

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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

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

Time Warner Cable Inc., Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corporation (collectively "Defendants"), by their counsel and pursuant to section

1.294(b) of the Commission's rules,<sup>1</sup> hereby file this Opposition to Herring Broadcasting, Inc. d/b/a WealthTV's ("WealthTV") interlocutory motion for oral argument in the above-captioned proceedings.<sup>2</sup> Oral argument is not warranted in these cases.<sup>3</sup>

The Commission will hear oral argument in a hearing case only in those "extraordinary circumstances"<sup>4</sup> when oral argument "will assist in the resolution of the issues presented."<sup>5</sup> The Commission established this standard specifically to "expedite the review process," because "the scheduling of oral argument . . . delays the ultimate resolution of the case."<sup>6</sup> The Commission has rejected oral argument requests that merely repeat arguments already fully briefed and fail to explain why the Commission would be aided by oral argument.<sup>7</sup> Further, the Commission has previously ruled that oral argument is inappropriate in expedited proceedings such as the instant cases.<sup>8</sup>

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<sup>1</sup> 47 C.F.R. § 1.294(b).

<sup>2</sup> Request for Oral Argument on Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel (filed Dec. 9, 2009) ("Request").

<sup>3</sup> Of course, if the Commission concludes that oral argument should, as a general matter, be part of the decision-making process in program carriage complaints, Defendants would welcome the opportunity to participate.

<sup>4</sup> *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1991) ("1991 Report and Order"). See also *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd 4050, 4055 (1990).

<sup>5</sup> 47 C.F.R. § 1.277(c).

<sup>6</sup> See *1991 Report and Order*, 6 FCC Rcd at 163.

<sup>7</sup> See, e.g., *Black Television Workshop of Los Angeles*, 8 FCC Rcd 4192, 4193 n.3 (1993).

<sup>8</sup> *Id.* In January, the Commission exhorted the Chief Judge to proceed expeditiously in conducting the hearing and issuing his recommended decision. *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, 24 FCC Rcd 1581, 1582 (2009). WealthTV's request for oral argument, with the attendant scheduling delays, is thus ironic given that WealthTV complained throughout this proceeding that the Commission was not acting quickly enough. Indeed, WealthTV has gone so far as to accuse Chief Judge Sippel of bias because he

WealthTV's Request does not even attempt to meet the Commission's exacting standard for oral argument, but instead appears to be nothing more than an unauthorized "surreply" to Defendants' Joint Reply. The Request focuses almost exclusively on attempting to rebut Defendants' arguments and repeating meritless arguments presented in WealthTV's earlier pleadings. The Request also fails to demonstrate any extraordinary circumstances such that oral argument would augment the Commission's understanding of any fact or issue involved in these proceedings.

The record includes thousands of pages of trial exhibits and testimony from 10 days of live testimony all admitted under oath, tested by the Federal Rules of Evidence, and subjected to probing cross-examination from the parties, the Enforcement Bureau, and the Chief Judge. Chief Judge Sippel carefully evaluated all of this evidence, making credibility and reliability findings with regard to each witness. He documented his analysis and conclusions in his thorough, 37-page *Recommended Decision*. The legal and factual issues that WealthTV now raises – including the specious charge of bias against the Chief Judge – have been fully briefed in WealthTV's Exceptions and Defendants' Joint Reply. Under these circumstances, oral argument is simply not necessary for the Commission's review of the *Recommended Decision*, and, as noted above, would serve only to delay a decision by the Commission.

WealthTV's half-hearted attempts to tie its substantive arguments to an alleged need for oral argument do not address, let alone satisfy, the Commission's standard. WealthTV argues

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did not move quickly enough. *See* Defendants' Joint Reply To WealthTV's Exceptions at 22-24 (filed Dec. 2, 2009) ("Joint Reply") (responding to WealthTV's allegation of bias in Chief Judge Sippel's decision to follow Judge Steinberg's determination (as ultimately ratified by Commission order) that the 60-day deadline imposed by the Media Bureau was infeasible and violated due process).

that oral argument is justified because the case involves the allocation of the burden of proof.<sup>9</sup>

There is nothing “extraordinary” – or even unusual – about the fact that, as the complainant, WealthTV bears the ultimate burden of proof.<sup>10</sup> In addition, the burden of proof issue was fully addressed in the *Recommended Decision* and in the parties’ pleadings, and there is no reason why this issue would justify oral argument.

