

49. WealthTV met with BHN representatives between 2004 and 2007 to discuss WealthTV's desire to obtain carriage on BHN's systems.²⁰⁴ Ms. Anne Stith, then Director of Product Marketing for the BHN's Tampa Division, met with WealthTV after Verizon FiOS, one of BHN's competitors, decided to carry WealthTV.²⁰⁵ Although Ms. Stith believed that WealthTV had a "[n]ice product," she did not think it was worth BHN's bandwidth needed to carry an HD channel, particularly since there was a lack of customer demand for WealthTV's programming.²⁰⁶ Mr. Steve Miron, then BHN's President had no interest in carrying WealthTV²⁰⁷ and declined to meet with the network's representatives.²⁰⁸ He did advise WealthTV truthfully that BHN is covered by TWC's national affiliation agreements and suggested that WealthTV attempt to negotiate directly with TWC.²⁰⁹

50. In July 2007, Mr. James Mead, at the direction of BHN, conducted a survey of BHN's customers to measure the level of interest in currently available HD networks that were not then carried by BHN.²¹⁰ BHN intended to use the results of the survey to determine which additional HD networks to add to its lineup.²¹¹ The survey showed that BHN customers had very little interest in WealthTV. The survey concluded that WealthTV ranked a dismal 36th of 37 channels most requested by subscribers having HDTV, and was rated next to last among 36 channels that HDTV owners were very likely to watch, if available.²¹²

51. Mr. Miron testified that the most important factor in BHN's decision not to carry WealthTV was its subscribers' lack of interest in its programming.²¹³ Other decisional considerations included BHN's view that WealthTV was not an established brand; was not managed by persons with a track record of launching successful networks; did not have carriage

²⁰⁴ WealthTV Exh. 144 (Testimony of Charles Herring) at 39-41.

²⁰⁵ BHN Exh. 10 (Declaration of Anne Stith) at 2 (¶¶ 5-6).

²⁰⁶ BHN Exh. 10 (Declaration of Anne Stith) at 4 (¶ 11); BNH Exh. 2 at 2; Tr. at 4427-28, 4465, 4469-70 (Stith).

²⁰⁷ Tr. at 4534 (Miron).

²⁰⁸ BHN Exh. 9 (Declaration of Steve Miron) at 4-5 (¶ 12). Tr. at 4506-07, 4527 (Miron). Mr. Miron testified that the WealthTV representative soliciting the meeting told him that a BHN division was very interested in WealthTV. But Mr. Miron's inquiries showed there was no such interest. Tr. at 4535 (Miron).

²⁰⁹ BHN Exh. 9 (Declaration of Steve Miron) at 4-5 (¶ 12). Mr. Miron stated that WealthTV's failure to obtain an affiliation agreement with TWC played only a "very minor role" in BHN's decision not to carry WealthTV. Tr. at 4508 (Miron). He testified that a lack of consumer interest in the network was the major factor in his decision not to carry the network. Tr. at 4508 (Miron).

²¹⁰ BHN Exh. 3 (HD Programming Study Interest, Use, Perceptions); BHN Exh. 9 (Declaration of Steven Miron) at 3-4 (¶ 10). See Tr. at 4498-99 (Miron).

²¹¹ Tr. at 4498 (Miron).

²¹² BHN Exh. 3 (HD Programming Study, Interest, Use, Perceptions at 2-3. WealthTV ranked 33rd of 36 HD channels that users are "very likely" to watch if available. Id. at 4.

²¹³ BHN Exh. 9 (Declaration of Steve Miron) at 3 (¶ 9). The lack of subscriber interest in WealthTV in the 2007 James Mead survey was a factor in BHN's decision not to carry WealthTV. Tr. at 4500 (Miron).

agreement with many MVPDs; and did not fill any unique gap in BHN's lineup.²¹⁴ The record also shows that BHN is not adverse to carrying unaffiliated networks. In fact, the large majority of networks on BHN systems are those in which BHN has no equity interest.²¹⁵ Mr. Miron testified that BHN's carriage of MOJO played no role in BHN's decision not to carry WealthTV,²¹⁶ and his testimony is consistent, competent and credible.

