

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
)  
Herring Broadcasting, Inc. d/b/a WealthTV, )  
Complainant )  
v. )  
Time Warner Cable Inc., )  
Defendant )  
)  
)  
Herring Broadcasting, Inc. d/b/a WealthTV, )  
Complainant )  
v. )  
Bright House Networks, LLC, )  
Defendant )  
)  
)  
Herring Broadcasting, Inc. d/b/a WealthTV, )  
Complainant )  
v. )  
Cox Communications, Inc., )  
Defendant )  
)  
)  
Herring Broadcasting, Inc. d/b/a WealthTV, )  
Complainant )  
v. )  
Comcast Corporation, )  
Defendant )

MB Docket No. 08-214

File No. CSR-7709-P

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File No. CSR-7907-P

To: The Commission

**OPPOSITION TO WEALTHTV PETITION FOR RECONSIDERATION**

Dated: July 27, 2011

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Time Warner Cable Inc., Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corporation (collectively “Defendants”), pursuant to section 1.106(g) of the Commission’s rules,<sup>1</sup> hereby file this Opposition to Herring Broadcasting, Inc. d/b/a WealthTV’s (“WealthTV”) Petition for Reconsideration of the Commission’s Memorandum Opinion and Order in the above-captioned proceedings.<sup>2</sup>

## I. INTRODUCTION AND SUMMARY

WealthTV’s Petition is a transparent attempt to divert attention from an overwhelming record demonstrating “that the [D]efendants never violated section 616 of the Act or section 76.1302(c) of the rules.”<sup>3</sup> The Commission’s unanimous (4-0) decision to adopt the Administrative Law Judge’s (“ALJ”) Recommended Decision properly rejected all of WealthTV’s exceptions and its other belated collateral maneuvers.<sup>4</sup> The Commission agreed with the ALJ’s findings that: (1) the record evidence demonstrated that WealthTV and Defendants’ now-defunct-but-once-affiliated network, MOJO, were not similarly situated;<sup>5</sup> (2) each of the four defendant cable operators had legitimate business reasons for declining to carry WealthTV;<sup>6</sup> (3) there was “no credible or reliable evidence” that ownership of MOJO played any

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<sup>1</sup> 47 C.F.R. § 1.106(g).

<sup>2</sup> Herring Broadcasting, Inc. d/b/a/ WealthTV, Petition for Reconsideration, MB Docket No. 08-214 (filed July 13, 2011) (“Petition”).

<sup>3</sup> *In re 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) (“*WealthTV Recommended Decision*”); *In re Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Memorandum Opinion & Order, MB Docket No. 08-214, FCC 11-94 ¶ 3 (rel. June 13, 2011) (“*WealthTV Order*”) (adopting the *WealthTV Recommended Decision*).

<sup>4</sup> *WealthTV Order* ¶ 3; *WealthTV Recommended Decision* ¶ 62.

<sup>5</sup> *See WealthTV Order* ¶¶ 22-26.

<sup>6</sup> *See id.* ¶ 32.

role in Defendants’ decisions regarding WealthTV;<sup>7</sup> and (4) the testimony of WealthTV’s sole fact witness – WealthTV’s President – was “unreliable and not credible.”<sup>8</sup> (The testimony of WealthTV’s expert witnesses fared no better.<sup>9</sup>) The Commission also adopted the ALJ’s finding that Defendants would prevail in these cases even if they had been required to carry the burdens of production and proof.<sup>10</sup> Finally, the Commission rejected WealthTV’s two most recent meritless procedural requests – its request for oral argument before the full Commission<sup>11</sup> and its motion to reopen the record.<sup>12</sup>

WealthTV does not seriously challenge any of these findings in its Petition. Instead, it first launches a scattershot attack over alleged “unresolved ethics concerns.”<sup>13</sup> After devoting the bulk of its pleading to this *ad hominem* barrage, WealthTV then briefly seeks to establish that the Commission applied “inadequate and inconsistent procedural standards”<sup>14</sup> and ruled “without

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<sup>7</sup> See *id.* ¶ 15.

