

REDACTED VERSION

FCC 09 D-01

**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)	

Issued: October 8, 2009

Released: October 14, 2009

**RECOMMENDED DECISION OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

Appearances

Kathleen Wallman, Esquire, Harold Feld, Esquire, and Joshua Rose, Esquire, on behalf of Herring Broadcasting, Inc., d/b/a WealthTV; Jay Cohen, Esquire, Arthur H. Harding, Esquire, Gary Carney, Esquire, Seth A. Davidson, Esquire, Samuel E. Bonderoff, Esquire, Micah M.

Caldwell, Esquire, and Vibhuti Jain, Esquire, on behalf of Time Warner Cable Inc.; R. Bruce Beckner, Esquire, Arthur J. Steinhauer, Esquire, Cody Harrison, Esquire, Adam M. Copeland, Esquire, and Robert M. Nelson, Esquire, on behalf of Bright House Networks, L.L.C.; David E. Mills, Esquire, Jason E. Rademacher, Esquire, J. Parker Erkmann, Esquire, and Lynn M. Deavers, Esquire, on behalf of Cox Communications, Inc.; David H. Solomon, Esquire, L. Andrew Tollin, Esquire, Robert G. Kirk, Esquire, J. Wade Lindsay, Esquire, James L. Casserly, Esquire, Michael H. Hammer, Esquire, Megan Stull, Esquire, Michael Hurwitz, Esquire, Michael P. Carroll, Esquire, David B. Toscano, Esquire, Antonio J. Perez-Marques, Esquire, and Jennifer A. Ain, Esquire, on behalf of Comcast Corporation; Kris Anne Monteith, Esquire, William Davenport, Esquire, Gary Schonman, Esquire, and Elizabeth Mumaw, Esquire, on behalf of the Enforcement Bureau of the Media Bureau of the Federal Communications Commission.

PRELIMINARY STATEMENT

1. In 2007 and 2008, Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”), a video programming vendor,¹ filed separate carriage complaints against four multichannel video programming distributors (“MVPDs”) ² — Comcast Corporation (“Comcast”), Time Warner Cable Inc. (“TWC”), Cox Communications, Inc. (“Cox”), and Bright House Networks, LLC (“BHN”) — alleging that these MVPDs had violated section 616 of the Communications Act of 1934, as amended,³ and section 76.1301(c) of the Commission’s rules,⁴ by discriminating against WealthTV in video programming distribution.⁵ Specifically, WealthTV asserted that the defendants failed to negotiate in good faith and denied it carriage while providing preferential treatment to MOJO, a programming vendor affiliated with defendants. According to Wealth TV, MOJO’s programming was similar to WealthTV’s programming and MOJO targeted the same audience as WealthTV. WealthTV claimed that the defendants’ actions unreasonably restrain its ability to compete fairly in the marketplace and requested the Commission to order each defendant to carry WealthTV for a period of ten years under specified terms and conditions.

¹ A “video programming vendor” is “a person engaged in the production, creation, or wholesale distribution of video programming for sale.” 47 U.S.C. § 536(6)(b).

² A “multichannel video programming distributor” is “an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming . . . includ[ing]. . . but are not limited to a cable operator.” 47 C.F.R. § 76.1000(e). MVPDs include cable operators, such as the defendants, telephone companies, such as Verizon FIOS, and satellite video program distributors, such as DirecTV and DISH Network.

³ 47 U.S.C. § 536(a)(3).

⁴ 47 C.F.R. § 76.1301(c).

⁵ See Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File No. CSR-7829-P (filed March 27, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008).

2. On October 10, 2008, the Media Bureau, by delegated authority, designated the four captioned cases for hearing in a single consolidated proceeding before an Administrative Law Judge ("Presiding Judge").⁶ The Bureau noted that the "pleadings and supporting documentation present several factual disputes, as to whether TWC, BHN, Cox and Comcast discriminated against WealthTV in favor of their affiliated MOJO service"⁷ so as to make it unable "to determine on the basis of the existing records whether [it] can grant relief."⁸ The Bureau ordered a recommended decision to be issued to the Commission within 60 days.⁹ As subsequently modified by the Presiding Judge to comply with the regulations, the issues designated by the *HDO* are as follows:

(a) whether the defendant[s] 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);

(b) if the Administrative Law Judge determines that the defendant[s] [have] 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[s] 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."¹⁰

3. Shortly after the release of the *HDO*, the Presiding Judge issued an Order assigning WealthTV both the burden of proceeding with the introduction of evidence and the burden of proof with respect to the designated issues.¹¹ The Presiding Judge in a subsequent order ruled

⁶ *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, MB Docket 08-214, 23 FCC Rcd 14787, 14792 (¶ 7) (MB 2008) ("*HDO*"). The *HDO* also designated two additional program carriage complaints for hearing in this consolidated proceeding *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, File No. CSR 7876-P and *TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Comcast Corporation ("MASN")*, File No. CSR-8001-P. The *NFL Enterprises* case was dismissed after the parties reached a settlement. See *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, FCC 09M-42 (released May 19, 2009). The *MASN* case will be addressed in a subsequent decisional ruling.

⁷ *HDO*, 23 FCC Rcd at 14814 (¶ 58).

⁸ *Id.* at 14787, 14792 (¶ 7).

⁹ *Id.* at 14790 (¶ 1).

¹⁰ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 08M-47 at 4 (¶ 8) (ALJ, released Nov. 20, 2008) ("*Nov. 20, 2008 Order*").

¹¹ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 08M-44 at 2 (ALJ, released Oct. 23, 2008) ("*Oct 23 Order*").

that the “evidence adduced at the hearing in this proceeding will be given *de novo* consideration and that the resolution of the issues in this case will be “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*.”¹² In light of the multiple complaints, the intricate and unique factual situation of each case, and the need for discovery, the Presiding Judge determined that the “60-day timeframe set forth in the *HDO* cannot be achieved” and set a hearing schedule that extended beyond the deadline set forth in the *HDO*.¹³

4. On December 24, 2008, the Media Bureau issued an order declaring (1) that the Administrative Law Judge had exceeded his authority in issuing a hearing schedule beyond its 60-day deadline, (2) that his delegated authority expired at the end of the 60-day period set forth in the *HDO* and (3) that the Media Bureau would resolve the carriage complaints without the benefit of a recommended decision.¹⁴ Approximately one month later, the Commission, *sua sponte*, issued an order rescinding the Media Bureau’s order.¹⁵ The Commission concluded that “the factual determinations required to fairly adjudicate these matters are best resolved through hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau.”¹⁶ The Commission directed the Presiding Judge to update the hearing schedule to accommodate delays caused by the Bureau’s December 24th decision. The Commission further directed issuance by the Presiding Judge of a recommended decision “as expeditiously as possible, consistent with the mandates of fairness and due process.”¹⁷

5. Following the completion of discovery, and the submission of written direct testimony, proposed exhibits, and trial briefs, formal hearings were held in the Office of Administrative Law Judges (“OALJ”) courtroom at Commission headquarters from April 20, 2009 through May 1, 2009. Three witnesses appeared on behalf of WealthTV¹⁸ and eighteen witnesses collectively appeared on behalf of the defendants.¹⁹

¹² *Nov. 20, 2008 Order* at 3 (¶ 6) (emphasis omitted).

¹³ *Id.* at 3 (¶ 7).

¹⁴ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, 23 FCC Rcd 18316 (MB 2008).

¹⁵ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, 24 FCC Rcd 1581 (2009) (“*Reinstatement Order*”).

¹⁶ *Id.* at 1581 (¶ 2).

¹⁷ *Id.*

¹⁸ Mr. Charles Herring, WealthTV’s president, testified as a fact witness on behalf of WealthTV. In addition, WealthTV presented two expert witnesses: Ms. Sandra McGovern, President, McGovern Media Associates, LLC; and Mr. Gary Turner, former Chief Executive Officer of Turner Media Group, Inc. WealthTV proffered written direct testimony of another expert witness, Mr. Mark Kersey, but the day before his cross-examination WealthTV sought to withdraw his testimony which concerned the tabulation of a survey, and to substitute a revised tabulation. The Presiding Judge refused to permit Mr. Kersey to testify due to his tardiness, and disallowed his proposed testimony on the ground that it was unreliable. Tr. 3699-3700, 3012-13 (Presiding Judge’s bench rulings).

¹⁹ The defendants presented *fifteen fact witnesses* at the hearing: Mr. David Asch, Executive Vice President of iN Demand (for all Defendants); Ms. Melinda Witmer, TWC’s Executive Vice President and

6. Subsequently, WealthTV for itself and the defendants in a joint submission filed (1) Proposed Findings of Fact and Conclusion of Law; (2) Reply Proposed Findings of Fact and Conclusions of Law, and (3) optional Proposed Recommended Decisions. The Enforcement Bureau, participating as a party limited to representing the public interest, conducted selective cross-examination and filed Comments opposing the four complaints.

