REDACTED VERSION

FCC O9 D-01

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	)	

Issued: October 8, 2009 **Released: October 14, 2009**

RECOMMENDED DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Appearances

Kathleen Wallman, Esquire, Harold Feld, Esquire, and Joshua Rose, Esquire, on behalf of Herring Broadcasting, Inc., d/b/a WealthTV; *Jay Cohen, Esquire, Arthur H. Harding, Esquire, Gary Carney, Esquire, Seth A. Davidson, Esquire, Samuel E. Bonderoff, Esquire, Micah M.*

Caldwell, Esquire, and Vibhuti Jain, Esquire, on behalf of Time Warner Cable Inc.; *R. Bruce Beckner, Esquire, Arthur J. Steinhauer, Esquire, Cody Harrison, Esquire, Adam M. Copeland, Esquire, and Robert M. Nelson, Esquire*, on behalf of Bright House Networks, L.L.C.; *David E. Mills, Esquire, Jason E. Rademacher, Esquire, J. Parker Erkmann, Esquire, and Lynn M. Deavers, Esquire*, on behalf of Cox Communications, Inc.; *David H. Solomon, Esquire, L. Andrew Tollin, Esquire, Robert G. Kirk, Esquire, J. Wade Lindsay, Esquire, James L. Casserly, Esquire, Michael H. Hammer, Esquire, Megan Stull, Esquire, Michael Hurwitz, Esquire, Michael P. Carroll, Esquire, David B. Toscano, Esquire, Antonio J. Perez-Marques, Esquire, and Jennifer A. Ain, Esquire*, on behalf of Comcast Corporation; *Kris Anne Monteith, Esquire, William Davenport, Esquire, Gary Schonman, Esquire, and Elizabeth Mumaw, Esquire*, on behalf of the Enforcement Bureau of the Media Bureau of the Federal Communications Commission.

PRELIMINARY STATEMENT

1. In 2007 and 2008, Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV"), a video programming vendor,[1] filed separate carriage complaints against four multichannel video programming distributors ("MVPDs") [2] — Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), Cox Communications, Inc. ("Cox"), and Bright House Networks, LLC ("BHN") — alleging that these MVPDs had violated section 616 of the Communications Act of 1934, as amended, [3] and section 76.1301(c) of the Commission's rules,[4] by discriminating against WealthTV in video programming distribution.[5] Specifically, WealthTV asserted that the defendants failed to negotiate in good faith and denied it carriage while providing preferential treatment to MOJO, a programming vendor affiliated with defendants. According to Wealth TV, MOJO's programming was similar to WealthTV's programming and MOJO targeted the same audience as WealthTV. WealthTV claimed that the defendants' actions unreasonably restrain its ability to compete fairly in the marketplace and requested the Commission to order each defendant to carry WealthTV for a period of ten years under specified terms and conditions.

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[1] A "video programming vendor" is "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(6)(b).

[2] A "multichannel video programming distributor" is "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming . . . includ[ing]. . . but are not limited to a cable operator.." 47 C.F.R. § 76.1000(e). MVPDs include cable operators, such as the defendants, telephone companies, such as Verizon FIOS, and satellite video program distributors, such as DirecTV and DISH Network.

[3] 47 U.S.C. § 536(a)(3).

[4] 47 C.F.R. § 76.1301(c).

[5] *See* 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).

2. On October 10, 2008, the Media Bureau, by delegated authority, designated the four captioned cases for hearing in a single consolidated proceeding before an Administrative Law Judge ("Presiding Judge").[6] The Bureau noted that the "pleadings and supporting documentation present several factual disputes, as to whether TWC, BHN, Cox and Comcast discriminated against WealthTV in favor of their affiliated MOJO service"[7] so as to make it unable "to determine on the basis of the existing records whether [it] can grant relief."[8] The Bureau ordered a recommended decision to be issued to the Commission within 60 days.[9] As subsequently modified by the Presiding Judge to comply with the regulations, the issues designated by the *HDO* are as follows:

> (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."[10]

3. Shortly after the release of the *HDO*, the Presiding Judge issued an Order assigning WealthTV both the burden of proceeding with the introduction of evidence and the burden of proof with respect to the designated issues.[11] The Presiding Judge in a subsequent order ruled

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[6] *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, MB Docket 08-214, 23 FCC Rcd 14787, 14792 (¶ 7) (MB 2008) ("*HDO*"). The *HDO* also designated two additional program carriage complaints for hearing in this consolidated proceeding, *NFL Enterprises LLC v. Comcast Cable Communications, LLC,* File No. CSR 7876-P and *TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Comcast Corporation ("MASN")*, File No. CSR-8001-P. The *NFL Enterprises* case was dismissed after the parties reached a settlement. *See NFL Enterprises LLC v. Comcast Cable Communications, LLC,* FCC 09M-42 (released May 19, 2009). The *MASN* case will be addressed in a subsequent decisional ruling.

[7] *HDO*, 23 FCC Rcd at 14814 (¶ 58).

[8] *Id.* at 14787, 14792 (¶ 7).

[9] *Id.* at 14790 (¶ 1).

[10] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 08M-47 at 4 (¶ 8) (ALJ, released Nov. 20, 2008) ("*Nov. 20, 2008 Order*").

[11] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 08M-44 at 2 (ALJ, released Oct. 23, 2008) ("*Oct 23 Order*").

that the "evidence adduced at the hearing in this proceeding will be given *de novo* consideration and that the resolution of the issues in this case will be "based solely on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*." [12] In light of the multiple complaints, the intricate and unique factual situation of each case, and the need for discovery, the Presiding Judge determined that the "60-day timeframe set forth in the *HDO* cannot be achieved" and set a hearing schedule that extended beyond the deadline set forth in the *HDO*.[13]

4. On December 24, 2008, the Media Bureau issued an order declaring (1) that the Administrative Law Judge had exceeded his authority in issuing a hearing schedule beyond its 60-day deadline, (2) that his delegated authority expired at the end of the 60-day period set forth in the *HDO* and (3) that the Media Bureau would resolve the carriage complaints without the benefit of a recommended decision.[14] Approximately one month later, the Commission, *sua sponte*, issued an order rescinding the Media Bureau's order.[15] The Commission concluded that "the factual determinations required to fairly adjudicate these matters are best resolved through hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau."[16] The Commission directed the Presiding Judge to update the hearing schedule to accommodate delays caused by the Bureau's December 24th decision. The Commission further directed issuance by the Presiding Judge of a recommended decision "as expeditiously as possible, consistent with the mandates of fairness and due process."[17]

5. Following the completion of discovery, and the submission of written direct testimony, proposed exhibits, and trial briefs, formal hearings were held in the Office of Administrative Law Judges ("OALJ") courtroom at Commission headquarters from April 20, 2009 through May 1, 2009. Three witnesses appeared on behalf of WealthTV[18] and eighteen witnesses collectively appeared on behalf of the defendants.[19]

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[12] *Nov. 20, 2008 Order* at 3 (¶ 6) (emphasis omitted).

[13] *Id.* at 3 (¶ 7).

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

[15] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, 24 FCC Rcd 1581 (2009) ("*Reinstatement Order*").

[16] *Id.* at 1581 (¶ 2).

[17] *Id.*

[18] Mr. Charles Herring, WealthTV's president, testified as a fact witness on behalf of WealthTV. In addition, WealthTV presented two expert witnesses: Ms. Sandra McGovern, President, McGovern Media Associates, LLC; and Mr. Gary Turner, former Chief Executive Officer of Turner Media Group, Inc. WealthTV proffered written direct testimony of another expert witness, Mr. Mark Kersey, but the day before his cross-examination WealthTV sought to withdraw his testimony which concerned the tabulation of a survey, and to substitute a revised tabulation. The Presiding Judge refused to permit Mr. Kersey to testify due to his tardiness, and disallowed his proposed testimony on the ground that it was unreliable. Tr. 3699-3700, 3012-13 (Presiding Judge's bench rulings).

[19] The defendants presented *fifteen fact witnesses* at the hearing: Mr. David Asch, Executive Vice President of iN Demand (for all Defendants); Ms. Melinda Witmer, TWC's Executive Vice President and

6. Subsequently, WealthTV for itself and the defendants in a joint submission filed (1) Proposed Findings of Fact and Conclusion of Law; (2) Reply Proposed Findings of Fact and Conclusions of Law, and (3) optional Proposed Recommended Decisions. The Enforcement Bureau, participating as a party limited to representing the public interest, conducted selective cross-examination and filed Comments opposing the four complaints.

FINDINGS OF FACT

Description of Parties

7. WealthTV is a national video programming vendor as defined by section 616 of the Act and section 76.1301(c) of the Commission's regulations.[20] WealthTV launched[21] its service on June 1, 2004 and provides 24-hours seven day per week, original themed programming in a high definition ("HD") format[22] as well as a down-converted standard definition ("SD") format.[23] WealthTV's programming offers showings of luxury lifestyles, such as travel, fine dining, luxury transport, gadgetry, finance and even philanthropy."[24] WealthTV is a family-owned company, and its principals include Chief Executive Officer Robert Herring Sr., and his son, Mr. Charles Herring. The Messrs. Herring have considerable experience as business entrepreneurs but had not operated a cable network before establishing WealthTV.[25] WealthTV

Chief Programming Officer; Mr. Arthur Carter, former Senior Director of Programming for TWC; Mr. Eric Goldberg, Senior Director of Programming for TWC; Mr. Andrew Rosenberg, Vice President of Programming for TWC (for Defendant TWC); Mr. Madison Bond, Executive Vice President for Content Acquisition for Comcast Cable Communications, LLC, an indirect subsidiary of Comcast; Mr. Alan Dannenbaum, then an Executive Vice President of Network Distribution for Comcast Programming Management, LLC, an indirect subsidiary of Comcast (for Defendant Comcast); Mr. Robert C. Wilson, Senior Vice President of Programming for Cox; Mr. Leo Brennan, Cox's Chief Operating Officer; Ms. Kimberly Edmunds, Senior Vice President and General Manager of Cox's Arkansas/Kansas cable systems (for Defendant Cox); Mr. Steve Miron, President of BHN; and Ms. Anne Stith, former Director of Product Marketing for BHN's Tampa Division (for Defendant BHN). In addition, *three expert witnesses* testified on behalf of the defendants: Mr. Michael Egan, Founder and Principal of the consulting firm Renaissance Media Partners, LLC; Mr. Howard Homonoff, Director in Price Waterhouse Coopers LLC's Entertainment, Media and Communications practice; and Dr. Janusz Ordover, Professor of Economics at the New York University and founding director of a consulting firm.

[20] *See* 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

[21] Launching occurs when an MVPD commences carriage of a particular video programming network.

[22] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2766 n.25 (2005) (High-definition programming "is a television signal with greater detail and fidelity than provided by the National Television Systems Committee ("NTSC") system. The high-definition picture has approximately twice the visual resolution as NTSC. High-definition programming also provides CD-quality audio.").

[23] WealthTV Exh. 144 (Testimony of Charles Herring) at 1-2, 9.

[24] *Id.* at 9. Apparently, philanthropy shows a sense of one's *noblesse oblige* while gaining tax advantages.

[25] *Id.* at 3-4.

is exclusively funded by the Herrings, as owners, without any outside funding.[26] WealthTV is not affiliated with Comcast, TWC, Cox, or BHN.

8. WealthTV has had uneven success in obtaining carriage on MVPDs but, significantly, WealthTV has been able to reach affiliation agreements with over 125 MVPDs. These include the three Bell telephone companies (Verizon FiOS, AT&T U-Verse, and Qwest Broadband Services), Charter Communications ("Charter"), the National Cable Television Cooperative ("NCTC") and GCI Cable.[27] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** WealthTV is not carried by 18 of the 25 largest MVPDs in the United States, including the two largest satellite MVPDs (DirecTV and Dish Network), Cablevision, Mediacom, Suddenlink, Cable One, Atlantic Broadband, Armstrong, Knology, Midcontinent Communications, Blue Ridge Communications and Broadstripe.[30] WealthTV is not carried by any of the defendants on a linear basis.[31]

9. But Wealth TV still is a significant program vendor and in the past two years **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

10. Defendants Comcast, TWC, Cox, and BHN are MVPDs that serve approximately 24.6 million, 13.3 million, 5.4 million and 2.3 million customers, respectively.[33] Comcast,

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[26] *Id.* at 6.

[27] WealthTV Exh. 144 at 23 (Testimony of Charles Herring).

[28] TWC Exhs. 10, 18, 61; Tr. at 3026-28, 3260-67, 3301 (Herring). "A 'hunting license' refers to an agreement that specifies basic carriage terms and gives the programmer the right to seek carriage by individual cable systems owned by a cable MSO [multiple system operator], as opposed to a nationwide carriage agreement which provides the programming service with carriage on all systems owned by the MSO." *HDO,* 23 FCC Rcd at 14792 n.25.