CONCLUSIONS OF LAW

A. Statutory Scheme

52. Section 616, added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),²¹⁷ directs the Commission to promulgate regulations which "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."²¹⁸

53. In accordance with that Congressional directive, the Commission adopted an implementing regulation that closely tracks the operative language of section 616 of the 1992 Cable Act. Regulation section 76.1301(c) provides:

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.²¹⁹

54. The statute and the regulation intended to address Congress' stated concern 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."²²⁰ Congress found that cable operators in certain instances could abuse their market

²¹⁴ BHN Exh. 9 (Declaration of Steve Miron) at 3 (¶ 9).

²¹⁵ BHN Exh.9 (Declaration of Steve Miron) at 2 (¶ 6).

²¹⁶ *Id.* at 4 (¶ 11).

²¹⁷ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

²¹⁸ 47 U.S.C. § 536(a)(3).

²¹⁹ 47 C.F.R. § 76.1301(c).

²²⁰ *Implementation of Sections 12 and 19 of The Cable Television Consumer Protection And Competition Act Of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 (¶ 2) (1993) ("*Second Report*"), reconsideration granted in part, 9 FCC Rcd at 4415 (1994) ("*Second Report Reconsideration*"). See S. Rep. No. 102-92, 102nd Cong., 1 Sess. 1991 at 25, 1991 WL 125145 "*Senate Report*").

power to the detriment of unaffiliated programmers.²²¹ Sections 616 and 76.1301(c) were designed to safeguard programming vendors against discrimination that arises from their non-affiliation with the cable operators. That discrimination must be proven to exist and must be shown to have an anti-competitive effect.

55. At the same time, Congress wanted to ensure that its bar against discrimination not have an unintended consequence of “restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace.”²²² Indeed, one principle advanced by the 1992 Cable Act, of which section 616 is a part, is to “rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming,” a legislative objective that the Commission took into account in implementing Section 76.1301(c).²²³ In other words, Sections 616 and 76.1301(c) are designed to “strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations.”²²⁴

56. Accordingly, under the statutory and regulatory language, two discrete elements must be proven by WealthTV in order to establish violations by defendants of sections 616 and 76.1301(c). First, the defendants must have discriminated against WealthTV in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation. Second, if discrimination by defendants occurred, the effect must be to unreasonably restrain the ability of WealthTV to compete fairly.

B. Assigned Burden of Proof

57. WealthTV argues for a bifurcated burden of proof in carriage complaint proceedings. According to WealthTV, it need carry only an initial burden of proof in establishing a *prima facie* case of discrimination. Then the burden shifts to defendants to prove, by a preponderance of evidence, its legitimate, non-discriminatory business reasons for the disparate treatment.²²⁵ Recall that the Media Bureau in its *HDO* “found” that WealthTV already had made a *prima facie*

²²¹ Senate Report at 24.

²²² *Second Report Reconsideration*, 9 FCC Rcd at 2643. See *Second Report*, 9 FCC Rcd at 2648 (¶ 15).

²²³ *Second Report Reconsideration*, 9 FCC Rcd at 2648 (¶ 15) (quoting 1992 Cable Act, § 2(b)(2)). See *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3402 ¶ 145 (1993).

²²⁴ *Second Report Reconsideration*, 9 FCC Rcd at 4416 (¶ 7). See *Second Report*, 9 FCC Rcd at 2648-49 (¶ 15).

²²⁵ WealthTV’s Proposed Findings of Fact and Conclusion of Law at 49-50 (¶¶ 227-231). Although WealthTV argues that the burden of proof shifted to the defendants after the *HDO* was issued, elsewhere it states that “[s]ection 616 of the Cable Act and the Commission’s program carriage regulations require WealthTV to make two straightforward showings: (1) that Defendants discriminated in the selection, terms, or conditions of carriage on the basis of affiliation or nonaffiliation and (2) that such discrimination unreasonably restrained the ability of WealthTV to compete fairly. WealthTV’s Proposed Reply Proposed Findings of Fact and Conclusion of Law at 46 (¶ 98) (internal quotations and brackets omitted).

showing that each defendant had violated Section 76.1301(c).²²⁶ WealthTV relies on that untested prehearing “finding” by the Media Bureau to establish its initial burden of proof before the hearing even began. WealthTV contends that at hearing the defendants faced a “shifted” burden to prove a negative by an evidentiary preponderance that they did not violate the Commission’s carriage rule.²²⁷ That argument is rejected.

