

**Before the  
Federal Communications Commission  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	MB Docket No. 08-214
Complainant	)	File No. CSR-7709-P
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

**REQUEST FOR ORAL ARGUMENT ON EXCEPTIONS TO RECOMMENDED  
DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL**

**HERRING BROADCASTING, INC.  
D/B/A WEALTHTV**

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On November 16, 2009, Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) filed Exceptions to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel (“Exceptions”) in the above styled matter.<sup>1</sup> On December 2, 2009, Time Warner Cable, Inc., Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corporation (collectively “Defendants”) filed Defendants’ Joint Reply to WealthTV’s Exceptions to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel<sup>2</sup> (“Reply”). Pursuant to Section 1.277(c) of the Commission’s Rules, 47 C.F.R. § 1.277(c), WealthTV hereby respectfully requests the opportunity to make oral arguments on the Exceptions.<sup>3</sup> The Commission should grant WealthTV’s request because oral arguments will assist in the resolution of the issues presented for the reasons described below.

The Defendants have repeatedly attempted to dismiss WealthTV’s allegations of discrimination as illegitimate, hollowly asserting that they had legitimate business reasons for failure to carry WealthTV. In so doing, the Defendants have repeatedly and improperly discounted the vast disparities in the methods used to evaluate whether to carry their affiliated channel and WealthTV in light of the channels’ substantial similarity.

WealthTV’s Exceptions and Defendants’ Reply present multiple issues, the resolution of which would benefit significantly from oral argument. Aside from Defendants’ repeated mischaracterizations of the record, these issues include the proper allocation of the burden of proof, the standard for determining whether two channels are substantially similar, and the means by which

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<sup>1</sup> Exceptions of Herring Broadcasting d/b/a WealthTV to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 08-214 (Nov. 16, 2009).

<sup>2</sup> Defendants’ Joint Reply to WealthTV’s Exceptions to the Recommended Decision of Chief Administrative Law Judge Rickard L. Sippel, MB Docket No. 08-214 (Dec. 2, 2009).

<sup>3</sup> Wealth TV’s Request for Oral Argument is timely filed. 47 C.F.R. § 1.277(c).

a video programming service may circumstantially demonstrate discrimination on the basis of affiliation.

With respect to the burden of proof, Defendants emphasize that neither section 616 of the Communications Act of 1934, as amended, nor the Commission's rules specifies which party bears the ultimate burden of proof or whether burdens of proof should shift from a complaining party to a defendant. Defendants also note that the Commission has not yet determined which party should bear the burden of proof after a complainant has made a *prima facie* showing of discrimination. Reply at 5. This ignores the intent of the Commission in creating a mechanism for expedited resolution of complaints and the specific intent of the Media Bureau, as set forth in the Hearing Designation Order, that the proceedings before the Administrative Law Judge ("ALJ") resolve the factual disputes in light of the fact that it concluded that Wealth TV had demonstrated a *prima facie* case of discrimination.<sup>4</sup> Oral argument will assist in the Commission's resolution of this critical issue. This is especially important given relevant precedent regarding the issue and the fact that the Commission has adopted burden shifting schemes in related cases.

Defendants assert that ALJ "acted within his sound discretion and in accord with usual practice in assigning the burden of proof to WealthTV." Reply at 6. However, this assignment disregarded, or at the least failed to adequately explain, its departure from Media Bureau precedent. As discussed in WealthTV's Exceptions, the Media Bureau has previously reviewed and approved of an arbitration proceeding, which employed burden shifting in the context of Section 76.1301(c) of the Commission's Rules, 47 C.F.R. § 76.1301(c). The Commission has also adopted burden shifting schemes in other discrimination cases. In analyzing program carriage complaints under Section 76.1002 of the Commission's rules, 47 C.F.R. § 76.1002, the Commission places the burden of proof

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<sup>4</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.* Memorandum Opinion and Hearing Designation Order ¶¶ 24, 35, 46, 57, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008)

on defendants to rebut complainants' *prima facie* showing of discrimination in the terms of program carriage. See, e.g., *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, ¶¶ 14, 15 (CSB 1998). The Media Bureau has rejected a challenge to an arbitration proceeding which similarly adopted a burden shifting scheme in the context of the Commission's rules on affiliation-based program carriage discrimination. *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).

