

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)	

To: The Commission

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

Herring Broadcasting, Inc. d/b/a WealthTV

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Dated: November 16, 2009

SUMMARY

Substantial errors below compel that the Commission not adopt the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel. Rather, the Commission should conclude that substantial record evidence supports a finding that each of the defendants discriminated against Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) on the basis of its non-affiliation with defendants. In reaching the erroneous conclusion that defendants did not discriminate against WealthTV, the Administrative Law Judge (“ALJ”) made errors of law and arbitrary and capricious findings of fact.

First, the ALJ arbitrarily and erroneously disregarded findings of the Media Bureau that WealthTV had established a *prima facie* showing of discrimination in violation of the Commission’s Rules. *See* 47 C.F.R. § 73.1301(c). In doing so, the ALJ disregarded relevant precedent, in which the Media Bureau accepted a burden-shifting framework under anti-discrimination provisions of the Cable Act, Pub. L. 102-385, 106 Stat. 1460, and the Commission’s program carriage regulations and erroneously allocated the burden of proceeding and proof to WealthTV. The ALJ further erred by placing on WealthTV the burden of demonstrating harm to its ability to compete in the marketplace rather than with defendants’ affiliated network, MOJO.

Further, the ALJ made arbitrary and erroneous findings of fact that WealthTV and defendants’ affiliated network, MOJO, were not similarly situated by erroneously employing a standard that required WealthTV to show that its programming and audience appeal are substantially identical to that of MOJO.

The ALJ also ignored substantial record evidence that defendants discriminated against WealthTV in violation of the Cable Act in favor of their affiliated and similar programming channel, which was developed as a new channel targeting the same audience as WealthTV. Namely, the ALJ failed to adequately consider the disparate treatment defendants accorded MOJO and WealthTV

when evaluating whether to grant carriage. The ALJ's erroneous findings of fact were compounded by: (1) failing to receive into evidence admissions of a party opponent, Comcast, that it evaluated affiliated and non-affiliated networks for carriage under differing standards and accorded competitive advantages to affiliated networks; and (2) arbitrarily and improperly denying WealthTV's request for a subpoena *ad Testificandum* for Robert Jacobson, President and Chief Executive Officer of iN Demand Networks, L.L.C. Mr. Jacobson could have testified regarding: (1) the facts and circumstances behind the development and launch of MOJO; and (2) MOJO's programming genres. Such testimony would have added significantly to the already substantial record evidence that MOJO targeted a similar audience as WealthTV. Moreover, the ALJ erroneously found defendants' expert witness Michael Egan credible, despite testimony indicating the unreliability of his methodologies used to evaluate WealthTV and MOJO.

Finally, the ALJ made arbitrary and capricious findings of fact, not supported by the record evidence, against WealthTV, demonstrating an improper bias against WealthTV.

As described further below, the ALJ improperly concluded that defendants had not discriminated against WealthTV in favor of a similarly situated, affiliated programming service. In light of the failure to find discrimination by defendants against WealthTV, the ALJ failed to grant the remedy of mandatory carriage sought by WealthTV.

TABLE OF CONTENTS

SUMMARY i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

I. Statement of the Case 2

II. Exceptions Presented 4

 A. Improper Shift of the Burden of Proceeding and Proof 4

 B. WealthTV and MOJO are Similarly Situated 4

 C. Substantial Evidence of Discrimination in Favor of Affiliated Programmer 4

 D. Failure to Receive into Evidence Admission of Party Opponent 5

 E. Denial of Request for Robert Jacobson to Testify was Improper 5

 F. Improper Bias of ALJ 5

 G. Testimony of Michael Egan Lacked Sufficient Indicia of Reliability 5

 H. Ultimate Conclusion 5

III. Argument 6

 A. Improper Shift of the Burden of Proceeding and Proof 6

 B. WealthTV and MOJO are Similarly Situated 10

 C. Substantial Evidence of Discrimination in Favor of Affiliated Programmer 13

 D. Failure to Receive into Evidence Admission of Party Opponent 17

 E. Denial of Request for Robert Jacobson to Testify was Improper 18

 F. Improper Bias of ALJ 21

 G. Testimony of Michael Egan Lacked Sufficient Indicia of Reliability 23

 H. Ultimate Conclusion 24

IV. Conclusion 25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Abuan v. Level 3 Communications, Inc.</i> , 353 F.3d 1158 (10th Cir. 2003).....	17
<i>Alexander v. Fulton County, Ga.</i> , 207 F.3d 1303 (11th Cir. 2000).....	10
<i>Algreg Cellular Engineering</i> , 9 FCC Rcd 5098 (Rev.Bd.1994).....	6, 11
<i>Anax Broadcasting, Inc.</i> , 87 FCC 2d 483 (1981).....	6,11, 21
<i>Applications of Bennett Gilbert Gains, Interlocutory Receiver for Magic 680, Inc.</i> , Decision, 8 FCC Rcd 1405 (Rev.Bd. 1993).....	21
<i>Daubert v. Merrell Dow Pharmaceuticals</i> , 509 U.S. 579 (1993).....	5, 23
<i>E.E.O.C. v. LA Weight Loss</i> , 509 F.Supp.2d 527 (D.Md. 2007).....	17
<i>Herring Broadcasting, Inc. v. Time Warner Cable, et al.</i> , Order, MB Docket No. 08-214, FCC 08M-50 (rel. Dec. 2, 2008).....	passim
<i>In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.</i> Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008).....	passim
<i>In re Applications of Liberty Productions, a Limited Partnership</i> , Memorandum Opinion and Order 16 FCC Rcd. 12061	11
<i>In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.</i> , Memorandum Opinion and Order, 23 FCC Rcd 18316 (MB 2008).....	passim
<i>In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.</i> , Order, FCC 08M-44 (ALJ, released Oct. 23, 2008).....	2
<i>In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.</i> , Order, 24 FCC Rcd 1581 (2009).....	3, 22
<i>In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.</i> , Order, FCC 09M-11 (ALJ, released Feb. 2, 2009)	3

In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.,
 Recommended Decision of Chief Administrative Law Judge Richard L. Sippel
 FCC 09-D-01(ALJ, released October 14, 2009) passim

In the Matter of Steven Strouth, Complainant v. The Western Union Telegraph Company,
 70 FCC 2d 525 (ALJ 1977)..... 11

In NFL Enterprises LLC v. Comcast Cable Communications, LLC,
 (MB Docket 08-214)..... 17

Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept.,
 510 F.3d 681 (7th Cir. 2007)..... 10

TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.,
 21 FCC Rcd 8989 (2006) 4, 6

Turner Vision, Inc. v. Cable Network, Inc.,
 (Memorandum Opinion and Order) 13 FCC Rcd 12610 (1998)..... 8

