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

**Re: *Applications for Consent to the Transfer of Control of Licenses*
MB Docket No. 08-120**

Dear Ms. Dortch:

This letter responds to the reply comments submitted in the above-captioned proceeding by the National Association of Independent Networks (“NAIN”) and WealthTV.¹ NAIN and WealthTV do not address the program access issues raised by the two commenting parties, RCN and Dish Network, but instead urge the Commission to impose program carriage requirements as a condition of approving the license transfers that arise from the separation of Time Warner Cable Inc. (“TWC”) from Time Warner Inc. (the “Separation Transaction”). Specifically, they argue that the Commission should (1) treat the Time Warner Inc. networks as affiliated with TWC for purposes of applying the Section 616 program carriage rules, even though the Separation Transaction will eliminate such affiliation; and (2) resolve pending program carriage complaints against TWC, even though those complaints have nothing to do with, and will be wholly unaffected by, the Separation Transaction. These proposed conditions are unnecessary, unsupported by facts, and contrary to law and public policy. The Commission therefore should summarily reject them.

As a threshold matter, TWC acknowledges that, as an MVPD, it will remain subject to the program carriage rules post-separation under the plain terms of Section 616 and the Commission’s rules. Thus, WealthTV’s pending program carriage complaint against TWC will be unaffected by the Separation Transaction.

There is no basis, however, to treat TWC and Time Warner Inc. as affiliated post-separation, as NAIN and WealthTV request. Post-separation, TWC and Time Warner Inc. plainly will not be “affiliated” for purposes of the program carriage rules, just as they will not be “vertically integrated” for purposes of the program access rules.² Contrary to NAIN’s assertion that TWC and Time Warner Inc. will be “commonly owned” following the Separation

¹ This letter also serves as a response to the August 13, 2008 e-mail from WealthTV’s CEO, Robert Herring, to Elizabeth Andron, Legal Advisor to Chairman Martin. *See* Letter to Marlene Dortch, Secretary, Federal Communications Commission, from Kathleen Wallman, Counsel to WealthTV, August 14, 2008.

² *See* Applicants’ Reply at 10-14 (responding to RCN’s Petition to Condition Consent or To Deny Applications).

Transaction,³ the two companies will immediately and completely cease to have any direct or indirect attributable relationship with one another upon consummation of that transaction. They will be managed on a fully separate and independent basis and will have no common officers or directors. Neither TWC nor Time Warner Inc. will hold any ownership interest in the other, and both companies' shares will be widely dispersed among myriad unaffiliated individuals and institutions.⁴

Nor can there be any serious argument that Time Warner Inc. and TWC should be deemed affiliated post-separation simply because they were *previously* affiliated. There is nothing in the Communications Act or the Commission's rules that would permit the imposition of program carriage obligations on a distributor with respect to non-vertically integrated programming; to the contrary, as the Applicants demonstrated in their Reply, Commission precedent establishes that a past history of vertical integration does not provide any basis for the continued application of such rules once the vertical integration ends.⁵

Moreover, there is no factual or logical basis for NAIN's assertion that, post-separation, TWC "will still have the exact same 'incentive and ability' . . . to favor [Time Warner Inc.] programming services."⁶ Even assuming TWC had an incentive to favor Time Warner Inc. programming when the companies were vertically integrated, there will be no vertical integration post-separation and accordingly no incentive to discriminate. As Applicants have explained, TWC's fiduciary duties will require it to strike carriage agreements that are in the best interests of its shareholders; it would be irrational and counterproductive to favor a *former* affiliate based simply on previous ties.⁷ NAIN also ignores the fact that contracts entered into between vertically integrated MVPDs and programmers are not presumptively anti-competitive or discriminatory.⁸ Rather, the Commission's rules specifically place the burden on the complainant to provide evidence that a violation of the rules has occurred.⁹ The Commission similarly has made clear that speculative assertions of harm unaccompanied by concrete allegations of discrimination "are not ripe for consideration and should be addressed, if at all, in separate proceedings."¹⁰ Yet NAIN and WealthTV offer nothing more than conclusory

³ NAIN Reply at 6.

⁴ *Id.* at 7-9. As Applicants explained in their Reply, any temporary overlap in public stock ownership will be irrelevant to any analysis of control. *Id.* at 8 (citing *Paramount Communications Inc. v. Time Inc.*, 1989 Del. Ch. Lexis 77, *6-65 (Del. Ch. 1989), Fed. Sec. L. Rep. (CCH) P94,514, *aff'd* 571 A.2d 1140 (Del. 1990)).

⁵ *See id.* at 11-13.

⁶ NAIN Reply at 6.

⁷ *See Applicants' Reply* at 9-11 & nn. 20, 24.

⁸ *See, e.g., News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee*, 23 FCC Rcd 3265 ¶ 126 (2008).

⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642 ¶ 29 ("When filing a complaint, the burden of proof will be on the programming vendor to establish a *prima facie* case showing that the defendant multichannel distributor has engaged in behavior that is prohibited by Section 616.").

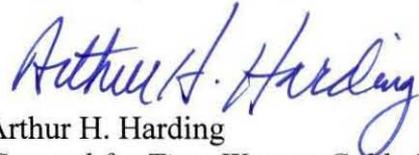
¹⁰ *Applications of Turner Broadcasting System, Inc., (Transferor) and Time Warner, Inc., (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd 19595 ¶ 13 (1996); *see also id.* ¶ 34 (declining to consider program access allegations because, "[u]nless or until a competing MVPD is offered Time Warner or Turner programming on discriminatory terms, there is no case or controversy for [the Commission] to rule on").

assertions of potential future harm. The Commission therefore should reject these unripe and unfounded claims.

Finally, NAIN and WealthTV propose that the Commission resolve pending program carriage complaints against TWC as a condition of approving the proposed license transfers. The Commission has made clear, however, that a license-transfer proceeding is not a proper vehicle for resolving carriage disputes or alleged rule violations that are unrelated to the proposed transaction.¹¹ Here, the two pending program carriage complaints cited by NAIN and WealthTV bear no relation whatsoever to the Separation Transaction. To the contrary, TWC's affiliation with the services covered by these complaints will not be affected by consummation of the Separation Transaction. Because TWC has already acknowledged that it will remain subject to the program carriage rules post-separation, there is no basis for delaying consideration of the license transfers at issue pending resolution of these complaints.¹²

For the reasons set forth above, as well as in the Applicants' Reply, the Commission should promptly and unconditionally grant the Applications.

Respectfully submitted,



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¹¹ See, e.g., *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation*, Memorandum Opinion and Order, 17 FCC Rcd 20559 ¶ 33 (2002) (“Outstanding allegations regarding rule violations are best handled in proceedings arising under the affected rule or policy because, in such proceedings, the Commission would have a complete record to review the relevant facts.”); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶ 240 (2006) (stating that parties concerned about potential regulatory violations by applicants “have other, more appropriate, avenues for obtaining relief regarding [such] non-transaction specific issues”).

¹² WealthTV cites the *XM-Sirius Order* as a purported basis for its proposed condition, see WealthTV Reply at 3, but that order is obviously distinguishable. There, the Commission addressed enforcement issues in conjunction with the merger because XM and Sirius had admitted to longstanding and systematic violations of the Commission's rules that were alleged to undermine their qualifications as licensees. Here, by contrast, the carriage disputes that WealthTV wants resolved involve discrete, non-transaction-specific allegations that TWC has already shown to be meritless.