

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

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Request for Comment on Petition for)	
Declaratory Ruling)	MB Docket No. 07-170
)	
V-me Media, Inc.)	
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**COMMENTS OF
EDUCATIONAL BROADCASTING CORPORATION**

September 7, 2007

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SUMMARY

Educational Broadcasting Corporation (“EBC”) opposes the Petition for Declaratory Ruling (the “Petition”) filed by the Hispanic Information and Telecommunications Network, Inc. (“HITN”). The Petition is based on a misunderstanding and misstatement of fact and, therefore fails to state a claim upon which FCC relief can be granted. It should be dismissed.

HITN alleges that V-me Media, Inc. (“V-me”), producer of the nation’s first Spanish-language public television network, is not a “qualified national educational programming supplier” for a DBS “set-aside” channel because it is a for-profit company. Alternatively, the Petitioner alleges that EBC and V-me have “colluded” to secure distribution of V-me’s noncommercial program service on a set-aside channel for which V-me, as a for-profit company, is unqualified.

The Petition is mistaken in its facts. V-me and EchoStar have no contractual relationship whatsoever. Rather, EBC, the licensee of PBS’s flagship television station, WNET(TV), has the right to license the national distribution of V-me programming on a DBS set-aside channel, which it is now doing pursuant to an agreement with EchoStar. EBC has the right to determine in its sole discretion the terms and conditions of DBS carriage of V-me programming. EBC has exercised its rights and executed a contract with EchoStar for carriage of V-me programming on EBC’s set-aside channel. V-me is not a party to that contract and has no right to require either EBC or EchoStar to take or not to take any action with respect to EchoStar’s carriage of V-me programming.

EBC’s right to program an EchoStar set-aside channel is most appropriate because EBC, licensee of public television station WNET(TV), is by definition a “qualified programmer” under

federal law and the Commission's rules. The V-me channel is a *bona fide* noncommercial educational and informational program service targeted to Hispanic households, a fact the Petition does not (and could not) challenge, regularly carried on a WNET(TV) HD multicast channel.

The Petition's allegation of collusion between EBC and V-me is similarly flawed. The V-me service is the product of years of research and development undertaken by EBC to create and widely disseminate the nation's first noncommercial public broadcast service to the U.S. Latino community. With the assistance of research funded by CPB, and with its own extensive experience in the development and production of high-quality, award-winning public television programming, EBC developed the principles of programming for a service that has come to be known as "V-me."

EBC went to the private sector to fund V-me and was successful in finding investors willing to take on the enormous economic burden and risk associated with launching a new nationwide programming venture, and also willing to leave ultimate editorial control in the hands of the party with decades of experience as a noncommercial television licensee and as a producer of national programming for public television. Public/private ventures to fund new programming are in the best traditions of public broadcasting and have been promoted by the FCC in the *Set-Aside Order* as effective means of creating high-quality noncommercial content. This long-standing practice has resulted in some of the most important and significant public television programming ever produced. Examples abound: Florentine Films (Ken Burns productions); Public Affairs Television (Bill Moyers productions); NewsHour Corp. (*NewsHour with Jim Lehrer*); major Hollywood studios (Classic Movies); and HIT Entertainment (*Barney, Bob the Builder, Thomas the Tank Engine*). The production of programming for public

television by a for-profit company does not disqualify the product from distribution on a noncommercial basis, nor does such production diminish the noncommercial qualification of a public television licensee that distributes that programming.

While EBC succeeded in shifting the economic risk of V-me's operations to the private sector, it retained a substantial ongoing relationship with the company and maintained substantive responsibility for the channel's programming. EBC holds a 20% equity interest in V-me, is required by contract to supply critical program content to V-me and, most importantly, has ultimate editorial control of V-me's programming. EBC has myriad ways to exercise its editorial control: it played a key role in selecting V-me's executives, the President of which was a long-time EBC employee; it enjoys significant rights on the V-me board of directors; and it participates on an advisory board that V-me is contractually required to establish. Moreover, EBC provides V-me with office space and production facilities and services at its headquarters in New York. Thus, EBC does not just "purport" to be the "programmer" of record, as the Petition alleges, EBC has a principal role in V-me's programming.

V-me is currently broadcast over-the-air by dozens of public television stations on digital multicast channels. The public broadcasting community uniformly recognizes V-me as a *bona fide* noncommercial service. Since its inception, V-me has received enthusiastic recognition from key elements of the public television broadcasting community such as CPB, PBS, and APTS, as well as dozens of individual public television stations.