<sup>8</sup> *WealthTV Order* ¶ 30, citing *WealthTV Recommended Decision* ¶ 44 n.179; see also *WealthTV Recommended Decision* ¶¶ 32, 46, 47 (finding Mr. Herring’s testimony lacking in reliability and credibility on various issues).

<sup>9</sup> See *WealthTV Order* ¶ 24; *WealthTV Recommended Decision* ¶ 17 n.62 (testimony of WealthTV expert Sandra McGovern “must be rejected” in light of the weight of contrary evidence); ¶ 25 (“Ms. McGovern’s acknowledgement of many differences in the programming of WealthTV and MOJO negates any credibility of her conclusion that the two networks had strikingly similar programming.”); ¶ 31 n.117 (testimony of WealthTV expert Gary Turner “not credible”); ¶ 60 n.238 (written direct testimony of WealthTV expert Mark Kersey “deemed unreliable” and excluded).

<sup>10</sup> *WealthTV Order* ¶ 18.

<sup>11</sup> See *id.* ¶ 44.

<sup>12</sup> See *id.* ¶ 49 (rejecting WealthTV’s motion because of “[its] untimeliness, WealthTV’s lack of due diligence in raising this issue, and the absence of any likelihood that this newly discovered evidence would be of decisional significance”).

<sup>13</sup> Petition at 9.

<sup>14</sup> *Id.*

proper standards or consistency in decision making”<sup>15</sup> by pointing to (and mischaracterizing) irrelevant events in this and other, unrelated proceedings.

WealthTV’s Petition is not merely lacking in merit; it represents the culmination of a long pattern of irresponsible advocacy based on reckless accusations and bizarre conspiracy theories. WealthTV commenced this litigation by alleging a vast and intricate plot by Defendants to steal its idea for a network; no evidence of any collusion among or copying by Defendants ever was identified, and WealthTV was forced to abandon that theory at trial. WealthTV then lodged equally unfounded claims of bias against the Commission’s Chief Administrative Law Judge (“ALJ”), which the Commission has decisively rejected.<sup>16</sup> WealthTV now impugns the integrity of the Commission itself by gathering together and attempting to ignite a pile of stray bits of speculation and innuendo pertaining to one former Commissioner, who recused herself from the Commission’s decision, and three former FCC employees, all of whom had left the Commission long before its decision.

In short, WealthTV’s last-ditch effort to resurrect its complaints against Defendants consists of little more than baseless and defamatory accusations, offers no factual or legal basis that would justify reopening the Commission’s decision, and should be summarily dismissed.

## **II. WEALTHTV HAS NOT DEMONSTRATED ANY TAIN TO THE COMMISSION’S DECISIONMAKING PROCESS.**

WealthTV’s principal claim is that the Commission’s decision may have been irreparably tainted by the alleged involvement of three former Commission employees, and one former

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<sup>15</sup> *Id.* at ii.

<sup>16</sup> *See* Herring Broadcasting, Inc. d/b/a WealthTV, Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 08-214, at 21 (Nov. 16, 2009) (“WealthTV Exceptions”). The Commission not only rejected but struck the allegation of improper bias on the part of the ALJ. *WealthTV Order* ¶¶ 42, 50.

Commissioner. But this is a red herring; WealthTV’s petition does not substantiate any “serious and material questions about the validity of the Commission’s Order.”<sup>17</sup> WealthTV raises questions galore, but it essentially acknowledges its failure to present any facts to back up its allegations.<sup>18</sup> As with its prior accusation of improper bias on the part of Chief Judge Sippel, WealthTV “does not come close”<sup>19</sup> to demonstrating an impermissible taint on the *WealthTV Order*. Nor is WealthTV alleging improper bias on the part of the Commissioners who actually voted on the *WealthTV Order*. WealthTV nonetheless speculates that the integrity of the decisional process somehow may have been “compromised.”<sup>20</sup>

WealthTV’s insinuations all rest on the unremarkable fact that some former Commission employees happen to have taken positions in the private sector, including with certain companies that WealthTV has sued.<sup>21</sup> But, as WealthTV acknowledges, the former Commissioner staffers

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<sup>17</sup> Petition at 10.

