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Jeremy M. Kissel
Admitted in DC and Florida

August 6, 2008

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

VIA ECFS

RE: Notice of Ex Parte Presentation; MB Docket Nos. 07-42 and 07-198

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.1206(b), we electronically provide this notice of an ex parte presentation in the docket listed above. On August 5, 2008, the following persons met with Commissioner Michael Copps and his Legal Advisor, Bruce Gottlieb:

Randy Brown, SVP, Affiliate Sales and Marketing, Outdoor Channel
Shawn H. Chang, Deputy Policy Director, Free Press
Parul Desai, Media Access Project
Tom Hornish, COO, Outdoor Channel
Dan Isett, Director of Public Policy, Parents Television Council
Joel Kelsey, Consumers Union
Jeremy M. Kissel, Cinnamon Mueller, Counsel for ACA
Steve Kraskin, RICA
Ross J. Lieberman, Vice President of Government Affairs, ACA
Christopher A. McLean, E-Copernicus, Representing Hispanic Information and Telecommunications Network, Inc.
Steve Pastorkovich, Business Development Director/Senior Policy Analyst, OPASTCO
Matthew M. Polka, President and CEO, ACA
Jose Rodriguez, Hispanic Information and Telecommunications Network, Inc.
David S. Turetsky, Dewey & LeBoeuf, Counsel for HDNet

At the meeting, participants expressed their support for Commission action in the wholesale unbundling rulemaking to address the various harms that result from the market abuses of programmers and broadcasters in their negotiations with multichannel video programming distributors (MVPDs), such as wholesale bundling. Independent programmers, including those that provide content of special interest to minority audiences, described how obligations on MVPDs to carry numerous undesired networks in exchange for the right to carry desired networks, can and reportedly do restrict severely the ability of independent programmers to gain and maintain carriage on capacity constrained systems. Consumer and family groups explained how curbing abusive wholesale bundling and penetration obligations would benefit consumers by helping to control the rate of increases in MVPD rates, and increase the variety of channel offerings to better reflect the social and economic realities of their own community. MVPDs, including small and competitive telecommunications operators, explained how wholesale programming practices raise their costs,

harm their ability to compete, and erode resources available for the substantial capital and operating costs necessary to deploy broadband in their areas.

In order to address the numerous problems with the existing wholesale programming market, meeting participants were supportive of the American Cable Associations' proposal, as presented in their January 3, 2008 comments. It was explained that the Commission has the legal authority to implement the ACA recommendations.

Finally, during the meeting, the participants discussed the need for and encouraged adoption of Section 616 carriage complaint reform, and were supportive of the proposals previously presented by NAIN and others, as reflected in a June 5, 2008 ex parte filing in MB Docket No. 07-42. As explained, those proposals include a discussion on the need for reforms to the Commission's program carriage rules, including the institution of a "shot clock" for the adjudication of program carriage access complaints, the necessity of a clearer definition in the regulations of the prima facie case standard, the introduction of an anti-retaliation clause, and a "stay" preserving the status quo before the allegedly discriminatory retiering or other violation until the complaint is decided (or dismissed for not stating a prima facie case).

A copy of letters from a bipartisan group of Senators and Congressmen that support the goals of the participants was provided. The letters are being filed with this ex parte.

Sincerely,

Jeremy M. Kissel

cc: Commissioner Michael Copps
Bruce Gottlieb
Randy Brown
Shawn H. Chang
Parul Desai
Tom Hornish
Dan Isett
Joel Kelsey
Steve Kraskin
Ross J. Lieberman
Christopher A. McLean
Steve Pastorkovich
Matthew M. Polka
Jose Rodriguez
David S. Turetsky

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June 13, 2008

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Dear Chairman Martin:

I write to you today to discuss timelines for consideration of items at the FCC. I worry that while the FCC has a shot clock for consideration of forbearance petitions, in a separate area of programming discrimination, the Commission lacks any type of timeline.