The issues posed in the Petition are based on misunderstandings and misstatements of the separate contractual relationships between EBC and V-me and between EBC and EchoStar. Thus, the cited concerns are not relevant to EBC's distribution of V-me. The facts are that EBC is a noncommercial educational television licensee, using a set-aside DBS channel that it has

contracted for and controls, to deliver to the American public a first-of-its-kind noncommercial educational and informational service that it conceived, in full compliance with the letter and the spirit of the Commission's set-aside rules. Accordingly, the Commission should promptly dismiss or deny the Petition and confirm that EBC may continue to distribute V-me on a DBS set-aside channel so that it can reach the historically underserved audience the network is designed to serve.

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OPPOSITION OF EDUCATIONAL BROADCASTING CORPORATION

Educational Broadcasting Corporation (“EBC”), through counsel, opposes the Petition for Declaratory Ruling, as modified by the Reply to Response to Declaratory Ruling (collectively, the “Petition”) in which the Hispanic Information and Telecommunications Network, Inc. (“HITN”) requests the Commission to declare that V-me Media, Inc. (“V-me”) does not qualify as a national educational programming provider entitled to set-aside carriage on DBS systems under Section 25.701 of the FCC’s Rules and Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Cable Act”). The Petition’s fundamental allegations are grounded in material misstatements of fact. The fact is that V-me is the product of years of research and development undertaken by EBC to create and widely disseminate the nation’s first noncommercial broadcast service dedicated to providing “PBS-quality” programming to Spanish-speaking households. As a noncommercial television licensee, EBC is clearly qualified to distribute V-me on a set-aside channel. Accordingly, the Petition should be promptly dismissed or denied.

I. EBC Developed V-me To Meet the Demands of a Historically Underserved Audience for High-Quality Noncommercial Educational and Informational Programming

EBC is a 501(c)(3) organization chartered in 1961 by the Board of Regents of the University of the State of New York as a nonprofit educational corporation. The stated purposes for which EBC was founded are:

- a. To acquire, construct and operate non-commercial educational radio and television stations, to obtain and hold appropriate authorizations and licenses for the operation of said stations from State and Federal authorities, and to participate in state, regional and national educational networks;
- b. To prepare and purchase educational or cultural programs, filings and recordings and to present the same on the corporation's own stations and to license, sell and make them available to any other persons, corporations and stations, whether commercial or noncommercial; and
- c. To aid and assist and to work in conjunction with corporations, educational institutions, organizations agencies and individuals interested or engaged in any of the fields or purposes of the corporation, and generally to encourage and foster educational television broadcasting.¹

EBC's mission is to be a "leading provider of educational, informational and cultural" television programming that would "[r]eflect and respect a diverse and complex world [and] serve the underserved."²

As explained in the following material, the development of V-me by EBC is in direct fulfillment of its state chartered objectives and its mission. For almost half a century, EBC has pursued its duty as the licensee of WNET(TV), the flagship affiliate of the Public Broadcasting System ("PBS") for the New York metropolitan area, serving New York, New Jersey and

¹ Absolute Charter of Educational Television for the Metropolitan Area, Inc., granted by the Board of Regents of the University of the State of New York, dated May 3, 1961, at para. 2. The corporate name of the entity as established was changed by amendment dated April 27, 1962 to Educational Broadcasting Corporation.

² See Thirteen, WNET New York, <http://www.thirteen.org/homepage/about/index.html> (last visited Sept. 7, 2007).

Connecticut communities.³ EBC is one of the key program providers for PBS and brings to the national audience such acclaimed series as *Great Performances*, *Nature*, *American Masters*, *The News Hour with Jim Lehrer*, *Charlie Rose*, *Now with David Brancaccio*, *Religion and Ethics Newsweekly*, *Secrets of the Dead*, *Wide Angle*, *Expose: America's Investigative Reports*, *Cyberchase*, and *Franny's Feet*. The excellence of EBC's noncommercial programming has been acknowledged with numerous George Foster Peabody Awards, Emmy Awards, Grammy Awards, and dozens of other local, regional, national and international honors.

EBC also has pioneered a range of creative programming services and initiatives in an effort to lead public broadcasting into the future. For example, using digital spectrum, EBC has created *ThirteenHD*, *Kids Thirteen*, *Create, World*, *Thirteen on Demand* and *Kids Thirteen on Demand*. And, most relevant to this proceeding, EBC has extended the quality of public television programming to an entirely new and increasingly prominent sector of the public with the launch of V-me, the first national public television service for Latino viewers in the United States.