STATUTES

Communications Act of 1934 (“Section 616”), 47 U.S.C. § 536 2, 6, 9

47 C.F.R. §§ 1.4, 1.276(a)(1) 1

47 C.F.R. § 1.277 1

47 C.F.R. § 1.351 20

47 C.F.R. § 76.1301(c)..... 2, 4, 6, 9

OTHER AUTHORITIES

*Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and
 Competition Act of 1992 and Development of Competition and Diversity in Video
 Programming Distribution and Carriage*,
 9 FCC Rcd 2642 (1993) 6, 7, 9

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Comcast Corporation,)	
Defendant)	

To: The Commission

Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”), pursuant to Section 1.277(c) of the Commission’s Rules, 47 C.F.R. § 1.277(c), hereby submits its Exceptions to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel.¹ WealthTV’s Exceptions are timely filed. See 47 C.F.R. §§ 1.4, 1.276(a)(1), 1.277(b).² The Commission should reverse the

¹ *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 09 D-01 (ALJ rel. Oct. 14, 2009) (“*Recommended Decision*”).

² See also Letter from Associate General Counsel Joel Kaufman (Nov. 9, 2009) (MB Docket No. 08-214), which established the date as November 16, 2009.

Recommended Decision and grant the carriage relief sought by WealthTV. Alternatively, the Commission should reverse and remand this case to the Media Bureau for resolution or to an administrative law judge for further proceedings under the correct standards for burdens of proceeding and proof, as set forth herein.³

I. Statement of the Case

These consolidated actions, brought pursuant to Section 616 of the Communications Act of 1934 (“Section 616”), 47 U.S.C. § 536, and Section 76.1301(c) of the Commission’s Rules, 47 C.F.R. § 76.1301(c), result from the discriminatory conduct of Time Warner Cable, Inc. (“TWC”), Cox Communications, Inc. (“Cox”), Comcast Corporation (“Comcast”), and Bright House Networks, LLC (“BHN”) (collectively, “defendants”) against WealthTV.⁴ Because WealthTV was not affiliated with defendants, they unreasonably restrained WealthTV’s ability to compete fairly with defendants’ affiliated network, MOJO.

On October 10, 2008, the Media Bureau adopted a Memorandum Opinion and Hearing Designation Order (“HDO”),⁵ which concluded that WealthTV had established a *prima facie* showing that each of the defendants had discriminated against it in violation of the program carriage rules, HDO ¶¶ 24, 35, 46, 57, directed the ALJ to resolve factual disputes, and return a recommended decision and remedy, if necessary, HDO ¶ 120. Despite the Media Bureau’s finding that WealthTV

³ In light of the substantial prejudice demonstrated against WealthTV by the ALJ who presided below, in the event that the Commission were to remand for further fact finding by an administrative law judge, WealthTV would respectfully request assignment of the case to a different administrative law judge in the event of a remand.

⁴ 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).

⁵ *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.* Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008) (“HDO”).

had established a *prima facie* showing of discrimination, the ALJ determined to conduct a *de novo* review and erroneously placed the burden of production and proof on WealthTV.⁶

Because of the continuing harm caused by defendants' discrimination, WealthTV moved for revocation of the *HDO*.⁷ By a December 24, 2008 Memorandum Opinion and Order ("*December 24 Order*"), the Media Bureau found that the ALJ exceeded his authority by setting a hearing date beyond the *HDO*'s 60-day deadline for issuing a recommended decision. The Media Bureau would therefore resolve the discrimination complaints based on the existing record.⁸ *Sua sponte*, on January 16, 2009, the Commission rescinded the Media Bureau's *December 24 Order* and instructed the ALJ: (1) to issue a revised procedural and hearing order updating the schedule previously announced; and (2) to issue recommended decisions and remedies.⁹ After a two-week hearing, the ALJ issued the *Recommended Decision*, improperly shifting the burden of production and of proof to WealthTV; applying an improper standard for determining whether WealthTV and MOJO are similarly situated; making multiple clearly erroneous findings of fact; and on these bases, erroneously concluding that WealthTV had not proved defendants' discrimination against it on the basis of affiliation or that such discrimination unreasonably restrained WealthTV's ability to compete fairly. *Recommended Decision* ¶¶ 20-51, 57-59, 61, 68, 69, 74.

⁶ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 08M-44 (ALJ, rel. Oct. 23, 2008).

⁷ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, MB Docket No. 08-214 (Nov. 24, 2008) ("*HDO Revocation Motion*").

⁸ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Memorandum Opinion and Order, 23 FCC Rcd 18316 (MB 2008) ("*December 24 Order*").

⁹ *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order (¶ 2), 24 FCC Rcd 1581 (2009); see also *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 09M-11 (ALJ, rel. Feb. 2, 2009).

II. Exceptions Presented

A. Improper Shift of the Burden of Proceeding and Proof

The ALJ arbitrarily and erroneously disregarded the *HDO*'s findings and Media Bureau precedent, in which the Media Bureau had accepted that a burden-shifting framework should govern complaints brought under anti-discrimination provisions of the Cable Act and the Commission's program carriage regulations, and instead allocated the burden of proceeding and proof to WealthTV,¹⁰ despite the Media Bureau's determination that WealthTV had established a *prima facie* showing of discrimination in violation of the Commission's program carriage rules.¹¹ The ALJ further erred by placing on WealthTV the burden of demonstrating harm to its ability to compete in the marketplace rather than with defendants' affiliated network, MOJO.

B. WealthTV and MOJO are Similarly Situated

The ALJ improperly determined that WealthTV was not similarly situated to defendants' affiliated network MOJO, *Recommended Decision* at 34 (¶ 69), by improperly requiring WealthTV to show that its programming and audience appeal are instead substantially identical to that of MOJO. Requiring WealthTV to make such a showing was improper as a matter of law.

C. Substantial Evidence of Discrimination in Favor of Affiliated Programmer

The ALJ ignored substantial record evidence that defendants discriminated against WealthTV in violation of the Cable Act in favor of their affiliated and similar programming channel (MOJO), which was developed as a new channel targeting the same audience as WealthTV.

¹⁰ See *Recommended Decision* at 29-30 (¶¶ 57-59); see also *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, DA 08-2441 (MB rel. Oct. 30, 2008) ("TCR Order on Review").

¹¹ *HDO* (¶¶ 24, 35, 46, 57); see also 47 C.F.R. § 76.1301(c); cf. *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶ 8 (2006).

D. Failure to Receive into Evidence Admission of Party Opponent

The ALJ erred as a matter of law in failing to receive into evidence admissions of a party opponent, Comcast, that it evaluated affiliated and non-affiliated networks for carriage under differing standards and accorded competitive advantages to affiliated networks.

