

**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 MOTION IN OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF THE TESTIMONY OF CHARLES HERRING**

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*April 16, 2009*

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## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
A.	Introduction	1
B.	Summary	3
II.	THE FACTS AND ASSERTIONS CONTAINED IN MR. HERRING'S TESTIMONY ARE ALREADY PART OF THE RECORD IN THIS PROCEEDING	5
III.	THE FEDERAL RULES OF EVIDENCE MUST BE RELAXED IN THIS PROCEEDING IN THE INTERESTS OF JUSTICE	6
A.	Hearsay is Admissible in Administrative Proceedings	8
B.	Mr. Herring's Business Views Are Lay Opinion Admissible Under Federal Rule of Evidence 701	10
C.	Lay Opinion Regarding Mixed Legal and Factual Questions is Admissible	13
D.	Mr. Herring's Personal Knowledge and the Collective Knowledge of WealthTV as an Organization Provide the Foundation for His Testimony	14

## I. INTRODUCTION AND SUMMARY

### A. Introduction

Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”), by its counsel, hereby respectfully submits this Motion in Opposition to the Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring (“Motion In Limine”) filed jointly by Time Warner Cable Inc. (“TWC”), Comcast Corporation (“Comcast”), Cox Communications, Inc. (“Cox”), and Bright House Networks, LLC (“BHN”) (collectively, “Defendants”). Defendants, in their Motion In Limine, seek to exclude a large number of statements in Mr. Herring’s written testimony on three grounds:

1. That some of his descriptions of exhibits and compilations of data are “expert” opinions within the meaning of Fed. R. Evid. 702, rather than lay opinions under Fed. R. Evid. 701;
2. That some of his statements lack a foundation to establish personal knowledge under Fed. R. Evid. 602; and
3. That some of his statements are based on hearsay or on his description of hearsay reports (i.e., hearsay on hearsay).

Time and space do not allow for a line-by-line rebuttal of Defendants’ objections as they are noted (by use of colored markers) on well over 50 separate pages of Mr. Herring’s 106 page written testimony.<sup>1</sup> A few examples give a flavor of the kinds of statements by Mr. Herring that Defendants are trying to exclude:

#### Expert Objections

- That he developed and pitched WealthTV as the first to offer “HD” quality “themed” programming targeted at a particular audience demographic while

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<sup>1</sup> WealthTV does not concede that any particular item of testimony would be barred from evidence under a strict construction of the Federal Rules of Evidence. If this Court is inclined to grant any part of Defendants’ motion, WealthTV asks for the opportunity to rebut Defendants’ claims item by item. The proper time for that exercise would be in connection with the document admission session on the admission of exhibits upon which much of the challenged testimony is based.

Defendants' affiliate "INHD" lacked such a target and was not so "themed." Herring Test. at 2-3, 10, 14-15, 24-26.

- That WealthTV has collected and tabulated viewer feedback forms since 2004 that indicate an actual audience that is 70% male and 55.5% in the over \$75,000 annual income bracket. Herring Test. at 17-18.
- Defendants have marked every word of Mr. Herring's testimony from page 30 to the top of page 70 as "expert" testimony. The testimony covers Mr. Herring's characterization of WealthTV's place in the market vis a vis the competitors he was concerned about. He notes the similarities in target and actual audience between WealthTV, Defendants' affiliate INHD and later MOJO, as well as some programming from other sources. Headings include his understanding of MOJO's audience (Herring Test. at 36); similar programming (Herring Test. at 40-47); whether there was any basis for believing MOJO was superior to WealthTV based on revenue possibilities (Herring Test. at 56); and why he believes MOJO failed where WealthTV would have succeeded. (Herring Test. at 66-70). His understanding is derived from his work in developing and promoting the programming of WealthTV. It is based on information from various documents, many of which were produced by Defendants, some of which were developed by WealthTV, and some of which were culled from internet and other published sources. The present motion does not address admissibility of either Defendants' or WealthTV's exhibits.