FINDINGS OF FACT

Description of Parties

7. WealthTV is a national video programming vendor as defined by section 616 of the Act and section 76.1301(c) of the Commission's regulations.²⁰ WealthTV launched²¹ its service on June 1, 2004 and provides 24-hours seven day per week, original themed programming in a high definition ("HD") format²² as well as a down-converted standard definition ("SD") format.²³ WealthTV's programming offers showings of luxury lifestyles, such as travel, fine dining, luxury transport, gadgetry, finance and even philanthropy.²⁴ WealthTV is a family-owned company, and its principals include Chief Executive Officer Robert Herring Sr., and his son, Mr. Charles Herring. The Messrs. Herring have considerable experience as business entrepreneurs but had not operated a cable network before establishing WealthTV.²⁵ WealthTV

Chief Programming Officer; Mr. Arthur Carter, former Senior Director of Programming for TWC; Mr. Eric Goldberg, Senior Director of Programming for TWC; Mr. Andrew Rosenberg, Vice President of Programming for TWC (for Defendant TWC); Mr. Madison Bond, Executive Vice President for Content Acquisition for Comcast Cable Communications, LLC, an indirect subsidiary of Comcast; Mr. Alan Dannenbaum, then an Executive Vice President of Network Distribution for Comcast Programming Management, LLC, an indirect subsidiary of Comcast (for Defendant Comcast); Mr. Robert C. Wilson, Senior Vice President of Programming for Cox; Mr. Leo Brennan, Cox's Chief Operating Officer; Ms. Kimberly Edmunds, Senior Vice President and General Manager of Cox's Arkansas/Kansas cable systems (for Defendant Cox); Mr. Steve Miron, President of BHN; and Ms. Anne Stith, former Director of Product Marketing for BHN's Tampa Division (for Defendant BHN). In addition, *three expert witnesses* testified on behalf of the defendants: Mr. Michael Egan, Founder and Principal of the consulting firm Renaissance Media Partners, LLC; Mr. Howard Homonoff, Director in Price Waterhouse Coopers LLC's Entertainment, Media and Communications practice; and Dr. Janusz Ordovery, Professor of Economics at the New York University and founding director of a consulting firm.

²⁰ See 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

²¹ Launching occurs when an MVPD commences carriage of a particular video programming network.

²² *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2766 n.25 (2005) (High-definition programming "is a television signal with greater detail and fidelity than provided by the National Television Systems Committee ("NTSC") system. The high-definition picture has approximately twice the visual resolution as NTSC. High-definition programming also provides CD-quality audio.").

²³ WealthTV Exh. 144 (Testimony of Charles Herring) at 1-2, 9.

²⁴ *Id.* at 9. Apparently, philanthropy shows a sense of one's *noblesse oblige* while gaining tax advantages.

²⁵ *Id.* at 3-4.

is exclusively funded by the Herrings, as owners, without any outside funding.²⁶ WealthTV is not affiliated with Comcast, TWC, Cox, or BHN.

8. WealthTV has had uneven success in obtaining carriage on MVPDs but, significantly, WealthTV has been able to reach affiliation agreements with over 125 MVPDs. These include the three Bell telephone companies (Verizon FiOS, AT&T U-Verse, and Qwest Broadband Services), Charter Communications (“Charter”), the National Cable Television Cooperative (“NCTC”) and GCI Cable.²⁷ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL] WealthTV is not carried by 18 of the 25 largest MVPDs in the United States, including the two largest satellite MVPDs (DirecTV and Dish Network), Cablevision, Mediacom, Suddenlink, Cable One, Atlantic Broadband, Armstrong, Knology, Midcontinent Communications, Blue Ridge Communications and Broadstripe.³⁰ WealthTV is not carried by any of the defendants on a linear basis.³¹

9. But Wealth TV still is a significant program vendor and in the past two years [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

10. Defendants Comcast, TWC, Cox, and BHN are MVPDs that serve approximately 24.6 million, 13.3 million, 5.4 million and 2.3 million customers, respectively.³³ Comcast,

²⁶ *Id.* at 6.

²⁷ WealthTV Exh. 144 at 23 (Testimony of Charles Herring).

²⁸ TWC Exhs. 10, 18, 61; Tr. at 3026-28, 3260-67, 3301 (Herring). “A ‘hunting license’ refers to an agreement that specifies basic carriage terms and gives the programmer the right to seek carriage by individual cable systems owned by a cable MSO [multiple system operator], as opposed to a nationwide carriage agreement which provides the programming service with carriage on all systems owned by the MSO.” *HDO*, 23 FCC Rcd at 14792 n.25.

²⁹ For example, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

³⁰ Tr. at 3252, 3054, 3255, 3257, 3278, 3290-95, 3302 (Herring).

³¹ Tr. at 3253, 3258, 3289. (Herring). A linear service is a service offered on a fixed schedule established by the network, *i.e.*, a service that is available on a specified tier and channel position on a 24 hour/seven days a week schedule. Linear programming is programming that is delivered at the scheduled time it is telecast. In contrast, “on demand” programming is programming that is aired only when specifically requested by a subscriber. Tr. at 3993 (Witmer).

³² Comcast Exh. 25.

³³ TWC Exh. 75.

TWC, Cox, and BHN jointly own iN DEMAND,³⁴ the company that provided HD programming between 2003 and 2008 through MOJO and MOJO's predecessors, INHD and INHD2.³⁵

iN DEMAND and MOJO

11. In 2002 and 2003, HD programming was scarce.³⁶ Cable operators, however, were eager to act swiftly to make available HD programming to those "early adopters" who had expended substantial sums in purchasing HD television sets.³⁷ A number of MVPDs, including satellite providers such as DirecTV and EchoStar, at this time were developing capabilities to distribute HD content.³⁸

12. In 2002 and 2003, in response to evolving HD technology and market forces, iN DEMAND developed a business plan to create two new channels, INHD and INHD2, that would showcase the HD format.³⁹ iN DEMAND launched INHD and INHD2 in September 2003.⁴⁰ Soon thereafter, each of the defendants carried the INHD and INHD2 channels without entering into a written affiliation agreement with iN DEMAND.⁴¹ The defendants had business reasons for carrying INHD and INHD2. First, the carriage of these affiliated networks provided defendants with channels in which they could showcase HD programming to those customers which were "early adopters" of HD television sets at a time when there was little HD programming available.⁴² Second, by exercising preemption rights, carriage of INHD and INHD2 provided locations in which defendants could air regional or local programming of particular interest to their viewers, such as a special sports event, in HD format.⁴³ It is particularly noteworthy that WealthTV was not yet launched when the defendants decided to carry INHD and INHD2. Therefore, WealthTV was not — and could not have been — a factor in any of the defendants' decisions to provide carriage to their affiliated networks, INHD and INHD2.

³⁴ BHN Exh. 9 (Testimony of Steve Miron) at 1-2 (¶ 3); Tr. at 4292 (Asch).

³⁵ Cox Exh. 84 (Testimony of David Asch) at 6-25 (¶¶ 17-91).

³⁶ Cox Exh. 84 (Testimony of David Asch) at 4 (¶ 12); TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 16); Cox Exh. 79 (Testimony of Robert Wilson) at 8 (¶ 26). Tr. at 4290-91 (Asch), 4870 (Wilson).

³⁷ TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 15).

³⁸ Cox Exh. 84 (Testimony of David Asch) at 5 (¶ 16).

³⁹ Cox Exh. 84 (Testimony of David Asch) at 6 (¶¶ 17-18); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10 (¶¶ 31-32).

⁴⁰ Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 19).

⁴¹ Tr. at 4334, 4308 (Asch). INHD and INHD2 were made available only to the defendants' HD subscribers, *i.e.*, those subscribers with HD tuners. *E.g.*, Cox Exh. 79 (Testimony of Robert Wilson) at 11 (¶ 36). Tr. at 4333, 4998 (Wilson). TWC tiered INHD, and made the channel available only to a subset of its HD subscribers. Tr. at 4998 (Wilson).

⁴² Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 20); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4291-93 (Asch).

⁴³ Cox Exh. 84 (Testimony of David Asch) at 8 (¶ 27); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4308 (Asch).

13. The defendants believed that the carriage of INHD and INHD2 furthered their business interests, but viewed the carriage of INHD and INHD2 channels to be a short-term project. They expected eventually to replace those networks when SD networks with established brands and audience developed HD versions of their existing programming.⁴⁴

14. The early adopters of HD technology and primary audience for HD programming at that time were males aged 18-49. For that reason, the iN DEMAND management identified age 18-49 males as the target demographic group for INHD and INHD2,⁴⁵ although a specific subset of that group, males aged 25-49, was particularly targeted by INHD and INHD2.⁴⁶ To advance its business, iN DEMAND acquired and aired HD programming — *i.e.*, shows featuring sports, movies, and rock music — that was designed to appeal to this target demographic group.⁴⁷ Among the programs aired on INHD and INHD2 were “Fields of Glory”, a program about college football stadiums; “The A List,” a program of high school basketball games; “Hardwood Heavens,” a program about famous college basketball arenas, “Tour de Gorge” a program featuring eating contests; “Cathedrals of the Game,” a program on famous baseball stadiums, and rock concerts featuring artists such as Ozzy Osbourne and The Who.⁴⁸

15. But HD programming was then relatively scarce, and therefore INHD and INHD2 also aired animated shows and family type programming.⁴⁹ Still, the bulk of INHD’s and INHD2’s budget was expended on programming that was targeted to younger adult males such as sports and movies.⁵⁰ Only a small percentage of MOJO’s programming budget was allocated to family programming.⁵¹

16. In 2004, iN DEMAND management commissioned marketing studies of the audience for INHD and INHD2.⁵² Research showed that most INHD and INHD2 viewers were affluent and within the targeted group of 18-49 age males.⁵³ This research also showed that

⁴⁴ Cox Exh. 79 (Testimony of Robert C. Wilson) at 10 (¶ 34); Cox Exh. 84 (Testimony of David Asch) at 8-9 (¶ 28); Cox Exh. 3; Tr. at 4310-11 (Asch).