E. Denial of Request for Robert Jacobson to Testify was Improper

Having assigned the burden of proceeding and proof upon WealthTV, the ALJ arbitrarily and improperly denied WealthTV's request for Robert Jacobson, President and Chief Executive Officer ("CEO") of iN Demand Networks, L.L.C. ("iN DEMAND"), an entity wholly owned and controlled by defendants, to testify regarding: (1) the facts and circumstances behind the development and launch of MOJO; and (2) MOJO's programming genres. Such testimony would have added significantly to the already substantial record evidence that MOJO targeted a similar audience as WealthTV. Tr. 2162:13-16.

F. Improper Bias of ALJ

The ALJ made arbitrary and capricious findings of fact, not supported by the record evidence, against WealthTV, which demonstrated an improper bias against WealthTV.

G. Testimony of Michael Egan Lacked Sufficient Indicia of Reliability

The ALJ ignored substantial record evidence that the testimony of defendants' expert witness, Michael Egan, lacked sufficient indicia of reliability to draw the conclusion that WealthTV and MOJO were not similarly situated and that TWC did not discriminate against WealthTV.¹²

H. Ultimate Conclusion

The ALJ improperly concluded that respondents had not discriminated against WealthTV in favor of a similarly situated, affiliated programming service. Further, in light of the failure to find

¹² See generally, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993).

discrimination by defendants against WealthTV, the ALJ failed to grant the remedy of mandatory carriage sought by WealthTV.

III. Argument

A. Improper Shift of the Burden of Proceeding and Proof

The ALJ arbitrarily and erroneously disregarded the HDO's findings and Media Bureau precedent, in which the Media Bureau had approved a burden-shifting framework under anti-discrimination provisions of the Cable Act and the Commission's program carriage regulations.¹³ Instead, the ALJ allocated the burden of proceeding and proof to WealthTV, *see Recommended Decision* at 29-30 (¶¶ 58-59), despite the fact that the Media Bureau determined that WealthTV had established a *prima facie* showing of each defendant's discrimination against WealthTV.¹⁴ The Commission should reject this allocation of the burden of proof as a matter of law. An administrative law judge has no authority to act inconsistently with the terms of a hearing designation order.¹⁵

Although neither Section 616 nor the Commission's carriage complaint rules provides for the allocation of the burden of proof, the conclusion that WealthTV bears the burden of proof is not supported by precedent. In fact, in an Order adopted by the Media Bureau on October 30, 2008, it accepted the opposite conclusion: the burden of proof should shift to defendants upon a *prima facie* showing of discrimination on the basis of affiliation. *See TCR Order on Review* at 10-11 (¶¶ 21-22). Notably, the Media Bureau issued the October 30, 2008 order just twenty days after the HDO, providing timely guidance on the proper allocation of burdens of proof.

¹³ *See TCR Order on Review* at 10-11 (¶¶ 21-22).

¹⁴ *See HDO* ¶¶ 24, 35, 46, 57; *see also* 47 C.F.R. § 76.1301(c); *cf.* Memorandum Opinion and Hearing Designation Order, *TCR Sports Broadcasting Holding, L.L.P. v. Comcast Corp.*, 21 FCC Rcd 8989, ¶ 8 (2006).

¹⁵ *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (¶ 11) (1981) (no authority to consider matters already considered by operating bureau in designating applications for hearing); *Algreg Cellular Engineering*, 9 FCC Rcd 5098 ¶75 (Rev.Bd. 1994) (ALJ has no authority to grant exceptors' request to confine the intervenors' participation to the Applicants where HDO accorded the intervenors full party status).

The *HDO* found that WealthTV had established a *prima facie* showing of discrimination. Although rescinded, the Media Bureau's *December 24 Order* admonished that "rather than limit the hearing to a resolution of factual disputes that the HDO designated for hearing, the ALJ would require re-litigation of all disputes in the case and review of all evidence *de novo*."¹⁶ The ALJ's action was not consistent with the Commission's emphasis on "expedited review of complaints made by a programming vendor[.]"¹⁷ The *December 24 Order* rejected the claim that the matter could not have been resolved in sixty days, except that the ALJ "decided to disregard the facts and conclusions recited in the HDO." *December 24 Order* ¶ 17. While this order was rescinded by the Commission, the *HDO* was not. The *December 24 Order* provides an additional basis for the conclusion that the *HDO* did intend to shift the burden of proof in the administrative hearing.

Moreover, in the context of a petition for review of an independent arbitrator's ruling regarding a carriage dispute between TWC and TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, the Media Bureau noted that the program carriage scheme provided the relevant legal framework for the dispute. The Media Bureau considered and denied TWC's request for review of the arbitrator's decision *de novo*. In the underlying arbitration, the arbitrator determined that, upon a *prima facie* showing of discrimination, "the burden shifts to the respondent to justify treatment of [the] non-affiliated programmer." *TCR Order on Review* ¶ 22.

In the TCR case, Media Bureau rejected the assertion that discrimination should be assessed under standards derived from the body of federal law prohibiting discrimination on the basis of race, age, and other characteristics. *TCR Order on Review* ¶ 23. The Media Bureau correctly rejected placing

¹⁶ *December 24 Order*, ¶ 10.

¹⁷ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2644, 2652 (¶ 4, 23-24) (1993) ("*Second ReO*"). "[W]e hereby adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply." *Id.* at 2652 (¶ 23).

the ultimate burden of proof on the complainant. Rather, it recognized that “MVPD’s¹⁸ have superior access to information justifying their carriage decisions... [and] conclude[d] that it would be unreasonable to require a complainant to provide direct evidence that its affiliation status had a determinative influence on the denial of its carriage request.” *TCR Order on Review* ¶ 25. The Media Bureau did not find that the arbitrator erred in placing the burden of proof on TWC.

Such burden shifting is employed in multiple other contexts and has compelling policy justifications.¹⁹ Program access complaints employ a burden shifting scheme, whereby a complainant need only make a *prima facie* showing that prices, terms or conditions offered to it differ from those offered to a competitor.²⁰ The defendant must then demonstrate legitimate reasons for the disparate treatment or show that the complainant is not similarly situated with the alleged competitor.²¹ A similar standard is proper in the context of carriage complaints, which deal with the obverse situation of discrimination by MVPDs in favor of affiliated programmers like iN DEMAND and MOJO.

An additional error with respect to the burden of proof is the suggestion that WealthTV had the burden of “affirmatively establish[ing] a nexus between the disparate treatment and the programming vendor’s affiliation or non-affiliation with the MVPD.” *Recommended Decision* at 34 (¶ 69). This implies that WealthTV had to affirmatively adduce direct evidence of discrimination on the basis of affiliation. In the absence of a “smoking gun,”²² however, a complainant must rely on circumstantial evidence alone. Disparate treatment of similarly situated parties and the failure of defendants to prove a legitimate, nondiscriminatory reason for the disparate treatment provide the

¹⁸ Multichannel Video Programming Distributor.