EBC's development of the service that eventually came to be called "V-me" was part of a much broader collaborative effort by the public television community to pioneer new noncommercial content, which could find distribution for the first time as a result of additional capacity provided by digital multicasting. Several years ago, with the support and encouragement of the Corporation for Public Broadcasting ("CPB"), the Public Broadcasting Service ("PBS"), American Public Television, the National Educational Telecommunications Association ("NETA"), and the Association of Public Television Stations ("APTS"), EBC, WGBH Boston, and other prominent public television entities developed several program

³ EBC is also the licensee of WLIW(TV), Garden City, NY.

concepts that could not have existed in the single-channel analog world. As a result of these efforts, public television stations are now multicasting a diverse spectrum of noncommercial programming, among them *V-me*; *Create*, a lifestyle channel covering a variety of “how-to,” travel, cooking, and do-it-yourself programming; and *PBS World*, which features documentaries, public affairs and news programming and a variety of linear channels focusing on “encore” and children’s programming. And the reach of these new program services has been extended even farther as a result of an agreement between PBS and the National Cable Telecommunications Association, by which major cable operators retransmit multicast channels broadcast by public television stations.

Specifically with respect to the development of *V-me*, more than six years ago EBC recognized that the Spanish-speaking public was vastly underserved by high quality, Spanish-language public television programming. Thus, EBC began a period of intense study to fashion programming that would “marry[] the traditional mission of public television – to inform, educate, enlighten, and entertain – with a focus on the culture, language and interests of North America’s growing and increasingly significant Latino population.”⁴ EBC envisioned that the broadcast of this new public television network over digital multicast channels of NCE stations could serve as a prime example of the enormous public benefits made possible through the conversion to digital television. Thus, with the assistance of research funded by the CPB, and with its own extensive experience in the development and production of high-quality public

⁴ See EBC 2006 Annual Report, *available at* http://www.thirteen.org/homepage/annual_report06/page1.html.

programming, EBC developed the principles of programming for a service then called “Viva TV” and renamed “V-me” in 2006.⁵

EBC initially planned to support V-me through the traditional financial model of public broadcasting, which relies primarily on foundations, government entities, and private philanthropy. EBC concluded, however, that the traditional model could not likely sustain the undertaking economically, given the extraordinary capital-intensive and high-risk nature of launching a first-of-its-kind, national Spanish-language public broadcasting service, which demanded a substantial investment in new programming and wide program distribution. As compelling as the V-me project was, EBC also needed to safeguard the financial stability of its existing broadcasting and program production services.

After considering a broad range of different funding options, EBC developed a business model by which it would shift the financial burden and risk of the enterprise to the private sector, but still retain a significant (20%) ownership interest in V-me as well as substantive editorial control of the programming operation. In this manner, EBC can ensure that the programming meets WNET’s high production standards, fulfills EBC’s educational mission, and complies in all respects with the Commission’s standards for noncommercial program services. Specifically, EBC partnered with The Baeza Group –V-me Partners, LLC (“BG-VMP”) to create V-me Media, Inc. BG-VMP is an investment vehicle for V-me’s two capital contributors, The Baeza Group and Syncom Funds, both of which have well-established track records of promoting

⁵ In mid-2006, EBC also filed to register V-me as its service mark, and registered in its name the “v-me.tv” domain name. EBC took these steps even before V-me Media, Inc. was formed as a Delaware limited liability company.

economic development and entrepreneurship among underserved populations.⁶ This entity provided all the capital for, and assumed one hundred percent of the economic risk of, V-me.⁷

By contract, EBC is obligated to provide V-me with a significant amount of content. Over a ten year period, EBC must supply 1,000 hours of programming, which will include new episodes of current key series, new specials and miniseries, and other programming from EBC's extensive library.⁸ Currently, EBC is providing V-me with approximately 150 hours of Spanish-language programming, including adaptations of its signature series *Great Performances (Escenario)*, *Expose*, *Nature (Naturaleza)*, *Wide Angle (Cronicas de Nuestro Tiempo)*, *Religion and Ethics (Creencias)*, *Franny's Feet (Los Pies Magicos de Franny)*, and *Cyberchase*. Rather than simply adding a Spanish-language voiceover, V-me re-produces much of this programming to make it more responsive to a Latino audience. This is done through substituting program content, hosts and revising scripts to make the programming more culturally relevant. This equates to roughly 14 percent of V-me's programming. In addition to supplying content, EBC also provides V-me with EBC's significant expertise in such areas as content development, production, distribution, sponsorship, and underwriting.

⁶ Syncom participates in ventures to enhance minority ownership and participation in media. See <http://www.syncomfunds.com/about.asp> (describing Syncom as a "leading venture capital firm primarily focused on early to mid-stage investments in *underserved segments* of the media and communications industry"). The Baeza Group focuses on enterprises supportive of the Hispanic community.

