Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Radio Perry, Inc.	)	
(WPGA-TV, Perry, Georgia)	)	
	)	CSR-8509-M
v.	)	
	)	
Cox Communications, Inc.	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 2011 **Released: December 5, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Radio Perry, Inc., licensee of television broadcast station WPGA-TV, Virtual Channel 58, Perry, Georgia ("WPGA"),[1] filed the above-captioned Petition for Emergency Relief and Declaratory Ruling against Cox Communications, Inc. ("Cox"). WPGA asks that we order immediate carriage of its station on Cox's Macon, Georgia cable system (the "system").[2] An opposition was filed by Cox, along with a related Petition for Declaratory Ruling against WPGA.[3] Cox asks that we find that WPGA has elected retransmission consent for the upcoming carriage cycle. WPGA replied,[4] Cox replied to the reply,[5] and WPGA filed a Surreply to the Cox reply.[6] For the reasons discussed below, we dismiss

[1] Part of the Macon, Georgia DMA.

[2] Perry Petition for Emergency Relief and Declaratory Ruling, CSR-8509-M (Filed July 27, 2011) ("WPGA Petition"). In this original Petition, WPGA asked us to issue a Declaratory Ruling requiring Cox to continue carriage of WPGA through the end of the current carriage cycle. In response, Cox committed to carrying WPGA uninterrupted until that time (December 31, 2011). Cox Communications, Inc., Motion for Extension of Time (Filed August 19, 2011). Although WPGA asks us to hold the docket open until the end of the year, Cox's commitment moots WPGA's initial Petition. WPGA expresses concern about improper action by Cox after the petition is dismissed, but we have no reason to doubt Cox's statement that carriage of WPGA will continue until the end of the carriage cycle and dismiss the petition in express reliance on this commitment.

[3] Cox Opposition to Radio Perry Inc.'s Petition for Emergency Relief and Declaratory Ruling and Petition of Cox Communications, Inc. for Declaratory Ruling (Filed September 15, 2011) ("Cox Petition").

[4] Perry Reply to Opposition to Radio Perry Inc.'s Petition for Emergency Relief and Declaratory Ruling and Opposition to Petition of Cox Communications, Inc. for Declaratory Ruling (Filed September 30, 2011) ("WPGA Reply").

[5] Reply of Cox Communications, Inc. to Opposition of Radio Perry Inc. to Petition of Cox Communications, Inc. for Declaratory Ruling (Filed October 13, 2011) ("Cox Reply").

[6] Perry Surreply to Reply (Filed October 26, 2011) ("WPGA Surreply"). Perry filed a Motion for Leave to file this Surreply, which would normally not be permitted under the Commission's rules. The Motion was unopposed by (continued….)

WPGA's petition as moot insofar as it relates to the 2009-2011 election cycle (subject to continued carriage by Cox until the end of that cycle). We now address the outstanding issues raised in response by Cox, regarding the 2012-2014 election cycle.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act, and implementing rules adopted by the Commission, a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market.[7] A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.[8] The Commission has clarified that "broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent."[9] A station not electing retransmission consent by October 1 of the year prior to the first year of a carriage cycle is deemed to have elected must carry.[10]

3. There is no dispute regarding the relevant facts of the case. This conflict first appeared before the Commission when on March 19, 2010, WPGA filed a carriage and channel positioning complaint.[11] It is undisputed that it failed to make any carriage election prior to the October 1, 2008 election deadline for the 2009-2011 carriage cycle. Thereafter, the parties signed an agreement, dated January 1, 2009,[12] in which WPGA stated that it was electing retransmission consent for both the 2009-2011 carriage cycle and the 2012-2014 carriage cycle.[13] Near the end of 2009, Cox notified WPGA of its intent to cease carrying the station on the system pursuant to a clause in the Agreement.[14] In response, WPGA filed its carriage complaint and argued that, notwithstanding the later Agreement, it had defaulted to must carry status for the 2009-2011 carriage cycle when it failed to elect otherwise before October 1, 2008. The Media Bureau agreed. On July 16, 2010 the Bureau issued a Memorandum Opinion and

(Continued from previous page)
Cox. In the interest of establishing a complete record in this proceeding, we believe the public interest is best served by accepting into the record and considering the WPGA Surreply.