¹⁹ Complainant Proposed Findings of Fact and Conclusions of Law (“WTC PFoF”) at 49-50 (¶¶ 227-231).

²⁰ *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, ¶¶ 14, 15 (CSB 1998).

²¹ *Id.*

²² Notably, such a “smoking gun” exists in the form of testimony from the Comcast Chief Operating Officer, which, as discussed below, the ALJ improperly excluded from the record.

nexus. Defendants failed utterly to provide evidence of a legitimate, nondiscriminatory reason for disparate treatment. *See* Complainant’s Proposed Reply Findings of Fact and Reply Conclusions of Law (“WTV RPFoF”) at ¶¶ 13-30.

Although the ALJ found defendants’ asserted legitimate business reasons for not carrying WealthTV determinative, he nonetheless ignored the glaring disparate treatment in defendants’ evaluative criteria used to decide whether to carry WealthTV or MOJO. WTV RPFoF at ¶¶ 13-30. Defendants employed multiple criteria in reaching the decision not to carry WealthTV but did not apply these criteria to their similarly situated, affiliated network. As the ALJ noted in the *Recommended Decision* ¶ 63, “[t]he litigant must show that the proscribed trait actually played a role in [the] process and had a determinative influence on the outcome[.]’... [t]he litigant can make that showing... by circumstantial evidence, such as uneven treatment of similarly situated entities.” The record plainly demonstrates both that WealthTV and MOJO are similarly situated and that Defendants treated their affiliated channel more favorably. A correct application of the burden of proof would, therefore, have resulted in a finding that defendants’ uneven treatment of affiliated and non-affiliated, similarly situated networks circumstantially proves the discrimination.

Further, the ALJ improperly placed a burden on WealthTV to demonstrate that defendants unreasonably restrained WealthTV’s ability to compete “in the marketplace,” *Recommended Decision* at 37 (¶ 73), a standard of his own making. The notion that WealthTV was required to demonstrate unreasonable restraint to compete “in the marketplace” is unsupported by the Commission’s rules or policies. The phrase “in the marketplace” does not appear in the Section 73.1301(c), 47 C.F.R. § 73.1301(c), of the Commission’s rules or in Section 616, 47 U.S.C. § 536. Although the Second Report and Order notes that the rules follow the statute’s directive to “‘rely on the marketplace, to the maximum extent feasible, to achieve greater availability’ of the relevant programming[.]”²³ it

²³ *Second R&O* at 2648 (¶ 15) (quoting Cable Act, Section 2(b)(2)).

likewise does not incorporate a “marketplace” concept into the required showing of discrimination. Moreover, the Media Bureau also rejected this notion, stating that the “Act prohibits an MVPD from discriminating against an unaffiliated programmer regardless of the competition the MVPD faces.” *HDO* ¶ 19.

Rather, the rule requires only a showing of unreasonable restraint to compete fairly “by discriminating in video programming distribution on the basis of affiliation or non-affiliation[.]”²⁴ The ALJ’s arbitrary rewriting of the Commission’s rules to add an additional “marketplace” element to the cause of action eviscerates the rule. It should properly be interpreted to refer to defendants’ unreasonable restraint of WealthTV’s ability to compete fairly only with defendants’ affiliated network, MOJO, in its efforts to gain carriage on defendants’ systems. Applying this standard, WealthTV has carried its burden to demonstrate unreasonable restraint.

B. WealthTV and MOJO are Similarly Situated

The ALJ improperly determined that WealthTV was not similarly situated to defendants’ affiliated network MOJO, *Recommended Decision* at 34 (¶ 69), by improperly requiring WealthTV to show that its programming and audience appeal are substantially identical to that of MOJO. Requiring such a showing was improper as a matter of law. At the outset, it should be noted that the ALJ failed entirely to describe the legal standards by which he evaluated whether WealthTV and MOJO were similarly situated; rather, the ALJ merely states that WealthTV has the burden of demonstrating this factor. It appears from the findings of fact that the Judge applied a standard no two channels could meet: demonstrating that they are substantially identical. Such a standard is incorrect as a matter of law. Indeed, the Media Bureau has determined that networks with programming as different as football and golf could be similarly situated. *HDO* ¶ 75.

²⁴ 47 C.F.R. § 76.1301(c).

The term “similarly situated” does not require a showing that two parties are identical in all respects. In the context of employment discrimination, for example, the Eleventh Circuit has held that disciplined employees need not show that they had engaged in “the same or nearly identical conduct” to be similarly situated.²⁵ Instead, “the law only requires ‘similar’ misconduct from the similarly situated comparator.”²⁶ In a similar context, the Seventh Circuit has stated that “[t]he law is not this narrow; the other employees must have engaged in similar — not identical — conduct to qualify as similarly situated.”²⁷

This interpretation is bolstered by the Media Bureau’s *HDO*. Citing to TWC’s arguments in its Answer that MOJO targets males aged 18-49 and WealthTV appeals to a broad audience, the Media Bureau specifically stated that “TWC appears to be arguing that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination[.]” *HDO* ¶ 17. The ALJ apparently adopted this standard, once again disregarding the Media Bureau’s finding that “this is a misreading of the program carriage statute and our rules.” *Id.* So that once again, the ALJ ignored a matter thoroughly considered by the substantive Bureau and imposed his own standard.²⁸

The Commission is required to review *de novo* the ALJ’s findings of fact.²⁹ Based upon such a review, the Commission should find that substantial record evidence does not support the ALJ’s

²⁵ *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1334 (11th Cir. 2000).

²⁶ *Id.*

²⁷ *Peirick v. Indiana University-Purdue University Indianapolis Athletics Dept.*, 510 F.3d 681, 689 (7th Cir. 2007) (quoting *Ezell v. Potter*, 400 F.3d 1041, 1050 (7th Cir. 2005)).

²⁸ *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (¶ 11) (1981); *Algreg Cellular Engineering*, 9 FCC Rcd 5098 ¶75 (Rev.Bd. 1994).

²⁹ *In re Applications of Liberty Productions, a Limited Partnership* (Memorandum Opinion and Order), 16 FCC Rcd. 12061, 12087 (¶ 57), FCC 01-129 (MM Docket No. 88-577) (on exception to an Initial Decision, the review of findings of an ALJ are *de novo*); see also *In the Matter of Steven Strouth, Complainant v. The Western Union Telegraph Company*, 70 FCC 2d 525, 563 (ALJ 1977) (“Under the Administrative Procedure Act (APA)... unlike the Federal, regular judiciary, most, if not all, proceedings before an Administrative Law Judge are always subject to *de novo* review by [t]his agency. That review comprehends both findings of fact and conclusions of law.”)

finding that WealthTV and MOJO are not similarly situated. *See Recommended Decision* ¶ 20.

