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Federal Communications Commission
Office of the Secretary

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, Complainant v. Time Warner Cable Inc., Defendant	)	File No. CSR-7709-P
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant v. Bright House Networks, LLC, Defendant	)	File No. CSR-7822-P
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant v. Cox Communications, Inc., Defendant	)	File No. CSR-7829-P
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant v. Comcast Corporation, Defendant	)	File No. CSR-7907-P

ENFORCEMENT BUREAU'S COMMENTS

To: Marlene H. Dortch, Secretary, Federal Communications Commission

Attn: Hon. Richard L. Sippel, Chief Administrative Law Judge

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List A B C D E

Summary

On the basis of its review of the captioned-parties' Proposed Findings of Fact and Conclusions of Law, and Replies thereto, the Enforcement Bureau submits that WealthTV has not satisfied its burdens of demonstrating that Defendants engaged in conduct the effect of which was to unreasonably restrain the ability of WealthTV to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation in the selection, terms, or conditions for carriage. Accordingly, the Presiding Judge should issue a recommended decision concluding that none of the Defendants has violated Section 76.1301(c) of the Commission's Rules in this instance. Furthermore, because WealthTV has failed to demonstrate that any of the Defendants violated Section 76.1301(c) of the Commission's Rules, the Presiding Judge should issue a recommended decision concluding that there is no basis for mandating carriage of WealthTV on the Defendants' cable systems.

I. INTRODUCTION

1. By *Herring Broadcasting, Inc. d/b/a Wealth TV*, Order, FCC 09M-38 (ALJ, rel. May 4, 2009), the Presiding Judge directed the Enforcement Bureau ("Bureau"), to submit comments by July 8, 2009, on the Proposed Findings of Fact and Conclusions of Law; Proposed Replies thereto; and Proposed Recommended Decisions, filed respectively by Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV" or "Complainant") and Time Warner Cable Inc. ("Time Warner"), Bright House Networks, LLC ("Bright House"), Cox Communications, Inc. ("Cox"), and Comcast Corporation ("Comcast") (collectively, "Defendants").[1] The Bureau hereby submits the following comments.[2]

II. BACKGROUND

2. The Hearing Designation Order in this proceeding[3] designated the four captioned program carriage complaint cases for hearing in a single consolidated proceeding.[4] The HDO, as

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[1] *See* Complainant's Proposed Findings of Fact and Conclusions of Law, filed June 2, 2009, by WealthTV ("Complainant's Proposed Findings"); Defendants' Joint Proposed Findings of Fact and Conclusions of Law, filed June 2, 2009, by Time Warner, Bright House, Cox, and Comcast ("Defendants' Joint Proposed Findings"); Complainant's Proposed Reply Findings of Fact and Conclusions of Law, filed June 24, 2009, by WealthTV ("Complainant's Proposed Reply Findings"); and Defendants' Joint Proposed Reply Findings of Fact and Conclusions of Law, filed June 24, 2009, by Time Warner, Bright House, Cox, and Comcast ("Defendants' Joint Proposed Reply Findings").

[2] Although the Bureau has, pursuant to *Herring Broadcasting, Inc. d/b/a WealthTV*, Erratum, DA 08-2269 at 4 (Chief, Media Bur., rel. Oct. 15, 2008) and 47 C.F.R. § 0.111(b), participated fully as a party in this proceeding, the Bureau's interests in this case differ from those of the captioned parties. Thus, while WealthTV and the Defendants have properly sought to serve their respective pecuniary and other *private* interests, the Bureau's role has been to ensure that the *public* interest is served and that the evidentiary record in this proceeding is full and complete in order that the Presiding Judge may have an adequate basis upon which to render a fair and reasoned recommended decision.

[3] *See Herring Broadcasting, Inc. d/b/a WealthTV*, Memorandum Opinion and Hearing Designation Order, DA 08-2269 (Chief, Media Bur., rel. Oct. 10, 2008) ("HDO").