58. Under delegated authority, the Presiding Judge issued a prehearing order assigning WealthTV “both the burden of proceeding with the introduction of evidence and the burden of proof.”²²⁸ Neither the 1992 Cable Act, the Commission’s carriage rule nor the *HDO* specify whether the MVPD or the programming vendor bears the burden of proof in a carriage complaint hearing and, therefore, the Presiding Judge had discretion to allocate the burden of proof.²²⁹ The Presiding Judge exercised that discretion reasonably by adhering to the usual practice of requiring that the party seeking relief by Commission order to bear the burden of proving that the violations occurred.²³⁰ WealthTV did not challenge the Presiding Judge’s allocation of the burden when the ruling was first issued.²³¹ Instead, WealthTV has sought a reassignment of the burden of proof after the record has been closed to additional evidence. Such retroactive reassignment would be fundamentally unfair to the defendants. They had a right as parties to rely upon the Presiding Judge’s prehearing allocation of the burden of proof in formulating

²²⁶ *HDO*, 23 FCC Rcd at 14792 (¶ 7) (2008).

²²⁷ See WealthTV’s Proposed Findings of Fact and Conclusion of Law at 51 (¶ 235).

²²⁸ *Oct 23 Order* at 2.

²²⁹ Section 4(j) of the Communications Act authorizes the Commission to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j). See also 47 U.S.C. § 154(i); 47 C.F.R. § 1.1; *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *FCC v. Pottsville*, 309 U.S. 134, 143 (1940); *City of Angels v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984). The “broad procedural authority” in section 4(j) empowers the Commission to make “ad hoc procedural rulings” in specific adjudications, such as an allocation of the burden of proof in a formal evidentiary hearing. *FCC v. Schreiber*, 381 U.S. at 289, 290. And the Commission in turn has delegated authority to allocate the burden of proof in these adjudicatory proceedings to presiding administrative law judges. See 47 C.F.R. §§ 0.341(b), 1.243(i). See generally 47 U.S.C. § 155(c)(1) (authorizing delegations of authority). See generally *Broadcast Data Corp. v. Kravetz Media Corp.*, 97 FCC 2d 650, 652 (¶ 5) (Rev. Bd. 1984) (quoting *RKO General, Inc.*, 48 FCC 2d 826, 827 (Rev. Bd. 1974)) (“It is well-established that the ALJ has broad power to regulate the course of a hearing, . . . which power is ‘plenary’ and ‘invests him with great latitude.’”). Pursuant to section 5(c)(3) of the Communications Act, an order issued under delegated authority, such as the Presiding Judge’s ruling on the allocation of the burden of proof, has “the same force and effect” as an order that is issued by the Commission. 47 U.S.C. § 155(c)(3).

²³⁰ See, e.g. *Schaffer v. Weast*, 546 U.S. 49, 56, (2005) (noting that where the statute is silent the “the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims). See also 5 U.S.C. § 556(d) (providing in the absence of statutory direction that “the proponent of a rule or order has the burden of proof.”) See also *Director of Office of Workers’ Compensation Programs Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).

²³¹ See 47 C.F.R. § 1.301(b) (providing a procedure whereby a party may request permission to challenge a presiding judge’s interlocutory ruling).

litigation strategy for presenting evidence at hearing.²³² In addition, a reallocation of the burden at this stage of the proceeding would run contrary to the Commission's mandate that these program complaint cases be adjudicated "consistent with the mandates of fairness and due process."²³³ In addition, a change of ruling on burden allocation would contravene the letter and spirit of the statutory command that the agency "conduct its proceedings in such manner as will best conduce to the . . . ends of justice."²³⁴

59. For these reasons, the burden of proof did not shift to defendants merely because the Media Bureau pronounced that WealthTV had established a *prima facie* case before the case went to hearing. After the *HDO* was issued but before the hearing began, the Presiding Judge ruled explicitly that he would give "*de novo* consideration" to the evidence adduced and would resolve the issues "*solely* [up]on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*."²³⁵ The Presiding Judge's ruling was approved by the Commission, which in its order reinstating the hearing, directed that fact determinations were to be made "in hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau."²³⁶

60. The evidence compiled after the completion of the evidentiary hearings is more complete, accurate, and reliable than the evidence before the Media Bureau when it issued the *HDO*. After the *HDO* was issued, the parties obtained additional information through discovery. During the course of the hearing, the direct testimony of the parties, including WealthTV, was tested by searching cross-examination. WealthTV withdrew evidence at hearing immediately prior to cross-examination, such as the written testimony of Ms. McGovern that programming of MOJO deliberately replicated the concepts, genres, formats and targeted audiences of WealthTV.²³⁷ Also, some of the material WealthTV had presented to the Media Bureau, such as