<sup>18</sup> Despite receiving responses to two FOIA requests directly inquiring as to the participation of Commission personnel in WealthTV’s “carriage access complaints” [sic] that WealthTV admits did not yield any evidence of improper conduct, WealthTV magnanimously avers that it “does not claim to know all the facts.” Petition at 7, 14. *See also id.* at 11 (“Nothing in the [*WealthTV Order*] offers any indication . . .”; “there is nothing in the record provided in the FOIA responses that reflects . . .”); *id.* at 15 (“ . . . is not known”; “. . . cannot be . . . ascertained”).

<sup>19</sup> *WealthTV Order* ¶ 42.

<sup>20</sup> Petition at 5.

<sup>21</sup> WealthTV’s principal concern here relates to the supposed “involvement of former Commission staff – and indeed a Member of the Commission – who have ‘switched sides’ to go work for one of the MVPDs during the pendency of this case.” Petition at i; *see also id.* at 2, 5, 10, 13-15. WealthTV presents no evidence that any individual was improperly “involved” in this matter on two different sides. Oblivious to irony, WealthTV’s petition also fails to note that a Commission Chairman, a Chief of the Media Bureau, and a General Counsel of the Commission have all – during the pendency of this case – left the Commission to join the law firm that currently represents WealthTV, the very firm that filed the instant petition and all of WealthTV’s recent pleadings in these cases.

had all left the Commission *before* the ALJ issued his ruling,<sup>22</sup> and the former Commissioner recused herself from any proceedings involving Comcast *weeks before* the Commissioners were presented with a draft order resolving WealthTV’s multiple challenges to the ALJ’s ruling.<sup>23</sup> WealthTV offers no evidence at all that any of the former employees or the former Commissioner played any role in deciding this case.<sup>24</sup>

WealthTV’s legal arguments are also devoid of merit. While WealthTV professes to be concerned about the integrity of the decisional process, the truth is that allowing WealthTV to pursue its fishing expedition into an agency’s “mental processes” would be “destructive of [the agency’s adjudicative] responsibility”; agency Commissioners, no less than judges and Cabinet

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<sup>22</sup> Even by WealthTV’s own account of the facts, all of the former legal advisors have been in their current positions since well before WealthTV filed its exceptions to the ALJ’s Recommended Decision. *See* Petition at 6-7. Indeed, Ms. Puzé has been in her position since September 2008, even before the Media Bureau issued the *HDO*; and Mr. Brioché and Mr. Chessen have been in their positions since before the ALJ issued the *WealthTV Recommended Decision* (nor is Mr. Chessen even employed by a party to these proceedings). Thus, any issues relating to these individuals, however baseless, should have been raised in WealthTV’s exceptions. At this juncture, they are as untimely as they are unfounded. *See* 47 C.F.R § 1.277(a) (“Any objection not saved by exception filed pursuant to this section is waived.”).

<sup>23</sup> WealthTV does not contest that the draft Commission order “went on circulation for the Commissioners’ review and vote on May 5, 2011.” Petition at 11. And WealthTV “completely acknowledge[s] statements by Commissioner Baker and [General Counsel] Schlick that Commissioner Baker recused herself from matters involving Comcast . . . in April.” *Id.* at 12. Yet the force of these two uncontroverted facts does not prevent WealthTV from proceeding along the well-trod path of conspiracy theorists who purport to “raise serious concerns” based on nothing other than their own “unanswered questions.” *Id.*

<sup>24</sup> WealthTV raises questions about the potential involvement of Commissioner Baker’s staff, but as WealthTV admits, that would be relevant only if Commissioner Baker engaged in “direct and active supervision of the participation of a subordinate in the matter.” Petition at 13. WealthTV offers nothing other than speculation and innuendo to suggest that any such supervision in this matter occurred once Commissioner Baker recused herself – which, again, was well before the draft decision was circulated to the Commissioners.