⁴⁵ Cox Exh. 84 (Testimony of David Asch) at 7-8. Tr. at 4294, 4296, 4305, 4362-63 (Asch). TW Exh. 12. The demographic males aged 18-49 was used by Nielson for rating purposes.

⁴⁶ Tr. at 4297-98 (Asch).

⁴⁷ Tr. at 4296-27, 4324 (Asch).

⁴⁸ Tr. at 4324-25 (Asch).

⁴⁹ Tr. at 4300, 4340-41 (Asch). Mr. Asch testified that family programming had been discontinued by late 2004 or early 2005. Tr. at 4398-4400 (Asch).

⁵⁰ Tr. at 4401 (Asch).

⁵¹ *Id.* INHD and INHD2 ceased airing family programming by late 2004 or early 2005. Tr. at 4398-4400 (Asch).

⁵² TW Exh. 12.

⁵³ Cox Exh. 84 (Testimony of David Asch) at 10 (¶ 32). The market research showed that 56 percent of the audience for INHD and INHD2 were men aged 18-49 (100 percent more than HD viewers overall) and that 61 percent of them had annual household incomes of \$75,000 or higher. *Id.*

viewers perceived the channels to be random and lacking in focus.⁵⁴ To correct this situation, iN DEMAND's management proposed a new brand identity for both INHD and INHD2 to better appeal to its target audience.⁵⁵ But iN DEMAND owners would approve only the re-branding of INHD.⁵⁶ That re-branding was an evolutionary process that was accomplished over a period of months.⁵⁷ This process included the airing of a branded block of original programming called the "MOJO Block," a three hour schedule of programming that was broadcast during prime time two nights a week. Initially, the network retained the name INHD.⁵⁸ iN DEMAND's management necessarily retained a substantial portion of its original programming line-up during the re-branding process, but it also acquired additional programming suited to the target demographic. This additional programming enabled it to retire programming that was not geared to younger adult males.⁵⁹ On May 1, 2007 — after the MOJO Block had been aired for almost a year — INHD was officially renamed MOJO.⁶⁰

17. Expert testimony of Mr. Michael Egan, defendants' programming expert, shows that it is customary practice in the cable industry for a network to make changes in its programming to heighten its appeal to current viewers and attract new viewers while keeping the same or similar programming genres.⁶¹ The preponderance of the record evidence demonstrates that re-branding of INHD to MOJO involved only the re-focus of an existing channel, and not the launch of a new channel.⁶² The programming aired on the INHD-MOJO network between 2004 and 2008 consistently was dominated by the same four genres: sports, movies, music and documentaries.⁶³ And the programming of each network in each of these four genres generally was geared to the same demographic: younger adult males.⁶⁴

⁵⁴ Tr. at 4312 (Asch).

⁵⁵ Cox Exh. 84 (Testimony of David Asch) at 13-14 (¶¶ 45-46); Tr. 4329-30 (Asch).

⁵⁶ Subsequently iN DEMAND's owners shut down INHD2 because they needed more bandwidth for other channels. The INHD2 channel went dark on December 31, 2006. *Id.* at 15 (¶ 52).

⁵⁷ Cox Exh. 84 (Testimony of David Asch) at 15 (¶ 49).

⁵⁸ Cox Exh. 84 (Testimony of David Asch) at 15 (¶¶ 49, 53-54); Tr. at 4341 (Asch).

⁵⁹ Tr. at 4326, 4340 (Asch). Cox Exh. 84 (Testimony of David Asch) at 10, 15 (¶¶ 35, 49).

⁶⁰ Cox Exh. 84 (Testimony of David Asch) at 16 (¶ 55); Tr. at 4329 (Asch).

⁶¹ TWC Exh. 85 (Testimony of Michael Egan) at 18 (¶ 25).

⁶² Ms. Sandy McGovern, WealthTV's programming expert, testified that MOJO was the launch of a new channel because MOJO and INHD were fundamentally different. WealthTV Exh. 152 (Testimony of Sandy McGovern) at 8 (¶ 14). That conclusion must be rejected in light of the weight of the contrary evidence set forth above. Ms. McGovern acknowledged that she had concluded in her verified declaration that MOJO was a launch of a new network without having viewed a single episode of MOJO programming. Tr. at 3808 (McGovern). It was only after she reached that unsupported conclusion, that Ms. McGovern viewed two weeks of MOJO programming and one week of INHD programming. Tr. at 3811 (McGovern).

⁶³ TWC Exh. 85 (Testimony of Michael Egan) at 20-21 (¶ 27).

⁶⁴ *Id.* at 20-21 (¶¶ 27-28). For example, the movies on INHD included "Clash of the Titans," "Gleaming the Cube," "Lord of the Flies," "Ioffa," and "Hellraiser;" the movies featured on MOJO included "Badlands," "Beyond the Poseidon Adventure," and "Body Heat." *Id.* at 21 (¶ 28). INHD aired

18. iN DEMAND's management did not consider WealthTV's programming or its status as a competitor in its decision to re-brand INHD as MOJO.⁶⁵ None of the defendants directed or suggested to iN DEMAND's management that it emulate WealthTV's demographic, content or genre.⁶⁶ Indeed, the record shows that the iN DEMAND personnel responsible for the re-branding were unaware of the existence of WealthTV at the time that the re-branding took place.⁶⁷

19. In June 2008, the iN DEMAND owners made the final decision to terminate MOJO.⁶⁸ A majority of owners considered the viewership of MOJO to be too low to justify the cost of carriage.⁶⁹ The owners also wanted to use the bandwidth occupied by MOJO to carry HD simulcasts of existing networks with established brands and audiences.⁷⁰ The MOJO channel served its purposes and was allowed to go dark in December, 2008.⁷¹

MOJO and WealthTV Networks Not Similarly Situated

20. WealthTV claims that it was similarly situated with MOJO because the two networks targeted the same demographic — affluent younger adult males — and presented similar types of programming.⁷² The defendants dispute that WealthTV and MOJO were similar networks. The preponderance of record evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience.

performances by music artists such as U2 and Lynaryd Sknyrd; MOJO aired concerts by Sheryl Crow, The Killers, Primal Scream and Rush. *Id.*

⁶⁵ Cox Exh. 84 (Testimony of David Asch) at 12, 13, 17 (¶¶ 40, 41, 43, 59); Cox Exh. 79 (Testimony of Robert Wilson) at 38 (¶ 130).

⁶⁶ Cox Exh. 84 (Testimony of David Asch) at 12 (¶ 41). *See* Cox Exh. 79 (Testimony of Robert Wilson) at 34, 38 (¶¶ 115, 130).

⁶⁷ Cox Exh. 84 (Testimony of David Asch) at 12, 13, 17 (¶¶ 40, 42, 59).

⁶⁸ Cox Exh. 84 (Testimony of David Asch) at 15 (¶ 52); Tr. at 4341 (Asch).

⁶⁹ Cox Exh. 84 (Testimony of David Asch) at 24-25 (¶ 90).

⁷⁰ *Id.* at 24 (¶ 87).

⁷¹ *Id.* at 15 (¶ 52); Tr. at 4664 (Bond).

⁷² WealthTV also argues that it is similarly situated with MOJO because the two networks sought advertising from the same companies. WealthTV Exh. 144 (Testimony of Charles Herring) at 26. WealthTV however, identifies only a single company, Bose, in which both networks advertised and only one additional company, Grey Goose Vodka, in which both networks had solicited for advertisements. *Id.* Evidence that MOJO and WealthTV both had business dealings with two advertisers, however, does not establish that the two networks generally solicited or contracted with the same advertisers. And even if WealthTV had established that it and MOJO generally dealt with the same advertisers, the record evidence when considered in its entirety fails to show that the two networks were similarly situated.

Contrast in WealthTV and MOJO Programming

21. According to Mr. Charles Herring, WealthTV's programming is centered upon an overall theme of "how wealth is achieved, used and enjoyed."⁷³ He testified that the programming "focus[es] on enjoyable aspects of financial success, including travel, fine dining, luxury transport, gadgetry, finance, philanthropy and thoughtful insights on cultures."⁷⁴ By contrast, MOJO's programming did not involve the showcasing of a luxury lifestyle, but rather focused generally on sports, movies and music.

22. Defendants' expert, Mr. Egan, compared the programming of WealthTV and MOJO by categorizing and quantifying every program aired by the two networks in sample weeks during July 2007 and January 2008 into specific genres (*i.e.*, music, sports, travel, and recreation, *etc.*).⁷⁵ Mr. Egan's analysis established that 54 percent of MOJO's programming time was devoted to sports, music, and movies whereas only three percent of WealthTV's programming time consisted of shows in those genres.⁷⁶ He also established that 60 percent of WealthTV's programming time consisted of shows in the genres of travel & recreation, lifestyle, food & drink, documentary, and art/design/collectables — programming that aired only 19 percent of the time on MOJO.⁷⁷

⁷³ WealthTV Exh. 144 (Testimony of Charles Herring) at 9.