[29] For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[30] Tr. at 3252, 3054, 3255, 3257, 3278, 3290-95, 3302 (Herring).

[31] Tr. at 3253, 3258, 3289. (Herring). A linear service is a service offered on a fixed schedule established by the network, *i.e.*, a service that is available on a specified tier and channel position on a 24 hour/seven days a week schedule. Linear programming is programming that is delivered at the scheduled time it is telecast. In contrast, "on demand" programming is programming that is aired only when specifically requested by a subscriber. Tr. at 3993 (Witmer).

[32] Comcast Exh. 25.

[33] TWC Exh. 75.

TWC, Cox, and BHN jointly own iN DEMAND,[34] the company that provided HD programming between 2003 and 2008 through MOJO and MOJO's predecessors, INHD and INHD2.[35]

iN DEMAND and MOJO

11. In 2002 and 2003, HD programming was scarce.[36] Cable operators, however, were eager to act swiftly to make available HD programming to those "early adopters" who had expended substantial sums in purchasing HD television sets.[37] A number of MVPDs, including satellite providers such as DirecTV and EchoStar, at this time were developing capabilities to distribute HD content.[38]

12. In 2002 and 2003, in response to evolving HD technology and market forces, iN DEMAND developed a business plan to create two new channels, INHD and INHD2, that would showcase the HD format.[39] iN DEMAND launched INHD and INHD2 in September 2003.[40] Soon thereafter, each of the defendants carried the INHD and INHD2 channels without entering into a written affiliation agreement with iN DEMAND.[41] The defendants had business reasons for carrying INHD and INHD2. First, the carriage of these affiliated networks provided defendants with channels in which they could showcase HD programming to those customers which were "early adopters" of HD television sets at a time when there was little HD programming available.[42] Second, by exercising preemption rights, carriage of INHD and INHD2 provided locations in which defendants could air regional or local programming of particular interest to their viewers, such as a special sports event, in HD format.[43] It is particularly noteworthy that WealthTV was not yet launched when the defendants decided to carry INHD and INHD2. Therefore, WealthTV was not — and could not have been — a factor in any of the defendants' decisions to provide carriage to their affiliated networks, INHD and INHD2.

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[34] BHN Exh. 9 (Testimony of Steve Miron) at 1-2 (¶ 3); Tr. at 4292 (Asch).

[35] Cox Exh. 84 (Testimony of David Asch) at 6-25 (¶¶ 17-91).

[36] Cox Exh. 84 (Testimony of David Asch) at 4 (¶ 12); TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 16); Cox Exh. 79 (Testimony of Robert Wilson) at 8 (¶ 26). Tr. at 4290-91 (Asch), 4870 (Wilson).

[37] TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 15).

[38] Cox Exh. 84 (Testimony of David Asch) at 5 (¶ 16).

[39] Cox Exh. 84 (Testimony of David Asch) at 6 (¶¶ 17-18); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10 (¶¶ 31-32).

[40] Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 19).

[41] Tr. at 4334, 4308 (Asch). INHD and INHD2 were made available only to the defendants' HD subscribers, *i.e.*, those subscribers with HD tuners. *E.g.*, Cox Exh. 79 (Testimony of Robert Wilson) at 11 (¶ 36). Tr. at 4333, 4998 (Wilson). TWC tiered INHD, and made the channel available only to a subset of its HD subscribers. Tr. at 4998 (Wilson).

[42] Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 20); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4291-93 (Asch).

[43] Cox Exh. 84 (Testimony of David Asch) at 8 (¶ 27); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4308 (Asch).

13. The defendants believed that the carriage of INHD and INHD2 furthered their business interests, but viewed the carriage of INHD and INHD2 channels to be a short-term project. They expected eventually to replace those networks when SD networks with established brands and audience developed HD versions of their existing programming.[44]

14. The early adopters of HD technology and primary audience for HD programming at that time were males aged 18-49. For that reason, the iN DEMAND management identified age 18-49 males as the target demographic group for INHD and INHD2,[45] although a specific subset of that group, males aged 25-49, was particularly targeted by INHD and INHD2.[46] To advance its business, iN DEMAND acquired and aired HD programming — *i.e.*, shows featuring sports, movies, and rock music — that was designed to appeal to this target demographic group.[47] Among the programs aired on INHD and INHD2 were "Fields of Glory", a program about college football stadiums; "The A List," a program of high school basketball games; "Hardwood Heavens," a program about famous college basketball arenas, "Tour de Gorge" a program featuring eating contests; "Cathedrals of the Game," a program on famous baseball stadiums, and rock concerts featuring artists such as Ozzy Osbourne and The Who.[48]

15. But HD programming was then relatively scarce, and therefore INHD and INHD2 also aired animated shows and family type programming.[49] Still, the bulk of INHD's and INHD2's budget was expended on programming that was targeted to younger adult males such as sports and movies.[50] Only a small percentage of MOJO's programming budget was allocated to family programming.[51]

16. In 2004, iN DEMAND management commissioned marketing studies of the audience for INHD and INHD2.[52] Research showed that most INHD and INHD2 viewers were affluent and within the targeted group of 18-49 age males.[53] This research also showed that

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[44] Cox Exh. 79 (Testimony of Robert C. Wilson) at 10 (¶ 34); Cox Exh. 84 (Testimony of David Asch) at 8-9 (¶ 28); Cox Exh. 3; Tr. at 4310-11 (Asch).

[45] Cox Exh. 84 (Testimony of David Asch) at 7-8. Tr. at 4294, 4296, 4305, 4362-63 (Asch). TW Exh. 12. The demographic males aged 18-49 was used by Nielson for rating purposes.

[46] Tr. at 4297-98 (Asch).

[47] Tr. at 4296-27, 4324 (Asch).

[48] Tr. at 4324-25 (Asch).

[49] Tr. at 4300, 4340-41 (Asch). Mr. Asch testified that family programming had been discontinued by late 2004 or early 2005. Tr. at 4398-4400 (Asch).

[50] Tr. at 4401 (Asch).

[51] *Id.* INHD and INHD2 ceased airing family programming by late 2004 or early 2005. Tr. at 4398-4400 (Asch).

[52] TW Exh. 12.

[53] Cox Exh. 84 (Testimony of David Asch) at 10 (¶ 32). The market research showed that 56 percent of the audience for INHD and INHD2 were men aged 18-49 (100 percent more than HD viewers overall) and that 61 percent of them had annual household incomes of $75,000 or higher. *Id.*

viewers perceived the channels to be random and lacking in focus.[54] To correct this situation, iN DEMAND's management proposed a new brand identity for both INHD and INHD2 to better appeal to its target audience.[55] But iN DEMAND owners would approve only the re-branding of INHD.[56] That re-branding was an evolutionary process that was accomplished over a period of months.[57] This process included the airing of a branded block of original programming called the "MOJO Block," a three hour schedule of programming that was broadcast during prime time two nights a week. Initially, the network retained the name INHD.[58] iN DEMAND's management necessarily retained a substantial portion of its original programming line-up during the re-branding process, but it also acquired additional programming suited to the target demographic. This additional programming enabled it to retire programming that was not geared to younger adult males.[59] On May 1, 2007 — after the MOJO Block had been aired for almost a year — INHD was officially renamed MOJO.[60]

17. Expert testimony of Mr. Michael Egan, defendants' programming expert, shows that it is customary practice in the cable industry for a network to make changes in its programming to heighten its appeal to current viewers and attract new viewers while keeping the same or similar programming genres.[61] The preponderance of the record evidence demonstrates that re-branding of INHD to MOJO involved only the re-focus of an existing channel, and not the launch of a new channel.[62] The programming aired on the INHD-MOJO network between 2004 and 2008 consistently was dominated by the same four genres: sports, movies, music and documentaries.[63] And the programming of each network in each of these four genres generally was geared to the same demographic: younger adult males.[64]

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[54] Tr. at 4312 (Asch).

[55] Cox Exh. 84 (Testimony of David Asch) at 13-14 (¶ 45-46); Tr. 4329-30 (Asch).

[56] Subsequently iN DEMAND's owners shut down INHD2 because they needed more bandwidth for other channels. The INHD2 channel went dark on December 31, 2006. *Id.* at 15 (¶ 52).

[57] Cox Exh. 84 (Testimony of David Asch) at 15 (¶ 49).

[58] Cox Exh. 84 (Testimony of David Asch) at 15 (¶¶ 49, 53-54); Tr. at 4341 (Asch).

[59] Tr. at 4326, 4340 (Asch). Cox Exh. 84 (Testimony of David Asch) at 10, 15 (¶¶ 35, 49).

[60] Cox Exh. 84 (Testimony of David Asch) at 16 (¶ 55); Tr. at 4329 (Asch).

[61] TWC Exh. 85 (Testimony of Michael Egan) at 18 (¶ 25).

[62] Ms. Sandy McGovern, WealthTV's programming expert, testified that MOJO was the launch of a new channel because MOJO and INHD were fundamentally different. WealthTV Exh. 152 (Testimony of Sandy McGovern) at 8 (¶ 14). That conclusion must be rejected in light of the weight of the contrary evidence set forth above. Ms. McGovern acknowledged that she had concluded in her verified declaration that MOJO was a launch of a new network without having viewed a single episode of MOJO programming. Tr. at 3808 (McGovern). It was only after she reached that unsupported conclusion, that Ms. McGovern viewed two weeks of MOJO programming and one week of INHD programming. Tr. at 3811 (McGovern).

[63] TWC Exh. 85 (Testimony of Michael Egan) at 20-21 (¶ 27).

[64] *Id.* at 20-21 (¶¶ 27-28). For example, the movies on INHD included "Clash of the Titans," "Gleaming the Cube," "Lord of the Flies," "Hoffa," and "Hellraiser;" the movies featured on MOJO included "Badlands," "Beyond the Poseidon Adventure," and "Body Heat." *Id.* at 21 (¶ 28). INHD aired

18. iN DEMAND's management did not consider WealthTV's programming or its status as a competitor in its decision to re-brand INHD as MOJO.[65] None of the defendants directed or suggested to iN DEMAND's management that it emulate WealthTV's demographic, content or genre.[66] Indeed, the record shows that the iN DEMAND personnel responsible for the re-branding were unaware of the existence of WealthTV at the time that the re-branding took place.[67]

19. In June 2008, the iN DEMAND owners made the final decision to terminate MOJO.[68] A majority of owners considered the viewership of MOJO to be too low to justify the cost of carriage.[69] The owners also wanted to use the bandwidth occupied by MOJO to carry HD simulcasts of existing networks with established brands and audiences.[70] The MOJO channel served its purposes and was allowed to go dark in December, 2008.[71]

MOJO and WealthTV Networks Not Similarly Situated

20. WealthTV claims that it was similarly situated with MOJO because the two networks targeted the same demographic — affluent younger adult males — and presented similar types of programming.[72] The defendants dispute that WealthTV and MOJO were similar networks. The preponderance of record evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience.

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performances by music artists such as U2 and Lynaryd Sknyrd; MOJO aired concerts by Sheryl Crow, The Killers, Primal Scream and Rush. *Id.*

[65] Cox Exh. 84 (Testimony of David Asch) at 12, 13, 17 (¶¶ 40, 41, 43, 59); Cox Exh. 79 (Testimony of Robert Wilson) at 38 (¶ 130).

[66] Cox Exh. 84 (Testimony of David Asch) at 12 (¶ 41). *See* Cox Exh. 79 (Testimony of Robert Wilson) at 34, 38 (¶¶ 115, 130).

[67] Cox Exh. 84 (Testimony of David Asch) at 12, 13, 17 (¶¶ 40, 42. 59).

[68] Cox Exh. 84 (Testimony of David Asch) at 15 (¶ 52); Tr. at 4341 (Asch).

[69] Cox Exh. 84 (Testimony of David Asch) at 24-25 (¶ 90).

[70] *Id.* at 24 (¶ 87).

[71] *Id.* at 15 (¶ 52); Tr. at 4664 (Bond).

[72] WealthTV also argues that it is similarly situated with MOJO because the two networks sought advertising from the same companies. WealthTV Exh. 144 (Testimony of Charles Herring) at 26. WealthTV however, identifies only a single company, Bose, in which both networks advertised and only one additional company, Grey Goose Vodka, in which both networks had solicited for advertisements. *Id.* Evidence that MOJO and WealthTV both had business dealings with two advertisers, however, does not establish that the two networks generally solicited or contracted with the same advertisers. And even if WealthTV had established that it and MOJO generally dealt with the same advertisers, the record evidence when considered in its entirety fails to show that the two networks were similarly situated.

