

REDACTED FOR PUBLIC INSPECTION

**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 MOTION TO REOPEN THE RECORD FOR FURTHER HEARING

March 15, 2010

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Comcast Corporation,)	
Defendant)	

OPPOSITION TO MOTION TO REOPEN THE RECORD FOR FURTHER HEARING

I. INTRODUCTION AND SUMMARY

Comcast Corporation (“Comcast”), pursuant to section 1.294(c) of the Commission’s Rules,¹ hereby opposes the Motion to Reopen the Record for Further Hearing filed by Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) in the above-captioned proceedings.

¹ 47 C.F.R. § 1.294(c).

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WealthTV asks the Commission to reopen the record and add a candor issue related to Comcast's legacy carriage of WealthTV on cable systems in Princeton, Hillsborough-Somerset and Long Hill, New Jersey resulting from Comcast's acquisition of those systems from Patriot Media Communications ("Patriot Systems").²

Put concisely, WealthTV's Motion is nothing more than an attempt to divert the Commission's attention from Chief Administrative Law Judge Richard Sippel's well-reasoned decision rejecting in every respect WealthTV's claims against Comcast.³ WealthTV's Motion is founded on omissions, misstatements and mischaracterizations that contradict WealthTV President Charles Herring's own testimony in the above-captioned proceedings and it fails to meet the applicable legal standards for reopening the record here. The Motion should be summarily dismissed or denied.

II. WEALTHTV'S MOTION IS UNTIMELY

WealthTV incorrectly asserts that its Motion is timely because it was filed within 30 days after Comcast "confirmed" that it continued to carry WealthTV programming on the former Patriot Systems.⁴ The relevant time period for filing a motion based on "new facts or newly discovered facts" is 15 days, not 30 as WealthTV suggests.⁵ In any event, none of the evidence cited by WealthTV is new. WealthTV admits that it continued authorizing delivery of its

² WealthTV Motion at 1-2.

³ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, 24 FCC Rcd 12967 (ALJ 2009) ("*Recommended Decision*").

⁴ WealthTV Motion at note 1.

⁵ 47 C.F.R. § 1.229(b)(3).

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programming to the Patriot Systems until March 6, 2010,⁶ when, without advance notice, it deauthorized its signal. Moreover, the fact that Comcast continued to carry WealthTV was referenced in a document included in Comcast's initial document production to WealthTV on February 24, 2009.⁷ Thus, WealthTV knew or should have known that its programming remained on the Patriot Systems at least over a year before it filed this motion.⁸ In fact, as discussed below, with even a modicum of diligence, WealthTV could have ascertained that the Patriot Systems were carrying its signal as early as September 2007 when Comcast acquired those systems.

In addition, Mr. Herring's declaration indicates only that he confirmed WealthTV's carriage on the Patriot Systems sometime after their sale to Comcast in September 2007 and prior to his January 26, 2010 letter to Mr. Bond.⁹ Thus, even assuming that the relevant time

⁶ See *infra* at Section II.A. The question of whether WealthTV was authorizing delivery of its signal to the Patriot Systems is distinct from whether there was an enforceable affiliation agreement between WealthTV and Comcast. See WealthTV Motion. WealthTV delivered a scrambled signal that could only be unscrambled with a 16-digit integrated receiver decoder number provided by WealthTV. See WealthTV Motion, Exhibit 4, Declaration of Charles Herring ¶ 5 ("Herring Decl."). WealthTV did not deauthorize or change that code when Comcast acquired the Patriot Systems, *see id.* ¶ 10, and continued authorizing delivery of its signal until March 6, 2010, when it finally deauthorized the code.

⁷ COMWTV 00003084 is entitled "Future/Other Channel Updates" [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] The document is attached hereto as Exhibit A.

⁸ While the Highly Confidential designation means that Mr. Herring is not entitled to review COMWTV 00003084, 10 WealthTV lawyers from five different law firms, including lawyers from the firm that filed the instant motion on behalf of WealthTV, signed declarations, either before or following the hearing, entitling them to review that document under the *Protective Order*. WealthTV, however, did not pursue this matter in discovery, at the hearing, or when it filed Exceptions to the *Recommended Decision*.