Secretaries, “are assumed to be men [and women] of conscience, capable of judging a particular controversy on the basis of its own circumstances.”<sup>25</sup>

The case law cited by WealthTV demonstrates that, to sustain the type of claim WealthTV brings here, it must provide substantial, credible evidence of blatant misconduct.<sup>26</sup>

Contrary to the facts in this case, most cases under 18 U.S.C. § 208 involve an agency official’s *failure* to recuse him or herself.<sup>27</sup> WealthTV cites no authority for the proposition that the

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<sup>25</sup> See *U.S. v. Morgan*, 313 U.S. 409, 422 (1941). In the *Morgan* case, the allegation of bias pertained to the official who had indisputably made the challenged decision, whereas here WealthTV does not provide even the slightest basis for questioning the objectivity and independence of the four Commissioners who voted on the Order. *Id.* at 420.

<sup>26</sup> All of the cases that WealthTV cites in its petition are relevant only insofar as they reinforce that WealthTV has no legal basis for the relief it seeks here. In *United States v. Mississippi Valley Generating Co.*, the court found a contract unenforceable when a government consultant who retained his outside employment as a director of a financial institution represented the government in negotiations over that contract while advancing the interests of the financial institution. The court recounted over 20 pages of facts pertaining to the consultant’s dual role, including the consultant’s failure to resign his government position even after he was given direct legal advice to resign. 364 U.S. 520, 525-547, 566 (1960). In *United States v. Medico Industries, Inc.*, an Army contracting officer oversaw a contract awarded to Medico, and then after leaving the government, he assisted Medico in preparing for further negotiations on the same and similar contracts with the Army. 609 F.Supp. 98, 99-100 (N.D. Ill. 1985). Finally, the one FCC case cited by WealthTV concerned the disqualification of counsel from representing a party during the pendency of a proceeding, when the counsel in question was a former *presiding judge* in a closely related matter. See *In re Application of Applications of Commercial Radio Institute, Inc. Columbus Ohio, et al.*, Memorandum Opinion & Order, 73 F.C.C. 2d 776 ¶¶ 5, 10 (1979). Unlike the petitioner in *Commercial Radio Institute*, WealthTV did not timely move for disqualification of any counsel – nor has it presented any basis to do so.

<sup>27</sup> See, e.g., *Air Line Pilots Ass’n, Int’l, v. U.S. Dep’t of Transp.*, 899 F.2d 1230, 1232 (D.C. Cir. 1990) (finding that the Secretary’s failure to recuse himself did not amount to a violation of 18 U.S.C. § 208 when he ruled on ALPA’s petition regarding an investigation into an airline that was a client of the Secretary’s future law firm, given that the firm did not serve as counsel in the case, and noting that ALPA’s position had a “make believe” quality and that ALPA engaged in “sheer speculation” with respect to its claims.); *Ctr. for Auto Safety v. FTC*, 586 F. Supp. 1245, 1247 (D.D.C. 1984) (finding that the failure of the chairman to recuse himself did not give the appearance of a conflict of interest and his actions were not an abuse of discretion given that, among other things, he had already recused himself for a two-year period from all related matters.) Notably, in *Center for Auto Safety*, the court stated that “it is appropriate that discretion should be vested in the first instance in the individual whose recusal is at issue, and

Commission should somehow infer improper conduct from Commissioner Baker's decision actually to recuse herself – indeed, such a principle of law would make no sense at all.

Similarly, as demonstrated by the cases that WealthTV itself cites, cases under 18 U.S.C. § 207 (and its predecessor, 18 U.S.C. § 434) require a showing of substantial credible evidence.<sup>28</sup>

WealthTV provides none.<sup>29</sup> Because WealthTV's petition does not come close to meeting any

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that his decision should be overturned by a court only for an abuse of that discretion." *Id.* at 1251. One exception that proves the rule is a case where an agency official whose bias in a matter had been squarely demonstrated failed initially to recuse himself, participated in the deliberations concerning the matter, and only recused himself on the day the order in question was released. *See Antoniu v. SEC*, 877 F.2d 721, 723 (8th Cir. 1989).