#### Foundation Objections

- That his company looked at Census data in defining its target demographic which showed 53 million men in the 25-49 year old bracket, some of whom had high incomes and others who might aspire to reach high income levels. Herring Test. at 15.
- That the senior programming "gate keepers" for TWC, Comcast, and Cox were also board members for iN DEMAND and that they knew that WealthTV was in direct competition with MOJO for the same demographic and the corresponding advertising dollars. Herring Test. at 29.

#### Hearsay Objections

- That iN DEMAND CEO, Robert Jacobson's statement filed in this proceeding, concedes that INHD was more "about technology" than about "having a brand that stood on its own." Herring Test. at 26.
- That a press release, as found on the "Business Wire" website, described MOJO as "a new primetime . . . exclusively for the discerning male." Herring Test. at 27.

For the reasons set forth below, Defendants' Motion In Limine should be denied and Mr.

Herring's written testimony should be admitted into the record in its entirety.

Further, with respect to Defendants' Written Direct Testimony, WealthTV had been disinclined to nitpick on grounds such as hearsay, lack of personal knowledge, lack of foundation and conclusion, intending to rely instead on the discretion of the Presiding Judge to give such testimony such weight as it may deserve. But Defendants' Written Direct Testimony contains numerous statements that are subject to challenge on technical objections and WealthTV reserves the right to bring a Motion In Limine to exclude such testimony if the Presiding Judge would find such delineation useful.

## **B. Summary**

Defendants, in the Motion In Limine, move to exclude from the record significant portions of Mr. Herring's written and oral testimony on three primary grounds: (1) that some of his descriptions of exhibits and compilations of data are "expert" opinions within the meaning of Fed. R. Evid. 702, rather than lay opinions under Fed. R. Evid. 701; (2) that some of his statements lack a foundation to establish personal knowledge under Fed. R. Evid. 602; and (3) that some of his statements are based on hearsay or on his description of hearsay reports (i.e. hearsay on hearsay). Defendants' objections are without merit.

As a procedural matter, the facts and assertions contained in Mr. Herring's testimony have already been made part of the record in the form of WealthTV's carriage complaints against the Defendants and in WealthTV's replies to Defendants' answers to those complaints. Treating them as such is in no way at odds with a de novo trial; they are in fact part of the record that explains how the case arose and came before the Presiding Judge. The information contained in Mr. Herring's testimony is, therefore, nothing new and should not be a surprise to the Defendants. Furthermore, as a general matter, in an administrative proceeding like the present

one, the rules of evidence may be relaxed to serve the ends of justice. Because the judicial “gate keeper” is also the finder of fact in this trial, the risk of prejudice to the jury by the admission of unreliable evidence does not exist. Therefore, strict adherence in this proceeding to rules of evidence designed to protect against such prejudice is unnecessary and inappropriate.

With respect to Defendants’ specific hearsay objections, Defendants’ argument is misplaced. It is well established that hearsay evidence is allowed in administrative proceedings such as this, precisely because the Presiding Judge can properly evaluate the probative value of such statements where a lay jury cannot. Even if the Presiding Judge elects to adhere strictly to the hearsay rules, most if not all of the portions of Mr. Herring’s testimony objected to on hearsay grounds are admissible under exceptions to such rules.

Similarly, Defendants’ objections to Mr. Herring’s testimony as inadmissible expert testimony are without merit. Mr. Herring is not offering expert testimony. He is offering lay person testimony of his first hand perception of WealthTV’s efforts to market and close contracts for carriage of and advertising during WealthTV programming. His testimony regarding such topics is, therefore, admissible. In addition, as with the hearsay rule, the rationale for strict construction of rules barring mixed factual and legal conclusions disappears in the administrative forum where there is no jury and where broad discretion is vested in the agency decision maker. As a result, any portion of Mr. Herring’s testimony that mixes legal and factual issues is admissible. It is left to the Presiding Judge to evaluate its probative value.

