Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), pursuant to Section 1.415(b) of the Commission's rules, hereby submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

I. INTRODUCTION

As the owner of both broadcast television stations and local cable systems, Cox appreciates the balance the Commission must try to strike as it assesses whether to reform its existing retransmission consent rules. Most parties resolve the majority of retransmission consent negotiations without government facilitation and without harming consumers. But when negotiations fail and television signals are taken off cable systems and other multichannel video programming distributors, consumers suffer. As the marketplace for retransmission consent continues to evolve, the Commission's task is to promote free market negotiation while protecting consumers.

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[1] Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, MB Docket No. 10-71, FCC 11-31 (rel. Mar. 3, 2011) (the "*NPRM*"); 76 Fed. Reg. 17071 (rel. Mar. 28, 2011).

Cox believes the Commission's proposal for non-binding mediation strikes the right balance.[2] A transparent mediation process would support a market-based bargaining system while providing an alternative way to resolve negotiations that have broken down and threaten a loss of service to consumers. Properly designed, a mediation process could help parties that have reached impasse by providing a knowledgeable, neutral third party to help the negotiators reach informed agreement on the market value of the signal carriage at issue.

One important feature of the process would be its transparency. In Cox's experience negotiating retransmission consent from both sides of the table, these negotiations sometimes fail because one or both parties lack sufficient information to assess the value of the retransmission rights at stake. The mediation process should be designed to ensure that the parties and the mediator have adequate information to settle the parties' differences based on valid competitive marketplace considerations, as required by Section 325 of the Communications Act. The mediation process also should provide accurate and timely information to the public about negotiations that threaten viewers with loss of access to their local broadcast signals on the MVPD of their choice.

In addition, the Commission should evaluate the impact of volume discounts when assessing whether the terms and conditions being offered in retransmission consent negotiations reflect "competitive marketplace conditions." Although volume discounts can play a legitimate – and valuable – role in programming agreements, they must be based on genuine

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2 *See NPRM* at ¶ 25. Last year, Cox asked the Commission to implement a "fair path" to resolution of retransmission consent disputes before consumers face actual or threatened loss of local broadcast service. *See* Comments of Cox Enterprises, Inc., MB Docket No. 10-71 (filed May 18, 2010) at 1, 2-5.

economic benefit. If they do not, they threaten to distort the competitive marketplace by unreasonably raising costs for smaller distributors and making it harder for them to compete.

II. A BALANCED, TRANSPARENT MEDIATION PROCESS CAN PROVIDE A FAIR PATH TO RESOLUTION OF FAILED RETRANSMISSION CONSENT NEGOTIATIONS

Mediation of retransmission consent disputes is not a new idea, but it is an idea whose time has come.[3] The evolution of the marketplace in recent years demonstrates that a more formal, structured mediation process is now warranted. Indeed, the Commission has become increasingly involved in informal efforts to monitor and mediate retransmission consent disputes in an effort to avoid the loss of television signals to the public.[4] Because there is no formal structure or advance expectation of mediation by the disputing parties, however, the Commission's efforts have met with uneven success.

Accordingly, the logical next step in the Commission's involvement with retransmission consent negotiations is to add form and structure to the efforts at mediation that the Commission already is making. A more clearly-defined process would give the negotiating parties greater clarity and, ultimately, increase the chances that a deal can be reached before consumers experience a disruption in their television service.[5] Rules establishing a Commission-endorsed

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[3] The Commission first considered instituting formal mediation in 2000, when originally implementing the good faith bargaining provisions of Section 325. *See* Implementation of the Satellite Home Viewer Improvement Act of 1999, *First Report and Order*, 15 FCC Rcd 5445, 5476-77 ¶¶ 73-74 (2000) ("*Good Faith Order*"). Although the Commission chose not to implement a formal mediation process at that time, it promised to revisit the issue "if our experience in enforcing the good faith provision indicates that such a measure is necessary." *See id.* at 5477 ¶74.

[4] *See, e.g.*, News Release, *FCC Chairman Julius Genachowski Statement on Fox/Dish Network Retransmission Agreement* (rel. Oct. 29, 2010) (urging Fox and Cablevision to complete their negotiations and restore disrupted service to viewers); News Release, *FCC Chairman Julius Genachowski Statement on Fox/Time Warner and Sinclair/Mediacom Retransmission Consent Disputes* (rel. Jan. 1, 2010) ("I commend the FCC's Media Bureau for its yeoman, pragmatic, and consumer-focused work encouraging yesterday's extension of the Sinclair/Mediacom retransmission agreement as well as today's Fox/Time Warner agreement").

[5] *NPRM* at ¶ 25.

mediation framework need not be elaborate; even simple rules could go a long way to providing much-needed certainty and an appropriate relief valve for retransmission consent disputes that are threatening to hit the boiling point. Key elements of such a mediation framework could include the following:

Non-Binding Mediation. The Commission should design the mediation process to preserve as much bargaining flexibility for the parties as possible. For that reason, mediation should not be mandatory.[6] In some cases – for example, where parties are very close to a deal and neither party believes mediation would be useful – the need to prepare for and participate in the mediation might actually slow down the process of concluding an agreement. If parties believe they will be able to complete negotiations before the expiration of their agreement without engaging in mediation, they should have that prerogative. At the same time, however, the Commission should establish that if one party chooses mediation as an existing agreement draws to a close and the other party refuses, such refusal will be a key factor in any analysis of allegations of violations of the good-faith bargaining requirement that stem from the dispute.

Mediation Timing. The mediation process also should not disrupt the bargaining practices that have developed over time. While Cox has observed that parties often wait to bargain seriously until the expiration date of the current agreement approaches, Cox agrees with the Commission that a 30-day time frame would provide the parties with sufficient time to bargain and also give the mediator sufficient time to help that process along when necessary.[7] Thus, the mediation process should be triggered no earlier than the 30th day before a

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[6] Cox agrees with the Commission's conclusion that "[n]on-binding mediation would also be consistent with the [Alternative Dispute Resolution Act, 5 U.S.C. §§ 571-584 (the "ADRA")], which prohibits compelled binding arbitration;" making mediation non-mandatory would remove any reasonable doubt that the proposal complies with ADRA. *See NPRM* ¶ 25.

[7] *See NPRM* ¶ 25 & App. B (new proposed rule 47 C.F.R. § 76.65(b)(1)(x)).

retransmission consent agreement expires. On that date, the parties should be required to inform the Commission of their intent to mediate. The Commission then would issue a public notice that the dispute is entering mediation. The parties' decision to begin mediation and the Commission's public notice of that fact should be deemed to satisfy any obligation the parties have to provide notice of the potential upcoming service disruption.[8] An FCC public notice would be an effective and dispassionate way to ensure that consumers get the information they need about ongoing negotiations.

Once the parties have elected mediation, they should be required mutually to select a mediator by the 24th day prior to expiration, with the mediation beginning no later than the 21st day before expiration. This time frame should avoid the last-minute panic that often accompanies today's impasses, without unduly compromising the parties' ability to negotiate the agreement according to their own timing strategies.

Industry Mediators. The Commission's mediation rules should encourage the parties to select an experienced mediator with substantial knowledge of the television programming industry and experience negotiating, reviewing, or approving retransmission consent or similar programming agreements. An experienced industry mediator would be able to command respect from the parties as someone who has "been there" and has a good understanding of what the parties are trying to accomplish. An ideal mediator would have sufficient familiarity with the market and the issues involved in a retransmission consent negotiation to help the parties immediately focus their attention on the problems that need to be resolved, with minimal time wasted on background issues. The Commission could be apprised of the mediator's work and be

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[8] *See* 47 U.S.C. § 534(b)(9); 47 C.F.R. §§ 76.1601 - .1603.

the custodian of the records developed during the mediation process, but it need have no direct role in the mediation itself.

Mediation Costs. The mediation rules also should require the parties to pay their own costs and fees, including splitting the mediator's fee. Broadcasters and MVPDs are equally responsible for conducting good-faith negotiations, and they should have equal responsibility for the costs of resolving an impasse. The relatively short time frames established by the rules should result in a process that is not tremendously expensive or time-consuming. The key is to involve a third party to help quickly resolve difficult issues – not to commence a lengthy legal proceeding. The likelihood that parties will be disadvantaged in negotiations by being required to pay their own costs in mediation is slight. But the Commission should pay close attention to ensure that large or well-heeled parties are not forcing mediation primarily as part of a war of attrition against entities of more limited means. The Commission also should consider whether cost-shifting is appropriate if it later determines that one of the parties to the mediation failed to negotiate in good faith.

Transparency and Limited Public Disclosure. While the Commission's procedures should respect parties' right to bargain hard, if mediation is to have the intended effect of helping parties resolve their differences more effectively and efficiently, it also should include some mechanisms that will help inform and discipline the parties' bargaining. One such mechanism would be the introduction of some transparency and public visibility into the mediation process.

Congress's prime directive to negotiating parties is that demands made in good faith must be based on "competitive marketplace considerations."[9] Although the rates, terms, and conditions included in completed agreements typically are not made public, recent high-visibility

[9] 47 U.S.C. § 325(b)(3)(C)(ii).

disputes suggest that the marketplace for retransmission consent is in considerable flux. Parties attempting to reach an agreement during such a dynamic period may find themselves unable to "get to yes" because they lack the necessary information regarding the market value of carriage to come to a mutually-agreeable business arrangement. The Commission could help remedy this situation by injecting a measure of transparency into the mediation process.

In particular, as described above, parties could be required to notify the Commission that they are entering mediation, and the Commission could issue a public notice announcing that fact. Parties also could be required to disclose to the mediator the substance of their last best offer on a per-subscriber basis and at least a brief explanation of how that offer comports with "competitive marketplace considerations." In the event that mediation fails to produce an agreement, the parties' last best offers could be made available to the public. And if the mediation is successful, the resulting key terms could be reported to the Commission on a confidential basis, and the agency could make that information available to other industry mediators dealing with subsequent disputes, subject to appropriate measures to protect the parties' confidential information.[10]

Requiring this level of transparency could have at least three salutary effects. First, it could help ensure that parties do not hold out for unreasonable retransmission rates, terms, and conditions and could reduce the number of disputes that are based on uncertainty about whether proposals on the table reflect the market. Second, the requirement to publicly disclose final offers could provide discipline to the offers made by both sides (and may in fact create an extra incentive to reach agreement before mediation). Finally, consumers facing a threatened or actual

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[10] *See* 5 U.S.C. § 552(b)(4) (provision of the Freedom of Information Act exempting confidential commercially sensitive information from public disclosure); 5 U.S.C. § 574 (provision of ADRA requiring mediators and parties to mediation to maintain confidentiality of information).

loss of service would receive improved information about this important matter that directly affects them.

Mediation Factors. Finally, the Commission should provide guidance about the kinds of information that the mediator can consider during the mediation. At minimum, the FCC's rules should specify that the mediator has the authority to request that the parties produce to the mediator – again, subject to appropriate confidentiality protections – both their expiring retransmission consent agreement as well as other comparable retransmission consent agreements to which they are a party. The mediator also should be able to consider other information that directly impacts the market value of retransmission consent, such as station ratings, network affiliations and other key programming rights held by the station(s), the cost of non-broadcast programming networks carried by the distributor (taking into consideration any relevant differences between broadcast and non-broadcast programming services such as the degree of exclusivity), the value of other financial terms provided separate from rates (*e.g.*, advertising availabilities), and the value of other, non-financial terms in the deal (*e.g.*, multicast signal carriage, local channel partnerships, or bartered promotional campaigns). Drawing on this information, the mediator should be able to determine a range of retransmission consent rates that can be supported by marketplace considerations in order to help the parties reach an agreement on the genuine value of the retransmission consent rights at stake.

III. THE COMMISSION SHOULD EVALUATE THE IMPACT OF VOLUME DISCOUNTS WHEN ASSESSING "COMPETITIVE MARKETPLACE CONSIDERATIONS"

As the *Notice* observes, a key element in determining whether a party to a retransmission consent negotiation has acted in bad faith is whether it insisted on terms and conditions not based on "competitive marketplace considerations."[11] Cox agrees with other commenters that the Commission should evaluate the reasonableness of volume discounts offered during negotiations when assessing the competitive marketplace considerations at issue in a particular retransmission consent dispute. Volume discounts are an accepted business practice and can be a legitimate component of market rates. But if such discounts become so significant that they no longer reflect genuine economic benefit, they can unfairly increase smaller distributors' costs and undermine those providers' ability to compete in the video programming marketplace. The Commission accordingly should closely examine contract terms like volume-based pricing disparities to ensure that the resulting rates truly represent the market value of carriage rather than an artificial price based on non-market considerations.

A useful analogy for such considerations would be the anti-discrimination prohibition of the statutory program access provision. The program access rules do permit volume discounts to the extent they are justified by the factors listed in Section 76.1002(b) of the Commission's rules,[12] but they do not permit unlimited, uneconomic volume discounts. These standards could provide useful guidance in the retransmission consent context as well.

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[11] *See NPRM* ¶ 32. As the Commission considers the totality of the circumstances that make up this requirement, it should ensure that compensation terms for broadcast retransmission consent actually reflect the value of the broadcast retransmission rights being negotiated between individual stations and individual MVPDs. For example, NBC recently announced that it intends to negotiate retransmission consent for its affiliates. Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, BROADCASTING & CABLE (May 16, 2011), http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php. To ensure that such negotiations are based on competitive marketplace considerations, compensation for carriage of each NBC affiliate should be based on the value of that affiliate's signal and not on the value of other non-broadcast Comcast/NBCU programming that might be bundled into package programming deals, or on other considerations not related to the retransmission consent marketplace. *See* Comcast Corporation, General Electric Company and NBC Universal, Inc., *Memorandum Opinion and Order*, 26 FCC Rcd 4238, 4254-55, 4257-58 ¶¶ 37, 44 & App. B (2011).

[12] Those factors include the "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 47 C.F.R. 76.1002(b)(3).

IV. CONCLUSION

For the reasons stated above, the Commission should adopt reforms consistent with these comments.

Respectfully submitted,

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