Although not “identical,” WealthTV has carried its burden of demonstrating that WealthTV and MOJO are “similarly” situated. The ALJ’s findings of fact on this issue rely not only on a disregard of substantial record evidence, but also on an erroneous finding that defendants’ expert witness, Michael Egan, was credible.

First, both WealthTV and MOJO targeted a similar audience. Substantial record evidence supports that WealthTV targets a male skewed audience, aged 25-49. As described by WealthTV’s president and co-founder, Charles Herring, WealthTV designed its programming to appeal, in particular, to a male skewed audience with incomes above \$100,000 and between the ages of 25 and 49. WTV Ex. 144 at 11-12; *see also* WTV Ex. 2. In its advertisements to the public, WealthTV targeted this audience as well. *See* WTV Ex. 3, 10, 32, 34-36. As the defendants’ expert witness Michael Egan conceded, the mere fact that programming may appeal to an audience outside the target audience does not mean that the target audience is the same as the audience to which a channel appeals. Tr. 5227:9-17 (Egan). Indeed, both WealthTV and MOJO appealed to audiences outside of their target audiences.

WealthTV also presented substantial evidence regarding the programming similarities of WealthTV and MOJO. *See* WTV PFoF ¶¶ 100-04. As noted by WealthTV’s expert, Sandy McGovern, “the essential programming elements of MOJO bear a direct similarity to those of WealthTV far beyond the casual similarity of elements that may occur in genre programming.” WTV Ex. 152 ¶ 10. Ms. McGovern based this conclusion on an extensive review of both networks’ programming, websites, declarations of defendants’ expert, Michael Egan, and multiple press releases, among other sources. WTV Ex. 152 ¶ 9. Ms. McGovern’s analysis further included a review of extensive press coverage of MOJO and interviews with Robert Jacobson – a witness very

important to WealthTV's case in chief, for whom the ALJ unreasonably refused to issue a subpoena. Tr. 2162:13-15; *see infra*.

WealthTV supplied additional evidence of the similarities of its and MOJO's programming through the direct written testimony of Charles Herring. Mr. Herring properly testified that he had reached the conclusion, based on his comparisons of WealthTV and MOJO programming, that many MOJO series paralleled WealthTV in target audience. WTV Ex. 144 at 20-23. Moreover, the ALJ improperly excluded Mr. Herring's comparison of WealthTV and MOJO programming, despite the fact that it was prepared in the course of business rather than for the instant litigation. Tr. 2980:19-2981:5; WTV Ex. 25. Simply, WealthTV and MOJO provide "high definition" video programming focused on "lifestyle" programming for the "male affluent educated demographic." *See* Tr. 4389:1, 4402:6 (Asch); *see also* WTV Ex. 144 at 20; WTV Ex. 94; WTV Ex. 152 at 8-9. A review of the record evidence in light of the fact that networks need not be substantially identical to be substantially similar reveals that the record is replete with evidence of the substantial similarity of WealthTV and MOJO.

C. Substantial Evidence of Discrimination in Favor of Affiliated Programmer

The ALJ ignored substantial record evidence that defendant cable operators discriminated against WealthTV in favor of their wholly-owned network. In particular, the ALJ's findings of fact with respect to supposed "good faith" negotiations between WealthTV and each of the defendants, *Recommended Decision* ¶ 35, run counter to substantial record evidence in a number of respects.

As an initial matter, defendants' negotiations with WealthTV could not have been in good faith due to the preferential treatment defendants accorded MOJO in granting it carriage. MOJO was not required to obtain a contract at all; carriage was automatic. Defendants concede that they applied certain decision-making criteria to WealthTV but failed to apply these criteria to the similarly situated, but affiliated network, MOJO. WTV PFOF ¶ 46. While on the one hand the defendants'

decision to carry MOJO was automatic, on the other the defendants evaluated WealthTV based on multiple criteria including: (i) financial stability, (ii) experience of a vendor's management team, (iii) whether the video programming service is carried on its competitors, (iv) the price and terms of carriage associated with the programming service, (v) association of the video programming vendor with an existing standard definition brand, and (vi) bandwidth constraints. TWC Ex. 81 at 2-6; Cox Ex. 79 at 14; Comcast Ex. 3 at 4-5; Tr. at 4752 (Bond). In light of these criteria, defendants claim to have either negotiated in good faith with WealthTV or rejected carriage based on legitimate business reasons. However, substantial record evidence demonstrates that this is not the case.

Beginning in 2004 and continuing through 2007, WealthTV met with management of TWC local cable systems and received expressions of interest in WealthTV from many of the TWC systems. WTV Ex. 144 at 30. At meetings with TWC systems in Texas, New York, North and South Carolina, Wisconsin, Ohio, and New England, representatives of TWC expressed interest in carrying WealthTV if a corporate deal could be concluded. WTV Ex. 144 at 30. During 2006, WealthTV understood that both the director of programming and executive vice president of TWC expressed interest in carrying WealthTV. This is consistent with WealthTV's experience with TWC San Antonio, which offered WealthTV Video On Demand ("HD VOD") carriage beginning in 2007. WTV Ex. 144 at 34; WTV Ex. 93. Following the launch of WealthTV's HD VOD service in TWC San Antonio, WealthTV continued to reach out to TWC corporate personnel to express its interest in executing an affiliation agreement with TWC. WTV Ex. 144 at 36. After WTV filed the pre-filing notice of this complaint, TWC initiated negotiations with WealthTV regarding a carriage agreement. WTV Ex. 144 at 37-38. Despite the fact that WealthTV conceded each point of disagreement over a proposed term sheet and TWC had agreed to provide a revised term sheet, TWC later insisted that it would need to renegotiate the deal. WTV Ex. 144 at 39. WealthTV,

therefore, reasonably concluded on this basis that TWC had no intention of entering into good faith negotiations. WTV Ex. 144 at 39.

Similarly, substantial record evidence demonstrates that BHN failed to negotiate in good faith with WealthTV. BHN had the ability to enter into carriage agreements independently of TWC. Tr. 4508:15-22 (Miron). Despite expressions of interest from Bright House Tampa, WTV Ex. 144 at 40-41, BHN suggested that it was unable to enter into a carriage agreement with WealthTV as it “is covered by TWC’s national programming agreements and ... it would not be an efficient use of WealthTV’s time to continue to pursue carriage directly with BHN.” BHN Ex. 9 ¶ 12.