Contrast in WealthTV and MOJO Programming

21. According to Mr. Charles Herring, WealthTV's programming is centered upon an overall theme of "how wealth is achieved, used and enjoyed."[73] He testified that the programming "focus[es] on enjoyable aspects of financial success, including travel, fine dining, luxury transport, gadgetry, finance, philanthropy and thoughtful insights on cultures."[74] By contrast, MOJO s programming did not involve the showcasing of a luxury lifestyle, but rather focused generally on sports, movies and music.

22. Defendants' expert, Mr. Egan, compared the programming of WealthTV and MOJO by categorizing and quantifying every program aired by the two networks in sample weeks during July 2007 and January 2008 into specific genres (i.*e.*, music, sports, travel, and recreation, *etc.*).[75] Mr. Egan's 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 time consisted of shows in those genres.[76] He also established that 60 percent of WealthTV's programming time consisted of shows in the genres of travel & recreation, lifestyle, food & drink, documentary, and art/design/collectables — programming that aired only 19 percent of the time on MOJO.[77]

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[73] WealthTV Exh. 144 (Testimony of Charles Herring) at 9.

[74] *Id.*

[75] TWC Exh. 85 (Testimony of Michael Egan) at 6-7 (¶¶ 10-11).

[76] *Id.* Mr. Charles Herring testified that MOJO aired a number of program series that were similar in category type (*i.e.*, adventure, travel, comedy) to the programming broadcast on WealthTV, *see* WealthTV Exh. 144 (Testimony of Charles Herring) at 24-26, but neither he nor any other WealthTV witness attempted to quantify the amount of broadcast time devoted to allegedly similar programming. WealthTV claims that Mr. Egan's analysis is not credible because the genre analysis is not a tested methodology. WealthTV's Proposed Findings at 59 (¶¶ 257-258). But WealthTV provides no evidence to show that methodology is wrong or unreliable. WealthTV also attempts to discredit Mr. Egan's genre analysis by arguing that Mr. Egan's conclusions concerning the genres of MOJO's programming are inconsistent with a MOJO press release cursorily listing the types of programming on the network. WealthTV Reply Findings at 28-29 (¶ 58). WealthTV does not show, however, that the programming actually aired by MOJO did not fall into the genres set forth in Mr. Egan's testimony.

[77] TWC Exh. 85 (Testimony of Michael Egan) at 6-7 (¶¶ 10-11). Based upon a network genre analysis, Mr. Egan provided evidence that WealthTV's programming was more similar to programming of networks such as Fine Living, and American Life TV than to the programming of MOJO. Specifically, Mr. Egan testified that several of the dominant genres on Fine Living and the American Life TV Network were among the top five genres on WealthTV. *Id.* at 14 (¶ 18). Although Mr. Charles Herring stated that it was his "impression" that the programming of Fine Living was not similar to the programming of WealthTV, WealthTV Exh. 144 (Testimony of Charles Herring) at 11, Mr. Herring is not an expert on network programming and his impressions were not the product of any quantitative analysis of the two networks. In any event, even if it were established that WealthTV's programming is dissimilar to the programming aired on Fine Living, that fact would not support the claim that WealthTV is similarly situated to MOJO.

23. Significantly, Mr. Egan opined that the on-air "look and feel" of MOJO and WealthTV were demonstrably different.[78] Mr. Egan, concluded that MOJO conveyed a "hip, urban irreverent, aggressive, and edgy" image akin to that of the MTV Network channels.[79] MOJO's hosts were young, irreverent, and often sarcastic. Its hard-charging production style featured contemporary music, fast-paced transitions between shows and advertisements, and off-beat humor.[80] In contrast, WealthTV presented a "calmer, more mature attitude."[81] WealthTV used orderly transitions to commercial breaks, and aired like library background music, not MOJO's rock and roll.[82]

24. Mr. Egan further testified that if WealthTV and MOJO presented programming covering the same subject-matter, the programming would be dissimilar. This is illustrated by a MOJO's program *Uncorked*, which features an unsophisticated Bill Merritt, a professional comedian who "promises to ask the dumb questions about wine so we won't have to and he delivers."[83] Mr. Merritt is a bumbler who "jokes, rambles, and mugs" while asking silly questions in street interviews, wine stores and restaurants.[84] In contrast, *Taste! The Beverage Show* features serious hosts dressed attractively who visit locations around the world reporting on rum-making in Jamaica, on the brewing of beer in Canada, and the history and art of winemaking in California,[85] featuring travelogue-type scenes.[86] MOJO's show, *Test Drive,* features Craig Jackson, described on MOJO's web site as "the son of an Air Force pilot and semi-pro bowler who grew up to desire to drive really, really fast, drink stale beer, and wear ugly shoes."[87] In that *persona,* Mr. Jackson depicts with humor driving issues and situations faced in urban life, such as auto theft, rental cars, and radar detectors.[88] In contrast, WealthTV's *Wealth on Wheels*, is a program featuring luxury or exotic automobiles, *e.g.*, the history of the Lamborghini automobile company, a show of vintage classic antique cars, or the Concorso Italiano.[89]

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[78] Mr. Egan, testified that "look and feel" is an industry term that describes the personality of a network conveyed by its visuals, the speech and dress of its hosts, music, subject matter, graphics and other factors. Tr. at 5172-73.

[79] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[80] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[81] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[82] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[83] TWC Exh. 85 (Testimony of Michael Egan) at 10-11 (¶ 16).

[84] Tr. at 5182-83 (Egan).

[85] TWC Exh. 85 (Testimony of Michael Egan) at 10 (¶ 16). Tr. at 5180 (Egan).

[86] Tr. at 5180 (Egan).

[87] TWC Exh. 85 (Testimony of Michael Egan) at 11 (¶ 16).

[88] *Id.*

[89] *Id.*

25. Notwithstanding the illustrative evidence described above, Ms. Sandy McGovern, WealthTV's programming expert, testified that the programming content of WealthTV and MOJO were "strikingly similar" in their theme and content.[90] Mr. Egan's contrary testimony described above is far more credible.[91] It is significant that Ms. McGovern based her opinion on a sample of WealthTV's programming selected for her review by Mr. Charles Herring.[92] 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.[93] Shockingly, Ms. McGovern acknowledged that she had reached the conclusion concerning the similarities of the two networks without undertaking a systematic review of the programming of either WealthTV or MOJO.[94] Moreover, Ms. McGovern's conclusion is even further undercut by her acknowledgement on cross-examination of many differences in the programming of the two networks. For example, Ms. McGovern conceded that MOJO aired sports programming and movies but that WealthTV does not air that type of programming.[95] Ms. McGovern also admitted that WealthTV, but not MOJO, broadcasted shows about fashion, shopping, philanthropy, and health.[96] In addition, she testified that MOJO has no programming comparable to WealthTV's specials on subjects such as watches and jewelry or to WealthTV's "The Boomer Show," a show targeted to the "Baby Boomer" generation of adults between the ages of 44 and 60-64.[97] Conceding at least one difference in the "look and feel" of the two networks, Ms. McGovern testified that WealthTV's programming is family-friendly whereas MOJO's programming was not family-friendly.[98] Ms. McGovern's acknowledgement of many differences in the programming of WealthTV and MOJO negates any credibility of her conclusion that the two networks had strikingly similar programming.

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[90] Tr. at 3715 (McGovern).

[91] WealthTV argues that Mr. Egan's opinions should carry no weight because a company in which Mr. Egan had been a principal was a business partner of TWC in a venture called Renaissance Media Holdings, LLC ("Holdings"). WealthTV Proposed Reply Findings at 30-31 (¶ 61). That relationship lasted less than one and one-half years and ended in March 1998. Tr. at 5216-17 (Egan). The fact that aspects of this past business relationship may have been financially rewarding to Mr. Egan does not establish that his testimony is tainted or unreliable. WealthTV also points out that Mr. Egan "worked in conjunction with TWC as a result of the sale of Cablevision Industries, Mr. Egan's previous employer, to TWC." WealthTV Proposed Reply Findings at 31. The mere fact that Mr. Egan had business dealings with TWC while employed by Cablevision Industries, does not undermine the reliability or credibility of Mr. Egan's consistent, convincing, and well organized expert testimony in this case.

[92] Tr. at 3814-15 (McGovern).

[93] Tr. at 3814-27. Ms. McGovern viewed only six of the 29 shows that were featured on WealthTV's website. Tr. at 3816-17 (McGovern).

[94] Tr. at 3871-72 (McGovern).

[95] Tr. at 3799-3800 (McGovern).

[96] Tr. at 3800-02 (McGovern).

[97] Tr. at 3802-03 (McGovern).

[98] Tr. at 3799 (McGovern).

26. WealthTV's attempt to discredit Mr. Egan's showing on the "look and feel" of the two networks is unpersuasive. WealthTV criticizes the formality of the method by which Mr. Egan conducted the "look and feel" analysis.[99] But it fails to show how Mr. Egan's conclusions were erroneous. Nor did WealthTV present any 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. With this gap in evidence, WealthTV does not make a case of favoritism.

Demographic Audience Targeted by WealthTV and MOJO.

27. One basis for WealthTV's claim that WealthTV and MOJO are similarly situated is that both networks targeted the same audience: affluent males between the ages of 25 and 49. The parties agree that MOJO targeted this demographic. The overwhelming weight of the record evidence, however, shows that WealthTV targeted a much broader audience that was not limited to adult males between the ages of 25 and 49. Indeed, WealthTV's **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** its marketing presentations to MVPDs and prospective advertisers; statements on its website; Mr. Charles Herring's sworn testimony in another case; as well as other matters of record show that WealthTV's target audience is not limited to males aged 24 to 49.

28. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

29. Similarly, many of WealthTV's PowerPoint marketing presentations to MVPDs, potential advertisers, and others describe WealthTV as appealing to an audience broader than the claimed target demographic of adult males aged 25 to 49. For example, in a PowerPoint marketing presentation made to ID Media in March 2007, WealthTV described itself as "targeting the most affluent viewer, 25-60+, educated, equal appeal to men and women."[104] In a number of PowerPoint presentations to MVPDs and advertisers, WealthTV described itself in boldface as having a "**[b]road appeal** across age and income demographics."[105] In a PowerPoint

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[99] *See* WealthTV Proposed Reply Findings at 29-30 (¶ 61).

[100] Cox Exh. 75 at 75-6; Cox Exh. 77 at 77-2; TWC Exh. 10 at 10-3; Tr. at 3032-38 (Herring).

[101] WealthTV Exh. 144 at 23 (Testimony of Charles Herring).

[102] Tr. at 3035, 3038, 3047 (Herring).

[103] Tr. at 3795-96 (McGovern).

[104] TWC Exh. 28 at 28-2.

[105] Comcast Exh. 22 at 22-2; Cox Exh. 6 at 6-3; Cox 23 at 23-3; Cox Exh. 56 at 56-3; TWC Exh. 4 at 4-7; TWC Exh. 9-3; TWC Exh. 22 at 22-2 (emphasis in original). Tr. at 3103-3014, 3144-45, 3149-52

slide presented to several of the defendants titled "WealthTV Demographic," WealthTV described its target audience as individuals with "luxury fever," a group "crossing all age groups."[106] Mr. Charles Herring disclosed that people with "luxury fever," *i.e.*, individuals interested in luxury items, include both men and women.[107] Another slide, titled "WealthTV Demographic," features the "baby boomers,"[108] the generation of adults between the ages of 44 and 60-64, which extends well beyond the group targeted by MOJO and its predecessor.

30. In its PowerPoint presentations to MVPDs and other companies. WealthTV typically included a "Magazine Complementary Set" intended to show sample periodicals with demographics overlapping those of WealthTV.[109] Although the Complementary Set included some male-skewed magazines, such as *The Robb Report*, a majority of the sample periodicals were either women magazines, such as W and *Town and Country*, or gender-neutral publications, such as *The New Yorker.* [110] Indeed, Mr. Charles Herring acknowledged that eight of the 10 presented in the "Magazine Complementary Set" were not male-skewed.[111] Similarly, WealthTV presented a marketing PowerPoint presentation to several companies entitled the "TV Competitive Set."[112] According to Ms. McGovern, a television competitive set is designed to convey the channels in which a specific network has an overlapping target demographic.[113] Of the four networks featured on this slide, WealthTV identified two as male-skewed (Golf and CNBC) and two as female-skewed (BBCA and HGTV).[114] The median age of the viewers of CNBC and HGTV were listed as 58.0 and 51.5, respectively.[115]

(Herring). Mr. Charles Herring testified that he had prepared a master PowerPoint deck with various slides that were used by himself and WealthTV sales personnel for presentations to potential advertisers and distributors. Tr. at 3162-63 (Herring).

