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Before the
Federal Communications Commission
Washington, D. C. 20554

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In the Matter of	)	
	)	MB Docket No. 08-214
	)	
Herring Broadcasting, Inc. d/b/a/ Wealth TV, Complainant	)	File No. CSR-7709-P
v.	)	
Time Warner Cable, Inc., Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a/ Wealth TV, Complainant	)	File No. CSR-7822-P
v.	)	
Bright House Networks, LLC, Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a/ Wealth TV, Complainant	)	File No. CSR-7829-P
v.	)	
Cox Communications, Inc., Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a/ Wealth TV, Complainant	)	File No. CSR-7907-P
v.	)	
Comcast Corporation, Defendant	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 2011 **Released: June 13, 2011**

By the Commission:

1. This proceeding arises from complaints filed in 2007 and 2008 by Herring Broadcasting, Inc. d/b/a WealthTV, a video programming vendor, against four multichannel video programming distributors ("MVPDs") – Time Warner Cable, Inc., Bright House Networks, Cox Communications and Comcast Corporation. The complaints allege that the MVPDs discriminated, in violation of the Communications Act and the Commission's rules, by refusing to carry WealthTV's programming where the MVPDs did carry a similar programming channel provided by a video programming vendor that was affiliated with the MVPDs.

2. In October 2008 the Media Bureau, acting pursuant to delegated authority, designated the complaints for hearing in a consolidated proceeding.[1] As subsequently modified by the Presiding Administrative Law Judge (ALJ), the issues designated for hearing were:

> (a) whether the defendant[s] engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c);
>
> (b) if the Administrative Law Judge determines that the defendant[s] [have] discriminated against the complainant's programming in violation of section 76.1301(c), whether mandatory carriage of the complainant's programming on the defendant[s'] system[s] is necessary to remedy the violation and, if so, the prices, terms and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends."[2]

3. Following a full evidentiary hearing, the ALJ issued a Recommended Decision finding that "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."[3] The ALJ denied the complaints, concluding that "WealthTV has not satisfied its burden of proving that any of the defendants engaged in discrimination in the selection, terms or conditions of carriage on the basis of WealthTV's nonaffiliation" or that "any of the defendants unreasonably restrained WealthTV's ability to compete fairly."[4] For the reasons explained below, we adopt the conclusions of the Recommended Decision and deny WealthTV's exceptions and other requests.

I. BACKGROUND

A. The Statute and Regulations

4. Section 616 of the Communications Act directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."[5] Among other things, Congress directed that the regulations "contain provisions designed to prevent a [MVPD] from engaging in conduct the effect of which is to unreasonably restrain the

[1] *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc., et al.*, 23 FCC Rcd 14787 (MB 2008) ("*HDO*"). The *HDO* also designated two additional program carriage complaints filed by NFL Enterprises and TCR Sports Broadcasting Holding against Comcast Corp. for hearing in the same proceeding. These complaints were dismissed after the parties reached settlements. *See NFL Enterprises LLC*, FCC 09M-42 (May 19, 2009); *TCR Sports Broadcasting Holding*, FCC 09M-58 (Dec. 23, 2009).

[2] *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV*, FCC 08M-47 ¶8 (ALJ Nov. 20, 2008).

[3] *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV*, 24 FCC Rcd 12967, 12997 ¶62 (ALJ 2009) ("*Recommended Decision*").

[4] *Id.* at 13003 ¶¶ 74, 75.

[5] 47 U.S.C. § 536. Section 616 was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[6]

5. The Commission adopted rules in 1993 to implement Section 616.[7] Specifically, Sections 76.1301(a) and (c) were added to the Commission's rules to prohibit a cable operator or other MVPD from engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of its nonaffiliation.[8]

6. In addition to establishing rules governing program carriage, the *Second Report and Order* also established procedures for the review of program carriage complaints and appropriate penalties and remedies. The Commission adopted procedures by which cases would be resolved on the basis of a complaint, answer and reply.[9] The Commission recognized that "resolution of Section 616 complaints [would] necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred."[10] The Commission anticipated that the "staff would be unable to resolve most carriage agreement complaints on the sole basis of a written record."[11] In such cases, if the staff determines that the complainant has established a *prima facie* case but that "disposition of the complaint would require the resolution of factual disputes or other extensive discovery," the staff is to notify the parties that they have the option of choosing Alternative Dispute Resolution ("ADR") or an adjudicatory hearing before an Administrative Law Judge.[12] The Commission stated that the appropriate relief for program carriage violations would be determined on a case-by-case basis, and that appropriate remedies and sanctions would include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.[13]

B. WealthTV's Complaints

7. WealthTV's complaints against the defendants in this proceeding assert that the defendants denied WealthTV carriage while providing preferential treatment to MOJO, a programming vendor affiliated with defendants.[14] According to WealthTV, MOJO's programming was similar to WealthTV's and MOJO targeted the same audience as WealthTV.[15] WealthTV

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[6] 47 U.S.C. § 536(a)(3); *see* 47 C.F.R. § 76.1301(c) (implementing discrimination provision).

[7] *See* 47 C.F.R. §§ 76.1300 – 76.1302; *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*, 9 FCC Rcd 2642 (1993) ("*Second Report and Order*").

[8] 47 C.F.R. § 76.1301(c).

[9] *See* 47 C.F.R. § 76.1302(c), (d), (e).

[10] *Second Report and Order*, 9 FCC Rcd at 2648.

[11] *Id.* at 2652.

[12] *Id.* at 2656.

[13] *Id.* at 2653.

[14] *HDO*, 23 FCC Rcd at 14790 ¶1.