<sup>28</sup> *See Mississippi Valley Generating Co.*, 364 U.S. at 525-547 (recounting over 20 pages of detailed facts regarding the dual-role of the government employee); *Medico*, 609 F.Supp. at 99 (detailing the evidence of how the former Army employee actively participated in the same particular matter after leaving his government employ); *cf. United States v. Schaltenbrand*, 930 F.2d 1554, 1560-61 (11th Cir. 1991) (finding insufficient evidence when an employee had represented his new employer in a meeting with the government on issues in which he had been involved as a government employee, without an adequate showing that he was acting as his new employer's agent).

<sup>29</sup> Indeed, WealthTV's allegations regarding Cristina Pauzé, a former staffer to Commissioner McDowell, are demonstrably false. While at the FCC, Ms. Pauzé did not "participate" in the WealthTV administrative complaint proceeding that is the subject of the Petition. As WealthTV's own contemporaneous statements in the FCC record establish, WealthTV executives met with Ms. Pauzé on three occasions to discuss the program carriage rulemaking proceeding (MB Docket No. 07-42), not WealthTV's administrative complaints against the Defendants. In its *ex parte* notice summarizing one of those meetings, WealthTV expressly (and correctly) acknowledged that its complaint proceedings were "restricted" matters and, thus "not a permitted topic of discussion" during meetings with Commission staff. Letter from Kathleen Wallman, Counsel to WealthTV, to Marlene Dortch, Secretary, FCC, MB Docket No. 07-42 (Apr. 23, 2008). Nor did Ms. Pauzé make an "appearance" in the complaint proceeding after she joined TWC. Her role at the hearing – which WealthTV did not object to at the time – was limited to attending and taking notes, sitting along the wall with other observers (not "at the table with" TWC counsel as the Petition baldly claims). The Office of Government Ethics has expressly concluded that such innocuous conduct is completely unobjectionable. *See* 5 C.F.R. § 2641.201(e)(4), Example 2. And, in any case, the minor role Ms. Pauzé played in the hearing before the ALJ is entirely irrelevant to the integrity of the Commission's *de novo* review of the ALJ's recommended decision. In short, WealthTV's attacks on Ms. Pauzé are utterly devoid of merit and clearly a post-hoc rationalization for its allegations in the Petition.

applicable standard, its baseless attacks on the Commission and on former Commission personnel fail as a matter of law.

### **III. THE WEALTHTV ORDER DID NOT LACK PROPER GUIDANCE OR CONSISTENCY.**

WealthTV's other claim is that the Commission's Order "was considered and ruled on without proper guidance or consistency."<sup>30</sup> Each of the arguments that WealthTV offers to support this claim is a makeweight, at best.

First, WealthTV's argument that the burdens of production and proof were inconsistently allocated and improperly applied has been fully considered and rejected by the Commission, and WealthTV provides no basis for reconsidering that decision. WealthTV incorrectly claims that the Media Bureau's Hearing Designation Order ("*WealthTV HDO*")<sup>31</sup> established that Defendants bear the burden of proof. It did nothing of the sort.<sup>32</sup> The Commission has already

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<sup>30</sup> Petition at 18.