[106] Comcast 22 at 22-18; Cox Exh. 23 at 23-8.

[107] Tr. at 3119 (Herring). In another PowerPoint slide presented to a number of companies, WealthTV stated that "luxury is hot across broad demographics. . . . Broad demographics with special appeal to multiple groups including Baby Boomers, aspiring low and middle class, and upper class." TWC Exh. 9 at 9-20; Cox Exh. 56 at 56-22; TWC Exh. 22 at 22-15.

[108] TWC Exh. 28 at 28-20. The same "WealthTV Demographic" was presented to a number of companies. *See also, e.g.*, Comcast Exh. 22 at 22-20; Cox Exh. 23 at 23-9.

[109] TWC Exh. 22 at 22-3; Cox Exh. 23 at 23-7; TWC Exh. 9 at 9-14; Comcast Exh. 22 at 22-3; Cox Exh. 56 at 56-7.

[110] Tr. at 3100-03, 3118 (Herring).

[111] *Id.*

[112] TWC Exh. 4 at 4-26; TWC Exh.9 at 9-35.

[113] Tr. at 3783.

[114] TWC Exh.9 at 9-35.

[115] *Id.* WealthTV's PowerPoint presentations also typically included slides titled "Featured Programming," setting forth descriptions of highlighted shows including their demographics. *See, e.g.*, TWC Exh. 4 at 4-2 to 4-6; Cox Exh. 23 at 23-12 to 23-17. Most of the shows featured in these slide presentation did not target males. For example, in presentations made to Cox and Forbes, WealthTV identified only five of the 18 featured shows as male-skewed. *Id.*

31. WealthTV also included a slide in its PowerPoint marketing presentations to MVPDs and potential advertisers that categorized its demographics in terms of six programming genres: travel/adventure; lifestyle; entertainment; new/information; biography/history; and health.[116] According to WealthTV, its programming in travel/adventure, lifestyle; entertainment; new/information and biography/history, which represents 95 percent of its total programming, is targeted to adults (male and female) whereas its programming on health, which consists of the remaining five percent of its total programming, is targeted specifically to females. WealthTV in that slide identified none of its programming as exclusively targeting men.[117]

32. The record contains a number of statements by WealthTV or its officials that are inconsistent with WealthTV's claim that the network's target audience is males between 25 and 49 years old. For example, prior to this proceeding, Mr. Charles Herring asserted under oath in another case that WealthTV's programming "appeals to about a 25 to 65+ crowd,"[118] a demographic that includes all adults within that broadly-defined age group, not just males. Mr. Herring also stated that WealthTV's overriding theme, *i.e.*, the showcasing of a luxury lifestyle, had a very broad appeal and that the only group that would not find WealthTV attractive was "monks that have taken a vow to poverty."[119] Indeed, Mr. Herring acknowledged in cross-examination in this case his belief that WealthTV had a broad appeal to men and women.[120] Such statements contradict Mr. Herring's direct written testimony that WealthTV targeted males aged 25-49.[121]

33. WealthTV states on its website that it has "a wide range of programming designed to have a broad appeal,"[122] with no mention of a target demographic of males aged 25-49.[123] The website also includes a link to a Call Center Sheet[124] that in turn depicts WealthTV as a network with "broad appeal across all demographics," again without reference to targeting younger adult males.[125] In addition, prior to its launch, WealthTV issued a press release describing itself as a

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[116] TWC Exh.9 at 9-26; Cox Exh. 23 at 23-10; TWC Exh. 4 at 4-16. Tr. at 3789.

[117] Mr. Gary Turner, WealthTV's expert witness, stated that WealthTV "always described itself" as a "male focused channel." WealthTV Exh. 146 at 3 (¶ 3) (Declaration of Gary Turner). That statement is not credible given the weight of the contrary evidence set forth above.

[118] TWC Exh. 139 at 139-4.

[119] TWC Exh. 139 at 139-6; Tr. at 3054-55 (Herring).

[120] Tr. at 3236 (Herring).

[121] WealthTV Exh. 144 at 11-20 (Testimony of Charles Herring).

[122] TWC Exh. 102.

[123] *Id.*

[124] A Call Center Sheet is an informational sheet created by WealthTV to assist distributors of its programming in training its personnel about WealthTV so that they can answer subscribers' questions about the network. Tr. at 3234-35 (Herring).

[125] TWC Exh. 111.

"network designed to appeal to a broad market[]."[126] Nothing in that press release describes the network as targeting 25-49 year old males.

34. In support of its contention that its programming targeted males aged 25-49, WealthTV claims that it presented a slide entitled "Target Audience of WealthTV" in a PowerPoint presentation to Cox, Comcast, Orion Cable and Yachting Magazine's Time4Media, a subsidiary of TWC that characterizes WealthTV's target audience as males between the ages of 25 and 49.[127] WealthTV also relies upon the fact that its exhibits at trade shows featured male-oriented items such as cigar rollers and exotic sports cars and that its advertising images are designed to appeal to affluent younger adult men.[128] Notwithstanding the existence of these presentations, exhibits, advertisements and other evidence, WealthTV's assertion that it "consistently" has described its target demographic as males aged 25-49[129] conflicts with the record evidence considered as a whole. Indeed, the great weight of evidence reflects that WealthTV's target audience is not limited to males aged 25-49.[130]

Good Faith Negotiations

35. WealthTV asserts that "[i]n addition to affording preferential treatment to its affiliate, MOJO, each of the defendants refused to negotiate with WealthTV in good faith for carriage on their respective systems."[131] The record evidence considered as a whole, however, does not support WealthTV's factual claim that any of the defendants failed to negotiate in good faith.

TWC Negotiations

36. WealthTV actively sought carriage on TWC since its inception in 2004, engaging in meetings and discussions with TWC personnel both at the corporate headquarters level and in

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[126] TWC Exh. 109; Tr. at 3249.

[127] WealthTV Exh. 2; WealthTV Exh. 117 at 7; WealthTV Exh. 120 at 8; WealthTV Exh. 122 at 8; WealthTV Exh.144 (Testimony of Charles Herring) at 11-13. In a number of those PowerPoint presentations, however, WealthTV also describes itself as having "broad appeal across age and income demographics. *E.g.*, WealthTV Exh. 117 at 3; WealthTV Exh. 120 at 3; WealthTV Exh. 122 at 3.

[128] WealthTV Exh.144 (Testimony of Charles Herring)) at 17-20; WealthTV Exh. 5.

[129] *See* WealthTV Proposed Reply Findings at 23.

[130] In support of its claim that its targeted demographic was males, WealthTV also relies upon a "tabulation of data collected through its website by Kersey Research Strategies," WealthTV Findings at 24 (¶ 90). However, at the hearing the Presiding Judge excluded from the record that tabulation on the grounds that it was unreliable. Tr. at 3012-13 (Presiding Judge).

[131] "Complainant's Proposed Findings of Fact and Conclusions of Law," (June 2, 2009) at 28 (¶ 107) ("WealthTV's Proposed Findings of Fact and Conclusions of Law"). Section 76.1301(c) does not impose a *per se* requirement on a cable operator to negotiate in good faith with a video programming vendor. An alleged failure to negotiate in good faith is relevant to a section 76.1301(c) violation only to the extent that it constitutes factual evidence of a cable operator's discrimination against a video programming vendor "on the basis of affiliation or non-affiliation." 47 C.F.R. § 76.1301(c).

individual systems across the country.[132] Mr. Herring testified that WealthTV's marketing efforts had produced positive feedback among a number of TWC systems, including locations in Texas, New York, North Carolina, South Carolina, Wisconsin, Ohio, and New England.[133] In contrast, a number of TWC officials, on the basis of direct communications with TWC employees, testified that those reports of interest in WealthTV were inflated and that there was no groundswell of support among TWC systems to carry WealthTV.[134] Contemporaneous emails, however, support the testimony of the TWC officials.[135] At a minimum, the weight of evidence shows that TWC officials in fact believed reasonably that there was not a substantial demand from TWC systems for an affiliation agreement with WealthTV and these officials made reasonable business decisions based on that belief.

37. The parties agree that the TWC system in San Antonio did express an interest in carrying WealthTV.[136] On February 16, 2007, WealthTV and TWC-San Antonio executed a six-month agreement whereby WealthTV would provide video-on-demand ("VOD")[137] programming on TWC's San Antonio system.[138] TWC corporate was interested in the San Antonio VOD trial so it could evaluate WealthTV's appeal.[139] TWC concluded that the performance of WealthTV's VOD was not overwhelming and saw that viewership began to decrease over time.[140] Nonetheless, TWC's San Antonio's office, with the concurrence of TWC corporate officials, expressed an interest in extending the VOD agreement after the expiration of the six month period.[141] But it was WealthTV that refused to extend the VOD trial unless TWC

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[132] *E.g.*, WealthTV Exh. 44 (Testimony of Charles Herring) at 29-39; TWC Exh. 82 (Testimony of Arthur Carter) at 3 (¶ 9); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5-11 (¶¶ 10-26).

[133] WealthTV Exh. 144 (Testimony of Charles Herring) at 30.

[134] TWC Exh. 82 (Testimony of Arthur Carter) at 3-4 (¶¶ 9-10); TWC Exh. 83 (Testimony of Eric Goldberg) at 11 (¶ 5); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5 (¶ 12); TWC's ownership interest in MOJO played no role in TWC's decision not to carry WealthTV. Contemporaneous emails support the testimony of these TWC officials, *see, e.g.*, TWC Exh. 29, and their testimony is credible.

[135] *See, e.g.*, TWC Exh. 29.

[136] TWC Exh. 82 (Testimony of Arthur Carter) at 4 (¶ 10); WealthTV Exh. 144 (Testimony of Charles Herring) at 32-34.

[137] VOD is programming offered on a per program basis, either with or without a separate per program fee. "VOD allows subscribers to order programming from a central server at any time of day, and to fast-forward, rewind, and pause the programs." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Report, 24 FCC Rcd 542, 571 (¶ 60) (2009).

[138] TWC Exh. 26; TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 4); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 3 (¶ 5). WealthTV's VOD content was the only HD VOD content that TWC's San Antonio's system was carrying at that time. TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 5).

[139] *See* Tr. at 4197-2000 (Rosenberg).

[140] TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 5).

[141] *Id.* at 3-4 (¶ 7).

agreed to a linear carriage agreement.[142] TWC did not take the bait and there was no extension by mutual refusals to deal.

38. After the San Antonio trial ended, WealthTV and TWC engaged in further negotiations in an attempt to reach a carriage agreement.[143] The two parties met on July 18, 2007. TWC asked WealthTV to offer market research, consumer data or other evidence that that would show WealthTV's value as a programming network. [144] Networks seeking carriage on TWC regularly produce such data. WealthTV did not supply that information at that meeting or thereafter.[145] Still, the parties continued to negotiate, exchanging various proposals and attempting to narrow differences. On September 6, 2007, as part of the continuing negotiations, WealthTV forwarded TWC a revised term sheet that included a hunting license agreement for the linear and VOD carriage of WealthTV's programming that would give TWC free HD VOD carriage upon condition of a linear launch in at least one system.[146] On October 31, 2007, TWC made a counteroffer proposing the removal of the provision that free HD VOD carriage be conditioned on the linear launch in at least one system.[147] WealthTV that same day rejected the counteroffer, asking instead for retention of the provision that that the free HD VOD content be conditioned upon a linear carriage launch on at least one system.[148] On December 3, 2007, TWC offered WealthTV exactly the same terms that WealthTV proposed in its October 31 counteroffer, *i.e.*, a hunting license for linear and VOD service, and an agreement that the HD VOD would be free if TWC launched WealthTV's linear service on at least one system.[149] WealthTV rejected this proposal.

39. The weight of 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. TWC has a demonstrated history of providing carriage to unaffiliated networks. Only three of 59 networks launched by TWC between 2004 and 2008 were affiliated

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[142] TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 6); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 4 (¶ 8); TWC Exh. 32.

[143] TWC Exh. 83 (Testimony of Eric Goldberg) at 5-6 (¶ 12); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 4-11 (¶¶ 9-26).

[144] TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5 (¶ 11).

[145] *Id. See* TWC Exh. 81 (Testimony of Melinda Witmer) at 3, 12 (¶¶ 26, 27).

[146] TWC Exh. 48; TWC Exh. 83 (Testimony of Eric Goldberg) at 9 (¶¶ 19, 21).

[147] TWC Exh. 52; TWC Exh. 83 (Testimony of Eric Goldberg) at 10 (¶ 22).

[148] TWC Exh. 83 (Testimony of Eric Goldberg) at 10 (¶ 22).

