

BRIEF FOR RESPONDENTS

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

\_\_\_\_\_  
No. 11-73134  
\_\_\_\_\_

HERRING BROADCASTING, INC. DBA WEALTHTV,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS,

COMCAST CORPORATION, ET AL.,

RESPONDENT-INTERVENORS.

\_\_\_\_\_  
ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION  
\_\_\_\_\_

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## GLOSSARY

<i>1993 Program Carriage Order</i>	<i>Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd 2642 (1993)</i>
<i>2011 Program Carriage Order &amp; NPRM</i>	<i>Revision of the Commission's Program Carriage Rules, 26 FCC Rcd 11494 (2011)</i>
Add.	Addendum to Petitioner's Brief
ALJ	Administrative Law Judge
BHN	Intervenor Bright House Networks, LLC
Comcast	Intervenor Comcast Corporation
Cox	Intervenor Cox Communications, Inc.
ER	Excerpts of Record
FCC	Federal Communications Commission or "Commission"
HD	High Definition
<i>Hearing Designation Order ("HDO")</i>	<i>Herring Broad., Inc. d/b/a WealthTV, Complainant v. Time Warner Cable, Inc., Defendant; Herring Broad., Inc. d/b/a WealthTV, Complainant v. Bright House Networks, LLC, Defendant; Herring Broad. Inc. d/b/a WealthTV, Complainant v. Cox Commc 'ns, Inc., Defendant; Herring Broad., Inc. d/b/a WealthTV, Complainant v. Comcast Corp., Defendant; NFL Enterprises LLC, Complainant v. Comcast Cable Commc 'ns, LLC, Defendant; TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network, Complainant v. Comcast Corp., Defendant, 23 FCC Rcd 14787 (Med. Bur. 2008)</i>
MVPD	Multichannel Video Programming Distributor

*Order* *Herring Broad., Inc. d/b/a WealthTV, Complainant v. Time Warner Cable, Inc., Defendant; Herring Broad., Inc. d/b/a WealthTV, Complainant v. Bright House Networks, LLC, Defendant; Herring Broad. Inc. d/b/a WealthTV, Complainant v. Cox Commc 'ns, Inc., Defendant; Herring Broad., Inc. d/b/a WealthTV, Complainant v. Comcast Corp., Defendant, 26 FCC Rcd 8971 (2011)*

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*SER* Respondents' Supplemental Excerpts of Record

*Tennis Channel* *Initial Decision, Tennis Channel, Inc., Complainant v. Comcast Cable Commc 'ns, L.L.C, 26 FCC Rcd 17160 (ALJ 2011)*

*Time Warner* Intervenor Time Warner Cable, Inc.

*VOD* Video on Demand

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

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This case involves a challenge to the Federal Communications Commission's denial of a video programming vendor's complaint that it was unlawfully denied carriage by four cable television companies.

Federal law prohibits a cable operator from discriminating in its distribution of video programming "on the basis of" a programming vendor's "affiliation or nonaffiliation" with the cable operator. 47 U.S.C. § 536(a)(3); *see also* 47 C.F.R. § 76.1301(c) (same). WealthTV, a programming vendor

that is unaffiliated with any cable operator, contends that intervenors Comcast Corporation (“Comcast”), Time Warner Cable, Inc. (“Time Warner”), Cox Communications, Inc. (“Cox”), and Bright House Networks, LLC (“BHN”) violated that law when they declined WealthTV’s demand for carriage on their cable systems.

After reviewing an extensive evidentiary record, the Federal Communications Commission (“FCC” or “Commission”) determined that the cable television companies did not unlawfully discriminate against WealthTV but instead rejected WealthTV’s carriage proposals for legitimate and non-discriminatory reasons. On judicial review, WealthTV asserts that the FCC abused its discretion and improperly weighed the evidence in denying WealthTV’s discrimination claims.

## **JURISDICTION**

The FCC released the Order on review on June 13, 2011.<sup>1</sup> Appellant Herring Broadcasting, Inc. d/b/a WealthTV (“WealthTV”) sought administrative reconsideration, thereby tolling the period within which to

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<sup>1</sup> *Herring Broad., Inc. d/b/a Wealth TV, Complainant v. Time Warner Cable, Inc., Defendant; Herring Broad., Inc. d/b/a Wealth TV, Complainant v. Bright House Networks, LLC, Defendant; Herring Broad. Inc. d/b/a Wealth TV, Complainant v. Cox Commc’ns, Inc., Defendant; Herring Broad., Inc. d/b/a Wealth TV, Complainant v. Comcast Corp., Defendant*, 26 FCC Rcd 8971 (2011) (“*Order*”) (ER 135).

seek judicial review. *See, e.g., Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 596-97 (D.C. Cir. 1997). WealthTV withdrew its petition for reconsideration on October 7, 2011 (ER 153-56) and filed a timely petition for judicial review of the *Order* on October 19, 2011, within the 60-day deadline established by 28 U.S.C. § 2344. This Court has jurisdiction to review the *Order* under 47 U.S.C. § 402(b) and 28 U.S.C. § 2342(1). *See, e.g., Los Angeles SMSA Ltd. P'ship v. FCC*, 70 F.3d 1358, 1359 (D.C. Cir. 1995).

### **STATEMENT OF ISSUE PRESENTED**

Whether the FCC properly upheld an administrative law judge's determination that four cable television companies did not unlawfully discriminate on the basis of affiliation, in violation of 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c), when they declined to carry WealthTV on their cable systems.

### **STATUTES AND REGULATIONS**

The pertinent statutory provisions and regulations are set forth in the addendum to this brief.

### **COUNTERSTATEMENT OF THE CASE**

In 2007 and 2008, WealthTV filed separate complaints with the FCC against four cable television companies, alleging that the companies had unlawfully discriminated against WealthTV by refusing to carry its programming while providing preferential treatment to an affiliated

programming network (MOJO) that the companies carried on their cable systems between September 2003 and December 2008.

The FCC's Media Bureau found that the pleadings presented several unresolved questions of fact. Thus, rather than dismissing WealthTV's complaints solely based on the pleadings, the Media Bureau designated the four complaints for hearing in a consolidated proceeding before an administrative law judge ("ALJ"). Following the completion of discovery, and the submission of written direct testimony, proposed exhibits, and trial briefs, the ALJ conducted ten days of formal hearings involving 21 witnesses.

After weighing the evidence and evaluating the credibility of the witnesses, the ALJ concluded that WealthTV failed to prove its claims that the cable companies discriminated against it "on the basis of affiliation or nonaffiliation," 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c), by declining to carry WealthTV while carrying MOJO. Relying on, among other things, WealthTV's own marketing materials and testimony, the ALJ concluded that the preponderance of the evidence established that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience. The ALJ also held that the evidence overwhelmingly showed that the cable television companies chose to carry their affiliated network, but not WealthTV, for legitimate and non-discriminatory business reasons unrelated

to WealthTV's status as an independent network. These reasons included: WealthTV's lack of an established brand with a proven record of appeal to subscribers; the fact that WealthTV had not obtained carriage with a number of other competing cable companies and the nation's two satellite providers of video programming; that WealthTV's owners were inexperienced in launching networks and lacked outside financing; that the channel space necessary to carry WealthTV could be more effectively used; and that WealthTV's proposed terms of carriage were unfavorable to the cable companies.

WealthTV filed exceptions to the ALJ's recommendations. In the agency *Order* challenged in this case, the FCC found that the ALJ's conclusions were supported by substantial evidence and denied the exceptions.

## **COUNTERSTATEMENT OF THE FACTS**

### **I. STATUTORY AND REGULATORY BACKGROUND.**

#### **A. The 1992 Cable Act.**

In the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress found that vertical integration (*i.e.*, common ownership) between producers and distributors of cable programming gave cable operators "the incentive and ability to favor their

affiliated programmers” and made it “more difficult for noncable-affiliated programmers to secure carriage on cable systems.” 1992 Cable Act § 2(a)(5), Pub. L. No. 102-385, 106 Stat. 1460. To address those concerns, Congress directed the FCC to establish regulations to prevent cable operators and other multichannel video programming distributors (“MVPDs”) from “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.” 47 U.S.C. § 536(a)(3).<sup>2</sup>

**B. The FCC’s 1993 Program Carriage Order.**

The FCC complied with this statutory mandate by promulgating rules for adjudicating cable program carriage complaints. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 2642 (1993) (“1993 Program Carriage Order”); *see also* 47 C.F.R. §§ 76.1300-76.1302 (FCC’s implementing rules).

“In implementing the provisions of” the program carriage statute, the FCC explained that its “regulations must strike a balance that not only pr[o]scribes behavior prohibited by the specific language of the statute, but

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<sup>2</sup> The 1992 Cable Act amended the Communications Act of 1934 by adding a new section 616, which is now codified at 47 U.S.C. § 536. We refer to section 616 and other provisions of the Communications Act by their U.S. Code number throughout this brief.

also preserves the ability of affected parties to engage in legitimate, aggressive negotiations.” *Id.* at 2648 (¶ 14). To achieve that balance, the FCC “adopt[ed] general rules that are consistent with the statute’s specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements.” *Id.* Among other things, rule 76.1301(c) (47 C.F.R. § 76.1301(c)), which tracks the language of 47 U.S.C § 536(a)(3), 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.

The FCC recognized that “the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation.” *1993 Program Carriage Order*, 9 FCC Rcd at 2648 (¶ 14). It therefore decided to “identify specific behavior that constitutes ‘coercion’ and ‘discrimination’ as [it] resolve[s] particular complaints” on a case-by-case basis. *Id.*

The FCC also established procedures for reviewing program carriage complaints on the basis of a written complaint, answer, and reply. *Id.* at 2652 (¶ 23); 47 C.F.R. § 76.1302(c)-(e). “When filing a complaint,” the FCC

specified, “the burden of proof will be on the programming vendor to establish a *prima facie* showing that the defendant multichannel distributor has engaged in behavior that is prohibited by [section 536(a)].” *Id.* at 2654 (¶ 29).

The FCC recognized that the agency’s Media Bureau – to which the Commission has delegated authority to rule on alleged violations of the program carriage statute and rule – “will be unable to resolve most program carriage complaints on the sole basis of a written record.” *Id.* at 2652 (¶ 24). The FCC therefore “anticipate[d] that resolution of most ... complaints will require an administrative hearing to evaluate contested facts related to the parties’ specific negotiations.” *Id.* at 2652 (¶ 24); *see also id.* at 2656 (¶ 34). Where the Media Bureau determines that the complainant has established a *prima facie* case but that “disposition of the complaint will require the resolution of factual disputes or other extensive discovery,” the Bureau is to notify parties that they have the option of choosing Alternative Dispute Resolution or an adjudicatory hearing before an ALJ. *Id.* at 2656 (¶ 34). If the parties choose the latter, any challenge to the ALJ’s subsequent “ruling on the merits” must be brought “directly to the Commission” – *i.e.*, to the full Commission rather than the FCC’s staff in the Media Bureau. *Id.*

## II. FACTUAL BACKGROUND.

### A. WealthTV's Program Carriage Disputes.

WealthTV is a national video programming vendor.<sup>3</sup> Launched on June 1, 2004, it offers original themed programming featuring “luxury lifestyles, such as travel, fine dining, luxury transport, gadgetry, finance and even philanthropy” in a high definition (“HD”) format. *RD* (¶ 7) (ER 82). WealthTV’s programming revolves around the theme of “how wealth is achieved, used and enjoyed.” *Id.* (¶ 21) (ER 88). WealthTV “is a family-owned company.” *Id.* (¶ 7) (ER 82). Its principals, Chief Executive Officer Robert Herring Sr., and his son, Charles Herring, “have considerable experience as business entrepreneurs but had not operated a cable network before establishing WealthTV.” *Id.*

WealthTV is not affiliated with any MVPD. *Id.* While “WealthTV has been able to reach affiliation agreements with over 125 MVPDs,” it “is not carried by 18 of the 25 largest MVPDs in the United States, including the two ... satellite MVPDs (DirecTV and Dish Network).” *Id.* (¶ 8) (ER 83).