⁷⁴ *Id.*

⁷⁵ TWC Exh. 85 (Testimony of Michael Egan) at 6-7 (¶¶ 10-11).

⁷⁶ *Id.* Mr. Charles Herring testified that MOJO aired a number of program series that were similar in category type (*i.e.*, adventure, travel, comedy) to the programming broadcast on WealthTV, *see* WealthTV Exh. 144 (Testimony of Charles Herring) at 24-26, but neither he nor any other WealthTV witness attempted to quantify the amount of broadcast time devoted to allegedly similar programming. WealthTV claims that Mr. Egan's analysis is not credible because the genre analysis is not a tested methodology. WealthTV's Proposed Findings at 59 (¶¶ 257-258). But WealthTV provides no evidence to show that methodology is wrong or unreliable. WealthTV also attempts to discredit Mr. Egan's genre analysis by arguing that Mr. Egan's conclusions concerning the genres of MOJO's programming are inconsistent with a MOJO press release cursorily listing the types of programming on the network. WealthTV Reply Findings at 28-29 (¶ 58). WealthTV does not show, however, that the programming actually aired by MOJO did not fall into the genres set forth in Mr. Egan's testimony.

⁷⁷ TWC Exh. 85 (Testimony of Michael Egan) at 6-7 (¶¶ 10-11). Based upon a network genre analysis, Mr. Egan provided evidence that WealthTV's programming was more similar to programming of networks such as Fine Living, and American Life TV than to the programming of MOJO. Specifically, Mr. Egan testified that several of the dominant genres on Fine Living and the American Life TV Network were among the top five genres on WealthTV. *Id.* at 14 (¶ 18). Although Mr. Charles Herring stated that it was his "impression" that the programming of Fine Living was not similar to the programming of WealthTV, WealthTV Exh. 144 (Testimony of Charles Herring) at 11, Mr. Herring is not an expert on network programming and his impressions were not the product of any quantitative analysis of the two networks. In any event, even if it were established that WealthTV's programming is dissimilar to the programming aired on Fine Living, that fact would not support the claim that WealthTV is similarly situated to MOJO.

23. Significantly, Mr. Egan opined that the on-air “look and feel” of MOJO and WealthTV were demonstrably different.⁷⁸ Mr. Egan, concluded that MOJO conveyed a “hip, urban irreverent, aggressive, and edgy” image akin to that of the MTV Network channels.⁷⁹ MOJO’s hosts were young, irreverent, and often sarcastic. Its hard-charging production style featured contemporary music, fast-paced transitions between shows and advertisements, and off-beat humor.⁸⁰ In contrast, WealthTV presented a “calmer, more mature attitude.”⁸¹ WealthTV used orderly transitions to commercial breaks, and aired like library background music, not MOJO’s rock and roll.⁸²

24. Mr. Egan further testified that if WealthTV and MOJO presented programming covering the same subject-matter, the programming would be dissimilar. This is illustrated by a MOJO’s program *Uncorked*, which features an unsophisticated Bill Merritt, a professional comedian who “promises to ask the dumb questions about wine so we won’t have to and he delivers.”⁸³ Mr. Merritt is a bumbler who “jokes, rambles, and mugs” while asking silly questions in street interviews, wine stores and restaurants.⁸⁴ In contrast, *Taste! The Beverage Show* features serious hosts dressed attractively who visit locations around the world reporting on rum-making in Jamaica, on the brewing of beer in Canada, and the history and art of winemaking in California,⁸⁵ featuring travelogue-type scenes.⁸⁶ MOJO’s show, *Test Drive*, features Craig Jackson, described on MOJO’s web site as “the son of an Air Force pilot and semi-pro bowler who grew up to desire to drive really, really fast, drink stale beer, and wear ugly shoes.”⁸⁷ In that *persona*, Mr. Jackson depicts with humor driving issues and situations faced in urban life, such as auto theft, rental cars, and radar detectors.⁸⁸ In contrast, WealthTV’s *Wealth on Wheels*, is a program featuring luxury or exotic automobiles, e.g., the history of the Lamborghini automobile company, a show of vintage classic antique cars, or the Concorso Italiano.⁸⁹

⁷⁸ Mr. Egan, testified that “look and feel” is an industry term that describes the personality of a network conveyed by its visuals, the speech and dress of its hosts, music, subject matter, graphics and other factors. Tr. at 5172-73.

⁷⁹ TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

⁸⁰ TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

⁸¹ TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

⁸² TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

⁸³ TWC Exh. 85 (Testimony of Michael Egan) at 10-11 (¶ 16).

⁸⁴ Tr. at 5182-83 (Egan).

⁸⁵ TWC Exh. 85 (Testimony of Michael Egan) at 10 (¶ 16). Tr. at 5180 (Egan).

⁸⁶ Tr. at 5180 (Egan).

⁸⁷ TWC Exh. 85 (Testimony of Michael Egan) at 11 (¶ 16).

⁸⁸ *Id.*

⁸⁹ *Id.*

25. Notwithstanding the illustrative evidence described above, Ms. Sandy McGovern, WealthTV's programming expert, testified that the programming content of WealthTV and MOJO were "strikingly similar" in their theme and content.⁹⁰ Mr. Egan's contrary testimony described above is far more credible.⁹¹ It is significant that Ms. McGovern based her opinion on a sample of WealthTV's programming selected for her review by Mr. Charles Herring.⁹² Nothing in the record establishes that the selections of WealthTV's programming viewed by Ms. McGovern are representative of WealthTV's programming as a whole.⁹³ Shockingly, Ms. McGovern acknowledged that she had reached the conclusion concerning the similarities of the two networks without undertaking a systematic review of the programming of either WealthTV or MOJO.⁹⁴ Moreover, Ms. McGovern's conclusion is even further undercut by her acknowledgement on cross-examination of many differences in the programming of the two networks. For example, Ms. McGovern conceded that MOJO aired sports programming and movies but that WealthTV does not air that type of programming.⁹⁵ Ms. McGovern also admitted that WealthTV, but not MOJO, broadcasted shows about fashion, shopping, philanthropy, and health.⁹⁶ In addition, she testified that MOJO has no programming comparable to WealthTV's specials on subjects such as watches and jewelry or to WealthTV's "The Boomer Show," a show targeted to the "Baby Boomer" generation of adults between the ages of 44 and 60-64.⁹⁷ Conceding at least one difference in the "look and feel" of the two networks, Ms. McGovern testified that WealthTV's programming is family-friendly whereas MOJO's programming was not family-friendly.⁹⁸ Ms. McGovern's acknowledgement of many differences in the programming of WealthTV and MOJO negates any credibility of her conclusion that the two networks had strikingly similar programming.

⁹⁰ Tr. at 3715 (McGovern).

⁹¹ WealthTV argues that Mr. Egan's opinions should carry no weight because a company in which Mr. Egan had been a principal was a business partner of TWC in a venture called Renaissance Media Holdings, LLC ("Holdings"). WealthTV Proposed Reply Findings at 30-31 (¶ 61). That relationship lasted less than one and one-half years and ended in March 1998. Tr. at 5216-17 (Egan). The fact that aspects of this past business relationship may have been financially rewarding to Mr. Egan does not establish that his testimony is tainted or unreliable. WealthTV also points out that Mr. Egan "worked in conjunction with TWC as a result of the sale of Cablevision Industries, Mr. Egan's previous employer, to TWC." WealthTV Proposed Reply Findings at 31. The mere fact that Mr. Egan had business dealings with TWC while employed by Cablevision Industries, does not undermine the reliability or credibility of Mr. Egan's consistent, convincing, and well organized expert testimony in this case.

⁹² Tr. at 3814-15 (McGovern).

⁹³ Tr. at 3814-27. Ms. McGovern viewed only six of the 29 shows that were featured on WealthTV's website. Tr. at 3816-17 (McGovern).

⁹⁴ Tr. at 3871-72 (McGovern).

⁹⁵ Tr. at 3799-3800 (McGovern).

⁹⁶ Tr. at 3800-02 (McGovern).

⁹⁷ Tr. at 3802-03 (McGovern).

⁹⁸ Tr. at 3799 (McGovern).

26. WealthTV's attempt to discredit Mr. Egan's showing on the "look and feel" of the two networks is unpersuasive. WealthTV criticizes the formality of the method by which Mr. Egan conducted the "look and feel" analysis.⁹⁹ But it fails to show how Mr. Egan's conclusions were erroneous. Nor did WealthTV present any evidence on the comparative "look and feel" of MOJO and WealthTV in support of its claim that the programming of the two networks is similar. With this gap in evidence, WealthTV does not make a case of favoritism.

Demographic Audience Targeted by WealthTV and MOJO.

27. One basis for WealthTV's claim that WealthTV and MOJO are similarly situated is that both networks targeted the same audience: affluent males between the ages of 25 and 49. The parties agree that MOJO targeted this demographic. The overwhelming weight of the record evidence, however, shows that WealthTV targeted a much broader audience that was not limited to adult males between the ages of 25 and 49. Indeed, WealthTV's [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] its marketing presentations to MVPDs and prospective advertisers; statements on its website; Mr. Charles Herring's sworn testimony in another case; as well as other matters of record show that WealthTV's target audience is not limited to males aged 24 to 49.

28. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

29. Similarly, many of WealthTV's PowerPoint marketing presentations to MVPDs, potential advertisers, and others describe WealthTV as appealing to an audience broader than the claimed target demographic of adult males aged 25 to 49. For example, in a PowerPoint marketing presentation made to ID Media in March 2007, WealthTV described itself as "targeting the most affluent viewer, 25-60+, educated, equal appeal to men and women."¹⁰⁴ In a number of PowerPoint presentations to MVPDs and advertisers, WealthTV described itself in boldface as having a "[b]road appeal across age and income demographics."¹⁰⁵ In a

⁹⁹ See WealthTV Proposed Reply Findings at 29-30 (¶ 61).

¹⁰⁰ Cox Exh. 75 at 75-6; Cox Exh. 77 at 77-2; TWC Exh. 10 at 10-3; Tr. at 3032-38 (Herring).

¹⁰¹ WealthTV Exh. 144 at 23 (Testimony of Charles Herring).

¹⁰² Tr. at 3035, 3038, 3047 (Herring).

¹⁰³ Tr. at 3795-96 (McGovern).

¹⁰⁴ TWC Exh. 28 at 28-2.

¹⁰⁵ Comcast Exh. 22 at 22-2; Cox Exh. 6 at 6-3; Cox 23 at 23-3; Cox Exh. 56 at 56-3; TWC Exh. 4 at 4-7; TWC Exh. 9-3; TWC Exh. 22 at 22-2 (emphasis in original). Tr. at 3103-3014, 3144-45, 3149-52

PowerPoint slide presented to several of the defendants titled “WealthTV Demographic,” WealthTV described its target audience as individuals with “luxury fever,” a group “crossing all age groups.”¹⁰⁶ Mr. Charles Herring disclosed that people with “luxury fever,” *i.e.*, individuals interested in luxury items, include both men and women.¹⁰⁷ Another slide, titled “WealthTV Demographic,” features the “baby boomers,”¹⁰⁸ the generation of adults between the ages of 44 and 60-64, which extends well beyond the group targeted by MOJO and its predecessor.

30. In its PowerPoint presentations to MVPDs and other companies, WealthTV typically included a “Magazine Complementary Set” intended to show sample periodicals with demographics overlapping those of WealthTV.¹⁰⁹ Although the Complementary Set included some male-skewed magazines, such as *The Robb Report*, a majority of the sample periodicals were either women magazines, such as *W* and *Town and Country*, or gender-neutral publications, such as *The New Yorker*.¹¹⁰ Indeed, Mr. Charles Herring acknowledged that eight of the 10 presented in the “Magazine Complementary Set” were not male-skewed.¹¹¹ Similarly, WealthTV presented a marketing PowerPoint presentation to several companies entitled the “TV Competitive Set.”¹¹² According to Ms. McGovern, a television competitive set is designed to convey the channels in which a specific network has an overlapping target demographic.¹¹³ Of the four networks featured on this slide, WealthTV identified two as male-skewed (Golf and CNBC) and two as female-skewed (BBCA and HGTV).¹¹⁴ The median age of the viewers of CNBC and HGTV were listed as 58.0 and 51.5, respectively.¹¹⁵

(Herring). Mr. Charles Herring testified that he had prepared a master PowerPoint deck with various slides that were used by himself and WealthTV sales personnel for presentations to potential advertisers and distributors. Tr. at 3162-63 (Herring).

¹⁰⁶ Comcast 22 at 22-18; Cox Exh. 23 at 23-8.

¹⁰⁷ Tr. at 3119 (Herring). In another PowerPoint slide presented to a number of companies, WealthTV stated that “luxury is hot across broad demographics. . . . Broad demographics with special appeal to multiple groups including Baby Boomers, aspiring low and middle class, and upper class.” TWC Exh. 9 at 9-20; Cox Exh. 56 at 56-22; TWC Exh. 22 at 22-15.

¹⁰⁸ TWC Exh. 28 at 28-20. The same “WealthTV Demographic” was presented to a number of companies. See also, *e.g.*, Comcast Exh. 22 at 22-20; Cox Exh. 23 at 23-9.

¹⁰⁹ TWC Exh. 22 at 22-3; Cox Exh. 23 at 23-7; TWC Exh. 9 at 9-14; Comcast Exh. 22 at 22-3; Cox Exh. 56 at 56-7.

¹¹⁰ Tr. at 3100-03, 3118 (Herring).

¹¹¹ *Id.*

¹¹² TWC Exh. 4 at 4-26; TWC Exh.9 at 9-35.

¹¹³ Tr. at 3783.

¹¹⁴ TWC Exh.9 at 9-35.

¹¹⁵ *Id.* WealthTV’s PowerPoint presentations also typically included slides titled “Featured Programming,” setting forth descriptions of highlighted shows including their demographics. See, *e.g.*, TWC Exh. 4 at 4-2 to 4-6; Cox Exh. 23 at 23-12 to 23-17. Most of the shows featured in these slide presentation did not target males. For example, in presentations made to Cox and Forbes, WealthTV identified only five of the 18 featured shows as male-skewed. *Id.*

31. WealthTV also included a slide in its PowerPoint marketing presentations to MVPDs and potential advertisers that categorized its demographics in terms of six programming genres: travel/adventure; lifestyle; entertainment; new/information; biography/history; and health.¹¹⁶ According to WealthTV, its programming in travel/adventure, lifestyle; entertainment; new/information and biography/history, which represents 95 percent of its total programming, is targeted to adults (male and female) whereas its programming on health, which consists of the remaining five percent of its total programming, is targeted specifically to females. WealthTV in that slide identified none of its programming as exclusively targeting men.¹¹⁷

32. The record contains a number of statements by WealthTV or its officials that are inconsistent with WealthTV's claim that the network's target audience is males between 25 and 49 years old. For example, prior to this proceeding, Mr. Charles Herring asserted under oath in another case that WealthTV's programming "appeals to about a 25 to 65+ crowd,"¹¹⁸ a demographic that includes all adults within that broadly-defined age group, not just males. Mr. Herring also stated that WealthTV's overriding theme, *i.e.*, the showcasing of a luxury lifestyle, had a very broad appeal and that the only group that would not find WealthTV attractive was "monks that have taken a vow to poverty."¹¹⁹ Indeed, Mr. Herring acknowledged in cross-examination in this case his belief that WealthTV had a broad appeal to men and women.¹²⁰ Such statements contradict Mr. Herring's direct written testimony that WealthTV targeted males aged 25-49.¹²¹

33. WealthTV states on its website that it has "a wide range of programming designed to have a broad appeal,"¹²² with no mention of a target demographic of males aged 25-49.¹²³ The website also includes a link to a Call Center Sheet¹²⁴ that in turn depicts WealthTV as a network with "broad appeal across all demographics," again without reference to targeting younger adult males.¹²⁵ In addition, prior to its launch, WealthTV issued a press release describing itself as a

¹¹⁶ TWC Exh.9 at 9-26; Cox Exh. 23 at 23-10; TWC Exh. 4 at 4-16. Tr. at 3789.

¹¹⁷ Mr. Gary Turner, WealthTV's expert witness, stated that WealthTV "always described itself" as a "male focused channel." WealthTV Exh. 146 at 3 (¶ 3) (Declaration of Gary Turner). That statement is not credible given the weight of the contrary evidence set forth above.

¹¹⁸ TWC Exh. 139 at 139-4.

¹¹⁹ TWC Exh. 139 at 139-6; Tr. at 3054-55 (Herring).

¹²⁰ Tr. at 3236 (Herring).

¹²¹ WealthTV Exh. 144 at 11-20 (Testimony of Charles Herring).

¹²² TWC Exh. 102.

¹²³ *Id.*

¹²⁴ A Call Center Sheet is an informational sheet created by WealthTV to assist distributors of its programming in training its personnel about WealthTV so that they can answer subscribers' questions about the network. Tr. at 3234-35 (Herring).

¹²⁵ TWC Exh. 111.

“network designed to appeal to a broad market[.]”¹²⁶ Nothing in that press release describes the network as targeting 25-49 year old males.

34. In support of its contention that its programming targeted males aged 25-49, WealthTV claims that it presented a slide entitled “Target Audience of WealthTV” in a PowerPoint presentation to Cox, Comcast, Orion Cable and Yachting Magazine’s Time4Media, a subsidiary of TWC that characterizes WealthTV’s target audience as males between the ages of 25 and 49.¹²⁷ WealthTV also relies upon the fact that its exhibits at trade shows featured male-oriented items such as cigar rollers and exotic sports cars and that its advertising images are designed to appeal to affluent younger adult men.¹²⁸ Notwithstanding the existence of these presentations, exhibits, advertisements and other evidence, WealthTV’s assertion that it “consistently” has described its target demographic as males aged 25-49¹²⁹ conflicts with the record evidence considered as a whole. Indeed, the great weight of evidence reflects that WealthTV’s target audience is not limited to males aged 25-49.¹³⁰

Good Faith Negotiations

35. WealthTV asserts that “[i]n addition to affording preferential treatment to its affiliate, MOJO, each of the defendants refused to negotiate with WealthTV in good faith for carriage on their respective systems.”¹³¹ The record evidence considered as a whole, however, does not support WealthTV’s factual claim that any of the defendants failed to negotiate in good faith.

