

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

HERRING BROADCASTING, INC.,)	
Complainant,)	
)	
v.)	File No. CSR-7709-P
)	
TIME WARNER CABLE, INC.)	
Defendant)	

**MOTION SEEKING LEAVE TO FILE OPPOSITION AND RESPONSE TO MOTION
TO STRIKE**

To The Commission:

WealthTV regrets the necessity of another filing in this matter, but it seeks leave to file this Opposition and Response to the Motion to Strike of Time Warner Cable, Inc. (TWC), which was filed in contradiction of Commission rules on March 11, 2008. WealthTV offers the following points:

1. The Motion to Strike, at 21 pages in length, is an attempted Surreply. This is not permitted by the Commission's rules. Such a filing also offends the goal of the rules to provide a streamlined adjudication of allegations of discrimination. Surplus pleadings by an incumbent MVPD with substantial resources force new entrants such as WealthTV into expensive extra pleading cycles and denies the complainant the "expeditious" outcome that the statute instructs the Commission to supply. For these reason, the

Commission should not accept TWC's motion for filing and should disregard it as it is an unauthorized pleading.

2. This is the second time that TWC has offered an unauthorized filing in this case, especially problematic because this case is a restricted proceeding.¹ WealthTV requests that the Commission promptly convene a status conference to instruct the parties as to which additional pleadings, if any, would be useful and acceptable to the Commission and to establish a timeline for adjudication of the matter.
3. Beyond these procedural deficiencies, the Motion to Strike is without merit and if it is considered by the Commission, it should be denied. WealthTV's reply offers no new matter, contrary to TWC's allegations. Each of the affidavits and each of the arguments in the body of the reply responds to matters raised in TWC's answer. The material in the reply is responsive to the answer and could not have been raised earlier in the complaint itself because TWC's counterarguments to the complaint were not known until they were articulated in TWC's answer.²
4. Mr. Herring's Supplemental Affidavit specifically addressed questions raised in the TWC Answer to the original Complaint. For example, TWC's Answer denied the significance of the 20 million viewer threshold that independent programmers, including WealthTV, have discovered is required to make an independent channel attractive to advertisers and, thus, financially viable. In his Supplemental Affidavit, Mr. Herring rebutted TWC's dismissal of the importance of the threshold by explaining its context. In any event, the

¹ On February 22, 2008, TWC filed in this docket a letter in which it offered a preemptive defense of the independence of one of its declarants.

² The relevant Commission rule is 76 C.F.R. § 1302(e):

(e) *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.

viewership threshold is well known to the Commission; it was extensively discussed in the docket in the Adelphia transaction docket.

5. Additionally, in *Classic Sports Network v. Cablevision* the Commission entertained a supplemental affidavit attached to the reply. The Reply of Classic Sports Network (CSN) to the Answer of Cablevision Systems Corporation included a “Supplemental Affidavit” from CSN President Stephen Greenburg that specifically addressed questions raised in the Cablevision Answer, from “Rate Issues” to “Channel Capacity” to “Cablevision’s Disparagement of CSN” to the “Timing of the Complaint,” and many more.³
6. Likewise, the affidavits of Mark Kersey and Jedd Palmer should not be struck merely because they are “new declarants...who were not cited or otherwise mentioned in the Complaint.”⁴ WealthTV’s is permitted in its reply to rebut what is contained in the answer. Mark Kersey, the president of a market research firm, presented an analysis of WealthTV viewer data in direct rebuttal of TWC’s assertion, supported by the declaration of Stacie Gray, that WealthTV and MOJO appeal to distinct demographics.⁵ Jedd Palmer, a 25-plus year veteran of the cable industry, submitted an affidavit that, based on his experience in the industry and his analysis of both WealthTV and MOJO, rebutted the assertion of TWC and their “independent” expert Michal Egan, that MOJO and WealthTV are not substantially similar services.⁶
7. Additionally, WealthTV notes that the Commission’s general pleading rules for Part 76, to which the pleading rules in § 76.1302 are supplements, not

³ See: Complainant’s Reply to Defendant’s Answer, *In Re Classic Sports Network, Inc. v. Cablevision Systems Corporation*, CSR-4975-P (sub. May 12, 1997).

⁴ See: TWC, Motion to Strike, CSR-7709-P, (sub. Mar. 11, 2008), at 8.

⁵ See: TWC Answer, at 18 and 19; *See Also*: Declaration of Stacie Gray, appended to the TWC Answer as Exhibit 9

⁶ See: TWC Answer, at 21; *See Also*: Declaration of Michael Egan, appended to the TWC Answer as Exhibit 8

replacements, specifically invite and require submission of affidavits in support of a reply. Section 76.7 (c) (1) provides as follows:

The petitioner or complainant may file a reply to a responsive pleading which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. Unless expressly permitted by the Commission, reply comments and replies to an answer shall not contain new matters.

CONCLUSION

For all of the foregoing reasons, WealthTV requests that the Commission accept this pleading, and that the Motion to Strike be rejected for filing and disregarded by the Commission, or, in the alternative, if considered by the Commission, denied. Further, WealthTV requests the prompt scheduling of a status conference to clarify which additional pleadings, if any, may be filed in this matter, and to establish a timeline for resolution of this case.

Respectfully submitted,

WealthTV
By Its Attorney
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BY: //signed//
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