[15] *Id.* at 14795-797 ¶¶12-17.

claimed that the defendants' actions unreasonably restrained its ability to compete fairly in the marketplace and requested the Commission to order each defendant to carry WealthTV under specified terms and conditions.[16]

8. In October 2008, the Media Bureau, acting pursuant to delegated authority, designated the four captioned complaints for hearing in a single consolidated proceeding after concluding that the pleadings raised factual disputes that made it unable "to determine on the basis of the existing records whether we can grant relief."[17] The Bureau ordered the ALJ to issue a recommended decision within 60 days. In a December 2008 order, in response to a motion by WealthTV,[18] 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*.[19] The Bureau stated that it would resolve the complaints itself, without a recommended decision from the ALJ.[20] 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."[21] The Commission "reinstate[d] the presiding Administrative Law Judge's delegated authority and direct[ed] him to proceed pursuant to the *HDO*."[22]

9. Following completion of discovery, formal hearing with testimony of 21 witnesses and written submissions by WealthTV, the defendants and the Commission's Enforcement Bureau, the ALJ issued his Recommended Decision on October 14, 2009.[23]

C. The Recommended Decision

10. The dispute reflected in WealthTV's complaint arose out of efforts by MVPDs such as defendants to provide high definition (HD) programming to their subscribers in the early 2000s when such programming was scarce. The defendants jointly own iN DEMAND, a company that provided HD programming to defendants beginning in 2003 through two channels known as INHD and INHD2. In 2007, INHD was rebranded as the MOJO channel. MOJO ceased operating in December 2008.[24] The ALJ found that the defendants viewed the carriage of these channels as a short term project to "showcase HD programming to those customers which were 'early adopters' of HD television sets at a time where there was little HD programming available."[25] He found that they expected eventually "to replace those networks when [standard

[16] *Id.* at 14792 ¶9.

[17] *Id.* at 14790 ¶7.

[18] *See* Motion for Revocation of Hearing Designation filed by Herring Broadcasting, Inc., Nov. 24, 2008.

[19] *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc., et al.*, 23 FCC Rcd 18316 (MB 2008).

[20] *Id.*

[21] *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc., et al.*, 24 FCC Rcd 1581, 1582 ¶2 (2009).

[22] *Id.*

[23] *Herring Broadcasting, Inc.*, 24 FCC Rcd 12967 (ALJ 2009).

[24] *Id.* at 12973-76 ¶¶11-19. The INHD2 channel was shut down in December 2006 to provide bandwidth for other HD channels. *See* Cox Ex. 84 (Asch Test. ¶52).

[25] *Id.* at 12973 ¶12.

definition] networks with established brands and audience developed HD versions of their existing programming."[26] The ALJ found it "particularly noteworthy" that WealthTV had not launched its channel when the INHD channels began operation in September 2003.[27]

11. The ALJ found, contrary to WealthTV's claims, that WealthTV's channel and the MOJO channel were not similarly situated because the record evidence established that they "neither aired the same type of programming, nor targeted the same audience."[28] Furthermore, the ALJ found the analysis of the two channels' programming provided by defendants' experts "far more credible" than the analysis of WealthTV's expert.[29] The *Recommended Decision* summarizes the record evidence of the differences in WealthTV's and MOJO's programming that led the ALJ to find that there were substantial differences in the content and presentation.[30]

12. The ALJ found the record evidence strongly supported defendants' claims that WealthTV and MOJO did not target the same audience. The parties agreed that MOJO's target audience was affluent males between the ages of 25 and 49. In contrast, the ALJ found that the "overwhelming weight of the record evidence ... shows that WealthTV targeted a much broader audience that was not limited to" that group.[31]

13. The ALJ concluded that the record evidence established that in 2003 the defendants chose to carry the INHD channel, which subsequently became MOJO, "for legitimate, non-discriminatory business purposes."[32] These purposes, he found, included a need: (1) to offer HD programming in order to compete with other MVPDs in appealing to "'early adopters' of HD [television] sets;" (2) to preserve flexibility to preempt scheduled programming on the MOJO channel to provide regional or local programming; and (3) for flexibility to replace the MOJO channel when HD versions of existing cable networks became available.[33] Noting that WealthTV had not even begun operations when the defendants began carrying the INHD channel and thus was not available for carriage, the ALJ concluded that the record provided "no credible evidence that the defendants, in deciding to carry INHD, discriminated against WealthTV or any other independent programming vendor on the basis of affiliation or non-affiliation."[34]

14. The ALJ rejected WealthTV's argument that the defendants launched a new channel when INHD was converted to MOJO. The ALJ found the record evidence showed, to the contrary, that "the re-branding of INHD into MOJO consisted of incremental changes over many months resulting in no significant change in the network's target demographic or general content.

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[26] *Id.* at 12974 ¶13.

[27] *Id.* at 12973 ¶12.

[28] *Id.* at 12976 ¶20.

[29] *Id.* at 12979 ¶25.

[30] *Id.* at 12977-80 ¶¶21-26.

[31] *Id.* at 12980 ¶27.

[32] *Id.* at 12998 ¶64.

[33] *Id.*

[34] *Id.* at ¶65.

