

July 28, 2011

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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: **AMENDED PETITION FOR RECONSIDERATION**  
Docket No. 08-214  
Herring Broadcasting, Inc. d/b/a WealthTV

Dear Ms. Dortch:

As indicated would be done in the “Statement for the Record” filed on July 27, 2011, Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) hereby amends its June 13, 2011 Petition for Reconsideration of the *Memorandum Opinion and Order* (“Order”) released by the Commission regarding the program carriage disputes between WealthTV and Time Warner Cable, Inc. (“TWC”), Bright House Networks, LLC (“BHN”), Cox Communications, Inc. (“Cox”), and Comcast Corporation (“Comcast”).<sup>1</sup> This amended filing withdraws and retracts arguments dealing with concerns about the role of certain former Commission employees in the decisionmaking process in this case. Certain information received in recent days clarified what was left unclear in, among other things, the responses to WealthTV's FOIA requests, so that it was determined to not to pursue and retract these arguments.

As noted yesterday, the undersigned counsel for WealthTV has advised lead counsel for TWC, BHN, Cox and Comcast of its intention to make this filing and has expressed WealthTV's consent to additional time pursuant to Section 1.46 of the Commission's Rules to respond to this Amended Petition for Reconsideration if the parties thought necessary.

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<sup>1</sup> *In the Matter of Herring Broadcasting Inc., d/ b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 11-94, MB Docket No. 08-214, (released June 13, 2011) affirming the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 09 D-01 (ALJ rel. Oct. 14, 2009).

Ms. Marlene Dortch  
July 28, 2011  
Page 2

Please note that there are no new arguments raised in this Amended Petition; that it simply deletes former Section II.B of the Petition and related statements.

If there are any questions about this matter, please contact the undersigned at 202-457-6340, or Mark C. Ellison at 202-457-7661.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen Diaz Gavin". The signature is fluid and cursive, with a small horizontal line at the end.

Stephen Díaz Gavin  
Counsel for Herring Broadcasting, Inc. d/b/a WealthTV

Attachment

cc: All counsel of record

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

**AMENDED PETITION FOR RECONSIDERATION**

Herring Broadcasting, Inc. d/b/a WealthTV

Stephen Díaz Gavin  
Mark C. Ellison  
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Its Counsel

Dated: July 28, 2011

## SUMMARY

Recent developments compel that the Commission reconsider its decision to adopt the Administrative Law Judge's *Recommended Decision* in the program carriage complaint proceedings between and among WealthTV and Time Warner Cable, Bright House Networks, Cox, and Comcast Corporation (collectively, the "Multichannel Video Programming Distributors" or "MVPDs") and remand the matter for further proceedings, including re-hearing, as may be appropriate, or such other proceedings as may be necessary or appropriate.

Reconsideration is warranted in light of the lack of appropriate and consistent standards applicable to program carriage cases. It is clear from the record in this proceeding, other recent program carriage rulings and the fact that the Commission now has underway a revamping of the program carriage rules that the WealthTV case was considered and ruled on without proper standards or consistency in decisionmaking.

As discussed in greater detail below, there are three specific areas where this lack of structure is apparent. First, the Commission expressly notes in the Order that it lacked guidance as to how to deal with issues of burden of proof. Second, in the Tennis Channel HDO, *infra*, the Media Bureau now concedes that the Commission applied an inconsistent and incorrect standard in the WealthTV HDO regarding the prima facie case made by WealthTV. Third, it is clear from the Enforcement Bureau Comments in Tennis Channel Case, *infra*, that there are no standards or inconsistent standards applied in making the determination of what programming is "substantially similar".

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**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

**Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”)**, pursuant to Section 405(a) of the Communications Act of 1934, as amended (the “Act”)<sup>1</sup> and Section 1.106 of the Commission’s Rules,<sup>2</sup> hereby submits this Amended Petition for Reconsideration of the *Memorandum Opinion and Order* (“Order”) released by the Federal Communications Commission (“Commission”) on June 13, 2011 regarding program carriage disputes between WealthTV and Time Warner Cable,

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<sup>1</sup> 47 U.S.C. § 405(a).

<sup>2</sup> 47 C.F.R. § 1.106.

Inc. (“TWC”), Bright House Networks, LLC (“BHN”), Cox Communications, Inc. (“Cox”), and Comcast Corporation (“Comcast”) (collectively, the “Multichannel Video Programming Distributors” or “MVPDs”).<sup>3</sup> Without waiving or abandoning any of its Exceptions and preserving all rights with respect thereto, WealthTV submits that new questions of fact have arisen since the last opportunity to present such matters pertaining to the Commission’s lack of appropriate and consistent standards applicable to program carriage cases.