Finally, Defendants’ foundational objections are without merit. Mr. Herring is not merely testifying based on his own personal knowledge. As President of WealthTV, he is also testifying based on the collective knowledge of the organization. His opinion about information that he and his subordinates have culled from documents produced by Defendants, from internal

surveys, and from market research is, therefore, admissible as within the knowledge of the organization.

**II. THE FACTS AND ASSERTIONS CONTAINED IN MR. HERRING'S TESTIMONY ARE ALREADY PART OF THE RECORD IN THIS PROCEEDING**

The facts and assertions contained in Mr. Herring's testimony are nothing new and are already part of the record in this proceeding. WealthTV filed its carriage complaints against each of the Defendants at various dates in 2007 and 2008.<sup>2</sup> The complaints filed by WealthTV, together with the replies WealthTV filed in response to the Answers submitted by each Defendant, make the same assertions with regard to Defendants' conduct, business plans, and the similarity of MOJO to WealthTV as are contained in Mr. Herring's written testimony. All of these matters were verified under an attestation from Charles Herring that, based on his experience with the events in question and reasonable inquiry, he believed them to be true. Mr. Herring's testimony does nothing more than to recount the underlying factual basis for his statements in the complaints and replies – which included his opinion that the programming of MOJO was substantially similar to that of WealthTV and that Defendants unfairly restrained his ability to compete fairly by favoring their affiliate over WealthTV.

Furthermore, Defendants argued before the Media Bureau that Mr. Herring's statements were insufficient to support a *prima facie* case under Section 536(a). 47 U.S.C. § 536(a). The Media Bureau after due consideration, found the statements averred to as true by Mr. Herring and supported by WealthTV's additional submissions sufficiently credible and reliable to refer

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<sup>2</sup> See Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., Carriage Agreement Complaint, MB Docket No. 08-214 (Dec. 20, 2007); Herring Broadcasting, Inc. d/b/a WealthTV v. Bright House Networks, LLC, Carriage Agreement Complaint, MB Docket No. 08-214 (March 12, 2008); Herring Broadcasting, Inc. d/b/a WealthTV v. Cox Communications, Inc., Carriage Agreement Complaint, MB Docket No. 08-214 (March 24, 2008); Herring Broadcasting, Inc. d/b/a WealthTV v. Comcast Corporation, Carriage Agreement Complaint, MB Docket No. 08-214 (April 21, 2008).

the matter for hearing precisely so that the Presiding Judge could consider the testimony and supporting evidence, take live testimony, observe the demeanor of Mr. Herring and other witnesses, and arrive at the truth. To exclude Mr. Herring's testimony from the record at this point would be contrary to what has already been admitted into the record and would defeat the purpose of the referral of this matter by the Media Bureau to an Administrative Law Judge ("ALJ") for a hearing.

### **III. THE FEDERAL RULES OF EVIDENCE MUST BE RELAXED IN THIS PROCEEDING IN THE INTERESTS OF JUSTICE**

Defendants offer arguments in their Motion In Limine for the exclusion of portions of Mr. Herring's testimony based on interpretations of the Federal Rules of Evidence that are designed to limit the prejudicial effect of unreliable statements on impressionable jurors. Those considerations are far less important in an administrative proceeding before an agency with expertise in the subject matter. The rules of the Federal Communications Commission (the "Commission") recognize this fact. Specifically, Commission rules state that in an administrative hearing under Commission rules, the Federal Rules of Evidence should be "relaxed if the ends of justice will be better served by so doing." 47 C.F.R. § 1.351.