⁹ Herring Decl. ¶¶ 13-14. Mr. Herring carefully avoids specifying exactly when he learned this fact. *See id.*

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period began running January 26, 2010, WealthTV's Motion is untimely because it was filed more than 15 days (indeed, more than 30 days) after that date and should be dismissed.

III. WEALTHTV'S MOTION DOES NOT DILIGENTLY RAISE, LET ALONE DEMONSTRATE, A SUBSTANTIAL LIKELIHOOD OF PROVING AN ISSUE OF DECISIONAL SIGNIFICANCE

As an untimely motion to enlarge, the Commission will entertain WealthTV's Motion "if (and only if)" the motion "raises a question of probable decisional significance."¹⁰ Moreover, the Commission has imposed more stringent requirements in the context of requests to reopen a hearing record:

[W]here the record in the proceeding has already been closed, as in this case, petitioners must show [1] that their contentions are based on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier and [2] that the new evidence, if true, would affect the ultimate disposition of the proceeding.¹¹

WealthTV fails to meet either of these burdens.

A. WealthTV Was Not Diligent in Raising This Matter

WealthTV provides no reason, and is unable to provide any, as to why it could not have ascertained whether its service continued to be carried on the Patriot Systems following their sale to Comcast. The continued carriage was certainly no secret and WealthTV could have discovered it had it conducted even a minimal inquiry.

As noted above, a reference to Comcast's carriage of WealthTV appears in a document Comcast produced to WealthTV in discovery.¹² Also, the channel lineups of the Patriot Systems,

¹⁰ 47 C.F.R. § 1.229(c).

¹¹ *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988) ("Omaha TV 15"). See also *Eve Ackerman*, 8 FCC Rcd 4205 (1993) ("Ackerman Order") (This test requires "a particularly strong showing of substantive sufficiency for post-hearing motions to reopen the record").

¹² See *supra* at note 7.

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listing carriage of WealthTV, were publicly available on Comcast's website throughout this period, as WealthTV acknowledges,¹³ in addition to being available on other public websites.¹⁴ Further, as noted above, WealthTV itself continued to authorize carriage on those systems, which means that someone in WealthTV knew or should have known that WealthTV was being carried on the Patriot Systems after September 2007.

In addition, Mr. Herring himself could have learned of WealthTV's continued carriage on the Patriot Systems had he acted with even a modicum of diligence in any of a number of ways. Mr. Herring states that, beginning in September 2007, and consistent with a letter Patriot Media sent to the National Cable Television Cooperative, Inc. ("NCTC") indicating its withdrawal from NCTC, WealthTV no longer received notices from NCTC confirming WealthTV's carriage on the Patriot Systems.¹⁵ Nevertheless, it appears that, during the time leading up to and during the hearing, WealthTV took no steps to confirm the status of its carriage on the Patriot systems. There is no evidence that WealthTV contacted either NCTC, Patriot Media or Comcast to inquire about its carriage status. Nor did WealthTV take any steps to "deauthorize" distribution of the

¹³ WealthTV states, "For more than two years now, since the Patriot acquisition, Comcast carried WealthTV in the Princeton and Somerset, New Jersey markets -- *as one can plainly see on its website.*" WealthTV Motion at 7 (emphasis added). See also Herring Decl. ¶ 13; WealthTV Motion, Exhibit 6, Comcast Channel Lineup for Somerset.

¹⁴ See Aol Television, TV Listings for Comcast – Digital Non-Reb in PRINCETON, NJ, <http://tvlistings.aol.com/listings/nj/princeton/comcast-digital-non-reb?hid=NJ29510&zipcode=08540> (last visited Mar. 8, 2010); Aol Television, TV Listings for Comcast Somerset General – Digital Non-Reb in PRINCETON, NJ, <http://tvlistings.aol.com/listings/nj/princeton/comcast-somerset-general-digital-non-reb?hid=NJ29486&zipcode=08540> (last visited Mar. 8, 2010); Aol Television, TV Listings for Comcast Long Hill – Digital Non-Reb in SOMERSET, NJ, <http://tvlistings.aol.com/listings/nj/somerset/comcast-long-hill-digital-non-reb?hid=NJ53913&zipcode=08873> (last visited Mar. 8, 2010).