<sup>31</sup> *In re Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Memorandum Opinion & Hearing Designation Order, 23 FCC Rcd 14787 (MB 2008),

<sup>32</sup> WealthTV is correct that the Media Bureau determined that WealthTV had presented a prima facie case, see *WealthTV HDO* ¶ 7, but it is entirely mistaken that the Bureau ruled "that the burden of proof fell on the MVPDs." Petition at 19. The *HDO* 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. See *WealthTV HDO* ¶¶ 124, 128, 132, 136. The fact remains that placing the burdens of production and proof on WealthTV as the complainant was entirely consistent with the Administrative Procedure Act, longstanding Commission practice, and centuries of American jurisprudence. See *Recommended Decision* ¶ 58 (citing *Schaffer v. West*, 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"). 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 ¶ 20 (2009) ("[T]he Commission always requires the petitioner to produce sufficient evidence and analysis to warrant granting the relief sought."); *id.* (placing the burden of proof on the party seeking relief "has historically been the case in American jurisprudence."); *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343, 2351 (2009) ("Where the

ruled on this issue, which was fully briefed in WealthTV’s exceptions and Defendants’ responses thereto.<sup>33</sup> The fact that the Commission has said that it may conduct a future rulemaking concerning how the burdens of proceeding and proof might be allocated in future cases provides no support for WealthTV’s claim that the burdens were improperly allocated in *this* case, which was properly conducted under *existing* rules and case law.<sup>34</sup> No theoretical change in the allocation of the burdens of production or proof would change the result in this case even in the unlikely event that a new rule could be applied retroactively, because WealthTV’s case “failed completely”<sup>35</sup> and Defendants “would have prevailed even if they had been required to carry the burdens of production and proof.”<sup>36</sup>

Second, WealthTV frivolously claims that it suffered “great detriment” because the Media Bureau summarized the Defendants’ answers to WealthTV’s claims in the 2008 *WealthTV HDO*.<sup>37</sup> WealthTV bases this claim on the Media Bureau’s statement in the 2010 hearing designation order in The Tennis Channel’s complaint against Comcast (“*Tennis Channel HDO*”)<sup>38</sup> that the Bureau would refrain from providing a detailed discussion of the defendant’s

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statutory text is silent on the allocation of the burden of persuasion, we begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.”) (citations omitted).

<sup>33</sup> See *WealthTV Order* ¶ 18; see also *WealthTV Exceptions* at 4, 6-10; Defendants’ Joint Reply to WealthTV’s Exceptions to the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 08-214, at 5-6 (Dec. 2, 2009).

<sup>34</sup> WealthTV interprets these statements in the *WealthTV Order* as the Commission “expressly conced[ing] its lack of basis in law to affirm the ALJ’s burden-shifting.” Petition at 21. This reading of the Commission’s order is untethered to reality.

<sup>35</sup> *WealthTV Recommended Decision* ¶ 63.

<sup>36</sup> *WealthTV Order* ¶ 18.

<sup>37</sup> Petition at 21.

<sup>38</sup> *The Tennis Channel, Inc., v. Comcast Cable Commc’ns, LLC*, Hearing Designation Order, 25 FCC Rcd 14149 (MB 2010).

arguments.<sup>39</sup> For WealthTV’s claim to make sense, it would have to show that the Media Bureau expressed support for Defendants’ positions in the *WealthTV HDO* and that such expression of support influenced the ALJ and later the Commission. No such showing is possible because, in both cases, the ALJs treated the HDOs as simply referring the issues for a *de novo* hearing based solely on the evidence compiled during the course of the hearing.<sup>40</sup> In this case, the Commission approved that approach, so there is no evidence that the Media Bureau’s presentation of the case in the *WealthTV HDO* had any effect at all.

Moreover, when the *WealthTV HDO* was released, all parties recognized that the Media Bureau’s recitation and criticism of the arguments and evidence presented by Defendants in their answers to WealthTV’s complaints worked to the benefit of WealthTV – not to that of the Defendants.<sup>41</sup> In fact, WealthTV repeatedly argued during the trial phase of this proceeding that the *WealthTV HDO* should be afforded substantial deference.<sup>42</sup> In any event, the Bureau made

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<sup>39</sup> Petition at 21-22.

<sup>40</sup> *WealthTV Recommended Decision* ¶ 3 (citations and quotation marks omitted); *accord Tennis Channel HDO* ¶ 2 (“We direct the Presiding Judge to develop a full and complete record and to conduct a *de novo* examination of all relevant evidence in order to make an Initial Decision.”). Defendants do not take any position here concerning the approach vis-à-vis the defendant’s arguments taken in the *Tennis Channel HDO*.