[4] The HDO also designated two additional program carriage complaint cases for hearing in this consolidated proceeding (Case No. CSR-7876-P, brought by NFL Enterprises LLC; and Case No. CSR-8001-P, brought by TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network), neither of which is the subject of the instant comments.

initially modified in a staff-level Erratum[5] and further modified in a Memorandum Opinion and Order by the Presiding Judge,[6] requires the Presiding Judge to submit, on an expedited basis, a recommended decision to the Commission based on his determination of the following issues as to each of Time Warner, Bright House, Cox and Comcast:

> [Issue No. 1:] [W]hether the defendant engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c); [and]
>
> [Issue No. 2:] [I]f the Administrative Law Judge determines that the defendant has discriminated against the complainant's programming in violation of Section 76.1301(c), whether mandatory carriage of the complainant's programming on the defendant's system is necessary to remedy the violation and, if so, the prices, terms, and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends.[7]

3. By *Herring Broadcasting, Inc. d/b/a Wealth TV*, Order, FCC 08M-44 at 2 (ALJ, rel. October 23, 2008), the Presiding Judge placed the burdens of proceeding with the introduction of evidence and of proof with respect to both issues in each of the four consolidated complaint cases on WealthTV. In addition, by *Herring Broadcasting, Inc. d/b/a Wealth TV*, Memorandum Opinion and Order, FCC 08M-47 at 3, ¶ 6 (ALJ, rel. Nov. 20, 2008), the Presiding Judge, confirming an earlier bench ruling about the extent to which he is bound by the HDO's discussion of the facts to be considered, stated, "the evidence adduced at the hearing in this proceeding will be given *de novo* consideration" and "[u]ltimately, 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." (emphasis in original).

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[5] *See Herring Broadcasting, Inc. d/b/a WealthTV*, Erratum at 2-3, ¶¶ 5-8 (Chief, Media Bur., rel. Oct. 15, 2008) (modifying ¶¶ 122, 126, 130, and 134 of the HDO to articulate specific issues to be decided by the Presiding Judge).

[6] *See Herring Broadcasting, Inc. d/b/a Wealth TV*, Memorandum Opinion and Order, FCC 08M-47 at 4, ¶ 8 (ALJ, rel. Nov. 20, 2008) (further modifying ¶¶ 122, 126, 130 and 134 of the HDO to more accurately track the language of the rule section at issue in this proceeding, Section 76.1301(c) of the Commission's Rules).

[7] *Id.*

4. The four captioned program carriage cases were tried together because they share a common complainant and similar issues. Hearing sessions were held at the Commission's headquarters in Washington, DC, from April 20 through May 1, 2009. During the two-week long hearing, WealthTV presented the testimony of three witnesses in support of its direct case, and the Defendants collectively presented fifteen witnesses. The Presiding Judge received into the record a total of approximately 230 documentary exhibits.

III. LEGAL STANDARD

5. As an initial matter, the Bureau agrees with Defendants that the burdens of proceeding with the introduction of evidence and of proof are on WealthTV.[8] In the instant cases, neither the HDO nor the Erratum thereto contained discussions or ordering clauses referencing the assignment of burdens at hearing. A presiding judge is vested with broad discretion to govern the course of a hearing, especially on matters on which the designation order is silent.[9] Therefore, the Presiding Judge properly exercised his authority by assigning the burdens to WealthTV, and WealthTV bears the burdens of proceeding with the introduction of evidence and of proof in this case.

6. With respect to the applicable standard to prove a violation of the Commission's program carriage rules, we must begin with the statute. The Cable Television Consumer Protection and Competition Act of 1992[10] added Section 616 to the Communications Act of 1934, as amended, which requires the Commission to adopt regulations governing program carriage agreements

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[8] Defendants' Joint Proposed Findings at 138-140.

