

**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

**REPLY TO OPPOSITION TO MOTION TO REOPEN THE RECORD FOR
FURTHER HEARING**

HERRING BROADCASTING, INC. d/b/a WEALTHTV, pursuant to Section 1.45(c), hereby replies to the Opposition to Motion to Reopen the Record for Further Hearing, filed March 15, 2010, by Defendant Comcast Corporation (“Corporation”).¹

¹ WealthTV’s response is timely filed. 47 C.F.R. § 1.45(c).

The *gravamen* of Comcast's opposition is that WealthTV's Motion to Reopen the Record for Further Hearing is untimely and, in any event, not a matter of decisional significance. As Comcast would have it, one obscure reference in one page, COMWTV00003084, from among thousands of pages of documents it and the other Defendants produced in discovery, should have apprised WealthTV that Comcast was continuing to carry it on the systems formerly owned by Patriot Media Communications CNJ, L.L.C.² ("Patriot") (Opposition at 3). Further, despite the fact that, as noted in the Motion, Patriot had notified WealthTV that it was terminating its National Cable Television Cooperative ("NCTC") agreement whereby it carried WealthTV, the burden was on WealthTV to have tracked down and ensured that Comcast was not carrying WealthTV without an agreement or compensation.

Comcast utterly fails to acknowledge the central point of the Motion. Comcast asserted in Defendants' Joint Proposed Findings of Fact and Conclusions of Law ("Defs. PFoF") that Comcast "did not view WealthTV's programming as a compelling value proposition for Comcast or its subscribers." Defs. PFoF ¶ 102. Indeed, Mr. Bond testified that "[in] my view, however, WealthTV simply did not demonstrate to me that its business proposition was sufficiently compelling to warrant WealthTV's demand for extensive, long-term carriage on Comcast's cable systems." (Comcast Ex. 3, p. 4). Contrary to the evidence submitted by Comcast, it now is evident that among the Defendants, certainly Comcast did have – and continued to have until earlier this month – the ability to measure the audience appeal of WealthTV's programming. Indeed, this ability in the Princeton-area systems related specifically to the kind of audience that WealthTV was targeting.

² COMWTV00003084 was a document produced in discovery, not a contemporaneous notification to WealthTV that Comcast would carry the channel without compensation when it reached the decision to do so. Being highly confidential, it could not and was not shown to WealthTV. In any event, it does not constitute notification. It is also contrary to Mr. Madison Bond's implication that Comcast was not carrying WealthTV. Motion at 3-4.

This matter addresses questions of decisional significance, in that it goes to the heart of the matter regarding Comcast's negotiating tactics and whether they negotiated in good faith with WealthTV.³

Comcast and the other Defendants claimed to have either negotiated in good faith with WealthTV or rejected carriage based on legitimate business reasons. In fact, as demonstrated in the Motion, Comcast failed to do either with WealthTV. Defendant Comcast's supposedly legitimate business reasons for not carrying WealthTV included claims of scarcity of channel capacity, Defs. PFOF ¶¶ 106-07, and lack of reliable data to be able to determine audience appeal of the programming, *id.* ¶ 102. In fact, in at least this one instance, the facts demonstrate the contrary.⁴

If WealthTV been aware during its ongoing negotiations with Comcast and at hearing that Comcast was carrying its programming and had the ability to measure audience response, this would have significantly affected WealthTV's negotiating posture with the other cable companies by allowing it to approach Cox, Time Warner and Bright House with data showing that Comcast had been able to measure.

Comcast's apparent carriage of WealthTV is also of decisional significance because it further demonstrates the disparate treatment of affiliated and non-affiliated channels. Although Comcast's affiliated channel, MOJO, could have, in negotiations, leveraged its carriage on Comcast systems, WealthTV could not due to Comcast's failure to provide it any notice of that carriage. Certainly, MOJO did not receive similar treatment, *i.e.*, no compensation and no notification. In addition, Comcast's carriage of WealthTV is of decisional significance to the issue, whether Comcast negotiated in good faith with WealthTV. Comcast hampered WealthTV's efforts at good faith

³ Even assuming *arguendo* that WealthTV has not filed in a timely manner, these are matters that are of "probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing." 47 C.F.R. § 1.229(c).