Cox likewise failed to negotiate in good faith for carriage with WealthTV. WTC PFOF ¶¶ 165-201. WealthTV began meeting with Cox systems in 2004 and received expressions of interest in carriage of WealthTV. WTV Ex. 144 at 45-47; Tr. 4894:18-4895:16 (Wilson). On the basis of these expressions of interest, WealthTV attempted to enter into carriage negotiations with Cox’ corporate programming department. Despite the interest of several Cox systems, the corporate office refused to enter into meaningful carriage discussions. WTC Ex. 144.

Comcast also failed to negotiate in good faith for carriage with WealthTV. Beginning in 2004, WealthTV began meeting with Comcast systems and Comcast corporate personnel to discuss the possibility of carriage. WTV Ex. 144 at 41. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END**

HIGHLY CONFIDENTIAL] WTV. Ex 144 at 42. Despite multiple additional offers from WealthTV in the form of proposed carriage agreements, Comcast failed to make any written proposals for carriage or offers of terms of carriage. Tr. at 4644-45 & 4661; *see also* WTV PFOF ¶ 156. Only after being informed that WealthTV intended to file a carriage complaint did Comcast

make an offer to carry WealthTV – and then only in a single market with 40,000 subscribers along with a hunting license.³⁰ WTV PFOF ¶ 158-62; Comcast Ex. 3 at 5-7; Tr. at 4655-56. In contrast, defendants’ carriage of MOJO was throughout the defendants’ systems without the need for a written agreement. WTC PFOF ¶ 35. After learning on April 18, 2008 that Comcast’s potential offer included linear carriage in such a small market, WealthTV reasonably concluded that Comcast did not intend to negotiate in good faith. Ex. 144 at 45; WTV PFOF ¶ 163-164.

By contrast, each of the defendants’ carriage of MOJO was automatic and not the result of an evaluative process. TWC considered the carriage of MOJO without a contract automatic due to the affiliation between iN DEMAND and TWC. *See* Tr. 3987:10-12, 4000-01. Similarly, BHN’s carriage of MOJO was automatic due to TWC’s responsibility for negotiation of affiliation agreements in its behalf. *See* Tr. at 4044, 4483-84, & 4507. Comcast did not enter into any negotiations or have a contract with MOJO or INHD for carriage, but rather granted carriage without a contract due to the affiliation between it and MOJO. *See* Tr. at 4615 & 4619-20. Cox did not subject MOJO to an evaluative process that it applied to unaffiliated networks. Instead, “by virtue of those [iN DEMAND financial] plans being approved, we effectively approved the business model, which included the idea that we would all carry it by approving the budget.” Tr. 4916:5-12.

The Commission should find that any purported failures of WealthTV to meet defendants’ discriminatorily applied evaluative criteria and any purported legitimate business reasons for failure to carry WealthTV are mere pretext to mask the discriminatory treatment of a non-affiliated network. Faced with two similarly situated networks, the defendants chose to carry their affiliated network – MOJO – without negotiations or contracts, in at least one case, merely because carriage was understood as part of the affiliated network’s budget approval process. The chasm between the

³⁰ A “hunting license” is a master agreement between a video programming service and a multiple system operator that enables the video programming service to seek carriage on the multiple system operator’s systems individually.

process used to determine carriage of WealthTV and the defendants' similarly situated, affiliated network clearly demonstrates impermissible discrimination under the Commission's rules. Even if the Commission finds that MOJO and WealthTV are not similarly situated, the vast difference in the methods used by defendants to evaluate affiliated and non-affiliated networks is clearly demonstrative of impermissible discrimination.

D. Failure to Receive into Evidence Admission of Party Opponent

The ALJ erred as a matter of law by prohibiting WealthTV from introducing hearing testimony excerpts of Stephen Burke, the Comcast Chief Operating Officer ("COO"), from a related carriage complaint hearing. A statement is not hearsay if it is "offered against a party and is... (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Ev. 801(d)(2). A corporation's COO falls squarely within the definition of a person "authorized by the party to make a statement concerning the subject."³¹ As an employee of Comcast, Mr. Burke's statements do not constitute hearsay because they were made within the scope of, and during, his employment.³² At Comcast, Mr. Bond leads the content acquisition group and in this capacity reports to Mr. Burke. Tr. 4564:5-15. Moreover, as COO, Mr. Burke was clearly authorized to make statements regarding the terms under which Comcast offers carriage. Otherwise, Mr. Burke would not have been called to testify in the related carriage case.

During the WealthTV hearing, Comcast called Madison Bond to testify. Mr. Bond is the executive vice president of content acquisition for Comcast and is responsible for Comcast's negotiation of programming and licensing agreements. Tr. 4555:9-17. Mr. Bond testified that

³¹ See e.g. *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158, 1171-72 (10th Cir. 2003).

³² See *E.E.O.C. v. LA Weight Loss*, 509 F.Supp.2d 527, 534 (D.Md. 2007).

Comcast's treatment of affiliated and non-affiliated networks was even-handed. Tr. 4707: 9-21. However, this contention is rebutted entirely by the Comcast COO's prior testimony.

On April 16, 2009, not two weeks prior to Mr. Bond's testimony, the Comcast COO testified in a carriage complaint before the same ALJ.³³ Mr. Burke's testimony would add direct evidence of Comcast's preferable treatment of affiliated networks by showing: (1) benefits accorded to affiliated networks; (2) that affiliated networks are treated "like siblings as opposed to like strangers"; (3) differing levels of scrutiny in making carriage decisions; and (4) a better ability of affiliated networks to sell to the cable distributor than non-affiliated networks.

While cross-examining Mr. Bond during the WealthTV hearing, WealthTV proffered the testimony of Mr. Burke, Tr. 4707-08, noting that it is an admission by a party opponent. Tr. 4708:14-15. Nonetheless, the ALJ sustained Comcast's objection to receiving the former testimony into evidence. The ALJ, however, lacked a proper basis for excluding this probative and relevant evidence under the Federal Rules of Evidence. Because the proffered testimony contains blatant admissions by Comcast that it treats networks differently on the basis of affiliation when deciding whether to offer carriage, its exclusion was particularly harmful to WealthTV.

E. Denial of Request for Robert Jacobson to Testify was Improper

Having assigned the burden of proceeding and proof upon WealthTV, the ALJ arbitrarily and improperly denied WealthTV's request for Robert Jacobson, president and chief executive officer of iN DEMAND -- a *de facto* subsidiary of the defendants -- to testify to the facts and circumstances regarding the development and launch of MOJO, which would have demonstrated that MOJO targeted a similar audience to WealthTV. Tr. 2162:13-16. On April 3, 2009, WealthTV submitted Complainant WealthTV's Identification of Witnesses for Trial.³⁴ In the Identification of

³³ See *NFL Enterprises LLC v. Comcast Cable Communications, LLC*, (MB Docket 08-214).

³⁴ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.* Complainant WealthTV's Identification of Witnesses for Trial, MB Docket No. 08-214 (Apr. 3, 2009).