²³² WealthTV raised a variety of arguments to support its claim that the burden of proof ought to have been placed on the defendants after the Media Bureau issued the *HDO*. See WealthTV's Proposed Findings of Fact and Conclusions of Law at 49-50, 51 (¶¶ 227-31, 235). For example, WealthTV asserts that the burden of proof that differential treatment is not based on affiliation or non-affiliation should be borne by defendants because they have "much more ready access to information about their own decision-making than will unaffiliated vendors." *Id.* at 50 (¶ 231). It also points out that a burden-shifting approach was upheld by the Media Bureau in one arbitration proceeding that currently is on review by the Commission (*TCR Sports Broadcasting Holding, L.L.P. d/b/a/ Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd (MB 2008), application for review) and has been applied in other types of discrimination cases. WealthTV's Proposed Findings of Fact and Conclusions of Law at 49-50 (¶¶ 228-30). Significantly, however, WealthTV does not attempt to justify a *retroactive* shift of the burden of proof to the defendants after the hearing has been concluded and the record has been closed. Moreover, WealthTV in this formal evidentiary hearing had "access to information" necessary to satisfy its burden of proof through discovery, a feature that distinguishes this proceeding from *TCR Sports Broadcasting*.

²³³ *Reinstatement Order*, 24 FCC Rcd at 1581 (¶ 2).

²³⁴ 47 U.S.C. § 154(j).

²³⁵ *Nov. 20, 2008 Order* at 3 (¶ 6) (emphasis in original).

²³⁶ *Reinstatement Order*, 24 FCC Rcd at 1581 (¶ 2).

²³⁷ *Tr.* at 3715-25 (McGovern).

the written declaration of WealthTV's expert, Mr. Mark Kersey, was found to be unreliable at the hearing and was rejected.²³⁸

61. For these reasons, the Presiding Judge reaffirms the *October 23 Order* ruling that WealthTV bears the burden of proceeding with the introduction of evidence and the burden of proof.²³⁹ Proof of carriage violations requires a showing that defendants have discriminated against the programming of WealthTV "on the basis of affiliation or non-affiliation." WealthTV, *inter alia*, thus has the affirmative burden of proving that such discrimination occurred. And, contrary to WealthTV's burden shifting argument, the defendants did not have any burden at hearing to prove that their business decisions on programming were not made on the basis of affiliation or non-affiliation. Defendants certainly need not rebut what WealthTV has not proven.

62. In the final analysis, the manner in which the burden of proof is allocated becomes immaterial to the decision. Whatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section 616 of the Act or section 76.1301(c) of the rules.

C. Discrimination on the Basis of Affiliation or Non-Affiliation

63. Recall that a video programming vendor seeking to satisfy its burden of proving a violation of sections 616 and 76.1301(c) must first establish that a MVPD discriminated against it in the selection, terms, or conditions of carriage "on the basis of the affiliation or non-affiliation."²⁴⁰ Congress did not intend the Commission "to create new standards for conduct in determining discrimination" but instead directed that the Commission be guided by "the extensive body of law . . . addressing discrimination in normal business practices."²⁴¹ In order to establish disparate treatment,²⁴² *i.e.* that the litigant has suffered discrimination "on the basis of" a proscribed consideration, the litigant must prove that the proscribed factor "actually motivated the decision."²⁴³ The litigant must show that the proscribed trait "actually played a

²³⁸ Among the evidence before the Media Bureau was the declaration of Mr. Mark Kersey concerning the tabulation of a survey of WealthTV customers. On the day before Mr. Kersey was expected to be cross-examined WealthTV attempted to change substantial data in Mr. Kersey's written testimony, an attempt that was nipped in the bud. Mr. Kersey's declaration was deemed unreliable. Mr. Kersey was not permitted to testify. Tr. at 3699-3700 (Presiding Judge).

²³⁹ *Oct 23 Order* at 2.

²⁴⁰ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). See paragraphs 52-56, above.

²⁴¹ H.R.Rep. No. 102-628, 102nd Cong., 2d Sess. 110 (1992), 1992 WL 166238 ("House Report"). See *Second Report*, 9 FCC Rcd at 2644 n.6.

²⁴² See *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-74 (2009). In addition to "disparate treatment" cases, some anti-discrimination statutes prohibit forms of unintentional discrimination that have a disparate impact on a protected class. *Id.* at 2673. See, e.g., 42 U.S.C. § 200e-2(k)(1)(A)(i). Sections 616 and 76.1301(c) do not speak in terms of disparate impact.