As set forth herein, WealthTV requests that the Commission reverse the Administrative Law Judge’s (“ALJ”) *Recommended Decision* and remand the matter for further proceedings, including re-hearing, as may be appropriate, or initiate such other proceedings as necessary or appropriate.<sup>4</sup>

## I. FACTS

In 2007 through 2008, Wealth TV filed program carriage complaints with the Commission, pursuant to Section 616 of the Communications Act of 1934 (“Section 616”), 47 U.S.C. § 536, and Section 76.1301(c) of the Commission’s Rules, 47 C.F.R. § 76.1301(c) (the “Rules”). WealthTV claimed it had been unreasonably restrained its ability to compete fairly with the MVPDs’ affiliated network, MOJO, because WealthTV is not affiliated with the MVPDs.<sup>5</sup>

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<sup>3</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 11-94, MB Docket No. 08-214, (released June 13, 2011) (the “*Order*”) affirming the Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 09 D-01 (ALJ rel. Oct. 14, 2009) (“*Recommended Decision*”).

<sup>4</sup> This Amended Petition for Reconsideration is being filed in follow-up to WealthTV’s Statement for the Record filed on July 27, 2011. This amendment withdraws and retracts arguments made in the original Petition for Reconsideration dealing with concerns about the role of certain former Commission employees in the decisionmaking process in this case. *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Statement for the Record, MB Docket No. 08-214 (filed July 27, 2011).

<sup>5</sup> Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File

WealthTV is a premier lifestyle and entertainment network targeting an upscale, male skewed audience. *WealthTV* is distributed by the major telecommunications video providers and numerous small and medium cable operators. However, it is not carried on any of the nation's largest cable systems operated by the MVPDs.

On October 10, 2008, the Media Bureau adopted a *Memorandum Opinion and Hearing Designation Order* (“*HDO*”),<sup>6</sup> which concluded that WealthTV had established a *prima facie* showing that each of the MVPDs had discriminated against it in violation of the program carriage rules, directed the ALJ to resolve factual disputes, and return a recommended decision and remedy, if necessary, in a specific timeframe.<sup>7</sup> Despite the Media Bureau's finding that WealthTV had established a *prima facie* showing of discrimination, the ALJ determined to conduct a *de novo* review and, WealthTV contends, erroneously shifted the burden of production and proof back on WealthTV.<sup>8</sup>

WealthTV moved for revocation of the *HDO*<sup>9</sup> and, by a December 24, 2008 *Memorandum Opinion and Order* (“*December 24 Order*”), the Media Bureau found that the ALJ exceeded his authority by setting a hearing date beyond the *HDO*'s 60-day deadline for issuing a recommended decision.

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No. CSR-7829-P (filed March 27, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008).

<sup>6</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.* Memorandum Opinion and Hearing Designation Order, MB Docket No. 08-214, 23 FCC Rcd 14787 (MB 2008) (“*HDO*”).

<sup>7</sup> *Id.* at ¶¶ 24, 35, 46, 57, 120.

<sup>8</sup> *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 08M-44 (ALJ, rel. Oct. 23, 2008).

<sup>9</sup> *Herring Broadcasting, Inc. v. Time Warner Cable, et al.*, Herring Broadcasting, Inc.'s Motion for Revocation of Hearing Designation, MB Docket No. 08-214 (Nov. 24, 2008) (“*HDO Revocation Motion*”).

The Media Bureau concluded that it would resolve the discrimination complaints based on the existing record.<sup>10</sup> *Sua sponte*, on January 16, 2009, the Commission rescinded the Media Bureau's *December 24 Order* and instructed the ALJ: (1) to issue a revised procedural and hearing order updating the schedule previously announced; and (2) to issue recommended decisions and remedies.<sup>11</sup> As a result, WealthTV became stuck in the middle of an internal power struggle between the Media Bureau and the ALJ.

After a two-week hearing, the ALJ issued the *Recommended Decision* in which he shifted the burden of production and of proof to WealthTV in contravention of the HDO.

On November 16, 2009, WealthTV filed Exceptions to the *Recommended Decision*, and about a year and half later, on June 13, 2011, the Commission issued the *Order* adopting the *Recommended Decision* and denying Wealth's exceptions and other requests.<sup>12</sup>

## **II. RECONSIDERATION IS PROPER BECAUSE OF INADEQUATE AND INCONSISTENT PROCEDURAL STANDARDS REGARDING THE PROGRAM CARRIAGE RULES AND IN LIGHT OF PENDING REVISIONS AND RULEMAKING**

The Commission has broad discretion to reconsider its adoption of the *Recommended Decision* in light of new and important developments. Specifically, Section 405 of the Communications Act of 1934 grants the Commission authority "in its discretion, to grant such a [petition for] reconsideration if sufficient reason therefor be made to appear."<sup>13</sup>

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<sup>10</sup> *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Memorandum Opinion and Order, 23 FCC Rcd 18316 (MB 2008) ("*December 24 Order*").