That re-branding constituted an evolutionary re-focus of an existing channel rather than the independent launch of a new network."[35]

15. The ALJ also rejected WealthTV's argument that the defendants unlawfully discriminated against WealthTV based on its non-affiliated status when they chose to carry the MOJO channel rather than WealthTV's channel. "The preponderance of the evidence," the ALJ concluded, "establishes that WealthTV's status as an independent programming vendor played no role in the defendants' individual decisions not to provide full linear carriage to WealthTV."[36] That record evidence, in the ALJ's judgment, demonstrated that the defendants based their decisions not to carry WealthTV on "non-discriminatory business reasons," including: (1) "their evaluation of WealthTV's programming;" (2) "their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers;" (3) that "WealthTV had not obtained carriage with a number of competing MVPDs;" (4) that "WealthTV's owners were inexperienced in launching networks;" (5) that "bandwidth necessary to carry WealthTV could be used for better purposes;" (6) that "WealthTV lacked outside financing;" and (7) that "WealthTV's proposed terms and conditions of carriage were unfavorable" to the defendants.[37] The ALJ concluded that the record provided "no credible or reliable evidence proving that any defendant refused to carry WealthTV for any purpose of enhancing the competitive position of the affiliated programming vendor, MOJO."[38] Indeed, he concluded that there was no "credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV."[39]

16. Section 616 of the statute and Section 76.1301(c) of our rules provide that, to establish a violation, a complainant like WealthTV must show that the effect of the alleged discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly."[40] The ALJ rejected defendants' arguments that an antitrust approach should be used in applying the statute and rule because the antitrust laws are designed to protect competition, not competitors, whereas sections 616 and 76.1301(c) are intended to protect a specific group of competitors.[41] The ALJ found that the defendants' approach "would permit MVPDs to discriminate against unaffiliated program vendors ... simply by showing that they have a relatively small percentage of overall subscribers or that a large proportion of viewers subscribe to MVPDs that are not vertically integrated."[42] The ALJ found this approach inconsistent with the underlying purpose of the statute to provide new remedies separate from those available under the antitrust laws.[43]

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[35] *Id.* at 12999 ¶66.

[36] *Id.* at ¶67.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[41] *Recommended Decision*, 24 FCC Rcd at 13001 ¶71.

[42] *Id.*

[43] *Id.*

17. While rejecting the defendants' proposed analytic approach, the ALJ nevertheless concluded that WealthTV had failed to demonstrate that the defendants' refusal to carry its programming channel unreasonably restrained its ability to compete fairly. He concluded that the record evidence demonstrated that

> each of the defendants made a decision not to carry WealthTV on the basis of reasonable and legitimate business reasons that were within the bounds of fair competition. Thus, WealthTV has failed to satisfy its burden of proving by a preponderance of the evidence that any of the defendant's actions *unreasonably* restrained WealthTV's ability to compete *fairly* under the second part of the standard of sections 616 and 76.301(c).[44]

II. DISCUSSION

A. The Burden of Proceeding and the Burden of Proof

18. The ALJ determined at the outset of this proceeding that WealthTV, as the complainant, had the burden of proceeding with the introduction of evidence and the burden of proof on the issues specified with respect to the complaints against these defendants.[45] WealthTV argues in its exceptions that the ALJ improperly allocated the burdens of proceeding and proof to it "despite the fact that the Media Bureau determined that WealthTV had established a *prima facie* showing of each defendant's discrimination against WealthTV."[46] In his *Recommended Decision*, the ALJ explained that he had adhered to "the usual practice of requiring that the party seeking relief by Commission order to bear the burden of proving that the violations occurred" and that WealthTV had not challenged his allocation when the ruling was first issued, but instead waited until after the evidentiary record was closed.[47] We acknowledge the ALJ's concern that the parties relied on his prehearing order assigning the burdens to the complainant, and that it would therefore have been "fundamentally unfair" to shift the burdens retroactively after the record was closed.[48] However, we need not decide here whether the ALJ properly allocated the burdens or whether WealthTV's objection to the allocation was untimely because we 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."[49] We conclude that the defendants would have prevailed even if they had been required to carry the burdens of production and proof, as WealthTV contends was proper. Accordingly, we need not

[44] *Id.* at 13003 ¶73.

[45] *See In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV*, FCC 08M-44 (ALJ Oct. 23, 2008).

[46] *Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel, filed by Herring Broadcasting, Inc. d/b/a WealthTV* (Nov. 16, 2009), at 6.

[47] *Recommended Decision*, 24 FCC Rcd at 12995 ¶58 and n.230. The ALJ also noted that the Commission's rules provide a procedure by which WealthTV could have sought permission to challenge the interlocutory ruling governing the burdens in this proceeding when it issued in October 2008, but WealthTV failed to do so. *Id.* at n. 231.

[48] *Id.* at 12995 ¶58.

[49] *Id.* at 12997 ¶62.

consider whether the burdens were properly allocated or WealthTV's objection to the allocation was timely.[50]

B. The Record

19. Several of WealthTV's exceptions contend that the record evidence did not support the ALJ's conclusions, specifically with respect to WealthTV's claims that its channel was similar to the MOJO channel in content and target audience and with respect to its claims that each defendant unlawfully discriminated by refusing to carry its programming in favor of the programming provided by the affiliated MOJO channel. As discussed below, we find that there is substantial record evidence supporting the ALJ's conclusions.

20. *Whether WealthTV and MOJO Were Similarly Situated.* A central element in WealthTV's complaints was the claim that it was similarly situated to MOJO because the two networks offered similar types of programming and targeted the same audience – affluent younger adult males.[51] Following a detailed analysis of the evidence, the ALJ concluded that "the preponderance of the record evidence demonstrates that WealthTV and MOJO were not similarly situated networks. The two networks aired different types of programming and targeted different demographic groups."[52]

21. In its exceptions, WealthTV argues that the ALJ's conclusion was erroneous. Specifically it argues that the ALJ applied an improper standard that required WealthTV to show that its programming and audience appeal were "substantially identical" to that of MOJO in order to demonstrate discrimination. In addition, it argues that substantial record evidence does not support the ALJ's conclusion.[53]

22. We find no basis for WealthTV's claim that the ALJ required it to demonstrate that the programming on its network and that on MOJO were substantially identical in order to maintain its complaints. It cites in its exceptions no specific language from the *Recommended Decision* that imposes such a requirement nor does it point to any discussion from which one could infer that the ALJ imposed such a standard. In any event, regardless of what standard WealthTV may claim that the ALJ required it to meet, the ALJ's findings that there were significant differences in the programming of WealthTV and MOJO is based on substantial evidence

[50] 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.

