

Telecommunications Alert: Major Cable Operators Did Not Discriminate against Unaffiliated Programmer, Wealth TV, FCC Judge Finds

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A recommended decision issued this week by a Federal Communications Commission (FCC) Administrative Law Judge (ALJ) found that four major cable operators¹ did not unlawfully discriminate against independent programmer Wealth TV in favor of another programming channel, MOJO, that was affiliated with the cable operators.² The decision by Chief ALJ Richard L. Sippel, the first to interpret the scope of the FCC's program carriage rules, establishes that program carriage complainants (1) bear the burden of proof and (2) will be required to present real evidence of discrimination, including evidence that the discrimination created an inability for the independent programmer to compete fairly. If this ALJ recommended decision is ratified by the FCC Commissioners, the cable industry will have a strong precedent to assist it in similar program carriage disputes now pending or filed in the future.

Background: Cable Operator Discrimination in Favor of Affiliated Programming Prohibited

The Communications Act and implementing FCC rules prohibit multichannel video programming distributors (MVPDs) (such as cable and DBS operators) from restraining the ability of an unaffiliated programmer to compete by discriminating in favor of programmers affiliated with the MVPDs in the “selection, terms, or conditions for carriage of video programming.”³ The rules are intended to address concerns that vertically integrated video distributors may have both the ability and incentive to discriminate in favor of their own programming affiliates when selecting the networks to offer over their cable or other video systems. Judge Sippel explained that the rules should not, however, have the unintended consequence of “precluding legitimate business practices common to a competitive market” and were designed to “strike a balance” to preserve the ability of parties to “engage in legitimate negotiations.”⁴ Consequently, a program carriage rule violation will be found only where a complaining programmer can prove **both** (1) discrimination in favor of affiliated programmers in making programming decisions, **and** (2) that the discrimination had an anti-competitive effect by unreasonably restraining the ability of the unaffiliated programmer to compete.⁵

Precedent Established: Burden of Proof Assigned to Complaining Programmer

Judge Sippel rebuffed Wealth TV's assertion that it had established a *prima facie* case of discrimination in its complaint, and had therefore shifted the burden of proof to the cable companies to show that they had not violated the anti-discrimination provisions. While the FCC Media Bureau suggested a *prima facie* case had been established when it first referred the case to the ALJ, the judge rejected that assessment as an "untested prehearing 'finding' by the Media Bureau" and relied instead on his own prehearing order placing the burden of proof on Wealth TV.⁶ Absent any direction to the contrary in the FCC's rules or the official hearing designation order from the Media Bureau, the presiding judge found he had discretion to allocate the burden of proof.

Wealth TV Failed To Meet Evidentiary Standards for a Finding of Discrimination by Cable Operators

To establish a charge of discrimination on a theory of disparate treatment, Wealth TV needed to prove that the fact that it was unaffiliated with the cable operators actually played a role in the cable operators' program carriage determination processes and had a determinative effect on the outcome. The judge explained that Wealth TV could do that by showing "direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence, such as uneven treatment of similarly situated entities."⁷ ALJ Sippel concluded that Wealth TV had "failed completely" to make the required showing.

Judge Sippel concluded that, in fact, the preponderance of the evidence established that "Wealth TV's status as an independent programming vendor played no role" in the cable company decisions not to carry its programming. Instead, the record showed that the cable companies "based their separate decisions not to carry Wealth TV on...non-discriminatory business reasons."⁸

Wealth TV's claim to circumstantial evidence of disparate treatment also failed because it was unable to establish that it was similarly situated to the cable company-affiliated programming that it claimed received preference.⁹ The record showed that Wealth TV and MOJO "aired different types of programming and targeted different demographic groups."¹⁰ To establish a claim, Judge Sippel said, the complainant must not only show disparate treatment, but must "establish a nexus between the disparate treatment and the programming vendor's affiliation or non-affiliation with the MVPD."¹¹

Cable Company Defense Cannot Rely on Antitrust Standards

Judge Sippel rejected cable company arguments that the standard for proof that discriminatory conduct "unreasonably restrain[s]" an unaffiliated programmer in its "ability to compete fairly" should rely on antitrust standards. Applying antitrust standards, the judge said, "would permit MVPDs to engage even in intentional and significant discrimination... simply by showing that they have a relatively small percentage of overall subscribers or that a large proportion of

viewers subscribe to MVPDs that are not vertically integrated.”¹² The judge also rejected cable company arguments that Wealth TV was not harmed because it could obtain carriage from other MVPDs, saying that if that “argument were to prevail, virtually no MVPD ever would be found to have violated” the program carriage rules.¹³

Wealth TV Failed to Show It Was Unreasonably Restrained from Fair Competition

On the other hand, ALJ Sippel held that Wealth TV could not satisfy its burden to show the cable companies “unreasonably restrain[ed]” the programmer’s ability to compete fairly by a mere showing that cable company programming decisions had “adversely affected its competitive position in the marketplace.”¹⁴ Wealth TV had failed to show that the cable companies had acted unreasonably in their programming decisions and had not negotiated with it in good faith. Therefore Wealth TV had not shown that its competitive position was “unreasonably restrained.”

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Please contact your Mintz Levin attorney, or any attorney listed in the left column of this Alert, for more information as we continue to follow developments in this and related cable program carriage cases.

Endnotes

¹ The defendants in the case were Comcast, Time Warner Cable, Cox Communications, and Bright House Networks.

² *Herring Broadcasting, Inc. d/b/a Wealth TV v. Time Warner Cable, Inc, et al.*, MB Docket No. 08-214, Recommended Decision of Chief Administrative Law Judge Richard L. Sippel (rel. Oct. 14, 2009) (“Decision”).

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

⁴ Decision ¶ 55.

⁵ *Id.* ¶¶ 54, 56.

⁶ *Id.* ¶¶ 57-58.

⁷ *Id.* ¶¶ 63.

⁸ *Id.* ¶ 67.

⁹ *Id.* ¶ 69.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* ¶ 71.

¹³ *Id.* ¶ 72.

¹⁴ *Id.* ¶ 73

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