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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )

Herring Broadcasting, Inc. )  
Complainant )

v. )

Cox Communications, Inc. )  
Defendant )

MB Docket No. 08-214

CSR-7829-P

FILED/ACCEPTED

OCT 20 2008

Federal Communications Commission  
Office of the Secretary

To: The Commission

Attn: Office of Administrative Law Judges

MOTION TO CLARIFY HEARING DESIGNATION ORDER OR IN THE  
ALTERNATIVE TO CERTIFY QUESTIONS TO THE COMMISSION

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**MOTION TO CLARIFY HEARING DESIGNATION ORDER OR IN THE  
ALTERNATIVE TO CERTIFY QUESTIONS TO THE COMMISSION**

Cox Communications, Inc. (“Cox”), by its attorneys, hereby submits this Motion to clarify the issues for review under the Hearing Designation Order<sup>1</sup> issued by the Media Bureau (the “Bureau”) in the above-captioned proceeding pursuant to Section 1.229(a) of the rules of the Federal Communications Commission (the “Commission”) or, in the alternative, to certify Cox’s request for clarification to the Commission pursuant to Section 1.115(e)(3) of the Commission’s rules if the Administrative Law Judge (“ALJ”) assigned to this proceeding determines that he does not have the authority under the Commission’s rules and policies to make the necessary clarification.

The motions made herein should be held in abeyance until the parties and the ALJ can address them at a pre-hearing conference. At that time, the parties should attempt to stipulate

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<sup>1</sup> *Memorandum Opinion and Hearing Designation Order*, DA 08-2269 (October 10, 2008), *as amended*, Erratum (October 15, 2008) (collectively, the “HDO”).

to the specific issues to be addressed, set a reasonable and fair schedule for discovery, hearings and briefings consistent with due process, and address any other procedural matters.

## I. BACKGROUND

This proceeding was initiated on March 27, 2008 by Herring Broadcasting, Inc., d/b/a/ WealthTV (“WTV”) when it filed a “Carriage Agreement Complaint” (the “Complaint”) with the Commission against Cox alleging violations of Section 616<sup>2</sup> of the Communications Act of 1934, as amended (the “Communications Act”) and Section 76.1301(c)<sup>3</sup> of the Commission’s regulations. WTV also filed complaints seeking Commission mandated carriage of its WTV programming against Time Warner Cable Inc., Comcast Corporation and Bright House Networks, LLC, alleging different facts for each. On May 5, 2008, Cox filed its Answer to WTV’s Complaint denying that it discriminated against WTV or that it violated any statutory or regulatory provision applicable to its programming decisions. Cox demonstrated in its Answer, among other things, that it exercised its constitutionally protected editorial discretion in declining to retransmit WTV’s programming on its cable television systems and that its decision was based on legitimate and routine business criteria that Cox and other cable operators use every day to evaluate possible carriage of new programming services.<sup>4</sup> WTV filed its Reply to Cox’s Answer on May 27, 2008.

On Friday, October 10, 2008, the Bureau issued the HDO that concluded WTV’s pleadings established a *prima facie* showing of a violation of the Commission’s program carriage rules<sup>5</sup> and designated the matter for a hearing before an ALJ to “resolve all factual

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<sup>2</sup> 47 U.S.C. § 536 (2007).

<sup>3</sup> 47 C.F.R. § 76.1301(c) (2007).

<sup>4</sup> Cox’s Answer, among other things, denied the material factual allegations underlying WTV’s Complaint. Cox’s Answer was supported by Declarations contradicting factual assertions in WTV’s Complaint.

<sup>5</sup> HDO at ¶ ¶ 7, 46.

disputes.”<sup>6</sup> The Bureau ordered the ALJ to “resolve all factual disputes and submit a recommended decision and remedy, if appropriate” within 60 days of the date of the HDO.<sup>7</sup> On October 15, 2008, the Bureau issued an Erratum to the HDO ordering the ALJ to make a recommended decision on (i) whether Cox “discriminated against the complainant’s programming in favor of its own programming, with the effect of unreasonably restraining complainant’s ability to compete fairly in violation of Section 76.1301(c);” and (ii) if illegal discrimination did occur, “the appropriate price, terms and conditions on which the complainant’s programming should be carried” on Cox’s systems.<sup>8</sup>

The Bureau offered the parties the option of attempting to resolve WTV’s Complaint by alternative dispute resolution (“ADR”) instead of an administrative hearing, and the HDO ordered each party to submit to the Commission within 10 days of the date of the HDO a written election identifying each party’s preferred procedure.<sup>9</sup> On October 14, 2008, WTV submitted a letter to the Bureau rejecting an ADR process and instead electing to proceed with a hearing before an ALJ. On October 20, 2008, Cox submitted its election letter to the Commission and expressed its willingness to engage in a non-binding ADR process; but because WTV had rejected an ADR process, Cox indicated that it also was prepared to proceed with an adjudicatory hearing pursuant to a schedule to be established by the designated ALJ.

