

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling Regarding)	
V-me Media, Inc. and its Eligibility)	MB 07-170
to be Carried as a DBS Public Interest)	
Noncommercial Programmer)	

COMMENT TO PETITION FOR DECLARATORY RULING

Hispanic Information and Telecommunications Network, Inc. (“HITN”), by its counsel, respectfully submits this Comment to the Petition for Declaratory Ruling¹ filed on May 18, 2007 that was placed on public notice in the above-referenced proceeding.² In that Petition, HITN requested that the Federal Communications Commission (“FCC” or “Commission”) issue a declaratory ruling that V-Me Media, Inc. (“V-me”) does not qualify for direct broadcast satellite (“DBS”) carriage on a reserved channel because V-me is a for-profit corporation and does not meet the requirements of a qualified national educational programming supplier under Section 25.701 of the Commission’s Rules. HITN applauds the Commission’s decision to place the Petition on public notice and to solicit comment on V-me’s eligibility as a for-profit corporation to be carried on a DBS public interest set-aside station.

Substantial evidence demonstrates that V-me, not its strategic partner, the Educational Broadcasting Corporation (“EBC”), is the actual programmer of the DBS set-aside channel.

¹ See *Petition for Declaratory Ruling* of Hispanic Information and Telecommunications Network, Inc. in Classification of V-Me Media, Inc. as a Qualified Programmer for Purposes of Carriage Obligation under Section 335 (filed May 18, 2007)(“Petition”).

² Request for Comment on Petition for Declaratory Ruling Regarding V-me Media, Inc. and Its Eligibility to be Carried as a DBS Public Interest Noncommercial Programmer, *Public Notice*, DA 07-3500, MB 07-170 (rel. Aug. 8, 2007) (“*Public Notice*”).

Moreover, FCC precedent and policy should prohibit an eligible entity from turning over virtually its entire schedule to a for-profit corporation.

1. Introduction and Background

HITN, founded in 1981, is a 501(c)(3) non-profit corporation whose mission is to provide educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN holds over 60 station authorizations in the Educational Broadband Service (“EBS”) for facilities throughout the United States and Puerto Rico. In 1987 HITN formed HITN-TV, the first and only independent 24-hour-a-day Spanish language public interest television channel in the United States. Today, HITN-TV is carried by DirecTV, Dish Network, Comcast Cable, Time Warner Cable, and Charter Communications and is presently available in over 15 million U.S. households. It remains the first and only non-profit Latino managed and controlled public interest television network offering educational content to the nation’s largest minority group and to all Americans who share an interest in Hispanic news, information, and culture.

On May 18, 2007, HITN filed a Petition for Declaratory Ruling asking the Commission to issue a declaratory ruling that V-me does not meet the requirements of a qualified national educational programming supplier under Section 25.701 of the Commission’s rules. EBC and V-me filed responses to the Petition.³ Both argued that EBC, not V-me, is the programmer of the reserved channel and asked the Commission to dismiss the Petition. The Media Bureau issued a *Public Notice* on August 8, 2007 asking for comment on whether V-me fails to satisfy the

³ Response of the Educational Broadcasting Corporation to *Petition for Declaratory Ruling in Classification of V-Me Media, Inc. as a Qualified Programmer for Purposes of Carriage Obligation under Section 335* (filed May 25, 2007; resubmitted to MB 07-170 on May 30, 2007)(“EBC Response”); Opposition of V-Me Media, Inc. to *Petition for Declaratory Ruling in Classification of V-Me Media, Inc. as a Qualified Programmer for Purposes of Carriage Obligation under Section 335* (filed May 24, 2007)(“V-me Opposition”).

eligibility requirements of an educational programming supplier for purposes of carriage by DBS providers in fulfillment of their public interest obligations under Section 25.701.⁴

In separate proceedings, HITN has argued (1) that the FCC should act forcefully to ensure that independent, unaffiliated, and emerging media have a place on the television dial and (2) that new IPTV video platforms, which offer an excellent opportunity to enhance media diversity, should be encouraged. On a fundamental level, HITN believes that there should be room for both a non-profit HITN and a for-profit V-me, as well as a wide array of educational, cultural and children's channels, on all multi-channel video providers.

However, the present issue before the FCC is simply this: Is a for-profit corporation eligible for public interest carriage directly or indirectly? An entity, which is itself ineligible for public interest carriage because of its for-profit status, should not be able to circumvent its ineligibility by having an otherwise eligible non-profit entity obtain public interest carriage and then turn over virtually all of that carriage to that ineligible for-profit corporation. While this issue is a narrow one, its importance extends far beyond the parties involved. Media consolidation and brand extensions of multi-media giants have made it difficult for independent voices to find a place in the current multi-channel ecosystem. Congress and the FCC created one small island of diversity in establishing the public interest set-aside program. It is vitally important that the FCC be vigilant and provide all interested parties clear guidance about what is and what is not acceptable for set-aside channels. A review of the available non-profit public interest programming demonstrates a diversity of voices found nowhere else in television broadcasting. Non-profit broadcasting is driven by fundamentally different forces than for-profit broadcasting. In establishing the set-aside program, Congress and the FCC understood that

⁴ See *supra* note 1.

distinction. If the FCC now fails to protect and defend this small island of diversity, however, it will be at risk of being washed away and lost to the waves of media consolidation that are sweeping across the current television environment.