TWC Negotiations

36. WealthTV actively sought carriage on TWC since its inception in 2004, engaging in meetings and discussions with TWC personnel both at the corporate headquarters level and in

¹²⁶ TWC Exh. 109; Tr. at 3249.

¹²⁷ WealthTV Exh. 2; WealthTV Exh. 117 at 7; WealthTV Exh. 120 at 8; WealthTV Exh. 122 at 8; WealthTV Exh. 144 (Testimony of Charles Herring) at 11-13. In a number of those PowerPoint presentations, however, WealthTV also describes itself as having “broad appeal across age and income demographics. *E.g.*, WealthTV Exh. 117 at 3; WealthTV Exh. 120 at 3; WealthTV Exh. 122 at 3.

¹²⁸ WealthTV Exh. 144 (Testimony of Charles Herring)) at 17-20; WealthTV Exh. 5.

¹²⁹ *See* WealthTV Proposed Reply Findings at 23.

¹³⁰ In support of its claim that its targeted demographic was males, WealthTV also relies upon a “tabulation of data collected through its website by Kersey Research Strategies,” WealthTV Findings at 24 (¶ 90). However, at the hearing the Presiding Judge excluded from the record that tabulation on the grounds that it was unreliable. Tr. at 3012-13 (Presiding Judge).

¹³¹ “Complainant’s Proposed Findings of Fact and Conclusions of Law,” (June 2, 2009) at 28 (¶ 107) (“WealthTV’s Proposed Findings of Fact and Conclusions of Law”). Section 76.1301(c) does not impose a *per se* requirement on a cable operator to negotiate in good faith with a video programming vendor. An alleged failure to negotiate in good faith is relevant to a section 76.1301(c) violation only to the extent that it constitutes factual evidence of a cable operator’s discrimination against a video programming vendor “on the basis of affiliation or non-affiliation.” 47 C.F.R. § 76.1301(c).

individual systems across the country.¹³² Mr. Herring testified that WealthTV's marketing efforts had produced positive feedback among a number of TWC systems, including locations in Texas, New York, North Carolina, South Carolina, Wisconsin, Ohio, and New England.¹³³ In contrast, a number of TWC officials, on the basis of direct communications with TWC employees, testified that those reports of interest in WealthTV were inflated and that there was no groundswell of support among TWC systems to carry WealthTV.¹³⁴ Contemporaneous emails, however, support the testimony of the TWC officials.¹³⁵ At a minimum, the weight of evidence shows that TWC officials in fact believed reasonably that there was not a substantial demand from TWC systems for an affiliation agreement with WealthTV and these officials made reasonable business decisions based on that belief.

37. The parties agree that the TWC system in San Antonio did express an interest in carrying WealthTV.¹³⁶ On February 16, 2007, WealthTV and TWC-San Antonio executed a six-month agreement whereby WealthTV would provide video-on-demand ("VOD")¹³⁷ programming on TWC's San Antonio system.¹³⁸ TWC corporate was interested in the San Antonio VOD trial so it could evaluate WealthTV's appeal.¹³⁹ TWC concluded that the performance of WealthTV's VOD was not overwhelming and saw that viewership began to decrease over time.¹⁴⁰ Nonetheless, TWC's San Antonio's office, with the concurrence of TWC corporate officials, expressed an interest in extending the VOD agreement after the expiration of the six month period.¹⁴¹ But it was WealthTV that refused to extend the VOD trial unless TWC

¹³² E.g., WealthTV Exh. 44 (Testimony of Charles Herring) at 29-39; TWC Exh. 82 (Testimony of Arthur Carter) at 3 (¶ 9); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5-11 (¶¶ 10-26).

¹³³ WealthTV Exh. 144 (Testimony of Charles Herring) at 30.

¹³⁴ TWC Exh. 82 (Testimony of Arthur Carter) at 3-4 (¶¶ 9-10); TWC Exh. 83 (Testimony of Eric Goldberg) at 11 (¶ 5); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5 (¶ 12); TWC's ownership interest in MOJO played no role in TWC's decision not to carry WealthTV. Contemporaneous emails support the testimony of these TWC officials, see, e.g., TWC Exh. 29, and their testimony is credible.

¹³⁵ See, e.g., TWC Exh. 29.

¹³⁶ TWC Exh. 82 (Testimony of Arthur Carter) at 4 (¶ 10); WealthTV Exh. 144 (Testimony of Charles Herring) at 32-34.

¹³⁷ VOD is programming offered on a per program basis, either with or without a separate per program fee. "VOD allows subscribers to order programming from a central server at any time of day, and to fast-forward, rewind, and pause the programs." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Report, 24 FCC Rcd 542, 571 (¶ 60) (2009).

¹³⁸ TWC Exh. 26; TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 4); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 3 (¶ 5). WealthTV's VOD content was the only HD VOD content that TWC's San Antonio's system was carrying at that time. TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 5).

¹³⁹ See Tr. at 4197-2000 (Rosenberg).

¹⁴⁰ TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 5).

¹⁴¹ *Id.* at 3-4 (¶ 7).

agreed to a linear carriage agreement.¹⁴² TWC did not take the bait and there was no extension by mutual refusals to deal.

38. After the San Antonio trial ended, WealthTV and TWC engaged in further negotiations in an attempt to reach a carriage agreement.¹⁴³ The two parties met on July 18, 2007. TWC asked WealthTV to offer market research, consumer data or other evidence that that would show WealthTV's value as a programming network.¹⁴⁴ Networks seeking carriage on TWC regularly produce such data. WealthTV did not supply that information at that meeting or thereafter.¹⁴⁵ Still, the parties continued to negotiate, exchanging various proposals and attempting to narrow differences. On September 6, 2007, as part of the continuing negotiations, WealthTV forwarded TWC a revised term sheet that included a hunting license agreement for the linear and VOD carriage of WealthTV's programming that would give TWC free HD VOD carriage upon condition of a linear launch in at least one system.¹⁴⁶ On October 31, 2007, TWC made a counteroffer proposing the removal of the provision that free HD VOD carriage be conditioned on the linear launch in at least one system.¹⁴⁷ WealthTV that same day rejected the counteroffer, asking instead for retention of the provision that that the free HD VOD content be conditioned upon a linear carriage launch on at least one system.¹⁴⁸ On December 3, 2007, TWC offered WealthTV exactly the same terms that WealthTV proposed in its October 31 counteroffer, *i.e.*, a hunting license for linear and VOD service, and an agreement that the HD VOD would be free if TWC launched WealthTV's linear service on at least one system.¹⁴⁹ WealthTV rejected this proposal.

39. The weight of record evidence shows that TWC's decision not to offer full linear carriage to WealthTV was based upon business considerations that were unrelated to TWC's affiliation with MOJO. TWC has a demonstrated history of providing carriage to unaffiliated networks. Only three of 59 networks launched by TWC between 2004 and 2008 were affiliated

¹⁴² TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 6); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 4 (¶ 8); TWC Exh. 32.

¹⁴³ TWC Exh. 83 (Testimony of Eric Goldberg) at 5-6 (¶ 12); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 4-11 (¶¶ 9-26).

¹⁴⁴ TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5 (¶ 11).

¹⁴⁵ *Id.* See TWC Exh. 81 (Testimony of Melinda Witmer) at 3, 12 (¶¶ 26, 27).

¹⁴⁶ TWC Exh. 48; TWC Exh. 83 (Testimony of Eric Goldberg) at 9 (¶¶ 19, 21).

¹⁴⁷ TWC Exh. 52; TWC Exh. 83 (Testimony of Eric Goldberg) at 10 (¶ 22).

¹⁴⁸ TWC Exh. 83 (Testimony of Eric Goldberg) at 10 (¶ 22).

¹⁴⁹ *Id.* at 10 (¶ 23); TWC Exh. 84, (Testimony of Andrew Rosenberg) at 10 (¶ 23); Tr. at 4191-92 (Goldberg). WealthTV maintains that "TWC does not dispute that [the December 3, 2007] offer was ever presented in writing." *see* WealthTV Proposed Reply Findings of Fact and Conclusions of Law at 19 (¶ 36). But WealthTV does not claim that the offer never was made. Indeed, Mr. Charles Herring on cross-examination acknowledged that TWC made such an offer and that WealthTV rejected it. Tr. at 3379-82 (Herring).

with TWC.¹⁵⁰ TWC lacks capacity to carry all the networks that seek affiliation and must decide what networks are in its best interest to carry.¹⁵¹ TWC concluded that WealthTV had not shown that its carriage would assist TWC to attract or maintain subscribers. TWC perceived that there was not sufficient support for WealthTV from its systems and WealthTV had failed to provide TWC with ratings data or other form of empirical proof of customer interest.¹⁵² TWC took into account the fact that WealthTV had no established brand recognition with proven appeal to subscribers.¹⁵³ In addition, WealthTV, an aspirational channel, did not offer sports or movies which are the types of programming that TWC believes to be highly sought-after by its subscribers.¹⁵⁴ TWC also considered the fact the WealthTV had not gained carriage on TWC's primary satellite competitors DirecTV and DISH and on a number of its cable competitors.¹⁵⁵ Nonetheless, as stated above, TWC had entered into an agreement with WealthTV for VOD carriage on its San Antonio system and offered the network a nationwide hunting license for both linear and VOD carriage — actions which evidence a willingness to carry within business limitations or at least to consider carriage of WealthTV's programming when it would be in the company's business interest.