¹⁵ Herring Decl. ¶ 11.

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WealthTV signal by the Patriot Systems¹⁶ – as would be done by a programmer that no longer authorizes carriage of its programming. Apparently, Mr. Herring “assumed” that WealthTV was no longer carried on the former Patriot Systems and left it at that.¹⁷ Mere assumptions do not constitute the diligence the Commission requires before it will reopen a hearing record after the record has closed and the Chief Administrative Law Judge has rendered a decision.¹⁸

In sum, had WealthTV exercised any diligence – or even examined properly the documents produced in discovery – it could have learned of Comcast’s carriage of WealthTV on the Patriot Systems and raised this issue during the hearing rather than seeking to reopen the record at this late date.

B. WealthTV Has Not Demonstrated a Substantial Likelihood of Proving an Issue of Decisional Significance

WealthTV’s Motion does not demonstrate a substantial likelihood of proving any issue of decisional significance. To the contrary, WealthTV’s allegation that Comcast’s non-disclosure of the Patriot situation demonstrates a lack of candor is entirely baseless. A party’s “intent to deceive” the Commission is an “essential element” of lack of candor.¹⁹ Moreover, “it must be

¹⁶ WealthTV Motion at note 7; *see also* Herring Decl. ¶ 10.

¹⁷ *See* Herring Decl. ¶¶ 8-9, 11.

¹⁸ The Commission has “consistently refused to order further proceedings to explore matters that are ‘easily discoverable initially and only deemed crucial when seen from the highland of hindsight.’” *Liberty Productions*, 7 FCC Rcd 7581, 7582 (1992) (quoting *Omaha TV 15*, 4 FCC Rcd at 731) (internal quotations removed); *see also* *Guinian v. FCC*, 297 F.2d 782, 787 (D.C. Cir. 1961).

¹⁹ *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8478 (1995) (“*Fox Television*”) (citing *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Garden State Broadcasting Ltd. P’ship v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993); *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983)). *See also* *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17467 (2008); *Sprint Nextel Corporation and Clearwire Corp.*, 23 FCC Rcd 17570, 17610 (2008) (“AT&T has failed to provide any evidence of intent to deceive the Commission that is the *sine qua non* of

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shown that the party knew that the information was relevant and intended to withhold it.”²⁰

WealthTV can show neither relevance nor an intent to deceive on Comcast’s part.

With regard to relevance, WealthTV does not and cannot demonstrate that Comcast’s disclosure during the hearing of its continued legacy carriage of WealthTV on the Patriot Systems would have affected the ultimate disposition of WealthTV’s program carriage complaint against Comcast.²¹ The issue presented by WealthTV’s program carriage complaint was whether Comcast unlawfully discriminated against WealthTV by refusing to provide extensive carriage across its systems equivalent to that provided to its now-defunct affiliated programming network

misrepresentation or lack of candor.”); *Wireless Telecommunications, Inc.*, 24 FCC Rcd 3162, 3168 (WTB 2009) (“[T]he *sine qua non* of misrepresentation or lack of candor is intent to deceive the Commission.”).

²⁰ *Fox Television*, 10 FCC Rcd at 8478. See also *Paging Network of Virginia, Inc.*, 15 FCC Rcd 6323, 6325 (2000) (“Second, there is no showing of intent to deceive, *i.e.*, that PNV withheld relevant information, that it knew the information was relevant, and that it intended to withhold that information.”).