²⁴³ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (quoting *Hazan Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). See *Ricci v. DeStefano*, 129 S.Ct. 2658, 2672 (2009) (quoting *Watson v. Forth Worth*

role in th[e] process and had a determinative influence on the outcome.”²⁴⁴ The litigant can make that showing by direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence,²⁴⁵ such as uneven treatment of similarly situated entities. WealthTV failed completely to make that showing in these cases.

64. The evidence of record establishes that the defendants decided in 2003 to carry INHD (the channel that subsequently was re-branded MOJO) for legitimate, non-discriminatory business purposes.²⁴⁶ In order to keep up with competing MVPDs, such as DirecTV and EchoStar, the defendants faced a business need to offer additional HD content through an additional HD channel to appeal to “early adopters” of HD sets.²⁴⁷ The defendants also needed the flexibility to preempt scheduled programming of the MOJO channel depending upon the regional or local programming interests of its viewers.²⁴⁸ They additionally wanted the flexibility to drop the MOJO channel when HD versions of programming of existing cable networks with their established brands and audiences programming of became available.²⁴⁹

65. In 2003, there was very little HD programming available.²⁵⁰ When the iN DEMAND managers proposed the creation of INHD to satisfy their owners’ short-term need for channels that provided HD programming that they could preempt at will, the defendants — the owners of iN DEMAND — approved this plan.²⁵¹ In other words, the defendants created and carried INHD because it furthered specific, non-discriminatory business objectives. There is no credible evidence that the defendants, in deciding to carry INHD, discriminated against WealthTV or any other independent programming vendor on the basis of affiliation or non-affiliation. For example, WealthTV did not show that defendants had denied carriage to a non-affiliated vendor that could have better served defendants’ business objectives than INHD. Indeed, because *WealthTV had not yet launched at the time the defendants decided to carry INHD*,²⁵² carriage of WealthTV (instead of INHD) was not available to the defendants in 2003.

Bank & Trust, 487 U.S. 977, 986 (1988) (“A disparate-treatment plaintiff must establish ‘that the defendant had a discriminatory intent or motive’” for its action.).

²⁴⁴ *Hazan Paper Co.*, 507 U.S. at 610. *Accord Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009); *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361, 2367 (2008).

²⁴⁵ See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-100 (2003).

²⁴⁶ See paragraphs 11-13, *supra*.

²⁴⁷ 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).

²⁴⁸ 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).

²⁴⁹ 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).

²⁵⁰ 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).

²⁵¹ Cox Exh. 84 (Testimony of David Asch) at 6 (¶¶ 17, 18); Tr. at 4916 (Wilson)

²⁵² WealthTV Exh. 144 (Testimony of Charles Herring) at 1-2.

66. WealthTV argues that iN DEMAND in 2007 launched what WealthTV characterizes as “a new channel, MOJO,”²⁵³ and that each of the defendants discriminated unlawfully against WealthTV by carrying MOJO instead of WealthTV. As shown in paragraphs 16-17, however, the defendants did not launch MOJO as a new channel in 2007. Instead the record evidence shows that the re-branding of INHD into MOJO consisted of incremental changes over many months resulting in no significant change in the network’s target demographic or general content. That re-branding constituted an evolutionary re-focus of an existing channel rather than the independent launch of a new network.

67. The preponderance of the evidence establishes that WealthTV’s status as an independent programming vendor played no role in the defendants’ individual decisions not to provide full linear carriage to WealthTV.²⁵⁴ Because there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, MVPDs simply cannot carry all channels that seek carriage.²⁵⁵ The record evidence shows that defendants based their separate decisions not to carry WealthTV on a linear basis for non-discriminatory business reasons that included not only their evaluation of WealthTV’s programming but also their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers; that WealthTV had not obtained carriage with a number of competing MVPDs; that WealthTV’s owners were inexperienced in launching networks; that bandwidth necessary to carry WealthTV could be used for better purposes; that WealthTV lacked outside financing; and that WealthTV’s proposed terms and conditions of carriage were unfavorable.²⁵⁶ There is no credible or reliable evidence proving that any defendant refused to carry WealthTV for any purpose of enhancing the competitive position of the affiliated programming vendor, MOJO. Overall, there is no credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV.