⁷ Stockholders' Agreement among The Baeza Group – V-me Partners, LLC, Educational Broadcasting Corporation and V-me Media, Inc., dated as of September 25, 2006 ("Shareholders' Agreement"). EBC is submitting to the Commission contracts cited in this Opposition under separate cover with a request for confidential treatment. As stated in the request, EBC is providing the contracts so that the Commission may independently verify the statements contained in this Opposition. Given the highly proprietary nature of the agreements, they should not be made available to the public, especially to competitive (and antagonistic) program service providers like HITN.

⁸ Shareholders' Agreement, §§ 9.1(a)(i) and (ii).

EBC has substantive editorial discretion with respect to all programming carried by V-me. By contract, V-me’s “programming shall reflect a quality level that is consistent with the standards of Public Broadcasting, and *EBC shall have the right to veto any proposed programming by [V-me] that two or more [Directors appointed by EBC] believe in good faith will not reflect the quality level that is consistent with standard of public broadcasting.*”⁹ Further, under a licensing agreement with V-me, EBC has the express right to preempt programming that it believes would violate the Commission’s rules or local community standards or that it deems would be in the public interest to preempt.¹⁰ For its part, V-me is contractually obligated to deliver a service that “is equal to the overall quality and standards of the programming then offered on PBS.” V-me must provide “a non-commercial service” that “will comply with applicable FCC rules and standards regarding noncommercial programming (including but not limited to underwriting, acknowledgements and interstitials, which underwriting, acknowledgements and interstitials will be generally equal to the overall quality and general standards of those offered by PBS stations).”¹¹

EBC has myriad ways to exercise its ultimate editorial control of V-me programming. First, EBC played a key role in selecting V-me’s executives. For example, EBC jointly selected the president, Carmen DiRienzo, with BG-VMP.¹² Prior to taking the helm at V-me, Ms. DiRienzo was Vice President and Managing Director of Corporate Affairs for EBC, in which

⁹ Shareholders’ Agreement at § 9.2(a) (emphasis added).

¹⁰ License Agreement between V-me Media, Inc. and Educational Broadcasting Corporation, dated as of March 5, 2007, at §§ 1(a)(4) and (5) (“License Agreement”).

¹¹ License Agreement at 1(m).

¹² Shareholders’ Agreement at § 9.2(e).

capacity she began the development of V-me.¹³ EBC also approved V-me's Chief Programming Officer, Guillermo Sierra. Neither the President nor the Chief Programming Officer may be replaced without EBC's consent.¹⁴

Second, EBC enjoys significant rights on the V-me board of directors. Currently, the board is comprised of three members, one of which must be designated by EBC.¹⁵ EBC's current board designee is Dr. William F. Baker, EBC's chief executive officer since 1987.¹⁶ The board may increase up to nine members, one-third of which must be selected by EBC, and one of which must be an independent director acceptable to EBC.¹⁷ EBC's consent is required to replace the board's chairman, currently Mario Baeza, who is also a Trustee of EBC.¹⁸ The private investors have no ability to remove or replace a director designated by EBC.¹⁹

Third, in its capacity as both a principal in, and a broadcaster of, V-me, EBC participates on an advisory board that V-me is required to establish pursuant to its agreements with EBC.²⁰ This board must consist exclusively of representatives of the public television stations airing the V-me service. The board meets with senior V-me management no less than once each quarter to

¹³ See Carmen M. DiRienzo, President, http://www.v-me.tv/_files/_bios/Carmen_DiRienzo_Eng.pdf (last visited Sept. 7, 2007).

¹⁴ Shareholders' Agreement at § 6.2(c).

¹⁵ *Id.* at § 4.2(a)(1).

¹⁶ *Id.* at § 4.2(b).

¹⁷ *Id.* at § 4.2(c).

¹⁸ *Id.* at § 6.3(c).

¹⁹ *Id.* at § 4.4

²⁰ *Id.* at Article V; License Agreement at § 3.

provide “advice and counsel” with respect to V-me’s programming and other operational matters.²¹

In short, V-me is the product of years of effort by EBC (and other public television leaders) to develop a new, high quality, noncommercial Spanish-language public television broadcasting service. EBC was able to create V-me, a service over which it exercises ultimate editorial discretion, to expand the mission of public broadcasting to a growing, underserved Hispanic community without shouldering the enormous financial burden and risk that would have accompanied any attempt to finance such a high-risk start-up enterprise with the traditional public broadcasting model.