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<sup>3</sup> *Herring Broad., Inc. d/b/a WealthTV, Complainant v. Time Warner Cable, Inc., Defendant; Herring Broad., Inc. d/b/a WealthTV, Complainant v. Bright House Networks, LLC, Defendant; Herring Broad. Inc. d/b/a WealthTV, Complainant v. Cox Commc'ns, Inc., Defendant; Herring Broad., Inc. d/b/a WealthTV, Complainant v. Comcast Corp., Defendant*, 24 FCC Rcd 12967, 12972 (¶ 7) (ALJ 2009) (“*Recommended Decision*” or “*RD*”) (ER 83).

MOJO was a cable network designed to appeal in the last decade to “early adopters of HD technology,” typically males aged 18-49. *Id.* (¶ 14) (ER 85).<sup>4</sup> Beginning in 2003, MOJO “acquired and aired HD programming – *i.e.*, shows featuring sports, movies, and rock music – that was designed to appeal to this target demographic group.” *Id.* The intervenor cable television companies viewed their carriage of MOJO as “a short-term project,” however, because “[t]hey expected to eventually replace [MOJO] when [standard definition] networks with established brands and audience developed HD versions of their existing programming.” *Id.* (¶ 13) (ER 85). Consistent with that plan, iN DEMAND’s owners terminated MOJO in December 2008, when HD programming became more widely available. *Id.* (¶ 19) (ER 87). Thereafter, the intervenors used the channel space previously occupied by MOJO “to carry HD simulcasts of existing networks with established brands and audiences.” *Id.*

In 2007 and 2008, after failing in its attempts to negotiate carriage agreements with the intervenors, WealthTV filed with the FCC separate

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<sup>4</sup> The intervenors (Comcast, Time Warner, Cox, and BHN) jointly own iN DEMAND, a company that provided HD programming to intervenors beginning in 2003 through two channels known as INHD and INHD2. *RD* (¶ 12) (ER 84). iN Demand “rebranded” INHD as MOJO in 2007 and shut down INHD2 on December 31, 2006. *RD* (¶ 16, n.56) (ER 86).

complaints against Time Warner, Cox, Comcast, and BHN alleging that each of them had violated 47 U.S.C. § 536(a)(3) and Rule 76.1301(c) by refusing to carry WealthTV's video programming while carrying MOJO on preferential terms. *RD* (¶ 1) (ER 79); *Order* (¶ 7) (ER 137-38). According to WealthTV, MOJO's programming was similar to WealthTV's, and MOJO targeted the same audience. *Id.* Thus, WealthTV alleged, the cable television companies were required to carry WealthTV on terms similar to MOJO's carriage arrangement. *See* "Hearing Designation Order" or "*HDO*" (¶ 9) (ER 6). While WealthTV did not specify the licensing fees it demanded for carriage, it sought an FCC order compelling each intervenor to carry WealthTV for a period of ten years under those general terms. *Id.*

On October 10, 2008, the FCC's Media Bureau, acting pursuant to delegated authority, designated the four complaints for hearing before an ALJ in a single consolidated proceeding. *See HDO* (ER 1-60). "After reviewing the pleadings and supporting documentation filed by parties ..., [the Media Bureau] f[ound] that the complainant[] ha[d] established a *prima facie* showing of a violation of the program carriage rules." *Id.* (¶ 7) (ER 6). The Media Bureau, however, also found that the "pleadings and supporting documentation present[ed] several factual disputes as to whether [Time Warner], BHN, Cox and Comcast discriminated against WealthTV in favor

of their affiliated MOJO service,” making it impossible for the Bureau “to determine on the basis of the existing records whether [it could] grant relief.” *Id.* (¶ 58) (ER 28). The Media Bureau therefore ordered the ALJ to conduct a hearing to “resolve the factual disputes with respect to the claims” and issue a recommended decision within 60 days. *Id.* (¶ 120) (ER 29).

In the ensuing proceedings, the ALJ issued an order assigning WealthTV the burden of proof and the burden of introducing evidence in support of its claims with respect to the issues designated for hearing. (ER 34). In a subsequent order, the ALJ ruled that the “evidence adduced at the hearing in this proceeding will be given *de novo* consideration” and that resolution of the disputed factual questions designated for hearing will be

“based solely on the evidence compiled during the course of the hearing.”

(ER 38) (emphasis omitted).<sup>5</sup>

Following the completion of discovery, and the submission of written direct testimony, proposed exhibits, and trial briefs, the ALJ conducted a formal hearing from April 20, 2009 through May 1, 2009. *RD* (¶ 5) (ER 81); *Order* (¶ 9) (ER 138). Three witnesses appeared for WealthTV and eighteen witnesses appeared for the intervenors. *Id.* The FCC’s Enforcement Bureau, participating to represent the public interest, conducted cross-examination and filed comments opposing WealthTV’s four complaints. *RD* (¶ 5) (ER 81).

#### **B. The ALJ’s Recommended Decision.**

In a 37-page Recommended Decision that carefully examined the evidentiary record, the ALJ determined that the intervenor cable television

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<sup>5</sup> Concluding that the “60-day timeframe set forth in the *HDO* [could not] be achieved” in light of the multiple complaints, the unique factual situation of each case, and the need for discovery, the ALJ set a hearing schedule that extended beyond the deadline established by the Media Bureau in the *HDO*. (ER 38-39). In response to a motion by WealthTV, the Media Bureau in December 2008 concluded that the ALJ’s authority expired when he failed to issue a decision within 60 days. (ER 63-65). The Media Bureau stated that it would therefore resolve the complaints itself. *Id.* The following month, the Commission rescinded the Bureau’s order. (ER 75-77). The Commission explained that “the factual determinations required to fairly adjudicate these matters are best resolved through hearings before an [ALJ], rather than solely through pleadings and exhibits as contemplated by the Media Bureau.” *Id.* (¶ 2) (ER 76). The Commission thus “reinstate[d] the presiding [ALJ’s] delegated authority and direct[ed] him to proceed pursuant to the *HDO*.” *Id.*

companies did not discriminate against WealthTV in violation of the program carriage statute and the FCC's rule by denying carriage for impermissible reasons related to WealthTV's status as an unaffiliated network. *RD* (¶ 74) (ER 114).

### **1. Burden of proof.**

At the outset, the ALJ considered and rejected WealthTV's argument that "it need carry only an initial burden of proof in establishing a *prima facie* case of discrimination," and that, after it establishes a *prima facie* case, "the burden shifts to [the intervenor cable companies] to prove, by a preponderance of evidence, ... legitimate, non-discriminatory business reasons for" declining to carry WealthTV. *RD* (¶ 57) (ER 105). The ALJ explained that "[n]either the 1992 Cable Act, the Commission's carriage rule nor the *HDO*" specifies such a burden-shifting approach. *Id.* (¶ 58) (ER 106). The ALJ accordingly "adher[ed] to the usual practice of requiring that the party seeking relief by Commission order to bear the burden of proving that the violations occurred." *Id.*

The ALJ ultimately held, however, that "the manner in which the burden of proof is allocated [is] immaterial" in this case. *Id.* (¶ 62) (ER 108). "Whatever the allocation," he concluded, "the preponderance of the evidence,

viewed in its entirety, demonstrates that the defendants never violated [47 U.S.C. § 536(a)(3)] or section 76.1301(c) of the [FCC's] rules.” *Id.*

**2. Whether WealthTV and MOJO were similarly situated.**

Turning to the merits of WealthTV's allegations of discrimination and preferential treatment of MOJO, the ALJ explained that “[i]n 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.” *RD* (¶ 69) (ER 111). The ALJ concluded that “[t]he preponderance of record evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience.” *Id.* (¶ 20) (ER 87).

The ALJ first found that WealthTV's and MOJO's programming were substantially different. The ALJ found credible the testimony of intervenors' expert Michael Egan, who categorized each program aired on the two networks during sample weeks. *Id.* (¶ 22) (ER 88). 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.” *Id.* Moreover, Mr. Egan's testimony “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,” while such programming “aired only 19 percent of the time on MOJO.” *Id.* The ALJ also noted that even WealthTV’s programming expert acknowledged many differences between the two networks. For example, MOJO but not WealthTV aired sports and movies, whereas WealthTV but not MOJO broadcast programs about fashion, shopping, philanthropy and health. *Id.* (¶ 25) (ER 90).

The ALJ emphasized that Mr. Egan’s testimony showed that “the on-air ‘look and feel’ of MOJO and WealthTV were demonstrably different.” *Id.* (¶ 23) (ER 89). “MOJO conveyed a ‘hip, urban irreverent, aggressive, and edgy’ image akin to that of the MTV network channels,” with a “hard-charging production style featur[ing] contemporary music, fast-paced transitions between shows and advertisements, and off-beat humor.” *Id.* “In contrast, WealthTV presented a ‘calmer, more mature attitude,’” using “orderly transitions to commercial breaks” – “like library background music” in contrast to “MOJO’s rock and roll.” *Id.*

The ALJ next held that WealthTV and MOJO did not target the same audience. *Id.* (¶ 27) (ER 91). The parties agreed that MOJO’s target audience consisted of affluent males between the ages of 25 and 49. *Id.* (¶ 29) (ER 91). But relying on WealthTV’s own marketing presentations to

MVPDs and prospective advertisers, statements on its website, and the sworn testimony of WealthTV's president in another case, the ALJ concluded that "the great weight of evidence reflects that WealthTV's target audience is not limited" to that group. *Id.* (¶ 34) (ER 94); *see also id.* (¶¶ 29-34) (ER 91-94).

### **3. Allegations of discrimination against WealthTV.**

The ALJ further determined that the intervenors chose to carry MOJO (and its predecessor network, INHD) "for legitimate, non-discriminatory business purposes." *RD* (¶ 64) (ER 109). These purposes, the ALJ found, included a need: (1) to showcase HD programming to those customers who were "early adopters" of HD television sets, thereby enabling intervenors to "keep up with competing MVPDs"; (2) to preserve intervenors' "flexibility to preempt scheduled programming of the MOJO channel depending upon the regional or local programming interests of its viewers"; and (3) for "flexibility to drop the MOJO channel when HD versions of programming of existing cable networks ... became available." *Id.* (¶¶ 12, 64-65) (ER 84, 109). Emphasizing that "*WealthTV had not yet launched at the time the defendants decided to carry INHD,*" the ALJ concluded that "[t]here is no credible evidence that the defendants, in deciding to carry INHD, discriminated against WealthTV ... on the basis of affiliation or non-affiliation." *Id.* (¶ 65) (ER 109).

The ALJ also rejected WealthTV’s claim that the intervenors unlawfully discriminated against WealthTV based on its non-affiliated status when they decided to carry MOJO (or its predecessor INHD), but not WealthTV. As the ALJ explained, the evidence demonstrated that the intervenors declined to carry WealthTV for “non-discriminatory business reasons” “that are independent of and unrelated to their affiliation with INHD/MOJO,” including: (1) “their evaluation of WealthTV’s programming”; (2) “their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers”; (3) that “WealthTV had not obtained carriage with a number of competing MVPDs”; (4) that “WealthTV’s owners were inexperienced in launching networks”; (5) that “bandwidth necessary to carry WealthTV could be used for better purposes”; (6) that “WealthTV lacked outside financing”; and (7) that “WealthTV’s proposed terms and conditions of carriage were unfavorable” to the intervenors. *Id.* (¶¶ 67, 69) (ER 110, 111); *see also id.* (¶¶ 35-51) (ER 94-104). The ALJ found “no credible or reliable evidence proving that any defendant refused to carry WealthTV” to “enhanc[e] the competitive position of ... MOJO.” *Id.* In fact, the ALJ found that there was no “evidence that any of the defendants considered MOJO ... in deciding whether or not to carry WealthTV.” *Id.* (¶ 67) (ER 110).

**C. The *Order On Review*.**

WealthTV filed exceptions to the ALJ's Recommended Decision. (ER 115-134). Reviewing the ALJ's decision pursuant to 47 U.S.C. § 409(b), the FCC "den[ied] WealthTV's exceptions" and "adopt[ed] the conclusions of the [ALJ's] Recommended Decision." *Order* (¶ 3) (ER 136).

**1. Burden of proof.**

In its exceptions, WealthTV argued that the ALJ abused his discretion in assigning it the burden of proof and the burden of introducing evidence after WealthTV had established a *prima facie* case. *Order* (¶ 18) (ER 141). The FCC found that it "need not decide ... whether the ALJ properly allocated the burdens ... because [it] agree[d] with the ALJ's conclusion that the allocation of the burdens is 'immaterial to the [ultimate] decision.'" *Id.* As the FCC explained, "defendants would have prevailed even if they had been required to carry the burden of production and proof, as WealthTV contends was proper." *Id.*

**2. Record evidence.**

The FCC also found "substantial record evidence supporting the ALJ's conclusions." *Id.* (¶ 19) (ER 142).