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<sup>6</sup> *Id.* at ¶ 132.

<sup>7</sup> *Id.* at ¶¶ 132; *see also* HDO at ¶ 120.

<sup>8</sup> *Id.* at ¶ 130(a); *See also* HDO at ¶ 5 (Section 76.1301(c) prohibits a cable operator from “engaging in conduct that unreasonably restrains the ability of an unaffiliated programming vendor to compete fairly by discriminating against such vendor on the basis of its nonaffiliation.”)

<sup>9</sup> *Id.* at ¶ 131.

## II. ARGUMENT

As its points and authorities for the motions made herein, in addition to the arguments set forth below, Cox adopts the arguments and reasoning set forth in the "Motion for Modification and Clarification or, in the Alternative, for Certification of Questions" filed by Time Warner Cable Inc on October 20, 2008 in File No. CSR-7709 -P, which case is part of MB Docket No. 08-214.

### A. The Factual Issues To Be Determined by the ALJ Must Be Clarified Before A Schedule Is Set , Discovery Undertaken and Hearings Held.

The HDO requires the ALJ to "resolve all factual disputes" with respect to whether Cox engaged in conduct that unreasonably restrained the ability of WTV to compete fairly in the multichannel video programming distribution market by discriminating against WTV's programming on the basis of WTV's nonaffiliation with Cox.<sup>10</sup> If the ALJ determines that Cox did engage in conduct that violated Section 616 of the Communications Act and the corresponding Commission regulations, then the ALJ is charged with the task of evaluating and proposing to the Commission an appropriate remedy for such violation.<sup>11</sup>

The HDO, as amended by the Erratum, leaves "all factual issues" raised by the parties' pleadings open for determination by the ALJ. The HDO did not finally resolve any of the factual or legal disputes raised by the parties' pleadings; it only determined that WTV's pleadings established a *prima facie* case against Cox.<sup>12</sup> Thus, the ALJ must engage in a *de novo* review of "all factual disputes" relating to WTV's claim of "discrimination" and all of

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<sup>10</sup> *Id.* at ¶ ¶ 5, 121, 130(a), 132.

<sup>11</sup> *Id.* at ¶ 130(b).

<sup>12</sup> Cox disputes the Bureau's conclusion that the pleadings and documents submitted by WTV demonstrate a *prima facie* case under Section 616 of the Communications Act or Section 76.1301 of the Commission's regulations.

Cox's defenses (factual and legal) to WTV's claim.<sup>13</sup> Moreover, such matters must be subject to appropriate discovery (including written discovery and testimony), motions, briefing and, if necessary, oral testimony and argument at one or more hearings.<sup>14</sup> Furthermore, in the event that the ALJ determines that a violation of the Commission's program carriage regulations occurred, the HDO (as amended by the Erratum) requires the ALJ to consider a remedy and recommend "appropriate price, terms and conditions" for an agreement covering carriage of WTV's programming on Cox's systems.<sup>15</sup> Although Cox does not concede that "mandatory carriage" of WTV programming is the only remedy available for a violation of the Commission's program carriage regulations, if such a remedy is to be considered by the ALJ, then establishing "appropriate price, terms and conditions" of a carriage agreement will require, at a minimum, discovery and hearings on WTV's existing carriage agreements with other cable operators, as well as the "price, terms and conditions" of WTV's proposed

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<sup>13</sup> All evidence presented should be considered within the context of the complete statutory test under Section 616, rather than the standard paraphrased in the Erratum, which omitted that the discrimination must be "on the basis of affiliation or nonaffiliation of . . . [WTV] in the selection, terms, or conditions for carriage of video programming provided by . . . [WTV]."

