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

Federal Communications Commission  
Office of the Secretary

In the Matter of )  
 )  
Review of the Commission's Program Access ) MB Docket No. 07-198  
Rules and Examination of Program Tying )  
Arrangements )

**PRELIMINARY COMMENT OF HERRING BROADCASTING, INC. D/B/A  
WEALTHTV ON EX PARTE COMMUNICATION BY CABLEVISION SYSTEMS  
CORP.**

On November 24, 2008, Cablevision Systems Corp. reported a November 22 ex parte communication with two members of the Commission's staff. In that communication, Cablevision provided language for a proposed rule that would prohibit cable programmers (and broadcasters with retransmission consent agreements) from establishing in their carriage agreements with MVPDs the number of subscribers who would be able to access their channels or the programming tier on which the channels would be carried.<sup>1</sup> At its December 18 open meeting the Commission plans to consider issuance of a notice of proposed rulemaking ("NPRM") on Cablevision's proposal and perhaps other related issues.<sup>2</sup>

Although it may comment on the NPRM once it is issued including various aspects of Cablevision's proposal, Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV") urges the Commission, if it asks for comment on the Cablevision proposal, to make clear that the proposal would have to comply with applicable statutory requirements. Specifically, any

<sup>1</sup> See Letter from Michael E. Olsen, Vice President, Cablevision Sys. Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-198 (Nov. 24, 2008) (attaching email from Michael Olsen to Michelle Carey, Legal Advisor to Chmn. Martin, and Monica Desai, Chief, Media Bureau (Nov. 22, 2008)).

<sup>2</sup> "FCC Announces Tentative Agenda for Dec. 18 Open Meeting, News Release, FCC, at 1 (Dec. 3, 2008); Jonathan Make, "FCC Video Order Would Expand Definition of Affiliated Networks," Comm. Daily 3, 4 (Dec. 2, 2008).

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obligations imposed by a new *rule* must be subordinate to the *statute*, namely Section 616 of the Communications Act of 1934, as amended, that prohibits MVPDs from discriminating against programmers on the basis of their affiliation as to carriage and terms and conditions of carriage and from demanding a financial interest in programming as a condition of carriage.<sup>3</sup>

Thus, because of the primacy of the statutory requirements, if the Cablevision proposal or something like it were adopted, a cable operator could not move an independent network to a low-penetration programming tier if, at the same time, it discriminatorily maintained its affiliated, competing network on a higher-penetration tier. The Media Bureau has already made clear that, even if a cable operator has a contractual right to determine the tier on which an independent network would be carried, that contractual right would not relieve the cable operator of its obligation to make its decision on a nondiscriminatory basis.<sup>4</sup> The Commission's NPRM in this case should similarly be clear.

In addition, Cablevision's proposal would create a carriage environment that is far more fast-moving and fluid than the current market because it would enable MVPDs, wholly at their own discretion and subject to their own timing, to shift independent program networks from tier to tier. Long-term arrangements between programmers and MVPDs would no longer assure stability as to tiering and other carriage arrangements for independent programmers. As a result, substantial reforms to the Commission's processes for resolving Section 616 complaints would be necessary. These are the subject of a Report and Order that is scheduled to be considered by the Commission at its December 18 meeting.

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<sup>3</sup> See 47 U.S.C. § 536.

<sup>4</sup> *Herring Broad., Inc. v. Time Warner Cable Inc., et al.*, Mem. Op. & Hearing Designation Order, MB Docket No. 08-214, DA 08-2269, ¶ 72 (rel. Oct. 10, 2008) ("Whether or not [a cable operator] had the right to retier [an independent network] pursuant to a private agreement is not relevant to the issue of whether doing so violated Section 616 of the Act and the program carriage rules. Parties to a contract cannot insulate themselves from enforcement of the Act or our rules by agreeing to acts that violate the Act or rules.").

In these circumstances, the current processes are too slow and would not provide effective relief. The Commission's existing Section 616 procedures are already demonstrably inadequate to resolve program carriage disputes even in today's environment, in which tier placement is usually established by contract for a sustained period of time. By the time they are resolved, some existing Section 616 complaints may have been pending before the Commission for as long as two years. During this extended period, independent programmers and consumers suffer the harms that Congress sought to prevent when it adopted Section 616.

If the Commission decides to seek comment on Cablevision's proposal or any similar concept, it should at the outset make clear that the proposal must be subject to Section 616 of the Communications Act of 1934, other statutes governing MVPDs' carriage obligations, and the Commission's rules implementing those statutes.

Respectfully submitted,

Herring Broadcasting, Inc., d/b/a WealthTV  
By Its Attorney

          //signed//            
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