

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

In the Matter of)	
)	
Petition for Rulemaking To Amend)	MB Docket No. 10-71
the Commission's Rules Governing)	
Retransmission Consent)	

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. (“Cox”), by its attorneys, hereby submits these comments in response to the Petition for Rulemaking filed in the above-referenced proceeding.¹

I. INTRODUCTION

Cox has a particularly good vantage point from which to observe the retransmission consent marketplace. As the owner of both broadcast television stations and cable television systems across the country, Cox has extensive experience on both sides of the retransmission consent negotiating table.²

As a broadcaster and as a cable operator, Cox is guided by an important principle: our customers always come first. This is the prism through which we view retransmission consent negotiations. Most of these private business negotiations are concluded without incident. But when they fail, and a local broadcast signal is dropped from multichannel video programming distribution, the resulting confusion and loss of service harms television viewers.

¹ See Petition for Rulemaking of Time Warner Cable, Inc., *et al.*, filed Mar. 9, 2010 (the “Petition”). See also Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, *Public Notice*, DA 10-474 (rel. Mar. 19, 2010); *Order*, DA 10-594 (rel. Apr. 2, 2010).

² Through its subsidiaries Cox Communications, Inc. and Cox Media Group, Inc., Cox operates the third-largest U.S. cable television company, serving 6.2 million customers nationwide, and 15 broadcast television stations in markets across the country.

The Petition provides the Commission with an opportunity to review the current retransmission consent marketplace and assess whether there are steps it could take to better protect consumers from service disruptions and other potentially adverse consequences of retransmission consent negotiations.³ Cox thus supports the Petition's request that the Commission initiate a rulemaking proceeding to explore reforms to the retransmission consent regime in light of the evolving marketplace and to address the threats to consumers posed by retransmission consent disputes.

As part of this rulemaking, the Commission should consider reforming its rules to provide a fair path to resolution when a television station and a multichannel video programming distributor ("MVPD") reach an impasse, despite negotiating over retransmission consent in good faith. In addition, the Commission should evaluate the impact on consumer welfare of the involvement of the major national television networks in retransmission consent negotiations between local broadcasters and MVPDs, and consider whether this network involvement is consistent with Congress's principal goal in enacting retransmission consent of ensuring continued and improved local television service to communities across the country.

II. THE COMMISSION SHOULD CREATE A WELL-DEFINED, GOVERNMENT-SANCTIONED FAIR PATH TO RESOLUTION OF RETRANSMISSION CONSENT IMPASSES.

The vast majority of Cox's retransmission consent negotiations, whether Cox has been the broadcaster or the cable operator, have been resolved without service disruption. This is true generally of retransmission consent discussions. Negotiations often are tough and protracted.

³ See 47 U.S.C. § 325(b)(3)(A) (requiring Commission to ensure that retransmission consent rules are consistent with ensuring reasonable rates for basic tier cable services); § 543(b) (requiring reasonable rates for basic tier cable services, including over-the-air broadcast signals).

Still, historically, broadcasters and MVPDs have been able to negotiate and reach agreement privately in most cases.

There have, however, been instances in which broadcasters and cable operators (or other MVPDs) have not been able to reach agreement, either by the time a contract is due to expire or as a deadline approaches. This is not surprising. Like any parties negotiating a rights agreement, broadcasters and MVPDs must have a dialogue about the value of the rights at stake. And the parties can have significantly different opinions about the value of the broadcaster's retransmission consent – even when both in fact are negotiating in good faith. Indeed, despite their genuine efforts, parties acting in good faith may, and sometimes do, reach an impasse that prevents them from reaching a timely retransmission consent agreement. Such impasses have been relatively rare during most of the life of the retransmission consent regime, but recent disputes suggest they may be beginning to occur more frequently.⁴

Under the FCC's current rules, when negotiations break down and an existing retransmission consent agreement nears expiration, both the broadcaster and the MVPD know that the MVPD might be legally required to drop the broadcaster's signal. This potential loss of service has to be explained to viewers by both sides. Such explanations almost invariably paint an unflattering picture of the conduct and position of each party to the negotiation. Viewers find themselves in the middle of pitched public relations battles that do nothing but confuse or anger them and poison the negotiating environment. And, in the cases where the parties fail to reach an agreement before retransmission consent expires, viewers lose their local broadcast signals on the MVPD of their choosing. Cox believes that customers are only harmed by these battles and

⁴ See, e.g., Statement of William T. Lake, Chief, Media Bureau, on Sinclair/Mediacom Retransmission Consent Agreement, *Press Release*, rel. Jan. 9, 2010; *Ex Parte* Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission consent Complaint, CSR Nos. 8233-C and 8234-M, filed Dec. 8, 2009.

by being held hostage to what should be private negotiations between two commercial companies.

To address these harms, the Commission should evaluate whether its retransmission consent rules should be reformed to protect consumers from unnecessary service disruptions. In Cox's view, the key for the Commission is to create a process that lets television stations and MVPDs bargain hard over retransmission consent arrangements – but also protects consumers when negotiations break down. Television viewers are ill-served by public business negotiations that leave them confused, used as pawns in disputes between communications companies, then deprived of the signals of local broadcasters that the Commission has licensed to serve them. Cox thus encourages the Commission to explore the creation of a well-defined, government-sanctioned fair path to resolution that parties negotiating in good faith could use when they simply cannot find common ground. This path or mechanism should be designed so that it is likely to be invoked only rarely, as a fail-safe mechanism in the relatively infrequent situations of true impasse that do not involve bad faith negotiation by one of the parties.⁵

There are a number of models or approaches the Commission could explore that might provide such a fair path to resolution, including mediation, binding arbitration, an expert tribunal, or some similar mechanism.⁶ But whatever approach the Commission ultimately

⁵ The Commission has in place rules to address instances where parties fail to negotiate retransmission consent in good faith in accordance with a specific set of standards and/or a general view of the “totality of the circumstances.” *See* 47 C.F.R. § 76.65.

⁶ For example, in the past, the Commission has determined that commercial arbitration is an effective tool for addressing retransmission consent disputes and the potential disruption of broadcast service in some contexts. *See, e.g.,* General Motors Corporation and The News Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 473, 572-76 (paras. 220-226) (2004) (imposing commercial arbitration condition as a remedy to protect competing MVPDs from potential discrimination by the merged News Corporation and DirecTV); *News Corporation and The DIRECTV Group, Inc., Memorandum Opinion and Order*, 23 FCC Rcd 3265, 3314-3315 (para. 106-107) & App. B at 3342-46 (2008) (accepting voluntary compliance

adopts, it should be designed to help the parties who choose to use it resolve a retransmission consent dispute before an existing agreement expires. In addition, the mechanism should include a provision for interim carriage of the broadcast station by the MVPD until the process is completed.⁷ The Commission also should carefully construct any mechanism to avoid disrupting the balance of negotiating leverage that already leads to private resolution of most retransmission consent negotiations without any need for recourse to a government-mandated process. In short, the process should be a fail-safe option of last resort, designed to be used only in those negotiations that cannot be resolved privately without disruption of service to the public.

III. THE COMMISSION SHOULD PAY PARTICULAR ATTENTION TO THE IMPACT OF TELEVISION NETWORK INVOLVEMENT IN THE RETRANSMISSION CONSENT PROCESS.

The Commission's rulemaking also should analyze the effects that network involvement in retransmission consent negotiations is having on video programming customers and the overall retransmission consent marketplace. It may be that one of the reasons retransmission consent disputes have become more common is that the major television networks are using retransmission consent in ways not contemplated in the original Congressional scheme.

Congress intended retransmission consent to be a mechanism for ensuring the continuation and improvement of local broadcast service, and the Commission should examine whether network

with modified commercial arbitration conditions as part of merger with Liberty Media). The Commission also has experience conducting arbitration proceedings itself when appropriate under the Act. *See, e.g.,* Petition of WorldCom, Inc., *et al., Memorandum Opinion and Order*, 17 FCC Rcd 27039 (2002) (arbitrating interconnection dispute between Verizon and several Virginia competitive local exchange carriers).

⁷ The Commission also should seek comment on whether the requirement that cable operators provide 30 days notice to customers before a broadcast signal is deleted should be tolled while a Commission-sanctioned process remains ongoing. *See* 47 C.F.R. § 76.1601. In Cox's experience, it is often difficult to gauge in the final stages of a more contentious negotiation whether a deal is likely. Contingency notifications made to meet notice requirements can upset consumers and make retransmission consent negotiations more contentious as the existing agreement nears expiration.

involvement in the retransmission consent negotiations of both their owned and operated stations and their non-owned affiliates may be interfering with that policy and harming consumers.

In particular, the Commission should consider the effects on consumers and the marketplace of the television networks' practices of: (1) seeking to tie carriage of affiliated non-broadcast programming to broadcast station retransmission consent for network-owned and operated broadcast stations; and (2) seeking to control and reap the financial benefits of retransmission consent agreements between their non-owned and operated broadcast affiliates and cable operators. To the extent the Commission compiles a rulemaking record demonstrating that these practices are having adverse consumer impacts or are frustrating congressional intent, Cox recommends that the Commission consider adopting appropriate reforms.

The Commission should seek comment on the prevalence and effects of efforts by national broadcast television networks to tie retransmission consent for local broadcast signals to licensing of non-broadcast programming. In the past, the Commission has received evidence about the negative consequences for consumers, cable operators, and local television stations that are caused when national television networks seek to tie retransmission consent for their owned and operated stations to the distribution of network-owned cable channels or other services. The Petition raises similar concerns.⁸ The evidence suggests that tying can adversely impact consumers in three distinct ways. First, tying can impair cable operators' discretion to construct channel lineups that best suit local needs. Second, tying can put upward pressure on cable rates by requiring cable operators to pay handsome licensing fees for networks that they otherwise would not carry (or, at least, would not carry at the "tied" rates). Third, tying can lessen customer access to diverse cable programming because of the channel and financial capacity

⁸ See Petition at 34.

required to satisfy the demands of the networks, reducing available channels for programming offered by other programmers. Accordingly, to the extent tying practices by the television networks continue today, the Commission should examine whether they play a role in increasing cable rates and decreasing programming diversity.

The Commission also should seek comment on television network involvement in the retransmission consent negotiations of their non-owned affiliates. There is evidence that the national broadcast television networks are demanding a larger role in the negotiation of their non-owned affiliates' retransmission consent agreements and a larger share of retransmission consent compensation.⁹ This behavior, however, threatens to harm consumers by putting continued upward pressure on retransmission consent rates, which ultimately results in higher basic cable rates. It also could undermine the benefits to local television stations that Congress sought to achieve when it adopted the retransmission consent regime in 1992.

As the Commission recognized in its *1993 Order* implementing the 1992 Cable Act, retransmission consent was a new, Congressionally-created “communications right” in individual local broadcaster signals, separate from the copyright rights and interests in the programming contained in the signal.¹⁰ Congress and the Commission contemplated that the retransmission consent right would belong to the local broadcaster and could not be asserted by a third-party network or other programming provider on the basis that it provides valuable copyrighted

⁹ See, e.g., Michael Malone, *Moonves: Give Us Our Retrans Cut*, BROADCASTING AND CABLE, Mar. 1, 2010, available at http://www.broadcastingandcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php.

¹⁰ Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues; Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market, *Report and Order*, 8 FCC Rcd 2965, 3005 (para. 173) (1993) (“*1993 Order*”).

