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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	MB Docket No. 08-214
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant	)	File No. CSR-7709-P
v.	)	
	)	
Time Warner Cable Inc., Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant	)	File No. CSR-7822-P
v.	)	
	)	
Bright House Networks, LLC, Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant	)	File No. CSR-7829-P
v.	)	
	)	
Cox Communications, Inc., Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV, Complainant	)	File No. CSR-7907-P
v.	)	
	)	
Comcast Corporation, Defendant	)	

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Federal Communications Commission
Office of the Secretary

DEFENDANTS' JOINT REPLY TO WEALTHTV'S EXCEPTIONS TO THE RECOMMENDED DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

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SUMMARY

The *Recommended Decision* is the result of a comprehensive and probing adjudication of the issues designated for hearing. After discovery (including document production and expert witness depositions), pre-filed testimony, and 10 days of live witness testimony, Chief Judge Sippel made detailed findings of fact and credibility findings for each witness. The results were unequivocal—"the [D]efendants never violated section 616 of the Act or section 76.1301(c) of the rules."

WealthTV selects small, unrepresentative portions of the record out of context to argue that Defendants unlawfully discriminated against WealthTV, that the Chief Judge made erroneous evidentiary rulings, and that the Chief Judge was biased in his treatment of WealthTV. These arguments ring hollow given the obvious care with which the Chief Judge conducted the hearing, weighed the evidence, and reached his factual and legal conclusions.

First, the ALJ properly placed the burden of proof on the complainant, as has historically been the case in American jurisprudence. Nothing in section 616 of the Act or the Commission's rules mandates shifting the burden of proof to Defendants. The Media Bureau's determination in the *HDO* that WealthTV established a *prima facie* case signified only that WealthTV avoided dismissal on the pleadings, not that Defendants had to shoulder the burden of proof at trial. The ALJ afforded both WealthTV and Defendants the opportunity to present their cases and concluded, based on the record as a whole, that Defendants did not discriminate against WealthTV on the basis of affiliation or non-affiliation.

Second, the overwhelming weight of the record supports the ALJ's findings that (i) WealthTV and Defendants' affiliated network, MOJO, were not substantially similar, and (ii) each Defendant acted in good faith and did not discriminate against WealthTV on the basis of affiliation. WealthTV's own documents (including marketing materials) and testimony reflected that it lacked MOJO's focus on attracting young, affluent males. WealthTV's expert conceded that her opinion of

WealthTV's programming was not based on an analysis of WealthTV's schedule but on an unrepresentative sample selected by WealthTV itself. Defendants' programming expert Michael Egan confirmed that the two networks focused on different programming genres and had a distinctive look and feel, conclusions that WealthTV's expert did not rebut. Further, credible and unrebutted testimony from key programming executives for each Defendant established that each had substantial and legitimate business reasons for their carriage decisions regarding WealthTV.

Third, the ALJ's evidentiary rulings were well-supported and in accordance with the Federal Rules of Evidence. The ALJ properly excluded a transcript of a Comcast executive's testimony in a separate case because WealthTV did not offer a witness competent to sponsor that transcript into evidence and took no other steps to lay a foundation for introduction of that transcript as a party admission. The ALJ also correctly declined WealthTV's "contingent" request to issue a subpoena to a third-party executive who was not on WealthTV's witness list and whose testimony would have been redundant of another executive from the same company.

Fourth, WealthTV's assertion of bias is both untimely and frivolous. Its challenge to the ALJ's pre-hearing, December 2, 2008 Order cannot be raised now, and it has failed to meet its heavy burden of showing that the Chief Judge "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible." That simply did not happen.

Finally, WealthTV cannot belatedly complain about the basis for testimony of an expert (Mr. Egan) whom the ALJ found to be credible and persuasive and to whose qualifications WealthTV raised no objection. In any event, WealthTV provided no evidence to show that Mr. Egan's work was "wrong or unreliable."

In sum, the *Recommended Decision* is firmly rooted in the record of these cases and correctly applies the law and the Commission's rules. WealthTV has offered no reason why the Commission should not adopt that *Recommended Decision* in full.

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I. PRELIMINARY STATEMENT

Time Warner Cable Inc. ("TWC"), Bright House Networks, LLC ("Bright House"), Cox Communications, Inc. ("Cox") and Comcast Corporation ("Comcast") (collectively, the "Defendants"), pursuant to sections 1.276 and 1.277 of the Commission's rules,[1] hereby jointly file this Reply in response to the Exceptions of Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV") to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel ("Chief Judge" or "ALJ").[2]

The two-week trial before the Chief Judge, in which each of the parties' witnesses testified live and was subjected to cross-examination, demonstrated convincingly that Defendants did not discriminate on the basis of affiliation in their independent determinations to decline carriage on terms demanded by WealthTV. The trial revealed that, contrary to the speculative and unsubstantiated allegations advanced by WealthTV in its carriage complaints, Defendants' carriage decisions regarding WealthTV had nothing whatsoever to do with their carriage of a different network that they jointly owned, MOJO. As the ALJ correctly found, the overwhelming weight of the evidence showed that Defendants had legitimate and sound business reasons for rejecting WealthTV's proposals, reasons that were unrelated to their carriage of MOJO— a network that pre-dated WealthTV, had different programming than WealthTV, and appealed to a different target demographic.

WealthTV's Exceptions are as misguided as the arguments and evidence that WealthTV presented to the Chief Judge. Time and again, WealthTV misleadingly cites carefully chosen snippets of the record, ignoring the overwhelming evidence upon which the ALJ based his well-reasoned decision and credibility findings. The *Recommended Decision* is firmly rooted in the record.

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[1] 47 C.F.R. §§ 1.276, 1.277.

[2] *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 08-214, FCC 09 D-01 (ALJ rel.

Contrary to WealthTV's assertions, the Chief Judge did not wrongly allocate the burden of proof to WealthTV, did not make improper evidentiary rulings, did not err in finding the respective programming and target audience of WealthTV and MOJO to be dissimilar, and correctly concluded that Defendants' independent decisions regarding WealthTV had nothing to do with the network's lack of affiliation with Defendants. Finally, WealthTV's allegation of "bias" on the part of the ALJ is frivolous; the fact that the argument even is advanced demonstrates the fundamental weakness of WealthTV's Exceptions.

In short, nothing in the Exceptions provides any basis for the Commission to deviate from the *Recommended Decision* of the ALJ, who weighed the evidence, evaluated the credibility of the witnesses, and issued a recommendation fully supported by the record and in accord with the views of the Enforcement Bureau. After detailing the findings of fact and thoroughly assessing the legal issues designated in the *Hearing Designation Order*,[3] the Chief Judge determined that WealthTV "failed completely" to prove unlawful discrimination and that "the [D]efendants *never* violated section 616 of the Act or section 76.1301(c) of the rules."[4] There is no basis in law or the record to reject or second guess that determination.

II. STATEMENT OF THE CASE

WealthTV, a national video programming vendor that offers programming related to "luxury lifestyles," filed four separate program carriage complaints, alleging that each Defendant violated section 616 of the Communications Act of 1934, as amended (the "Act"), and section 76.1301(c) of

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Oct. 14, 2009) (the "*Recommended Decision*"). WealthTV's filing is hereafter referred to as the "Exceptions."

[3] *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Mem. Op. and H'rg Designation Order, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008), *modified by Erratum* (ALJ rel. Oct. 15, 2008) (collectively the "*HDO*"), *modified by Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Mem. Op. and Order, MB Docket No. 08-214, FCC 08M-47, ¶ 8 (ALJ rel. Nov. 20, 2008) ("*November 20 Order*"), *corrected by Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Erratum, MB Docket No. 08-214 (ALJ rel. Nov. 21, 2008).