[9] *See RKO General, Inc.*, Memorandum Opinion and Order, 48 FCC 2d 826, 827, ¶ 4 (1974) ("It is well established that the presiding judge's authority to regulate the course of a hearing is 'plenary' and 'invests the presiding officer with great latitude."); *Atlantic Broadcasting Co.*, Memorandum Opinion and Order, 5 FCC 2d 717, 720, ¶ 9 (1966) (where a particular question has been thoroughly considered in a designation order, subordinate officials are expected to follow that judgment; however, subordinate officials are justified in reaching a different conclusion with respect to a particular question when it is established that the matter has not been fully considered in the designation order).

[10] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

between cable operators and other multichannel video programming distributors and video programming vendors. Among other things, Section 616 orders the Commission to establish rules that:

> contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[11]

In adopting these provisions, Congress observed "that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."[12]

7. The Commission recognized that unaffiliated program vendors that compete with vertically integrated entities may suffer harm to the extent that they do not receive the same favorable terms and conditions of carriage.[13] To deter discriminatory conduct in the carriage of programming, the Commission adopted Section 76.1301(c) of the rules, which closely tracks the statute:

> *Discrimination.* No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

8. In adopting Section 76.1301(c), the Commission specifically attempted to strike a balance between proscribing certain anticompetitive activities while preserving the ability of the

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[11] 47 U.S.C. § 536(a)(3).

[12] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2643, ¶ 2 (1993) ("*1993 Program Carriage Order*").

[13] *Id.* at 2643, ¶ 2.

parties to engage in "legitimate, aggressive negotiations."[14] The Commission also sought to implement Congress' stated policy to "'rely on the marketplace, to the maximum extent feasible, to achieve greater availability' of the relevant programming."[15] At no point did Congress or the Commission state an intention to characterize vertically-integrated MVPDs as common carriers (thus, *requiring* them in every case to provide carriage upon reasonable request)[16] or deny them the ability to exercise legitimate business and editorial discretion over their carriage decisions.

9. Although Section 76.1301(c) was adopted in 1993, there is a scarcity of guidance and case law on the specific subject of program carriage discrimination. Nevertheless, in evaluating Issue No. 1 in this proceeding, it is reasonable, based on a plain reading of Section 76.1301(c), to employ a two-pronged analysis which essentially tracks the required elements of the rule section. First, the Presiding Judge should look to whether the vertically-integrated, multichannel video program distributor (MVPD")[17] has engaged in discrimination in the selection, terms, or conditions of carriage on the basis of the program vendor's affiliation or non-affiliation. Second, if the MVPD is found to have engaged in such discriminatory conduct, the Presiding Judge should then examine whether the effect of such conduct has been to unreasonably restrain the ability of the unaffiliated program vendor to compete fairly. Both prongs must be satisfied to make out a violation of Section 76.1301(c) of the Commission's Rules.[18]

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[14] *Id.* at 2648, ¶ 14.

[15] *See* 1992 Cable Act, Section 2(b)(2), *cited in 1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 15.

[16] *See* H.R. Rep. No. 102-628, at 110 (1992) ("House Report") ("The Committee intends that the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act.").

[17] MVPDs include cable operators (such as each of the Defendants), telephone companies that distribute video programs to subscribers (such as Verizon FIOS and AT&T U-verse TV), and satellite video program distributors (such as DirecTV and DISH Network).

[18] The Presiding Judge need not engage in an analysis of Issue No. 2 in this proceeding (requiring a determination of whether carriage should be mandated and, if so, under what prices, terms and/or conditions) if he is unable to conclude that any of the Defendants has violated Section 76.1301(c) of the Commission's Rules.

10. Under the first prong of the two-prong analysis, in determining whether an MVPD has engaged in discriminatory conduct, the Presiding Judge should evaluate whether the vertically-integrated distributor has: (a) favored its own affiliated programming over the programming of an unaffiliated program vendor in the selection, terms, and/or conditions of carriage on (b) the basis of affiliation or non-affiliation. The legislative history to Section 616 provides that "the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices."[19] The Supreme Court has held that discrimination involves "a comparison of substantially similar entities."[20] Consequently, with respect to part (a) of the first prong, in determining whether an MVPD has favored its affiliated programming over the programming of an unaffiliated program vendor, the Presiding Judge initially should consider whether the affiliated and unaffiliated programming at issue are "substantially similar." The Bureau finds that programming need not necessarily be identical for there to be a finding that they are substantially similar.[21] Relevant considerations should include whether the content, target demographics, focuses, and target advertisers of the two programming networks are comparable.