²¹ To the extent that WealthTV is arguing that Comcast was improperly carrying its programming on the Patriot Systems without a valid affiliation agreement that is a private contractual matter and has no bearing on WealthTV’s discrimination claim. Moreover, it is perfectly reasonable for Comcast to have continued carrying WealthTV after it acquired the Patriot Systems. First, it is Comcast’s general practice in connection with the acquisition of cable systems not to terminate any programming channel until directed to do so by the programmer. Second, Comcast acquired the Patriot Systems *after* WealthTV had threatened Comcast with its program carriage complaint. See WealthTV Motion at 6. Thus, had Comcast removed WealthTV from the Patriot Systems even though WealthTV continued to authorize carriage, *see supra* at Section II.A, WealthTV may very well have tried to raise an allegation of retaliation in support of its discrimination claim. Indeed, WealthTV has repeatedly raised with the Commission its concerns regarding the possibility of retaliation in carriage negotiations. See Letter from Kathleen Wallman, Counsel to WealthTV, to Marlene Dortch, Secretary, Federal Communications Commission WealthTV, MB Docket No. 07-42 (Oct. 9, 2008) (noting concerns about retaliation by a cable operator after bringing a carriage complaint and asking the Commission to require a “stay during litigation” such that, if there is a change in carriage after the filing of a complaint, “the terms and conditions of carriage shall revert to *status quo ante* for the duration of the pendency of the Commission’s decision upon such complaint.”).

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MOJO.²² WealthTV was demanding carriage equivalent to that provided to MOJO.²³ The question whether Comcast was carrying WealthTV on three systems to approximately 25,000 of its approximately 24 million subscribers as a legacy of its acquisition of Patriot Media simply has no bearing on whether Comcast was discriminating in favor of MOJO when it refused to provide the expansive – and expensive – carriage WealthTV was demanding. The fact that WealthTV could have but did not pursue this issue in discovery or in hearing (or in its Exceptions)²⁴ demonstrates that this issue was not of decisional significance – apparently not even to WealthTV.

WealthTV now argues, well after the hearing has closed, that this issue is of significance because “Comcast has maintained at all phases of this proceeding that it did not – and would not for various reasons – carry WealthTV on its cable systems.”²⁵ This statement is not only false, but also it is directly contradicted by Charles Herring’s own testimony before the Chief Administrative Law Judge.²⁶ Mr. Herring admitted that Comcast offered to provide WealthTV

²² See Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast Corporation, File No. CSR-7907-P at 25 (filed April 21, 2008) (“WealthTV Complaint”). WealthTV filed four program carriage complaints, against Comcast and three other multichannel video programming distributors (“MVPDs”), raising the same question – whether each MVPD discriminated against it in violation of Section 76.1301(c) of the Commission’s rules by denying extensive linear carriage – ultimately for payment – across their cable systems on the basis of each MVPD’s affiliation with the now-defunct programming network MOJO.

²³ WealthTV Complaint at 25.

²⁴ See *supra* at note 8.

²⁵ WealthTV Motion at 3. See also *id.* at i. Nothing in the quotes from Mr. Bond’s testimony offered in WealthTV’s Motion even remotely suggests that Comcast “did not – and would not for various reasons – carry WealthTV on its cable systems.”

²⁶ See *Recommended Decision* ¶ 45.

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linear carriage on one of its systems in Chicago, Illinois.²⁷ Mr. Herring also admitted that he had discussions with Mr. Bond regarding the possibility of Comcast granting a hunting license to WealthTV,²⁸ which would have enabled WealthTV to negotiate carriage with individual Comcast systems.²⁹ Mr. Herring further admitted that Mr. Bond stated to him that a carriage deal with WealthTV along the lines outlined by Comcast could be completed in two weeks.³⁰ Finally, Mr. Herring admitted that WealthTV – not Comcast – terminated those carriage negotiations.³¹ In short, and contrary to WealthTV's assertion in its Motion, the record shows that Comcast was willing to carry WealthTV under certain terms and conditions, but it was not willing to provide the expansive linear carriage across Comcast's systems that WealthTV was demanding. The fact that Comcast provided WealthTV free carriage on three fully built-out systems as a legacy of the Patriot Media acquisition is thus entirely consistent the record.