[4] *Recommended Decision* ¶¶ 62, 63 (emphasis added).

the Commission's rules.[5] Because each complaint presented an "intricate and unique situation" that required additional fact-finding beyond the pleading materials originally presented to the Media Bureau,[6] in the *HDO* the Media Bureau instructed the ALJ to develop a factual record and issue a recommended decision addressing whether Defendants unlawfully discriminated in the selection, terms or conditions of carriage of WealthTV on the basis of affiliation.[7] The parties thereafter engaged in substantial document and deposition discovery, and submitted lengthy pre-trial briefs, written direct testimony of fact and expert witnesses, and hundreds of trial exhibits.[8]

The ALJ received the evidence during 10 days of live testimony and cross-examination by the parties and the Enforcement Bureau. Thirteen fact witnesses and five expert witnesses testified.[9] After the close of the hearing, the parties each filed proposed and reply findings of fact and conclusions of law and proposed recommended decisions.[10] The Enforcement Bureau, "representing the public interest," filed Comments urging the Chief Judge to deny all four complaints because it "agrees with Defendants that WealthTV failed to present *any* direct documentary or testimonial evidence that any of the Defendants' refusals to carry WealthTV were based on considerations of affiliation or non-affiliation."[11]

In the *Recommended Decision*, the Chief Judge explained why his evaluation of all the evidence, witness credibility, and legal argument was critical:

> The evidence compiled after the completion of the evidentiary hearing[] is more complete, accurate, and reliable than the evidence before the Media Bureau when it issued the *HDO*. After the *HDO*

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[5] *See id.* ¶¶ 1, 7.
[6] *See id.* ¶ 3 (citing *November 20 Order*).
[7] *Id.* ¶ 2.
[8] *See generally Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Further Revised Procedural and Hr'g Order, MB Docket No. 08-214, FCC 09M-08 (ALJ rel. Jan. 29, 2009); *see also Recommended Decision* ¶ 5.
[9] *Recommended Decision* ¶ 5.
[10] *Id.* ¶ 6.
[11] *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Enforcement Bureau Comments, MB Docket No. 08-214, ¶ 17 (Jul. 8, 2009) ("Comments") (emphasis added).

> was issued, the parties obtained additional information through discovery. During the course of 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 [its expert] Ms. McGovern that programming of MOJO deliberately replicated the concepts, genres, formats and targeted audiences of WealthTV. Also, some of the material WealthTV had presented to the Media Bureau, such as the written declaration of [another of] WealthTV's expert[s], Mr. Mark Kersey, was found to be unreliable at the hearing and was rejected.[12]

With that foundation, the Chief Judge concluded, based on the whole record, 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."[13]

III. ARGUMENT

A. The Commission Affords Deference to an ALJ's Credibility Findings

Although the Commission's review is *de novo*, "Commission precedent requires that credibility findings of an ALJ be given decisional deference, unless those findings are in irreconcilable conflict with the record evidence."[14] WealthTV misstates this settled standard of review, ignores the ALJ's witness credibility determinations and fails to demonstrate that the ALJ's findings are inconsistent with—let alone in irreconcilable conflict with—the record evidence.

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[12] *Recommended Decision* ¶ 60 (citations omitted). The Media Bureau's finding that WealthTV made a *prima facie* case of unlawful discrimination relied heavily on Mr. Kersey's fundamentally unreliable declaration. *See HDO*, 23 FCC Rcd at 14796, 14801, 14805, 14810, 14812.

[13] *Recommended Decision* ¶ 74.

[14] *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2535 (Rev. Bd. 1989) (citation omitted). *See also Signal Ministries, Inc.*, 104 FCC 2d 1481, 1486 (Rev. Bd. 1986) (absent "patent conflicts with the record evidence, the Commission accords special deference to a presiding officer's credibility findings since the trier of fact has had a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility") (internal citations omitted); *Mobilfone Commc'ns*, 95 FCC 2d 668, 673 (Rev. Bd. 1983); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 13 (Rev. Bd. 1987).

B. The ALJ Properly Assigned the Burden of Proof to WealthTV

At the hearing, the ALJ properly placed the burden of proof on the complainant WealthTV, as "has historically been the case in American jurisprudence."[15] In its Exceptions, WealthTV erroneously asserts that the burden of proof necessarily shifted to Defendants as a consequence of the Media Bureau's conclusion in the *HDO* that WealthTV had established a *prima facie* case.[16] The *HDO* did not shift the burden of proof. It merely reflected the Media Bureau's determination that, based on the untested allegations in WealthTV's Complaint, WealthTV had made a sufficient showing to avoid summary dismissal.[17] The *HDO* itself correctly directed the ALJ to "resolve all factual disputes" in the administrative hearing without any suggestion that the burden of proof would lie with Defendants at that hearing.[18]

As WealthTV concedes, neither section 616 nor the Commission's program carriage rules provides for any burden shifting to Defendants.[19] Indeed, the Commission has never held that,

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[15] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56, ¶ 20 (rel. June 29, 2009) ("[T]he Commission always requires the petitioner to produce sufficient evidence and analysis to warrant granting the relief sought"); *see also Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351 (2009).

[16] Exceptions at 6-7. WealthTV also asserts that the Chief Judge improperly placed the burden on WealthTV to demonstrate an unreasonable restraint on WealthTV's ability to compete "in the marketplace..., a standard of his own making." *Id.* at 9-10. WealthTV is wrong on multiple counts. The Chief Judge referenced "the marketplace" only in a single sentence where he *rejected* the standard proposed by WealthTV. *Recommended Decision* ¶ 73. Drawing directly from the statutory language, the ALJ concluded—as the evidence before him dictated—that "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*." *Id.* (emphasis in original). In any event, given that the evidence is so definitive regarding a lack of discrimination, any issue regarding the second part of the statutory test is moot.

[17] The Media Bureau's determination that WealthTV had made out a *prima facie* case is analogous to finding that a plaintiff has survived summary judgment and is entitled to proceed to trial. There is no connection between such a finding and the allocation of the burden of proof at trial. *See, e.g., Pavlik v. Lane Ltd./Tobacco Exps. Int'l*, 135 F.3d 876, 889 (3d Cir. 1998) (observing lack of connection between burden of proof at summary judgment stage and "more difficult burden" at trial stage).

[18] *HDO* ¶¶ 124, 128, 132, 136.

[19] Exceptions at 6.

once a *prima facie* case is established, the burden of proof shifts.[20] Accordingly, as explained in the *Recommended Decision*, the ALJ acted within his sound discretion and in accord with usual practice in assigning the burden of proof to WealthTV.[21] The Enforcement Bureau agreed that "the Presiding Judge properly exercised his authority by assigning the burdens to WealthTV."[22]

WealthTV's reliance on the Media Bureau's December 24, 2008 Order[23] is misplaced. The Commission expressly rescinded that order on January 27, 2009.[24] In its *January 27 Order*, the Commission rejected the Media Bureau's stated approach of determining the matter "solely through pleadings and exhibits," and instead instructed the ALJ to proceed with a full hearing "consistent with the mandates of fairness and due process."[25]

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[20] Moreover, such burden-shifting is incompatible with First Amendment concerns. While the ALJ did not reach the important issue of whether compelled carriage of WealthTV would violate Defendants' First Amendment rights, the ALJ's recommendation is consistent with Defendants' First Amendment right not to be forced by the Commission to distribute content "which reason tells them should not be published." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (internal citation and quotations omitted); *see also Hill v. Colo.*, 530 U.S. 703, 748 (2000); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[21] *Recommended Decision* ¶ 58 (citing *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"); 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").