11. With respect to part (b) of the first prong, the Bureau further agrees with the staff ruling that an "MVPD is not precluded from treating unaffiliated programmers disparately from affiliates, so long as it can demonstrate that such treatment did not result from the programmer's status as an unaffiliated entity."[22] Relevant evidence relating to whether an MVPD had a legitimate, non-discriminatory business or editorial basis for denying carriage of a non-affiliated complainant's programming includes whether there were lackluster audience ratings for complainant's programming; lack of consumer demand for complainant's programming; whether and for what

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[19] 1993 Program Carriage Order, 9 FCC Rcd at 2645 n.6, *citing* House Report at 110.

[20] *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

[21] *See* HDO, at 11, 15, 20, 25-26, ¶¶ 17, 27, 39, 51.

[22] *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, 15794, ¶ 24 (Media Bur. 2008), *application for review pending* ("*2008 MASN Order*").

reasons other MVPDs had denied carriage of complainant's programming; and unfavorable price, terms and/or conditions of proposed carriage.[23] Other factors include whether there were bandwidth or other technical constraints to carriage; little or no programming experience by the complainant; and concerns about complainant's financial wherewithal to sustain a long-term business relationship with the MVPD.

12. Under the second prong of the two-prong analysis, if there is a finding of discrimination under Section 76.1301(c), the Presiding Judge should then determine whether the discriminatory conduct had the effect of unreasonably restraining the unaffiliated program vendor's ability to compete fairly. Relevant considerations include the effect of the discriminatory conduct on the unaffiliated program vendor's ability to compete for viewers, advertisers, and programming.[24] The Presiding Judge need not go so far as to find that, without carriage, the unaffiliated program vendor would be entirely unable to compete.[25]

IV. DISCUSSION

A. WealthTV Has Not Shown that Defendants Engaged in Discriminatory Conduct

13. Turning to the first prong of the analysis, the Bureau agrees with Defendants that WealthTV has not met its burden of proving that the now-defunct MOJO network was similarly situated with the WealthTV network for the purposes of Section 76.1301(c).[26] At hearing,

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[23] *See generally id.* at 15800-06, ¶¶ 32-41.

[24] *See id.* at 15799, ¶ 31.

[25] *See id.* at 15798, ¶ 30. WealthTV maintains that "[p]lainly, the word 'unreasonably' does not refer to the *extent* of the restraint imposed by the discriminatory conduct of the Defendant, but rather the *character* of the conduct that created the restraint." Complaint's Reply Findings at 62 (emphasis in original). The Bureau submits that Section 76.1301(c), as it is written, does not prohibit *all* discriminatory conduct relating to program carriage on the basis of affiliation or non-affiliation; rather, it only proscribes discriminatory conduct the effect of which unreasonably restrains a complainant's ability to compete fairly. Thus, not only does the term "unreasonably," as it appears in Section 76.1301(c), immediately precede and therefore modify the word "restrain," but the entire phrase -- "the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly" -- modifies the nature and extent of the discriminatory conduct that is prohibited.

[26] Defendants' Joint Proposed Findings at 146–47; Defendants Joint Proposed Reply Findings at 85, 95-96.