First, the FCC saw no basis to reverse the ALJ's finding that MOJO and WealthTV aired different programming (*id.* (¶ 23) (ER 143)) – a finding that undermined WealthTV's theory that MOJO was similarly situated to

WealthTV and that the intervenors gave preferential treatment to MOJO because of its status as an affiliate. *See id.* n.51 (ER 142) (noting that “WealthTV framed its complaint around the allegation that its channel was similarly situated with the MOJO channel”). The FCC concluded that the ALJ properly declined to credit the testimony of WealthTV’s programming expert, Sandy McGovern, noting that she “based her analysis of WealthTV’s programming on selections of that channel’s programming provided to her by WealthTV President Charles Herring,” and not on “any ‘systematic review of the programming of either WealthTV or MOJO.’” *Id.* (¶ 24) (ER 143). Citing the ALJ’s findings, the FCC further noted that WealthTV’s own expert “acknowledged in her testimony ‘many differences in the programming of WealthTV and MOJO.’” *Id.* Like the ALJ, the FCC also gave weight to the expert evidence produced by the intervenors demonstrating the differences between the two networks. *Id.* (citing Mr. Egan’s testimony); *see also* pp. 15-16, above. The FCC thus found “ample basis for the ALJ’s conclusion that the expert testimony presented by defendants was more credible than that of WealthTV.” *Id.*

The FCC likewise found that substantial record evidence supported the ALJ’s conclusion that WealthTV and MOJO did not target similar audiences. *Id.* (¶ 26) (ER 144). The FCC agreed with the ALJ’s determination “that the

‘overwhelming weight of the record evidence ... shows that WealthTV targeted a much broader audience than adult males between the ages of 25 and 49’” targeted by MOJO. *Id.* (¶ 25) (ER 143). As one example, the FCC noted a presentation in which “WealthTV described itself as targeting the most affluent viewer, 25-60+, educated, equal appeal to men and women.” *Id.* (¶ 26) (ER 144). The FCC, like the ALJ, “also took note of [WealthTV president Charles] Herring’s sworn testimony in unrelated litigation – inconsistent with his testimony [before the FCC] – that WealthTV’s programming ‘appeals to about a 25 to 65+ crowd,’ irrespective of gender, and that ‘the only group that would not find WealthTV attractive was monks that have taken a vow to poverty.’” *Id.*

Finally, the FCC found no merit to WealthTV’s claim that “the record contained substantial evidence of discrimination by defendants against it and in favor of their affiliated network.” *Id.* (¶ 27) (ER 144). “The *Recommended Decision* contains a detailed analysis of each defendant’s negotiations with WealthTV,” the FCC explained, and “WealthTV’s exception with respect to discrimination largely ignores these findings.” *Id.* (¶ 28) (ER 144); *see also id.* (¶¶ 28-32) (ER 144-46); *RD* (¶¶ 36-51) (ER 94-104). The FCC concluded that “[t]here is substantial record evidence that defendants’ refusals to carry WealthTV were based on legitimate business

reasons that were unrelated to WealthTV's status as an independent programming vendor." *Order* (¶ 32) (ER 146).

**3. The ALJ's rulings on witnesses and evidence.**

The FCC denied WealthTV's exception to the ALJ's refusal to permit it to introduce into evidence the testimony of Stephen Burke, Comcast's former chief operating officer, from a separate proceeding, which WealthTV attempted to use when cross-examining a different Comcast executive, Madison Bond, in this case. *Id.* (¶ 35) (ER 146). Noting that "[d]eference is ordinarily accorded an ALJ in the conduct of a hearing," the FCC affirmed the ALJ's exclusion of this evidence on the ground that "Mr. Bond was not competent under Rule 901 of the Federal Rules of Evidence to authenticate the transcript of testimony of a different individual in a separate proceeding." *Id.* (¶ 34) (ER 146).

Likewise, the FCC found that the ALJ did not abuse his discretion when he denied WealthTV's request to call Robert Jacobson, former president and chief executive officer of iN DEMAND, to testify about MOJO. *Id.* (¶ 37) (ER 147). The FCC explained that the ALJ reasonably barred Mr. Jacobson's testimony because "WealthTV failed to include [him] on its witness list," as required by the ALJ's prior order. *Id.* The FCC, moreover, was not persuaded by WealthTV's excuse that Mr. Jacobson's

testimony only became necessary after certain portions of Mr. Charles Herring's testimony were excluded. *Id.* As the FCC explained, WealthTV "should not have been surprised by the defendants' challenge to ... his proposed testimony," because portions of it related to the policies of *iN DEMAND* – a matter about which Mr. Herring, a principal of *WealthTV*, was not competent to testify. *Id.* The FCC also found it significant that after "the defendants and WealthTV subsequently agreed on Mr. Herring's testimony, ... WealthTV did not renew its request for the testimony of Mr. Jacobson." *Id.* "In any event," the FCC explained, WealthTV "fail[ed] to demonstrate how it was harmed," noting that a fact witness (David Asch, executive vice president of programming at *iN DEMAND*) testified at the hearing about *iN DEMAND*'s policies. *Id.* (¶ 37 & n.91) (ER 147).

Finally, the FCC rejected WealthTV's claim that the testimony of intervenors' expert Michael Egan "should have been accorded 'little weight' by the ALJ." *Id.* (¶ 38) (ER 147). The FCC explained that "an ALJ's determination of the credibility of witnesses at a hearing is due substantial deference," and it "f[oun]d no basis to conclude that the ALJ abused his discretion in finding Mr. Egan's testimony reliable and credible." *Id.* (¶ 39) (ER 147). Indeed, while WealthTV criticized Mr. Egan's analysis, the FCC

noted that it “fail[ed] to show how Mr. Egan’s conclusions were erroneous[,] [n]or did WealthTV present any countervailing evidence.” *Id.* (ER 147-48).

#### **D. Subsequent Developments.**

In 2011, after the FCC released the *Order* on review in this case, the Commission amended its rules governing program carriage complaints. *Revision of the Commission’s Program Carriage Rules*, 26 FCC Rcd 11494, 11495 (¶ 2) (2011) (“*2011 Program Carriage Order & NPRM*”).

“Because it is unlikely that direct evidence of a discriminatory motive will be available to potential complainants,” the FCC explained that “a complainant can establish ... a *prima facie* case ... by providing the following circumstantial evidence of discrimination ‘on the basis of affiliation or non-affiliation.’” *2011 Program Carriage Order & NPRM*, 26 FCC Rcd at 11504 (¶ 14); *see also* 47 C.F.R. § 76.1302(d)(3)(iii). First, a program carriage complainant that relies on circumstantial (rather than direct) evidence must submit evidence “that it provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD, based on a combination of factors, such as genre, ratings, license fees, target audience, target advertisers, target programming, and other factors.” *Id.* “Second, the complaint must contain evidence that the defendant MVPD has treated the video programming

provided by the complainant programming vendor differently than the similarly situated video programming provided by the programming vendor affiliated with the defendant MVPD with respect to the selection, terms, or conditions for carriage.” *Id.* at 11504-05 (¶ 14).<sup>6</sup>

The FCC “emphasize[d] that a Media Bureau finding that a complainant has established a *prima facie* case does *not* mean that the complainant has proven its case or any elements of its case on the merits.” *Id.* at 11505 (¶ 16) (emphasis added). “Rather,” the FCC explained, “a *prima facie* finding means that the complainant has provided sufficient evidence in its complaint, without the Media Bureau having considered any evidence to the contrary, to proceed.” *Id.* Thus, if “the record is not sufficient to resolve the complaint, the adjudicator ... will allow the parties to engage in discovery and will then conduct a *de novo* examination of all relevant evidence on each factual and legal issue.” *Id.* In that circumstance, the FCC explained, “the adjudicator ... may reach an opposite conclusion after conducting further proceedings and developing a more complete evidentiary record.” *Id.*

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<sup>6</sup> The FCC clarified that the rule amendments adopted in the *2011 Program Carriage Order & NPRM* do not apply to the complaints at issue here. *See* 26 FCC Rcd at 11496 (¶ 2, n.8) (explaining that “[t]he new procedures ... do not apply to program carriage complaints that are currently pending or to program carriage complaints that are filed before the effective date of the new procedures adopted herein”).

In a Notice of Proposed Rulemaking (“NPRM”) accompanying the *2011 Program Carriage Order & NPRM*, the FCC noted that “[o]nly two program carriage cases have been decided on the merits to date,” and “[i]n neither case was the Commission required to decide the issue of which party bears the burdens of production and persuasion.” *Id.* at 11544 (¶ 79). The FCC thus “propose[d] to codify in [its] rules which party bears th[ose] burdens ... after the complainant has established a *prima facie* case.” *Id.* at 11545 (¶ 80). The FCC has not yet acted on the additional rules proposed in the NPRM.

### SUMMARY OF ARGUMENT

The FCC properly denied WealthTV’s program carriage complaints. Substantial record evidence supports the agency’s conclusion that the intervenors carried MOJO but not WealthTV for legitimate business reasons, and not “on the basis of” WealthTV’s “nonaffiliation” with intervenors. 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). Because this Court in reviewing an administrative agency’s decision will not “reweigh the evidence,” *Rhine v. Stevedoring Svcs. of Am.*, 596 F.3d 1161, 1165 (9th Cir. 2010), WealthTV’s claims fail.

1. As the FCC noted, “WealthTV framed its complaint around the allegation that its channel was similarly situated with the MOJO channel.”

*Order* (n.51) (ER 142). Based on their comprehensive review of the record, however, the ALJ and the FCC concluded the contrary. The two networks aired different types of programming – as WealthTV’s own expert conceded on cross-examination – and had a different look and feel. Moreover, WealthTV and MOJO had different target audiences, as WealthTV’s marketing materials and statements by its president confirmed.

The record also contained ample evidence that intervenors declined to carry WealthTV for legitimate business reasons unrelated to WealthTV’s status as an unaffiliated network. The record showed that the intervenors based their carriage decisions on, among other things, insufficient demand for WealthTV’s programming, the inexperience of its management team, WealthTV’s lack of independent financing, WealthTV’s inability to secure carriage agreements with other large satellite and cable television providers, the unfavorable terms upon which WealthTV sought carriage, and constraints on available channel space on the intervenors’ cable systems.

In sum, WealthTV has failed to carry its heavy burden of showing that the evidence was not “adequate to support” the FCC’s decision. *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).

2. This Court lacks jurisdiction to consider WealthTV’s claim that the FCC acted arbitrarily and capriciously when it adjudicated WealthTV’s

program carriage complaints without standards or rules that meet WealthTV's preferred level of specificity. WealthTV never presented that claim to the FCC in the proceedings leading to the *Order* on review and the claim is therefore statutorily barred. *See* 47 U.S.C. § 405(a). This claim also fails on the merits because the FCC properly exercised its authority to adopt general program carriage rules clarified through case-by-case adjudication.

3. WealthTV's challenge to the ALJ's allocation of the burden of proof is equally unavailing. Neither the statute nor FCC precedent specifies how the burden of proof should be assigned after a claimant establishes a *prima facie* case of program carriage discrimination. And it is traditional to allocate the burden of proof to the party seeking relief from the agency. But the issue is immaterial in this case. As both the ALJ and the Commission held, WealthTV's complaints failed however the burden of proof was allocated, based on the overwhelming weight of the record evidence.

4. Lastly, the FCC properly upheld the ALJ's rulings concerning WealthTV's attempts to introduce testimony of two witnesses. The ALJ did not abuse his discretion when he excluded the unauthenticated testimony of Comcast employee Stephen Burke in a different case, which WealthTV attempted to introduce via cross-examination of a different witness in the present case. Likewise, the ALJ acted well within his discretion when he

refused to compel the attendance of a witness, Robert Jacobson, whom WealthTV failed to include on its initial witness list. Indeed, any error was committed by WealthTV, which never renewed its motion to subpoena that witness – despite the ALJ’s express permission to do so – later in the proceeding. But even if there were any error by the ALJ, the error would have been harmless. Given the overwhelming record evidence, the excluded testimony, even if admitted, would not have changed the outcome of this case.