[22] Comments ¶ 5.

[23] *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, Mem. Op. and Order, MB Docket No. 08-214, 23 FCC Rcd 8316 (MB 2008).

[24] *Herring Broad., Inc. d/b/a WealthTV, WealthTV v. Time Warner Cable Inc.*, Order, MB Docket No. 08-214, 24 FCC Rcd 1581, 1582 (2009) ("*January 27 Order*").

[25] *Id.* ¶ 2. WealthTV's reliance on the Media Bureau's use of a "burden-shifting framework" in the *MASN Arbitration*, or that applied in program access disputes under section 628 of the Cable Act, is similarly misplaced. *See* Exceptions at 8 (citing *TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd 15783 (MB 2008), *app. rev. pending* ("*MASN Arbitration*")). The *MASN Arbitration* decision is a Bureau-level order pending on review by the full Commission, which is not bound by prior findings by staff in this case or by precedent issued by the staff under delegated authority. *See Greater Media Radio Co.*, 15 FCC Rcd 7090, 7095 n.13 (1999) (overruling Bureau precedent). The program access provisions establish a different discrimination standard than that found in section 616 of the Act and section 76.1301(c) of the rules, and therefore cannot serve as a viable benchmark for a burden-shifting rule here. *Compare* 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c) *with* 47 U.S.C. § 548(c)(2)(B) and 47 C.F.R. § 76.1002(b).

Nor did the Chief Judge's decision not to shift the burden deprive WealthTV of an opportunity to show affiliation-based discrimination through circumstantial evidence, as it erroneously asserts. To the contrary, the ALJ properly permitted WealthTV to make its case, which in fact was predicated entirely on circumstantial evidence of the purported "substantial similarity" of WealthTV and MOJO and differential treatment by Defendants. Although demonstrating that WealthTV and MOJO were not "substantially similar" alone would have been sufficient, each Defendant also rebutted WealthTV's circumstantial case by presenting overwhelming evidence of the non-discriminatory and non-pretextual business reasons for rejecting carriage of WealthTV.[26] The ALJ's decision to accept Defendants' evidence and reject WealthTV's had nothing to do with the burden of proof and everything to do with the ALJ's determination that Defendants' evidence was more persuasive.[27]

C. The ALJ Correctly Determined that WealthTV and MOJO Are Not Substantially Similar

WealthTV next contends that "[t]he ALJ improperly determined that WealthTV was not similarly situated to [D]efendants' affiliated network MOJO … by improperly requiring WealthTV to show that its programming and audience appeal are substantially identical to that of MOJO."[28] But the Chief Judge did not impose any such "substantial identity" requirement on WealthTV. To the contrary, based on a full consideration of the parties' proof and the credibility determinations

[26] *See, e.g.*, *Recommended Decision* ¶¶ 38-39.

[27] Indeed, as the ALJ noted, WealthTV's discussion of burden-shifting has no relevance to the result: "In the final analysis, the manner in which the burden of proof is allocated becomes immaterial to the decision. Whatever the allocations 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." *Id.* ¶ 62.

[28] Exceptions at 10.

that he made, the Chief Judge correctly concluded that WealthTV had failed to demonstrate any material "similarity" between WealthTV and MOJO.[29]

WealthTV's challenge is based on a narrow and selective reading of the record. For example, WealthTV argues that the record reflects that "both WealthTV and MOJO targeted a similar audience" of men aged 25 to 49 earning more than $100,000 per year.[30] To support its objection to the Chief Judge's findings, WealthTV cites only Mr. Herring's self-serving and "contradictory" testimony, the testimony of a purported advertising expert, Gary Turner,[31] a handful of WealthTV advertisements,[32] and a single marketing slide reflecting WealthTV's purported target demographic.[33]

No one disputes that MOJO targeted a younger, upscale male audience; the ALJ, however, correctly found that WealthTV did not.[34] The ALJ considered and rejected WealthTV's evidence, relying instead on Defendants' substantial credible testimony and documentary evidence that showed that WealthTV and MOJO did not target similar audiences.[35] Defendants presented numerous **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[29] *Recommended Decision* ¶¶ 20-34; *see also id.* at 10 (subheading entitled "MOJO and WealthTV Networks Not Similarly Situated"); *id.* ¶ 63 (WealthTV failed to make a showing by circumstantial evidence that there was "uneven treatment of similarly situated entities").

[30] Exceptions at 12.

[31] *Recommended Decision* ¶ 31 n.118 (citing WealthTV Ex. 146, Turner Decl. ¶ 3). The Chief Judge noted that Mr. Turner's sworn statement that WealthTV "always described itself" as a "male focused channel" was "not credible given the weight of the contrary evidence" in the case. *Id.* Defendants submit that none of Mr. Turner's expert opinions were credible—Mr. Turner only worked for a few hours on his expert report, the initial draft of which was prepared by Mr. Herring. *See* Tr. 2720-21 (Turner).

[32] *Recommended Decision* ¶ 34.

[33] *Id.* (citing WealthTV Exs. 2, 117, 120 and 122; WealthTV Ex. 144, Herring Dir. Test. at 11-13).

[34] *Recommended Decision* ¶ 20.

[35] *See id.* ¶¶ 27-34.

[redacted][36] [redacted] [redacted][37] **[END HIGHLY CONFIDENTIAL]** Similarly, the Chief Judge noted the absence of references to 25-to-49-year-old men in WealthTV's marketing presentations to MVPDs and prospective advertisers.[38] Indeed, those presentations included one in which WealthTV described its network as "targeting the most affluent viewer, 25-60+, educated, equal appeal to men and women."[39] Time and again WealthTV described itself as having a "broad appeal," competing for advertisers with magazines and programming networks that were both "female-skewed" and "male-skewed" or with ones that were simply "gender-neutral."[40] Statements on WealthTV's website and in press releases consistently described WealthTV as having "broad appeal" without any reference to specific appeal to affluent men aged 25 to 49.[41] The ALJ also took note of Mr. Herring's "inconsistent" sworn testimony in unrelated litigation that WealthTV's programming "appeals to about a 25 to 65+ crowd," irrespective of gender, and that "the only group that would not find WealthTV attractive was 'monks that have taken a vow to poverty.'"[42]

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[36] *Id.* ¶ 28.
[37] *Id.* ¶ 28 (citing Tr. 3035, 3038, 3047 (Herring); Tr. 3795-96 (McGovern)).
[38] *Id.* ¶¶ 29-30 (citing TWC Ex. 4 at 4-7 and 4-26; TWC Ex. 9 at 9-3 and 9-35; TWC Ex. 28 at 28-2; Comcast Ex. 22 at 22-2 and 22-18; Comcast Ex. 23 at 23-8; Cox Ex. 6 at 6-3; Cox Ex. 56 at 56-3; Tr. 3100-3114, 3144-45, 3149-52 (Herring)). Again, Ms. McGovern acknowledged that most networks would identify their audience targets in marketing materials. *Id.* ¶ 30 (citing Tr. 3783 (McGovern)).
[39] *Id.* ¶ 29 (citing TWC Ex. 28 at 28-2).
[40] *Id.* ¶ 30 (citing Cox Ex. 23 at 23-7; TWC Ex. 9 at 9-14; Comcast Ex. 22 at 22-3; Cox Ex. 56 at 56-7; Tr. 3100-03, 3118 (Herring)).
[41] *Id.* ¶ 33 (citing TWC Ex. 102). The Enforcement Bureau readily agreed that WealthTV targeted a broad audience. *See* Comments ¶ 13.
[42] *Recommended Decision* ¶ 32 (citing TWC Ex. 139 at 139-4, 6; Tr. 3054-55 (Herring)); *see also id.* (stating that "Mr. Herring acknowledged in cross-examination in this case his belief that WealthTV had a broad appeal to men and women" (citing Tr. 3236 (Herring); WealthTV Ex. 144, Herring Dir. Test. at 11-20)).