<sup>11</sup> *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, 24 FCC Rcd 1581(¶ 2) (2009); *see also In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 09M-11 (ALJ, rel. Feb. 2, 2009).

<sup>12</sup> *In the Matter of Herring Broadcasting d/b/a WealthTV, et al.*, Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 08-214 (Nov. 16, 2009).

<sup>13</sup> 47 U.S.C. § 405(a).

Here, reconsideration is warranted in light of the lack of appropriate and consistent standards applicable to program carriage cases. It is clear from the record in this proceeding, other recent program carriage rulings and the fact that the Commission now has underway a revamping of the program carriage rules that the WealthTV case was considered and ruled on without proper guidance or consistency.

As discussed in greater detail below, there are three specific areas where this lack of structure is apparent. First, the Commission expressly notes in the Order that it lacked guidance as to how to deal with issues of burden of proof. Second, in the Tennis Channel HDO, *infra*, the Media Bureau clearly admits that it applied an inconsistent and incorrect standard in the WealthTV HDO regarding the *prima facie* case made by WealthTV. Third, it is clear from the Enforcement Bureau Comments in the Tennis Case, *infra*, that there are inconsistent standards applied in making the determination of what programming is “substantially similar”.

**A. Lack of Standards Regarding the Burden of Proof**

Reconsideration is appropriate given the Commission’s own recognition that the program carriage rules failed to provide adequate guidance with respect to which entity in the original hearing had the burden of proof, and the fact that according to reports the Commission is currently voting on an Order and Notice of Proposed Rulemaking to revise program access rules and presumably to provide such guidance. It is unfair and unreasonable for the Commission to both allow the *Recommended Decision* to stand despite Media Bureau’s finding that WealthTV had established its *prima facie* case and that the burden of proof fell on the MVPDs, while at the same time adopting rules seeming to ensure that the same issue doesn’t arise in a subsequent proceeding. Such a ruling would create more confusion and a double-standard and serve only to complicate and disrupt the program carriage complaint process.

The ALJ's *Recommended Decision* ignored and contravened the finding of the Media Bureau that WealthTV had established a *prima facie* showing of discrimination in violation of the Commission's rules. The Order thus disregarded relevant precedent of a burden-shifting framework under anti-discrimination provisions of the Cable Act<sup>14</sup> and the Commission's program carriage regulations and erroneously allocated the burden of proceeding and proof to WealthTV. The ALJ arbitrarily and erroneously disregarded the *HDO's* findings and Media Bureau precedent.<sup>15</sup>

The Commission should have rejected this allocation of the burden of proof as a matter of law. An administrative law judge has no authority to act inconsistently with the terms of a hearing designation order<sup>16</sup> and the Commission had no valid basis to conclude that defendants would have prevailed even if the lawful precedent had been followed and the Media Bureau's allocation of burden of proof to the defendants had been properly observed.

Instead, the Commission dismissed WealthTV's argument with a broad statement:

. . . [W]e agree with the ALJ's conclusion that the allocation of the burdens is "immaterial to the [ultimate] decision" inasmuch as "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." We conclude that the

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<sup>14</sup> Pub. L. 102-385, 106 Stat. 1460.

<sup>15</sup> See *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783, 15792-93 (MB 2008) (an arbitrator applied program access and program carriage decisions, concluding that "the claimant must establish a *prima facie* case of discrimination as defined by the applicable statute, at which point the burden shifts to the respondent to justify treatment of [the] non-affiliated programmer." (internal citation omitted)) *rev'd on other grounds TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 18099 (2010).

<sup>16</sup> *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 486 (¶ 11) (1981) (no authority to consider matters already considered by operating bureau in designating applications for hearing); *Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5145 (¶75) (Rev.Bd. 1994) (ALJ has no authority to grant exceptors' request to confine the intervenors' participation to the Applicants where HDO accorded the intervenors full party status).

defendants would have prevailed even if they had been required to carry the burdens of production and proof, as WealthTV contends was proper.

Despite the magnitude of this decision, the Commission did not provide even a glimpse into how it weighed the complicated facts in this case. The *Recommended Decision* included over 30 pages discussing the ALJ's finding of facts and conclusions of law, but the Commission dispensed with a critical element of this case with a broad conclusion and no detailed support.

In addition, the Commission expressly conceded its lack of basis in law to affirm the ALJ's burden-shifting, as it notes:

We recognize that it would be helpful for us to provide guidance on the proper allocation of the burdens of proceeding and proof in program carriage cases that are designated for hearing. *To that end, we anticipate initiating a rulemaking proceeding that will seek comment on this and other issues regarding the program carriage rules, which will afford all interested parties an opportunity to present their views.*<sup>17</sup> (Emphasis added.)

According to press reports, it now appears that such rulemaking is imminent.<sup>18</sup>

## **B. Prejudicial Information in the WealthTV HDO**

Furthermore, it is quite clear that the Commission applied inconsistent and potentially prejudicial information in the HDO to the great detriment of WealthTV. The Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture in the case of *The Tennis Channel, Inc. vs. Comcast Cable Communications, Inc.* released October 5, 2010<sup>19</sup> (“*Tennis Channel Case*” and “*Tennis Channel HDO*”, respectfully), contains an admission by the Media Bureau that it may have mishandled the HDO in WealthTV by setting out the counter-arguments to WealthTV's *prima facie* case and possibly implying to the ALJ that the Bureau was advocating the arguments of the

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<sup>17</sup> *Order* at ¶ 18, n. 50.

<sup>18</sup> See Jonathan Make, *Program Carriage Final Vote by FCC Nears; All Democrats Backing Draft*, COMMUNICATIONS DAILY, July 5, 2011, at 4.

<sup>19</sup> *In the Matter of THE TENNIS CHANNEL, INC. v. COMCAST CABLE COMMUNICATIONS, LLC*, Designation Order and Notice of Opportunity for Hearing for Forfeiture, 25 FCC Rcd 14149 (MB 2010).

MVPDs.<sup>20</sup> In the Tennis HDO, the Media Bureau notes that it did not articulate such counter-arguments in prior cases and in the Tennis Case the Bureau indicated that it was reverting back to prior practices. Expressly citing the WealthTV HDO, the Bureau further states the following:

We note that in the most recent program carriage decisions making a *prima facie* determination, the Bureau provided a detailed discussion of the defendant's counter-arguments to each of the claims made by the complainant. *See Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, 14792-814 (MB 2008) (“*WealthTV HDO*”); . . . . The Bureau did not follow this approach, however, in earlier program carriage cases. . . . *We believe the approach taken in MASN I HDO and Classic Sports is more appropriate for a prima facie determination, which requires the Bureau to assess the evidence set forth in the complaint. Moreover, providing a detailed discussion of the defendant's counter-arguments to each of the claims made by the complainant may incorrectly imply that the Bureau is taking a position on the merits of those arguments.* While we do not summarize each of Comcast's counter-arguments below, our review of the existing record, including Comcast's Answer, makes clear that there are substantial and material questions of fact as to whether Comcast has engaged in conduct that violates the program carriage provisions of the Act and the Commission's rules.<sup>21</sup> (Emphasis added.)

Additional trade press reports and *ex parte* filings confirm that the new program carriage rules 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 if the programmer can make a *prima facie* showing to the Media Bureau.<sup>22</sup> Given this information, one can logically assume that either the new rules, the FCC's discussion of those rules, or the associated Notice of Proposed Rulemaking will address the *prima facie* burden shifting problem that arose in the WealthTV complaint proceeding and will likely address the improper inclusion of counter-arguments to the *prima facie* case in hearing designation orders.

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<sup>20</sup> *Id.* at 14149-50, n.3

<sup>21</sup> *Id.*

<sup>22</sup> *See e.g.*, Brooks Boliek, *FCC Mulls Cable Programming Disputes*, POLITICOPRO, July 6, 2011; NCTA, *In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42 (filed July 6, 2011).

Should the Commission now provide clarification or explicitly begin the process of adopting rules to resolve the very problems at issue in this matter, especially when the *Order* is just one month old, fairness and reasonableness dictate that the Commission reconsider this matter in light of changes to the rules and clarification. Allowing the ALJ's decision to stand would create a double-standard that at a minimum would cause confusion during the period before any new rules become effective or while a rulemaking proceeding is pending, and serve only to complicate and disrupt the program carriage complaint process.

In addition, the *Order*, while affirming the *Recommended Decision's* finding that it would have been "fundamentally unfair" to allegedly shift the burden of proof to the MVPDs retroactively, ignores the fundamental unfairness to WealthTV that occurred when the ALJ disregarded the finding of the Media Bureau that WealthTV had established its *prima facie* case.