<sup>41</sup> As WealthTV’s counsel wrote to the Chief of the Media Bureau just four days after the *WealthTV HDO* was released: “The [Hearing Designation] Order obviously reflects a great deal of careful analysis of the claims in the record, and WealthTV appreciates the considerable efforts of the Bureau and all at the Commission reflected in the Order.” *See* Letter from Counsel for WealthTV, to Chief, Media Bureau, MB Docket No. 08-214 (dated Oct. 14, 2008; filed Oct. 20, 2008) (among other things, declining alternative dispute resolution procedures, and asking the Chief of the Media Bureau to interfere in the assignment of ALJs to the cases, impose discovery holds on Defendants, and provide relief with respect to Defendants’ carriage commitments, all notwithstanding that the case was then in the hands of the Office of ALJs).

<sup>42</sup> WealthTV argued that the ALJ should have attached evidentiary weight to the Bureau’s finding that a *prima facie* case had been established – an argument that ultimately was unavailing. *See WealthTV Recommended Decision* ¶ 3 (“Shortly after the release of the *HDO*, the Presiding Judge issued an Order assigning WealthTV both the burden of proceeding with the

clear that the approach it took in the *Tennis Channel HDO* was intended to avoid implying that the Media Bureau had prejudged the merits of the defendant's arguments.<sup>43</sup> This change in approach was not an "admission by the Media Bureau that it may have mishandled the [*WealthTV HDO*]." <sup>44</sup> But even if it were, the Bureau's error would have been prejudicial to Defendants, not WealthTV, and cannot serve as a basis for granting WealthTV's request for reconsideration.<sup>45</sup>

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introduction of evidence and the burden of proof with respect to the designated issues. The Presiding Judge in a subsequent order ruled that the 'evidence adduced at the hearing in this proceeding will be given *de novo* consideration' and that the resolution of the issues in this case will be 'based solely on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*.'" (citations omitted). After these rulings, WealthTV continued to assert that the *WealthTV HDO* should be given unwarranted deference and, in fact, led the Media Bureau into error with that argument. *See WealthTV Order* ¶ 8 ("In a December 2008 order, in response to a motion by WealthTV, the Media Bureau ruled that the ALJ's authority had expired when he had not issued a decision within 60 days as set forth in the *HDO*. The Bureau stated that it would resolve the complaints itself, without a recommended decision from the ALJ. In a January 2009 order, the Commission rescinded the Media Bureau's December 2008 order, concluding that 'these proceedings are best resolved by hearings before an Administrative Law Judge.' The Commission 'reinstate[d] the presiding Administrative Law Judge's delegated authority and direct[ed] him to proceed pursuant to the *HDO*.'" (citations omitted).

<sup>43</sup> *Tennis Channel HDO* ¶ 2 n.3. As the Bureau pointed out, this modified approach was a return to the earlier practice in *Classic Sports v. Cablevision* (1997) and *MASN v. Comcast* (2006). *See Tennis Channel HDO* ¶ 2 n.3 (explaining that the Bureau was returning to the "approach" in those two "earlier program carriage cases" instead of the approach it had taken in the *WealthTV HDO*) (citations omitted). Thus, it is also untimely for WealthTV to take exception now to the approach in the 2008 *WealthTV HDO*, since any departure from prior practice in that order should have been evident at the time.

<sup>44</sup> Petition at 21.