Moreover, WealthTV cannot validly dispute the ALJ's conclusion that "the preponderance of the record evidence establishes that MOJO and WealthTV [did not] air the same type of programming…"[43] Although WealthTV urges the Commission to rely on the testimony of its expert, Ms. McGovern, it fails to note that the Chief Judge expressly discounted her testimony as an independent expert because her opinions were based exclusively on her review of an unrepresentative sample of programming cherry-picked for her by Mr. Herring.[44] On cross-examination, moreover, Ms. McGovern ultimately conceded that when she considered the network's programming as a whole, rather than the slice that had been selected for her by WealthTV's principal, there were substantial programming differences between WealthTV and MOJO.[45]

In contrast, the Chief Judge found probative and accepted the analysis of WealthTV's and MOJO's programming presented by Defendants' expert, longtime cable industry veteran Michael Egan.[46] Mr. Egan performed a quantitative "genre analysis" of the programming on each of the two channels, determining, for example, that "54 percent of MOJO's programming time was devoted to sports, music, and movies whereas only three percent of WealthTV's programming time consisted of shows in those genres."[47] Mr. Egan's testimony regarding the disparity in the "hip, urban, irreverent" "look and feel" of MOJO and the "calmer, more mature attitude" of WealthTV was

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[43] *Id.* ¶ 20.
[44] *See id.* ¶ 25 (citing Tr. 3715, 3814-27, 3871-72, 3799-3803 (McGovern)).
[45] *Id.* ¶ 25 (citing Tr. 3715, 3814-27, 3871-72, 3799-3803 (McGovern)). The Chief Judge also correctly rejected Mr. Herring's views regarding comparative programming. *See id.* ¶ 22 n.78 (noting that "Mr. Herring is not an expert in network programming" and that his statements about WealthTV's similarities or lack thereof to other networks were "not the product of any quantitative analysis"). Despite WealthTV's protests (*see* Exceptions at 13), the ALJ's exclusion of that comparison was also proper because he found, as Mr. Herring admitted, that his "comparison" testimony was prepared after the litigation had commenced, and no "business record" was produced in discovery. Tr. 2989-93, 2996-97 (Herring).
[46] *Recommended Decision* ¶ 22 (citing TWC Ex. 85, Egan Dir. Test. ¶¶ 10-11, 18 (describing network programming genre analyses of WealthTV and MOJO)).
[47] *Id.* ¶ 22 (citing TWC Ex. 85, Egan Dir. Test. ¶¶ 10-11).

similarly persuasive.[48] In short, the Chief Judge found Mr. Egan's testimony to be "consistent, convincing and well-organized" and "far more credible" than the testimony on programming presented by Ms. McGovern tainted by the selection bias.[49]

D. The ALJ Correctly Determined that There Was No Evidence of Discrimination by Defendants Against WealthTV in Favor of MOJO

WealthTV asserts that "[t]he ALJ ignored substantial record evidence that Defendants discriminated against WealthTV."[50] Yet, it is WealthTV that ignores record evidence and the ALJ's credibility findings with regard to numerous witnesses. Taken as a whole, the record shows that "[t]here 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."[51]

For instance, WealthTV nowhere disputes that the Defendants launched MOJO's predecessor channels, INHD and INHD2, prior to the creation of WealthTV; thus, "WealthTV was not—and could not have been—a factor in any of the [D]efendants' decisions to provide carriage to their affiliated networks, INHD and INHD2."[52] Nor does WealthTV contradict live testimony and extensive documentation from iN DEMAND's management that it did not consider WealthTV's programming or its status as a competitor in its decision to re-brand INHD as MOJO.[53]

Even more telling, WealthTV does not rebut the testimony of Defendants' programming executives confirming that each Defendant's consideration of WealthTV was not affected in any way by its affiliation with MOJO or its lack of affiliation with WealthTV[54]—testimony that the Chief

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[48] *Id.* ¶ 23 (citing Tr. at 5172-73, 5176 (Egan); TWC Ex. 85 ¶ 14).
[49] *Id.* ¶ 25.
[50] Exceptions at 13.
[51] *Recommended Decision* ¶ 67; *see also id.* ¶ 35.
[52] *Id.* ¶ 12.
[53] *Id.* ¶ 18 (citing Cox. Ex. 84, Asch Dir. Test. at 12, 13, 17; Cox Ex. 79, Wilson Dir. Test. ¶ 130).
[54] TWC Ex. 81, Witmer Dir. Test. ¶ 33; Comcast Ex. 3, Bond Dir. Test. ¶¶ 5, 8-11, 16-20; Tr. 4561:9-14, 4555:18-4556:12 (Bond); Comcast Ex. 8, Dannenbaum Dir. Test. ¶¶ 5-6; Tr. 4755:3-9,

Judge uniformly found to be consistent and credible.[55] WealthTV also does not dispute evidence that each Defendant relied heavily on non-affiliated networks for their programming lineups and added numerous non-affiliated networks during the same period that WealthTV was seeking carriage.[56]

In the face of this evidence, WealthTV falls back on its claim, unsupported by the record, that "defendants' negotiations with WealthTV could not have been in good faith due to the preferential treatment defendants accorded MOJO in granting it carriage."[57] But there is no record evidence to support this allegation of bad faith. As the Chief Judge concluded, in accepting the position of not only the Defendants, but the Enforcement Bureau as well, differential treatment between networks standing alone does not support a finding of discrimination on the basis of affiliation.[58] That conclusion applies with special force where, as here, any differences were entirely justified given the fundamentally different business cases presented by each network.[59]

Moreover, the record demonstrates that the Defendants' carriage decisions regarding INHD/MOJO were entirely consistent with their consideration and conclusions regarding carriage

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4752:11-4753:7 (Dannenbaum); Cox Ex. 79, Wilson Dir. Test. ¶ 96; Tr. 4909:13-16 (Wilson); Tr. 4420:18-4421:11 (Stith), 4486:14-21 (Miron).

[55] *Recommended Decision* ¶ 40 (citing TWC Ex. 81, Witmer Dir. Test. ¶ 33; Tr. at 3951-52 (Witmer); Tr. at 4097-98 (Carter)); *id.* ¶ 43 (citing Cox Ex. 81, Brennan Dir. Test. ¶ 19); *id.* ¶ 44 (citing Comcast Ex. 3, Bond Dir. Test. ¶ 6; Tr. at 4561 (Bond); Tr. 4755 (Dannenbaum)); *id.* ¶ 51 (citing BHN Ex. 9, Miron Dir. Test. ¶ 11).

[56] *Id.* ¶ 39 (citing TWC Ex. 56 (Affiliation Agreement); TWC Ex. 85, Egan Dir. Test. ¶ 31; TWC Ex. 81, Witmer Dir. Test. ¶ 33); *id.* ¶ 51 (citing BHN Ex. 9, Miron Decl. ¶ 6). *See also* Comcast Ex.. 3, Bond Dir. Test. ¶ 3; Tr. 4560:7-11, 4560:17-4561:8 (Bond); Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 13; Cox Ex. 79, Wilson Dir. Test. ¶ 103; Cox. Ex. 13; Tr. 4908:4-12, 4909:4-8, 5050:15-5051:2 (Wilson).