I have written to you in the past about the issue of forbearance and maintain the same concern over the Qwest forbearance petitions as I had with the Verizon petitions. Petitions should only be granted if it is clear that there will be a competitive environment following the forbearance. I worry that with these Qwest petitions, there is not enough competition and the FCC's actions may eliminate service by smaller companies who actually are competing with the incumbents. The Commission must take the time to carefully evaluate each market and yet for this crucial decision, the FCC has a required deadline.

However, for the consideration of discrimination complaints concerning programming, there is no timeline for Commission action. As you may know, I have sent a letter to the GAO requesting that they study the decrease in independent programming carried on television and radio. I think we need to work to protect the few independent programmers that exist from possible discrimination. It is at least important that they receive timely responses from the Commission when they file complaints. I hope the Commission will consider adopting a timeline for FCC response and resolution.

Thank you for your careful consideration.

Sincerely,

Byron L. Dorgan
U.S. Senator

cc:
Michael J. Copps, Commissioner
Jonathan S. Adelstein, Commissioner
Deborah T. Tate, Commissioner
Robert M. McDowell, Commissioner

PRINTED ON RECYCLED PAPER

Congress of the United States
House of Representatives
Washington, DC 20515

June 30, 2008

The Honorable Kevin Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554-0001

Dear Chairman Martin:

We write to express concern about the challenges that independent programming networks face to secure distribution on cable and satellite in the current regulatory environment. A docket currently pending, MB Docket No. 07-42, will address a number of problems independent programming networks face by streamlining the carriage complaint rules and increasing their effectiveness and we request that the FCC move forward with action on the docket.

Given the extent to which the distributors themselves are owners of programming, it is important that independent programming networks have a fair opportunity to secure carriage agreements with multichannel video programming distributors (MVPDs), and are able to have carriage disputes quickly resolved. Consumers benefit from the choices and competition that independent networks provide. These networks can contribute to the diversity of voices that both the public and Congress value.

Regulatory policy should continue to ensure an avenue of distribution for media entrepreneurs to add to the diversity of voices the public can hear by building and continuing to operate these competing national networks. Opportunity for distribution should not be weighted more heavily toward major media corporations and vertically-integrated MVPDs.

Congress attempted to address these issues in the past, particularly in the 1992 Cable Act, however regulatory updates are necessary. In a competitive environment with vertically-integrated television companies, that law recognized that companies have an incentive and ability to seek a financial interest in programming, or to discriminate in the selection, conditions and terms of carriage, based on the affiliation or non-affiliation of a programmer. The current complaint process is not as efficient as it could be, and MB Docket No. 07-42 will address many shortcomings in the current process.

The absence of a strong, reliable complaint process has a significant impact on the marketplace. Independent programmers continue to leave the market, partly because entities that discriminate against independent programmers can do so with little risk. Private negotiations between independent programmers and distributors are likely more difficult, because the boundaries set by this law are less likely to be respected.

Accordingly, we urge you to provide more effective remedies and streamline the complaint process outlined through MB Docket No. 07-42. Specifically, we ask that the FCC consider adopting: (1) a 6 month "shot clock," i.e., a deadline for a final Commission determination measured from the filing of the complaint, whether related to alleged misconduct while on the platform, or to exclusion from it; (2) a better defined and more reasonable definition of a prima facie case, and a short timetable in the early part of the 6 months to address and resolve any challenges; (3) a definition of discrimination that includes retaliation; and (4) taking into account the relative bargaining positions of the parties, a requirement that the status quo before the challenged action be preserved until the complaint is decided under the newly adopted timeline, meaning that a programmer will not first be subjected to an allegedly discriminatory "re-tiering."

We appreciate that the Commission's attention to this matter, and urge you to move forward on MB Docket No. 07-42. Thank you in advance for your consideration of this request and we look forward to your response. Should you have any questions or require additional information, please do not hesitate to contact our offices.

