

**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 OPOSITION TO
WEALTHTV PETITION FOR RECONSIDERATION**

Herring Broadcasting, Inc. d/b/a WealthTV

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Dated: August 3, 2011

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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”)¹ and Section 1.106(h) of the Commission’s Rules,² hereby submits this Reply to Opposition to WealthTV Petition for Reconsideration. WealthTV seeks reconsideration of the *Memorandum Opinion and Order* (“Order”) released by the Federal Communications Commission (“Commission”) on June 13, 2011 regarding

¹ 47 U.S.C. § 405(a).

² 47 C.F.R. § 1.106(h).

program carriage disputes between WealthTV and Time Warner Cable, Inc. (“TWC”), Bright House Networks, LLC (“BHN”), Cox Communications, Inc. (“Cox”), and Comcast Corporation (“Comcast”) (collectively, the “Multichannel Video Programming Distributors” or “MVPDs”).³

WealthTV submits that the Opposition side-steps or completely ignores meritorious arguments and facts set forth in the Petition, and reconsideration is proper in this case because of inadequate and inconsistent procedural standards regarding the program carriage rules and in light of pending revisions and rulemaking applicable to such rules.

I. BACKGROUND

More than three years ago, 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 in its ability to compete fairly with the MVPDs’ affiliated network, MOJO, because WealthTV is not affiliated with the MVPDs.⁴

As set forth in the Petition, the case was eventually referred to an Administrative Law Judge (“ALJ”) and, despite significant evidence to the contrary, the ALJ issued the *Recommended Decision* in favor of the MPVDs in which he shifted the burden of production and of proof to WealthTV. On November 16, 2009, WealthTV filed Exceptions to the *Recommended Decision*, and about a year and

³ *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Order, 26 FCC Rcd 8971 (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*”).

⁴ 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 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).

half latter, on June 13, 2011, the Commission issued the *Order* adopting the *Recommended Decision* and denying Wealth's exceptions and other requests.⁵

On July 13, 2011, WealthTV filed a Petition for Reconsideration asking the Commission to reconsider its prior decision and to reverse and remand the *Recommended Decision*.⁶ As WealthTV explained, 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 the rules and procedures applicable to the decision-making process.

WealthTV outlined three specific areas where this lack of legal structure is acknowledged by the Commission. 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 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". In addition, in its recent *Second Report and Order*, the Commission expressly states that "current program carriage procedures are ineffective and in need of reform."⁷

⁵ *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).

⁶ On July 28, 2011, WealthTV submitted an Amended Petition for Reconsideration that withdrew certain arguments. The Amended Petition did not supplement the Petition or contain any new arguments, but simply deleted former Section II.B and related statements. Therefore, the Amended Petition for Reconsideration is referred to herein as "Petition".

⁷ *In the Matter of Revision of the Commission's Program Carriage Rules, Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order in

On July 27, 2011, the MVPDs filed an Opposition to the Petition (“Opposition”) to which WealthTV hereby replies.⁸

II. CONTRARY TO THE MVPDS’ CONTENTIONS, RECONSIDERATION IS WARRANTED

The Opposition side-steps or completely ignores meritorious arguments and facts set forth in the Petition, and reconsideration is proper in this case because of inadequate and inconsistent procedural standards regarding the program carriage rules and in light of pending revisions and rulemaking applicable to such rules.

A. The Enforcement Bureau’s Comments in the Tennis Channel Case are Significant

The Opposition fails to understand or acknowledge the importance of the Enforcement Bureau’s Comments in the Tennis Channel case. Those comments are relevant and applicable to this proceeding not only because the Enforcement Bureau concedes that “there is a scarcity of guidance and case law on the specific subject of program carriage discrimination”, but also because after doing so the Enforcement Bureau came to a conclusion that was in stark contrast to what the ALJ concluded in the WealthTV *Recommended Decision*.⁹ The guidelines cannot be said to be clear and consistent when they lead to such diverse conclusions based on such similar facts.

As discussed in the Petition, the Enforcement Bureau concluded that three sports channels are similar, while the ALJ applied a different analysis and found that two lifestyle channels that had

MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, FCC 11-119, ¶8 (rel. Aug. 1, 2011) (“*Second Report and Order*” and “*NPRM*”, respectively).

⁸ This reply is timely filed under 47 C.F.R. § 1.106(g). Counsel for defendants orally advised the undersigned counsel that they would not be revising their opposition in light of WealthTV’s Amended Petition, so that this reply is timely filed on August 3, 2011.

⁹ *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, ¶¶ 8, 13-18 (Public Version--Redacted) (filed July 8, 2011) (“*EB Comments*”).

been similarly described and that appealed to similar demographics were not similarly situated.¹⁰ In addition, the Enforcement Bureau discarded the subjective testimony of Comcast’s “expert” witness, Michael Egan, while the ALJ gave great weight to this same witness’ “look and feel” testimony.¹¹

Specifically, 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 clearly notes that Golf and Tennis “obviously” provide programs related to different athletic activities.¹² This is in clear contrast to the results and conclusions in 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, perhaps more so than a comparison of tennis and golf – yet the ALJ held that MOJO and WealthTV were not similarly situated.¹³

In addition, 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 Egan, giving apparent weight to Mr. Egan’s finding that the “look and feel” of MOJO and WealthTV were different.¹⁴ Yet, in the Tennis Channel case, the Enforcement Bureau dismisses that same witness’s (i.e., Mr.

¹⁰ See *id.* at ¶¶13-18; *Recommended Decision* at ¶20.

¹¹ See *EB Comments* at ¶16; *Recommended Decision* at ¶23.