⁴ Comcast attempts to brush aside the carriage of WealthTV on the Patriot systems by characterizing it as "legacy carriage". As noted in the Motion, there was no basis for continued carriage, as the NCTC Agreement had been repudiated by Patriot prior to the closing of the sale to Comcast.

negotiations not only by its failure to provide any sort of reporting information or performance data for WealthTV on Comcast systems.

Questions of timeliness aside, WealthTV has alleged facts showing a substantial and material question of fact about whether Comcast negotiated in good faith, because it knew – or should have known⁵ – that it was carrying WealthTV.

⁵ Comcast alleges that WealthTV should have been aware from COMWTV00003084 that a Comcast system was carrying WealthTV. For the reasons noted above, one page in thousands is no basis for imputing knowledge on the part of Wealth TV. By contrast, it is Comcast, which produced the documents for apparently internal business discussions, that should have been aware of the carriage of WealthTV programming and, therefore, candid with WealthTV in its negotiations over carriage. Failure to disclose its carriage of WealthTV in the context of the hearing was, at best, a grossly negligent omission.

WHEREFORE, in light of the foregoing, WealthTV respectfully submits that it has presented matters of decisional significance that merit further consideration by the Commission and request that the Commission grant the Motion to Reopen the Record for Further Hearing.

Respectfully submitted,

**Herring Broadcasting, Inc. d/b/a
WealthTV**

By: 

Stephen Díaz Gavin
Rory E. Adams
PATTON BOGGS LLP
2550 M Street NW
Washington, DC 20037
(202) 457-6000
Its Counsel

Dated: March 22, 2010

CERTIFICATE OF SERVICE

I, Rory E. Adams, hereby certify that, on this 22nd day of March, 2010, copies of the foregoing "Reply to Opposition to Motion to Reopen the Record for Further Hearing" were sent via email, to the following:

P. Michele Ellison
William Davenport
Gary P. Schonman
Elizabeth Mumaw
Federal Communications Commission
Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

David H. Solomon
L. Andrew Tollin
Robert G. Kirk
J. Wade Lindsay
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037
Counsel for Comcast Corporation

Michael P. Carroll
David B. Toscano
Antonio J. Perez-Marques
Jennifer A. Ain
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
Counsel for Comcast Corporation

Jay Cohen
Gary Carney
Samuel E. Bonderoff
Vibhuti Jain
Paul Weiss Rifkind Wharton &
Garrison LLP
1285 Avenue of the Americas
New York, NY 10011
Counsel for Time Warner Cable Inc.

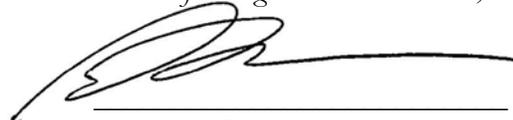
Arthur H. Harding
Seth A. Davidson
Micah M. Caldwell
Fleischman and Harding LLP
1255 23rd Street, NW, 8th Floor
Washington, DC 20037
Counsel for Time Warner Cable Inc.

James L. Casserly
Michael H. Hammer
Michael Hurwitz
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, D.C. 20006-1238
Counsel for Comcast Corporation

David E. Mills
Jason E. Rademacher
Lynn M. Deavers
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20036
Counsel for Cox Communications, Inc.

John R. Wilner
Robert M. Nelson
Adam M. Copeland
Fleischman and Harding LLP
1255 23rd Street, NW, 8th Floor
Washington, DC 20037
Counsel for Bright House Networks, LLC

Arthur J. Steinhauer
Cody Harrison
Sabin Bermant & Gould LLP
Four Times Square
New York, NY 10036
Counsel for Bright House Networks, LLC



Rory E. Adams