[57] Exceptions at 13. The Chief Judge correctly found that section 76.1301(c) does not impose a *per se* requirement on a cable operator to negotiate in good faith with a video programming vendor. *Recommended Decision* ¶ 35, n.132. "An alleged failure to negotiate in good faith is relevant to a section 76.1301(c) violation only the extent that it constitutes factual evidence of a cable operators' discrimination against a video programming vendor 'on the basis of affiliation or non-affiliation.'" *Id.* (internal citation omitted). *Compare with* 47 C.F.R. § 76.65 (duty to negotiate in good faith in the retransmission consent context).

[58] *Recommended Decision* ¶ 63.

of WealthTV. Carriage of INHD, INHD2 and MOJO was not "automatic" but was the result of an ongoing deliberative process[60] that took into account whether the programming was of value to the Defendants' respective customers,[61] the management experience and financial backing of the network,[62] and whether carriage constituted an efficient use of scarce bandwidth.[63] The Defendants had similar legitimate business reasons for not carrying WealthTV: the efficient use of limited bandwidth;[64] WealthTV's inability to demonstrate that it could attract or maintain subscribers;[65] a lack of interest in WealthTV on the part of the Defendants' systems;[66] the lack of WealthTV's brand recognition;[67] and WealthTV's lack of carriage on the Defendants' primary satellite competitors.[68]

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[59] *Id.* ¶¶ 39, 42, 44, 50-51; Comments ¶ 11.

[60] *See, e.g.*, Cox. Ex 79, Wilson Dir. Test. ¶¶ 32-34, 113-14; TWC Ex. 81, Witmer Dir. Test. ¶ 16; Comcast Ex. 3, Bond Dir. Test. ¶¶ 17-20; **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[61] *See* Cox Ex. 84, Asch Dir. Test. ¶¶ 17-18; Cox Ex. 79, Wilson Dir. Test. ¶ 31; TWC Ex. 81, Witmer Dir. Test. ¶ 16; Tr. 4292:10-22, 4307:22-4308:8, 4344:7-10 (Asch), 4878:10-4879:13, 4883:2-20 (Wilson); Comcast Ex. 3, Bond Dir. Test. ¶ 17; Tr. 4562:17-4563:5, 4693:1-20, 4703:14-4704:1 (Bond).

[62] *See* Tr. 3992:1-3993:2 (Witmer); *see also* TWC Ex. 81, Witmer Dir. Test. ¶ 16; Tr. 4590:11-16, 4591:6-13 (Bond); Tr. 4873:11-4874:3, 4875:17-4877:12, 4885:1-11, 4889:9-21, 4929:13-4930:4 (Wilson).

[63] Cox Ex. 84, Asch Dir. Test. ¶ 52.

[64] *Recommended Decision* ¶¶ 39 (citing Tr. 3912-13 (Witmer)), 42 (citing Cox. Ex. 79 at 24 (¶ 78)); *see also* Comcast Ex. 3, Bond Dir. Test. ¶ 5; Tr. 4613:9-4614:22 (Bond); Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5; Tr. 4427:14-4428:5, 4465:7-22; 4468:22-4469:14 (Stith); Tr. 4485:2-4486:18; 4500:16-4501:20 (Miron).

[65] *Recommended Decision* ¶¶ 39, 42 (citing Cox. Ex. 79 at 13-14, 16-17 (¶¶ 46, 50, 56-58)); *see also* Comcast Ex. 9 at 9-1, Comcast Ex. 21; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5; Tr. 4773:6-4774:12 (Dannenbaum); Tr. 4892:18-4893:4, 4917:20-4918:6, 4930:5-21, 4933:1-4 (Wilson); Tr. 4427:14-4428:5, 4465:7-22; 4468:22-4469:14 (Stith); Tr. 4485:2-4486:18, 4500:16-4501:20 (Miron).

[66] *Recommended Decision* ¶¶ 39 (citing TWC Ex. 81, Witmer Dir. Test. ¶ 26), 42 & n.167 (citing various Cox exhibits and testimony); *see also* Tr. 4753:3-7 (Dannenbaum); Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 7; Comcast Ex. 21 at 21-2; Tr. 4894:1-17, 4897:2-12 (Wilson); BHN Ex. 3; Tr. 4503:2-4 (Miron).

[67] *Recommended Decision* ¶¶ 39 (citing TWC Ex. 82, Carter Dir. Test. ¶¶ 5-7; TWC Ex. 81 Witmer Dir. Test. ¶ 26), 42 (citing Cox. Ex. 79 at 13-14, 16-17 (¶¶ 46, 50, 56-58)). *See also* Comcast Ex. 9 at 9-1, Comcast Ex. 21; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5; Tr. 4773:6-4774:12 (Dannenbaum); Tr. 4530:8-17 (Miron).

[68] *Recommended Decision* ¶ 39 (citing TWC Ex. 82, Carter Dir. Test. ¶¶ 5-7; TWC Ex. 81 Witmer Dir. Test. ¶ 26). Mr. Herring himself admitted on cross-examination that each Defendant had non-

1. TWC Dealt with WealthTV In Good Faith and Did Not Discriminate

The Chief Judge concluded that "[t]he weight of the record evidence shows that TWC's decision not to offer full linear carriage to WealthTV was based upon business considerations that were unrelated to TWC's affiliation with MOJO."[69] TWC offered the testimony of Melinda Witmer, TWC's Chief Programming Officer since 2007, and Arthur Carter, TWC's former Senior Director of Programming, both of whom testified that MOJO played no role in TWC's decision not to offer a full linear carriage deal to WealthTV.[70] The Chief Judge found these witnesses to be "consistent, competent, and credible"—in contrast to WealthTV's witnesses.[71]

The Chief Judge found particularly compelling the evidence that TWC did not perceive significant demand for WealthTV from its regional offices.[72] Not only did TWC's fact witnesses confirm such perceptions, but the testimony was reinforced by numerous contemporaneous TWC documents.[73] Although WealthTV presented exhibits and testimony suggesting it received positive feedback and interest in carriage from TWC,[74] the Chief Judge determined that these contentions were less credible and convincing than TWC's, because "[c]ontemporaneous emails … support the testimony of the TWC officials."[75] Given the weight of the evidence, the ALJ concluded that "TWC officials in fact believed reasonably that there was not a substantial demand from TWC systems for

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discriminatory, legitimate business reasons for deciding not to carry WealthTV. *See* Tr. 3251:15-3252:7, 3274:2-13, 3284:16-3285:13, 3319:20-3320:11, 3665:14-3666:19, 3667:6-11 (Herring); *see also* Cox. Ex. 79 at 50-51 (¶¶ 174-76).

[69] *Recommended Decision* ¶ 39.

[70] *Id.* ¶ 40 (citing TWC Ex. 81, Witmer Dir. Test. ¶ 33; Tr. at 3951-52 (Witmer); Tr. at 4097-98 (Carter)).

[71] *Id.*

[72] *Id.* ¶ 36 & n.135.

[73] *See, e.g.*, TWC Ex. 82, Carter Dir. Test. ¶¶ 9-10; TWC Ex. 83, Goldberg Dir. Test. ¶ 5; TWC Ex. 84, Rosenberg Dir. Test. ¶ 12; *see also, e.g.*, TWC Ex. 29.

[74] *Recommended Decision* ¶ 36 (citing WealthTV Ex. 144, Herring Dir. Test. at 30).