40. Both Ms. Melinda Witmer, TWC's Chief Programming Officer since 2007 and Mr. Arthur Carter, TWC's former Senior Director of Programming, testified that TWC's ownership interest in MOJO played no role in TWC's decision not to provide full linear carriage to WealthTV.¹⁵⁶ Their testimony is consistent, competent and credible.

Cox Negotiations

41. WealthTV met with Mr. Robert Wilson, Senior Vice President of Programming for Cox and others in Cox's corporate programming department in 2004 and 2005 to discuss WealthTV's desire to obtain carriage on Cox's systems.¹⁵⁷ WealthTV continued to market its programming to Cox in the ensuing years.¹⁵⁸ In 2004, Cox concluded that WealthTV was a marginal network that would not bring value to Cox, and thus it decided not to carry WealthTV.¹⁵⁹ Cox continued to meet with WealthTV, however, because it kept open the

¹⁵⁰ TWC Exh. 56 (Affiliation Agreement); TWC Exh. 81; TW Exh. 85 (Testimony of Michael Egan) at 23 (¶ 31); TW Exh. 81 (Testimony of Melinda Witmer) at 15 (¶ 33).

¹⁵¹ Tr. at 3912-13 (Witmer).

¹⁵² TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

¹⁵³ E.g., TWC Exh. 82 (Testimony of Arthur Carter) at 2-3 (¶¶ 5-7); TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

¹⁵⁴ TWC Exh. 82 (Testimony of Arthur Carter) at 3 (¶ 8).

¹⁵⁵ E.g., TWC Exh. 82 (Testimony of Arthur Carter) at 2-3 (¶¶ 5-7); TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

¹⁵⁶ TW Exh. 81 (Testimony of Melinda Witmer) at 15 (¶ 33); Tr. at 3951-52 (Witmer); Tr. at 4097-98 (Carter).

¹⁵⁷ Cox Exh. 79 (Testimony of Robert Wilson) at 14, 16 (¶¶ 51, 55).

¹⁵⁸ Tr. at 4920 (Wilson).

¹⁵⁹ *Id.*

possibility that WealthTV would provide it with new material that might convince it to carry the network.¹⁶⁰

42. Cox makes its carriage decisions at the corporate level.¹⁶¹ It considers a variety of factors in considering whether to add a new network including likely viewer appeal, quality of the programming; probability of success in light of management and business plan; bandwidth constraints; proposed terms and conditions of carriage; and the unique needs of Cox's systems, such as local or regional content.¹⁶² Cox based its decision not to carry WealthTV on the basis of those criteria. Cox believed that WealthTV lacked any brand appeal that might draw an audience and was indistinguishable from many other start-up networks seeking carriage on Cox.¹⁶³ Cox concluded that WealthTV offered programming that was closely similar in content and audience to Fine Living, an unaffiliated network already carried by Cox.¹⁶⁴ Cox viewed WealthTV's business plan as assuming that producing content in an HD format would ensure success. Cox considered that plan not to be sustainable because all linear SD networks eventually would roll out HD feeds.¹⁶⁵ Cox also found WealthTV's management team to lack experience in video programming and to have no proven track record.¹⁶⁶ Cox also thought that WealthTV's programming lacked any regional or local appeal.¹⁶⁷ In addition, Cox believed that carriage of WealthTV would not fit into its business strategy of using its scarce bandwidth only for HD programming with demonstrated customer appeal.¹⁶⁸ Finally, Cox viewed the terms of carriage proposed by WealthTV to be unacceptable as a business proposition and even impossible to meet from a logistical standpoint.¹⁶⁹ The preponderance of the record evidence

¹⁶⁰ Tr. at 4919, 4902 (Wilson).

¹⁶¹ Tr. at 4862 (Wilson); Cox Exh. 81 (Testimony of Leo (Brennan) at 2 (¶ 4); Tr. at 5077 (Edmunds).

¹⁶² Cox Exh. 79 (Testimony of Robert Wilson) at 14 (¶ 48).

¹⁶³ *Id.* at 13, 14, 16-17 (¶¶ 46, 50, 56-58).

¹⁶⁴ *Id.* at 16-17 (¶¶ 56-59).

¹⁶⁵ *Id.* at 24 (¶¶ 77-78).

¹⁶⁶ *Id.* at 25 (¶ 81).

¹⁶⁷ *Id.* at 28-29 (¶¶ 94-95). Mr. Wilson, Cox's Senior Vice President for Programming, is the company official that has the final say in determining whether Cox will enter into affiliation agreements. So Cox's systems knew to contact Cox's corporate programming department if they wanted to seriously consider carriage of a particular network. *See, e.g.*, Exh. 81 (Testimony of Leo Brennan) at 4 (¶ 10); Tr. at 5077-79 (Edmunds). Mr. Wilson received no expression of interest in carrying WealthTV from any Cox system. Cox Exh. 79 (Testimony of Robert Wilson) at 21 (¶ 70). *See* Tr. at 4895 (Wilson). Mr. Wilson is aware of only a single expression of interest received at Cox's corporate programming department — a contact made by Mr. Tony Matthews, the employee responsible for marketing in Cox's Kansas/Arkansas system. Cox Exh. 79 (Testimony of Robert Wilson) at 22 (¶ 71); Tr. at 4895 (Wilson). But Ms. Kimberly Edmunds, the General Manager of Cox's Kansas/Arkansas system testified that she never asked Cox's corporate programming department to carry WealthTV and that she believed that there was no business reason for Cox to carry WealthTV. Cox Exh. 82 (Testimony of Kimberly Edmunds) at 4-5 (¶¶ 14-15); Tr. at 5085 (Edmunds).

¹⁶⁸ *Id.* at 24 (¶ 78).

¹⁶⁹ Cox Exh. 79 (Testimony of Robert Wilson) at 26-28 (¶¶ 86-93).

thus shows that business factors, and not Cox's affiliation with MOJO, were the reasons that Cox declined to carry WealthTV.

43 Still, WealthTV alleges that Cox unreasonably blocked it from carriage on its Las Vegas system by not permitting a deal with KLAS(TV), a network affiliated with CBS, for the multicast of WealthTV's programming.¹⁷⁰ But Cox's actions did not constitute discrimination on the basis of affiliation. KLAS(TV) has the capability to use its digital signals to transmit not only its primary video signal, but also multiple subsidiary programming, known as "multicast" streams.¹⁷¹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL] When KLAS(TV) asked Cox if it were willing to carry a multicast program stream that consisted of WealthTV broadcasting, Mr. Leo Brennan, then Senior Vice President and General Manager of Cox's Las Vegas cable system, refused because: (1) [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL], (2) the carriage of WealthTV via KLAS(TV) would circumvent Cox's policy that all cable programming deals are to be made through Cox's corporate programming department.¹⁷⁴ Mr. Brennan testified completely and convincingly that Cox would have refused to carry any national cable network as a multicast feed.¹⁷⁵ Clearly, the refusal was to comply with a non-discriminatory business policy and was not attributable to WealthTV's lack of affiliation with Cox.¹⁷⁶

Comcast Negotiations

44. In March 2004 — before the launch of the WealthTV network — WealthTV began meeting with Comcast officials to discuss its desire to obtain carriage on Comcast systems.¹⁷⁷ Between 2004 and 2006, WealthTV representatives had numerous meetings and telephone calls with Mr. Dannenbaum, Comcast's Executive Vice President of Network Distribution of Programming Management and/or Mr. Madison Bond, Executive Vice President for Content

¹⁷⁰ See WealthTV's Proposed Findings of Fact and Conclusions of Law at 40-41 (¶ 178-86).

¹⁷¹ Exh. 81 (Testimony of Leo Brennan) at 5 (¶ 15).

¹⁷² See Cox Exh. 49; Exh. 81 (Testimony of Leo Brennan) at 6 (¶ 17).

¹⁷³ Exh. 81 (Testimony of Leo Brennan) at 6 (¶ 17).

¹⁷⁴ Exh. 81 (Testimony of Leo Brennan) at 6-7 (¶¶ 18-19).

¹⁷⁵ *Id.* at 7 (¶ 19).

¹⁷⁶ Cox's decision affected only the broadcast of KLAS(TV) on Cox's Las Vegas system. That decision did not preclude WealthTV from reaching an agreement with KLAS(TV) that provided for the broadcasting of WealthTV's programming over-the air. *Id.* at 7 (¶ 20-21).

¹⁷⁷ WealthTV Exh. 144 (Testimony of Charles Herring) at 41. Tr. 2906-08 (Herring), 4758 (Dannenbaum).

