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

In the Matter of	)	
	)	**MB Docket No. 08-214**
Herring Broadcasting, Inc.	)	
Complainant	)	**CSR-7829-P**
	)	
v.	)	
	)	
Cox Communications, Inc.	)	
Defendant	)	

To: Marlene H. Dortch, Secretary
Federal Communications Commission

Attn: Arthur I. Steinberg
Administrative Law Judge

COX'S REPLY IN SUPPORT OF MOTION TO CLARIFY HDO

Cox Communications, Inc. ("Cox"), by its attorneys and pursuant to Section 1.294(c) of the Commission's regulations,[1] hereby submits its Reply to the Opposition of Herring Broadcasting, Inc., d/b/a WealthTV ("WTV"), to Cox's Motion to Clarify Hearing Designation Order or in the Alternative to Certify Questions to the Commission.

WTV's Opposition offers no explanation as to how *six* cases, each with different fact patterns, and *seven* parties (including the Commission's Enforcement Bureau), with *dozens* of witnesses, including experts, with proper examinations and cross-examinations, proposed Findings of Fact and Conclusions of Law, and a Recommended Decision in *each case*, could possibly be accomplished by December 9, 2008, only 24 business days from today. Moreover, WTV actually *adds* confusion to the question of what issues are before the ALJ in this hearing.

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[1] 47 C.F.R. § 1.294(c) (2008).

If anything, WTV's Opposition demonstrates why clarification on these points is necessary before these multiple hearings can proceed.

I. The Opposition Confirms The Need For Clarification Of The Issues.

WTV argues there is no need to clarify the issues because the statute establishes the standard for program carriage discrimination and because the *HDO*[2] clearly delineates the issues left to be resolved by the ALJ.[3] Without even mentioning the *Erratum*,[4] which was necessary precisely because the issues for determination were *not* set forth in the *HDO*, WTV argues that the *HDO* limits the issues before the ALJ by resolving a number of factual and legal matters, leaving only a few narrow facts to be determined.

In contrast, the Enforcement Bureau correctly notes that the intent of the *Erratum* is "to direct the Presiding Judge to initially determine in each of the cases in this proceeding whether there has been a violation of Section 76.1301(c) of the Commission's Rules and the appropriate remedy for any violation found."[5] Thus, the Enforcement Bureau's view is that all issues relevant to a determination of whether Cox violated the statute, and the appropriate remedy, if any, are properly before the ALJ.

The disparity between (a) WTV's reading of the *HDO* (which reading ignores the *Erratum*) and (b) the plain language of the *Erratum* and the views of the Enforcement Bureau and all the MSO defendants, demonstrates why clarification of the issues is necessary.

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[2] Herring Broadcasting, Inc., *Memorandum Opinion and Order and Hearing Designation Order*, DA 08-2269, rel. Oct. 10, 2008 (the "*HDO*").

[3] WTV Opposition at 2-3.

[4] Herring Broadcasting Inc., *Erratum*, MB Docket No. 08-214, rel. Oct. 15, 2008 (the "*Erratum*").

[5] Enforcement Bureau Comments on Issues Designated For Hearing, MD Docket No. 08-214,File No. CSR 7709-P, *et al.* ¶ 3 (filed October 27, 2008) ("Enforcement Bureau Comments").

The Enforcement Bureau is correct that the *Erratum* designates for hearing all issues relevant to whether Cox violated Section 76.1301(c) and any appropriate remedy and that Section 76.1301(c) supplies the relevant standard.[6] The *HDO* reflects the Media Bureau's determination that WTV has presented a *prima facie* case, but it designates for hearing the factual and legal determinations of whether WTV can actually *prove its case* against Cox. This is why the parties start with an "empty box" at the hearings; WTV has the burden[7] to present evidence on, and to prove, each element of a violation of Section 76.1301(c) and any appropriate remedy, subject to Cox's right to challenge that evidence in a hearing and to present its own evidence to refute WTV's claims.

