requiring expert knowledge under Rule 702: 1) that the opinion is rationally based on witness perception; and 2) that no special scientific reasoning process is required to arrive at the opinion.

Just as hearsay objections go to the weight of the evidence rather than its admissibility, so too, the weight of a lay witness’s conclusions is influenced by his reliance on hearsay.

The fact that Complainant has designated expert witnesses to talk about the same issues that Mr. Herring summarizes in his statement does not, as Defendants suggest, prove either that specialized training is required to reach the conclusions or that Mr. Herring lacks the credentials to understand his company’s business. Unlike medicine, toxicology, statistics or engineering, marketing, viewer appeal and viewer perception are fundamentally issues that are amenable to lay observation and opinion as well as expert opinion offered by those with experience in the field.

\* \* \*

For the foregoing reasons, Defendants’ Motion should be denied.

Respectfully submitted,

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

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April 19, 2009

**CERTIFICATE OF SERVICE**

I, Kathleen Wallman, hereby certify that, on April 19, 2009 copies of the foregoing document were served via electronic mail on the following except as indicated:

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