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June 5, 2008

Re: Ex Parte, MB Docket No. 07-42; MB Docket No. 07-198

Dear Ms. Dortch:

On June 4, 2008, Robert Herring Senior and Charles Herring of WealthTV, Mark Cuban of HDNet LLC, Todd Webster of MASN, Jose Luis Rodriguez of HITN, Nick Psaltos of the Horror Channel, David Turetsky, Counsel to HDNet and Cameron McAlpine of Wallman Consulting, and the undersigned met with Chairman Kevin Martin and Catherine Bohigian, Chief of the Office of Strategic Planning and Policy Analysis. At the meeting the following matters were discussed by the above named participants:

- The goals of the newly formed National Association of Independent Networks,
- The need for reforms to the Commission's program carriage rules, including:
 - the institution of a six month "shot clock" for the adjudication of program carriage access complaints,
 - a clearer definition in the regulations of the prima facie case standard,
 - an anti-retaliation clause, and
 - a stay of adverse discriminatory changes to independent channels during litigation.
- Finally, the issues of HD original programming versus up-converted programming and wholesale unbundling were discussed. In the context of wholesale unbundling, the parties expressed their frustration that the practice of "program tying" consumes bandwidth, limiting cable companies from considering other programming choices, stifling competition.

Attached to this ex parte is a document that was left behind with Chairman Martin and Ms. Bohigian that further explains the items that were discussed in the meeting and suggests potential rule language on these matters.

The meeting was also attended by Ross Lieberman of the American Cable Association and Jeremy Kissel of Cinnamon Mueller, who will be filing a separate ex parte.

Very truly yours,

Kathleen Wallman

Kathleen Wallman, PLLC

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 cable or DBS 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.