2. V-me, Not EBC, Is the Party in Interest and the Recipient of the DBS Set-Aside Channel.

In responses to HITN's petition, EBC and V-me argue that (1) EBC, not V-me, is the programmer of the reserved channel exhibiting V-me on EchoStar Communications Corporation's ("EchoStar") Dish Network, (2) EBC, not V-me, is negotiating with DirecTV Group, Inc. ("DirecTV") to obtain a reserved DBS channel from DirecTV in order to exhibit V-me's programming on DirecTV, and (3) if EBC obtains a reserved DBS channel from DirecTV, it will be EBC, not V-me, that will be the programmer of that channel notwithstanding that EBC will exclusively exhibit V-me's programming thereon.⁵ These arguments make it imperative that the Commission issue a declaratory ruling as to whether V-me and other for-profit television programmers can pursue financial gain by obtaining carriage on, and displacing existing noncommercial educational programmers off of, DBS set-aside channels that are by law reserved solely for noncommercial educational programmers. The issue is just as important and the effect the same when it is done directly by the for-profit corporation, or indirectly when an otherwise eligible entity secures public interest carriage and then turns that capacity over in its virtual entirety to a for-profit corporation.

HITN has presented substantial evidence to the Commission in its Petition that V-me is a for-profit corporation.⁶ V-me is organized under the corporate laws of the State of Delaware as a for-profit stock corporation and is not registered with the Internal Revenue Service as a

⁵ See *supra* note 2.

⁶ Petition at 5-8.

charitable organization under Section 501(c)(3), which the FCC uses to determine whether an entity qualifies as an eligible national educational programming supplier.⁷ Nowhere have EBC and V-me challenged the contention that V-me is a for-profit corporation. To the contrary, in its Opposition to the Petition, V-me states that it does not claim to be a qualified programmer, and press articles on V-me's Web page describe V-me as being a for-profit corporation.⁸

Nor has EBC offered any factual or other support for its contention that EBC is the programmer of the reserved channel currently exhibiting V-me's programming on the Dish Network or that EBC is the entity seeking carriage, and will be the programmer, for V-me's programming on one of DirecTV's reserved channels. The preponderance of the evidence obtained by HITN from the public record instead demonstrates that V-me, not EBC, is the party in interest:

- The FCC's rules require DBS operators to maintain a public file which records the entities to which noncommercial capacity is being provided.⁹ Both DirecTV's public file and EchoStar's public file list V-me as the entity requesting carriage. Further, DirecTV's public file identifies a V-me employee as its contact for this channel.¹⁰

⁷ Publication 78, *Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1986*. Publication 78 contains a list of organizations to which charitable contributions are deductible for federal income tax purposes. The list is not all-inclusive. If an organization is not listed but has a ruling or determination letter holding contributions to be deductible, generally the letter will serve as evidence to contributors of the deductibility of their contributions. HITN could find no evidence of such a ruling or letter. <http://www.irs.gov/charities/index.html> (visited September 9, 2007).

⁸ V-me Opposition at 1; http://www.v-me.tv/_files/_press_pdf/businessweek.pdf (visited September 9, 2007); ("A for-profit venture partnered with public television..."); http://www.v-me.tv/_files/_press_pdf/uniontribune.pdf (visited September 9, 2007).

⁹ 47 C.F.R. § 27.701(f)(6).

¹⁰ Petition, Exhibit 1.

- EchoStar’s Dish Network lists the channel on its channel line-up as “V-me” with no mention of EBC.¹¹ The channel’s on-screen “bug” that appears in the corner of the television screen also identifies the channel as “V-me”.
- In a filing with the FCC, DirecTV identified V-me not EBC as the party with whom it was dealing.¹²
- V-me’s Web site and several of its press releases describe V-me as a Spanish-language television network that is “presented” by public television but make no mention of V-me being a network that is programmed by EBC. EBC’s Web page similarly omits any mention that it is programming a channel being carried by EchoStar.
- When EchoStar commenced its carriage of the V-me channel, V-me issued a press release announcing the same, but V-me’s press release made no mention of EBC.¹³
- The Commission’s rules require broadcast stations to make station identification announcements hourly and at the beginning and ending of each period of operation.¹⁴ V-me’s daily programming, which is drawn from a digital multicast broadcasting channel, mentions neither EBC nor WNET(TV), EBC’s public broadcasting channel. Instead, all identification on the channel is solely that of V-me.