[149] *Id.* at 10 (¶ 23); TWC Exh. 84, (Testimony of Andrew Rosenberg) at 10 (¶ 23); Tr. at 4191-92 (Goldberg). WealthTV maintains that "TWC does not dispute that [the December 3, 2007] offer was ever presented in writing." *see* WealthTV Proposed Reply Findings of Fact and Conclusions of Law at 19 (¶ 36). But WealthTV does not claim that the offer never was made. Indeed, Mr. Charles Herring on cross-examination acknowledged that TWC made such an offer and that WealthTV rejected it. Tr. at 3379-82 (Herring).

with TWC.[150] TWC lacks capacity to carry all the networks that seek affiliation and must decide what networks are in its best interest to carry.[151] TWC concluded that WealthTV had not shown that its carriage would assist TWC to attract or maintain subscribers. TWC perceived that there was not sufficient support for WealthTV from its systems and WealthTV had failed to provide TWC with ratings data or other form of empirical proof of customer interest.[152] TWC took into account the fact that WealthTV had no established brand recognition with proven appeal to subscribers.[153] In addition, WealthTV, an aspirational channel, did not offer sports or movies which are the types of programming that TWC believes to be highly sought-after by its subscribers.[154] TWC also considered the fact the WealthTV had not gained carriage on TWC's primary satellite competitors DirecTV and DISH and on a number of its cable competitors.[155] Nonetheless, as stated above, TWC had entered into an agreement with WealthTV for VOD carriage on its San Antonio system and offered the network a nationwide hunting license for both linear and VOD carriage — actions which evidence a willingness to carry within business limitations or at least to consider carriage of WealthTV's programming when it would be in the company's business interest.

40. Both Ms. Melinda Witmer, TWC's Chief Programming Officer since 2007 and Mr. Arthur Carter, TWC's former Senior Director of Programming, testified that TWC's ownership interest in MOJO played no role in TWC's decision not to provide full linear carriage to WealthTV.[156] Their testimony is consistent, competent and credible.

Cox Negotiations

41. WealthTV met with Mr. Robert Wilson, Senior Vice President of Programming for Cox and others in Cox's corporate programming department in 2004 and 2005 to discuss WealthTV's desire to obtain carriage on Cox's systems.[157] WealthTV continued to market its programming to Cox in the ensuing years.[158] In 2004, Cox concluded that WealthTV was a marginal network that would not bring value to Cox, and thus it decided not to carry WealthTV.[159] Cox continued to meet with WealthTV, however, because it kept open the

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[150] TWC Exh. 56 (Affiliation Agreement); TWC Exh. 81; TW Exh. 85 (Testimony of Michael Egan) at 23 (¶ 31); TW Exh. 81 (Testimony of Melinda Witmer) at 15 (¶ 33).

[151] Tr. at 3912-13 (Witmer).

[152] TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

[153] *E.g.*, TWC Exh. 82 (Testimony of Arthur Carter) at 2-3 (¶¶ 5-7); TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

[154] TWC Exh. 82 (Testimony of Arthur Carter) at 3 (¶ 8).

[155] *E.g.*, TWC Exh. 82 (Testimony of Arthur Carter) at 2-3 (¶¶ 5-7); TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

[156] TW Exh. 81 (Testimony of Melinda Witmer) at 15 (¶ 33); Tr. at 3951-52 (Witmer); Tr. at 4097-98 (Carter).

[157] Cox Exh. 79 (Testimony of Robert Wilson) at 14, 16 (¶¶ 51, 55).

[158] Tr. at 4920 (Wilson).

[159] *Id.*

possibility that WealthTV would provide it with new material that might convince it to carry the network.[160]

42. Cox makes its carriage decisions at the corporate level.[161] It considers a variety of factors in considering whether to add a new network including likely viewer appeal, quality of the programming; probability of success in light of management and business plan; bandwidth constraints; proposed terms and conditions of carriage; and the unique needs of Cox's systems, such as local or regional content.[162] Cox based its decision not to carry WealthTV on the basis of those criteria. Cox believed that WealthTV lacked any brand appeal that might draw an audience and was indistinguishable from many other start-up networks seeking carriage on Cox.[163] Cox concluded that WealthTV offered programming that was closely similar in content and audience to Fine Living, an unaffiliated network already carried by Cox.[164] Cox viewed WealthTV's business plan as assuming that producing content in an HD format would ensure success. Cox considered that plan not to be sustainable because all linear SD networks eventually would roll out HD feeds.[165] Cox also found WealthTV's management team to lack experience in video programming and to have no proven track record.[166] Cox also thought that WealthTV's programming lacked any regional or local appeal.[167] In addition, Cox believed that carriage of WealthTV would not fit into its business strategy of using its scarce bandwidth only for HD programming with demonstrated customer appeal.[168] Finally, Cox viewed the terms of carriage proposed by WealthTV to be unacceptable as a business proposition and even impossible to meet from a logistical standpoint.[169] The preponderance of the record evidence

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[160] Tr. at 4919, 4902 (Wilson).

[161] Tr. at 4862 (Wilson); Cox. Exh. 81 (Testimony of Leo (Brennan) at 2 (¶ 4); Tr. at 5077 (Edmunds).

[162] Cox Exh. 79 (Testimony of Robert Wilson) at 14 (¶ 48).

[163] *Id.* at 13, 14, 16-17 (¶¶ 46, 50, 56-58).

[164] *Id.* at 16-17 (¶¶ 56-59).

[165] *Id.* at 24 (¶¶ 77-78).

[166] *Id.* at 25 (¶ 81).

[167] *Id.* at 28-29 (¶¶ 94-95). Mr. Wilson, Cox's Senior Vice President for Programming, is the company official that has the final say in determining whether Cox will enter into affiliation agreements. So Cox's systems knew to contact Cox's corporate programming department if they wanted to seriously consider carriage of a particular network. *See, e.g.*, Exh. 81 (Testimony of Leo Brennan) at 4 (¶ 10); Tr. at 5077-79 (Edmunds). Mr. Wilson received no expression of interest in carrying WealthTV from any Cox system. Cox Exh. 79 (Testimony of Robert Wilson) at 21 (¶ 70). *See* Tr. at 4895 (Wilson). Mr. Wilson is aware of only a single expression of interest received at Cox's corporate programming department — a contact made by Mr. Tony Matthews, the employee responsible for marketing in Cox's Kansas/Arkansas system . Cox Exh. 79 (Testimony of Robert Wilson) at 22 (¶ 71); Tr. at 4895 (Wilson). But Ms. Kimberly Edmunds, the General Manager of Cox's Kansas/Arkansas system testified that she never asked Cox's corporate programming department to carry WealthTV and that she believed that there was no business reason for Cox to carry WealthTV. Cox Exh. 82 (Testimony of Kimberly Edmunds) at 4-5 (¶¶ 14-15); Tr. at 5085 (Edmunds).

[168] *Id.* at 24 (¶ 78).

[169] Cox Exh. 79 (Testimony of Robert Wilson) at 26-28 (¶¶ 86-93).

thus shows that business factors, and not Cox's affiliation with MOJO, were the reasons that Cox declined to carry WealthTV.

43 Still, WealthTV alleges that Cox unreasonably blocked it from carriage on its Las Vegas system by not permitting a deal with KLAS(TV), a network affiliated with CBS, for the multicast of WealthTV's programming.[170] But Cox's actions did not constitute discrimination on the basis of affiliation. KLAS(TV) has the capability to use its digital signals to transmit not only its primary video signal, but also multiple subsidiary programming, known as "multicast" streams.[171] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** When KLAS(TV) asked Cox if it were willing to carry a multicast program stream that consisted of WealthTV broadcasting, Mr. Leo Brennan, then Senior Vice President and General Manager of Cox's Las Vegas cable system, refused because: (1) **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL],** (2) the carriage of WealthTV via KLAS(TV) would circumvent Cox's policy that all cable programming deals are to be made through Cox's corporate programming department.[174] Mr. Brennan testified completely and convincingly that Cox would have refused to carry any national cable network as a multicast feed.[175] Clearly, the refusal was to comply with a non-discriminatory business policy and was not attributable to WealthTV's lack of affiliation with Cox.[176]

Comcast Negotiations

44. In March 2004 — before the launch of the WealthTV network — WealthTV began meeting with Comcast officials to discuss its desire to obtain carriage on Comcast systems.[177] Between 2004 and 2006, WealthTV representatives had numerous meetings and telephone calls with Mr. Dannenbaum, Comcast's Executive Vice President of Network Distribution of Programming Management and/or Mr. Madison Bond, Executive Vice President for Content

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[170] *See* WealthTV's Proposed Findings of Fact and Conclusions of Law at 40-41 (¶ 178-86).

[171] Exh. 81 (Testimony of Leo Brennan) at 5 (¶ 15).

[172] *See* Cox Exh. 49; Exh. 81 (Testimony of Leo Brennan) at 6 (¶ 17).

[173] Exh. 81 (Testimony of Leo Brennan) at 6 (¶ 17).

[174] Exh. 81 (Testimony of Leo Brennan) at 6-7 (¶¶ 18-19).

[175] *Id.* at 7 (¶ 19).

[176] Cox's decision affected only the broadcast of KLAS(TV) on Cox's Las Vegas system. That decision did not preclude WealthTV from reaching an agreement with KLAS(TV) that provided for the broadcasting of WealthTV's programming over-the air. *Id.* at 7 (¶ 20-21).

[177] WealthTV Exh. 144 (Testimony of Charles Herring) at 41. Tr. 2906-08 (Herring), 4758 (Dannenbaum).

Acquisition. The parties discussed the possibility of Comcast entering into a hunting license with WealthTV and including WealthTV's programming in Comcast's VOD service.[178] Neither Mr. Dannenbaum, Mr. Bond, nor any other Comcast representative ever expressed any interest in entering into a national carriage agreement with WealthTV.[179] Mr. Dannenbaum and Mr. Bond 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.[180] Both Comcast officials 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.[181] Their testimony is consistent, competent and credible.

45. After WealthTV threatened to file a program carriage complaint, Comcast made two offers of carriage to WealthTV. In a telephone call to Mr. Herring on April 14, 2008, Mr. Bond proposed that WealthTV enter into a hunting license with Comcast.[182] Mr. Herring rejected that proposal.[183] WealthTV instead made a proposal that included carriage on a digital tier of Comcast's systems in at least four designated market areas with guaranteed carriage for ten years.[184] On April 17, 2008, Mr. Bond proposed to Mr. Herring that, in addition to the hunting license, Comcast would guarantee linear carriage in an urban market, such as Chicago, and also include WealthTV's programming in Comcast's VOD service.[185] Mr. Bond then offered to toll

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[178] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 2 (¶¶ 3-4); Comcast Exh. 3 (Testimony of Madison Bond) at 3 (¶ 6).

[179] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 3 (¶ 7); Tr. at 4753. Mr. Charles Herring testified that "several" Comcast locations expressed support of WealthTV after they were visited by WealthTV's "affiliate sales team." WealthTV Exh. 144 (Testimony of Charles Herring) at 42. Mr. Herring does not identify any such location nor did any member of the WealthTV affiliate sales team corroborate Mr. Herring's testimony. Mr. Danenbaum testified that he made inquiries to Comcast's divisional and corporate management to ascertain whether there was any interest in carrying WealthTV and found no such interest. Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 3 (¶ 7). *See* Tr. at 4777-78 (Dannenbaum). Mr. Dannenbaum's testimony is corroborated by an email sent in 2006 to Mr. John Ghiorzi, WealthTV's Vice President of Affiliate Sales, in which Mr. Dannenbaum stated that he previously informed "both [Mr. Ghiorzi] and Charles [Herring] that I have not received any indication from anyone in the systems or divisions, nor here at corporate, that there is interest in launching your service." Comcast Exh. 21 at 21-2. Given the contrary testimony of Mr. Dannenbaum, Mr. Herring's testimony concerning the interest of Comcast "locations" in WealthTV is rejected as unreliable and not credible.

[180] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 2-3 (¶¶ 5-6); Comcast Exh. 3 (Testimony of Madison Bond) at 4-5 (¶¶ 8-10).

[181] Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶ 3); Tr. at 4755 (Dannenbaum); Tr. 4561 (Bond).

[182] Comcast Exh. 3 (Testimony of Madison Bond) at 5 (¶ 12).

[183] *Id.* at 6 (¶ 12). Tr. 3619 (Herring).

[184] Tr. 3619-27 (Herring) WealthTV Exh. 204.

[185] Comcast Exh. 3 (Testimony of Madison Bond) at 6 (¶ 15). Tr. at 4651-52 (Bond). Although WealthTV asserts correctly that Comcast's proposals were not made in writing (*see* WealthTV's

the statute of limitations for the filing of WealthTV's carriage complaint to give the parties additional time to negotiate.[186] Mr. Bond advised Mr. Herring that a Chicago launch would not cover the entire Chicago DMA with its 2.2 million subscribers, but would only cover a subset of that market.[187] WealthTV rejected any such limitation and terminated negotiations.[188] Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith some form of affiliation agreement with WealthTV, and that Comcast made a good faith effort to avoid this carriage complaint.