[51] *See HDO*, 23 FCC Rcd at 14795-797, 14801, 14806, 14812 ¶¶13-18, 28, 40, 52. We need not decide whether a complainant alleging affiliation-motivated discrimination, in the absence of direct evidence of discrimination, must meet a threshold burden of showing that its program channel and the affiliated program channel are similarly situated in terms of types of programming and targeted audience as the *Recommended Decision* suggests. It is sufficient to observe here that WealthTV framed its complaint around the allegation that its channel was similarly situated with the MOJO channel, and the *HDO* took the complaint as presented. *See, e.g.*, "Carriage Agreement Complaint," File No. 7907-P at 1, 2, 14-20, filed by Herring Broadcasting Corp. (Oct. 15, 2008).

[52] *Recommended Decision*, 24 FCC Rcd at 13000 ¶69 (footnotes omitted); *see also id.* at 12976-83 ¶¶20-34.

[53] Exceptions at 11-13.

supporting his conclusion that the two networks were not similarly situated with respect to program content.[54]

23. The ALJ rejected WealthTV's claim that it presented "substantial evidence regarding the programming similarities of WealthTV and MOJO" (Exceptions at 12). We see no basis for disagreeing with the ALJ's finding that the preponderance of record evidence established that MOJO and WealthTV aired different types of programming. Defendants' expert compared the programming on each channel in two sample weeks in July 2007 and January 2008. His "analysis established that 54 percent of MOJO's programming time was devoted to sports, music, and movies whereas only three percent of WealthTV's programming consisted of shows in those genres."[55] In addition, his study "established that 60 percent of WealthTV's programming time consisted of shows in the genres of travel and recreation, lifestyle, food & drink, documentary, and art/design/collectables – programming that aired only 19 percent of the time on MOJO."[56] He also concluded that "the on-air 'look and feel' of MOJO and WealthTV were demonstrably different."[57] The ALJ found the defendants' expert to have provided "consistent, convincing, and well organized expert testimony."[58]

24. By contrast, the ALJ found that WealthTV's programming expert based her analysis of WealthTV's programming on selections of that channel's programming provided to her by WealthTV President Charles Herring and that she had not based her views on any "systematic review of the programming of either WealthTV or MOJO."[59] "Nothing in the record establishes that the selections of WealthTV's programming viewed by Ms. McGovern are representative of WealthTV's programming as a whole."[60] The ALJ also noted that WealthTV's expert had acknowledged in her testimony "many differences in the programming of WealthTV and MOJO."[61] We find that there was ample basis for the ALJ's conclusion that the expert testimony presented by defendants was more credible than that of WealthTV.

25. WealthTV's additional claim that the two networks were similarly situated based on record evidence that they "targeted a similar audience" is belied by an examination of the record. There appears to be no dispute that the target audience for MOJO was younger adult males.[62] WealthTV argues that it targets a similar "male skewed audience, aged 25-49."[63] The ALJ found, however, that the "overwhelming weight of the record evidence … shows that WealthTV targeted a much broader audience than adult males between the ages of 25 and 49" and

[54] *See Recommended Decision*, 24 FCC Rcd at 12976-83 ¶¶20-34.

[55] *Id.* at 12977 ¶22.

[56] *Id.*

[57] *Id.* at 12978 ¶23.

[58] *Id.* at 12979 n.91.

[59] *Id.* at ¶25.

[60] *Id.*

[61] *Id.*

[62] Id. at 12980 ¶27

[63] Exceptions at 12.

that "WealthTV's assertion that it 'consistently' has described its target demographic as males aged 25-49 conflicts with the record evidence considered as a whole."[64]

26. The ALJ considered and rejected WealthTV's evidence. The ALJ noted the absence of references to 25-49-year-old men in WealthTV's marketing presentations to MVPDs and prospective advertisers. Indeed, those presentations included one in which "WealthTV described itself as 'targeting the most affluent viewer, 25-60+, educated, equal appeal to men and women.'"[65] WealthTV repeatedly described itself as having a "broad appeal," competing for advertisers with magazines and programming networks that were "female-skewed" or "gender neutral." Statements on WealthTV's website and in press releases consistently described WealthTV as having "broad appeal" without any reference to specific appeal to affluent men aged 25-49.[66] The ALJ also took note of Mr. Herring's sworn testimony in unrelated litigation – inconsistent with his testimony here – that WealthTV's programming "appeals to about a 25 to 65+ crowd," irrespective of gender, and that "the only group that would not find WealthTV attractive was 'monks that have taken a vow to poverty.'"[67] In sum, substantial record evidence supports the ALJ's conclusion that WealthTV and MOJO did not target similar audiences.

27. *Allegations of Discrimination Against WealthTV.* WealthTV also contends that the ALJ erred in concluding that WealthTV's status as an independent programmer "played no role in the defendants' individual decisions not to provide full linear carriage to WealthTV."[68] According to WealthTV, the record contained substantial evidence of discrimination by defendants against it and in favor of their affiliated network. We disagree.

28. The *Recommended Decision* contains a detailed analysis of each defendant's negotiations with WealthTV concerning carriage of WealthTV's program channel.[69] WealthTV's exception with respect to discrimination largely ignores these findings. For example, with respect to defendant Time Warner Cable (TWC) the ALJ found that although TWC officials reasonably believed that there was little demand from its cable systems for carriage of WealthTV's programming and that those "officials made reasonable business decisions based on that belief,"[70] TWC had continued to negotiate in good faith with WealthTV. He noted, for example, that the TWC system in San Antonio had offered to extend a trial in which it provided WealthTV programming as a video-on-demand service, but WealthTV refused to extend the agreement unless TWC provided a linear carriage agreement.[71] The ALJ pointed out that "only three of 59 networks launched by TWC between 2004 and 2008 were affiliated with TWC," and "TWC lacks capacity to carry all the networks that seek affiliation and must decide what networks are in its

[64] *Recommended Decision*, 24 FCC Rcd at 12980 ¶27, 12983 ¶34.