Courts have elaborated on the rationale for relaxed evidentiary standards in other administrative contexts. Because there is no jury, the risk of prejudice by considering evidence that lacks strict indicia of reliability is greatly diminished. An ALJ, as an expert in specialized hearings and, frequently, in the subject matter at hand, is well qualified to consider any probative value and to weigh it against any reliability issues, as well as the presence or absence of conflicting evidence:

A second distinction between the rules of evidence applicable to a criminal proceeding and those that apply to administrative hearings is one of due process. A criminal defendant has a constitutional right to trial by jury and rules of evidence must be

construed according. By contrast, administrative proceedings are creatures of statute as are the rights adjudicated in such hearings. Congress has provided a default rule of evidence in the Administrative Procedures Act which should inform the interpretation of the degree of relaxation of evidentiary rules that is permissible: Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

5 U.S.C. § 556.

It is clearly in the interest of justice to allow Mr. Herring to expand upon the basis for his complaint now that the Media Bureau has found it sufficient to establish a prima facie case of discrimination under 47 U.S.C. § 536(a) and 47 C.F.R. § 76.1301(c). All of the rationales for relaxing the Federal Rules of Evidence in an administrative proceeding are present in this case. Mr. Herring's testimony will be presented before the Presiding Judge and Defendants will have every opportunity to test such evidence through cross-examination. As the Chief ALJ with subject matter expertise, the Presiding Judge is well positioned to weigh the credibility and probative value of Mr. Herring's testimony without the need to exclude it from the record. Furthermore, scarce judicial resources are better spent in considering the merits of the case than in attempting to distinguish which parts of a witness statement would properly be admitted in the normal give and take of a direct examination before a jury.

Not only does the interest of justice argue for permitting WealthTV's one fact witness to provide a full explanation for the allegations in the complaint – which spanned years of negotiation supervised by Mr. Herring and in which he was an active participant – but Defendants' proposed interminable exercise of going line-by-line through the testimony arguing for a rigid application of the Federal Rules of Evidence serves no purpose other than to delay this proceeding and obscure the real factual issues at the heart of this case.

### **A. Hearsay is Admissible in Administrative Proceedings**

The most widely accepted distinction between proceedings in a court established pursuant to Article III of the U.S. Constitution and those before an administrative tribunal is the suspension of the hearsay rule. It is well established that hearsay evidence is allowed in administrative proceedings such as this, precisely because the expert judge can properly evaluate the probative value of such statements where a lay jury cannot. *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir., 1980). Consistent with this principle, the Commission has adopted the rule applied in hearings governed by the Administrative Procedures Act,<sup>3</sup> and by other statutes, that hearsay evidence may be considered:

It is well-settled that administrative adjudications may consider relevant and material hearsay. *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Montana Power Co. v. FPC*, 185 F.2d 491, 498 (D.C.Cir.1950), cert. denied, 340 U.S. 947 (1951). Indeed, "not only is hearsay admissible, but under the appropriate circumstances, it may constitute substantial evidence." *Johnson v. United States*, 628 F.2d 187, 190 (D.C.Cir.1980). The Board has recognized these precepts, noting that the weight to be accorded hearsay "depends on its truthfulness, reasonableness, and credibility," and that "a prime indicium of probity is whether the declarants are disinterested witnesses." *Perry S. Smith*, 103 FCC 2d 1078, 1082 (Rev.Bd.1985). The Commission's Rules, 47 CFR § 1.351, also allow for the relaxation of the Federal Rules of Evidence. See *GACO Communications Corp.*, 94 FCC 2nd 761, 768 n. 15 (Rev.Bd.1983); see generally K. Davis, *Administrative Law of the Seventies*, § 14.00 at 338; § 14.11, at 340 (1976); but see *United Broadcasting Corp.*, 53 RR 2d 57, 80 n. 114 (1983) (hearing exhibits relating to financial showing rejected as hearsay).

*In re Applications of Janice Fay Surber; Fate Lamont McNally* 5 FCC Rcd. 6155, 6157 -6158 (Rev. Bd. 1990); *Willingham v. Gonzales* 391 F.Supp.2d 52, 64 (D.D.C.2005); *Tarnove v. Bentsen* 17 C.I.T. 1324, 1326 (1993).

