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January 13, 2010

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

Re: Notice of *Ex Parte* Presentation
MB Docket Nos. 07-29 and 07-198, Program Access

Dear Ms. Dortch:

Today Mark Brennan of Hogan & Hartson and I met with Austin Schlick, General Counsel, Nancy Murphy, and Diana Sokolow from the Media Bureau and Stuart Benjamin from the Office of Strategic Planning concerning the above captioned matters. A copy of the points we discussed is attached.

Pursuant to section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed electronically with the Office of the Secretary and served on the Commission participants in the meetings.

Should you have any questions regarding this matter, please contact the undersigned.

Sincerely,

Daniel L. Brenner

cc: Austin Schlick
Nancy C. Murphy
Stuart Benjamin
Diana Cohen Sokolow

Enclosures

TALKING POINTS

VERTICALLY- INTEGRATED NETWORKS EXCLUSIVELY DISTRIBUTED TO AN OPERATOR'S CUSTOMERS WITHOUT USE OF SATELLITES SHOULD NOT BE COVERED BY SECTION 628 OF THE COMMUNICATIONS ACT

- Bright House Networks (BHN) operates local origination networks, Bright House Sports Network, Bay News Nine and Central Florida News 13, with the news networks available in English and Spanish. These local origination services are exclusive to Bright House customers and are distributed from the head ends of the systems to customers.

- There is no distribution, by satellite or terrestrially, to other MVPDs. They were created to increase the competitiveness and diversity of BHN in the markets in which they operate against satellite and SMATV distributors and newer MVPDs like Verizon. They do not carry the games of the three major professional sports leagues (i.e., NFL, NBA, or Major League Baseball).

- **The FCC should explicitly exclude local origination program services like those described here from the reach of Sec. 628. A rule which leaves BHN vulnerable to Sec. 628 complaints when it creates local competitive products will cause investment in such services to dry up and discourage the development of such desirable program services.**

- Verizon itself offers exclusive home-grown channels akin to BHN's channels: FiOS 1 Washington, launched in 2008; and FiOS 1 Long Island and FiOS New Jersey launched in 2009, offer news, sports, weather and local information and entertainment programming. BHN Networks offer similar home-grown competitive programming. These are the essence of competition and shouldn't be subject to being subjected to claims of forced access.

- The *New England Cable News* (NECN) case (1994) is instructive on the treatment of the BHN networks. NECN was a vertically-integrated, satellite delivered "news, weather sports, and other … programming of regional interest in the New England area." It sought exclusivity for its cable affiliates for seven years, which required FCC approval. In granting exclusivity, the FCC noted:

  > We find it highly significant that all of the other regional news networks in the country provide exclusive distribution to their cable affiliates, which supports NECN's assertions regarding the importance of the ability to offer exclusivity to the viability of a regional service like NECN. (¶ 38).

  Earlier in the order the FCC noted: "The two vertically integrated services (New York One News and News 12) are distributed to cable systems owned by the parent companies of the networks, and, according to NECN, are not governed by the program access rules because they are not 'satellite' programming." (n.21)

- Rule-change advocates argue that the denial of certain terrestrial programming, in the words of Sec. 628(b) of the statute, "hinder[s] significantly or … prevent[s]" it from offering satellite delivered programming (to which it has access). And they therefore would bring terrestrially delivered programming within the scope of the statute, despite the years of FCC excluding it.

- The FCC, starting over 11 years ago and as recently as 2007, consistently held that the program access rules do not apply to terrestrially delivered program services. As the FCC explained in 1999, the Senate version of Sec. 628 would have extended the rules to such services but he House bill, that was eventually adopted, did not. Any changes to the rule should be construed as narrowly as possible.

- Neither the FCC nor the court of appeals in the 2009 *MDU Exclusivity Order* read Section 628 as a general competition statute akin to, say, FTC Section 5. The *MDU Exclusivity Order* involved the inability of a competing MVPD to offer *any* service to customers in a building where another MVPD has exclusivity. The exclusion of a terrestrially-delivered network may result in a different mix of programs. But there is no evidence that denying that service has ever precluded a competitive offer. Indeed, DirecTV and DishTV, the #2 and #3 MVPDs in the country, have been successful in the marketplace for years without access to terrestrially-delivered networks. And Verizon and AT&T have had self-described great success in launching competing cable services.

    - If the FCC, as reported, plans a "regression test", it must also update its rules, as required by 628(f)(3), which calls for penalties for "frivolous" complaints. Given the success of MVPD competitors, the likelihood is high that Verizon or other large MSOs will be unlikely to show that the absence of a terrestrial network "hinders significantly" its ability to sell its service. Yet program networks will have to bear the expense of such a proceeding.

- Whatever the scope of Sec. 628 after the *MDU Exclusivity Order*, <u>there must be some limiting principle</u> Otherwise, the FCC would entertain claims for access to any asset of an MVPD, if denial significantly hinders it from delivering its satellite programming package. That list of assets can't be limited to "terrestrially delivered programming."
    - For example, making available for resale AT&T or Verizon's vast wireless networks at TELRIC (or lower) prices, or requiring those companies to make their credit facilities to any MVPD competitor, would "increase competition and diversity" in the marketplace, under Sec. 628(a).
    - And denying those to a competitor might "hinder significantly or … prevent" an MVPD from providing satellite programming. But no one has suggested Section 628 is that broad or that a procedural test should be created to test whether denials of these or other assets constitute a violation of Sec. 628.

- It is worth noting that Congress mandated in Sec. 628(c)(1) that the FCC was to complete the rules for Sec. 628 within 180 days after enactment. It is now poised to re-write substantially those rules nearly 18 *years* after enactment.
    - The deadline established in the 1992 Act is relevant to what is happening here. Rule-making time limits benefit those who seek prompt development of implementing regulations. But it limits the ability to go beyond the tenure of those members of Congress who enacted the legislation if the implementation goes far afield from what was intended.