WealthTV characterized its programming and MOJO's programming as targeting wealthy, young, male-dominated audiences.[27] Charles Herring, WealthTV's principal, acknowledges, however, that the several, self-selected screen shots and snippets of programming that WealthTV proffered at hearing in support of its position were not representative of WealthTV's overall programming.[28] Similarly, Sandra McGovern, the company's expert witness on programming, concedes that, in forming her expert opinion, she relied upon a selective examination of male-skewed WealthTV programs hand-picked for her by Mr. Herring.[29] In fact, virtually all of WealthTV's marketing materials, affiliation agreements, and its website held WealthTV out as a network targeted toward a broad audience -- men and women of all ages interested in how wealth is achieved and enjoyed.[30]

14. Moreover, Defendants provide reliable evidence effectively distinguishing WealthTV from MOJO. In this regard, Defendants demonstrate that, while WealthTV concentrated on travel, recreation, lifestyle, food, drink, art, design and collectibles as hallmarks of its overall programming, MOJO emphasized several genres focusing on sports, music, movies, and reality programming.[31] Time Warner's programming expert, Michael Egan, persuasively characterizes WealthTV's overall programming as having a calm, mature, and sophisticated "look and feel" about it, while MOJO's presentation was considerably more edgy, hip, urban, and irreverent.[32] In sum, while there may have been certain similarities -- namely some commonality of advertisers[33] -- the

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[27] Complainant's Proposed Findings at 24–27, 58; Complainant's Reply Findings at 23-24.

[28] Defendants' Joint Proposed Findings at 3, 103, 106-07, 146; Defendants' Joint Proposed Reply Findings at 70.

[29] Defendants' Joint Proposed Findings at 3, 116-18, 146; Defendants' Joint Proposed Reply Findings at 4, 70-71.

[30] Defendants' Joint Proposed Findings at 108-09; Defendants' Joint Reply Findings at 3, 29-30, 62-63.

[31] Defendants' Joint Proposed Findings at 103-04.

[32] Defendants' Joint Proposed Findings at 4, 106; Defendants' Joint Proposed Reply Findings at 71.

[33] Complainant's Proposed Findings at 25; Complainant's Proposed Reply Findings at 56.

evidence does not support WealthTV's contention that the two networks were similarly situated for purposes of Section 76.1301(c).

15. Assuming *arguendo* that the two networks were similarly situated, the Bureau submits that WealthTV has not satisfied its burden of demonstrating that each of the Defendants made decisions regarding carriage of WealthTV on the basis of iN DEMAND's affiliation or WealthTV's non-affiliation. WealthTV seems to suggest that the relationship between a vertically integrated MVPD and its programming affiliate must necessarily be at "arms length."[34] WealthTV accurately points out that Defendants did not always treat iN DEMAND and MOJO exactly as they did unaffiliated vendors and their programming in terms of the need for written contracts and application of various other evaluative criteria.[35]

16. The *sine qua non* for a carriage decision consistent with Section 76.1301(c), however, is not whether a vertically integrated cable operator has ignored the practical considerations and marketplace realities that come from having a financial stake in programming that it carries, treating affiliated and unaffiliated program vendors identically in all respects. The Bureau is aware of no provision requiring vertically integrated MVPDs to undertake a review of every conceivable factor when evaluating a new unaffiliated programming network that seeks carriage on its system. Similarly, an exhaustive evaluation of every aspect of an affiliated program vendor may be superfluous, given the MVPD's familiarity with the affiliated vendor's sources of funding, experience, and programming, among other things.[36] Rather, Section 76.1301(c) appears to require a practical inquiry into whether affiliation or non-affiliation formed the basis for, or was the motivation, intention or *raison d'être* behind, each Defendant's denial of carriage, and whether their

[34] Complainant's Proposed Findings at 13-14; Complainant's Proposed Reply Findings at 2.

[35] Complainant's Proposed Findings at 12-24.

[36] Defendants' Joint Proposed Reply Findings at 11-28.

respective claimed business decisions for rejecting WealthTV were legitimate or simply pretexts for discrimination.