[75] *Id.* ¶ 36 (citing TWC Ex. 29).

an affiliation agreement with WealthTV and these officials made reasonable business decisions based on that belief."[76]

Based on evidence that included the testimony of TWC witnesses Eric Goldberg and Andrew Rosenberg, the Chief Judge further concluded that it was WealthTV, not TWC, that failed to use TWC's San Antonio Video on Demand ("VOD") agreement with WealthTV to broaden the relationship.[77] The ALJ found that "TWC's San Antonio office, with the concurrence of TWC corporate officials, expressed an interest in extending the VOD agreement. … But it was WealthTV that refused to extend the VOD trial unless TWC agreed to a linear carriage agreement."[78] The ALJ then concluded that, once the VOD trial ended, TWC offered a linear carriage agreement with "exactly the same terms [of carriage] that WealthTV proposed in [a prior] counteroffer … [but] WealthTV rejected this proposal," and negotiations did not resume.[79] That critical fact—that TWC offered to carry WealthTV on exactly the terms WealthTV had sought only months prior—is glaringly absent from WealthTV's Exceptions.

2. Comcast Dealt With WealthTV In Good Faith and Did Not Discriminate

WealthTV rests its claim that Comcast's individual dealings with WealthTV lacked good faith in significant part on Mr. Herring's testimony that Comcast systems had expressed interest in carrying WealthTV.[80] WealthTV, however, does not even acknowledge the Chief Judge's decision to reject this testimony as "unreliable and not credible."[81] Indeed, Mr. Herring's testimony on this point is obviously unreliable; he (a) admitted that he had no personal knowledge that any Comcast

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[76] *Id.* ¶ 36.
[77] *Id.* ¶ 37 (citing TWC Ex. 26; TWC Ex. 83, Goldberg Dir. Test. ¶ 4; TWC Ex. 84, Rosenberg Dir. Test. ¶ 5).
[78] *Id.* ¶ 37 (citing TWC Ex. 83, Goldberg Dir. Test. ¶¶ 6-7; TWC Ex. 84, Rosenberg Dir. Test. ¶ 8; TWC Ex. 32).
[79] *Id.* ¶ 38 (citing TWC Ex. 83, Goldberg Dir. Test. ¶ 23; TWC Ex. 84, Rosenberg Dir. Test. ¶ 23; Tr. at 4191-92 (Goldberg)).
[80] Exceptions at 15.

system ever expressed interest in WealthTV,[82] (b) admitted that he based his testimony on reports from WealthTV's affiliate sales team that he believed to be unreliable and possibly fraudulent,[83] and (c) provided no factual details that might bolster the credibility of his claims.[84] Also, Comcast's senior executive, Alan Dannenbaum, directly contradicted Mr. Herring, testifying that he made inquiries to Comcast's divisional and corporate management and found no interest in carrying WealthTV.[85] Mr. Dannenbaum's testimony—unlike Mr. Herring's— was corroborated by contemporaneous documentary evidence,[86] and the ALJ found Mr. Dannenbaum's testimony—unlike Mr. Herring's—to be "credible," a finding that WealthTV does not challenge.[87] Indeed, the Chief Judge found the testimony of Mr. Bond and Mr. Dannenbaum that affiliation or non-affiliation played no role in the carriage decisions regarding WealthTV to be "consistent, competent, and credible"[88]—in contrast to WealthTV witnesses.

WealthTV's bad faith claim also rests on the assertion that Comcast did not provide WealthTV with any written proposal for carriage and offered carriage to only a relatively small number of Comcast subscribers.[89] Notably, WealthTV does not dispute that, over the years, WealthTV and Comcast discussed the possibility of Comcast entering into a hunting license with WealthTV and including WealthTV's programming in Comcast's VOD service.[90] Nor does it dispute that Comcast made two specific and valuable offers of carriage, including an offer of linear

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[81] *Recommended Decision* ¶ 44 n.180.
[82] Tr. 2920:7-2924:22 (Herring).
[83] *Id.* at 2922:11-2923:13, 2926:8-2929:7, 3495:4-11, 3498:3-7 (Herring); *see also* Cox Ex. 105 at 105-10, 105-11; Cox Ex. 106 at 106-12.
[84] *Recommended Decision* ¶ 44 n.180. WealthTV also failed to introduce any corroborating witness testimony or documentary evidence on this point. *Id.*
[85] *Id.* (citing Comcast Ex. 8, Dannenbaum Dir. Test. at ¶7; Tr. at 4777-78 (Dannenbaum)).
[86] *Id.* (citing Comcast Ex. 21 at 21-2); *see also* Dannenbaum Dir. Test. ¶ 8.
[87] *Recommended Decision* ¶ 44.
[88] *Id.*
[89] Exceptions at 15-16. *See also Recommended Decision* ¶ 45.
[90] *Recommended Decision* ¶ 45.

carriage, prior to the filing of WealthTV's program carriage complaint.[91] Finally, it was WealthTV that rejected these proposals[92] and WealthTV that terminated negotiations without making any counter-proposals.[93] Given these undisputed facts, the absence of a written carriage offer from Comcast is not evidence of bad faith. To the contrary, the Chief Judge concluded that these facts showed that Comcast's dealings with WealthTV were in good faith[94]—a finding that WealthTV declined even to acknowledge.

3. Cox Dealt with WealthTV In Good Faith and Did Not Discriminate

WealthTV takes two exceptions to the Chief Judge's conclusion that "[t]he preponderance of the record evidence … shows that business factors, and not Cox's affiliation with MOJO, were the reasons that Cox declined to carry WealthTV."[95] WealthTV first argues that the Chief Judge improperly ignored evidence that Cox refused to enter into "meaningful" carriage negotiations despite "expressions of interest" from Cox's individual cable systems.[96] Everything about this argument is wrong. WealthTV unsuccessfully sought to introduce evidence of alleged "strong support" at some Cox systems, but the evidence was excluded because Mr. Herring admitted it was unreliable and that his summary of that alleged interest was not a "fair and accurate representation of the views of Cox's systems."[97] In any event, the Chief Judge correctly assigned little importance to these allegations, because the unrebutted testimony of Bob Wilson, the head of Cox's corporate programming department, corroborated by internal documents and two other live witnesses, Leo Brennan and Kim Edmunds, demonstrated that support from local systems is a minor consideration

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[91] *Id.*; Comcast Ex. 3, Bond Dir. Test. ¶¶ 12-15.
[92] Tr. 3619, 3623-24, 3627 (Herring); Tr. 4559-60 (Bond).
[93] Tr. 3623-24, 3627 (Herring); Tr. 4559-60 (Bond).
[94] *Recommended Decision* ¶ 45.
[95] *Id.* ¶ 42.
[96] *See* Exceptions at 15.
[97] *See* WTV Ex. 144, Herring Dir. Test. 45-47; Tr. 3048:18-3050:3, 3494:12-3503:17, 3526:3-19 (Herring).

in Cox's national carriage decisions for general entertainment channels like WealthTV.[98] Moreover, while WealthTV claims Cox engaged in no "meaningful carriage discussions,"[99] the evidence from both Cox and Mr. Herring shows that Cox's corporate programming department met with WealthTV in 2004, 2005, and 2007;[100] that WealthTV's presentations at those meetings failed to convince Cox that it should carry WealthTV;[101] and that Cox clearly and consistently communicated its decision and its reasons to WealthTV.[102] Cox's evidence shows that it chose not to carry WealthTV solely on the merits of the programming network and the scarcity of bandwidth. The Chief Judge found this evidence credible,[103] leaving no room for WealthTV's bald accusation that Cox acted in bad faith.