Sincerely,

Gene Green
Member of Congress

Mike Doyle
Member of Congress

Charles Gonzalez
Member of Congress

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

June 23, 2008

The Honorable Kevin Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Martin:

I am writing to you regarding an issue of long standing concern to me as Chairman of the Subcommittee on Antitrust, Competition Policy and Consumer Rights – the ability of independent programmers to gain carriage on reasonable and nondiscriminatory terms on cable and satellite television. I have long believed that it is vitally important that independent programming channels are offered to the American public, rather than just programming affiliated with the major cable, satellite or broadcast television companies. Our democracy depends on the ability of independent voices to be heard, and increasing the diversity and variety of points of view available on television should be an important objective of both competition and communications policy. For this reason, I have strongly supported the FCC's program carriage rules and the principle that independent programmers gain access to cable and satellite systems (otherwise known as multi-channel video distributors or "MVPD") on reasonable and nondiscriminatory terms.

In 2005, the Antitrust Subcommittee held a hearing on the challenges faced by independent programmers in gaining carriage. An independent programmer witness, the America Channel, testified regarding the substantial difficulty that they had in getting carried on the major cable television systems. In the course of preparing for the hearing, the subcommittee heard from several other independent programmers who corroborated this testimony. More recently, members of the National Association of Independent Networks have told us of similar difficulties. Beyond getting carriage, these networks face what they believe is disparate treatment with respect to their channels being placed on the most expensive tiers with minimal distribution. These independent programmers believe that they are being discriminated against with respect to channel placement and conditions of carriage offered to programming channels affiliated with the MVPD companies. Additionally other large programmers, often but not always affiliated with MVPDs, bundle their channels together, tying less desirable channels to certain "must have" channels (such as national sports networks, for example). This bundling causes MVPDs to purchase unwanted channels and occupy limited channel capacity which they might otherwise use to carry channels offered by independent programmers.

I urge that the FCC take action to redress these barriers to independent programmers gaining carriage on cable and satellite systems. Especially important is that the program carriage rules be an effective and timely means for independent

programmers to seek redress. These rules currently mandate that independent programmers be treated fairly and on reasonable and nondiscriminatory terms in seeking carriage agreements, and further prohibit MVPDs from demanding equity interests in programming in return for carriage. However, independent programmers contend that these rules are ineffective as currently applied because program carriage complaints lack timetables, take years to adjudicate, and are governed by uncertain standards.

The FCC currently has a rulemaking pending, MB Docket 07-42, addressing these issues, and I urge that it be used to strengthen the program carriage rules and to simplify and make more efficient the process by which program carriage complaints are adjudicated. Specifically, I urge that the FCC set a deadline by which program carriage complaints by programmers be decided in prompt and reasonable time; provide a more certain definition as to what constitutes discrimination in program carriage disputes; provide a procedure for staying adverse action by an MVPD against an independent programmer (such as, for example, moving the independent programmer's channel to a disfavored or costly tier) while that independent programmer's discrimination complaint is being adjudicated; and enact any other rule the FCC believes necessary to strengthen program carriage requirements.

I also urge that the FCC take action on its tying/bundling rulemaking, MB Docket 07-29. Specifically, I urge the FCC to enact rules to prevent programmers affiliated with MVPDs or broadcast networks from unreasonably bundling channels together, when such bundling is done in order to deny independent programmers the channel capacity needed to be carried on MVPD systems.

In sum, I believe it is strongly in the interests of competition policy and the values of democracy and diversity of expression for independent programmers have a fair and equal opportunity to gain carriage on cable and satellite systems. I urge that you use these pending rulemakings to strengthen program carriage and tying/bundling rules so essential to giving independent programs this opportunity.

Thank you for your attention to this matter.