WTV is fundamentally wrong that the scale is already tipped in its favor – or that half the case is already decided – as we begin this adjudicatory hearing. According to WTV, for example, the Media Bureau has already decided that WealthTV and MOJO are substantially similar and, therefore, there is no need to consider that issue in the hearing.[8] This is incorrect. While the Media Bureau considered substantial similarity in the context of determining whether WTV had made a *prima facie* showing of discrimination,[9] that issue and all other determinations on issues relevant to whether Cox actually violated the statute remain open for presentation of evidence, argument, findings of fact and conclusions of law, and determination in this hearing. That is because the *Erratum* designates for hearing "whether there has been a violation of Section 76.1301(c) of the Commission's Rules and the appropriate remedy for any violation found."[10]

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6 *See* Enforcement Bureau October 27 Comments ¶ 3.

7 Order, No. FCC 08M-44 (ALJ rel. October 23, 2008)("*ALJ Order*").

8 *See* WTV Opposition at 2.

9 *See HDO* ¶ 39.

10 Enforcement Bureau October 27 Comments ¶ 3.

That is the basic premise of this particular hearing, which includes all issues relevant to Cox's compliance with Section 76.1301(c), not just the issue of discrimination. It also includes, for example, whether Cox's conduct unreasonably restrained WTV's ability to compete fairly. Thus, while the Media Bureau stated in the context of assessing WTV's *prima facie* case that the small size of a cable system was insufficient, standing alone, to negate competitive injury,[11] it did not make a final determination on that issue, remove that issue from the hearing, or excuse WTV from actually proving that allegation. Certainly, the fact that other large MVPDs (including many unaffiliated with MOJO) have refused to carry WealthTV is relevant not only to whether WTV was unreasonably restrained in its ability to compete fairly, but also to demonstrate that Cox's decision not to carry WealthTV was based on legitimate business reasons. The Media Bureau clearly did not (and did not purport to) make final determinations on these issues.[12]

WTV also purports to incorporate all the arguments raised by the NFL Network ("NFL") and TCR,[13] even though those programmers are not involved in the WTV case, and the cases have no facts in common. Naturally, the NFL and TCR argue that the hearing with respect to their claims against Comcast Corporation ("Comcast") involves only limited issues, pointing to language in the *HDO* that suggests the Media Bureau has decided a number of issues in that proceeding and left only a narrow set of factual issues to be determined with respect to Comcast's conduct.[14]

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[11] *See HDO* ¶ 42.

[12] The same analysis applies to Cox's statute of limitations defense. Determining whether WTV can establish a violation of Section 76.1301(c) includes that threshold issue, and this hearing must permit evidence and proposed findings and conclusions on that issue as well.

[13] *See* WTV Opposition at 1-2. We note that WTV did not serve Cox with these documents.

[14] *See* NFL n.6, 9 (referring to Media Bureau resolution of factual disputes and the "few, if any, material disputes about the underlying facts"); TCR at 2 (referring to "remaining factual questions").

WTV's attempt to incorporate the NFL and TCR arguments creates even more confusion about what issues remain in this hearing because the factual settings of those cases are starkly different from WTV's case against Cox. But even if those arguments were considered here, they should be rejected for the same reasons stated above. As the *Erratum* makes clear (and the Enforcement Bureau agrees), this hearing requires a *de novo* determination on all factual and legal issues relevant to whether WTV can prove a violation of Section 76.1301(c), and any appropriate remedy.[15]

In light of WTV's position (including the incorporation of inapt arguments from the NFL and TCR) and the confusion it is creating, however, it is highly likely that – absent clarification – the various parties would present evidence on incongruent sets of issues in this hearing. For this reason, it is necessary and appropriate for the ALJ to clarify the issues *before the hearing begins*.

