

**KATHLEEN WALLMAN
KATHLEEN WALLMAN, PLLC
9332 RAMEY LANE
GREAT FALLS, VA 22066**

December 11, 2008

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

RE: 07-42

Dear Ms. Dortch:

On December 10, 2008, Robert Herring, Sr. and Charles Herring, of WealthTV and the National Association of Independent Networks (“NAIN”), Jose Rodriguez of HITN, also a member of NAIN, and his advisor, Chris McLean, Shawn Chang of Free Press, Harold Feld and Parul Desai of Media Access Project and Ross Lieberman of American Cable Association (“ACA”) met with Commissioner Copps and his advisor, Rick Chessen. Subsequently, all of the above minus Messrs. Feld and Lieberman met with Commissioner McDowell and his advisor Rosemary Harold. Also, all of the above minus Messrs. Chang and Feld met with Commissioner Tate and her advisor, Amy Blankenship. I attended as litigation counsel to WealthTV.

In each meeting, we urged swift adoption of the four-point process reform proposal previously advanced to address the definition of the prima facie standard, prohibited retaliation, a hold harmless provision during litigation brought by programmers that are carried, and the imposition of a shot clock. Mr. Lieberman, speaking as Vice President of Government Affairs for ACA expressed his organization’s interest in there being a strong independent programming industry, and outlined independent operators’ concerns with some of the Report and Order’s proposed rules that were not part of the four-point process reform proposal. In the meeting with Commissioner McDowell, we explained the definition of the prima facie case. In the meeting with Commissioner Copps, we discussed the proposed redefinition of “affiliate” apparently included in the circulated item, but not included in the NAIN-proposed reforms. We suggested that in considering whether and how to implement any change, the commission should consider the unique challenges facing small cable providers and the long-standing policy of the Commission to encourage small cable systems to develop local programming. In the meeting with Commissioner Tate, we discussed the shot clock and expressed the necessity of having an overall shot clock establishing a time limit for a decision by the agency. We left a copy of the NAIN proposal, previously filed in the record and attached hereto, with Commissioner Tate.

Very truly yours,

//signed//

Kathleen Wallman

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.