[65] *Id.* at 12980 ¶29.

[66] *Id.* at 12981-83 ¶¶30, 33.

[67] *Id.* at 12982 ¶32.

[68] *Id.* at 12999 ¶67.

[69] *Id.* at 12983-93 ¶¶35-51.

[70] *Id.* at 12984 ¶36.

[71] *Id.* at ¶37; *see also id.* at ¶38 (discussing TWC's continuing negotiations in an attempt to reach a carriage agreement with WealthTV). Linear carriage refers to carriage of a programming channel full time, that is, generally 24 hours a day 7 days a week.

best interest to carry."[72] He concluded that the "weight of the record evidence shows that TWC's decision not to offer full linear carriage to WealthTV was based upon business considerations that were unrelated to TWC's affiliation with MOJO."[73]

29. The ALJ found the record also to show that although defendant Cox Communications had concluded that WealthTV "was a marginal network that would not bring value to Cox, [it] continued to meet with WealthTV, however, because it kept open the possibility that WealthTV would provide it with new material that might convince it to carry the network."[74] The ALJ cited numerous factors developed from the record that led him to find that the preponderance of the record evidence thus shows that business factors, and not Cox's affiliation with MOJO, were the reasons that Cox declined to carry WealthTV. WealthTV's claims in its exception that the ALJ ignored evidence that Cox refused to enter into "meaningful" carriage negotiations despite "expressions of interest" from individual Cox cable systems are not supported by the record.[75]

30. The ALJ noted that two Comcast executives with responsibility for program carriage both "testified that Comcast's affiliation with MOJO played no role either in Comcast's negotiations with WealthTV or in its carriage decisions regarding that network."[76] They "testified that pursuing a carriage agreement with WealthTV was a low priority for Comcast given the cost of carriage, the uncertain consumer appeal of WealthTV's programming, bandwidth constraints, the fact that WealthTV had attracted relatively few carriage agreements, the lack of experience of its owners in the programming business, and absence of outside investment support."[77] The ALJ found their testimony to be credible. By contrast, the ALJ found that the testimony of WealthTV president Charles Herring that there was support among individual Comcast cable systems for carriage of WealthTV to be "unreliable and not credible."[78]

31. The ALJ found that the record led to similar findings with respect to WealthTV's negotiations with Bright House Networks (BHN) for carriage. BHN executives concluded that their subscribers had very limited interest in WealthTV's programming and for that reason thought it was not "worth BHN's bandwidth needed to carry an HD channel ...."[79] BHN's then-president testified that "BHN's carriage of MOJO played no role in BHN's decision not to carry WealthTV," and the ALJ found this testimony to be credible.[80]

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[72] *Id.* at 12985 ¶39.

[73] *Id.*

[74] *Id.* at 12986 ¶41.

[75] *See* Exceptions at 15.

[76] *Recommended Decision*, 24 FCC Rcd at 12989 ¶44 (footnote omitted).

[77] *Id.*

[78] *Id.* n. 179.

[79] *Id.* at 12992 ¶49. The ALJ noted that the record contained evidence of a survey BHN had conducted in July 2007 which showed that among BHN subscribers, WealthTV ranked next to last (36th of 37) both among program channels most requested by subscribers having HD television sets and among channels that HD set owners were likely to watch if available. *Id.* at ¶50.

[80] *Id.* at 12993 ¶51.

32. WealthTV's claims that the defendants treated it unfairly may reflect its good-faith belief. However, we agree with the ALJ's conclusion that the record evidence as a whole does not support WealthTV's claims. In particular, we find no basis in the record for WealthTV's claim that the reasons given by defendants for refusal to carry its programming were "mere pretext to mask the discriminatory treatment of a non-affiliated network."[81] There is substantial record evidence that defendants' refusals to carry WealthTV were based on legitimate business reasons that were unrelated to WealthTV's status as an independent programming vendor.[82]

C. The ALJ's Rulings On Witnesses And Evidence

33. WealthTV also contends that the ALJ erred in his rulings with respect to certain evidence and the testimony of certain witnesses. Deference is ordinarily accorded an ALJ in the conduct of a hearing.[83] WealthTV's exceptions present no basis to conclude that the ALJ abused his discretion in his rulings on the witnesses and evidence that are challenged.

34. *The ALJ's Exclusion of Certain Evidence.* WealthTV excepts to the ALJ's refusal to permit it to introduce into evidence as a party admission the testimony of Comcast chief operating officer Stephen Burke from a separate proceeding. WealthTV asserts that this testimony would have rebutted the testimony in this proceeding of a different Comcast executive, Madison Bond.[84] WealthTV contends that the ALJ erroneously refused to admit the testimony given in the separate proceeding because it was hearsay, but that was not the basis for the ALJ's ruling. Rather, the ruling was based on the fact that WealthTV sought to introduce the testimony during its cross examination of Mr. Bond, and Mr. Bond was not competent under Rule 901 of the Federal Rules of Evidence to authenticate the transcript of testimony of a different individual in a separate proceeding.[85]

35. Although the ALJ indicated at the time of his ruling sustaining Comcast's objection that there were alternative procedures by which WealthTV could have sought to have the transcript admitted into evidence, WealthTV's exceptions make no reference to any further effort on its part at any other time to introduce this evidence pursuant to appropriate procedures. Even if it is true, as WealthTV claims, that Mr. Burke's testimony in the separate proceeding would have been inconsistent with Mr. Bond's statements in this proceeding that Comcast treated affiliated and non-affiliated networks even-handedly, there is no evidence that Mr. Burke's testimony in a separate proceeding had any bearing on WealthTV's specific complaint against Comcast or the other defendants here. We therefore reject WealthTV's arguments that the ALJ erred in this evidentiary ruling.