17. The Bureau agrees with Defendants that WealthTV failed to present any direct documentary or testimonial evidence that any of the Defendants' refusals to carry WealthTV were based on considerations of affiliation or non-affiliation.[37] By contrast, Defendants presented credible documentary evidence and testimony of multiple key programming executives and experts demonstrating that Defendants' respective decisions not to carry WealthTV were made independently of each other and were based on legitimate business concerns.[38] Furthermore, the record evidence demonstrates that many of the justifications Defendants provide for not carrying WealthTV were similar to those that other unrelated, non-vertically integrated MVPDs provided to WealthTV for not carrying the fledgling network: insufficiently compelling content, little or no track record in the programming business, no audience or consumer research data, lack of brand recognition, unfavorable terms of carriage, and bandwidth constraints.[39]

18. The Bureau disagrees with WealthTV's claim that MOJO was more than a rebranding of iN DEMAND's predecessor network, INHD.[40] iN DEMAND launched INHD, a high definition network, in September 2003,[41] before Herring Broadcasting, Inc. launched WealthTV on June 1, 2004.[42] In 2007, INHD became known as MOJO.[43] WealthTV presents no evidence that

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[37] Defendants' Joint Proposed Findings at 16-17, 30-31, 49-50, 82; Defendants' Joint Proposed Reply Findings at 6.

[38] Defendant's Joint Proposed Reply Findings at 15 – 28.

[39] Defendants' Joint Proposed Findings at 82 – 86. WealthTV and Defendants disagree about whether Mr. Herring believes at least some of the reasons that Defendants provide for not carrying WealthTV to be legitimate. *Compare* Defendants' Joint Proposed Findings at 82-87 *with* Complainant's Proposed Reply Findings at 14-15. While Mr. Herring may have provided inconsistent testimony in this regard, the Bureau submits that it is of no decisional consequence, given Mr. Herring's status as a non-expert witness in this case.

[40] Complainant's Proposed Findings at 7-9, 63-64; Complainant's Proposed Reply Findings at 33-37.

[41] Cox Ex. 84 at 6; Complainant's Proposed Findings at 5.

[42] Complainant's Proposed Findings at 1; Defendants' Joint Proposed Findings at 7.

Defendants opted to create a WealthTV-like network of their own in order to avoid having to carry an unaffiliated network. Defendants demonstrate that: iN DEMAND intended to create a branding identity that better defined INHD as a destination for its existing young affluent male demographic;[44] the process of transitioning from INHD to MOJO was incremental in that it involved maintaining the vast majority of INHD programming and introducing new programming over a period of approximately a year;[45] much of the programming on MOJO – sports, movies and music – was representative of the kind of programming that had always been on INHD;[46] and the development of MOJO followed a common industry practice of evolving a channel through rebranding, rather than launching a new channel.[47] While MOJO became a more refined and focused version of INHD, there was no large-scale shift in programming that would suggest that MOJO constituted the launch of a brand new channel on Defendants' cable systems.

19. WealthTV dismisses the rebranding/new launch debate as a semantic one that "misses the legal point" because "[w]hether MOJO was considered a rebrand or a new launch, Defendants had a choice as to whether to switch to MOJO or, instead, offer carriage to WealthTV."[48] Such voluntary choice notwithstanding, WealthTV's interpretation of Section 76.1301(c) would seemingly *require* a cable operator to evaluate whether to remove an existing affiliated network from its lineup to make room for an unaffiliated, similarly situated network seeking carriage. Such an interpretation is without support.

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[43] Defendants' Joint Proposed Findings at 6.

[44] *Id.* at 93.

[45] *Id.* at 94-96.

[46] *Id.* at 96.

[47] *Id.* at 98.

[48] Complainant's Proposed Findings at 64.

20. In sum, despite Herring Broadcasting, Inc.'s strong belief in the desirability of WealthTV,[49] the evidence does not demonstrate that each Defendant's ultimate decision not to carry WealthTV was driven by its affiliation with iN DEMAND and MOJO or non-affiliation with Herring Broadcasting, Inc. and WealthTV.