<sup>45</sup> This section of WealthTV's petition also incoherently refers to trade press reports and ex parte filings that suggest that new program carriage rules – which have yet to be proposed, much less adopted – "may grant an independent programmer that is already carried on a cable system prior to a carriage dispute the right to maintain coverage on the system during the complaint proceeding . . . ." *Id.* at 22. That is not remotely relevant to WealthTV, which was seeking to obtain new distribution from each of the Defendants, not to maintain existing carriage. Nor is speculation about the contents of a future notice of proposed rulemaking a basis for claiming that

Third, WealthTV claims that the comments of trial staff in an unrelated case constituted an “admission” that the Commission lacks “clear and consistent guidelines as to how to determine whether programming channels are ‘substantially similar.’”<sup>46</sup> The comments of the Commission’s trial staff in the Tennis Channel manner are just that – comments – they are not a decision by the Commission or by a Commission Bureau made pursuant to delegated authority. Such comments should have no impact on the Commission’s disposition of this case.<sup>47</sup> And in any event, the absence of rigid standards to be applied in program carriage complaint proceedings is the product of an 18-year-old Commission policy of avoiding inflexible criteria for determining violations of Section 616 in favor of an analytic framework that takes into account the totality of the circumstances in each situation.<sup>48</sup> The Commission and the ALJ

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“fairness and reasonableness” entitle a complainant to reconsider a decision rendered under existing rules. *Id.*

<sup>46</sup> *Id.* at 19, 23.

<sup>47</sup> WealthTV apparently fails to recognize that the specific quote from the Enforcement Bureau trial staff’s comments in the Tennis Channel proceeding that WealthTV cites with emphasis, *see* Petition at 23, and claims to be a newfound “admission,” is the *verbatim language* that appeared in the Enforcement Bureau’s comments in the WealthTV proceeding. *See In re The Tennis Channel, Inc., v. Comcast Cable Commc’ns, LLC*, Enforcement Bureau’s Comments, MB Docket No. 10-204, at 4 (filed July 8, 2011) (“there is a scarcity of guidance and case law on the specific subject of program carriage discrimination”); *In re Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, Enforcement Bureau’s Comments, MB Docket No. 08-214, at 7 (filed July 8, 2009) (“there is a scarcity of guidance and case law on the specific subject of program carriage discrimination”). WealthTV’s concerns about this unremarkable statement are therefore untimely as well as unfounded.

<sup>48</sup> In implementing Section 616, consistent with Congressional intent, the Commission deliberately eschewed establishing rigid criteria *ex ante* as to prohibited behaviors and instead decided that it would “identify specific behavior that constitutes ‘coercion’ and ‘discrimination’ as we resolve particular Section 616 complaints, because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.” *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd 2642 ¶ 14 (1993); *see also id.* ¶ 17 & n.33 (elaborating the preferred approach of a “case-by-case inquiry”). Of

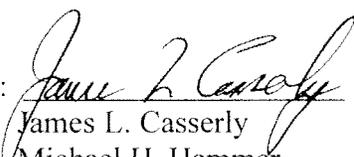
obviously acted in accordance with that policy by conducting a rigorous fact-finding effort followed by an equally rigorous application of the law to those facts. The standards for determining a violation of Section 616 were more than sufficiently clear to decide this case; the ALJ and the Commission correctly found that WealthTV's evidence failed to satisfy those standards.

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course, between 1993 and 2005, only two program carriage complaints had been brought, and WealthTV's consolidated cases are only the second time that a program carriage matter has proceeded to a final decision by the Commission.

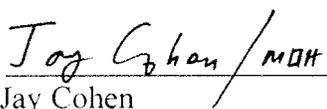
**CONCLUSION**

For all the foregoing reasons, the Commission should dismiss WealthTV's Petition for Reconsideration.

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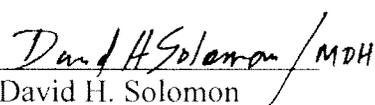
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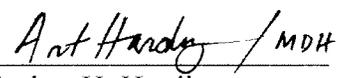
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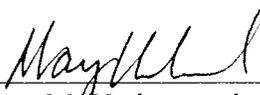
Dated: July 27, 2011

CERTIFICATE OF SERVICE

I, Mary M. Underwood, certify that on this 27<sup>th</sup> day of July, 2011, I caused true and correct copies of Defendants' foregoing Joint Opposition to Petition for Reconsideration to be hand delivered to:

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