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[81] Exceptions at 16.

[82] *See id.* at 12999 ¶67. We are not persuaded by WealthTV's argument that some number of Cox systems had some interest in carrying WealthTV. Even if this were the case, it would not demonstrate that Cox acted improperly in making a system-wide decision as to whether to carry WealthTV.

[83] *In re Applications of Intercontinental Radio, Inc.*, 98 F.C.C.2d 608 ¶41 (Rev. Bd. 1984), *aff'd in relevant part*, 100 F.C.C.2d 817 (1985).

[84] Exceptions at 18.

[85] *See* Tr. 4707-09.

36. *The ALJ's Denial of WealthTV's Request for the Testimony of Robert Jacobson.* WealthTV also contends that the ALJ erred when he denied WealthTV's request for the president of iN DEMAND "to testify to the facts and circumstances regarding the development and launch of MOJO."[86]

37. WealthTV failed to include Mr. Jacobson on its witness list, which was required to be filed by April 3, 2009.[87] WealthTV states that his testimony became necessary when portions of the testimony of WealthTV President Charles Herring were challenged by defendants as improper expert testimony and hearsay.[88] The testimony in question related to the policies of iN Demand.[89] However, as defendants note in their reply, WealthTV should have known that its president Mr. Herring would not be competent to testify as to the policies of iN Demand and thus should not have been surprised by the defendants' challenge to those portions of his proposed testimony.[90] Moreover, the defendants and WealthTV subsequently agreed on Mr. Herring's testimony, and WealthTV did not renew its request for the testimony of Mr. Jacobson. We find no basis to conclude that the ALJ abused his discretion in refusing to allow the testimony of Mr. Jacobson. In any event, WealthTV's exception on this point fails to demonstrate how it was harmed by not having Mr. Jacobson's testimony.[91]

38. *The ALJ's Reliance on the Testimony of Michael Egan.* WealthTV also excepts to the ALJ's conclusion that the testimony of defendants' expert Michael Egan was credible, arguing that the testimony was unreliable and should have been accorded "little weight" by the ALJ.[92] The ALJ considered Mr. Egan's testimony and WealthTV's challenges to its reliability in some detail and was not persuaded that the testimony was "wrong or unreliable."[93] The ALJ found Mr. Egan "far more credible" than WealthTV's programming expert.[94]

39. It is well established that an ALJ's determination of the credibility of witnesses at a hearing is due substantial deference.[95] We find no basis to conclude that the ALJ abused his discretion in finding Mr. Egan's testimony reliable and credible. WealthTV's exceptions suffer from the same flaws as its argument to the ALJ. For example, the ALJ pointed out that "WealthTV criticizes the formality of the method by which Mr. Egan conducted the 'look and feel' analysis. But it fails to show how Mr. Egan's conclusions were erroneous. Nor did

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[86] Exceptions at 18.

[87] *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV*, FCC 09M-30 (ALJ April 1, 2009).

[88] Exceptions at 19; *see* "Defendants Motion *In Limine* to Exclude Portions of the Testimony of Charles Herring," (April 10, 2009).

[89] *Id.*

[90] *See* Reply to Exceptions at 21.

[91] Numerous executives of the defendant companies testified at the hearing, including the Executive Vice President of Programming at iN DEMAND, David Asch. *See generally* Tr. 4343-4411.

[92] Exceptions at 23-24.

[93] *Recommended Decision*, 24 FCC Rcd at 12977 n.76; *see also id.* at n.77; 12979 n.91; 12980 ¶26.

[94] *Id.* at 12979 ¶25.

[95] *See, e.g., In re Reading Broadcasting, Inc.*, 17 FCC Rcd 14001, 14006 ¶16 (2002); *Telestar, Inc.*, 2 FCC Rcd 5, 13 ¶23 (Rev.Bd. 1987).

WealthTV present any countervailing evidence on the comparative 'look and feel' of MOJO and WealthTV in support of its claim that the programming of the two networks is similar."[96] The ALJ gave full consideration to WealthTV's arguments as to the reliability of Mr. Egan's testimony, and we find no basis to disagree either with his rejection of those arguments or with his decision to credit that testimony.

D. Alleged Bias By The ALJ

40. WealthTV contends that the ALJ "demonstrated an improper bias against it," evidenced by the fact that he "made arbitrary and capricious findings of fact, not supported by the record evidence, against WealthTV."[97] The Commission's rules provide a specific procedure to address questions of bias on the part of a presiding ALJ at an evidentiary hearing, which includes a right to immediate review.[98] WealthTV did not avail itself of that procedure, although it points to events occurring at the very outset of the proceeding in late 2008 and early 2009 as the "most notabl[e]" evidence of bias on the part of the ALJ.[99] The Commission has held that where a party to a hearing proceeding fails, without justification, to utilize these specified procedures governing the disqualification of a presiding ALJ on the basis of bias, but raises the issue of bias for the first time in its exceptions to an ensuing adverse decision, the appropriate response is to strike those exceptions. Raising a bias issue in this manner seeks "through the back door to cast serious aspersions on the integrity of the presiding ALJ with undocumented maledictions in a forum in which the ALJ cannot respond."[100] Courts also have recognized generally that "[c]laims of bias must 'be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist.'"[101] WealthTV has submitted no justification for its tardy claim of bias. Accordingly, we will strike those portions of WealthTV's exceptions alleging bias on behalf of the ALJ in this matter.