46. WealthTV also alleges that in 2005 Comcast blocked WealthTV from gaining carriage on Adelphia. But the weight of record evidence does not support such allegation. In 2005 WealthTV signed an agreement with OlympuSAT that would have resulted in WealthTV replacing Chronicle on OlympuSAT's channel lineup carried on Adelphia, a cable company that Comcast was in the process of acquiring, as well as other cable systems.[189] Mr. Herring testified that Mr. Dannenbaum met with Messrs. Herring and Ghiorzi on July 6, 2005, and told WealthTV's representatives that Comcast had directed Adelphia not to make any channel lineup changes without Comcast's approval, and that he would block the launch of WealthTV on Adelphia.[190] Mr. Dannenbaum denies any recollection of that conversation.[191] He testified that he was "virtually 100 percent certain" that he did not call Adelphia regarding the carriage of WealthTV.[192] WealthTV did not have Mr. Ghiorzi testify at the hearing. Nor did WealthTV provide any documentary evidence to corroborate Mr. Herring's version of the events, or to support its claim that Comcast prevented WealthTV's carriage on Adelphia. However, Mr. Herring acknowledged on cross examination that he had no personal knowledge of whether Mr. Dannenbaum had contacted Adelphia, or whether Adelphia might have had business reasons for not permitting the carriage of WealthTV.[193] Mr. Herring's testimony regarding Comcast's blocking of WealthTV's launch on Adelphia is rejected as speculative and lacking in reliability.

Proposed Findings of Fact and Conclusions of Law at ¶ 159; *see also* Tr. at 4701 (Bond)), it does not claim that the offers were never made.

[186] Comcast Exh. 3 (Testimony of Madison Bond) at 6 (¶ 15).

[187] WealthTV Exh. 144 (Testimony of Charles Herring) at 45.

[188] Tr. at 3623-24 & 3627 (Herring), 4559-60 (Bond).

[189] WealthTV Exh. 144 (Testimony of Charles Herring) at 42. *Applications for Consent of Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc., and from Adelphia Communications Corporation to Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*") (approving Comcast and Time Warner acquisition of all domestic cable systems of Adelphia Communications Corporation.).

[190] WealthTV Exh. 144 (Testimony of Charles Herring) at 42-43. Adelphia subsequently decided not to carry WealthTV. *Id.* at 43.

[191] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5 (¶ 12).

[192] Tr. at 4779-80 (Dannenbaum).

[193] Tr. at 3639-40 (Herring).

47. WealthTV also claims that Mr. Dannenbaum, at a meeting in 2006 with Messrs. Ghiorzi and Herring, asserted that Comcast did not "want to [have] another MTV on its back without owning the network."[194] According to WealthTV, Mr. Dannenbaum's statement "convey[ed] the message that Comcast would not have any interest in launching WealthTV unless it had a direct ownership interest in the network."[195] This allegation lacks credibility for several reasons. First, Mr. Dannenbaum denies making that statement[196] and WealthTV has provided no testimony from Mr. Ghiorzi or any contemporaneous documentation corroborating Mr. Herring's version of the conversation. Second, there is no record evidence suggesting that Comcast had any interest in obtaining any ownership interest in WealthTV. Third, the record shows that the majority of networks that Comcast carries are unaffiliated companies.[197] Comcast even closed on many carriage arrangements with unaffiliated networks during the same time period in which it was discussing possible business arrangements with WealthTV.[198] It is unlikely that a Comcast representative would state that the company objects to carrying WealthTV without Comcast having an equity interest when Comcast's practice is to just the opposite, *i.e.*, to carry unaffiliated networks if such carriages further Comcast's business interests.

BHN Negotiations

48. BHN is affiliated with TWC.[199] BHN is covered by the affiliation agreements that TWC negotiates with national cable networks.[200] However, BHN has decision-making authority as to what programming is carried on BHN's cable systems,[201] and has entered into separate affiliation agreements with cable networks.[202] Typically, BHN's programming decisions were tied to TWC's programming decisions and BHN usually carried those networks that had affiliation agreements with TWC.[203]

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[194] WealthTV Exh. 144 (Testimony of Charles Herring) at 44.

[195] WealthTV Proposed Findings of Fact and Conclusions of Law at 35 (¶ 154).

[196] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5 (¶ 13).

[197] *Id* at 5 (¶ 13); Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶ 3).

[198] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5-6 (¶ 13); Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶¶ 3, 4).

[199] BHN is an affiliate of Time Warner Entertainment – Advance/Newhouse Partnership, a general partnership whose interests are held by the "TW Partners" (direct and indirect subsidiaries of TWC) and by Advance/Newhouse (a partnership owned by subsidiaries of Advance Publications Inc. and Newhouse Broadcasting Corporation. BHN Exh. 9 (Declaration of Steve Miron) at 1 (¶ 2).

[200] BHN Exh. 9 (Declaration of Steve Miron) at 2 (¶ 7).

[201] Tr. at 4441 (Stith), 4484, 4508 (Miron).

[202] Tr. at 4508-10 (Miron).

[203] Tr. at 4422 (Stith).

49. WealthTV met with BHN representatives between 2004 and 2007 to discuss WealthTV's desire to obtain carriage on BHN's systems.[204] Ms. Anne Stith, then Director of Product Marketing for the BHN's Tampa Division, met with WealthTV after Verizon FiOS, one of BHN's competitors, decided to carry WealthTV.[205] Although Ms. Stith believed that WealthTV had a "[n]ice product," she did not think it was worth BHN's bandwidth needed to carry an HD channel, particularly since there was a lack of customer demand for WealthTV's programming.[206] Mr. Steve Miron, then BHN's President had no interest in carrying WealthTV[207] and declined to meet with the network's representatives.[208] He did advise WealthTV truthfully that BHN is covered by TWC's national affiliation agreements and suggested that WealthTV attempt to negotiate directly with TWC.[209]

50. In July 2007, Mr. James Mead, at the direction of BHN, conducted a survey of BHN's customers to measure the level of interest in currently available HD networks that were not then carried by BHN.[210] BHN intended to use the results of the survey to determine which additional HD networks to add to its lineup.[211] The survey showed that BHN customers had very little interest in WealthTV. The survey concluded that WealthTV ranked a dismal 36th of 37 channels most requested by subscribers having HDTV, and was rated next to last among 36 channels that HDTV owners were very likely to watch, if available.[212]

51. Mr. Miron testified that the most important factor in BHN's decision not to carry WealthTV was its subscribers' lack of interest in its programming.[213] Other decisional considerations included BHN's view that WealthTV was not an established brand; was not managed by persons with a track record of launching successful networks; did not have carriage

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[204] WealthTV Exh. 144 (Testimony of Charles Herring) at 39-41.

[205] BHN Exh. 10 (Declaration of Anne Stith) at 2 (¶¶ 5-6).

[206] BHN Exh. 10 (Declaration of Anne Stith) at 4 (¶ 11); BNH Exh. 2 at 2; Tr. at 4427-28, 4465, 4469-70 (Stith).

[207] Tr. at 4534 (Miron).

[208] BHN Exh. 9 (Declaration of Steve Miron) at 4-5 (¶ 12). Tr. at 4506-07, 4527 (Miron). Mr. Miron testified that the WealthTV representative soliciting the meeting told him that a BHN division was very interested in WealthTV. But Mr. Miron's inquiries showed there was no such interest. Tr. at 4535 (Miron).

[209] BHN Exh. 9 (Declaration of Steve Miron) at 4-5 (¶ 12). Mr. Miron stated that WealthTV's failure to obtain an affiliation agreement with TWC played only a "very minor role" in BHN's decision not to carry WealthTV. Tr. at 4508 (Miron). He testified that a lack of consumer interest in the network was the major factor in his decision not to carry the network. Tr. at 4508 (Miron).

[210] BHN Exh. 3 (HD Programming Study Interest, Use, Perceptions); BHN Exh. 9 (Declaration of Steven Miron) at 3-4 (¶ 10). *See* Tr. at 4498-99 (Miron).

[211] Tr. at 4498 (Miron).

[212] BHN Exh. 3 (HD Programming Study, Interest, Use, Perceptions at 2-3. WealthTV ranked 33rd of 36 HD channels that users are "very likely" to watch if available. Id. at 4.

[213] BHN Exh. 9 (Declaration of Steve Miron) at 3 (¶ 9). The lack of subscriber interest in WealthTV in the 2007 James Mead survey was a factor in BHN's decision not to carry WealthTV. Tr. at 4500 (Miron).

agreement with many MVPDs; and did not fill any unique gap in BHN's lineup.[214] The record also shows that BHN is not adverse to carrying unaffiliated networks. In fact, the large majority of networks on BHN systems are those in which BHN has no equity interest.[215] Mr. Miron testified that BHN's carriage of MOJO played no role in BHN's decision not to carry WealthTV,[216] and his testimony is consistent, competent and credible.

CONCLUSIONS OF LAW

A. Statutory Scheme

52. Section 616, added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[217] directs the Commission to promulgate regulations which "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the 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."[218]

53. In accordance with that Congressional directive, the Commission adopted an implementing regulation that closely tracks the operative language of section 616 of the 1992 Cable Act. Regulation section 76.1301(c) provides:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[219]

54. The statute and the regulation intended to address Congress' stated concern that "vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."[220] Congress found that cable operators in certain instances could abuse their market

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[214] BHN Exh. 9 (Declaration of Steve Miron) at 3 (¶ 9).

[215] BHN Exh.9 (Declaration of Steve Miron) at 2 (¶ 6).

[216] *Id.* at 4 (¶ 11).

[217] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[218] 47 U.S.C. § 536(a)(3).

[219] 47 C.F.R. § 76.1301(c).

[220] *Implementation of Sections 12 and 19 of The Cable Television Consumer Protection And Competition Act Of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 (¶ 2) (1993) ("*Second Report*"), *reconsideration granted in* part, 9 FCC Rcd at 4415 (1994) ("*Second Report Reconsideration*"). *See* S. Rep. No. 102-92, 102nd Cong., 1 Sess. 1991 at 25, 1991 WL 125145 "Senate Report").

power to the detriment of unaffiliated programmers.[221] Sections 616 and 76.1301(c) were designed to safeguard programming vendors against discrimination that arises from their non-affiliation with the cable operators. That discrimination must be proven to exist and must be shown to have an anti-competitive effect.

55. At the same time, Congress wanted to ensure that its bar against discrimination not have an unintended consequence of "restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace."[222] Indeed, one principle advanced by the 1992 Cable Act, of which section 616 is a part, is to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming," a legislative objective that the Commission took into account in implementing Section 76.1301(c).[223] In other words, Sections 616 and 76.1301(c) are designed to "strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations."[224]

56. Accordingly, under the statutory and regulatory language, two discrete elements must be proven by WealthTV in order to establish violations by defendants of sections 616 and 76.1301(c). First, the defendants must have discriminated against WealthTV in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation. Second, if discrimination by defendants occurred, the effect must be to unreasonably restrain the ability of WealthTV to compete fairly.

B. Assigned Burden of Proof

57. WealthTV argues for a bifurcated burden of proof in carriage complaint proceedings. According to WealthTV, it need carry only an initial burden of proof in establishing a *prima facie* case of discrimination. Then the burden shifts to defendants to prove, by a preponderance of evidence, its legitimate, non-discriminatory business reasons for the disparate treatment.[225] Recall that the Media Bureau in its *HDO* "found" that WealthTV already had made a *prima facie*

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[221] Senate Report at 24.

[222] *Second Report Reconsideration*, 9 FCC Rcd at 2643. *See Second Report*, 9 FCC Rcd at 2648 (¶ 15).

[223] *Second Report Reconsideration*, 9 FCC Rcd at 2648 (¶ 15) (*quoting* 1992 Cable Act, § 2(b)(2)). *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage,* First Report and Order, 8 FCC Rcd 3359, 3402 ¶ 145 (1993).

[224] *Second Report Reconsideration*, 9 FCC Rcd at 4416 (¶ 7). *See Second Report*, 9 FCC Rcd at 2648-49 (¶ 15).