68. WealthTV argues brashly that the defendants had a double standard for program carriage as compared to unaffiliated vendors.²⁵⁷ WealthTV claims that defendants gave automatic carriage to INHD and MOJO without entering into a written carriage agreement,²⁵⁸ and denied carriage to WealthTV based upon a enumerated criteria , *inter alia*, the experience of the video programming vendor’s management team, the video programmer’s financial strength, price and terms of carriage, video programming service carried by competitors, price and terms of carriage, bandwidth constraints.²⁵⁹ WealthTV posits that if defendants had applied those criteria evenhandedly, MOJO would not have satisfied many of them.²⁶⁰ That argument is unavailing because it is unsupported by the evidence of record.

²⁵³ WealthTV’s Proposed Findings at 9 (¶ 33).

²⁵⁴ See paragraphs 35-51, *supra*.

²⁵⁵ TWC Exh. 86 (Testimony of Howard B. Homonoff) at 5 (¶ 10).

²⁵⁶ *Id.*

²⁵⁷ WealthTV Proposed Findings at 12-23 (¶¶ 46-84).

²⁵⁸ *Id.* at 12-14 (¶ 48-55).

²⁵⁹ *Id.* at 14-22 (¶ 56-812).

²⁶⁰ *Id.* at 14-16 (¶¶ 56, 57, 79).

69. In order to establish an inference of affiliation-motivated discrimination that was based on defendants' disparate treatment of WealthTV and MOJO, WealthTV bears the threshold burden of showing that WealthTV and MOJO are similarly situated.²⁶¹ WealthTV has not satisfied that burden. As shown above, the preponderance of the record evidence demonstrates that WealthTV and MOJO were not similarly situated networks.²⁶² The two networks aired different types of programming and targeted different demographic groups.²⁶³ And contrary to WealthTV's intimation, the disparate treatment of two networks by itself does not establish violations of sections 616 and 76.1301(c). To establish those violations, a complainant must affirmatively establish a nexus between the disparate treatment and the programming vendor's affiliation or non-affiliation with the MVPD. Each of the defendants in these cases decided to carry INHD/MOJO for business reasons that are independent of and unrelated to their affiliation with INHD/MOJO.²⁶⁴ And each of the defendants decided not to carry WealthTV on a linear basis for business reasons that are unrelated to their lack of affiliation with WealthTV. The defendants are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation.²⁶⁵ WealthTV has not satisfied its burden of proving discrimination on the basis of affiliation or non-affiliation in these carriage complaint cases.²⁶⁶

²⁶¹ See, e.g., *Shah v. General Electric Co*, 816 F.2d 264, 268 (6th Cir. 1987). See generally *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977).

²⁶² See paragraphs 20-34, *supra*

²⁶³ See paragraphs 20-34, *supra*.

²⁶⁴ As noted previously, the defendants carried the channel that became MOJO for a specific business purpose, *i.e.*, obtaining HD programming attractive to the younger adult male "early adopters" of HD television sets while reserving the right to preempt the network's programming when it suited its business needs and ultimately to drop the channel when more desirable HD programming became available. See 4 12-14, 62, *supra*. WealthTV has not shown that its carriage by defendants would have served that business purpose. The record shows, that WealthTV did not specifically target the younger adult male "early adopters" of HD sets, the very group that defendants sought to attract by carrying INHD/MOJO. And nothing in the record shows that WealthTV would have permitted its programming to be preempted at will.

²⁶⁵ Contrary to WealthTV assertion, the defendants did not automatically carry MOJO because it was an affiliate. As noted above, the defendants made their decision to carry the channel that became MOJO in 2003 for business purposes that were unrelated to its status as an affiliated company. See paragraphs 12-14, 64, *supra*. And the defendants dropped that channel (notwithstanding its affiliation) when carriage no longer served a business purpose. Cox Exh. 84 (Testimony of David Asch) at 23-25 (¶¶ 84-91).

²⁶⁶ WealthTV's reliance on evidence that INHD/MOJO and the defendants had no written contract for carriage is misplaced. It is generally considered in the industry that the lack of a written affiliation agreement places the video programmer in a disadvantageous position. Tr. at 4069-70 (Witmer). For example, it gives an MVPD the ability abruptly to alter the terms of carriage to suit its own business purposes, to preempt the network's programming at will, and to drop the network whenever it suited their business needs. Mr. Bond testified that Comcast did not want to enter into an affiliation agreement with IN DEMAND when INHD was launched because Comcast "did not really know if [INHD] had a future" and Comcast thought it "might end up going away at some point in time with the proliferation of [other HD channels]." Tr. at 4562-63 (Bond). Thus, there is no decisional significance to the absence of a written contract.

