Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Carriage Rules	))	MB Docket No. 11-131

COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits the following comments in response to two of the Commission's proposals to expand the scope of the anti-discrimination provisions of Section 616(a) of the Communications Act described in the *Notice of Proposed Rulemaking* in the above-referenced proceeding.[1]

I. INTRODUCTION

Cox supports the Commission's efforts to take a hard look at the television programming market to better ensure fairness for both cable operators and programmers. However, as described below, Cox opposes two proposals in this proceeding because they are based on the faulty and unsupportable premise that Cox's limited programming network holdings and Cox's carriage of programming of the market's larger programmers will cause Cox to discriminate against independent programmers.

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[1] Revision of the Commission's Program Carriage Rules, *Notice of Proposed Rulemaking*, MB Docket No. 11-131, FCC 11-119 (rel. Aug. 1, 2011) (the "*NPRM*"); Media Bureau announces Comments and Reply Comment Deadlines for the Notice of Proposed Rulemaking Regarding Revision of the Commission's Program Carriage Rules, *Public Notice*, MB Docket No. 11-131, DA 11-1644 (rel. Sept. 29, 2011).

As a mid-sized MVPD, Cox has a strong interest in ensuring that cable television programming is bought and sold on fair and nondiscriminatory terms.[2] As operator of a small number of local and regional channels and a minority, non-controlling owner in two national programming services, Cox is well-positioned to comment on the relative importance of affiliation in making programming purchasing decisions in the current market. While Cox is the third largest cable operator and fifth largest multichannel video programming distributor ("MVPD") in the United States, it is less than half the size of the next largest MVPD and only about one-fifth the size of the largest. In other words, Cox is large enough to benefit from some of the economies of scale that result in high quality, reliable services for its customers, but Cox lacks the purchasing power to command optimal rates and terms from programmers or the programming or distribution power to drive carriage decisions by other MVPDs.

Moreover, given Cox's experience in spending the last three years defending against a program carriage discrimination claim that the Commission found to be meritless,[3] Cox has a strong interest in helping the Commission devise rules that will grant relief in cases of actual

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[2] Cox's local programming ventures include: (1) Cox Sports Television, a regional sports network based in New Orleans that Cox makes available to other MVPDs throughout the Gulf South region; (2) Cox Sports, with entertainment programs of interest in New England, including some sports programs of high schools and local Rhode Island colleges; and (3) Channel 4 SD, a local channel serving the San Diego market, which until recently cablecast San Diego Padres games, but which now carries primarily local, non-sports programming. In a few of its markets, Cox also has interests in local news channels and other locally originated channels with a varied mix of programming. Cox's local and regional channels obtain most of their distribution from Cox itself, and have only modest distribution on the systems of other vertically-integrated operators. Cox's national programming interests include a minority, non-controlling interest in Travel Channel and even smaller stakes in iNDEMAND, which primarily provides Cox and other MVPDs with pay-per-view programming services; Music Choice, which provides music programming; and MLB Network.

[3] *See* Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner, et al., *Memorandum Opinion and Order*, 26 FCC Rcd 8988 (2011) ("*WealthTV*"), *petition for review pending sub nom. Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner, et al.*, No. 11-73134 (9th Cir. Oct. 18, 2011).

discrimination without encouraging more programmers to seek carriage through threats of costly legal action.

Based on these experiences, Cox endorses clear rules like the Commission's proposals to clarify the statute of limitations for bringing discrimination claims and the burden of proof in program carriage complaints.[4] These rule changes should both improve the process of negotiating carriage agreements and promote the resolution of complaints when disputes arise.

At the same time, however, the Commission should reject rules that do not reflect the realities of today's cable programming marketplace. In particular, the Commission should not (1) expand the universe of cognizable claims under Section 616(a)(3) to include allegations that a vertically integrated cable operator has discriminated in favor of a programmer due to its affiliation with another MVPD;[5] or (2) expand the definition of "affiliated" and "attributable interest" to include relationships created through agreements to carry multiple commonly owned programming networks owned by another cable operator.[6] Neither of these proposals accurately reflects the motivations of or challenges faced by cable operators – including those like Cox with modest programming interests – purchasing programming in today's television programming market.[7] Rather than creating a fairer cable programming market, these changes would bring further distortion to an already challenging programming market and encourage programmers to

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4 *NPRM* at ¶¶ 38-40, 79-81.