[7] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Report and Order, 8 FCC Rcd 2965, 2976-2977 (1993).

[8] Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. § 534(h)(1)(C). Section 76.55(e) of the Commission's rules requires that a commercial broadcast television station's market be defined by The Nielsen Company's DMAs. *See* 47 C.F.R. § 76.55(e). The Nielsen Company was previously named Nielsen Media Research.

[9] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, MM Docket No. 92-259, Clarification Order, 8 FCC Rcd. 4142, 4144 (1993).

[10] 47 C.F.R. § 76.64(f)(3).

[11] *Id*.

[12] "Retransmission Consent and VOD License Agreement" (the "Agreement").

[13] The relevant Section of the Agreement reads, in its entirety, "The parties acknowledge and agree that the terms hereof shall constitute a retransmission consent election notice (as required under applicable FCC Rules) for the 2009-2011 and 2012-2014 retransmission consent/must-carry election cycles."

[14] The Agreement contained a provision under which Cox would not be required to "retransmit the Digital Signal pursuant to Section 4 if the station is not, or ceases to be" affiliated with the ABC, CBS, FOX, or NBC networks. WPGA is no longer affiliated with one of those networks. Perry Mandatory Carriage and Channel Positioning Complaint, CSR-8306-M at Exhibit D, page 4; *see also* Exhibit D, page 2 (defining "Top-4 Station") (Filed March 19, 2010).

Order holding that WPGA became a must-carry station for the 2009-2011 carriage cycle because it did not elect retransmission consent prior to the October 1, 2008 deadline.[15] The Bureau made no statement regarding WPGA's status in the upcoming 2012-2014 carriage cycle.

4. As noted above, WPGA's election of retransmission consent for WPGA on the Cox System for the 2012-2014 carriage cycle took place via contract in 2009, substantially prior to October 1, 2011. On September 23, 2011, WPGA sent a letter to Cox in which it stated that the contract was "terminated and at an end." On September 27, 2011, WPGA sent another letter to Cox, stating that it "elects must-carry for the carriage of" WPGA on the Cox System for the 2012-2014 election cycle. On October 5, 2011, Cox responded to WPGA with a letter arguing that the contract was not terminated, and that WPGA's retransmission consent election remained valid. Cox has asked that the Bureau issue a Declaratory Ruling affirming WPGA's election of retransmission consent for the upcoming carriage cycle.

III. DISCUSSION

5. Cox argues that, despite the January 1, 2009 Agreement being found defective by the Bureau as to the 2009-2011 election period, it is by its terms still valid for the 2012-2014 carriage cycle.[16] We agree. The Agreement was clearly intended by WPGA as a retransmission consent election for the upcoming 2012-2014 carriage cycle. This stated intent was not altered by the holding that, as to the current carriage cycle, the attempted election in the same document was deficient. The earlier *Order* did not need to resolve WPGA's carriage status for the 2012-2014 cycle, and so did not reach that question. Perry argues that the *Order* was a general rejection of "Cox's attempt to draw the Commission into any aspect of the 2009 Agreement," and that there has been offered "no persuasive authority for the principle that a contractual election standing on its own can form the basis for an FCC election."[17] As Cox succinctly states in their Reply, "[of] course, a broadcaster can make an election in an agreement."[18] And, the Bureau's responsibility is to review agreements to determine whether an election was validly made under the Commission's rules.