Mr. Herring states clearly that WealthTV relies on sources such as newspaper articles, internet blogs, and press releases in gauging the market for his programming product. While these sources may be regarded as hearsay, they are research tools in the cable programming

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<sup>3</sup> 5 U.S.C. § 500 et seq.

industry. Similarly, WealthTV regularly relies on tabulations of viewer responses to gauge its actual audience. WealthTV uses such materials in its efforts to convince cable companies like Defendants, as well as advertisers, that its programming can attract a desirable target audience. It is the kind of evidence that programming executives have before them when they make the decision to carry or decline programming from independents, as well as the type of material that Mr. Herring relied upon to make the *prima facie* case before the Media Bureau. There is no evidence that the programming proposals or decisions are based on more rigorous analysis when an affiliate pitches an idea to its parent executives. As a result, there is no reason why the Presiding Judge should not consider the arguments Mr. Herring and WealthTV would make and did make in presentations to cable company decision makers.

Furthermore, even if the Presiding Judge were to apply the Federal Rules of Evidence, the statements objected to fall into exceptions permitted under Fed. R. Evid. 803, or fall outside of it altogether because they are offered for the fact that the statements were made rather than for the truth of the statements themselves. For example, the tabulations of viewer feedback and market studies relied upon by Mr. Herring are potentially exempt from the hearsay rule as records made in the average course of business (Fed. R. Evid. 803(6)) and/or as commercial market reports (Fed. R. Evid. 803(17)). Conflicting statements by spokespeople for iN DEMAND and Defendants with regard to the nature of MOJO programming demonstrate the basis for Mr. Herring's lay opinion that INHD was "floundering" and seeking to copy WealthTV's successful model regardless of which conflicting statement is correct.

Although Mr. Herring's testimony satisfies the requirements of the Federal Rules, the Presiding Judge need not make detailed findings on why every line objected to falls within the exceptions to Fed. R. Evid. 703 governing hearsay.

Defendants will, no doubt, wish to argue extensively at the hearing why Fed. R. Evid. 803 applies to the designated statements and why, where Fed. R. Evid. 803 would apply, the exceptions in Fed. R. Evid. 803 do not apply. Rather than consume judicial resources on such argument and in keeping with the general rules of administrative proceedings favoring a thorough evaluation by the Presiding Judge on the facts, and the Commission's requirement that the Presiding Judge consider the "interests of justice" when weighing how rigidly to apply the Federal Rules of Evidence, the Presiding Judge should rely on the longstanding rule permitting hearsay evidence where probative and resolve the objections that actually arise in the context of the hearing itself, where Mr. Herring can answer any questions the Presiding Judge finds relevant to the determination.

**B. Mr. Herring's Business Views Are Lay Opinion Admissible Under Federal Rule of Evidence 701**

Like other evidentiary rules, the limits on lay opinion and the "gate keeping" function of keeping junk science from jurors under *Daubert*,<sup>4</sup> are "relaxed" in administrative proceedings. 47 C.F.R. § 1.35. See *National Taxpayers Union v. U.S. Social Sec. Admin.*, 302 Fed.Appx. 115, 121 (3d Cir. 2008) (*Daubert* rule inapplicable in administrative proceedings).

The 2000 Amendment to Fed. R. Evid. 701 added subparagraph (c) which bars lay opinion "based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702. The amendment was intended to thwart "surprise expert testimony" offered by "simply calling an expert witness in the guise of a layperson." Fed. R. Evid. 701, Committee Notes on Rules – 2000 Amendment. The amendment was not intended to change the rule that a business owner or executive can testify based on "the particularized knowledge that the witness has by virtue of his position in the business." *Id.* (citing *Lightning Lube, Inc. v Witco Corp.*, 4

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<sup>4</sup> *Daubert v. Merrell Dow Pharma.* 509 U.S. 579 (1993).

F.3d 1153 (3d Cir. 1993).

As the Advisory Committee phrased it, the difference between expert opinion under Fed.

R. Evid. 702 and lay opinion under Fed. R. Evid. 701 is that:

. . . lay testimony ‘results from a process of reasoning familiar in everyday life,’ while expert testimony ‘results from a process of reasoning which can be mastered only by specialists in the field.