<sup>14</sup> For example, any analysis of WTV's "discrimination" claim would include, among other things, an evaluation of (i) whether WTV's programming is "substantially similar" to Cox's affiliated programming as alleged by WTV (*see* WTV's Complaint at 1) and whether any similarities legally justify an inference of discrimination by Cox; (ii) the reasons for Cox's editorial decision not to retransmit WTV's programming on Cox systems; (iii) the strength and experience of WTV's management team and the business plan for the WTV programming at the time Cox's carriage decision was made; (iv) the treatment of WTV programming by other multichannel video programmers and distributors; (v) the justifications provided by other multichannel video program distributors for not carrying WTV's programming; (vi) the criteria used by WTV to make its programming decisions; (vii) the likely viewer appeal of the WTV programming at either the national or local level; and (viii) the proposed price, terms and conditions of carriage of WTV programming offered to or by other video program distributors.

<sup>15</sup> As stated in Section 76.1302(g) of the Commission's regulations, 47 C.F.R. § 76.1302(G) (2007), the available remedies for violations "include, if necessary, mandatory carriage," but the regulation certainly does not dictate that such a remedy is appropriate as implied by the HDO. The ALJ should clarify that the appropriate remedy, if any, is open for consideration *de novo* by the ALJ.

carriage agreements with cable operators who have not yet executed carriage agreements with WTV.

Fundamental fairness and due process require that the parties be permitted to present evidence on all disputed factual issues in the context of the actual governing statute and regulations so that the ALJ can properly evaluate any alleged violation of Commission regulations and, if applicable, the proper remedy for such violations, which remedy may include, but is not limited to, "appropriate price, terms and conditions" for an agreement covering carriage of WTV's programming on Cox's systems. Therefore, to the extent that any party might question the scope of the issues to be determined by the ALJ, and to avoid any doubt that all issues remain open, Cox requests the ALJ, pursuant to Section 1.229(a) of the Commission's regulations, to clarify the scope of the HDO to confirm that "all factual issues" raised by the parties' pleadings, all defenses (factual and legal) and any potential remedies, including "price, terms and conditions" of any carriage agreement, are open for discovery and the submission of evidence and argument by the parties and for review by the ALJ. Because of the abbreviated timeframe proposed by the HDO, it is essential that this requested clarification is addressed before a schedule is set, discovery undertaken and hearings held.

If the ALJ concludes that there is any ambiguity in the language of the HDO on the scope of the factual and legal issues to be determined by the ALJ or if the ALJ concludes that the issues to be addressed under the HDO are more narrow than described above, then Cox requests the ALJ to expand the issues under Section 1.229(a) to include all issues relevant to Cox's alleged liability and any potential remedy under the Communications Act and relevant Commission regulations. Alternatively, if the ALJ determines that it has no authority or otherwise declines to issue the clarification or expansion of issues requested in this Motion, because it "presents a new or novel questions of law of policy," then Cox requests that the

ALJ immediately certify such matter pursuant to Section 1.115(e)(3) of the Commission's regulations.<sup>16</sup> If the scope of the issues to be presented by the parties and reviewed by the ALJ is limited unnecessarily and it is later determined by the Commission or a reviewing court that the relevant factual issues are broader than initially determined by the ALJ, then the parties will need to return to the ALJ for further proceedings, thereby delaying final resolution of the litigation. Consequently, clarification of this matter by the ALJ or, if necessary, certification of the matter to the Commission would "materially expedite the ultimate resolution of the litigation."<sup>17</sup>

**B. The ALJ Must Clarify That The 60-Day Period Identified in the HDO For The ALJ To Conduct Discovery and Hearings and To Prepare a Recommended Determination Can Be Expanded By The ALJ If Necessary.**

The 60-day period proposed in the HDO for the ALJ to deliver a "recommended determination" to the Bureau is highly unrealistic by any measure if Cox is to have a fair hearing with due process.<sup>18</sup> WTV has filed program carriage complaints against multiple cable operators. Although WTV has requested consolidation of such complaints into one proceeding, and while consolidation might be appropriate for certain limited discovery purposes, even WTV recognizes that these cases require separate factual determinations, and each cable operator must be afforded a fair opportunity to develop its own defenses and to present evidence and argument. In light of the complexity of the interconnected issues, the need for discovery (including written discovery and testimony) on numerous factual issues, the time needed for preparing and submitting responsive briefs, and the number of parties potentially involved in the hearings (whether or not WTV's consolidation request is granted),

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<sup>16</sup> 47 C.F.R. § 1.115(e)(3) (2007).