D. Unreasonable Restraints on WealthTV's Ability to Compete Fairly

70. In order to establish a violation of sections 616 and 76.1301(c), a video programming vendor also must show that the effect of the MVPD's discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly."²⁶⁷ Relying on an antitrust analysis, the defendants argue that this statutory and regulatory language requires a video programming vendor to prove the existence of a restraint that is "unreasonably restrictive of competitive conditions."²⁶⁸ The defendants claim that WealthTV cannot satisfy that antitrust standard because WealthTV could compete successfully by securing carriage on MVPDs that are unaffiliated with the defendants. Specifically, defendants argue that WealthTV by obtaining carriage agreements on other MVPDS, including DirectTV and Dish, could have gained access to 50 million subscribers, and thus could not be restrained in its ability to compete.²⁶⁹ Cox and BHN separately argue that they could not have violated sections 616 and 76.1301(c) given their low percentage of total subscribers, and the small percentage of interest in iN DEMAND.²⁷⁰

71. Defendants' arguments that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive. The antitrust laws are designed to protect competition and not competitors.²⁷¹ The legislative objective underlying sections 616 and 76.1301(c), in contrast, is to protect a specific group of competitors — independent video programming vendors from discrimination in carriage decisions by MVPDs based upon affiliation or non-affiliation.²⁷² The legislative history of section 616 specifies that the purpose of sections 616 is to "ensure" that a vertically integrated MVPD "does not discriminate against an unaffiliated video programming vendor in which it does not hold a financial interest."²⁷³ The defendants' construction of sections 616 and 76.1301(c) would permit MVPDs to discriminate against unaffiliated video programming vendors — indeed, permit MVPDs to engage even in intentional and significant discrimination — simply by showing that they have a relatively small percentage of overall subscribers or that a large proportion of viewers subscribe to MVPDs that are not vertically integrated. Such a construction undermines the very purpose underlying sections 616 and 76.1301(c). It also is totally at odds with the legislative history which shows that Congress

²⁶⁷ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

²⁶⁸ "Defendants Joint Proposed Findings of Fact and Conclusions of Law," (June 2, 2009) at 150 (¶ 26) (quoting *Standard Oil Co. v. United States*, 221 U.S. 58 (1911)).

²⁶⁹ *Id.* at 151-52 (¶¶ 29, 30).

²⁷⁰ *Id.* at 152 (¶ 31). Cox has 3.4 million subscribers and BHN has 2.5 million subscribers out of a total of 95 million subscribers. Cox and BHN respectively have 12 percent and 5 percent interest in iN DEMAND. BHN Exh. 8 (Expert Report of Januz Ordover) at 5 (¶ 9); Cox Exh. 44 (Expert Report of Januz Ordover) at 6 (¶ 9).

²⁷¹ See, e.g., *Brown v. United States*, 370 U.S. 294, 320 (1962).

²⁷² See *Second Report*, 9 FCC Rcd at 2643 (¶ 2).

²⁷³ House Report at 110. See *Second Report*, 9 FCC Rcd at 2643 (¶ 2).

intended section 616 to “provide new remedies” separate from those available under the antitrust laws.²⁷⁴

72. The defendants further err in claiming that an insufficient showing of competitive impact on WealthTV alone demonstrates that WealthTV failed to establish a violation of sections 616 and 76.1301(c). Defendants Comcast, TWC, Cox, and BHN serve approximately 24.6 million, 13.3 million, 5.4 million and 2.3 million subscribers, respectively.²⁷⁵ By denying linear carriage on all of its systems, each defendant made it more difficult for WealthTV to gain access to millions of customers,²⁷⁶ which in turn had a negative competitive impact on WealthTV.²⁷⁷ The denial of carriage had the effect of impairing the growth in WealthTV’s subscription revenues, making it more difficult for WealthTV to attract advertisers, and preventing WealthTV from spreading its costs across a larger subscriber base.²⁷⁸ Contrary to the defendants’ argument, WealthTV’s ability to secure carriage from other MVPDs by itself does not establish that the actions of the defendants in this case could not have unreasonably restrained WealthTV’s ability to compete fairly within the meaning of sections 616 and 76.1301(c).²⁷⁹ If defendants’ argument were to prevail, virtually no MVPD ever would be found to have violated sections 616 and 76.1301(c).

