

June 22, 2011

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 07-42
Ex Parte Notice

Dear Ms. Dortch:

On June 20, 2011, Gerard J. Waldron and Robert M. Sherman from Covington & Burling LLP, representing the Tennis Channel and other interested independent programmers, and David S. Turetsky and Michelle Liguori from Dewey & LeBoeuf LLP, representing HDNet LLC, met with Joshua Cinelli, Media Advisor for Commissioner Michael J. Copps. The participants also represented the viewpoints of Gigi B. Sohn, from Public Knowledge, and Andrew Jay Schwartzman, from Media Access Project, who previously attended meetings with the participants, but who could not attend the present meeting.

The participants discussed further action by the Commission relating to the carriage complaint process. They indicated that they were not meeting with the Commission to discuss any specific MVPD or programming dispute. The participants expressed the hope that a fair and effective set of rules providing for a swift process might help reduce the need to file complaints by leading to negotiations between MVPDs and independent channels that stay within the bounds set by Congress in the 1992 Cable Act.

The participants further noted that in passing the 1992 Cable Act, Congress intended to make room for independent voices in the cable industry. They noted that the Commission's failure to enact a truly expedited complaint process has perpetuated the difficulties faced by independent programmers prior to the 1992 Cable Act.

The participants discussed and highlighted a set of proposals that have been repeated time and again over the past several years in the record of the 07-42 proceeding: the establishment of a shot clock, imposition of a standstill in carriage upon the filing of a complaint alleging discrimination, definition of the *prima facie* case standard, and prohibition against retaliation. The participants emphasized that the Commission does not need to go through another comment period before acting on these issues. The participants especially emphasized the immediate need for a shot clock and standstill.

- Shot-clock: Messrs. Waldron and Sherman argued that the Commission should adopt a 180-day shot clock, which would require the Commission to make a decision on a carriage complaint within 180 days of its filing date. The participants explained that a shot clock would be instrumental to providing independent programmers with the expedited review process called for in the

1992 Cable Act, and that any substantive rights are illusory without meaningful expedited review. The participants also argued that MVPDs, who can absorb the costs of a prolonged proceeding, currently have incentive to drag out procedures in a way that is detrimental to independent programmers, most of whom cannot easily absorb such costs. Messrs. Waldron and Sherman also argued that there is no need to extend the answer period beyond the current 30 days, noting that the Federal Rules of Civil Procedure provide 30 days to respond to a federal district court complaint, and that there is no reason to conclude that answering a complaint in the carriage dispute context would be any more difficult, especially since MVPDs have easy access to their carriage relationships with all other programmers. The participants further argued that the Commission is statutorily obligated to provide an expedited complaint process, that a 180-day shot clock is reasonable, and that the shot clock would create incentives for all parties to move forward expeditiously.

- Standstill: Mr. Turetsky said that a standstill should be available to independent programmers to preserve the status of carriage before the allegedly wrongful activity. He explained that, if an independent channel was not carried by an MVPD prior to filing a complaint alleging discrimination, then until the Commission's expedited review is completed, the independent channel need not be carried by the MVPD. Similarly, however, if the channel was carried and the violation of the law alleged in the complaint was to terminate carriage or relegate the channel to a lightly viewed and compensated tier, the independent programmer should be able to maintain the carriage it had before the allegedly wrongful acts, if it chooses. Mr. Turetsky argued that the standstill should remain in place, at least until the Commission determines whether the complaint makes out a *prima facie* case. If the Commission finds there is no *prima facie* case, the standstill favoring the programmer could terminate, if the MVPD chooses. If the complaint states a *prima facie* case, the programmer could choose to continue the standstill. Mr. Turetsky further argued that, if the Commission provides an expedited review, the time interval involved in the standstills should be modest.

Mr. Turetsky emphasized that a standstill is essential to making the complaint process meaningful for independent channels that typically make money through subscriber fees and advertising. He explained that creation of quality, independent content, such as HDNet's "Dan Rather Reports," often consumes a large portion of these channels' budgets. Being forced to accept carriage in a lightly subscribed tier, even if just for the pendency of the complaint, can cause severe hardships to independent channels, including: loss of subscriber and advertising revenue; inability to meet expenses for programming that has been contracted in advance, especially original programming; inability to make significant new financial commitments necessary to obtain quality programming in the future; permanent loss of audience because of changed viewing habits; and potential triggering of "most favored nation" clauses (typically found in independent programmers' contracts with MVPDs) that will force the programmer to accept the same terms from all MVPDs that it is forced to accept in a case of alleged discrimination.

Respectfully submitted,
/s/David S. Turetsky
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