II. WNET and Nearly Two Dozen Other Public Television Station Licensees Broadcast V-me Programming, Which the Public Broadcasting Community Uniformly Recognizes as a *Bona Fide* Noncommercial Service

Ignored entirely in HITN’s Petition is the salient fact that, first and foremost, EBC is the noncommercial licensee of WNET(TV), which distributes V-me programming over-the-air. As a public television licensee, EBC must ensure that its programming comports with the service rules for educational licensees, which require, among other things, that the programming material be noncommercial and educational or instructional in nature, and not contain commercial advertisements.²² In addition to WNET, 21 of the nation’s most prominent educational television licensees consider V-me to be a legitimate noncommercial service available for broadcast in compliance with the Commission’s requirements for noncommercial stations.²³ Pursuant to licensing agreements with V-me, these public stations distribute V-me

²¹ License Agreement at § 3.

²² See 47 CFR 73.621.

²³ See Exhibit A, Stations Broadcasting V-me.

over-the-air on digital multicast channels and secure retransmission of the V-me service by multichannel video programming distributors (“MVPDs”) within their respective Designated Market Areas.²⁴ WNET and the other public broadcasting stations carrying V-me have the right to substitute local interstitial matter, local underwriting announcements and local Spanish-language programming within or in place of V-me material. This enables the stations to customize the service in a manner that best serves their local viewers.

Since its inception, V-me has received broad support from key elements of the public television broadcasting community. As noted previously, CPB provided funding to EBC to support research and development for the Spanish-language service. Specifically, CPB included \$3.5 million in its FY 2007 Operating Budget for the “[d]evelopment of content and services for distribution on public broadcasting’s new digital television” channels, including “investments in Viva-TV” (now V-me) and other services.²⁵ This allocation was in furtherance of one of CPB’s six core “strategic priorities” for FY 2007 – to “encourage the development of programming that involves creative risks and that addresses the needs of unserved and underserved audiences, particularly children and minorities.”²⁶ Indeed, CPB President and Chief Executive Officer Patricia Harrison has applauded CPB’s efforts “to support WNET’s VIVA-TV,” and expressed CPB’s excitement “of bringing the highest quality television and online programming to Hispanic homes.”²⁷

²⁴ For example, License Agreement at § 1(a).

²⁵ CPB Operating Budget, adopted July 18, 2006, http://www.cpb.org/aboutcpb/leadership/board/resolutions/060718_cpb_fy07operatingbudget.pdf (last visited Sept. 7, 2007).

²⁶ *Id.*

²⁷ Remarks of Patricia de Stacy Harrison, President and Chief Executive Officer of CPB, to the NETA Conference, Houston, TX, January 27, 2006, *available at*

PBS promotes V-me as the “next generation of public television programming” that targets “communities and interests that were underrepresented in the single channel world.” According to PBS, V-me is a “groundbreaking broadcasting venture that debuted in March 2007, presenting the world’s highest-quality programs to Spanish-speaking viewers in the U.S.”²⁸ APTS similarly lauds V-me as one of public broadcasting’s cutting-edge digital services.²⁹

Less than six months after the V-me launch, nearly two dozen public television stations nationwide make V-me available over-the-air to millions of television households. As FCC Chairman Kevin J. Martin recently noted, however, V-me is not yet available to all homes that would benefit from the service.³⁰ Thus, EBC endeavors to expand the availability of V-me – a service Chairman Martin called “Maryland’s first public all-Spanish-language channel”³¹ – to all homes that desire, and need, the service the most, including homes reached by DBS.

(Continued . . .)

<http://www.cpb.org/aboutcpb/leadership/statements/harrison/060127neta.html>.

²⁸ PBS, About PBS, Corporate Facts, Beyond Traditional Broadcast, http://www.pbs.org/aboutpbs/aboutpbs_corp_pbsorg.html (last visited Sept. 7, 2007).

²⁹ Public Television Stations Announce Innovative Multicast Offerings under Historic Digital TV Cable Carriage Agreement, <http://www.pts.org/stories/Public-Television-Stations-Announce-Innovative-Multicast-Offerings-Under-Historic-Digital-TV-Cable-Carriage-Agreement.cfm> (last visited Sept. 7, 2007).

³⁰ Letter from Kevin J. Martin, Chairman, FCC, to Gary Flowers, Executive Director and CEO, Black Leadership Forum, *et al.* (August 22, 2007), at <http://www.fcc.gov/commissioners/martin/documents/alacarte-ltr-082207.pdf>.

³¹ *Id* at 2.