73. WealthTV cannot satisfy its burden to establish that each defendant’s conduct “unreasonably restrain[ed]” its “ability to compete fairly”²⁸⁰ merely by showing that the defendants’ individual carriage decisions adversely affected its competitive position in the marketplace. As shown by the plain language: (1) the only restraints proscribed by sections 616 and 76.1301(c) are those that are “unreasonabl[e],” and (2) such restraints must impair the video

²⁷⁴ House Report at 111.

²⁷⁵ TWC Exh. 75.

²⁷⁶ Contrary to WealthTV’s intimation, *see* WealthTV Findings at 63 (¶ 137), the defendants’ *collective* subscriber base is not relevant in assessing whether or not each *individual* defendant unreasonably constrained WealthTV’s ability to compete fairly.

²⁷⁷ Cox and Bright House presented the expert testimony of Dr. Ordover, who concluded that WealthTV had not shown that any “acts by Cox or Bright House have resulted in any exclusion or foreclosure of WealthTV from competing in the relevant marketplace.” BHN Exh.8 (Direct Testimony of Januz Ordover) at 3 (¶ 6). Dr. Ordover points out that WealthTV could have achieved distribution to millions of subscribers by entering into affiliation agreements with MVPDs other than defendants or by accessing subscribers with alternative methods of distribution. According to Dr. Ordover, “[t]o show anticompetitive foreclosure, WealthTV must explain why it could not have achieved viability by gaining sufficient carriage” on other systems. BHN Exh.8 (Expert Report of Januz A. Ordover) at 6 (¶ 9); Cox Exh. 44 (Expert Report of Januz A. Ordover) at 6-7 (¶ 9). This defensive boot-strapping of antitrust analysis overlooks the relevant legal test under sections 616 and 76.1301(c), which is not whether the video programmer is excluded or foreclosed from competition, or whether in the absence of affiliation-based discrimination WealthTV could obtain viability, but rather whether it is unreasonably restrained from competing fairly.

²⁷⁸ WealthTV Exh. 152 (Testimony of Sandy McGovern) at 11-12 (¶¶ 18-22).

²⁷⁹ *See HDO*, 23 FCC Rcd at 14798, 14802, 14807, 14813 (¶¶ 19, 30, 42, 54).

²⁸⁰ 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

programming vendor's ability to compete "fairly."²⁸¹ The analysis of the record evidence demonstrates that each of the defendants made a decision not to carry WealthTV on the basis of reasonable and legitimate business reasons that were within the bounds of fair competition. Thus, WealthTV has failed to satisfy its burden of proving by a preponderance of the evidence that any of the defendant's actions *unreasonably* restrained WealthTV's ability to compete *fairly* under the second part of the standard of sections 616 and 76.1301(c).

ULTIMATE CONCLUSIONS

74. Based on foregoing findings of fact and conclusions of law, it is concluded that WealthTV has not satisfied its burden of proving that any of the defendants engaged in discrimination in the selection, terms or conditions of carriage on the basis of WealthTV's non-affiliation.

75. Based on foregoing findings of fact and conclusions of law, it is further concluded that WealthTV has not satisfied its burden of proving that any of the defendants unreasonably restrained WealthTV's ability to compete fairly.

76. In light of the ultimate conclusions reached in paragraphs 74 and 75, above, *HDO* Issue No. 1 is resolved in the defendants' favor and *HDO* Issue No. 2 is moot.

RECOMMENDED DECISION

77. IT IS RECOMMENDED that the complaints filed by Herring Broadcasting, Inc. d/b/a WealthTV in MB Docket No. 08-214 BE DENIED.²⁸²

FEDERAL COMMUNICATIONS COMMISSION²⁸³

Richard L. Sippel
Chief Administrative Law Judge

²⁸¹ *Id.*

²⁸² Section 5 of the Communications Act authorizes an aggrieved person to seek Commission review of "any" actions issued under delegated authority, including this recommended decision. See 5 U.S.C. § 155(c)(4). The parties may seek Commission review of this recommended decision by filing exceptions in accordance with sections 1.276 and 1.277 of the Commission's rules governing appeals for Initial Decisions. 47 C.F.R. §§ 1.276, 1.277.

²⁸³ Copies of this Recommended Decision are e-mailed to counsel for each party upon issuance.