5 *Id.* at ¶¶ 72-77.

6 *Id.* at ¶ 78.

7 Indeed, the realities of the current programming marketplace would better support revisiting the definition of "affiliated" and "attributable interest" under Section 76.1300(a) and (b) to exclude cable operators' minority, non-controlling interests in programming networks. As described herein, such *de minimis* interests provide no incentive for cable operators to discriminate against other programmers and give the owner little or no influence over the rates and terms the network demands for carriage.

seek carriage through the Commission rather than through good-faith negotiation with cable operators.

II. COX HAS NO INCENTIVE TO MAKE CARRIAGE DECISIONS BASED ON THE AFFILIATION OF PROGRAM NETWORKS.

The Commission seeks comment on whether to permit an independent programmer to pursue not only claims that a vertically integrated cable operator has favored its own programming but also claims that such an operator has favored programming vendors affiliated with *other* operators.[8] In support of this proposal the Commission cites past arguments raised by programmers that vertically integrated programmers have the incentive to engage in such conduct to secure carriage of their own programming in a type of *quid pro quo* arrangement.[9] The Commission acknowledges, however, that both the D.C. Circuit and previous Commission decisions have concluded that no support exists for the conclusion that cable operators are likely to engage in this type of behavior.[10] The Commission also recognizes that cable operators without affiliated programming interests lack any incentive to favor other MVPDs' affiliated programming.[11]

The Commission's proposal should be rejected because it rests on the faulty and unsupportable premise that as soon as a cable operator gains an attributable interest – however small – in a cable programming venture, its incentive to promote widespread carriage of that programming automatically overrides the many other non-discriminatory criteria the operator otherwise would have applied to its carriage decisions. This is false. In today's fiercely

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8 *Id.* at ¶ 75.

9 *Id.* at ¶ 72 & n.248.

10 *Id.* at ¶ 74 (citing *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001); Cable Horizontal and Vertical Ownership Limits, *Fourth Report and Order*, 23 FCC Rcd 2134, 2165-66, ¶¶ 63-66 (2008), *vacated*, *Comcast Corp. v. FCC*, 579 F.3d 1 (2009)).

11 *See NPRM* at ¶ 72.

competitive programming market, MVPDs select programming based on powerful incentives to contain programming costs, develop the most attractive possible channel lineup for customers, and manage a finite amount of bandwidth to serve customers. Striking this balance properly is a competitive necessity because cable operators today face competition from a wide array of satellite, telco, and other MVPDs, as well as from a growing number of non-MVPD video programming sources. An MVPD like Cox with small-scale and minority interests in programming networks cannot waste bandwidth carrying undesirable MVPD-affiliated programming or pay significant additional programming licensing fees merely to benefit its own small programming investment. To do so would negatively affect Cox's core cable distribution business and would produce no net benefit.

The Commission's proposed expansion of potential liability under Section 616(a)(3) is, at best, over-inclusive because it would subject operators with small programming holdings to a greatly expanded universe of potential claims even though such operators have no incentive to discriminate. Moreover, it is by no means clear that cable operators with larger programming holdings have the incentive or inclination to engage in this type of behavior.[12] In any case, creating such a sweeping rule, based merely on an unproven and, in fact, false assumption about Cox's behavior, would unfairly make Cox the target of meritless but costly litigation and of "negotiation" through threats of such litigation.

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[12] In the *WealthTV* case, the Commission developed an extensive record of what goes into the programming selection decisions by four vertically integrated cable operators, two of which have extensive programming interests. Despite large-scale discovery and sworn testimony from the programming decision-makers at all four companies, not a shred of evidence was produced indicating that these cable operators consider the affiliation status of a prospective network when deciding whether to carry it. *See* WealthTV v. Time Warner Cable, Inc., et al., *Recommended Decision of Chief Administrative Law Judge Richard L. Sippel*, 24 FCC Rcd 12967 at ¶¶ 39, 42, 44, 51, *aff'd*, *Memorandum Opinions and Order*, 26 FCC Rcd 8988 at ¶¶ 28-31.