4. BHN Dealt with WealthTV In Good Faith and Did Not Discriminate

WealthTV bases its claim that BHN failed to negotiate in good faith entirely on the self-serving testimony of Charles Herring and on the lack of a carriage agreement notwithstanding Mr. Herring's assertion that there were "expressions of interest from Bright House Tampa."[104] Not only is there no record support for this claim, but there was also substantial record evidence (which WealthTV's exceptions willfully ignore) that BHN had no interest in carrying WealthTV due to a well-researched and documented lack of viewer demand.

As the Chief Judge found, Anne Stith, then Director of Product Marketing for BHN's Tampa Division, met with WealthTV representatives on two occasions and concluded that the

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[98] Cox Ex. 79, Wilson Dir. Test. ¶¶ 70-71; Tr. 4868:9-21, 5063:16-5064:21 (Wilson); Tr. 5304:2-14 (Brennan); Tr. 5085:2-9 (Edmunds).
[99] *See* Exceptions at 15.
[100] *Recommended Decision* ¶ 41.
[101] *See* Cox Ex. 79, Wilson Dir. Test. ¶¶ 51, 55.
[102] *Id.* ¶¶ 117-24; Cox Exs. 17-19; *see also* Tr. 4900:16-4904:8 (Wilson).
[103] *Recommended Decision* ¶¶ 42, 43.
[104] Exceptions at 15.

bandwidth needed to carry the channel could not be justified given the lack of viewer demand.[105] Ms. Stith's trial testimony was consistent with her evaluation of WealthTV in written communications to her superiors following these meetings.[106] BHN President Steve Miron agreed with Ms. Stith, asserting a lack of subscriber interest in WealthTV and noting that representatives from WealthTV made false claims to him that his company's field offices were interested in carrying WealthTV.[107] Notably, in contrast to Mr. Herring's testimony, the Chief Judge characterized Mr. Miron's testimony as "consistent, competent and credible."[108] Finally, a survey commissioned by BHN in the ordinary course of business to gauge viewer interest in available HD networks not currently being carried by BHN found that WealthTV ranked a "dismal 36th out 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 made available."[109] WealthTV offered no evidence impeaching either Ms. Stith's or Mr. Miron's testimony. The Chief Judge's finding that BHN acted in good faith is fully supported by uncontroverted evidence that BHN engaged in good faith discussions with WealthTV but ultimately rejected the service due to almost a complete lack of viewer interest.

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[105] *Recommended Decision* ¶ 49 (citing BHN Ex. 10, Stith Decl. ¶ 11; BHN Ex. 2 at 2; Tr. at 4427-28, 4465, 4469-70 (Stith)). Upon review of the record, it becomes clear that WealthTV infers "interest" in carrying its service from even the most casual request for more information about it. The record shows that Ms. Stith reached out to WealthTV to get more information about the service, but came away unimpressed. *Id.* Moreover, the record reflects multiple instances where it was BHN who initiated contact with WealthTV, not the other way around. Tr. 4463 (Stith); Defs. Proposed Findings and Conclusions ¶¶ 114, 117 (internal citations omitted). Such conduct belies WealthTV's claim that BHN failed to evaluate WealthTV in good faith.

[106] *See* BHN Ex. 2.

[107] *Recommended Decision* ¶ 49 (citing BHN Ex. 9, Miron Decl. ¶ 12); Tr. At 4506-07, 4527, 4535).

[108] *Id.* ¶ 51.

[109] *Id.* ¶50 (citing BHN Ex. 3 (HD Programming Study Interest, Use, Perceptions)).

E. The Chief Judge Properly Excluded Excerpts of Hearing Testimony from Another Case

Contrary to WealthTV's assertion,[110] the Chief Judge had a sound legal basis for precluding WealthTV from introducing excerpts from testimony in a separate hearing by Stephen Burke, Chief Operating Officer for Comcast Corporation.[111] WealthTV's citations to hearsay and party admissions rules are irrelevant and misleading.[112] The Chief Judge did not exclude the transcript on hearsay grounds, but because WealthTV improperly sought to introduce the document during its cross-examination of Mr. Madison Bond, Executive Vice President for Content Acquisition for Comcast Cable Communications, LLC.[113] Simply put, Mr. Bond was not competent under Fed. R. Evid. 901 to authenticate a transcript of testimony by Mr. Burke from a different proceeding.[114]

Moreover, in explaining his ruling to WealthTV, the Chief Judge pointed out that there were a number of ways that WealthTV could have tried to establish the transcript as a relevant party admission, even though it could not do so through cross-examination of Mr. Bond.[115] WealthTV never attempted to proffer the transcript as a party admission at an appropriate time, let alone establish its relevance to the WealthTV hearing. Indeed, WealthTV does not even explain now how the admission of Mr. Burke's testimony would have led to a different result with respect to Comcast, much less with respect to the other Defendants.[116]

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[110] Exceptions at 17-18.
[111] Mr. Burke testified as a witness for Comcast Cable Communications, LLC in *NFL Enters. LLC v. Comcast Cable Comm'ns, LLC*, MB Docket 08-214, File No. CSR-7876-P.
[112] *See, e.g.*, Exceptions at 17.
[113] Tr. 4708.
[114] *See* Fed. R. Evid. 901.
[115] Tr. 4709.
[116] Exceptions at 17-18.

F. The ALJ Properly Denied WealthTV's Request for the Testimony of Robert Jacobson

The Chief Judge also properly refused to grant WealthTV's untimely request that Robert Jacobson, the Chief Executive Officer of iN DEMAND, be subpoenaed to testify at trial.[117] WealthTV did not identify Mr. Jacobson on its witness list, as was required by the ALJ,[118] and sought his testimony only in response to Defendants' Motion *in Limine* to Exclude Portions of the Testimony of Charles Herring (the "Motion *in Limine*").[119] WealthTV claims that it was unfairly surprised by the Motion *in Limine*, which WealthTV notes was filed "one week after WealthTV submitted [its] list of witnesses" that it expected to call during the trial.[120]

None of WealthTV's arguments has merit. The ALJ was well within his discretion to refuse to permit the testimony of a witness who was not timely identified by the party seeking to call him.[121] Moreover, Defendants' Motion *in Limine* hardly could have been a surprise. First, Defendants' motion was timely filed. Second, WealthTV knew—or should have known—that Mr. Herring was not competent to testify about "iN DEMAND and its management of, strategies regarding, and target demographic for MOJO."[122] WealthTV could have listed a competent witness (like Mr. Jacobson) but chose not to.[123]

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[117] Exceptions at 19; *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Complainant WealthTV's Contingent Request for Issuance of Subpoena *Ad Testificandum*, MB Docket No. 08-214 (Apr. 16, 2009) (the "Contingent Motion").

[118] *See Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc.*, MB Docket No. 08-214, Order Adopting Further Revised Dates, FCC 09M-30 (ALJ Apr. 1, 2009).

[119] *See* Exceptions at 19.

[120] *Id.* at 19.

[121] *See, e.g.*, *Las Americas Commc'ns, Inc., Newark, New Jersey, Frances*, 1 FCC Rcd 786, 795 (Rev. Bd. 1986) (declining to find that the ALJ abused his discretion or denied due process by striking exhibits of sponsoring witnesses who did not timely appear for cross-examination).

[122] Exceptions at 19.