41. In addition, we separately and independently find that even if we were to consider WealthTV's exception on this issue, nothing in its argument would support a finding of bias on the part of the ALJ here or call for further examination of this question. Although claiming broadly that the ALJ "made arbitrary and capricious findings of fact, not supported by the record evidence ... which demonstrated an improper bias against [WealthTV]" (Exceptions at 21), WealthTV focuses primarily on one asserted example of such alleged bias.[102] It contends that in a

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[96] *Recommended Decision*, 24 FCC Rcd at 12980 ¶26 (footnote omitted).

[97] Exceptions at 21.

[98] *See* 47 C.F.R. §1.245. Because the special nature of bias claims is reflected in the rule that specifically allows bias challenges during the course of a hearing, a challenge to the qualification of a presiding ALJ on the basis of bias as established in this rule is not precluded by the language in the *Second Report and Order* stating as a general matter that "[i]nterlocutory appeals shall be permitted only after a ruling on the merits." 9 FCC Rcd at 2656 ¶34.

[99] Exceptions at 21.

[100] *Aspen FM, Inc.*, 5 FCC Rcd 3196 ¶4 (Rev.Bd. 1990); *see also In re Application of Maria M. Ochoa*, 10 FCC Rcd 4323, 4324 ¶9 (Rev.Bd. 1995).

[101] *Pharaon v. Board of Gov. of the Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998), *quoting Marcus v. Director, Office of Workers' Comp.*, 548 F.2d 1044, 1051 (D.C. Cir. 1976)(footnotes omitted).

[102] WealthTV's additional citation to a comment of the ALJ at the hearing as evidence of bias is frivolous. *See* Exceptions at 23. We find no evidence of bias against WealthTV in the comment, and certainly no evidence of "a prejudice against WealthTV [that] materially affected his findings of fact in these cases." *Id.*

December 2, 2008 procedural order, the ALJ adopted a schedule for the proceeding that would have led to delay harmful to both WealthTV and the public interest. As a result, WealthTV moved to revoke the *HDO*. It now relies on language in the Media Bureau's order granting that motion in support of its claim of bias on the part of the ALJ.[103] We note, however, that nothing in the Bureau's order intimated a view that its criticism of the ALJ was based at all on a view that the ALJ was biased against WealthTV, and WealthTV made no such claim at the time. WealthTV also overlooks that the Commission "rescind[ed] in full" the Media Bureau order on which it relies, thus its reliance on statements in the order are improper.[104]

42. WealthTV's claims fall far short of meeting its "heavy burden" of "demonstrat[ing] personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner."[105] Adverse rulings by an ALJ alone do not support allegations of bias unless they demonstrate "a fixed opinion – a closed mind on the merits of the case."[106] WealthTV's claim, citing primarily a single assertedly adverse procedural ruling by the ALJ in this case, does not come close to meeting that standard.

43. Accordingly, we find that there would be no basis for WealthTV's exception that the ALJ in this proceeding had been improperly biased against it even if the claim had been raised in a timely manner.

E. Request For Oral Argument

44. WealthTV has also filed a "Request for Oral Argument on Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel." WealthTV contends, reciting the language of 47 C.F.R. § 1.277(c), that "oral arguments will assist in the resolution of the issues presented."[107] WealthTV's request, however, fails to identify any specific grounds for its assertion that oral argument would be beneficial to the resolution of this case, and we see none. In view of the extensive record compiled in this proceeding and the thorough decision of the ALJ, we find that oral argument is unnecessary to the resolution of the issues presented in WealthTV's exceptions. The request for oral argument, therefore, will be denied.

F. Motion To Reopen The Record

45. On March 4, 2010, WealthTV filed a "Motion To Reopen The Record For Further Hearing." The motion stated that WealthTV had recently discovered that Comcast had been carrying WealthTV's program channel without compensation to it for more than two years on several cable television systems in the Princeton, New Jersey area that Comcast acquired from another operator in 2007. According to the motion, this calls into question "whether Comcast Corporation has been truthful and candid in its representations to the Commission about its

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[103] Exceptions at 21-23; *see In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable, Inc., et al.*, 23 FCC Rcd 18316 (MB 2008).

[104] *Herring Broadcasting, Inc.*, 24 FCC Rcd at 1582 ¶2.

[105] *In the Matter of Family Broadcasting, Inc.*, 17 FCC Rcd 19332, 19333 ¶7 (2002), *citing WWOR-TV*, 5 FCC Rcd 2845 ¶6 (1990); *Metropolitan Council of NAACP Branches*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995).

[106] *Pharaon*, 135 F.3d at 155.

[107] Request at 2.

negotiations with WealthTV regarding carriage of its programming channel" because "Comcast has maintained during this proceeding that it did not – and would not for various reasons – carry WealthTV on its cable systems."[108] The motion seeks to enlarge the issues in the proceeding to explore whether a specific Comcast official testified candidly and, in light of findings on that issue, whether the Commission should conclude that Comcast negotiated with WealthTV in good faith or engaged in anti-competitive conduct.[109] Comcast filed an opposition to the motion arguing that it was untimely, that WealthTV had not been diligent in raising this issue and that the motion failed to demonstrate a substantial likelihood of proving an issue of decisional significance.[110]

46. Where a motion to enlarge is filed belatedly, as this motion was,[111] the rules provide that "the motion to enlarge will be considered on its merits if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing."[112] In addition, the Commission will entertain a request to reopen a proceeding after the close of the record only where the party seeking to reopen the proceeding shows that its "contentions are based on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier and that the new evidence, if true, would affect the ultimate disposition of the proceeding."[113]

47. The motion fails to meet the applicable criteria for enlarging issues in a proceeding or for reopening a proceeding. WealthTV has failed to demonstrate that it could not have discovered this evidence earlier. Its pleadings do not even make clear when it actually discovered that Comcast had been carrying its program channel on these systems, beyond Mr. Herring's declaration, which indicates only that it was sometime after September 2007 and before January 26, 2010.[114] Moreover, as Comcast points out in its opposition, its continued carriage of WealthTV on these systems was disclosed in a document production to WealthTV in this proceeding more than a year earlier in February 2009.[115] WealthTV does not deny the accuracy of Comcast's claim, but responds that "one page in thousands is not basis for imputing knowledge on the part of WealthTV."[116] This misses the point, which is whether WealthTV, with exercise of

[108] Motion at i.