### **C. Inconsistent Standards for Determining "Substantially Similar" Programming**

Recent admissions and statements of the Enforcement Bureau filed in the Tennis Channel Case concede that there is a lack of any clear and consistent guidelines as to how to determine whether programming channels are "substantially similar," and include an admission by the Commission that standards are lacking.<sup>23</sup> The Enforcement Bureau states, "Although Section 76.1301(c) was adopted in 1993, *there is a scarcity of guidance and case law on the specific subject of program carriage discrimination.*"<sup>24</sup> The Enforcement Bureau concluded that the Tennis Channel is closely aligned with both, the Golf Channel and Versus, and used a "broad category" classification determining that all three networks are sports programming related. The Enforcement Bureau

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<sup>23</sup> *In the Matter of THE TENNIS CHANNEL, INC. v. COMCAST CABLE COMMUNICATIONS, LLC*, Enforcement Bureau's Comments, MB Docket No. 10-204, File No. CSR-82588-P (filed July 8, 2011) ("*EB Comments*").

<sup>24</sup> *Id.* at ¶ 8.

clearly notes that Golf and Tennis “obviously” provide programs related to different athletic activities. Contrast this to the facts presented during the WealthTV case. MVPD-owned iN DEMAND’s own programming executive stated that MOJO was a “high definition”, “lifestyle” channel for the “male affluent educated demographic” – which is substantially similar to WealthTV.<sup>25</sup>

In 2007, when WealthTV filed its first complaint, MOJO and WealthTV were two of only a small percentage of “high definition” channels. That similarity is largely ignored in the ALJ’s *Recommended Decision*, as is evidence that both WealthTV and MOJO had at least one common advertiser (Grey Goose vodka) and had pursued another common sponsor (Bose). Instead, the ALJ relied in large part on the testimony of Comcast’s “expert” witness, Michael Eagan, giving apparent weight to Mr. Eagan’s finding that the “look and feel” of MOJO and WealthTV were different.<sup>26</sup> Yet, in the Tennis Channel case, the Enforcement Bureau dismisses that same witness’s (i.e., Mr. Eagan) “feelings” noting that such subjective assessment does not overcome compelling quantitative evidence.<sup>27</sup>

In fact, the Commission has been previously cautioned against attempts to apply unclear standards that are based on “administrative feel.” In *Central Florida Enterprises, Inc., v. F.C.C.*,<sup>28</sup> the

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<sup>25</sup> See Tr. At 4282, 4327, 4332, and 4402 (Asch).

<sup>26</sup> See *Recommended Decision* at ¶ 23..

<sup>27</sup> *EB Comments* at ¶ 16. The different standard applied by the Enforcement Bureau in the Tennis Case is also reflected in the treatment of testimony of Comcast employee Madison Bond. In the WealthTV ALJ Decision, Mr. Bond’s testimony is frequently cited to support the *Recommended Decision* (see e.g., *Recommended Decision* at ¶¶ 64 (n. 248), 69 (n.266)) and in that proceeding WealthTV’s effort to introduce evidence undermining Mr. Bond’s credibility was denied by the ALJ and affirmed by the Order. But that same witness (Mr. Bond) in the Tennis Channel Case is shown to have little credibility. (See *EB Comments* at ¶20, n. 38).

<sup>28</sup> 598 F.2d 37 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979) (subsequent history omitted)

D.C. Circuit rejected the Commission's reliance on broadcast renewal hearing standards that were not clear, and held that: "The Commission nowhere even vaguely described how it aggregated its findings into the decisive balance; rather, we are told that the conclusion is based on 'administrative feel.'" Such intuitional forms of decision-making, completely opaque to judicial review, fall somewhere on the distant side of arbitrary."<sup>29</sup>

It is thus readily apparent that evaluative standards are lacking.

### III. CONCLUSION

Recent developments compel that the Commission reconsider its decision to adopt the ALJ's *Recommended Decision* in the program carriage complaint proceedings between WealthTV and the MVPDs, and remand the matter for further proceedings, including re-hearing, as may be appropriate, or such other proceedings as may be necessary or appropriate.

Respectfully submitted,

Herring Broadcasting, Inc. d/b/a WealthTV

By: 

---

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Its Counsel

Dated: July 28, 2011

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<sup>29</sup> *Id.* at 50 (internal footnote omitted).

## CERTIFICATE OF SERVICE

I, Ryan W. King, certify on this 28th of July, 2011, a copy of the foregoing Amended

Petition for Reconsideration has been served via first class mail, postage pre-paid, to the following:

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