III. EBC Delivers V-me Programming to DBS for Carriage on a Set-Aside Channel in Full Accord with the Commission's Standards

A. EBC Is a "Qualified Programmer" That Provides "Noncommercial Programming of an Educational or Informational Nature"

The 1992 Cable Act, as implemented by the Commission, requires DBS operators to reserve four percent of their channel capacity for use by "qualified programmers" to deliver "noncommercial programming of an educational or informational nature."³² The Commission defines "qualified programmer" to include, *inter alia*, (a) noncommercial educational broadcast stations as defined in Section 397(6) of the Communications Act of 1934, as amended; and (b) noncommercial entities with an educational mission.³³ As noted above, EBC is the licensee of noncommercial educational television stations WNET and WLIW, and is a 501(c)(3) nonprofit educational corporation, chartered by an established educational facility with a specific educational purpose. Thus, EBC is without doubt a "qualified programmer" under the standards set forth in the Commission's rules.

In adopting rules implementing the set-aside provision of the 1992 Cable Act, the Commission declined to define "noncommercial programming of an educational or informational nature." Rather, it concluded that "eligible programmers will have every incentive to provide educational and informational programming on their reserved channels."³⁴ By drawing a clear line between the nature of the programmer and the character of the content, the Commission

³² 47 C.F.R. § 701(f).

³³ 47 C.F.R. § 25.701(f)(2).

³⁴ The Commission also noted that "in order to qualify as noncommercial programming, the programmer cannot include advertisements." *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act*, Report & Order (rel. Nov. 25, 1998), MM Docket No. 93-25, FCC 98-307, ¶¶ 94-95 ("Set Aside Order").

properly established rules that do not require an examination of the profit or non-profit status of every producer whose content is distributed by “qualified programmers.”

As one of the nation’s leading producers and distributors of public broadcast programming for almost 50 years, EBC is eminently qualified to make responsible judgments regarding the content it airs and distributes. Consistent with its right (and obligation) as the “qualified programmer,” EBC contracted with EchoStar to distribute V-me on a set-aside channel. The feed provided to EchoStar is identical to the programming broadcast by WNET on its multicast channel, with the exception of immaterial, non-programming differences in station identification and local underwriting which better serves the purpose of a national programming service. Thus, for purposes of establishing compliance with the Commission’s set-aside rules, a qualified educational television licensee – EBC – is distributing on a DBS set-aside channel a noncommercial program – V-me – that the licensee conceived, ultimately controls the content of, broadcasts over-the-air on its own station, and has determined addresses the educational and informational needs of a historically underserved audience. This is precisely the type of entity and program service the set-aside rules were intended to promote.³⁵

In its filings, HITN misstates the contractual relationship between EchoStar and V-me – there is none. HITN does not dispute that EBC satisfies the definition of “qualified programmer” under the 1992 Cable Act. Nor does HITN appear to claim that V-me’s content is not “noncommercial programming of an educational or informational nature.” Thus, on its face, the Petition fails to make a case that EBC’s provision of V-me to DBS carriers for carriage on a set-aside channel is inconsistent with the terms of the 1992 Cable Act or the FCC’s rules.

³⁵ *Id* at 78.

Rather than attempt to refute either the legal status of EBC or the noncommercial nature of the programming it distributes, HITN urges the Commission to declare whether “V-me and other for-profit television programmers can pursue financial gain by shouldering aside legitimate noncommercial qualified programmers... simply by providing their programming to a public television station and then permitting that public television station to be or purport to be the ‘programmer’ of record.”³⁶ As the question is posed by HITN, the Petition (as modified by the Reply) seems to rest entirely on two claims: the entity V-me Media Inc. is not a noncommercial entity; and EBC has either willingly conspired (or “colluded,” as HITN stated in a letter to Chairman Martin³⁷) in a scheme to circumvent the Commission’s rules, or has been duped or bullied into entering into agreements on V-me’s behalf for V-me’s commercial gain. The first claim is meaningless because the relationship between EBC and V-me is fully in accord with Commission policy that encourages production of educational and informational programming through creative public/private partnerships. The second allegation, in addition to being offensive, is contrary to the facts and to common sense.³⁸

³⁶ Reply at 2.

³⁷ See Ex Parte Letter of R. Geist, Esq. To Chairman Kevin J. Martin (June 29, 2007) at 1.

³⁸ In the event the Commission finds that EBC is the “qualified programmer,” HITN argues that EBC’s relationship with V-me is barred by the Order and Declaratory Ruling regarding RFD-TV in *Farm Journal*, MB Dkt No. 06-92, FCC 06-172 (rel. Dec. 4, 2006), *Petition for Reconsideration pending*. That decision is not relevant here. In *Farm Journal*, the Commission found that the “primary purpose” of RFD-TV’s exclusive carriage of certain cattle auctions, which are inherently commercial transactions, was “commercial, and not educational or informational in nature.” In contrast, none of the programming distributed by V-me is commercial in nature, a fact not contested by HITN. Moreover, unlike RFD-TV, which received substantial sponsorship revenues from the cattle auctioneer, EBC does not receive any sponsorship income from V-me in exchange for the broadcast or DBS distribution of V-me’s programming.