The proper allocation of the burden of proof in a program carriage dispute, and the issue whether the burden shifts upon a *prima facie* showing of discrimination remains unresolved by the Commission and will likely arise in other program carriage complaints. Resolving this issue is of significant importance to the outcome of this case. In light of the fact that burden shifting in this context remains unresolved by the Commission, it should permit oral argument on this issue.

Oral argument will also facilitate resolution of the proper standard for determining whether two channels are similarly situated. The Defendants mischaracterize the standard the ALJ employed to determine whether the channels were *similarly* situated. In light of the record evidence, the WealthTV and Defendants' affiliated channel MOJO were not identical. However, requiring that two channels are identical in programming content and audience appeal sets a standard that no two channels could meet.<sup>5</sup>

Defendants mischaracterize the record in arguing that WealthTV and MOJO are not similarly situated. Like the ALJ, Defendants also appear to have adopted a "substantially identical" standard for comparing WealthTV and MOJO. As discussed at length in WealthTV's Exceptions,

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<sup>5</sup> The Media Bureau had recognized this in the HDO, when it found that channels with content as different as football and golf can be substantially similar. *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.* Memorandum Opinion and Hearing Designation Order at ¶ 75, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008).

this is an improper standard. Oral argument would facilitate the Commission's resolution of the proper standard for determining similarity and the record evidence demonstrating such similarity. Notwithstanding Defendants' protestations, the record does contain ample evidence of substantial similarity. WeathTV Ex. 152 ¶10. Moreover, the record contains ample evidence that MOJO and WealthTV both appealed to audiences outside of the target audience. *See* Tr. 5197-5200 (Egan). The fact that both channels had appeal to women and to those outside the targeted age range does not support the proposition that they were not substantially similar.

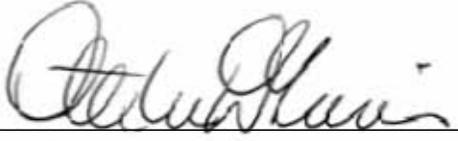
Oral argument would also facilitate resolution of the important issue of what types of differential treatment may constitute discrimination. The Defendants have asserted that they each failed to carry WealthTV based on legitimate business reasons. Reply at 12. Defendants assert that they rejected carriage of WealthTV in light of considerations such as efficient use of bandwidth, lack of carriage on Defendants' primary satellite competitors, or inability of WealthTV to attract or maintain subscribers. Reply at 13. However, Defendants have not demonstrated that the procedures it used to select MOJO for carriage did not provide a significant competitive advantage to their affiliated channel. As discussed in WealthTV's Exceptions, the Defendants' carriage of MOJO was automatic and not the result of an evaluative process. Substantial record evidence demonstrates that Defendants' decision to carry MOJO was without a written contract, without negotiation regarding the terms of carriage, and without an evaluative process applied to non-affiliated channels. *See* WealthTV Exceptions at 13-16. Oral argument will help clarify the standard to avoid the situation where, as has occurred in this case, four large cable companies can reach an agreement to form a joint venture and carry its programming on all four cable companies' systems without the need to reduce the carriage terms to writing or to apply an evaluative process that they applied to non-affiliated channels. Determining whether such conduct amounts to prohibited

discrimination under the Commission's rules is a critical issue in this case and oral argument will assist the Commission in resolving this issue.

In light of the important legal issues presented in this matter, the Commission would be well served by permitting oral argument to address them. For the foregoing reasons, WealthTV respectfully requests that the Commission grant its request for oral argument.

Respectfully submitted,

Herring Broadcasting, Inc. d/b/a WealthTV

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## CERTIFICATE OF SERVICE

I, Rory E. Adams, certify that copies of the foregoing "Request for Oral Argument on Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel" were served via electronic mail and U.S. mail on the following:

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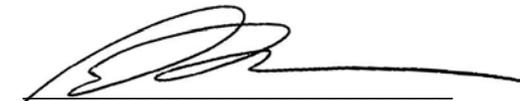
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