

Herring Networks, Inc.

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June 13, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 16-41, Submitting Party – Herring Networks, Inc., dba One America News Network and AWE

Notice of Inquiry (“NOI”) – Promoting the Availability of Diverse and Independent Sources of Video Programming

Dear Ms. Dortch:

This ex parte notice is filed on behalf of Herring Networks, Inc. On June 9, 2016, Charles Herring, President of Herring Networks, Inc. spoke telephonically with Mr. J. David Grossman, Chief of Staff, Commissioner Clyburn’s Office.

Mr. Herring reviewed the attached proposed suggestions for promoting the availability of diverse and independent sources of video programming. Mr. Herring suggested that the FCC should define “An Independent Programmer”. Mr. Herring proposed that MVPDs and OVDs should not be allowed to enforce any unconditional MFN provisions with Independent Programmers. Mr. Herring also proposed that ADM provisions with Independent Programmers should be non-enforceable. Proposed changes to FCC Regulations 73.1301 were also encouraged.

Respectfully submitted,



Charles P. Herring
President
Herring Networks, Inc.



DEFINE AN INDEPENDENT PROGRAMMER

Proposed Language:

“An Independent Programmer is a provider of 24/7 video programming that does not have any common interest with any MVPD or broadcaster and owns and operates no more than three branded 24/7 video programming networks.”

NEGATE UNCONDITIONAL MFNS PLACED ON INDEPENDENT PROGRAMMERS

Proposed Language:

“MVPDs and OVDs shall not enforce any Unconditional MFN provision with an Independent Programmer. Such Unconditional MFNs may be enforced on a conditional basis, taking into account all terms and conditions of the agreement”

Definition of Conditional and Unconditional MFNs:

“A conditional MFN provision entitles a distributor to certain contractual rights that the programmer has granted to another distributor, as long as the distributor also accepts equivalent or related terms and conditions contained in that other distributor’s agreement. An unconditional MFN provision, by contrast, contains no such requirement that the distributor entitled to MFN rights accept equivalent or related terms and conditions; it can elect to incorporate in its agreement any of the terms of the other distributor’s agreement that it wants to incorporate.”
Source: NOI 16-41, dated Feb. 18, 2016, page 4, footnote

NEGATE ADM PROVISIONS

Proposed Language:

“MVPDs and OVDs shall not enforce any agreement with an Independent Programmer that forbids, limits, or creates incentives to limit the Independent Programmer’s provision of its Video Programming to one or more MVPD and/or OVD.”

This language is consistent with the DOJ Proposed Final Judgement, which was relied upon by the FCC to address what it found to be anti-competitive behavior.

PROPOSED CHANGES TO FCC REGULATION 73.1301 – CARRIAGE ACCESS COMPLIANT PROCESS

1. Establishment of a Shot Clock

Once a Complaint, Answer, and Reply are filed, there is neither a timeline for when the FCC will respond to the complaint nor when final resolution will take place. Proposed change to Section 76.1302:

(h) Deadlines for Commission Findings and Decisions

- (1) The Commission shall make a determination as to whether a complainant has made out a prima facie case under this section within 30 days of the filing of a complainant’s reply to a defendant’s answer to a complaint, or the date on which such reply would be due if none is filed.

(2) The Commission shall issue a final order resolving a complaint found to have made out a prima facie case no later than 6 months from the date of the initial filing of the complaint.

2. Definition of Prima Facie Case

Currently, there is no definition in the rules of what constitutes a prima facie case. Consequently, defendants argue their own versions of the standard to try to get independent programmers' complaints dismissed. This lack of clarity is a problem for independent programmers who are in litigation before the Commission, and for programmers who are contemplating litigation to vindicate their rights. Proposed change to Section 76.1302:

- (c) *Contents of Complaint* (5) "Prima facie case" means that the complainant shall put before the Commission evidence of the elements of the discrimination offense, supported as appropriate by documents and testimony by declaration or affidavit, that, if subsequently found to be true by a finder of fact, would be sufficient to establish a violation under this section.

3. Prohibition against retaliation

It is important that the Commission make it clear that MVPD discrimination in the form of retaliation against independent programmers for their lawful assertion of their rights will not be tolerated, whether before, during or after carriage. Proposed change to Section 76.1301:

- (c) *Discrimination*. [Add the following at the end of subsection c] A multichannel video programming distributor's refusal to deal, or refusal to negotiate in good faith, with a non-affiliated video programming provider because of the latter's assertion of rights or remedies under this Subpart shall constitute discrimination.

4. Stay During Litigation

Independent programmers who have carriage and are offering their programming to MVPD subscribers may suffer discrimination in the terms or conditions of carriage. For example, after the network has made substantial investments and commitments in programming, and entered into advertising and other arrangements, the MVPD may seek to favor affiliated programming by "re-tiering" the independent programmer to an expensive or unpopular tier with reduced viewership and revenue during or after an initial term of the carriage agreement. Proposed change to Section 76.1302:

Insert before existing subsection (g) and renumber accordingly:

- (g) *Stay during litigation*: Upon a complainant's filing of a complaint alleging discrimination with respect to a change in the terms or conditions of carriage, any such change shall be null and void and the terms and conditions of carriage shall revert to *status quo ante* for the duration of the pendency of the Commission's decision upon such complaint.