Frankly, certification to the Commission on the scope of the issues would be unnecessary if the ALJ clarifies that this hearing will be a *de novo* determination on all issues relevant to whether Cox violated Section 76.1301(c) and any appropriate remedy if such a violation were found. Certification would be important, however, if the ALJ were to construe the issues more narrowly, because WTV would not be put to its proof, Cox and the other WTV defendants would not be able to present their defenses fully, and the process would have to be repeated if it were

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[15] The Media Bureau's recent decision in *TCR Sports Broadcasting Holding, L.L.P.*, DA 08-2441 (Med. Bur. Rel. Oct. 30, 2008) ("*TCR Holding*"), which TCR has submitted as supplemental authority, *see* Notice of Supplemental Authority of TCR Sports Broadcasting Holding, L.L.P., MB Docket No. 08-214, File No. CSR-8001-P, filed Oct. 31, 2008, supports Cox's position on this issue. There the Media Bureau confirmed that the arbitrator had properly made findings of fact and conclusions of law regarding both the complainant's *prima facie* case and the defendant's claims of legitimate business reasons for non-carriage, in short whether the defendant had discriminated against the complainant under the statute. Here, the ALJ stands in the same position as the arbitrator in *TCR Holding*. As the *Erratum* makes clear, the ALJ must take evidence *de novo* and make recommended findings and conclusions on whether Cox discriminated against WTV under the statute. To the extent TCR suggests that the *TCR Holding*

later determined that the issues were too narrowly defined. Such a process would take longer and waste the ALJ's and the parties' time and resources.[16]

II. The Hearing Cannot Be Accomplished In 60 Days, And The Court Has Authority To Extend The Proceeding Beyond 60 Days If Necessary.

WTV offers no cogent explanation of how the 60-day timeframe in the *HDO* is feasible or why the ALJ cannot extend that timeframe as necessary to hold a fair hearing that affords parties their due process rights. WTV merely offers that the 60-day timeframe is "fair, manageable, and feasible," claims that it can submit its case within that period, and concludes therefore that "[t]here is no need for deviation from the sixty days specified in the HDO."[17] And on Friday, the Enforcement Bureau submitted as a comment that the Media Bureau had the authority to establish a 60-day timeframe and that certification of that question is unnecessary.[18]

WTV's argument is incorrect. Six simultaneous hearings on numerous issues, involving seven parties (including the Enforcement Bureau), dozens of witnesses and experts, innumerable exhibits, proposed Findings of Fact and Conclusions of Law, and a Recommended Decision, among other procedures, cannot possibly be accomplished property by December 9, 2008. That is only 24 business days from today. WTV has not even attempted to explain how that could be

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elucidates standards and other legal issues applicable in this hearing, that is not currently before the ALJ, and Cox reserves its right to address it at the appropriate time.

[16] Both the NFL and TCR brush off the result in *Algreg Cellular*, but neither provides any basis for finding it inapposite. That proceeding was built on an improper foundation and ended up taking five years to resolve. NFL illogically argues that this case differs because (NFL believes) the Media Bureau's rulings here were correct, NFL at 7, but that argument can always be made prior to Commission and judicial review. TCR argues that the ALJ will avoid the delay occasioned in *Algreg* by construing the *HDO* to present only a "narrow" set of "factual disputes on a handful of issues" – notwithstanding the language in the *Erratum* and the position of the Enforcement Bureau – but that, too, is illogical. Construing the issues in the *Erratum* narrowly is *more* likely to lead to the type of delay that occurred in *Algreg* when the case had to be remanded.

[17] WTV Opposition at 2.

[18] *See* Enforcement Bureau's Consolidated Comments, MB Docket No. 08-214, File No. CSR-7709-P, *et al.*, filed Oct. 31, 2008 ¶¶ 3-4. This second round of comments was neither requested by the

done. WTV's mere assertion that the 60-day period is "fair, manageable and feasible" is simply not credible.[19]

WTV is also wrong that the *ALJ Order* demonstrates that this proceeding *could* be completed in 60 days. To the contrary, the *ALJ Order* shows that this hearing could *not* be done in 60 days. Even the ambitious schedule outlined in the *ALJ Order* exceeds 60 days, and it left no time whatsoever for drafting a recommended decision.