6. As the original *Order* made clear, however, we can go no further in contractual interpretation because "[o]ur deliberations in this matter are limited to the rights of the parties under the Commission's rules."[19] WPGA asks the Commission to find that the Agreement has been validly terminated based on its letter to Cox. In essence, WPGA asks us to interpret the provisions of the Agreement with Cox. We find it no more appropriate in the instant context than it was in the earlier proceeding, when "Cox ask[ed] us to adjudicate a specific dispute concerning that private agreement."[20] There, we explained that "this is simply outside the purview of the Commission."[21] Under our rules, WPGA made a binding retransmission consent election prior to October 1, 2011 for the 2012-2014 election cycle. As Cox

[15] *Radio Perry, Inc. (WPGA-TV, Perry, Georgia) vs. Cox Communications, Inc.*, CSR-8306-M, Memorandum Opinion and Order, DA 10-1286 at ¶ 9 (Media Bureau, July 16, 2010) ("*Order*").

[16] Cox Petition at 5.

[17] WPGA Reply at 4, 3.

[18] Cox Reply at note 1.

[19] *Order* at ¶ 8. *See also Telefuture Fresno LLC v. Echostar Communications Corp.*, CSR-6197-M, Memorandum Opinion and Order, 18 FCC Rcd. 22940, ¶ 12 (MB 2003); *Monroe, Georgia Water, Light, and Gas Commission v. Morris Network, Inc.*, CSR-6237-C and CSR-6254-C, Memorandum Opinion and Order, 19 FCC Rcd. 13977 (MB 2004) ("Monroe").

[20] *Order* at ¶ 7.

[21] *Id.*

correctly observes, WPGA can not "unring the election bell."[22] Cox argues that to de-legitimize early carriage elections would imperil the current system of multi-year carriage agreements that "avoid the disruption of service due to a retransmission consent impasse."[23] We concur. The Commission's rules do not contemplate changing or disaffirming an election once made, and as the Cable Services Bureau has said in the past, to permit stations to change a valid election would "lead to administrative chaos."[24]

7. *Cablevision Systems Corp.*, cited by Cox, is directly on point.[25] In *Cablevision Systems Corp.* a station, WOOD, made a must-carry election for a cycle for which it had earlier made a valid retransmission consent agreement. As the Cable Services Bureau explained, "WOOD-TV's [earlier and still-valid] election of retransmission consent preclude[d] the station from claiming must-carry status during the 1997-1999 period."[26] WPGA, like WOOD before it, properly elected retransmission consent for the upcoming carriage cycle, and its carriage during that cycle is therefore governed by the terms of the private carriage agreement between the parties unless found deficient by a court of competent jurisdiction.[27]

IV. CONCLUSION

8. The Commission "will not interject [itself] into specific arguments concerning private agreements between broadcasters and MVPDs."[28] By agreement with Cox and pursuant to the Communications Act, WPGA became a retransmission-consent station for the 2012-2014 carriage cycle when it elected that status prior to October 1, 2011. Our decision here is not intended to suggest any opinion regarding the terms of that agreement, but only to affirm that the parties are governed by it, rather than the Commission's must-carry rules, for the upcoming cycle.

[22] Cox Reply at 3.

[23] Cox Reply at 5.

[24] *Cablevision Systems Corp.*, CSR-4666-M, Memorandum Opinion and Order, 12 FCC Rcd. 13121, at ¶ 12 (CSB 1996).

[25] *Id*.

[26] *Id.*

[27] Although the parties raise other issues and hypothetical situations, we decline to reach any other issues as they are unnecessary for resolution of this matter.

[28] Monroe, *supra* note 20, at ¶ 10.

V. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3), and section 76.57 of the Commission's rules, 47 C.F.R. § 76.57, the petition filed by Radio Perry, Inc., licensee of television broadcast station WPGA-TV, Perry, Georgia, **IS DISMISSED** as discussed herein.

10. **IT IS ORDERED FURTHER ORDERED** that, pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3), and section 76.57 of the Commission's rules, 47 C.F.R. § 76.57, the petition filed by Cox Communications, Inc., operator of a cable system in Macon, Georgia, **IS GRANTED IN PART** as discussed herein.

11. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[29]

FEDERAL COMMUNICATIONS COMMISSION

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Senior Deputy Chief, Policy Division
Media Bureau

[29] 47 C.F.R. § 0.283.