¹² See *EB Comments* at ¶14.

¹³ See Tr. at 4282, 4327, 4332, and 4402 (Asch).

¹⁴ See *Recommended Decision* at ¶ 23.

Egan) “feelings” noting that such subjective assessment does not overcome compelling quantitative evidence.¹⁵ Clearly, inconsistent evaluative standards were applied. It is telling that the Opposition ignores these important arguments.

Regardless of how the MVPDs characterize the statements of the Enforcement Bureau’s “trial staff”, they cannot dispute the Commission’s own conclusion that “current program carriage procedures are ineffective and in need of reform.”¹⁶

B. The Media Bureau’s Concern in the Tennis Channel HDO Cannot be Easily Cast Aside

In the Tennis Channel HDO, the Media Bureau’s express concern is that providing a detailed discussion of a defendant’s counter-arguments may cause harm. As the Bureau notes, “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.”¹⁷ In their Opposition, the MVPDs go so far as to label WealthTV as “frivolous” for having the audacity to suggest that it could have been harmed by the fact that the Media Bureau provided a detailed discussion of a defendant’s counter-arguments in the *WealthTV HDO* when, in fact, the Media Bureau acknowledges the potential of such harm in the WealthTV case. There is absolutely nothing “frivolous” about this issue: it is one of serious concern that calls

¹⁵ *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).

¹⁶ *Second Report and Order* at ¶8.

¹⁷ *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, 14149-50, n.3 (MB 2010).

into question the fundamental fairness of the ALJ's decision, as well as the consistent application of standards. Indeed, that is precisely what concerns the Media Bureau.

The Opposition also seems to argue that the Media Bureau's prior practice of providing a detailed discussion of the cable operator's counter arguments could not have a prejudicial effect on an ALJ's decision if the ALJ conducted a *de novo* review of the facts, as occurred in the WealthTV case. However, this argument does not make sense. The Media Bureau found reason to be concerned about its prior practice even though it was clearly aware of the fact that the ALJ in the WealthTV case conducted a *de novo* review.

The MVPDs argument is not bolstered by citing to a letter from WealthTV's prior attorney to the Commission in which counsel expresses gratitude for the Bureau's careful analysis and efforts. The fact that WealthTV acknowledged that the Bureau conducted a careful analysis or worked diligently on the HDO does not in any way alleviate the Bureau's decision that its prior practice could have a prejudicial effect on the ALJ's decision. Nor is the passage from the letter or the fact that the WealthTV sought to have the ALJ give deference to part of the *WealthTV HDO*, somehow, as the MVPDs imply, a statement of unequivocal support for every word or conclusion contained in the *HDO*.

C. Pending Revisions and Rulemaking Regarding Program Carriage Complaint Procedures are Relevant to this Complaint Proceeding

What clearly has been overlooked in this matter and notably in the Opposition is the unique nature of the situation at hand. It is not mere "speculation" about a future notice regarding the rules, as the Opposition claims.¹⁸ It is a fact that the Commission has asserted that the carriage rule procedures are ineffective and that reform is needed, and has initiated a proceeding to implement such reform *within just weeks* of the Order in this case. As the Commission and the Opposition

¹⁸ "Opposition to WealthTV Petition for Reconsideration" at 11-12 n.45.

indicate,¹⁹ only two program carriage cases have been resolved to date on the merits, the *WealthTV Order* and *MASN v. Time Warner Cable*, and both of which the Commission ruled on within the last eight months and are the subject of appeals.²⁰ Prior to December 2010, there were no such rulings, let alone clear standards from the Commission. And even when the Commission had the chance to provide clarity first in the *MASN* case and then in the *WealthTV* case about the correct legal framework for adjudicating these cases, it did not articulate a standard for allocating burden and claimed that the cable company would prevail no matter the framework.²¹

This left the *WealthTV* matter in 2008 and 2009 as virtually a test case in which clear and consistent standards were not formulated, and from which grew the recent and very telling acknowledgement by the Commission of the need to reform the currently ineffective program carriage procedures.

In the June 2011 Order, the Commission dismissed *WealthTV*'s arguments about the burden of proof, yet expressly recognized, “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” and indicated that it would open a rulemaking in which it would address this issue.²²

Then, merely *49 days* after release of the *WealthTV Order*, the Commission released new program carriage rules and opened a proceeding in which it directly addressed the standards and

¹⁹ *NPRM* at ¶79; “Opposition to *WealthTV* Petition for Reconsideration” at 12-13 n.48.

²⁰ *See generally Order*, In the Matter of 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) (“*MASN*”), appeal pending sub nom. TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC, No. 11-1151 (4th Cir.).

²¹ *Order* at 8977-78 & n. 50; *MASN* at 18105.

²² *Order* at 8978, n.50.

procedures issues raised in the *WealthTV Order*. To now enact rules in the immediate wake of the WealthTV case, one that has dragged on for over three years is unfair, unreasonable, and an abuse of discretion.

Fortunately, the Commission's rules provide broad discretion for it 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."²³

WealthTV submits that it is proper for the Commission to exercise this discretion and reconsider the matter at hand in light of the clear lack of standards, the pending rules revisions, and in the interest of fairness, reasonableness, and the due process to which WealthTV is entitled.

²³ 47 U.S.C. § 405(a).

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,

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Dated: August 3, 2011

CERTIFICATE OF SERVICE

I, Ryan W. King, certify on this 3rd of August, 2011, a copy of the foregoing Reply to Opposition to WealthTV Petition for Reconsideration has been served via first class mail, postage pre-paid, to the following:

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