But WTV goes even further. WTV suggests (incorporating TCR's argument at 10) that there is ample time for the "full panoply of discovery." Really? The "full panoply of discovery" would include interrogatories, document requests, depositions of dozens of fact witnesses, reports from several experts, and expert depositions, at a minimum, and all this on six different fact patterns (three different programming services) plus all the issues involved in ascertaining any appropriate remedy. Even assuming there were no scheduling problems, discovery disputes requiring ALJ intervention, or other delays, the process with full discovery would exceed 60 days by a multiple, even if expedited (and, again, there are only 24 business days left).

And even if (for whatever reason) WTV were willing to waive fair hearing procedures and stampede through its own case, it certainly cannot require Cox to waive its rights to fair procedures with due process.

WTV is also wrong that the ALJ lacks authority to control its own proceedings and determine the appropriate timeframe for their completion. None of the cases TCR and NFL cite

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ALJ nor timely, and while Cox certainly does not oppose the Enforcement Bureau's involvement as a party, it does not favor a process allowing random filings without fixed timeframes.

[19] WTV also claims that "[a]ny delay in that sixty day timetable would have adverse consequences for WealthTV, a small start-up business." WTV Opposition at 2. WTV does not provide any explanation or support for this allegation, as it must "by affidavit of a person or persons having personal knowledge thereof," as required by Commission regulations. 47 C.F.R. § 1.229(d) (2008). Consequently, this argument must be rejected.

(which WTV purportedly incorporates by reference) as being completed within a comparable timeframe are applicable here, because none involved the multiplicity of parties and issues involved in this case.

WTV, the NFL and TCR also completely ignore the Commission's hearing regulations and precedent. It is well established that the authority granted to an ALJ under the Commission's regulations and policies is "plenary" and invests the ALJ with "great latitude."[20] The Commission's own rules give the ALJ wide discretion to "[r]egulate the course of" hearings, to prescribe reasonable time schedules, and to grant "continuances and extensions" for good cause shown, among other things.[21] The discretion granted under these rules shows that the ALJ has the authority to conduct a full and complete hearing that resolves all designated issues through a process deemed appropriate by the ALJ.[22]

There can be no dispute that, once a matter is designated for hearing, it is the ALJ's responsibility to conduct fair hearings without interference from other arms of the Commission.

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[20] See, e.g., *Selma Television, Inc.*, 3 FCC2d 63 (1966); *see also Broadcast Data Corp.*, 97 FCC2d 650, 652 (1984); (ALJ's power to regulate hearing is "plenary" and "invests [him] with great latitude"); *In re Petitions filed by the EEOC*, 38 FCC2d 33, 38 (1972) (same); *Chronicle Broadcasting Co.*, 20 FCC2d 728, 728 (1969) (ALJ's obligation is to conduct proceedings with due regard for equity and fairness to all participating parties).

[21] 47 C.F.R. §§ 1.243(f), 1.248(b)(2), 1.205 (2008).

[22] *See, e.g., Selma Television, Inc.*, 3 FCC2d 63 (1966) (ALJ's decisions "on such matters as continuances of the hearing are entitled to great weight and will not be overturned in the absence of a clear abuse of discretion by arbitrary or capricious action."); *WMOZ, Inc.*, 5 RR2d 732 (1965) (ALJ's authority under Section 1.243(f) "is not to be disturbed unless its exercise is arbitrary, capricious or an abuse of discretion."); *Lompoc Valley Cable TV, Inc.*, 3 RR2d 523, 525 (1964) (ALJ's authority to grant continuances is within the general authority to regulate the hearing and the ALJ's broad discretion to grant continuances will not be reversed unless arbitrary or capricious); *see also Amendment of Part I, Rules of Practice and Procedure to Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory hearings*, 52 RR2d 913, 920 (1982)(An ALJ should "exercise firm control of the course and conduct of a proceeding and . . . adopt such innovations in procedure as are consistent with the statutes, the Rules of the Commission, the rights of the parties, and adapted to achieve expedition of proceedings, the full disclosure of facts and the attainment of justice.") (citation omitted).

It would be a strange rule indeed that nonetheless allowed a Bureau to impose a binding and unalterable condition that rendered it impossible for the ALJ to fulfill that responsibility.

WTV, TCR, and the NFL are simply wrong that the ALJ lacks the authority to extend the timeframe even if adherence to it would be impossible or would compromise the fairness of the hearing process.[23] Even assuming the Media Bureau was within its rights initially to specify a timeframe, there is no reason the ALJ cannot, once the matter has been designated and passed to the ALJ's jurisdiction, extend that time as necessary and appropriate. In fact, TCR appears to concede that the ALJ has been delegated the same authority the Media Bureau has,[24] and the Media Bureau plainly has the authority to extend the "deadline" (there is no statutory deadline).[25] Consequently, the ALJ would have the same authority to modify the timeframe.[26]

The Enforcement Bureau's comments from Friday are not to the contrary. While the Enforcement Bureau is of the opinion that the Media Bureau has the authority to set a timeframe,

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[23] *See* TCR Opposition at 12.

[24] *See id.* at 7 & n.12.

[25] In adopting procedures for program carriage disputes, the Commission specifically acknowledged that it was not "practicable or advisable" to impose a requirement on the Commission's staff (including ALJs) to dispose of program carriage cases within a specified period of time due to their "complexity." *See 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).

[26] One problem with WTV's wholesale incorporation by reference of briefs from entirely unrelated cases is that it is unclear which arguments WTV wishes to incorporate and, therefore, need to be addressed. For example, the due process analysis in TCR's Opposition would not apply in the context of WTV's complaint against Cox. But even under the analytical framework TCR describes, the ALJ would be required to afford the defendants significant procedural due process rights, especially because this case involves the exercise of Cox's constitutionally protected editorial discretion in selecting and distributing programming to subscribers. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 520-521 (1958) ("the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake, the more important must be the procedural safeguards surrounding those rights.").

it does not opine on whether, once jurisdiction passes to the ALJ, the ALJ has the authority to modify that schedule in the interests of conducting a fair hearing.[27]

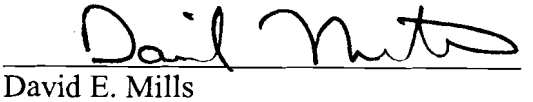
Again, certification is unnecessary if the Court establishes fair timeframes for the hearing, but if the Court feels constrained to wedge all six cases into the next five weeks, the question should be certified to the Commission to ensure that this proceeding is not merely repeated after Commission and judicial review. Contrary to WTV's arguments (as incorporated), the proceeding will be more efficient, not less so, if these matters are addressed at the outset.

III. Conclusion

For the foregoing reasons, Cox requests that the ALJ grant Cox's motion.

Respectfully submitted,

COX COMMUNICATIONS, INC.



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[27] *See* Enforcement Bureau's Consolidated Comments, MB Docket No. 08-214, File No. CSR-7709-P, *et al.*, filed Oct. 31, 2008 ¶¶ 3-4.

VERIFICATION

To the best of my knowledge, information and belief formed after reasonable inquiry, this "Cox's Reply in Support of Motion to Clarify HDO" 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.

David E. Mills

November 3, 2008

CERTIFICATE OF SERVICE

I, Cynthia M. Forrester, hereby certify that a true and correct copy of the foregoing "Cox's Reply in Support of Motion to Clarify HDO" was sent to the following as indicated indicated, on this 3rd day of November 2008 to the following:

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