Similarly, WealthTV’s assertion that Defendants and the Chief Judge improperly adopted a “substantially identical” standard is entirely baseless<sup>11</sup> – it lacks foundation in anything written or said by the Judge or Defendants.<sup>12</sup> Moreover, WealthTV is merely repeating arguments that have been fully briefed by the parties, and it fails to explain how the Commission would be aided by oral argument on this point.

Finally, WealthTV asserts that oral argument would facilitate resolution of the ultimate question of whether the parties’ alleged disparate treatment of WealthTV constituted unlawful

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<sup>9</sup> Request at 3-4.

<sup>10</sup> See generally *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 24 FCC Rcd 9543, 9555 (2009) (“[T]he Commission always requires the petitioner to produce sufficient evidence and analysis to warrant granting the relief sought.”); see *id.* 9554 (Placing the burden of proof on the party seeking relief “has historically been the case in American jurisprudence.”); see also *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2351 (2009). In any event, the assignment of the burden of proof was not material in these cases. “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.” *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, ¶ 62 (ALJ rel. Oct. 14, 2009) (“*Recommended Decision*”).

<sup>11</sup> Request at 4-5. It was WealthTV that alleged that MOJO was a “copy” of WealthTV – an allegation that WealthTV’s expert witness Ms. McGovern disavowed at the hearing. See Tr. 3717-3721 (McGovern).

<sup>12</sup> See Joint Reply at 7-11.

discrimination.<sup>13</sup> But the Commission already has before it a meticulously constructed record, a thorough recommended decision, and extensive comments from the parties and the Enforcement Bureau that address the discrimination issue in complete detail. The Commission is well-positioned to resolve this, and all other issues, now and oral argument would serve no useful purpose.<sup>14</sup>

In sum, there is nothing to justify oral argument in these particular cases and the Commission should deny the Request.

Respectfully submitted,

By:     /s/ James L. Casserly      
James L. Casserly  
Michael H. Hammer  
Michael Hurwitz

WILLKIE FARR & GALLAGHER LLP  
1875 K Street, NW  
Washington, D.C. 20006-1238  
(202) 303-1000

*Counsel for Comcast Corporation*

By:     /s/ David H. Solomon      
David H. Solomon  
L. Andrew Tollin  
J. Wade Lindsay

WILKINSON BARKER KNAUER, LLP  
2300 N Street, NW, Suite 700  
Washington, D.C. 20037  
(202) 783-4141

*Counsel for Comcast Corporation*

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<sup>13</sup> Request at 5-6.

<sup>14</sup> See *Black Television Workshop*, 8 FCC Rcd at 4193 n.3 (“[T]he parties' views have already been fully delineated in the numerous pleadings submitted in this proceeding and . . . oral argument would [not] serve any useful purpose at this time.”).

By: /s/ Jay Cohen  
Jay Cohen  
Gary R. Carney  
Samuel E. Bonderoff  
Vibhuti Jain

PAUL WEISS RIFKIND WHARTON  
AND GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10019  
(212) 373-3000

*Counsel for Time Warner Cable Inc.*

By: /s/ Arthur H. Harding  
Arthur H. Harding  
Seth A. Davidson  
Micah M. Caldwell

FLEISCHMAN AND HARDING LLP  
1255 23rd Street, NW  
Eighth Floor  
Washington, DC 20037  
(202) 939-7900

*Counsel for Time Warner Cable Inc.*

By: /s/ David E. Mills  
David E. Mills  
Jason E. Rademacher  
Lynn M. Deavers

DOW LOHNES PLLC  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 776-2000

*Counsel for Cox Communications, Inc.*

By: /s/ R. Bruce Beckner  
R. Bruce Beckner  
Adam M. Copeland  
Robert M. Nelson

FLEISCHMAN AND HARDING LLP  
1255 23rd Street, NW  
Washington, D.C. 20037  
(202) 939-7900

*Counsel for Bright House Networks, LLC*

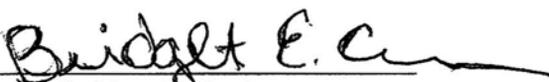
Date: December 15, 2009

**CERTIFICATE OF SERVICE**

I, Bridget E. Anderson, hereby certify that, on December 15, 2009, copies of the attached Opposition to Request for Oral Argument on Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel were served by email to the following:

Stephen Díaz Gavin\*  
Rory E. Adams  
Patton Boggs LLP  
2550 M Street, NW  
Washington, DC 20037

P. Michele Ellison  
William Davenport  
Gary P. Schonman  
Elizabeth Mumaw  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

  
\_\_\_\_\_  
Bridget E. Anderson

\* Also sent by First Class Mail