B. WealthTV Has Not Shown That It Was Unreasonably Restrained in Its Ability To Compete Fairly

21. Finally, even if WealthTV had demonstrated that Defendants engaged in discriminatory conduct, WealthTV has not satisfied its burden of showing that such conduct had the effect of unreasonably restraining WealthTV's ability to compete fairly. WealthTV appears to suggest that *any* disadvantage that it has experienced from Defendants' denial of carriage on their systems supports a finding of violation of Section 76.1301(c) of the Commission's Rules.[50] The Bureau disagrees. A denial of carriage by a video distributor will almost always result in some adverse consequences for a program vendor, regardless of the number of subscribers served by the distributor. Furthermore, such an argument could be made by any non-affiliated program vendor that has been denied carriage by a vertically-integrated MVPD.

22. Section 76.1301(c), however, was not intended to eliminate all consequences of disparate treatment by MVPDs. The rule section was narrowly tailored to proscribe a particular kind of discriminatory conduct -- that which is based on affiliation or non-affiliation, <u>and</u> has the effect of *unreasonably* restraining the ability of a non-affiliated program vendor to compete fairly.[51] WealthTV's attempt to minimize the significance of the term "unreasonably" as it relates to restraint

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[49] *See e.g.*, Complainant's Proposed Findings at 1-2, 27; Complainant's Proposed Reply Findings at 31-32 (elaborating on WealthTV's perceived superior attributes).

[50] Complainant's Proposed Findings at 47.

[51] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 14 ("In addition, we observe that Section 616(a)(3) [of the Communications Act of 1934, as amended] prohibits *only* that conduct 'the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.'") (emphasis added).

on competition or to effectively read the word out of Section 76.1301(c) is unsupported and is inconsistent with fundamental concepts of statutory construction.[52]

23. The Bureau also disagrees with WealthTV's apparent suggestion that, because of the size of Defendants' *collective* subscriber base, it is somehow self evident that WealthTV has been unreasonably restrained in its ability to compete fairly.[53] WealthTV's burden of demonstrating that it has been unreasonably restrained in its ability to compete fairly applies to each of the Defendants individually, not collectively. Whether a complainant has been unreasonably restrained in its ability to compete fairly because of the discriminatory conduct of an MVPD is a key element in determining whether there has been a violation of Section 76.1301(c).[54] WealthTV's failure to carry its burden of showing that it has been so unreasonably restrained as to each of Time Warner, Bright House, Cox and Comcast is, the Bureau submits, fatal to WealthTV's complaints.

V. CONCLUSION

24. Accordingly, for the foregoing reasons, the Bureau submits that WealthTV has not satisfied its burden of demonstrating that Defendants engaged in discrimination in the selection, terms, or conditions of carriage on the basis of WealthTV's non-affiliation. Even assuming, *arguendo*, that Defendants did engage in such discrimination, WealthTV has not shown that Defendants' conduct unreasonably restrained WealthTV's ability to compete fairly. Accordingly, the Bureau believes the Presiding Judge should issue a recommended decision finding that Defendants have not violated Section 76.1301(c) of the Commission's Rules in this instance and

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[52] *See, e.g., Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 167 (2004) (It is "settled rule that we must, if possible, construe a statute to give every word some operative effect."); *Duncan v. Walker*, 533 U.S. 167, 175 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute . . . We are thus reluctant to treat statutory terms as surplusage in any setting.").

[53] Complainant's Proposed Findings at 3, 65; Complaint's Proposed Reply Findings at 38.

[54] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2648, ¶ 14 ("Thus, the implementing regulations for Section 616 [of the Communications Act of 1934, as amended] will *require* that any complainant alleging a violation of Section 616(a)(3) *must demonstrate* that the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.") (emphasis added).

concluding that Issue No. 1 should be resolved in Defendants' favor. Furthermore, because WealthTV has failed to demonstrate that Defendants violated Section 76.1301(c) of the Commission's Rules, the Presiding Judge should issue a recommended decision finding there is no basis for mandating carriage of WealthTV on Defendants' cable systems and concluding that Issue No. 2 is moot.

Respectfully submitted,
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July 8, 2009

CERTIFICATE OF SERVICE

David Bradford, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has, on this 8th day of July 2009, sent via first class United States mail and E-Mail copies of the foregoing "Enforcement Bureau's Comments" to:

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