Witnesses, WealthTV identified that it would present the testimony of Charles Herring, Sandy McGovern, Mark Kersey, and Gary Turner. It is important to note that on April 10, 2009, one week after WealthTV submitted this list of witnesses, the defendants filed a motion *in limine* to exclude significant portions of Charles Herring's written direct testimony. The motion claimed that portions of the testimony constituted improper expert testimony and hearsay, and that Charles Herring lacked personal knowledge of the facts described.³⁵ The portions of Mr. Herring's testimony that defendants sought to exclude contained evidence that would have significantly bolstered WealthTV's demonstration of discrimination, namely Mr. Herring's testimony regarding iN DEMAND and its management of, strategies regarding, and target demographic for MOJO.

In light of the motion *in limine*, on April 16, 2009, WealthTV filed a Contingent Request for Issuance of Subpoena *ad Testificandum* requesting the ALJ to issue a subpoena for Robert D. Jacobson.³⁶ If the ALJ had granted WealthTV's request for a subpoena, Mr. Jacobson could have provided testimony regarding not only the information above, but also established a foundation for statements made in the trade press and press releases and described: (1) categories of programming that iN DEMAND assigned to MOJO; (2) advertising solicited by MOJO; and (3) the affiliation negotiations between iN DEMAND and defendants.

The ALJ addressed the motion *in limine* during the first day of the hearing. The Judge directed WealthTV and defendants to review Mr. Herring's testimony, remove portions on which WealthTV and the defendants could agree, and submit amended written direct testimony. Tr. 2148-49, 2154:7-20.³⁷ As a result of this effort, significant portions of Mr. Herring's written direct

³⁵ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Defendants' Motion In Limine to Exclude Portions of the Testimony of Charles Herring, MB Docket No. 08-214 (April 10, 2009).

³⁶ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.* Contingent Request for Issuance of Subpoena ad Testificandum, MB Docket No. 08-214 (April 16, 2009).

³⁷ Responding to WealthTV's request to submit amended written testimony after Mr. Herring's cross-examination in the interests of time, the ALJ chastised that such a request was "just puzzling to [him] to no end, particularly from a party that's been screaming about time." Tr. 2155:18-21.

testimony were removed from the amended version. Without objection, the ALJ accepted the amended testimony into evidence. Tr. 2873. After addressing the motion *in limine*, the ALJ turned to WealthTV's contingent request for issuance of a subpoena for Robert Jacobson. WealthTV explained that portions of Mr. Herring's testimony, to which the defendants objected, relied on statements of Mr. Jacobson. Tr. 2159:3-9. Mr. Jacobson would also be a necessary witness to lay a proper foundation for admission of statements in press releases for the truth of the matter asserted. *See generally* Tr. 2159-60.

While the ALJ did admit certain press releases related to MOJO and iN DEMAND, he expressly noted that the press releases were admitted into evidence only for the purpose of showing that iN DEMAND issued a press release. The ALJ did not admit the press releases to prove the truth of the matter asserted, Tr. 2283-2284; 2456:11-19, and inadequately considered them in the Recommended Decision. *Recommended Decision* ¶ 22 n. 77. If the ALJ had granted WealthTV's motion for the issuance of a subpoena, WealthTV could have elicited significant testimony regarding multiple iN DEMAND press releases, *e.g.* WTV Ex. 94, which supported a finding that WealthTV and MOJO were similarly situated. Therefore, WealthTV submits that the Commission should remand the case to the ALJ, reopen the record, and issue a subpoena to compel the testimony of Robert Jacobson.

Alternatively, the statements of iN DEMAND and Mr. Jacobson should have been admitted as admissions by a party opponent. While iN DEMAND itself was not a party to these actions, it was wholly owned by the defendants, Tr. 3974:21-3975:3 (Witmer), and wholly controlled by the defendants. Tr. 3975:4-22. As described by Melinda Witmer, the executive vice president and chief programming officer for TWC and a member of the iN DEMAND board of directors, "[i]t's one company per vote." Tr. 3975:22. Given that the Commission's rules specifically provide that the

Federal Rules of Evidence “may be relaxed if the ends of justice will be better served by so doing”³⁸ the ALJ’s refusal to admit in DEMAND and Mr. Jacobson’s statements for the truth of the matter asserted was an abuse of discretion.

F. Improper Bias of ALJ

The ALJ made arbitrary and capricious findings of fact, not supported by the record evidence, against WealthTV which demonstrated an improper bias against it, most notably WealthTV’s initially successful motion to revoke the *HDO* due to the then ALJ’s failure to meet the hearing schedule ordered by the Media Bureau.

The *HDO* contained a reasonable schedule for proceeding in this matter. Under the *HDO*, the Media Bureau ordered the ALJ “within 60 days of this Order, [to] resolve all factual disputes and submit a recommended decision and remedy, if appropriate.” *HDO* ¶¶ 124, 128, 132, 136.³⁹ It is well established that where the Commission or the Media Bureau have thoroughly considered a particular question in a hearing designation order, “the ALJ should not undo what was done in the *HDO*.”⁴⁰ This is, however, precisely what the ALJ did through the December 2, 2008 Procedural and Hearing Order.⁴¹ WealthTV filed a motion on November 24, 2008 seeking revocation of the *HDO* because the continuing administrative delay would have the effect of causing additional harm to WealthTV. *See HDO Revocation Motion*. In the motion, WealthTV asserted that the ALJ’s delay in resolving the carriage complaints was inconsistent with the public interest. *Id.* at 2. WealthTV

³⁸ 47 C.F.R. § 1.351; *see also Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Complainant’s Motion in Opposition to Defendants’ Motion In Limine to Exclude Portions of the Testimony of Charles Herring at 2, 6, MB Docket No. 08-217 (April 16, 2009).

³⁹ This was consistent with its determination that the *prima facie* case had been made and that the burden should have shifted to defendants.

⁴⁰ *In re Applications of Bennett Gilbert Gains, Interlocutory Receiver for Magic 680, Inc.*, Decision, 8 FCC Rcd 1405 (Rev.B. 1993); *Anax Broadcasting, Inc.*, 87 FCC2d 483 ¶ 11 (1981).

⁴¹ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Order, MB Docket No. 08-214, FCC 08M-50 (rel. Dec. 2, 2008).

further argued that the ALJ's actions constituted an "adverse ruling with respect to the petitioner's participation in the proceeding." *Id.* at 4.