[225] WealthTV's Proposed Findings of Fact and Conclusion of Law at 49-50 (¶¶ 227-231). Although WealthTV argues that the burden of proof shifted to the defendants after the *HDO* was issued, elsewhere it states that "[s]ection 616 of the Cable Act and the Commission's program carriage regulations require WealthTV to make two straightforward showings: (1) that Defendants discriminated in the selection, terms, or conditions of carriage on the basis of affiliation or nonaffiliation and (2) that such discrimination unreasonably restrained the ability of WealthTV to compete fairly. WealthTV's Proposed Reply Proposed Findings of Fact and Conclusion of Law at 46 (¶ 98) (internal quotations and brackets omitted).

showing that each defendant had violated Section 76.1301(c).[226] WealthTV relies on that untested prehearing "finding" by the Media Bureau to establish its initial burden of proof before the hearing even began. WealthTV contends that at hearing the defendants faced a "shifted" burden to prove a negative by an evidentiary preponderance that they did not violate the Commission's carriage rule.[227] That argument is rejected.

58. Under delegated authority, the Presiding Judge issued a prehearing order assigning WealthTV "both the burden of proceeding with the introduction of evidence and the burden of proof."[228] Neither the 1992 Cable Act, the Commission's carriage rule nor the *HDO* specify whether the MVPD or the programming vendor bears the burden of proof in a carriage complaint hearing and, therefore, the Presiding Judge had discretion to allocate the burden of proof.[229] The Presiding Judge exercised that discretion reasonably by adhering to the usual practice of requiring that the party seeking relief by Commission order to bear the burden of proving that the violations occurred.[230] WealthTV did not challenge the Presiding Judge's allocation of the burden when the ruling was first issued.[231] Instead, WealthTV has sought a reassignment of the burden of proof after the record has been closed to additional evidence. Such retroactive reassignment would be fundamentally unfair to the defendants. They had a right as parties to rely upon the Presiding Judge's prehearing allocation of the burden of proof in formulating

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[226] *HDO*, 23 FCC Rcd at 14792 (¶ 7) (2008).

[227] *See* WealthTV's Proposed Findings of Fact and Conclusion of Law at 51 (¶ 235).

[228] *Oct 23 Order* at 2.

[229] Section 4(j) of the Communications Act authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). *See also* 47 U.S.C. § 154(i); 47 C.F.R. § 1.1; *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *FCC v. Pottsville*, 309 U.S. 134, 143 (1940); *City of Angels v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984). The "broad procedural authority" in section 4(j) empowers the Commission to make "ad hoc procedural rulings" in specific adjudications, such as an allocation of the burden of proof in a formal evidentiary hearing. *FCC v. Schreiber*, 381 U.S. at 289, 290. And the Commission in turn has delegated authority to allocate the burden of proof in these adjudicatory proceedings to presiding administrative law judges. *See* 47 C.F.R. §§ 0.341(b), 1.243(i). *See generally* 47 U.S.C. § 155(c)(1) (authorizing delegations of authority). *See generally Broadcast Data Corp. v. Kravetz Media Corp.*, 97 FCC 2d 650, 652 (¶ 5) (Rev. Bd. 1984) (*quoting RKO General, Inc.*, 48 FCC 2d 826, 827 (Rev. Bd. 1974)) ("It is well-established that the ALJ has broad power to regulate the course of a hearing, . . . which power is 'plenary' and 'invests him with great latitude.'"). Pursuant to section 5(c)(3) of the Communications Act, an order issued under delegated authority, such as the Presiding Judge's ruling on the allocation of the burden of proof, has "the same force and effect" as an order that is issued by the Commission. 47 U.S.C. § 155(c)(3).

[230] *See, e.g. Schaffer v. Weast*, 546 U.S. 49, 56, (2005) (noting that where the statute is silent the "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims). *See also* 5 U.S.C. § 556(d) (providing in the absence of statutory direction that "the proponent of a rule or order has the burden of proof.)" *See also Director of Office of Workers' Compensation Programs Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).

[231] *See* 47 C.F.R. § 1.301(b) (providing a procedure whereby a party may request permission to challenge a presiding judge's interlocutory ruling).

litigation strategy for presenting evidence at hearing.[232] In addition, a reallocation of the burden at this stage of the proceeding would run contrary to the Commission's mandate that these program complaint cases be adjudicated "consistent with the mandates of fairness and due process."[233] In addition, a change of ruling on burden allocation would contravene the letter and spirit of the statutory command that the agency "conduct its proceedings in such manner as will best conduce to the . . . ends of justice."[234]

59. For these reasons, the burden of proof did not shift to defendants merely because the Media Bureau pronounced that WealthTV had established a *prima facie* case before the case went to hearing. After the *HDO* was issued but before the hearing began, the Presiding Judge ruled explicitly that he would give "*de novo* consideration" to the evidence adduced and would resolve the issues "*solely* [up]on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*."[235] The Presiding Judge's ruling was approved by the Commission, which in its order reinstating the hearing, directed that fact determinations were to be made "in hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau."[236]

60. The evidence compiled after the completion of the evidentiary hearings is more complete, accurate, and reliable than the evidence before the Media Bureau when it issued the *HDO*. After the *HDO* was issued, the parties obtained additional information through discovery. During the course of the hearing, the direct testimony of the parties, including WealthTV, was tested by searching cross-examination. WealthTV withdrew evidence at hearing immediately prior to cross-examination, such as the written testimony of Ms. McGovern that programming of MOJO deliberately replicated the concepts, genres, formats and targeted audiences of WealthTV.[237] Also, some of the material WealthTV had presented to the Media Bureau, such as

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[232] WealthTV raised a variety of arguments to support its claim that the burden of proof ought to have been placed on the defendants after the Media Bureau issued the *HDO*. *See* WealthTV's Proposed Findings of Fact and Conclusions of Law at 49-50, 51 (¶¶ 227-31, 235). For example, WealthTV asserts that the burden of proof that differential treatment is not based on affiliation or non-affiliation should be borne by defendants because they have "much more ready access to information about their own decision-making than will unaffiliated vendors." *Id.* at 50 (¶ 231). It also points out that a burden-shifting approach was upheld by the Media Bureau in one arbitration proceeding that currently is on review by the Commission (*TCR Sports Broadcasting Holding, L.L.P. d/b/a/ Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd (MB 2008), application for review) and has been applied in other types of discrimination cases. WealthTV's Proposed Findings of Fact and Conclusions of Law at 49-50 (¶¶ 228-30). Significantly, however, WealthTV does not attempt to justify a *retroactive* shift of the burden of proof to the defendants after the hearing has been concluded and the record has been closed. Moreover, WealthTV in this formal evidentiary hearing had "access to information" necessary to satisfy its burden of proof through discovery, a feature that distinguishes this proceeding from *TCR Sports Broadcasting*.

[233] *Reinstatement Order*, 24 FCC Rcd at 1581 (¶ 2).

[234] 47 U.S.C. § 154(j).

[235] *Nov. 20, 2008 Order* at 3 (¶ 6) (emphasis in original).

[236] *Reinstatement Order*, 24 FCC Rcd at 1581 (¶ 2).

[237] Tr. at 3715-25 (McGovern).

the written declaration of WealthTV's expert, Mr. Mark Kersey, was found to be unreliable at the hearing and was rejected.[238]

61. For these reasons, the Presiding Judge reaffirms the *October 23 Order* ruling that WealthTV bears the burden of proceeding with the introduction of evidence and the burden of proof. [239] Proof of carriage violations requires a showing that defendants have discriminated against the programming of WealthTV "on the basis of affiliation or non-affiliation." WealthTV, *inter alia*, thus has the affirmative burden of proving that such discrimination occurred. And, contrary to WealthTV's burden shifting argument, the defendants did not have any burden at hearing to prove that their business decisions on programming were not made on the basis of affiliation or non-affiliation. Defendants certainly need not rebut what WealthTV has not proven.

62. In the final analysis, the manner in which the burden of proof is allocated becomes immaterial to the decision. Whatever the allocation of burdens, 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.

C. Discrimination on the Basis of Affiliation or Non-Affiliation

63. Recall that a video programming vendor seeking to satisfy its burden of proving a violation of sections 616 and 76.1301(c) must first establish that a MVPD discriminated against it in the selection, terms, or conditions of carriage "on the basis of the affiliation or non-affiliation."[240] Congress did not intend the Commission "to create new standards for conduct in determining discrimination" but instead directed that the Commission be guided by "the extensive body of law . . . addressing discrimination in normal business practices."[241] In order to establish disparate treatment,"[242] *i.e.* that the litigant has suffered discrimination "on the basis of" a proscribed consideration, the litigant must prove that the proscribed factor "actually motivated the decision." [243] The litigant must show that the proscribed trait "actually played a role in th[e]

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[238] Among the evidence before the Media Bureau was the declaration of Mr. Mark Kersey concerning the tabulation of a survey of WealthTV customers. On the day before Mr. Kersey was expected to be cross-examined WealthTV attempted to change substantial data in Mr. Kersey's written testimony, an attempt that was nipped in the bud. Mr. Kersey's declaration was deemed unreliable. Mr. Kersey was not permitted to testify. Tr. at 3699-3700 (Presiding Judge).

[239] *Oct 23 Order* at 2.

[240] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). *See* paragraphs 52-56, above.

[241] H.R.Rep. No. 102-628, 102nd Cong., 2d Sess. 110 (1992), 1992 WL 166238 ("House Report"). *See Second Report*, 9 FCC Rcd at 2644 n.6.

[242] *See Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-74 (2009). In addition to "disparate treatment" cases, some anti-discrimination statutes prohibit forms of unintentional discrimination that have a disparate impact on a protected class. *Id.* at 2673. *See, e.g.*, 42 U.S.C. § 200e-2(k)(1)(A)(i). Sections 616 and 76.1301(c) do not speak in terms of disparate impact.

[243] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (*quoting Hazan Paper Co. v. Biggins*. 507 U.S. 604, 610 (1993)). *See Ricci v. DeStefano*, 129 S.Ct. 2658, 2672 (2009) (*quoting Watson v. Forth Worth*

process and had a determinative influence on the outcome."[244] The litigant can make that showing by direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence,[245] such as uneven treatment of similarly situated entities. WealthTV failed completely to make that showing in these cases.

64. The evidence of record establishes that the defendants decided in 2003 to carry INHD (the channel that subsequently was re-branded MOJO) for legitimate, non-discriminatory business purposes.[246] In order to keep up with competing MVPDs, such as DirecTV and EchoStar, the defendants faced a business need to offer additional HD content through an additional HD channel to appeal to "early adopters" of HD sets.[247] The defendants also needed the flexibility to preempt scheduled programming of the MOJO channel depending upon the regional or local programming interests of its viewers.[248] They additionally wanted the flexibility to drop the MOJO channel when HD versions of programming of existing cable networks with their established brands and audiences programming of became available.[249]

65. In 2003, there was very little HD programming available.[250] When the iN DEMAND managers proposed the creation of INHD to satisfy their owners' short-term need for channels that provided HD programming that they could preempt at will, the defendants — the owners of iN DEMAND — approved this plan.[251] In other words, the defendants created and carried INHD because it furthered specific, non-discriminatory business objectives. There is 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. For example, WealthTV did not show that defendants had denied carriage to a non-affiliated vendor that could have better served defendants' business objectives than INHD. Indeed, because *WealthTV had not yet launched at the time the defendants decided to carry INHD*,[252] carriage of WealthTV (instead of INHD) was not available to the defendants in 2003.

Bank & Trust, 487 U.S. 977, 986 (1988) ("A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive'" for its action.).

[244] *Hazan Paper Co.*, 507 U.S. at 610. *Accord Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009); *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361, 2367 (2008).

[245] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-100 (2003).

[246] *See* paragraphs 11-13, *supra.*

[247] Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 20); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4291-93 (Asch).

[248] Cox Exh. 84 (Testimony of David Asch) at 8 (¶ 27); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4308 (Asch).

[249] Cox Exh. 79 (Testimony of Robert C. Wilson) at 10 (¶ 34); Cox Exh. 84 (Testimony of David Asch) at 8-9 (¶ 28); Cox Exh. 3; Tr. at 4310-11 (Asch).

[250] Cox Exh. 84 (Testimony of David Asch) at 4 (¶ 12); TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 16); Cox Exh. 79 (Testimony of Robert Wilson) at 8 (¶ 26). Tr. at 4290-91 (Asch), 4870, (Wilson).

[251] Cox Exh. 84 (Testimony of David Asch) at 6 (¶¶ 17, 18); Tr. at 4916 (Wilson)

[252] WealthTV Exh. 144 (Testimony of Charles Herring) at 1-2.

66. WealthTV argues that iN DEMAND in 2007 launched what WealthTV characterizes as "a new channel, MOJO,"[253] and that each of the defendants discriminated unlawfully against WealthTV by carrying MOJO instead of WealthTV. As shown in paragraphs 16-17, however, the defendants did not launch MOJO as a new channel in 2007. Instead the record evidence shows 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. That re-branding constituted an evolutionary re-focus of an existing channel rather than the independent launch of a new network.

67. The preponderance of the evidence 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.[254] Because there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, MVPDs simply cannot carry all channels that seek carriage.[255] The record evidence shows that defendants based their separate decisions not to carry WealthTV on a linear basis for non-discriminatory business reasons that included not only their evaluation of WealthTV's programming but also their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers; that WealthTV had not obtained carriage with a number of competing MVPDs; that WealthTV's owners were inexperienced in launching networks; that bandwidth necessary to carry WealthTV could be used for better purposes; that WealthTV lacked outside financing; and that WealthTV's proposed terms and conditions of carriage were unfavorable.[256] There is 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. Overall, there is no credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV.

68. WealthTV argues brashly that the defendants had a double standard for program carriage as compared to unaffiliated vendors.[257] WealthTV claims that defendants gave automatic carriage to INHD and MOJO without entering into a written carriage agreement,[258] and denied carriage to WealthTV based upon a enumerated criteria , *inter alia*, the experience of the video programming vendor's management team, the video programmer's financial strength, price and terms of carriage, video programming service carried by competitors, price and terms of carriage, bandwidth constraints.[259] WealthTV posits that if defendants had applied those criteria evenhandedly, MOJO would not have satisfied many of them.[260] That argument is unavailing because it is unsupported by the evidence of record.

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[253] WealthTV's Proposed Findings at 9 (¶ 33).

[254] *See* paragraphs 35-51, *supra.*

[255] TWC Exh. 86 (Testimony of Howard B. Homonoff) at 5 (¶ 10).

[256] *Id.*

[257] WealthTV Proposed Findings at 12-23 (¶¶ 46-84).

[258] *Id* at 12-14 (¶ 48-55).

[259] *Id* at 14-22 (¶ 56-812).

[260] *Id* at 14-16 (¶¶ 56, 57, 79).

69. In order to establish an inference of affiliation-motivated discrimination that was based on defendants' disparate treatment of WealthTV and MOJO, WealthTV bears the threshold burden of showing that WealthTV and MOJO are similarly situated.[261] WealthTV has not satisfied that burden. As shown above, the preponderance of the record evidence demonstrates that WealthTV and MOJO were not similarly situated networks.[262] The two networks aired different types of programming and targeted different demographic groups.[263] And contrary to WealthTV's intimation, the disparate treatment of two networks by itself does not establish violations of sections 616 and 76.1301(c). To establish those violations, a complainant must affirmatively establish a nexus between the disparate treatment and the programming vendor's affiliation or non-affiliation with the MVPD. Each of the defendants in these cases decided to carry INHD/MOJO for business reasons that are independent of and unrelated to their affiliation with INHD/MOJO.[264] And each of the defendants decided not to carry WealthTV on a linear basis for business reasons that are unrelated to their lack of affiliation with WealthTV. The defendants are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation.[265] WealthTV has not satisfied its burden of proving discrimination on the basis of affiliation or non-affiliation in these carriage complaint cases.[266]

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[261] *See, e.g., Shah v. General Electric Co*, 816 F.2d 264, 268 (6th Cir. 1987). *See generally Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977).

[262] *See* paragraphs 20-34, *supra*

[263] *See* paragraphs 20-34, *supra.*

[264] As noted previously, the defendants carried the channel that became MOJO for a specific business purpose, *i.e.*, obtaining HD programming attractive to the younger adult male "early adopters" of HD television sets while reserving the right to preempt the network's programming when it suited its business needs and ultimately to drop the channel when more desirable HD programming became available. *See* 4 12-14, 62, *supra.* WealthTV has not shown that its carriage by defendants would have served that business purpose. The record shows, that WealthTV did not specifically target the younger adult male "early adopters" of HD sets, the very group that defendants sought to attract by carrying INHD/MOJO. And nothing in the record shows that WealthTV would have permitted its programming to be preempted at will.

[265] Contrary to WealthTV assertion, the defendants did not automatically carry MOJO because it was an affiliate. As noted above, the defendants made their decision to carry the channel that became MOJO in 2003 for business purposes that were unrelated to its status as an affiliated company. *See* paragraphs 12-14, 64, *supra.* And the defendants dropped that channel (notwithstanding its affiliation) when carriage no longer served a business purpose. Cox Exh. 84 (Testimony of David Asch) at 23-25 (¶¶ 84-91).

[266] WealthTV's reliance on evidence that INHD/MOJO and the defendants had no written contract for carriage is misplaced. It is generally considered in the industry that the lack of a written affiliation agreement places the video programmer in a disadvantageous position. Tr. at 4069-70 (Witmer). For example, it gives an MVPD the ability abruptly to alter the terms of carriage to suit its own business purposes, to preempt the network's programming at will, and to drop the network whenever it suited their business needs. Mr. Bond testified that Comcast did not want to enter into an affiliation agreement with iN DEMAND when INHD was launched because Comcast "did not really know if [INHD] had a future" and Comcast thought it "might end up going away at some point in time with the proliferation of [other HD channels]." Tr. at 4562-63 (Bond). Thus, there is no decisional significance to the absence of a written contract.

D. Unreasonable Restraints on WealthTV's Ability to Compete Fairly

70. In order to establish a violation of sections 616 and 76.1301(c), a video programming vendor also must show that the effect of the MVPD's discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly."[267] Relying on an antitrust analysis, the defendants argue that this statutory and regulatory language requires a video programming vendor to prove the existence of a restraint that is "'unreasonably restrictive of competitive conditions.'"[268] The defendants claim that WealthTV cannot satisfy that antitrust standard because WealthTV could compete successfully by securing carriage on MVPDs that are unaffiliated with the defendants. Specifically, defendants argue that WealthTV by obtaining carriage agreements on other MVPDS, including DirectTV and Dish, could have gained access to 50 million subscribers, and thus could not be restrained in its ability to compete.[269] Cox and BHN separately argue that they could not have violated sections 616 and 76.1301(c) given their low percentage of total subscribers, and the small percentage of interest in iN DEMAND.[270]

71. Defendants' arguments that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive. The antitrust laws are designed to protect competition and not competitors.[271] The legislative objective underlying sections 616 and 76.1301(c), in contrast, is to protect a specific group of competitors — independent video programming vendors from discrimination in carriage decisions by MVPDs based upon affiliation or non-affiliation.[272] The legislative history of section 616 specifies that the purpose of sections 616 is to "ensure" that a vertically integrated MVPD "does not discriminate against an unaffiliated video programming vendor in which it does not hold a financial interest."[273] The defendants' construction of sections 616 and 76.1301(c) would permit MVPDs to discriminate against unaffiliated video programming vendors — indeed, permit MVPDs to engage even in intentional and significant discrimination — 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. Such a construction undermines the very purpose underlying sections 616 and 76.1301(c). It also is totally at odds with the legislative history which shows that Congress

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[267] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[268] "Defendants Joint Proposed Findings of Fact and Conclusions of Law," (June 2, 2009) at 150 (¶ 26) (*quoting Standard Oil Co. v. United* States, 221 U.S. 58 (1911).

[269] *Id.* at 151-52 (¶¶ 29, 30).

[270] *Id.* at 152 (¶ 31). Cox has 3.4 million subscribers and BHN has 2.5 million subscribers out of a total of 95 million subscribers. Cox and BHN respectively have 12 percent and 5 percent interest in iN DEMAND. BHN Exh. 8 (Expert Report of Januz Ordover) at 5 (¶ 9); Cox Exh. 44 (Expert Report of Januz Ordover) at 6 (¶ 9).

[271] *See, e.g., Brown v. United States,* 370 U.S. 294, 320 (1962).

[272] *See Second Report*, 9 FCC Rcd at 2643 (¶ 2).

[273] House Report at 110. *See Second Report*, 9 FCC Rcd at 2643 (¶ 2).

intended section 616 to "provide new remedies" separate from those available under the antitrust laws.[274]

72. The defendants further err in claiming that an insufficient showing of competitive impact on WealthTV alone demonstrates that WealthTV failed to establish a violation of sections 616 and 76.1301(c). Defendants Comcast, TWC, Cox, and BHN serve approximately 24.6 million, 13.3 million, 5.4 million and 2.3 million subscribers, respectively.[275] By denying linear carriage on all of its systems, each defendant made it more difficult for WealthTV to gain access to millions of customers,[276] which in turn had a negative competitive impact on WealthTV.[277] The denial of carriage had the effect of impairing the growth in WealthTV's subscription revenues, making it more difficult for WealthTV to attract advertisers, and preventing WealthTV from spreading its costs across a larger subscriber base.[278] Contrary to the defendants' argument, WealthTV's ability to secure carriage from other MVPDs by itself does not establish that the actions of the defendants in this case could not have unreasonably restrained WealthTV's ability to compete fairly within the meaning of sections 616 and 76.1301(c).[279] If defendants' argument were to prevail, virtually no MVPD ever would be found to have violated sections 616 and 76.1301(c).

73. WealthTV cannot satisfy its burden to establish that each defendant's conduct "unreasonably restrain[ed]" its "ability to compete fairly"[280] merely by showing that the defendants' individual carriage decisions adversely affected its competitive position in the marketplace. As shown by the plain language: (1) the only restraints proscribed by sections 616 and 76.1301(c) are those that are "unreasonabl[e]," and (2) such restraints must impair the video

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[274] House Report at 111.

[275] TWC Exh. 75.

[276] Contrary to WealthTV's intimation, *see* WealthTV Findings at 63 (¶ 137), the defendants' *collective* subscriber base is not relevant in assessing whether or not each *individual* defendant unreasonably constrained WealthTV's ability to compete fairly.

[277] Cox and Bright House presented the expert testimony of Dr. Ordover, who concluded that WealthTV had not shown that any "acts by Cox or Bright House have resulted in any exclusion or foreclosure of WealthTV from competing in the relevant marketplace." BHN Exh.8 (Direct Testimony of Januz Ordover) at 3 (¶ 6). Dr. Ordover points out that WealthTV could have achieved distribution to millions of subscribers by entering into affiliation agreements with MVPDs other than defendants or by accessing subscribers with alternative methods of distribution. According to Dr. Ordover, "[t]o show anticompetitive foreclosure, WealthTV must explain why it could not have achieved viability by gaining sufficient carriage" on other systems. BHN Exh.8 (Expert Report of Januz A. Ordover) at 6 (¶ 9); Cox Exh. 44 (Expert Report of Januz A. Ordover) at 6-7 (¶ 9). This defensive boot-strapping of antitrust analysis overlooks the relevant legal test under sections 616 and 76.1301(c), which is not whether the video programmer is excluded or foreclosed from competition, or whether in the absence of affiliation-based discrimination WealthTV could obtain viability, but rather whether it is unreasonably restrained from competing fairly.

[278] WealthTV Exh. 152 (Testimony of Sandy McGovern) at 11-12 (¶¶ 18-22).

[279] *See HDO*, 23 FCC Rcd at 14798, 14802, 14807, 14813 (¶¶ 19, 30, 42, 54).

[280] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

programming vendor's ability to compete "fairly."[281] The analysis of the record evidence demonstrates 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 76.1301(c).

ULTIMATE CONCLUSIONS

74. Based on foregoing findings of fact and conclusions of law, it is concluded 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 non-affiliation.

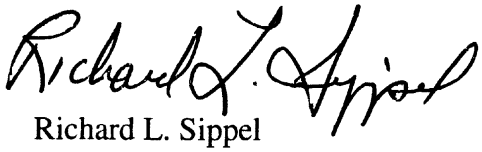
75. Based on foregoing findings of fact and conclusions of law, it is further concluded that WealthTV has not satisfied its burden of proving that any of the defendants unreasonably restrained WealthTV's ability to compete fairly.

76. In light of the ultimate conclusions reached in paragraphs 74 and 75, above, *HDO* Issue No. 1 is resolved in the defendants' favor and *HDO* Issue No. 2 is moot.

RECOMMENDED DECISION

77. IT IS RECOMMENDED that the complaints filed by Herring Broadcasting, Inc. d/b/a WealthTV in MB Docket No. 08-214 BE DENIED.[282]

FEDERAL COMMUNICATIONS COMMISSION[283]



Richard L. Sippel
Chief Administrative Law Judge

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[281] *Id.*

[282] Section 5 of the Communications Act authorizes an aggrieved person to seek Commission review of "any" actions issued under delegated authority, including this recommended decision.. *See* 5 U.S.C. § 155(c)(4). The parties may seek Commission review of this recommended decision by filing exceptions in accordance with sections 1.276 and 1.277 of the Commission's rules governing appeals for Initial Decisions. 47 C.F.R. §§ 1.276, 1.277.

[283] Copies of this Recommended Decision are e-mailed to counsel for each party upon issuance.