¹¹ *See id.*, Exhibit 2.

¹² *Consolidated Opposition to Petitions to Deny and Response to Comments of the DirecTV Group, Inc. to the Application of News Corporation and the DirecTV Group, Inc., Transferors, and Liberty Media, Transferee, for Authority to Transfer Control*, MB Dkt. No. 07-18 (filed April 9, 2007).

¹³ *Dish Network Adds V-me to Its Basic Channel Line-up*, V-me Media Inc., April. 197, 2007 <http://www.v-me.tv/_files/V-me_DISH_Eng.pdf>.

¹⁴ 47 C.F.R. § 73.1201.

3. EBC Is Engaging in Inherently Commercial Activity which Disqualifies It as a Set-Aside.

Notwithstanding EBC's unsupported contention that it qualifies as the programmer of the V-me channel, FCC precedent prohibits an eligible entity from using public interest capacity for commercial programming. In an *Order and Declaratory Ruling*, the FCC found that RFD-TV failed to qualify for public interest carriage by DBS operators because it acted like a commercial entity and favored certain providers.¹⁵ The Commission found that RFD-TV was acting like a commercial entity because (1) it maintained a significant exclusive relationship with Superior Livestock Auctions, Inc. ("Superior"), which was supplying programming of live cattle auctions, (2) the programming supplier was commercial, and (3) RFD-TV acted as if it was a commercial enterprise.¹⁶ The FCC found that RFD-TV was acting as a commercial enterprise as it promoted programming from one supplier to the exclusion of others and that supplier was the largest source of funding for RFD-TV's sponsorship revenue.¹⁷

The relationship between V-me and EBC is potentially even more problematic than that of RFD-TV and Superior Livestock Auctions under the FCC's criteria enunciated in the RFD-TV case. First, RFD-TV was only carrying one program featuring regularly scheduled livestock auctions. Here, EBC is turning over its entire capacity for the allegedly noncommercial DBS channel to a for-profit corporation on the pretext that EBC is retaining some limited oversight over that for-profit corporation's programming. Second, V-me is a for-profit programming supplier, as Superior was. On February 7, 2007, the New York Times quoted the founder and executive chairman of V-me, as stating that V-me's goal is "to earn a private equity-like return"

¹⁵ In the Matter of Farm Journal, Inc. Petition for Declaratory Ruling, *Order and Declaratory Ruling*, MB Dkt. No. 06-92, FCC 06-172 (rel. Dec. 4, 2006).

¹⁶ *Id.* para. 7.

¹⁷ *Id.* para. 8.

and that he expects V-me to turn a profit within three years.¹⁸ Third, EBC maintains a direct and exclusive relationship with V-me to the exclusion of competing Spanish-language programmers. RFD-TV was receiving sponsorship revenue from its programming provider and no direct compensation resulting from the covered auctions. EBC has acknowledged that it has partnered with two private investment entities, holds an equity interest in V-me, and has a place on V-me's board.¹⁹ If EBC is indeed the licensee of the reserved channel, the Commission should disqualify EBC under these circumstances from carriage on DBS capacity set aside pursuant to Section 25.701 as EBC is acting like a commercial entity.

4. Conclusion.

Through its own admission in press articles and in a previous submission to the FCC, V-me is a for-profit corporation. As such, it does not qualify for a DBS set-aside channel. Furthermore, V-me is the party in interest for V-me's carriage on the Dish Network and the party behind EBC's purported application to DirecTV for public interest carriage. Even if EBC could qualify as the programmer, its exclusive partnership with a for-profit corporation that provides virtually 100 percent of the channel's programming to the exclusion of all others is an inherently commercial activity that disqualifies the channel from eligibility as a DBS set-aside channel under Commission rules and precedent. Accordingly, HITN respectfully requests that the Commission confirm for all interested parties that DBS public interest set-aside capacity is to be reserved for eligible non-profit public interest programmers.

¹⁸ Elizabeth Jensen, *Public Television Plans Network for Latinos*, N.Y. TIMES, February 7, 2007 <<http://www.freepress.net/news/20899>>.

¹⁹ Letter from John Bagwell to Marlene H. Dortch regarding Educational Broadcasting Corporation and V-me Media, Inc. *Notice of Ex Parte Meeting with FCC Staff* (August 3, 2007).

Respectfully submitted,

HISPANIC INFORMATION AND
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A handwritten signature in blue ink, appearing to be 'RJG', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Norman Liu, hereby certify that copies of the foregoing *Comment to Petition for Declaratory Ruling* of Hispanic Information and Telecommunications Network, Inc. were served this 7th day of September, 2007 on the following parties via Electronic Mail, unless otherwise noted, at the following addresses:

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