## ARGUMENT

### I. THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL.

The FCC’s *Order* must be upheld unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Fones4All Corp. v. FCC*, 550 F.3d 811, 821 (9th Cir. 2008) (quoting 5 U.S.C. § 706(2)(A)). Judicial review under this standard is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Northwest Ecosystem Alliance v. United States Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (internal quotations omitted). The scope of review “is narrow”; “[i]t is not for this court to substitute its judgment for that of the Commission.” *Am. Civil Liberties Union v. FCC*, 523 F.2d 1344, 1350 (9th Cir. 1975). The

Court's task is simply "to ensure that the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Northwest Ecosystem Alliance*, 475 F.3d at 1140 (internal quotations omitted).

To the extent that WealthTV challenges the Commission's factual findings and its evaluation of the evidence, the Court "must affirm" the FCC's decision so long as it "is supported by substantial evidence and applies correct legal standards." *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1222, n.2 (9th Cir. 2010). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Tommasetti*, 533 F.3d at 1038). Under this standard, "[t]he evidence must be more than a mere scintilla but not necessarily a preponderance." *Tommasetti*, 533 F.3d at 1038 (internal quotation omitted). Accordingly, the Court "will uphold" the FCC's decision even "when the evidence is susceptible to more than one rational interpretation." *Id.* Even if the Commission reasonably could have reached a different conclusion based on the record in this case, "[the Court's] task is not to reweigh the evidence, but only to determine if substantial evidence supports [the FCC's] findings." *Rhine*, 596 F.3d at 1165 (internal quotations omitted).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE FCC'S DECISION TO DENY WEALTHTV'S PROGRAM CARRIAGE COMPLAINTS.**

A “central element in WealthTV’s complaints” was its claim that it was “similarly situated to MOJO,” intervenors’ affiliate, “because the two networks offered similar types of programming and targeted the same audience.” *Order* (¶ 20) (ER 142); *see also id.* n.51 (ER 142) (noting that “WealthTV framed its complaint around [that] allegation”). As the FCC and the ALJ found, however, there was substantial evidence that WealthTV was *not* similarly situated to MOJO: the subject matter of WealthTV’s programming, its “look and feel,” and its target audience were all very different from that of MOJO’s. Moreover, there was substantial evidence that intervenors carried MOJO (and its predecessor networks), while declining to carry WealthTV, for legitimate business reasons unrelated to WealthTV’s unaffiliated status. Because there was no “discriminat[ion] in video programming distribution on the basis of affiliation or non-affiliation of vendors,” 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1302(c), the FCC correctly determined that the intervenors did not violate the program carriage statute or FCC rule in this case.

**A. WealthTV Was Not Similarly Situated To MOJO.**

The FCC correctly affirmed the ALJ’s “conclu[sion] that ‘the preponderance of the record evidence demonstrates that WealthTV and MOJO were not similarly situated networks.’” *Order* (¶ 20) (ER 142), citing *RD* (¶ 69) (ER 111). Among other things, “MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience.” *RD* (¶ 20) (ER 87).

**1. The programming was different.**

In concluding that the programming offered by the two networks was different, the ALJ credited the testimony of intervenors’ expert, Michael Egan, who performed an analysis of the programming of the two channels. *RD* (¶¶ 22-23) (ER 88-89); *Order* (¶ 23) (ER 143); *see also* TWC Exhibit 85 (Direct Testimony of Michael Egan) (ER 3830-56). Mr. Egan determined 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.” *RD* (¶ 22) (ER 88); *Order* (¶ 23) (ER 143). Moreover, Mr. Egan explained, “60 percent of WealthTV’s programming time” consisted of shows on “travel & recreation, lifestyle, food & drink, documentary, and art/design/collectables,” while such programming “aired only 19 percent of the time on MOJO.” *Id.* Mr. Egan

also contrasted the “hip, urban, irreverent” “look and feel” of MOJO with the “calmer, more mature attitude” of WealthTV. *RD* (¶ 23) (ER 89); *Order* (¶ 23) (ER 143); *see also RD* (¶ 24) (ER 89) (noting that where WealthTV and MOJO presented “programming covering the same subject-matter,” it was “dissimilar” in style and tone).<sup>7</sup>

The ALJ reasonably found Mr. Egan’s testimony to be “far more credible” than that of WealthTV’s programming expert, Sandy McGovern. *RD* (¶ 25) (ER 90); *see also Order* (¶ 24) (ER 143). The ALJ discounted Ms. McGovern’s testimony because her opinions were based exclusively on her review of an unrepresentative sample of programming hand-picked by WealthTV’s president. *Id.*; *see also Tr.* at 3814-15 (ER 1300-01). Moreover, on cross-examination, Ms. McGovern conceded that there were “many differences in the programming of WealthTV and MOJO.” *RD* (¶ 25) (ER 90); *see also id.* (acknowledging that WealthTV’s programming was “family-friendly” whereas MOJO’s programming was not); *Tr.* at 3799-03

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<sup>7</sup> WealthTV argues that the ALJ improperly required MOJO and WealthTV “functionally to be identical.” *Br.* 54. But as the FCC explained ((¶ 22) (ER 142)), WealthTV “cites ... no specific language from the *Recommended Decision* that imposes such a requirement nor does it point to any discussion from which one could infer that the ALJ imposed such a standard.” In any event, as the FCC held, substantial evidence supported the ALJ’s findings that “there were significant differences in the programming” of the two networks. *Id.*

(ER 1285-89). It is well settled that “[t]his court will not reverse the ALJ’s credibility findings as affirmed by the [agency] unless they are ‘inherently incredible or patently unreasonable.’” *Blackfoot Livestock Comm’n Co. v. Dept. of Agriculture, Packyards and Stockyards Admin.*, 810 F.2d 916, 921 (9th Cir. 1987) (quoting *Southwest Sunsites, Inc. v. F.T.C.*, 785 F.2d 1431, 1437 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986)). *See also Lackey v. FAA*, 386 F. App’x. 689, 697 (9th Cir. 2010) (credibility determinations, unless made in an arbitrary or capricious manner, are within the “exclusive providence” of the ALJ). WealthTV does not come close to meeting that exacting standard.

WealthTV next complains that the ALJ “disapproved of Egan’s methodology” in a subsequent program carriage case involving the Tennis Channel. Br. 57. *See Initial Decision, Tennis Channel, Inc., Complainant v. Comcast Cable Commc’ns, L.L.C.*, 26 FCC Rcd 17160 (2011) (“*Tennis Channel*”) (Add. 150a-212a). This argument is not properly before the Court because it was not raised before the agency (except in the petition for reconsideration that WealthTV has now withdrawn. *See* ER 153-56). Section 405(a) of the Communications Act provides that the filing of a petition for reconsideration with the FCC is a “condition precedent to judicial review” of any “questions of fact or law upon which the Commission ... has

been afforded no opportunity to pass.” 47 U.S.C. § 405(a); *see also Fones4All*, 550 F.3d at 818 (“Congress ... explicitly mandated that the FCC have ‘the opportunity to pass’ on the merits of any challenges to its orders before review may be sought in the Courts of Appeals.”).

Moreover, *Tennis Channel* is an ALJ’s decision that has been appealed to the Commission, and “an agency is not bound by the actions of its staff if the agency has not endorsed those actions.” *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008); *see also Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 554 (D.C. Cir. 2009).

Further, there is no inconsistency between the ALJ’s rulings concerning Mr. Egan’s testimony in this case and his testimony in the *Tennis Channel* case. The methodology Mr. Egan employed in *Tennis Channel* was quite different from the analysis he employed in this case – and on which the ALJ relied. Here, Mr. Egan distinguished between “broad substantive categories” of programming (or “genres”) (*see RD* (¶ 22) (ER 88)); in *Tennis Channel* (¶ 28) (Add. 162a), by contrast, Mr. Egan sought to distinguish among programming (in that case, sports programming) that was concededly within the same “genre.” It was this attempt to distinguish between “subgenres” of similar programming – a distinction that the ALJ found to

“inconsistent” with the genre methodology used in this case – that the ALJ rejected in *Tennis Channel*. *Tennis Channel* (¶ 28) (Add. 162a).

WealthTV also contends that the ALJ and the FCC erred in finding Mr. Egan’s “look and feel” analysis credible because Mr. Egan allegedly “did not apply any objective criteria when analyzing the two networks with that methodology.” Br. 58. The FCC properly rejected that argument, explaining that WealthTV “fail[ed] to show how Mr. Egan’s conclusions were erroneous,” and failed to “present any countervailing evidence” to suggest that the programming was similar in this regard. *Order* (¶ 39) (ER 147-48). There is likewise no inconsistency with the ALJ’s refusal to credit Mr. Egan’s “look and feel” analysis in the *Tennis Channel* case, since Egan’s analysis in that case was based on an entirely different set of facts. *Tennis Channel* (¶¶ 30-36) (Add. 163a-166a). The disparate “look and feel” of the programming of the two networks in this case was only one of several factors that led the FCC and the ALJ to conclude that the programming was not substantially similar. WealthTV does not argue (nor could it) that, absent consideration of this single factor, the FCC would have reached a different result. *See Tommasetti*, 533 F.3d at 1038.

## 2. The targeted audiences were different.

The ALJ and the FCC also relied on abundant testimony and documentary evidence showing that WealthTV and MOJO did not target a similar audience. *RD* (¶¶ 27-34) (ER 91-94); *Order* (¶¶ 25-26) (ER 143-44). While MOJO targeted “affluent males between the ages of 25 and 49” (*RD* (¶ 27) (ER 91)), WealthTV’s own marketing presentations to MVPDs and prospective advertisers “describe Wealth TV as appealing to an audience broader than [that].” *RD* (¶¶ 29) (ER 91); *see also Order* (¶ 26) (ER 144) (quoting WealthTV presentation stating that it targets viewers aged “25-60+,” and has “equal appeal to men and women”). Indeed, as the FCC and the ALJ noted, WealthTV’s president testified elsewhere that “the only group that would not find WealthTV attractive was ‘monks that have taken a vow to poverty.’” *RD* (¶ 32) (ER 93); *Order* (¶ 26) (ER 144).<sup>8</sup>

WealthTV contends that it was improper for the ALJ to compare the “target” audiences for WealthTV and MOJO rather than the “actual” audiences for each network. Br. 60-62. Before the ALJ, however, WealthTV itself relied on evidence of target demographics in claiming that its audience

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<sup>8</sup> Unlike the unauthenticated testimony of Mr. Burke from a different proceeding – which WealthTV sought to introduce via cross-examination of a different witness in the present case (*see pp. 55-57, below*) – this testimony from Mr. Herring was properly authenticated. *See Tr. at 3055 (ER 717) (Mr. Herring’s testimony on cross-examination in this case, confirming statement).*

was demographically similar to MOJO's audience. *See Complainant's Proposed Findings of Fact and Conclusions of Law* (¶¶ 88-91) (SER 2-4). Further, the ALJ's approach to audience demographics was fully consistent with the approach the FCC later adopted in the *2011 Program Carriage Order & NPRM*, which WealthTV argues (Br. 60) should have governed the analysis in this case. *See* 26 FCC Rcd at 11504 (¶ 14) (considering "target" audience in determining whether affiliated and unaffiliated programming networks are similarly situated). An "ALJ has considerable discretion in determining what evidence will be allowed." *Frazier v. Johnson*, 312 Fed. Appx. 879, 881 (9th Cir. 2009). WealthTV provides no basis to exclude intervenors' target-audience evidence, nor does it dispute that its own marketing materials described WealthTV as having "broad appeal." Br. 61; *see also Order* (¶¶ 25-26) (ER 143-44).

WealthTV next asserts that the FCC failed to address its argument that WealthTV targeted the same advertisers as MOJO. Br. 59-60. Although WealthTV raised this argument before the ALJ, it did not raise it before the Commission. As a consequence, WealthTV is barred from presenting it to this Court. *Fones4All*, 550 F.3d at 818; *Environmental LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011) ("[R]aising an issue before a designated authority is not enough to preserve it for review ...; a party must raise the issue before the

Commission as a whole.”). In any event, the ALJ correctly concluded that the fact that WealthTV and MOJO shared a single advertiser, Grey Goose Vodka, “d[id] not establish that the two networks generally solicited or contracted with the same advertisers.” *RD* (¶ 20, n.72) (ER 87). The ALJ also made clear that even if “WealthTV had established that it and MOJO generally dealt with the same advertisers,” the preponderance of the evidence still demonstrated that the networks were not similarly situated. *RD* (¶ 20 n.72) (ER 87).

Finally, WealthTV complains that the ALJ found it significant that INHD and INHD2 (MOJO’s predecessors) were launched before WealthTV, but deemed it “immaterial” in *Tennis Channel* that the complainant had been launched after the defendant’s affiliated networks. Br. 62. WealthTV’s contention was not raised before the Commission and is therefore barred. *Fones4All*, 550 F.3d at 818. Regardless, the INHD and INHD2 launch date had nothing to do with “whether Intervenors deemed WealthTV as a similarly-situated competitor” (Br. 62); instead, it demonstrated that intervenors did not discriminate against WealthTV when they decided to carry MOJO. See *RD* (¶ 12) (ER 84). The evidence was different in *Tennis Channel*. Compare *RD* (¶ 65) (ER 109) (“WealthTV did not show that defendants had denied carriage to a non-affiliated vendor that could have

better served defendants' business objectives than [MOJO]," because "WealthTV had not launched at the time the defendants decided to carry MOJO."), with *Tennis Channel* (§ 73) (Add. 183a-184a) (ALJ's finding that "Comcast Cable does not carry *any* affiliated network exclusively on the Sports Tier, even affiliated networks that were launched at the same time or later than Tennis Channel.").

**B. Substantial Record Evidence Supports The Agency's Finding That Intervenors Did Not Discriminate Against WealthTV On The Basis Of Affiliation.**

The FCC in the *Order* (§ 32) (ER 146) also properly upheld the ALJ's conclusion that "[t]here 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." *RD* (§ 67) (ER 110); *see also id.* (§ 35) (ER 94).

The ALJ's Recommended Decision contains a "detailed analysis of each defendant's negotiations with WealthTV concerning carriage of WealthTV's program channel." *Order* (§ 28) (ER 14), citing *RD* (§§ 35-51) (ER 94-104). In light of that analysis, the FCC concluded that there was "substantial record evidence that defendants' refusals to carry WealthTV were based on legitimate business reasons that were unrelated to WealthTV's status as an independent programming vendor." *Order* (§ 32) (ER 146).

The record showed that Time Warner “officials reasonably believed that there was little demand from its cable systems for carriage of WealthTV’s programming.” *Id.* (¶ 28) (ER 144); *see also RD* (¶ 36) (ER 95). Nonetheless, the Time Warner system in San Antonio agreed to a six-month trial during which it would provide WealthTV programming as a video-on-demand (“VOD”) service,<sup>9</sup> rather than a full-time (or “linear”) programming channel.<sup>10</sup> *RD* (¶ 37) (ER 95); *Order* (¶ 28) (ER 144). Although “the performance of WealthTV’s VOD was not overwhelming,” Time Warner’s San Antonio system nonetheless offered to extend the VOD trial. *RD* (¶ 37) (ER 95). WealthTV, in response, “refused to extend the agreement unless [Time Warner] provided a linear carriage agreement.” *Order* (¶ 28) (ER 144); *see also RD* (¶ 37) (ER 95-96). Because of WealthTV’s insistence on full-time carriage, which Time Warner declined, the trial period was not extended. *Id.* The ALJ found that “[t]he weight of record evidence shows that [Time Warner’s] decision not to offer full linear carriage to WealthTV was based upon business considerations that were unrelated to TWC’s affiliation with MOJO.” *RD* (¶ 39) (ER 96).

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<sup>9</sup> “VOD is programming offered on a per program basis, either with or without a separate per program fee.” *RD* (n.137) (ER 95).

<sup>10</sup> “Linear carriage refers to carriage of a programming channel full time, that is, generally 24 hours a day 7 days a week.” *Order* (n.71) (ER 144).

The record also showed that Comcast initially declined to provide carriage due to “the cost of carriage, the uncertain customer 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.” *RD* (¶ 44) (ER 100); *Order* (¶ 30) (ER 145). Under threat of litigation from WealthTV, Comcast subsequently made two offers of carriage. WealthTV declined both – including an offer that would have given it linear carriage on Comcast’s cable system in Chicago. *RD* (¶ 45) (ER 100-01). The ALJ concluded that “the preponderance of evidence ... shows that Comcast was willing to negotiate in good faith some form of affiliation agreement with WealthTV.” *Id.* (ER 101).

The ALJ similarly found that Cox’s decision not to carry WealthTV was based on its assessment that “WealthTV was a marginal network that would not bring value to Cox”; in particular, that the network “lacked any brand appeal that might draw an audience and was indistinguishable from many other start-up networks seeking carriage on Cox.” *Id.* (¶¶ 41, 42) (ER 97, 98) (noting Cox’s conclusion that “WealthTV offered programming that was closely similar in content and audience to Fine Living, an unaffiliated network already carried by Cox”). Cox also “found WealthTV’s

management team to lack experience in video programming,” and it “viewed the terms of carriage proposed by WealthTV to be unacceptable as a business proposition.” *Id.* (¶ 42) (ER 98).

Finally, the ALJ found that BHN’s decision not to carry WealthTV was primarily based on BHN’s assessment that its subscribers had little interest in WealthTV’s programming. *Id.* (¶ 50) (ER 103) (describing a 2007 survey concluding WealthTV ranked “36th of 37 channels most requested by subscribers having HDTV,” and “rated next to last among 36 channels that HDTV owners were likely to watch, if available”). According to BHN’s president, other factors 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 agreements with many MVPDs; and did not fill any unique gap in BHN’s lineup.” *RD* (¶ 51) (ER 103-04). The ALJ found this testimony “consistent, competent, and credible.” *Id.* (ER 104).

In sum, substantial evidence in the record showed that the intervenors did not deny WealthTV carriage based on its status as an independent programming vendor. Rather, intervenors based their decisions on insufficient demand for WealthTV’s programming, the inexperience of its management team, WealthTV’s lack of independent financing, WealthTV’s

inability to secure carriage agreements with other large satellite and cable television providers, the unfavorable terms and conditions upon which WealthTV sought carriage, and channel capacity constraints on intervenors' cable systems. *RD* (¶¶ 35-51) (ER 94-104). In light of the ALJ's detailed examination of the record, there is no basis for WealthTV's suggestion that the agency did not "meaningfully evaluate[] the various proffered reasons for declining carriage to WealthTV." Br. 48.

WealthTV claims that the ALJ "constructively requir[ed] WealthTV to prove direct discrimination instead of simply making a circumstantial case." Br. 47. To the contrary, the ALJ acknowledged that a complainant can establish discrimination using "direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence, such as uneven treatment of similarly situated entities." *RD* (¶ 63) (ER 109).<sup>11</sup> The fact of the matter is that the ALJ considered both types of evidence (*see, e.g., RD* (¶¶ 63-69) (ER 108-11)), and concluded that WealthTV failed to demonstrate that

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<sup>11</sup> The ALJ's approach was fully consistent with that adopted by the FCC in the subsequent *2011 Program Carriage Order & NPRM*. That order makes clear that a program carriage complainant can establish a *prima facie* case of discrimination on the basis of affiliation or nonaffiliation by "direct evidence" or "circumstantial evidence." 26 FCC Rcd at 11504 (¶¶ 13-14).

intervenors unlawfully discriminated when they denied WealthTV carriage on its preferred terms and conditions.

WealthTV also contends that intervenors “had a double standard for program carriage as compared to unaffiliated vendors.” Br. 50. But no evidence in the record supports that contention. To the contrary, the evidence showed that intervenors “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 HD network’s programming [*i.e.*, interrupt that programming with other content] when it suited its business needs and ultimately to drop the channel when more desirable HD programming became available.” *Id.* (n.264) (ER 111). Indeed, intervenors did so in December 2008, when they dropped MOJO after it had “served its purpose[.]” *Id.* (¶ 19) (ER 87). As the ALJ explained, carriage of WealthTV would not have served the same business purpose because “WealthTV did not specifically target the younger adult male early adopters of HD sets,” and “nothing in the record show[ed] that WealthTV would have permitted its programming to be preempted at will.” *Id.* (n.264) (ER 111). Accordingly, no “double standard” was employed in this case; rather, as the FCC found, intervenors carried MOJO, but not WealthTV, “based on legitimate business reasons that were

unrelated to WealthTV's status as an independent programming vendor.”

*Order* (¶ 32) (ER 146).<sup>12</sup>

WealthTV's other complaints concerning the terms and conditions of MOJO's carriage by intervenors – such as its national rollout and the license fees paid to iN DEMAND (Br. 10-11, 48-49) – are presented for the first time to this Court. As such, they are statutorily barred because they were never raised before the Commission. *See* 47 U.S.C. § 405(a); *Fones4All*, 550 F.3d at 818. They are also unavailing. The program carriage statute and FCC rule do not broadly require MVPDs, such as intervenors, to carry *any* non-affiliated programming. As relevant here, they prohibit only those denials of carriage that are “on the basis of affiliation or nonaffiliation” and that unreasonably restrain the ability of the complainant to compete fairly. 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). Thus, differential treatment between networks, standing alone, does not support a finding of unlawful discrimination under the program carriage statute and FCC rule. *RD* (¶ 69) (ER 111).

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<sup>12</sup> The ALJ found insignificant “the absence of a written contract” between intervenors and MOJO. *RD* (n.266) (ER 111). As the ALJ explained, “the lack of a written affiliation agreement places the video programmer in a disadvantageous position” because 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.” *Id.*

### **III. WEALTHTV'S CHALLENGES TO THE FCC'S PROCEDURES LACK MERIT.**

In addition to its challenges to the sufficiency of the evidence, WealthTV challenges two aspects of the FCC's decisional process in this case – the Commission's decision to engage in a fact-specific inquiry in an adjudication conducted pursuant to the agency's program carriage rules, and its allocation of the burden of proof.

#### **A. The FCC Acted Within Its Discretion In Applying Its Program Carriage Rules In Case-By-Case Adjudication.**

WealthTV asserts that the FCC “act[ed] arbitrarily and capriciously” because it “adjudicate[d] [WealthTV's] case without defined standards, rules, or guidelines.” Br. 58; *see also id.* at 26, 53. Like several of WealthTV's other arguments, this argument is not properly before the Court because it was not raised before the agency (except in WealthTV's now-withdrawn petition for reconsideration). 47 U.S.C. § 405(a); *Fones4All Corp.*, 550 F.3d at 818.

Even if the argument were not procedurally barred, it is meritless. In the *1993 Program Carriage Order*, the FCC *did* “adopt general rules” implementing the program carriage statute's “specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements.” 9 FCC Rcd at 2648 (¶ 14). At the same time, the

agency recognized that 47 U.S.C. § 536(a)(3) did not prohibit MVPDs from engaging in “legitimate, aggressive negotiations,” or “from acquiring exclusivity rights or financial interests from programming vendors.” *Id.* The FCC accordingly determined that “the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation,” and that it therefore should “identify specific behavior that constitutes ‘coercion’ and ‘discrimination’” only “as [it] resolve[s] particular [program carriage] complaints” through case-by-case adjudication. *Id.*

This sensible approach in no way violates the Administrative Procedure Act. It has long been settled that “the choice between rulemaking and adjudication lies in the first instance within the (agency’s) discretion.” *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)); *see also Grolier, Inc. v. FTC*, 699 F.2d 983, 989 (9th Cir. 1983) (FTC did not abuse its discretion by proceeding against company through adjudication rather than by enacting standards for entire industry). Here, the agency has established rules that have been further clarified through case-by-case adjudication. If an agency may elect to proceed *entirely* via adjudication (as the authorities cited above demonstrate), it surely may adopt the approach taken by the FCC here. That

is particularly so because the Commission enjoys broad latitude to establish its own procedures. *See* 47 U.S.C. § 154(i), (j) (“[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with this Act, as may be necessary in the execution of its functions” and “may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice”). Accordingly, it was well within the FCC’s discretion to engage in case-by-case inquiry to resolve program carriage complaints.

**B. The Burden Of Proof Is Immaterial In This Case.**

Wealth TV complains (Br. 37-52) that the ALJ erred when he assigned it “both the burden of proceeding with the introduction of evidence and the burden of proof.” *RD* (¶ 58) (ER 106). But WealthTV concedes (Br. 40-41) that the ALJ’s approach did not violate any statute or rule: neither section 536(a)(3) nor the FCC’s program carriage rules (*see* 47 C.F.R. §§ 76.1300-76.1302) assign the burden of proof to either party. In fact, how to allocate the burdens of production and persuasion after a claimant has established a *prima facie* case is the subject of a pending FCC rulemaking. *See 2011 Program Carriage Order & NPRM*, 26 FCC Rcd at 11554 (¶ 79).

In the absence of controlling authority, the ALJ had “discretion to allocate the burden of proof.” *RD* (¶ 58 & n.229) (ER 106). The ALJ did not

abuse that discretion when he followed the general principle that the party seeking Commission relief has the burden to demonstrate that a violation occurred. *Id.* (¶ 58 & n.230) (ER 106) (citing *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (noting that where the statute is silent the “ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims”); 5 U.S.C. § 556(d) (providing in the absence of statutory direction that “the proponent of a rule or order has the burden of proof”)).

Furthermore, WealthTV did not challenge the ALJ’s assignment of the burdens of production and proof until “after the record ... closed to additional evidence.” *RD* (¶ 58) (ER 106); *Order* (¶ 18) (ER 141). As the ALJ noted, it would have been “fundamentally unfair” to shift the burdens to intervenors

retroactively, given that they relied on his earlier ruling when “formulating [their] litigation strategy.” *RD* (¶ 58) (ER 106-07).<sup>13</sup>

In any event, the allocation of the burden of proof made no difference in this case. As the ALJ determined, “[i]n the final analysis, the manner in which the burden of proof is allocated” was “immaterial” to his decision. *RD* (¶ 62) (ER 108). Instead, he made clear, “[w]hatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section [536(a)(3)] and section 76.1301(c) of the rules.” *Id.* The Commission likewise concluded that “the defendants would have prevailed even if they had been required to carry the burdens of production and proof,” and the agency therefore found

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<sup>13</sup> WealthTV contends (Br. 41-43) that the ALJ was bound to follow prior Media Bureau decisions that assigned the burdens of proof and persuasion to defendants. Br. 43-46. But it is well settled that the FCC “is not bound by ... staff decisions” that the agency “has not endorsed,” even if those decisions are “unchallenged.” *Comcast*, 526 F.3d at 769. Here, the sole program carriage precedent cited by WealthTV in support of its argument (Br. 41-42) consists of an order by the Media Bureau staff that was ultimately *reversed* by the Commission. *See TCR Sports Broad. Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, 25 FCC Rcd 18099, 18105 (¶ 11) (2010), *pet’n for rev. pending*, *TCR Sports Broad. Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. FCC* (4th Cir. No. 11-1151). Moreover, in reversing the Media Bureau in that case, the Commission expressly *declined* to decide whether the burden-shifting approach advocated by WealthTV applies in the program-carriage context. *Id.* at 18114 (n.111). WealthTV does not even claim – much less establish – that the ALJ’s decision to assign the burden of proof to it in this case was inconsistent with any binding Commission-level precedent.

that it did not have to “consider whether the burdens were properly allocated or WealthTV’s objection to the allocation was timely.” *Order* (¶ 18) (ER 141-42). Because the allocation of the burdens of proof was “inconsequential to the . . . determination,” it cannot provide a basis for reversal under the APA. *Stout v. Commissioner*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see also Tommasetti*, 533 F.3d at 1042; *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 648 (9th Cir. 2010).

**C. The ALJ Properly Engaged In *De Novo* Review Of Unresolved Factual Questions Designated For Hearing.**

WealthTV complains that “the ALJ gave no weight” to the Media Bureau’s *prima facie* “finding” in its *HDO* (Br. 27) when he ruled “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*.” *RD* (¶ 59) (ER 107).

WealthTV misapprehends the significance of the Media Bureau’s determination that WealthTV had made out a *prima facie* case. As the *1993 Program Carriage Order* explained, a *prima facie* case is based on the face of the threshold carriage complaint pleadings (and supporting documentation); its purpose is to weed out insubstantial claims. *See* 9 FCC Rcd at 2655 (¶ 31). Thus, as the FCC has subsequently affirmed, “a Media

Bureau finding that a complainant has established a *prima facie* case does not mean that the complainant has proven its case or any elements of its case on the merits.” *2011 Program Carriage Order & NPRM*, 26 FCC Rcd at 11505 (¶ 16).<sup>14</sup>

Moreover, the *HDO* in this case did not require the ALJ to give the *prima facie* finding any weight; to the contrary, it held that “the pleadings and supporting documentation present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims.” *HDO* (¶ 7) (ER 6); *see also id.* (¶ 58) (ER 28) (noting “several factual disputes as to whether [defendants] discriminated against WealthTV in favor of their affiliated MOJO service”). The *HDO* directed the ALJ to “resolve all factual disputes,” not some unidentified subset thereof. *Id.* (¶¶ 124, 126, 132, 138) (ER 30-31). The FCC likewise determined in its order reinstating the hearing “that the factual determinations required to fairly adjudicate these matters are best resolved through hearings

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<sup>14</sup> By analogy, a plaintiff who withstands a motion to dismiss in federal court will not necessarily withstand a motion for summary judgment, much less ultimately prevail at trial.

before an [ALJ], rather than solely through pleadings and exhibits as contemplated by the Media Bureau.” (ER 76).<sup>15</sup>

#### **IV. THE FCC PROPERLY UPHELD THE ALJ’S EVIDENTIARY RULINGS.**

WealthTV finally contends that the ALJ erred in (1) excluding certain testimony by Stephen Burke, Comcast’s former chief operating officer, in a different adjudicative proceeding before the agency, and (2) refusing to grant its request to subpoena Robert Jacobson, then-chief executive officer of iN DEMAND. Br. 63-67.

ALJs are granted “considerable discretion” to make evidentiary rulings. *Frazier*, 312 F. App’x. at 881; *see also Atlantic Pac. Constr. Co. v. NLRB*, 52 F.3d 260, 263 (9th Cir. 1995) (ALJ evidentiary rulings are reviewed under an abuse of discretion standard). The ALJ did not abuse that discretion here.

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<sup>15</sup> WealthTV suggests that the ALJ should have given dispositive effect to the Media Bureau’s finding that WealthTV had established a *prima facie* case of program carriage discrimination. Br. 27, 47. But that argument makes little sense in this context. As the ALJ explained, “[t]he 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*.” *RD* (¶ 60) (ER 107). Unlike the untested allegations in WealthTV’s complaint, the hearing evidence was developed through discovery and “tested by searching cross-examination.” *Id.* Indeed, “WealthTV withdrew evidence at hearing immediately prior to cross-examination,” and “some of the material WealthTV had presented to the Media Bureau ... was found to be unreliable at the hearing and was rejected.” *Id.*

**A. The ALJ Properly Excluded The Unauthenticated Testimony Of Mr. Burke In Another Case.**

WealthTV contends that the FCC abused its discretion when it upheld the ALJ's decision to exclude excerpts from testimony that Stephen Burke, then-chief operating officer for Comcast, had presented in a separate case regarding Comcast's view of its affiliated networks. Br 63-65. WealthTV's claim lacks merit.

WealthTV sought to introduce excerpts of Mr. Burke's testimony during its cross-examination of a different witness – Madison Bond, who was then Comcast's executive vice president for content acquisition. *Order* (¶ 34) (ER 146). Mr. Bond, however, was not competent to authenticate a transcript of testimony by Mr. Burke from an unrelated proceeding. *See* Fed. R. Evid. 901; *Orr v. Bank of Am.*, 285 F.3d 764, 776-77 (9th Cir. 2002) (transcripts of testimony from an unrelated case are inadmissible absent “a proper foundation laid to authenticate them”); *Beyene v. Coleman Sec. Servs., Inc.*,

854 F.2d 1179, 1182 (9th Cir. 1988) (same).<sup>16</sup> Whether WealthTV might have sought to introduce the testimony on a different basis is immaterial because WealthTV made no “further effort ... at any other time to introduce this evidence pursuant to appropriate procedures.” *Order* (¶ 35) (ER 146).<sup>17</sup>

More fundamentally, even if the ALJ had erred, any error would have been harmless. There is no reason to think that a single statement by Mr. Burke in an unrelated case could offset the overwhelming weight of the evidence contradicting WealthTV’s claims of unlawful discrimination by the intervenors – evidence the FCC and the ALJ (who observed the demeanor of many witnesses) found to be reliable and credible. *See Order* (¶¶ 28-31) (ER

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<sup>16</sup> WealthTV contends that “because Burke had made his statements under oath before the same ALJ, WealthTV did not need to authenticate them.” Br. 64. That is incorrect. Had the ALJ himself purported to authenticate Mr. Burke’s testimony, he would have become a witness for WealthTV, in violation of Fed. R. Evid. § 605. *Cf., United States v. Pritchett*, 699 F.2d 317, 318-20 (6th Cir. 1983) (where prosecutor was unable to establish that individual had a prior conviction, presiding judge remarked that he had previously sentenced the individual; reviewing court characterized judge’s remark as “improper testimony” because it “confirmed what the prosecutor had unsuccessfully attempted to solicit”).

<sup>17</sup> WealthTV’s reliance on the hearsay rule as it relates to party admissions is misplaced. Br. 63-65. As the FCC explained, the hearsay rule “was not the basis for the ALJ’s ruling” excluding Mr. Burke’s prior testimony. *Order* (¶ 34) (ER 146). The ALJ excluded that testimony because WealthTV could not authenticate the transcript of Mr. Burke’s testimony through cross-examination of Mr. Bond – not because the testimony was otherwise inadmissible hearsay. *Id.*

144-45). Thus, even if the ALJ's evidentiary ruling was incorrect, any error was harmless. *See* 5 U.S.C. § 706 (judicial review of administrative action shall take "due account . . . of the rule of prejudicial error"); *Molina v. Astrue*, \_\_\_ F.3d \_\_\_, No. 10-16578, 2012 WL 1071637, at \*7-\*13 (9th Cir. Apr. 2, 2012) (finding ALJ's decision to discount lay testimony harmless); *Tommasetti*, 533 F.3d at 1038; *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989) (upholding order of Federal Trade Commission substantially affirming ALJ's decision where any error in ALJ's exclusion of witness' testimony was harmless).

**B. The ALJ Properly Denied WealthTV's Untimely Request To Compel Mr. Jacobson To Testify.**

For similar reasons, WealthTV provides no grounds to remand the *Order* based on the ALJ's denial of WealthTV's request to subpoena Mr. Jacobson.

WealthTV acknowledges (Br. 66) that it "left Jacobson off its initial witness list because it anticipated that Charles Herring would be able to testify about iN DEMAND's policies." *See also Order* (¶ 37) (ER 147). When intervenors challenged the admissibility of portions of Mr. Herring's testimony "as improper expert testimony and hearsay," WealthTV sought to have Mr. Jacobson testify in Mr. Herring's stead. *Id.* The FCC properly found that WealthTV "should not have been surprised by the defendants'

challenge to those portions of [Mr. Herring's] proposed testimony.” *Id.* Mr. Herring – president of WealthTV – had no personal knowledge of iN DEMAND’s business decisions, and any supposed testimony he might have offered as to iN DEMAND’s policies was unnecessary: a fact witness with relevant knowledge (David Asch, iN DEMAND’s executive vice president for programming) was available to testify about those very issues and in fact did so. *Id.* (¶ 37 n.91) (ER 147). *See, e.g., Geschke v. Astrue*, 393 F. App’x 470, 473 (9th Cir. 2010) (upholding ALJ’s discretion to decline to compel testimony of witness that was not necessary to the proceedings).<sup>18</sup> Moreover, in denying WealthTV’s motion to compel Mr. Jacobson’s appearance, the ALJ expressly permitted WealthTV to further seek his testimony if Mr. Asch’s testimony proved insufficient.<sup>19</sup>

WealthTV claims that the Commission abused its discretion in upholding the ALJ’s denial of WealthTV’s untimely pre-hearing request to

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<sup>18</sup> Mr. Asch testified about iN DEMAND’s business decisions and strategies, including target audience and demographics, and WealthTV had an opportunity to cross examine him on those topics. *See* Tr. at 4281-4412 (ER 1671-1793).

<sup>19</sup> *See* Tr. at 2162-63 (ER 354-55) (stating that, if Mr. “Asch turns out to be a recalcitrant witness or if Asch is a reluctant witness or if Asch is in any way giving me a hard time, I’ll reconsider, but if it appears that Asch is telling the truth and he knows enough about the situation to tell us what we need to know, then Mr. Jacobson can stay home or do whatever he does”).

compel Mr. Jacobson's appearance because no FCC rule specifically "requires a party to renew a motion" in order to appeal its denial. Br. 66-67. But if, after the testimony of Mr. Herring and Mr. Asch, WealthTV believed that the record was somehow deficient regarding iN DEMAND's business decisions and strategies, it was incumbent upon WealthTV to renew its motion and explain what relevant, non-duplicative testimony Mr. Jacobson could provide. *Order* (¶ 37) (ER 147). WealthTV failed to do so.

Finally, as with the testimony of Mr. Burke, WealthTV nowhere explains how the denial of its request to subpoena Mr. Jacobson could have made a difference to the outcome in this case. *See* pp. 56-57, above. WealthTV asserts that it needed Jacobson's testimony to lay a foundation for proffering various iN DEMAND "press releases about MOJO" and unspecified statements by Jacobson "for the truth of the matter asserted." Br. 67. But such a vague and conclusory allegation falls far short of carrying WealthTV's burden of showing that the FCC's decision was unsupported by substantial evidence.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied.

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**STATEMENT OF PENDENCY OF OTHER RELATED  
PROCEEDINGS OR CASES**

The Order on review has not previously been before this Court or any other court, and counsel is not aware of any related case before this or any other court.

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April 24, 2012

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Signature Maureen K. Flood

Attorney for Federal Communications Commission

Date April 24, 2012

## **STATUTORY AND REGULATORY APPENDIX**

**5 U.S.C. § 556**

**5 U.S.C. § 706**

**47 U.S.C. § 154**

**47 U.S.C. § 402**

**47 U.S.C. § 405**

**47 U.S.C. § 409**

**47 U.S.C. § 536**

**47 C.F.R. § 76.1300**

**47 C.F.R. § 76.1301**

**47 C.F.R. § 76.1302**

**5 U.S.C. § 556**

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence--

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may--

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a

material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

## 5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## 47 U.S.C. § 154

### a) Number of commissioners; appointment

The Federal Communications Commission (in this chapter referred to as the “Commission”) shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

### (b) Qualifications

**(1)** Each member of the Commission shall be a citizen of the United States.

**(2)(A)** No member of the Commission or person employed by the Commission shall--

**(i)** be financially interested in any company or other entity engaged in the manufacture or sale of telecommunications equipment which is subject to regulation by the Commission;

**(ii)** be financially interested in any company or other entity engaged in the business of communication by wire or radio or in the use of the electromagnetic spectrum;

**(iii)** be financially interested in any company or other entity which controls any company or other entity specified in clause (i) or clause (ii), or which derives a significant portion of its total income from ownership of stocks, bonds, or other securities of any such company or other entity; or

**(iv)** be employed by, hold any official relation to, or own any stocks, bonds, or other securities of, any person significantly regulated by the Commission under this chapter;

except that the prohibitions established in this subparagraph shall apply only to financial interests in any company or other entity which has a significant interest in communications, manufacturing, or sales activities which are subject to regulation by the Commission.

**(B)(i)** The Commission shall have authority to waive, from time to time, the application of the prohibitions established in subparagraph (A) to persons employed by the Commission if the Commission determines that the financial interests of a person which are involved in a particular case are minimal, except that such waiver authority shall be subject to the provisions of [section 208 of Title 18](#). The waiver authority established in this subparagraph shall not apply with respect to members of the Commission.

**(ii)** In any case in which the Commission exercises the waiver authority established in this subparagraph, the Commission shall publish notice of such action in the Federal Register and shall furnish notice of such action to the appropriate committees of each House of the Congress. Each such notice shall include information regarding the identity of the person receiving the waiver, the position held by such person, and the nature of the financial interests which are the subject of the waiver.

**(3)** The Commission, in determining whether a company or other entity has a significant interest in communications, manufacturing, or sales activities which are subject to regulation by the Commission, shall consider (without excluding other relevant factors)--

**(A)** the revenues, investments, profits, and managerial efforts directed to the related communications, manufacturing, or sales activities of the company or other entity involved, as compared to the other aspects of the business of such company or other entity;

**(B)** the extent to which the Commission regulates and oversees the activities of such company or other entity;

**(C)** the degree to which the economic interests of such company or other entity may be affected by any action of the Commission; and

**(D)** the perceptions held by the public regarding the business activities of such company or other entity.

**(4)** Members of the Commission shall not engage in any other business, vocation, profession, or employment while serving as such members.

**(5)** The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.

**(c)** Terms of office; vacancies

Commissioners shall be appointed for terms of five years and until their successors are appointed and have been confirmed and taken the oath of office, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

**(d)** Compensation of Commission members

Each Commissioner shall receive an annual salary at the annual rate payable from time to time for level IV of the Executive Schedule, payable in monthly installments. The Chairman of the Commission, during the period of his service as Chairman, shall receive an annual salary at the annual rate payable from time to time for level III of the Executive Schedule.

**(e)** Principal office; special sessions

The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

**(f)** Employees and assistants; compensation of members of Field Engineering and Monitoring Bureau; use of amateur volunteers for certain purposes; commercial radio operator examinations

**(1)** The Commission shall have authority, subject to the provisions of the civil-service laws and chapter 51 and subchapter III of chapter 53 of Title 5, to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other

employees as are necessary in the exercise of its functions.

(2) Without regard to the civil-service laws, but subject to chapter 51 and subchapter III of chapter 53 of Title 5, each commissioner may appoint three professional assistants and a secretary, each of whom shall perform such duties as such commissioner shall direct. In addition, the chairman of the Commission may appoint, without regard to the civil-service laws, but subject to chapter 51 and subchapter III of chapter 53 of Title 5, an administrative assistant who shall perform such duties as the chairman shall direct.

(3) The Commission shall fix a reasonable rate of extra compensation for overtime services of engineers in charge and radio engineers of the Field Engineering and Monitoring Bureau of the Federal Communications Commission, who may be required to remain on duty between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian or on Sundays or holidays to perform services in connection with the inspection of ship radio equipment and apparatus for the purposes of part II of subchapter III of this chapter or the Great Lakes Agreement, on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond 5 o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from 5 o'clock postmeridian to 8 o'clock antemeridian) and two additional days' pay for Sunday or holiday duty. The said extra compensation for overtime services shall be paid by the master, owner, or agent of such vessel to the local United States collector of customs or his representative, who shall deposit such collection into the Treasury of the United States to an appropriately designated receipt account: *Provided*, That the amounts of such collections received by the said collector of customs or his representatives shall be covered into the Treasury as miscellaneous receipts; and the payments of such extra compensation to the several employees entitled thereto shall be made from the annual appropriations for salaries and expenses of the Commission: *Provided further*, That to the extent that the annual appropriations which are authorized to be made from the general fund of the Treasury are insufficient, there are authorized to be appropriated from the general fund of the Treasury such additional amounts as may be necessary to the extent that the amounts of such receipts are in excess of the amounts appropriated: *Provided further*, That such extra compensation shall be paid if such field employees have been ordered to report for duty and have so reported whether the actual inspection of the radio equipment or apparatus takes place or not: *And provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the engineers in charge are vested with authority to regulate the hours of such

employees so as to agree with prevailing working hours in said ports where inspections are to be made, but nothing contained in this proviso shall be construed in any manner to alter the length of a working day for the engineers in charge and radio engineers or the overtime pay herein fixed: and *Provided further*, That, in the alternative, an entity designated by the Commission may make the inspections referred to in this paragraph.

**(4)(A)** The Commission, for purposes of preparing or administering any examination for an amateur station operator license, may accept and employ the voluntary and uncompensated services of any individual who holds an amateur station operator license of a higher class than the class of license for which the examination is being prepared or administered. In the case of examinations for the highest class of amateur station operator license, the Commission may accept and employ such services of any individual who holds such class of license.

**(B)(i)** The Commission, for purposes of monitoring violations of any provision of this chapter (and of any regulation prescribed by the Commission under this chapter) relating to the amateur radio service, may--

**(I)** recruit and train any individual licensed by the Commission to operate an amateur station; and

**(II)** accept and employ the voluntary and uncompensated services of such individual.

**(ii)** The Commission, for purposes of recruiting and training individuals under clause (i) and for purposes of screening, annotating, and summarizing violation reports referred under clause (i), may accept and employ the voluntary and uncompensated services of any amateur station operator organization.

**(iii)** The functions of individuals recruited and trained under this subparagraph shall be limited to--

**(I)** the detection of improper amateur radio transmissions;

**(II)** the conveyance to Commission personnel of information which is essential to the enforcement of this chapter (or regulations prescribed by the Commission

under this chapter) relating to the amateur radio service; and

**(III)** issuing advisory notices, under the general direction of the Commission, to persons who apparently have violated any provision of this chapter (or regulations prescribed by the Commission under this chapter) relating to the amateur radio service.

Nothing in this clause shall be construed to grant individuals recruited and trained under this subparagraph any authority to issue sanctions to violators or to take any enforcement action other than any action which the Commission may prescribe by rule.

**(C)(i)** The Commission, for purposes of monitoring violations of any provision of this chapter (and of any regulation prescribed by the Commission under this chapter) relating to the citizens band radio service, may--

**(I)** recruit and train any citizens band radio operator; and

**(II)** accept and employ the voluntary and uncompensated services of such operator.

**(ii)** The Commission, for purposes of recruiting and training individuals under clause (i) and for purposes of screening, annotating, and summarizing violation reports referred under clause (i), may accept and employ the voluntary and uncompensated services of any citizens band radio operator organization. The Commission, in accepting and employing services of individuals under this subparagraph, shall seek to achieve a broad representation of individuals and organizations interested in citizens band radio operation.

**(iii)** The functions of individuals recruited and trained under this subparagraph shall be limited to--

**(I)** the detection of improper citizens band radio transmissions;

**(II)** the conveyance to Commission personnel of information which is essential to the enforcement of this chapter (or regulations prescribed by the Commission under this chapter) relating to the citizens band radio service; and

**(III)** issuing advisory notices, under the general direction of the Commission, to persons who apparently have violated any provision of this chapter (or regulations prescribed by the Commission under this chapter) relating to the citizens band radio service.

Nothing in this clause shall be construed to grant individuals recruited and trained under this subparagraph any authority to issue sanctions to violators or to take any enforcement action other than any action which the Commission may prescribe by rule.

**(D)** The Commission shall have the authority to endorse certification of individuals to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services (as defined by the Commission by rule) if such certification programs are conducted by organizations or committees which are representative of the users in those services and which consist of individuals who are not officers or employees of the Federal Government.

**(E)** The authority of the Commission established in this paragraph shall not be subject to or affected by the provisions of [part III of Title 5 or section 1342 of Title 31](#).

**(F)** Any person who provides services under this paragraph shall not be considered, by reason of having provided such services, a Federal employee.

**(G)** The Commission, in accepting and employing services of individuals under subparagraphs (A) and (B), shall seek to achieve a broad representation of individuals and organizations interested in amateur station operation.

**(H)** The Commission may establish rules of conduct and other regulations governing the service of individuals under this paragraph.

**(I)** With respect to the acceptance of voluntary uncompensated services for the preparation, processing, or administration of examinations for amateur station operator licenses pursuant to subparagraph (A) of this paragraph, individuals, or organizations which provide or coordinate such authorized volunteer services may recover from examinees reimbursement for out-of-pocket costs.

**(5)(A)** The Commission, for purposes of preparing and administering any examination for a commercial radio operator license or endorsement, may accept and employ the services of persons that the Commission determines to be qualified. Any person so employed may not receive compensation for such services, but may recover from examinees such fees as the Commission permits, considering such factors as public service and cost estimates submitted by such person.

**(B)** The Commission may prescribe regulations to select, oversee, sanction, and dismiss any person authorized under this paragraph to be employed by the Commission.

**(C)** Any person who provides services under this paragraph or who provides goods in connection with such services shall not, by reason of having provided such service or goods, be considered a Federal or special government employee.