WealthTV's argument that carriage on the former Patriot Systems would have been of decisional significance because such carriage would have allowed Comcast to test WealthTV's consumer appeal also fails.³² At best, this argument is speculation. More accurately, it is irrelevant speculation. WealthTV's appeal or lack thereof among approximately 0.1% of Comcast's subscribers who are on high bandwidth capacity systems with adequate high

²⁷ See WealthTV Exhibit 144, Written Direct Testimony of Charles Herring, at 45; Hearing Tr. at 3618 – 3623 (Herring).

²⁸ Hearing Tr. at 3619 (Herring).

²⁹ See *Recommended Decision* at note 29.

³⁰ Hearing Tr. at 3623 (Herring).

³¹ *Id.* at 3623-3624, 3627 (Herring)

³² WealthTV Motion at 8.

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definition capacity³³ does not inform the question of whether Comcast's refusal to provide WealthTV carriage equivalent to that provided to MOJO was unlawfully discriminatory.

The Chief Administrative Law Judge's *Recommended Decision* bears this point out. The Judge found that "[w]hatever the allocation of burdens [of proof], 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."³⁴ Specifically, the Judge concluded:

The record evidence shows that defendants based their separate decisions not to carry WealthTV on a linear basis for non-discriminatory business reasons that included not only their evaluation of WealthTV's programming but also their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers; that WealthTV had not obtained carriage with a number of competing MVPDs; that WealthTV's owners were inexperienced in launching networks; that bandwidth necessary to carry WealthTV could be used for better purposes; that WealthTV lacked outside financing; and that WealthTV's proposed terms and conditions of carriage were unfavorable.³⁵

Given the weight of the evidence and the strength of the Judge's reasoning, the fact that Comcast did not interrupt the authorized delivery of WealthTV to a small number of subscribers in central New Jersey does not affect the conclusion that Comcast did not discriminate against WealthTV in favor of MOJO.

³³ Comcast acquired the Patriot Systems in part because they were fully built out 860 MHz systems with sufficient capacity to carry more high definition programming. See Press Release, Comcast Corporation to Acquire Patriot Media (Apr. 3, 2007), <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=3>; Steve Donohue, *A Campaign Draped in Red, White, and Blue*, MULTICHANNEL NEWS, (Sept. 25, 2005), http://www.multichannel.com/article/90814-A_Campaign_Draped_In_Red_White_and_Blue.php

³⁴ See *Recommended Decision* ¶ 62.

³⁵ *Id.* ¶ 67.

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WealthTV also fails to show an “intent to deceive” on Comcast’s part. In fact, WealthTV does not even mention the “intent to deceive” test for lack of candor, much less make a proffer of evidence to show that Comcast intended to deceive the Commission. Nor can it, given that Comcast disclosed this situation in its document production to WealthTV such that WealthTV could have raised it in the hearing if it could show the information to be relevant. Thus, WealthTV’s Motion fails for this reason alone.

Moreover, as discussed above, WealthTV’s carriage on the Patriot Systems was of no decisional significance, so Comcast would have had no motive to deceive the Commission on this point. Even had this information been of decisional significance, however, Comcast would have had no incentive or motive to deceive the Commission regarding its legacy carriage on the former Patriot systems in three communities in New Jersey. If it were helpful to anyone, this information would have been helpful to Comcast. As noted above, the fact that Comcast did not interrupt WealthTV’s pre-existing carriage on three fully built out systems was consistent with Comcast’s position throughout this litigation. Thus, this fact might have provided one more scintilla of evidence showing that Comcast was willing to carry WealthTV under appropriate terms and conditions. In sum, WealthTV cannot show a “substantial likelihood of proving” its allegations, as it must do to justify reopening the record.³⁶

³⁶ *Ackerman Order*, 8 FCC Rcd at 4205.

IV. CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny WealthTV's Motion.

Respectfully submitted,

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EXHIBIT A

WITHHELD FROM PUBLIC INSPECTION PURSUANT TO PROTECTIVE ORDER IN

FCC FILE NOS. CSR-7709-P, CSR-7822-P, CSR-7829-P, CSR-7907-P

CERTIFICATE OF SERVICE

I, Bridget E. Anderson, hereby certify that, on March 15, 2010, copies of the attached Opposition to Motion to Reopen the Record for Further Hearing were served by email to the following:

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