The better course is to maintain the Commission's existing interpretation of Section 616(a)(3) as applying only to instances of alleged discrimination by a vertically integrated cable operator in favor of its own affiliated programming. If, however, the Commission decides to expand the scope of the program discrimination provisions as outlined in the *NPRM*, it should fashion an exception for smaller and mid-sized cable operators like Cox that lack the incentive to discriminate based on their relatively modest programming holdings.

III. EXPANDING THE DEFINITION OF "AFFILIATED" TO INCLUDE NON-OWNERSHIP ARRANGEMENTS WOULD UNFAIRLY PENALIZE MVPDS FOR PURCHASING MUST-HAVE PROGRAMMING.

The Commission also seeks comment on changes to the definition of "affiliated" and "attributable interest" that would result in an MVPD being considered "affiliated" if it agrees to carry multiple channels commonly owned by the same programmer.[13] This proposal reflects a profound misunderstanding of today's programming marketplace. If the Commission adopts this change, virtually every MVPD that does business with a large programmer potentially would be subject to carriage discrimination claims by independent programmers as a result of those dealings. No basis exists in the Act or the marketplace for such a vast expansion of Section 616(a) beyond its intended coverage of competitively damaging discrimination by vertically integrated MVPDs on behalf of their owned programming.

On its face, the Commission's proposal to classify Cox and other MVPDs as "affiliated" with any programmer from which they buy multiple programming services can only be understood as a pure legal fiction. Far from exhibiting the community of interest suggested by the term "affiliated," Cox's relationships with the major programming vendors are frequently contentious and are always characterized by hard bargaining in which each party zealously

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13 *See NPRM* at ¶ 78.

pursues its own interests. As the Commission is aware, the cost of video programming for MVPDs is ratcheting ever upward.[14] Cox's size does not give it the power to control the market. To the extent that Cox can pursue a strategy in choosing and negotiating for programming, it must pursue certain imperatives. It must obtain, at the lowest price it can negotiate, the programming its customers want. It must do so while managing its bandwidth carefully so that it can offer the full range of video programming and non-video services that its customers and potential customers expect in a competitive marketplace at competitive prices. And Cox must pursue these objectives in an environment in which programmers have most of the leverage in these negotiations.

Because Cox is not nearly as large as the four largest MVPDs, it is simply not able to take advantage of significant volume discounts in rates that are generally available to MVPDs with larger subscriber bases. A rule classifying Cox as an "affiliate" of the program networks to which it is forced to pay these high and ever-increasing carriage fees thus would reflect precisely the opposite of the reality faced by operators like Cox.

The Commission must not penalize the weaker party to programming negotiations for its inability to resist a programming vendor's superior leverage. Section 616(a) was designed to ensure that MVPDs would not discriminate against independent programming in favor of their own programming; it was not designed to stop MVPDs from doing the best they can to obtain the programming that their customers demand under very difficult market conditions. For these

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[14] *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd 542 ¶48 (2009) (most recent FCC report on competition noting a 62% increase in programming costs from 2004-2006). *See also*, *e.g.*, Johnny Diaz, *Cable Rates Are Rising, But Don't Blame Your Provider – Entirely*, BOSTON GLOBE, June 5, 2011, *available at* http://articles.boston.com/2011-06-05/business/29686171_1_cable-rates-cable-subscribers-basic-cable; Jim Barthold, *Programming Costs to Blame for Cox Basic Cable Hikes*, FIERCECABLE, June 8, 2011, *available at* http://www.fiercecable.com/story/programming-costs-blame-cox-basic-cable-hikes/2011-06-08.

reasons, the Commission should reject the fallacy that "affiliation" arises merely as a result of entering into a contract to carry multiple networks commonly owned by a single programmers.

CONCLUSION

The proposals addressed in Sections II and III of these Comments are based on a misunderstanding of the programming marketplace. Cox's small programming network holdings do not create an incentive for Cox to favor other vertically integrated programming. And Cox's carriage deals with larger programmers, whether they are vertically integrated or not, reflect the considerable power of those programmers, not any discriminatory intent by Cox. These proposals should not be adopted.

Respectfully submitted,

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