[109] *Id.* at 1-2.

[110] *See* "Opposition To Motion To Reopen The Record For Further Hearing" (March 15, 2010).

[111] A motion to enlarge issues "based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party." 47 C.F.R. § 1.229(b)(3). WealthTV acknowledges that it became aware of the facts that form the basis for its motion at least by January 26, 2010. The motion, however, was not filed until March 3, 2010, more than 5 weeks later.

[112] 47 C.F.R. § 1.229(c).

[113] *Omaha TV 15, Inc.*, 4 FCC Rcd 730 ¶6 (1988), *citing American Int'l Development, Inc.*, 86 F.C.C.2d 808, 811 ¶5 (1981); *Southeast Arkansas Radio, Inc.*, 61 F.C.C.2d 72, 73–74 ¶4 (1976). *See also Advanced Communications Corp.*, 18 FCC Rcd 2926, 2930 n.20 (2003); *Southwestern Bell Tel. Co., v. FCC*, 180 F.3d 307, 312 (D.C. Cir. 1999).

[114] *See* Herring Decl. at ¶¶11-14.

[115] *See* Opposition at 3.

[116] Reply at 4 n.5

due diligence, could have discovered this evidence earlier. Because these facts were actually made available to WealthTV in documents exchanged in the discovery stage of this very proceeding, months before the close of the record, we are unable to find that WealthTV has exercised due diligence. The Commission has consistently refused to order further proceedings to explore matters that are "easily discoverable initially and only deemed crucial when seen from the highland of hindsight."[117]

48. We also are not persuaded by WealthTV's pleadings that it has raised a question of substantial importance that could affect the ultimate disposition of this proceeding. The most that can be said of WealthTV's argument is that Comcast failed to disclose prominently enough that it had continued to carry WealthTV's program channel on three cable systems in New Jersey with approximately 25,000 subscribers (0.1% of Comcast's total cable subscribers). However, Comcast's allegedly inadequate presentation is barely relevant to this proceeding at all, much less a matter that would likely affect its ultimate disposition. The record here showed that Comcast "was willing to carry WealthTV under certain terms and conditions, but it was not willing to provide the expansive linear carriage across Comcast's systems that WealthTV was demanding."[118] Comcast's carriage of WealthTV's program channel on the New Jersey systems is consistent with those record facts. Comcast asserts that it believed it was authorized to continue carrying WealthTV on these systems without charge following their acquisition in 2007.[119] These systems had "sufficient capacity to carry more high definition programming," although they represented a tiny fraction of Comcast's total subscribers.[120] WealthTV's claim that this evidence undermines Comcast's position that it "'did not view WealthTV's programming as a compelling value proposition for Comcast or its subscribers'" (Reply at 2) is unpersuasive. We find it unremarkable that a cable operator might continue to carry a program network on a small number of systems following a small acquisition without engaging in the same level of analysis involved in deciding whether to carry the network across all its systems.

49. Based on the motion's 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, WealthTV's motion to reopen the record for further proceedings will be denied.

III. ORDERS

50. Accordingly, **IT IS ORDERED**, for the reasons discussed above, that the Exceptions presented by WealthTV to the Recommended Decision in this proceeding are resolved as follows:

> Exception A, alleging an "Improper Shift of the Burden of Proceeding and Proof" **IS DENIED**.

[117] *Liberty Productions, Inc.*, 7 FCC Rcd 7581, 7582 ¶14 (1992), *quoting Omaha TV 15*, 4 FCC Rcd 730, 731 ¶7 (1988), and *Guinan v. FCC*, 297 F.2d 782, 787 (D.C. Cir. 1961)(internal quotes omitted).

[118] Opposition at 9.

[119] Opposition at 3 n.6.

[120] *Id.* at 9, 10 n.33.

Exception B, alleging that "WealthTV and MOJO are Similarly Situated," **IS DENIED**.

Exception C, alleging "Substantial Evidence of Discrimination in Favor of Affiliated Programmer," **IS DENIED**.

Exception D, alleging "Failure to Receive into Evidence Admission of a Party Opponent," **IS DENIED**.

Exception E, alleging "Denial of Request for Robert Jacobson to Testify was Improper," **IS DENIED**.

Exception F, alleging "Improper Bias of ALJ," **IS STRICKEN**.

Exception G, alleging "Testimony of Michael Egan Lacked Sufficient Indicia of Reliability," **IS DENIED**.

Exception H, alleging that the "Ultimate Conclusion" of the Recommended Decision was erroneous, **IS DENIED**.

51. **IT IS FURTHER ORDERED** that WealthTV's "Request for Oral Argument on Exceptions to Recommended Decision of Chief Administrative Law Judge Richard L. Sippel" **IS DENIED**.

52. **IT IS FURTHER ORDERED** that WealthTV's "Motion To Reopen The Record For Further Hearing" **IS DENIED**.

53. **IT IS FURTHER ORDERED** that the *Recommended Decision* that the complaints filed by Herring Broadcasting, Inc. d/b/a/ WealthTV in MB Docket No. 08-214 against the remaining defendants be denied **IS ADOPTED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary