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June 1, 2011

VIA ECFS

EX PARTE NOTICE

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

Re: MB Docket No. 07-42

Dear Ms. Dortch:

On May 31, 2011, Cristina Pauzé, Vice President, Federal Regulatory Affairs of Time Warner Cable Inc. ("TWC"), and the undersigned met separately with the following FCC staff to discuss the above-referenced proceeding regarding the FCC program carriage rules:

- 1) Bill Lake, Michelle Carey, Nancy Murphy, Mary Beth Murphy, Steve Broeckaert, and David Konczal of the Media Bureau.
- 2) Sherrese Smith, Legal Advisor for Media, Consumer and Enforcement Issues for Chairman Genachowski.
- 3) Joshua Cinelli, Media Advisor for Commissioner Copps.
- 4) Rosemary Harold, Legal Advisor, Media for Commissioner McDowell.

Ms. Pauzé had a similar meeting today with Dave Grimaldi, Chief of Staff and Media Legal Advisor for Commissioner Clyburn.

During these meetings, we stated that the Commission should take into consideration developments in the video programming marketplace when deciding whether and how to modify the program carriage rules. Multichannel video programming distributors ("MVPDs") face intense competition making it impractical for them to refuse to carry popular programming services valued by consumers. Moreover, vertical integration between MVPDs and programmers has decreased dramatically, making it less likely for situations that would implicate the program carriage rules to arise.

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TWC also pointed out that program carriage requirements raise serious constitutional questions, and that any changes to the rules must be considered within this framework. As First Amendment speakers, cable operators have the editorial right to decide which services to carry or not carry. That right must be respected. Because program carriage implicates forced speech, First Amendment concerns with carriage regulations are heightened.

TWC's positions with respect to specific program carriage proposals under consideration in this proceeding are summarized below.

Prima Facie Standard. The *prima facie* case standard must require a plaintiff to make an adequate showing regarding each of the elements established by Congress in the program carriage statute. Specifically, a plaintiff alleging a program carriage violation should be required to document that its service is substantially similar to the MVPD-affiliated service in terms of content, genre, target audience, license fees, ratings, audience demographics, and other relevant factors. The complaint also must include facts showing that the discriminatory acts allegedly committed by defendant were based on affiliation, *e.g.*, by showing the extent to which other MVPDs are granting the terms and conditions of carriage requested by the plaintiff, including details regarding the plaintiff's efforts to obtain carriage on such terms and conditions from other MVPDs. Finally, the plaintiff must show that its ability to compete fairly has been unreasonably restrained. A complaint failing to produce evidence of all these factors, at least regarding the plaintiff's programming service, should be dismissed.

Filing and Related Deadlines. The desire for expedited resolution needs to be carefully balanced against considerations of due process. As under current law, the statute of limitations should run for one year from the date of the behavior leading to the complaint. In setting the pleading cycle, the Commission must recognize that a plaintiff has one year to file a complaint, and thus the defendant needs a full and fair opportunity to respond. Time frames should be flexible to account for unique circumstances. Once the pleading cycle is complete, the Bureau can follow reasonable targets for its own prompt action. Cases referred to an ALJ should be free from arbitrary deadlines (at least during the trial phase, prior to closing the record), and instead should be governed by the exercise of the presiding officer's sound discretion.

Standstill. An MVPD should remain free to exercise its contractual rights to drop or reposition a programmer who has filed a program carriage complaint unless the Commission determines that the traditional factors for granting a stay are satisfied. Under no circumstances should an MVPD be required to launch a previously uncarried service, or move a service to a more desirable tier, absent a final order by the full Commission.

Burden of Proof. The statute places the burden of proof on the plaintiff. Consistent with the legislative history underlying the program carriage statute, "discrimination on the basis of

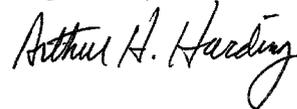
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affiliation” should be interpreted in the same way as in the employment discrimination and other contexts where the burden of proof rests on the plaintiff to show that discrimination was intentional and that the justification put forward by the defendant for its actions is not merely a pretext for discrimination. The fact that a plaintiff has made out a *prima facie* case does not serve to shift the burden of proof to the defendant. Rather, similar to a motion to dismiss, satisfaction of the *prima facie* case test merely allows the plaintiff to proceed to discovery, *etc.*, in an attempt to meet its burden of proof.

MVPD Affiliation. There is no basis in the statutory language or the legislative history for applying the prohibition on affiliation-based discrimination to MVPDs with no ownership interest in the alleged beneficiary of the claimed discrimination. Furthermore, there is no sound policy reason for extending the rules to cover programming services owned by other MVPDs. Such a rule presumes collusion among all MVPDs, which is untrue, and would be beyond the statutory authority established by Congress.

Please feel free to contact me with any questions regarding this letter.

Respectfully submitted,



Arthur H. Harding
Counsel for Time Warner Cable Inc.

cc: Bill Lake
Michelle Carey
Nancy Murphy
Mary Beth Murphy
Steve Broeckaert
David Konczal
Sherrese Smith
Joshua Cinelli
Rosemary Harold
Dave Grimaldi