B. Commercial Content Providers Are a Critical Source of Educational and Informational Programming for Public Television

The arrangement between EBC and V-me is consistent with longstanding, and vitally important, industry practice, and raises no novel legal or policy issues. V-me acquires programming from both noncommercial and commercial third-party content providers. Public television stations throughout the country rely on commercial, for-profit corporate sources for much of their most important programming, including commercial ventures such as major Hollywood studios (Classic Movies), HIT Entertainment (*Barney*, *Bob the Builder*, *Thomas the Tank Engine*), Florentine Films (Ken Burns productions), Public Affairs Television (Bill Moyers productions), and NewsHour Corp. (*NewsHour with Jim Lehrer*).

The origination of programming by a for-profit company does not impact, let alone disqualify the product from, distribution on a noncommercial basis. Nor does it change the essential noncommercial nature of the public television licensee that distributes the programming. As a producer and aggregator of noncommercial programming for distribution by public television licensees, V-me is merely following a long-established, and fundamentally necessary, means of providing programming to public television stations.

Moreover, the Commission has long promoted creative arrangements between public and private enterprises for the purpose of creating viable public television programming. In the *Set-Aside Order*, the Commission expressly held that set-aside channels could be used by public/private joint ventures where the venture was noncommercial and had an educational mission. Such arrangements would “facilitate the development of quality educational and informational programming in furtherance of the objectives of Section 335 by providing additional sources of funding for noncommercial programmers without altering the

noncommercial nature of the programming.”³⁹ In this instance, it is not a commercial joint venture that is seeking to use a set-aside channel; rather, EBC is doing so as a noncommercial enterprise with an educational mission and distributes a noncommercial service *that EBC created*.⁴⁰ Although V-me Media Inc. is a for profit corporation, its first endeavor, the V-me channel, is a non-commercial service created and distributed by the venture’s co-owner, EBC, a “qualified programmer” under the statute and the Commission’s rules. Thus, the relationships between V-me and EBC, and between EBC and the DBS carrier(s), satisfy the letter, the spirit, and the purpose of the set-aside rules.

C. EBC Controls Whether, and Under What Terms and Conditions, DBS May Carry V-me on a Set-Aside Channel

The separate contractual arrangements between V-me and EBC, and between EBC and EchoStar governing set-aside carriage of V-me programming properly safeguard EBC’s status and responsibility as a qualified non-profit provider of a noncommercial service. Most critically, EBC has the right, *but not the obligation*, to license nationwide distribution of V-me’s service on DBS set-aside channels.⁴¹ In other words, EBC can decide, in its sole discretion, not to seek distribution of V-me on a set-aside channel *at all*. Once EBC decides to pursue set-aside carriage, it has the right to determine in its sole discretion the terms and conditions of carriage. In this case, EBC exercised its rights and entered into an agreement with EchoStar for carriage of

³⁹ *Set-Aside Order* at ¶ 89.

⁴⁰ EBC’s distribution of V-me is materially different than the arrangement described in the Request for Determination of Eligibility for DBS Set Aside submitted by Noggin, a joint venture between The Children’s Television Workshop (now Sesame Workshop) and Nickelodeon. In that case, the parties sought a declaration that Noggin, a for-profit company, could enter into direct relationships with DBS carriers for carriage of Noggin on a set-aside channel. Since EBC, a noncommercial entity, retains the right to distribute the service to DBS and since it is EBC, not V-me, that has the direct relationship with a DBS carrier for carriage of V-me on a set-aside channel, the issue raised in the Noggin proposal is not raised here.

⁴¹ License Agreement at § 1(a)(4).

V-me on a set-aside channel.⁴² V-me is not a party to that agreement and has no right to require either EBC or EchoStar to take (or refrain from taking) any action with respect to EchoStar's carriage of the program service.