Supplementing its motion on December 2, 2008, WealthTV described the November 25, 2008 pre-hearing conference, which provided further support for its motion to revoke the *HDO*. As described in the supplement, Chief Judge Sippel, who had replaced Judge Steinberg due to Judge Steinberg's imminent retirement, failed to indicate whether consideration was given to assigning more than a single administrative law judge to the six carriage complaints proceeding in MB Docket 08-214. In the supplement, WealthTV challenged the ALJ's regard for due process through his abrogation of the *HDO*, noting that the proper observance of due process should have considered the "harm and delay inflict[ed] on a small business that seeks recourse to the Commission's processes for relief from discrimination."⁴²

The Media Bureau agreed. In its *December 24 Order*, the Media Bureau found that the "ALJ exceeded his authority by setting a hearing date beyond the Hearing Designation Order's 60-day deadline" and that "the ALJ's delegated authority over these hearing matters has thus expired[.]"⁴³ The Media Bureau's order described the multiple issues on which the ALJ failed to conform to the *HDO* including that "rather than limit the hearing to a resolution of factual disputes that the *HDO* designated for hearing, the ALJ would require re-litigation of all disputes in the case and review all evidence *de novo*."⁴⁴ The Media Bureau criticized the ALJ for determining he could not reach a recommended decision in the requisite period of time after "the ALJ decided to disregard the facts and conclusions recited in the Hearing Designation Order, and instead give *de novo* consideration to

⁴² *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Supplement to Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, MB Docket No. 08-214 (Dec. 3, 2008).

⁴³ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Memorandum Opinion and Order ¶ 2, DA 08-2805, MB Docket 08-214 (rel. Dec. 24, 2008).

⁴⁴ *Id.* ¶ 10 (emphasis added).

all issues in the matter.”⁴⁵ The Media Bureau continued, “the ALJ had no authority to expand the designated issues for hearing in this manner or extend the deadline for issuing a recommended decision” and determined that the ALJ’s authority had expired.⁴⁶

In reinstating the *HDO sua sponte*, the Commission notably did not address burdens of proof or the ALJ’s assertion that he could disregard the Media Bureau’s factual findings through *de novo* review. Rather, the Commission simply reinstated the *HDO* on a revised schedule.⁴⁷ During the hearing, the ALJ also made statements evincing bias and a lack of understanding of the Commission’s carriage rules. These included a statement implying that defendants could use carriage distribution rights at their sole discretion:

I’m just bothered by the fact that here you’ve got a valuable piece of – valuable property rights. You know, it’s like having – It’s like back when the king gave the governor of a province or something he had the right to set up a toll road and he sets up a toll road and he says, “Okay. We’re going to set it up this way for people of the royalty and over here we have the people who are not royalty. They’re going to have to pay tolls and all that kind of stuff.” I mean it’s – This is the way it is. I mean this is the way it’s set up.

Tr. 3855-56.

These matters evidence a prejudice against WealthTV and materially affected his findings of fact in these cases. In its *de novo* review of the record, the Commission should reconsider the substantial record evidence of improper discrimination in this light.

G. Testimony of Michael Egan Lacked Sufficient Indicia of Reliability

The ALJ ignored substantial record evidence that the testimony of defendants’ expert witness, Michael Egan, lacked sufficient indicia of reliability. The Commission should, therefore, give little weight to Mr. Egan’s conclusion that WealthTV and MOJO were not similarly situated and

⁴⁵ *Id.* ¶ 17 (emphasis in original).

⁴⁶ *Id.* ¶¶ 17, 19.

⁴⁷ *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, 24 FCC Rcd 1581 (2009).

that TWC did not discriminate against WealthTV.⁴⁸ As discussed at length in Complainant's Proposed Reply Findings of Fact and Reply Conclusions of Law, WTV RPFoF at ¶¶ 55-62, the testimony of defendants' expert witness Michael Egan is unreliable. The ALJ erred in finding that Mr. Egan's testimony was credible. *Recommended Decision* ¶ 25. In fact, substantial record evidence supports the opposite conclusion.

Mr. Egan testified inconsistently with his prior statements regarding the demographic appeal of MOJO. *Compare* Egan Declaration, TWC Answer to WTV's Complaint *with* TWC Ex. 85 at 8; Tr. at 5197:4-5198:13, 5200:9-5201:14 (Egan). Mr. Egan's genre analysis of WealthTV and MOJO programming did not rely on any objective, standardized industry tools, Tr. 5217:11-18, but instead substituted subjective, self-serving genres for the purpose of his expert report. Tr. 5220:14-5221:1, 5226:11-14. Mr. Egan was unwilling to acknowledge demonstrable changes in MOJO's audience demographics following its launch from those of INHD. WTV RPFoF ¶ 59. Mr. Egan's admitted methodology for performing a "Look and Feel" analysis consisted of watching MOJO at home a few times a week approximately a year before as a sporadic casual user. Tr. 5251:4-7, 5251:13-18, 5251:21-5252:8. Indeed, it is particularly difficult to understand how Mr. Egan's testimony could be given any weight in light of his admission that his casual and sporadic review of MOJO programming occurred without this litigation in mind, but rather to what he acknowledged was "kicking up [his] feet, having a beer[.]" Tr. 5251:16-18 (Egan). Taken together, the ALJ's finding of fact that Mr. Egan's testimony was credible is contradicted by substantial record evidence.

H. Ultimate Conclusion

The *Recommended Decision* and record contain multiple errors of law with respect to the admission of relevant evidence and the allocation of burdens of proof. The ALJ's findings of fact contradict substantial record evidence. On the basis of these erroneous findings of fact and

⁴⁸ See generally, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

conclusions of law, the ALJ improperly concluded that respondents had not discriminated against WealthTV in favor of a similarly situated, affiliated programming service. Further, in light of the failure to find discrimination by Defendants against WealthTV, the ALJ failed to grant the remedy of mandatory carriage sought by WealthTV.

IV. Conclusion

WHEREFORE, in light of the foregoing, as well as the reasons set forth in WealthTV's Proposed Findings of Fact and Conclusions of Law, WealthTV respectfully request that the Commission reverse the Recommended Decision; sustain WealthTV's carriage complaint; and order WealthTV's carriage on the same Defendant systems on which Defendants carried MOJO,

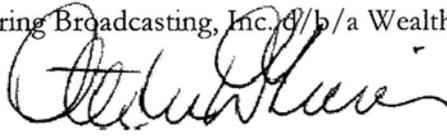
[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

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[END HIGHLY CONFIDENTIAL] In the alternative, WealthTV respectfully requests the Commission reverse and remand this case for further hearing; reopen the record; permit additional discovery; and refer this case to an ALJ for reconsideration and further findings of fact, whether defendants' justifications for failure to grant WealthTV carriage are mere pretext.

Respectfully submitted,

Herring Broadcasting, Inc. d/b/a WealthTV

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Dated: November 16, 2009

CERTIFICATE OF SERVICE

I, Rory E. Adams, certify that copies of the foregoing “Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel” were served via U.S. mail on the following:

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