[123] In addition, the contingency in WealthTV's Contingent Motion did not occur; Mr. Herring's testimony was not stricken. Rather, at the ALJ's direction, the parties conferred and agreed to submit a revised version of Mr. Herring's testimony after, as WealthTV's counsel described it, "cooperative work between WealthTV's [and] a number of Defendants' counsel to try to meet their objections." Tr. 2860. WealthTV made no representation that it had been ill-served by the meet-

In any event, Mr. Jacobson's testimony would have been redundant, and WealthTV was not prejudiced by his absence. All of the subjects on which WealthTV alleges Mr. Jacobson could have testified, such as MOJO categories of programming, MOJO advertising and affiliation negotiations between iN DEMAND and Defendants, were addressed by Defendant witness David Asch, Executive Vice President of Programming at iN DEMAND, who pre-filed his testimony and was subject to cross-examination.[124] Moreover, WealthTV was able to cross-examine three of the Board members of iN DEMAND—Ms. Witmer, Mr. Bond, and Mr. Wilson. And WealthTV concedes that many of the documents that it sought to move into evidence through Mr. Jacobson were, in fact, admitted.[125]

G. WealthTV's Allegation of Bias Is Untimely and Unsupported by the Record

WealthTV alleges bias on the part of the Chief Judge, "most notably" on the basis that he failed to meet the Media Bureau's 60-day hearing schedule.[126] This allegation should be summarily dismissed as untimely,[127] meritless, and frivolous.[128]

WealthTV does not come even remotely close to meeting its "heavy" burden of showing that the Chief Judge "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible."[129] In setting the hearing schedule in his *December 2 Order*, Chief Judge Sippel

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and-confer process, voiced no objection to *any* of the changes in Mr. Herring's testimony (*id.* 2860-61) and did not renew its request for the testimony of Mr. Jacobson. *Id.*

[124] *See generally* Tr. 4343-4411 (Asch).

[125] Exceptions at 20.

[126] *Id.* at 21.

[127] This allegation focuses primarily on the Chief Judge's December 2, 2008 Procedural and Hearing Order and not his conduct at the hearing. It is therefore time-barred by section 1.245(b)(1) of the Commission's rules and should be dismissed. *See* 47 C.F.R. § 1.245(b)(1) (ALJ disqualification requests must be filed "not later than 5 days before the commencement of the hearing unless, for good cause shown, additional time is necessary").

[128] *See* 47 C.F.R. § 76.6(f) (prohibiting frivolous pleadings in program carriage proceedings); 47 C.F.R. § 1.52. A pleading is frivolous if it "has no good ground to support it." Public Notice, "Commission Taking Tough Action Against Frivolous Pleadings," 11 FCC Rcd 3030 (1996).

[129] *Family Broad., Inc.*, 17 FCC Rcd 19332, 19333 (2002) (holding that, unless a claim of bias is based upon allegations that a judge relied upon "knowledge acquired outside" the proceeding, a claim of

was simply following as "the rule of the case,"[130] an earlier decision by Judge Steinberg that the 60-day schedule in the *HDO* violated the parties' due process rights.[131] Judge Steinberg's order on its face represented a careful legal analysis and thorough explanation of why the "60-day timeframe set forth in the *HDO* [could not] be achieved,"[132] and the Chief Judge was entitled to rely on that judgment. Indeed, the Commission ultimately agreed with Judge Steinberg and the Chief Judge not to set a deadline for completing the hearing when the Commission rejected the Media Bureau's attempt—at WealthTV's behest—to seize back jurisdiction of the case.[133]

Finally, WealthTV's attempt to demonstrate bias through a passing comment of the Chief Judge during the hearing warrants little consideration.[134] The hearing transcript demonstrates that the Chief Judge was extremely careful to treat all parties fairly.[135]

H. The ALJ Properly Admitted and Relied on the Testimony of Michael Egan

WealthTV claims that the testimony and analysis of Defendants' programming expert Michael Egan "did not rely on any objective, standardized industry tools[,]" "lacked sufficient indicia of reliability," and therefore should have been accorded "little weight" by the ALJ.[136] But the ALJ considered this argument and was not persuaded by it, pointing out that no WealthTV witness

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judicial bias can succeed only where the judge "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible") (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

[130] Tr. 97.

[131] *November 20 Order.*

[132] *Id.* ¶ 7.

[133] *See January 27 Order* at 1582.

[134] *See* Exceptions at 23 (quoting Tr. 3855-56). Nothing in the Chief Judge's comment even remotely suggests bias. Moreover, WealthTV has distorted what the Chief Judge said, ignoring the fact that the Chief Judge said that his comment had no relevance in the program carriage context. Tr. 3856.

[135] *See, e.g.*, Tr. 2549:4-2549:16 (declining to admit a Defendant exhibit because "... I'm also doing it for purposes of some balance of fairness. I'm trying to give as much of the same rulings as I can to both sides knowing full well that that is impossible to do, but I'm doing my best to do it on an even keel"); Tr. 4053:3-4053:6 (receiving WealthTV exhibit "in the interests of time, and in the interests of letting WealthTV perfect its case the best they can"). *See also* Tr. 2222:21-2223:21; Tr. 2525:17-2526:1; Tr. 2650:15-2650:21; Tr. 2981:18-2981:20; Tr. 2982:8-2982:12.

attempted to quantify similar programming and concluding that "WealthTV provides no evidence to show that [Mr. Egan's] methodology is wrong or unreliable."[137] WealthTV now cites *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993),[138] but WealthTV never moved to exclude Mr. Egan on *Daubert* grounds notwithstanding the fact that his opinion was clearly laid out in his written direct testimony that was provided to WealthTV in advance of trial. To the contrary, WealthTV's counsel voiced "no objection" to Mr. Egan's testifying as a programming expert.[139]

Similarly, WealthTV misleadingly claims that Mr. Egan's "look and feel" analysis with respect to MOJO "consisted of watching MOJO at home a few times a week approximately a year before as a sporadic casual user."[140] This is simply false. Mr. Egan testified that not only had he previously watched MOJO as a casual viewer, but also that after his engagement as an expert he "watched 15 episodes of five different shows on DVD" and also watched "streaming episodes" of MOJO programs on YouTube and the MOJO website.[141] In any event, as the ALJ astutely observed, "WealthTV criticizes the formality of the method by which Mr. Egan conducted the 'look and feel' analysis. But it fails to show how Mr. Egan's conclusions were erroneous."[142]

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[136] Exceptions at 23-24.
[137] *Recommended Decision* ¶ 22 n.77. WealthTV has still not provided such evidence.
[138] Exceptions at 24 n.48.
[139] Tr. 5162-67 (Egan). *See Doe/03 v. Sec'y of Dep't of Health and Human Servs.*, 2007 WL 2350645, at *4 (Fed. Cl. July 31, 2007) ("If the proponent of scientific or technical evidence cannot establish its reliability, the evidence is excluded *before* trial") (citations omitted) (emphasis added).
[140] Exceptions at 24.
[141] Tr. 5174-75 (Egan). Indeed, the Enforcement Bureau, whose questioning of Mr. Egan WealthTV cites, concluded that Mr. Egan "persuasively characterizes WealthTV's overall programming as having a calm, mature, and sophisticated 'look and feel' about it, while MOJO's presentation was considerably more edgy, hip, urban, and irreverent." Comments ¶ 14.
[142] WealthTV also asserts that "Mr. Egan testified inconsistently with his prior statements regarding the demographic appeal of MOJO." Exceptions at 24. The entire basis for this accusation is that, in Mr. Egan's January 2008 declaration in this case, he mistakenly described MOJO's target demographic as men aged 18 to 49, but in his written testimony he described the age range as 25 to 49. Tr. at 5197-98 (Egan). This is hardly the type of material "inconsistency" that WealthTV attempts to assert in the Exceptions.

CONCLUSION

For all the foregoing reasons, WealthTV's exceptions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Micah M. Caldwell, hereby certify that, on this 2nd day of December, 2009, copies of the foregoing "Defendants' Joint Reply to WealthTV's Exceptions to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel" were sent via email, to the following:

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