Sincerely,

Herb Kohl

HERB KOHL
Chairman, Subcommittee on
Antitrust, Competition Policy
and Consumer Rights

Cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell

AMY KLOBUCHAR
MINNESOTA

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COMMERCE, SCIENCE, AND TRANSPORTATION
ENVIRONMENT AND PUBLIC WORKS
JOINT ECONOMIC COMMITTEE

United States Senate

WASHINGTON, DC 20510

July 24, 2008

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Martin:

I am writing to you regarding the FCC's consideration of possible modifications to the agency's processes for resolving program carriage disputes in MB Docket No. 07-42. The agency should quickly complete its review and bring much-needed clarity and certainty to the program carriage rules.

Independent programming plays a vital role in providing a diversity of views and information and in promoting video competition. In order to ensure that consumers have access to independent programming, the statute is clear that unaffiliated providers of video programming must be protected from discrimination by multichannel video programming distributors (MVPDs), and that the FCC is to provide expedited review of any complaints made by unaffiliated programming providers.

Independent programming providers continue to express concern that continued uncertainties and delays create a chilling effect on their willingness to bring discrimination complaints, because of their fear of potential retaliation by MVPDs while a complaint remains pending. Meanwhile, I understand that the FCC is considering adopting mechanisms such as time clocks and further clarifying the elements of a *prima facie* discrimination case.

Without an effective and timely FCC process to decide complaints – including protections for those parties bringing the complaints – the integrity of any safeguards against program carriage discrimination is undermined. Accordingly, I urge the FCC to quickly resolve any outstanding issues raised with respect to its program carriage rules in order to ensure that consumers continue to reap the benefits of independent programming.

Sincerely,

Amy Klobuchar

Amy Klobuchar
U.S. Senator

Cc: Michael J. Copps, Commissioner
Jonathan S. Adelstein, Commissioner
Deborah Taylor Tate, Commissioner
Robert M. McDowell, Commissioner

KAY BAILEY HUTCHISON
TEXAS

COMMITTEES:
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United States Senate

WASHINGTON, DC 20510–4304

Honorable Kevin Martin
Chairman
Federal Communications Commission
45 12th Street, SW
Washington, DC 20554

Re: Program Carriage Disputes

July 27, 2008

Dear Chairman Martin:

In November of last year I wrote to you expressing my concerns about disputes between cable operators and independent programmers over carriage terms. At that time, I expressed my belief that the existing dispute resolution processes are not encouraging the timely resolution of these disputes or providing the proper incentives for the parties to negotiate terms. I remain concerned about this issue, and also about the growing number of disputes between broadcasters and cable operators relating to retransmission authority. I believe that the Commission needs to take a comprehensive look at both of these areas and determine whether the existing dispute resolution processes are sufficient to address the conflicts.

Negotiation between the parties without unwarranted intervention is the most effective approach; however, the realities in the marketplace do not always provide the right incentives for parties to negotiate in good faith. In such cases, it is critical that we have a comprehensive dispute resolution process with a predictable and expeditious time table for resolution. I believe the availability of this kind of process to both parties will actually help facilitate negotiations by providing structure and certainty to resolutions when negotiations fail to produce an agreement.

Congress has received some reports of broadcasters using so called "tying arrangements" to compel cable systems to carry multiple channels of programming as a condition for receiving a highly desirable channel, or threatening to withhold channels all together unless system operators agree to specific terms. Similarly, we have heard about the difficulties some independent programmers have in obtaining placement on cable, satellite, and telephone company systems, and the possibility that the system operators may have an ownership interest in competing programming. This latter concern raises concerns about fairness and conflicts of interest.

As member of the Committee on Commerce, Science, and Transportation, I would like a status report on the type and number of complaints received by the Commission involving carriage disputes between independent programmers and cable system operators, as well as

those between cable system operators and broadcasters relating to retransmission agreements. I would also like to know whether the Commission is considering any modified dispute resolution process.

I look forward to your response.

Sincerely,

Kay Bailey Hutchison

Kay Bailey Hutchison