Fed. R. Evid. 701, Committee Notes on Rules – 2000 Amendment (citing *State v. Brown*, 836 S.W.2d 530, 549 (1992)).

Testimony about competitors that is garnered from working in the business, rather than derived from a study of the business is the kind of lay testimony that does not require specialized “expert” reasoning. *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.* 320 F.3d 1213, 1220 (11<sup>th</sup> Cir. 2003) (testimony about ship repair engineering and competitors’ market rates for repairs); *Mississippi Chemical Corp. v. Dresser-Rand Co.* 287 F.3d 359, 373 (5th Cir. 2002) (lay testimony from director of risk management about lost profits from defective factory equipment).

Similarly, no expert knowledge is required to offer summary charts or to offer a non-expert compilation of exhibits and documents otherwise in evidence. Lay people can summarize business records and similar knowledge based on compilations of records generated in the normal course of business. *Lideres Entertainment Group, Inc. v. Valdovinos*, 2005 WL 5960939, 1 (S.D.Fla.,2005) (“her testimony will assist the trier of fact by helping to summarize numerous documents in a meaningful way, saving both the court and jury's time”).

Testimony by a business executive based on his knowledge of business processes, the events at issue, and reports made to him by his subordinates is precisely the kind of lay testimony that can assist a court in synthesizing the evidence and the party’s position without requiring expert qualifications. *Joy Mfg. Co. v. Sola Basic Industries, Inc.* 697 F.2d 104, 112 (3d Cir.

1982).

In the instant case, Defendants raise dozens of separate objections to parts of Mr. Herring's summaries and interpretation of business records and research as impermissible under Fed. R. Evid. 702. However, WealthTV has compiled the data in question in pursuit of the carriage and advertising agreements that are the core of its business. Mr. Herring's views about the marketplace and his competitors are garnered from his perceptions as the head of the business, not from any process of reasoning that requires expert training and qualification. The fact that WealthTV has also submitted statements and analysis by qualified experts whose analysis is not based on personal observation and experience in the business does not change the essentially first hand nature of Mr. Herring's testimony.

Mr. Herring does not offer his opinions as an expert. Rather, he offers testimony of his first hand perception of WealthTV's efforts to market for and close contracts for carriage of and advertising on WealthTV programming. He personally participated in developing WealthTV's business plan, its studies of its competition, its target audience, its actual audience, its projected revenues and similar compilations of business records and "on the job" knowledge. Most importantly, he directed WealthTV's efforts to obtain carriage from Defendants and its local networks. Nothing in the amendments to Fed. R. Evid. 701 was intended to curtail the traditional rule that such knowledge, derived from the conduct of his own business, requires the qualification of the witness as an expert under Fed. R. Evid. 702 and Defendants offer no case law to suggest that the head of a business cannot summarize his company's position as a lay witness under Fed. R. Evid. 701. All of the cases it cites involve specialized reasoning applied to facts not based on the witnesses own involvement in the decision being challenged.<sup>5</sup>

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<sup>5</sup>For example, Defendants cite to cases applying the *Daubert* standard to proffers of expert testimony in criminal cases - where the due process and jury considerations require the strictest evidentiary standards. For example, in

Finally, it is important to note that the Presiding Judge has not determined whether expert testimony is even necessary (as opposed to helpful) to establish the elements of liability under Section 536(a). 47 U.S.C. § 536(a). To the extent that it requires greater expertise than being the victim of discrimination in favor of an affiliate to establish the necessary elements, the Presiding Judge sits in the best position to weigh the probative value of Mr. Herring's lay testimony.