**(g)** Expenditures

**(1)** The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, for printing and binding, for land for use as sites for radio monitoring stations and related facilities, including living quarters where necessary in remote areas, for the construction of such stations and facilities, and for the improvement, furnishing, equipping, and repairing of such stations and facilities and of laboratories and other related facilities (including construction of minor subsidiary buildings and structures not exceeding \$25,000 in any one instance) used in connection with technical research activities), as may be necessary for the execution of the functions vested in the Commission and as may be appropriated for by the Congress in accordance with the authorizations of appropriations established in [section 156](#) of this title. All expenditures of the Commission, including all necessary expenses for transportation incurred by the commissioners or by their employees, under their orders, in making any investigation or upon any official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission or by such other member or officer thereof as may be designated by the Commission for that purpose.

**(2)(A)** If--

**(i)** the necessary expenses specified in the last sentence of paragraph (1) have been incurred for the purpose of enabling commissioners or employees of the Commission to attend and participate in any convention, conference, or meeting;

**(ii)** such attendance and participation are in furtherance of the functions of the Commission; and

**(iii)** such attendance and participation are requested by the person sponsoring such convention, conference, or meeting;

then the Commission shall have authority to accept direct reimbursement from such sponsor for such necessary expenses.

**(B)** The total amount of unreimbursed expenditures made by the Commission for travel for any fiscal year, together with the total amount of reimbursements which the Commission accepts under subparagraph (A) for such fiscal year, shall not exceed the level of travel expenses appropriated to the Commission for such fiscal year.

**(C)** The Commission shall submit to the appropriate committees of the Congress, and publish in the Federal Register, quarterly reports specifying reimbursements which the Commission has accepted under this paragraph.

**(D)** The provisions of this paragraph shall cease to have any force or effect at the end of fiscal year 1994.

**(E)** Funds which are received by the Commission as reimbursements under the provisions of this paragraph after the close of a fiscal year shall remain available for obligation.

**(3)(A)** Notwithstanding any other provision of law, in furtherance of its functions the Commission is authorized to accept, hold, administer, and use unconditional gifts, donations, and bequests of real, personal, and other property (including voluntary and uncompensated services, as authorized by [section 3109 of Title 5](#)).

**(B)** The Commission, for purposes of providing radio club and military-recreational call signs, may utilize the voluntary, uncompensated, and unreimbursed services of amateur radio organizations authorized by the Commission that have tax-exempt status under [section 501\(c\)\(3\) of Title 26](#).

**(C)** For the purpose of Federal law on income taxes, estate taxes, and gift taxes, property or services accepted under the authority of subparagraph (A) shall be deemed to be a gift, bequest, or devise to the United States.

**(D)** The Commission shall promulgate regulations to carry out the provisions of this paragraph. Such regulations shall include provisions to preclude the acceptance of any gift, bequest, or donation that would create a conflict of interest or the appearance of a conflict of interest.

**(h)** Quorum; seal

Three members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed.

**(i)** Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

**(j)** Conduct of proceedings; hearings

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) Annual reports to Congress

The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain-

(1) such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy;

(2) such information and data concerning the functioning of the Commission as will be of value to Congress in appraising the amount and character of the work and accomplishments of the Commission and the adequacy of its staff and equipment;

(3) an itemized statement of all funds expended during the preceding year by the Commission, of the sources of such funds, and of the authority in this chapter or elsewhere under which such expenditures were made; and

(4) specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Office of Management and Budget.

(l) Record of reports

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

(m) Publication of reports; admissibility as evidence

The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

(n) Compensation of appointees

Rates of compensation of persons appointed under this section shall be subject to the reduction applicable to officers and employees of the Federal Government generally.

(o) Use of communications in safety of life and property

For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.

## 47 U.S.C. § 402

### (a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

### (b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

- (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
- (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
- (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
- (7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
- (8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person

who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

**47 U.S.C. § 405**

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

## 47 U.S.C. § 409

### a) Filing of initial decisions; exceptions

In every case of adjudication (as defined in section 551 of Title 5) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

### (b) Exceptions to initial decisions; memoranda; determination of Commission or authority within Commission; prohibition against consideration of own decision

In every case of adjudication (as defined in section 551 of Title 5) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 155(d)(1) of this title: Provided, however, That such authority shall not be the same authority which made the decision to which the exception is taken.

### (c) Notice and opportunity for participation by parties; applicability of administrative procedure provisions

(1) In any case of adjudication (as defined in section 551 of Title 5) which has been designated by the Commission for a hearing, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 155(d)(1) of this title, unless upon notice and opportunity for all parties to participate.

(2) The provision in section 554(d) of Title 5 which states that such subsection shall not apply in determining applications for initial licenses, shall not be

applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.

(d) Applicability of administrative procedure provisions

To the extent that the foregoing provisions of this section and section 155(d) of this title are in conflict with the provisions of subchapter II of chapter 5, and chapter 7, of Title 5, such provisions of this section and section 155(d) of this title shall be held to supersede and modify the provisions of subchapter II of chapter 5, and chapter 7, of Title 5.

(e) Subpenas; witnesses; production of documents; fees and mileage

For the purposes of this chapter the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(f) Designated place of hearing; aid in enforcement of orders

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(g) Contempts

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(h) Depositions

The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States magistrate judge, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided.

(i) Oaths; testimony in writing

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(j) Foreign depositions

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(k) Deposition fees

Witnesses whose depositions are taken as authorized in this chapter, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(l) Repealed. Pub.L. 91-452, Title II, § 242, Oct. 15, 1970, 84 Stat. 930

(m) Penalties

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$100 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

## 47 U.S.C. § 536

### (a) Regulations

Within one year after October 5, 1992, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

- (1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
- (2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;
- (3) contain provisions designed to 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;
- (4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;
- (5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and
- (6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

### (b) "Video programming vendor" defined

As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

## **47 C.F.R. 76.1300**

a) Affiliated. For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(b) Attributable interest. The term “attributable interest” shall be defined by reference to the criteria set forth in Notes 1 through 5 to § 76.501 provided, however, that:

(1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and

(2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(c) Buying groups. The term “buying group” or “agent,” for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

(d) Multichannel video programming distributor. The term “multichannel video programming distributor” means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(e) Video programming vendor. The term “video programming vendor” means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

**47 U.S.C. § 76.1301**

(a) Financial interest. No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) Exclusive rights. No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) Discrimination. 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.

## **47 C.F.R. § 76.1302**

(a) Complaints. Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint. The complaint shall be filed and responded to in accordance with the procedures specified in § 76.7 of this part with the following additions or changes:

(b) Prefiling notice required. Any aggrieved video programming vendor or multichannel video programming distributor intending to file a complaint under this section must first notify the potential defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in § 76.1301 of this part. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(c) Contents of complaint. In addition to the requirements of § 76.7, a carriage agreement complaint shall contain:

(1) Whether the complainant is a multichannel video programming distributor or video programming vendor, and, in the case of a multichannel video programming distributor, identify the type of multichannel video programming distributor, the address and telephone number of the complainant, what type of multichannel video programming distributor the defendant is, and the address and telephone number of each defendant;

(2) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(3) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (b) of this section has been made.

(d) Prima facie case. In order to establish a prima facie case of a violation of § 76.1301, the complaint must contain evidence of the following:

(1) The complainant is a video programming vendor as defined in section 616(b) of the Communications Act of 1934, as amended, and § 76.1300(e) or a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d);

(2) The defendant is a multichannel video programming distributor as defined in section 602(13) of the Communications Act of 1934, as amended, and § 76.1300(d); and

(3)(i) Financial interest. In a complaint alleging a violation of § 76.1301(a), documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant required a financial interest in any program service as a condition for carriage on one or more of such defendant's systems.

(ii) Exclusive rights. In a complaint alleging a violation of § 76.1301(b), documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant coerced a video programming vendor to provide, or retaliated against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(iii) Discrimination. In a complaint alleging a violation of § 76.1301(c):

(A) Evidence that the conduct alleged has the effect of unreasonably restraining the ability of an unaffiliated video programming vendor to compete fairly; and

(B)(1) Documentary evidence or testimonial evidence (supported by an affidavit from a representative of the complainant) that supports the claim that the defendant discriminated 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; or

(2)(i) Evidence that the complainant provides video programming that is similarly situated to video programming provided by a video programming vendor affiliated (as defined in § 76.1300(a)) with the defendant multichannel video programming distributor, based on a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors; and

(ii) Evidence that the defendant multichannel video programming distributor has treated the video programming provided by the complainant differently than the similarly situated, affiliated video programming described in paragraph (d)(3)(iii)(B)(2)(i) of this section with respect to the selection, terms, or conditions for carriage.

(e) Answer.

(1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within sixty (60) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall address the relief requested in the complaint, including legal and documentary support, for such response, and may include an alternative relief proposal without any prejudice to any denials or defenses raised.

(f) Reply. Within twenty (20) days after service of an answer, unless otherwise directed by the Commission, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters.

(g) Prima facie determination.

(1) Within sixty (60) calendar days after the complainant's reply to the defendant's answer is filed (or the date on which the reply would be due if none is filed), the Chief, Media Bureau shall release a decision determining whether the complainant has established a prima facie case of a violation of § 76.1301.

(2) The Chief, Media Bureau may toll the sixty (60)-calendar-day deadline under the following circumstances:

(i) If the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) If complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(3) A finding that the complainant has established a prima facie case of a violation of § 76.1301 means that the complainant has provided sufficient evidence in its complaint to allow the case to proceed to a ruling on the merits.

(4) If the Chief, Media Bureau finds that the complainant has not established a prima facie case of a violation of § 76.1301, the Chief, Media Bureau will dismiss the complaint.

(h) Time limit on filing of complaints. Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or

(2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or

(3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section.

(i) Deadline for decision on the merits.

(1)(i) For program carriage complaints that the Chief, Media Bureau decides on the merits based on the complaint, answer, and reply without discovery, the Chief, Media Bureau shall release a decision on the merits within sixty (60) calendar days after the Chief, Media Bureau's prima facie determination.

(ii) For program carriage complaints that the Chief, Media Bureau decides on the merits after discovery, the Chief, Media Bureau shall release a decision on the merits within 150 calendar days after the Chief, Media Bureau's prima facie determination.

(iii) The Chief, Media Bureau may toll these deadlines under the following circumstances:

(A) If the complainant and defendant jointly request that the Chief, Media Bureau toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(B) If complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness.

(2) For program carriage complaints that the Chief, Media Bureau refers to an administrative law judge for an initial decision, the deadlines set forth in § 0.341(f) of this chapter apply.

(j) Remedies for violations--

(1) Remedies authorized. Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of a video programming vendor's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of a video programming vendor's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor to delete existing programming from its system to accommodate carriage of a video programming vendor's programming. In such instances, if the defendant seeks review of the staff, or administrative law judge decision, the order for carriage of a video programming vendor's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the video programming vendor's programming for an additional period equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) Additional sanctions. The remedies provided in paragraph (j)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

(k) Petitions for temporary standstill.

(1) A program carriage complainant seeking renewal of an existing programming contract may file a petition along with its complaint requesting a temporary standstill of the price, terms, and other conditions of the existing programming contract pending resolution of the complaint. To allow for sufficient time to consider the petition for temporary standstill prior to the expiration of the existing programming contract, the petition for temporary standstill and complaint shall be filed no later than thirty (30) days prior to the expiration of the existing programming contract. In addition to the requirements of § 76.7, the complainant shall have the burden of proof to demonstrate the following in its petition:

- (i) The complainant is likely to prevail on the merits of its complaint;
- (ii) The complainant will suffer irreparable harm absent a stay;
- (iii) Grant of a stay will not substantially harm other interested parties; and
- (iv) The public interest favors grant of a stay.

(2) The defendant multichannel video programming distributor upon which a petition for temporary standstill is served shall answer within ten (10) days of service of the petition, unless otherwise directed by the Commission.

(3) If the Commission grants the temporary standstill, the adjudicator deciding the case on the merits (i.e., either the Chief, Media Bureau or an administrative law judge) will provide for remedies that are applied as of the expiration date of the previous programming contract.

**11-73134**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Herring Broadcasting, Inc., Petitioner**

**v.**

**Federal Communications Commission and the United States of  
America, Respondents.**

**CERTIFICATE OF SERVICE**

I, Maureen K. Flood, hereby certify that on April 24, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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