Acquisition. The parties discussed the possibility of Comcast entering into a hunting license with WealthTV and including WealthTV's programming in Comcast's VOD service.¹⁷⁸ Neither Mr. Dannenbaum, Mr. Bond, nor any other Comcast representative ever expressed any interest in entering into a national carriage agreement with WealthTV.¹⁷⁹ Mr. Dannenbaum and Mr. Bond testified that pursuing a carriage agreement with WealthTV was a low priority for Comcast given the cost of carriage, the uncertain consumer appeal of WealthTV's programming, bandwidth constraints, the fact that WealthTV had attracted relatively few carriage agreements, the lack of experience of its owners in the programming business, and absence of outside investment support.¹⁸⁰ Both Comcast officials testified that Comcast's affiliation with MOJO played no role either in Comcast's negotiations with WealthTV or in its carriage decisions regarding that network.¹⁸¹ Their testimony is consistent, competent and credible.

45. After WealthTV threatened to file a program carriage complaint, Comcast made two offers of carriage to WealthTV. In a telephone call to Mr. Herring on April 14, 2008, Mr. Bond proposed that WealthTV enter into a hunting license with Comcast.¹⁸² Mr. Herring rejected that proposal.¹⁸³ WealthTV instead made a proposal that included carriage on a digital tier of Comcast's systems in at least four designated market areas with guaranteed carriage for ten years.¹⁸⁴ On April 17, 2008, Mr. Bond proposed to Mr. Herring that, in addition to the hunting license, Comcast would guarantee linear carriage in an urban market, such as Chicago, and also include WealthTV's programming in Comcast's VOD service.¹⁸⁵ Mr. Bond then offered to toll

¹⁷⁸ Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 2 (¶¶ 3-4); Comcast Exh. 3 (Testimony of Madison Bond) at 3 (¶ 6).

¹⁷⁹ Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 3 (¶ 7); Tr. at 4753. Mr. Charles Herring testified that "several" Comcast locations expressed support of WealthTV after they were visited by WealthTV's "affiliate sales team." WealthTV Exh. 144 (Testimony of Charles Herring) at 42. Mr. Herring does not identify any such location nor did any member of the WealthTV affiliate sales team corroborate Mr. Herring's testimony. Mr. Danenbaum testified that he made inquiries to Comcast's divisional and corporate management to ascertain whether there was any interest in carrying WealthTV and found no such interest. Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 3 (¶ 7). See Tr. at 4777-78 (Dannenbaum). Mr. Dannenbaum's testimony is corroborated by an email sent in 2006 to Mr. John Ghiorzi, WealthTV's Vice President of Affiliate Sales, in which Mr. Dannenbaum stated that he previously informed "both [Mr. Ghiorzi] and Charles [Herring] that I have not received any indication from anyone in the systems or divisions, nor here at corporate, that there is interest in launching your service." Comcast Exh. 2I at 21-2. Given the contrary testimony of Mr. Dannenbaum, Mr. Herring's testimony concerning the interest of Comcast "locations" in WealthTV is rejected as unreliable and not credible.

¹⁸⁰ Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 2-3 (¶¶ 5-6); Comcast Exh. 3 (Testimony of Madison Bond) at 4-5 (¶¶ 8-10).

¹⁸¹ Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶ 3); Tr. at 4755 (Dannenbaum); Tr. 4561 (Bond).

¹⁸² Comcast Exh. 3 (Testimony of Madison Bond) at 5 (¶ 12).

¹⁸³ *Id.* at 6 (¶ 12). Tr. 3619 (Herring).

¹⁸⁴ Tr. 3619-27 (Herring) WealthTV Exh. 204.

¹⁸⁵ Comcast Exh. 3 (Testimony of Madison Bond) at 6 (¶ 15). Tr. at 4651-52 (Bond). Although WealthTV asserts correctly that Comcast's proposals were not made in writing (*see* WealthTV's

the statute of limitations for the filing of WealthTV's carriage complaint to give the parties additional time to negotiate.¹⁸⁶ Mr. Bond advised Mr. Herring that a Chicago launch would not cover the entire Chicago DMA with its 2.2 million subscribers, but would only cover a subset of that market.¹⁸⁷ WealthTV rejected any such limitation and terminated negotiations.¹⁸⁸ Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith some form of affiliation agreement with WealthTV, and that Comcast made a good faith effort to avoid this carriage complaint.

46. WealthTV also alleges that in 2005 Comcast blocked WealthTV from gaining carriage on Adelphia. But the weight of record evidence does not support such allegation. In 2005 WealthTV signed an agreement with OlympuSAT that would have resulted in WealthTV replacing Chronicle on OlympuSAT's channel lineup carried on Adelphia, a cable company that Comcast was in the process of acquiring, as well as other cable systems.¹⁸⁹ Mr. Herring testified that Mr. Dannenbaum met with Messrs. Herring and Ghiorzi on July 6, 2005, and told WealthTV's representatives that Comcast had directed Adelphia not to make any channel lineup changes without Comcast's approval, and that he would block the launch of WealthTV on Adelphia.¹⁹⁰ Mr. Dannenbaum denies any recollection of that conversation.¹⁹¹ He testified that he was "virtually 100 percent certain" that he did not call Adelphia regarding the carriage of WealthTV.¹⁹² WealthTV did not have Mr. Ghiorzi testify at the hearing. Nor did WealthTV provide any documentary evidence to corroborate Mr. Herring's version of the events, or to support its claim that Comcast prevented WealthTV's carriage on Adelphia. However, Mr. Herring acknowledged on cross examination that he had no personal knowledge of whether Mr. Dannenbaum had contacted Adelphia, or whether Adelphia might have had business reasons for not permitting the carriage of WealthTV.¹⁹³ Mr. Herring's testimony regarding Comcast's blocking of WealthTV's launch on Adelphia is rejected as speculative and lacking in reliability.

Proposed Findings of Fact and Conclusions of Law at ¶ 159; *see also* Tr. at 4701 (Bond)), it does not claim that the offers were never made.

¹⁸⁶ Comcast Exh. 3 (Testimony of Madison Bond) at 6 (¶ 15).

¹⁸⁷ WealthTV Exh. 144 (Testimony of Charles Herring) at 45.

¹⁸⁸ Tr. at 3623-24 & 3627 (Herring), 4559-60 (Bond).

¹⁸⁹ WealthTV Exh. 144 (Testimony of Charles Herring) at 42. *Applications for Consent of Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc., and from Adelphia Communications Corporation to Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*") (approving Comcast and Time Warner acquisition of all domestic cable systems of Adelphia Communications Corporation.).

¹⁹⁰ WealthTV Exh. 144 (Testimony of Charles Herring) at 42-43. Adelphia subsequently decided not to carry WealthTV. *Id.* at 43.

¹⁹¹ Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5 (¶ 12).

¹⁹² Tr. at 4779-80 (Dannenbaum).

¹⁹³ Tr. at 3639-40 (Herring).

47. WealthTV also claims that Mr. Dannenbaum, at a meeting in 2006 with Messrs. Ghiorzi and Herring, asserted that Comcast did not “want to [have] another MTV on its back without owning the network.”¹⁹⁴ According to WealthTV, Mr. Dannenbaum’s statement “convey[ed] the message that Comcast would not have any interest in launching WealthTV unless it had a direct ownership interest in the network.”¹⁹⁵ This allegation lacks credibility for several reasons. First, Mr. Dannenbaum denies making that statement¹⁹⁶ and WealthTV has provided no testimony from Mr. Ghiorzi or any contemporaneous documentation corroborating Mr. Herring’s version of the conversation. Second, there is no record evidence suggesting that Comcast had any interest in obtaining any ownership interest in WealthTV. Third, the record shows that the majority of networks that Comcast carries are unaffiliated companies.¹⁹⁷ Comcast even closed on many carriage arrangements with unaffiliated networks during the same time period in which it was discussing possible business arrangements with WealthTV.¹⁹⁸ It is unlikely that a Comcast representative would state that the company objects to carrying WealthTV without Comcast having an equity interest when Comcast’s practice is to just the opposite, *i.e.*, to carry unaffiliated networks if such carriages further Comcast’s business interests.

BHN Negotiations

48. BHN is affiliated with TWC.¹⁹⁹ BHN is covered by the affiliation agreements that TWC negotiates with national cable networks.²⁰⁰ However, BHN has decision-making authority as to what programming is carried on BHN’s cable systems,²⁰¹ and has entered into separate affiliation agreements with cable networks.²⁰² Typically, BHN’s programming decisions were tied to TWC’s programming decisions and BHN usually carried those networks that had affiliation agreements with TWC.²⁰³

¹⁹⁴ WealthTV Exh. 144 (Testimony of Charles Herring) at 44.

¹⁹⁵ WealthTV Proposed Findings of Fact and Conclusions of Law at 35 (¶ 154).

¹⁹⁶ Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5 (¶ 13).

¹⁹⁷ *Id* at 5 (¶ 13); Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶ 3).

¹⁹⁸ Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5-6 (¶ 13); Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶¶ 3, 4).

¹⁹⁹ BHN is an affiliate of Time Warner Entertainment – Advance/Newhouse Partnership, a general partnership whose interests are held by the “TW Partners” (direct and indirect subsidiaries of TWC) and by Advance/Newhouse (a partnership owned by subsidiaries of Advance Publications Inc. and Newhouse Broadcasting Corporation. BHN Exh. 9 (Declaration of Steve Miron) at 1 (¶ 2).

²⁰⁰ BHN Exh. 9 (Declaration of Steve Miron) at 2 (¶ 7).

²⁰¹ Tr. at 4441 (Stith), 4484, 4508 (Miron).

²⁰² Tr. at 4508-10 (Miron).

²⁰³ Tr. at 4422 (Stith).