**C. Lay Opinion Regarding Mixed Legal and Factual Questions is Admissible**

Defendant's objections to portions of Mr. Herring's testimony as legal conclusions are easily dismissed. Fed. R. Evid. 704(a) provides explicitly that:

. . . testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Even the rule barring testimony about pure legal conclusions can be relaxed in administrative proceedings. As the Advisory Committee notes to the 1972 amendments to Fed. R. Evid. 704 make clear, testimony about the law should be excluded if it is not "helpful to the trier of fact." Fed. R. Evid. 701, 702, & 403. The purpose of such exclusion is not to avoid confusion to the judge, but to avoid confusing the jury with possibly incorrect impressions of the law to be applied:

The problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury. This "invade[s] the province of the court to determine the applicable law and to instruct the jury as to that law." *F.A.A. v. Landy*, 705 F.2d 624, 632 (2d Cir.), cert. denied, 464 U.S. 895, 104 S.Ct. 243, 78 L.Ed.2d 232 (1983).

*Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir.1985).

As with the hearsay rule and the rule against expert testimony by lay persons, the rationale for strict construction disappears in the administrative forum where there is no jury and

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*U.S. v Giambro*, 544 F.3d 26 (1<sup>st</sup> Cir. 2008), the court simply held that plaintiffs' expert lacked a factual basis to form his proffered opinion about the accuracy of the national firearms registry based on some FOIA requests. Mr. Herring clearly has far more personal knowledge about his own company than a private consultant could possibly glean from a FOIA request about a national program administered through federal agency.

where broad discretion is vested in the agency decision maker.

Mr. Herring's views that WealthTV targets and reaches the same audience as MOJO; that its programming and audience potential are superior; and that Defendants have treated his company differently in the terms and conditions of carriage clearly involve mixed questions of law and fact. The fact that he opines on the ultimate questions of fact is not a reason to exclude the evidence. The Presiding Judge is perfectly capable of distinguishing fact from legal argument without wasting time on an evidentiary admission exercise.

**D. Mr. Herring's Personal Knowledge and the Collective Knowledge of WealthTV as an Organization Provide the Foundation for His Testimony**

Defendants raise multiple objections to much of the testimony of Mr. Herring. His opinion about information that he and his subordinates have culled from documents produced by Defendants, from internal surveys or from market research on the internet is described alternatively as hearsay, as expert opinion, or as lacking the foundation of personal knowledge.

The question of what constitutes "personal knowledge" under Fed. R. Evid. 602 is similar to the question of what constitutes an "opinion rationally based on the perception of the witness" under the lay opinion limits of Fed. R. Evid. 701(a).

When a witness is speaking as the collective spokesperson for a corporation, some latitude is allowed in providing what is, in essence, corporate knowledge. Just as the "perception" of a corporate representative includes information gained in his business capacity, so too his "personal knowledge" can include strategies and inferences drawn from his role as the corporate decision maker:

Because, under the rule 30(b)(6) framework, Grigsby acts as the agent for the corporation, he should be able to present Cajun's subjective beliefs as to whether the products were in breach of warranty, as long as those beliefs are based on the collective knowledge of Cajun personnel. Cajun argues that Grigsby had no personal knowledge of this matter under rule 602 and that rule 701 prohibits lay witnesses from testifying as to

issues that are not within their personal perception. But Grigsby does not testify as to his personal knowledge or perceptions; as explained in *Resolution Trust*, he testifies “vicariously,” for the corporation, as to its knowledge and perceptions.

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

As the President of WealthTV and due to his extensive involvement in WealthTV’s marketing, carriage negotiations, and similar day-to-day operations, Mr. Herring’s personal knowledge includes more than just his own personal observations. It includes strategies and inferences drawn from his role at WealthTV and from the collective knowledge of the organization. It is this knowledge, together with his own personal observations that forms the foundation for his testimony. As a result, Mr. Herring’s testimony on such topics as his opinions about information that he and his subordinates have culled from documents produced by Defendants, from internal surveys, and from market research has sufficient foundation under Fed. R. Evid. 602 and is, therefore, admissible.

\* \* \*

For the foregoing reasons, Defendants' Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring should be denied.

Respectfully submitted,

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April 16, 2009

## CERTIFICATE OF SERVICES

I, Kathleen Wallman, hereby certify that, on this 16<sup>th</sup> day of April, 2009, copies of the foregoing “Motion in Opposition to Defendants’ Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring” were sent via electronic mail, to the following:

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