Similarly, EBC has entered into its own backhaul arrangement with PBS to provide transport services for V-me programming. PBS uplinks the V-me national feed to EchoStar's headend and to all V-me affiliates under an arrangement with EBC. Like the set-aside carriage arrangement with EchoStar, V-me is not a party to the PBS uplink arrangement.⁴³

In sum, EBC's distribution of V-me as a *bona fide* noncommercial service is firmly grounded in the public television tradition and the Commission's rules. As demonstrated in detail above, V-me was the result of industry-wide efforts led by EBC to develop new public television programming for Latinos in this country enabled by the additional capacity of digital multicasting, and was the product specifically of EBC's years' long efforts to produce and distribute a high-quality Spanish-language public broadcasting service. V-me was developed by one of the nation's premier public television broadcasters with the help of funding from the CPB. EBC supplies key content and exercises ultimate editorial control of V-me's programming. Some of the nation's leading public television institutions, including CPB, PBS and APTS, hail EBC's V-me service as a ground-breaking and next generation public television venture that presents the "highest quality programming" to Hispanic homes.⁴⁴ EBC does not merely "purport to be" the programmer of record. EBC *is* the ultimate programmer.

⁴² Public Interest Programming Agreement, by and between EchoStar Satellite L.L.C. and Educational Broadcasting Corporation, entered into as of January 24, 2007. V-me indemnifies EBC for costs it incurs under this agreement.

⁴³ V-me indemnifies EBC for costs it incurs under this arrangement.

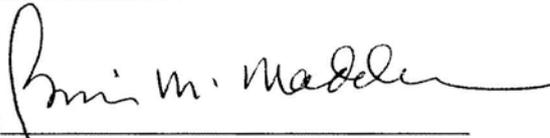
⁴⁴ See, e.g., PBS, Corporate Facts, http://www.pbs.org/aboutpbs/aboutpbs_corp_pbsorg.html (last visited Sept. 7, 2007);

IV. Conclusion

The specific question posed by HITN in its Petition – whether a for-profit company can “insulate” its commercial status for purposes of the set-aside rules with a noncommercial entity with no practical relationship to the program service – is simply not relevant to EBC’s distribution of V-me. EBC is a noncommercial educational television licensee that uses set-aside channels to deliver to the American public a noncommercial educational and informational service it conceived in compliance with the Commission’s set-aside rules. Accordingly, the Commission should promptly dismiss or deny HITN’s Petition and confirm that EBC may continue to distribute V-me on a DBS set-aside channel.

Respectfully submitted,

EDUCATIONAL BROADCASTING
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September 7, 2007

Its Attorneys

(Continued . . .)

Association of Public Television Stations, Public Digital Television,
<http://www.aptv.org/PTVissues/digitalTV/multicasting.cfm> (last visited Sept. 7, 2007).

Exhibit A**Public Television Station Licensees Broadcasting V-me Programming**

LICENSEE	STATION	MARKET
Community Television of Southern California	KCET	Los Angeles, CA
Educational Broadcasting Corporation	WNET	New York, NY
Community TV Foundation of South Florida, Inc.	WPBT	Miami, FL
University of Houston System	KUHT	Houston, TX
Window To The World Communications, Inc.	WTTW	Chicago, IL
Alamo Public Telecommunications Council	KLRN	San Antonio, TX
Northern California Public Broadcasting, Inc.	KTEH-TV	San Francisco, CA
Northern California Public Broadcasting, Inc.	KQET	San Jose, CA
RGV Educational Broadcasting, Inc.	KMBH	Harlingen, TX
KVIE, Inc.	KVIE	Sacramento, CA
Regents of the University of New Mexico and the Board of Education of the City Of Albuquerque, NM	KNME-TV	Albuquerque/ Santa Fe, NM
Board of Trustees for San Diego University	KPBS	San Diego, CA
Valley Public Television, Inc.	KVPT	Fresno, CA

Regents Of New Mexico State University	KRWG	El Paso- Las Cruces, TX
Rocky Mountain Public Broadcasting Network, Inc.	KRMA-TV	Denver, CO
Community Communications, Inc.	WMFE-TV	Orlando, FL
Florida West Coast Public Broadcasting, Inc.	WEDU	Tampa, FL
Clark County School District	KLVX	Las Vegas, NV
Community TV Foundation of South Florida, Inc.	WPBT	West Palm Beach, FL
KCTS Television	KCTS	Seattle, WA (As of September 17, 2007)
KCTS Television	KYVE	Yakima, WA (As of September 17, 2007)
Milwaukee Area Technical College District Board	WMVS	Milwaukee, WI
Educational Broadcasting Foundation, Inc.	WLAE	New Orleans, LA
Maryland Public Broadcasting Commission	WMPT	Baltimore, MD

Declaration of Joshua C. Nathan

I, Joshua C. Nathan, declare, under penalty of perjury, hereby state as follows:

1. I am Secretary, Vice President, and General Counsel of Educational Broadcasting Corporation.
2. I have reviewed the foregoing Comments of Educational Broadcasting Corporation.
3. The facts contained therein are true and correct to the best of my knowledge, information, and belief.

Date: September 7, 2007



Joshua C. Nathan