<sup>17</sup> *Id.*

<sup>18</sup> Cox notes that the 60-day period identified in the HDO includes the federal holidays of Columbus Day, Veterans Day and Thanksgiving Day. Not counting the date of this Motion, there are only 34 business days remaining in the 60-day period identified in the HDO.

there is no serious question that the ALJ will need additional time beyond the 60-day period identified in the HDO to conduct proceedings consistent with due process requirements.<sup>19</sup>

The 60-day period indicated in the HDO is not and should not be considered binding on the ALJ's conduct of an adjudication. Indeed, when the Commission adopted regulations and procedures implementing Section 616 of the Communications Act, the Commission rejected setting any specific time period for resolving program carriage disputes.<sup>20</sup> Under the Commission's regulations, the ALJ has the authority to control the conduct of its hearings.<sup>21</sup> The Bureau cannot interfere with the procedural course of the adjudicatory hearings, which by rule is and must be within the jurisdiction of the ALJ.

Accordingly, to the extent it is not already clear, Cox requests the ALJ pursuant to Sections 1.229 and 1.243 of the Commission's regulations to clarify that the 60-day period identified in the HDO can and will be expanded by the ALJ as necessary to provide due process to all parties and to permit reasonable discovery, briefing and hearing schedules in this matter. In the alternative, if for any reason the ALJ believes that it cannot or should not permit the process to exceed 60 days notwithstanding the fact that 60 days is insufficient and

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<sup>19</sup> See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) ( Due process under the U.S. Constitution requires a reasonable opportunity, "at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950)).

<sup>20</sup> *Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 9 FCC Rcd 2642, 2655 n.52 (1993) (recognizing the complexity of the issues involved in program carriage cases and rejecting a proposed 90-day deadline as not "practicable or advisable").

<sup>21</sup> 47 C.F.R. § 1.243 (2007) (presiding officer has the authority to "[r]egulate the course of the hearing"); see also 47 C.F.R. § 1.248(b)(2) (2007) ("Except as circumstances otherwise require, the presiding officer shall allow a reasonable period prior to commencement of the hearing for the orderly completion of all prehearing procedures, including discovery, and for the submission and disposition of all prehearing motions."); 47 C.F.R. § 1.205 (2007) (the presiding officer has authority to grant continuances and extensions for good cause shown).

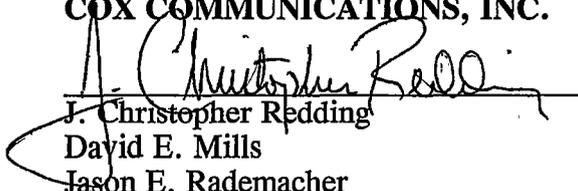
fundamentally unfair, Cox moves for certification of this issue to the full Commission pursuant to Section 1.115(e)(3) of the Commission's regulations.<sup>22</sup>

### III. CONCLUSION

For the foregoing reasons, Cox respectfully moves the ALJ to clarify the issues for review and the timeframe of any final determination by the ALJ the under the HDO pursuant to Section 1.229(a) of the Commission's regulations or, in the alternative, to certify Cox's request for clarification to the Commission pursuant to Section 1.115(e)(3) of the Commission's rules if the ALJ assigned to this proceeding determines that he does not have the authority under the Commission's rules and policies to make the necessary clarification.

Respectfully submitted,

**COX COMMUNICATIONS, INC.**



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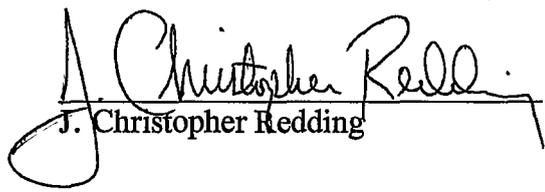
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### VERIFICATION

To the best of my knowledge, information and belief formed after reasonable inquiry, this "Motion to Clarify Hearing Designation Order or in the Alternative to Certify Questions to the Commission" is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.



J. Christopher Redding

October 20, 2008

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<sup>22</sup> 47 C.F.R. § 1.115(e)(3) (2007).

**CERTIFICATE OF SERVICE**

I, Sandra Dallas Jeter, hereby certify that a true and correct copy of the foregoing Motion to Clarify Hearing Designation Order or in the Alternative to Certify Questions to the Commission was sent by first class U.S. mail, postage prepaid, except where hand-delivery is indicated, on this 20th day of October 2008 to the following:

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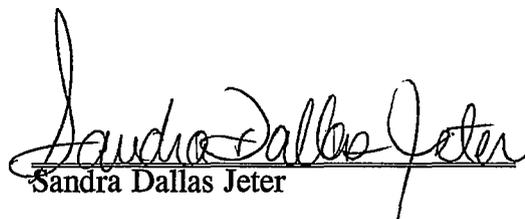
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