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**Ex Parte**

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

**Re: In re Leased Commercial Access; Development of Competition and Diversity  
in Video Programming Distribution and Carriage, MB Docket No. 07-42**

Dear Ms. Dortch:

On July 1, 2011, Diane Burstein, Stephanie Poday, and I, all of the National Cable & Telecommunications Association, met with the following Commission staff: Austin Schlick, General Counsel, Julie Veach, William Scher, and Susan Aaron of the General Counsel's Office, and David Konczal of the Media Bureau.

During the meeting, we stated that the Commission should seek comment on a potential "standstill" requirement before moving to consideration of a final rule.<sup>1</sup>

It is undisputed that the short 2007 Notice of Proposed Rulemaking (NPRM)<sup>2</sup> in this proceeding failed to provide any express notice that the Commission was considering a standstill requirement. The NPRM contained no proposed rules, no mention of the word "standstill," and no discussion of the concept of preserving the status quo during the pendency of a program carriage complaint.

Nevertheless, Media Access Project ("MAP") has recently asserted that notice was sufficient to adopt a final standstill rule, suggesting that a standstill requirement might be a "logical outgrowth" of a different issue raised in the NPRM – a possible rule prohibiting MVPD "retaliation" against a programmer for the act of filing a program carriage complaint.<sup>3</sup>

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<sup>1</sup> A "standstill" requirement would permit a complainant to ask the Commission to impose carriage conditions reflecting the *status quo ante* prior to any alleged wrongful acts during the pendency of a program carriage dispute.

<sup>2</sup> See *In re Leased Commercial Access and Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 22 FCC Rcd 11222 (June 15, 2007).

<sup>3</sup> See Letter from Andrew J. Schwartzman, Senior Vice President and Policy Director, Media Access Project, to Marlene H. Dortch, Secretary, FCC, MB Docket No 07-42 (June 9, 2011) ("The Commission clearly asked

As an initial matter, a final rule qualifies as a “logical outgrowth” of an issue raised in an NPRM if interested parties “should have anticipated” that the change from the proposed rule was possible and thus “reasonably should have filed their comments on the subject during the notice-and-comment period.”<sup>4</sup> On the other hand, “a final rule fails the logical outgrowth test and thus violates the APA’s notice requirement where interested parties would have had to ‘divine [the agency’s] unspoken thoughts,’ because the final rule was surprisingly distant from the proposed rule.”<sup>5</sup>

The argument that a standstill rule is a “logical outgrowth” of a potential rule against retaliation cannot meet this standard. First, the issues are logically distinct. A standstill involves preserving the status quo that existed *prior* to the filing of a complaint. In other words, it generally looks *backwards* from the filing of a complaint and attempts to put the parties in the same position they were in before the allegedly wrongful acts occurred. By contrast, the potential rule against retaliation involved protecting complainants from wrongful acts *subsequent to* and *because of* the filing of a complaint. A rule against retaliation is thus intended to give parties the assurance that they will not be punished for taking advantage of the FCC’s complaint process; unlike a potential standstill rule, it has nothing to do with preserving the status quo in light of business disputes or behavior occurring before a complaint is filed.<sup>6</sup>

Moreover, the Commission’s vastly different treatment of the standstill issue in other proceedings is probative of its intent here. In the recent *Council Tree* decision overturning a Commission rule for lack of APA notice, the Third Circuit found it “instructive” that the FCC had solicited public comment on the relevant issue more broadly and “in much more specific terms” in other proceedings.<sup>7</sup> The *Council Tree* court found that “the contrast could not be more stark” between the “transparent discussion” of the issue in one proceeding and the lack of such discussion in the case at issue, and thus that commenters could not reasonably have anticipated that the issue was under consideration.

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parties in this proceeding to address the problems associated with program carriage procedures, including problems associated with retaliation against complainants.”) (“*June 9 MAP Letter*”).

<sup>4</sup> See *CSX Transportation, Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (internal citations and quotation marks omitted).

<sup>5</sup> *Id.* at 1080 (citing *Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005)).

<sup>6</sup> The Commission should reject any argument based on a claim that there may be some spill-over between the two concepts because in some instances issuing a standstill could also have the effect of impeding some instances of retaliation. See *June 9 MAP Letter*. Such an argument would both be so over-inclusive (requiring a return to the status quo for acts occurring prior to the filing of a complaint that by definition cannot be “retaliation” for the filing of a complaint) and so under-inclusive (potentially leaving unaddressed certain acts of retaliation that go beyond preserving the carriage status quo) that parties could not reasonably anticipate that they needed to comment on a potential final standstill rule. See *Council Tree Commc’ns v. FCC*, 619 F.3d 235, 253 (3d Cir. 2010) (rejecting the logical outgrowth argument that the notice of a spectrum auction qualification rule was sufficient, because the final rule was over-inclusive and addressed a different objective than that expressed in the notice).

<sup>7</sup> See *Council Tree*, 619 F.3d at 254.

In this case, only a few months after release of the program carriage NPRM, the Commission issued an NPRM examining potential changes to its program access rules.<sup>8</sup> That NPRM, unlike the program carriage NPRM, explicitly and at length sought comment on the possibility of adopting a “standstill” requirement to preserve the status quo pending resolution of program access disputes.<sup>9</sup> As in *Council Tree*, the contrast between the two NPRMs – issued just a few months apart – “could not be more stark” and demonstrates that the Commission knew how to ask about a potential standstill requirement where that was its intent.<sup>10</sup>

In addition, while an agency *itself* must provide notice of its regulatory proposals and cannot bootstrap notice from the comments,<sup>11</sup> the pleadings filed in response to the NPRM reflect the fact that commenters did not reasonably anticipate that the request for comment on retaliation could lead to a standstill mandate. Based on our review of the record, no commenter raised the standstill issue in the initial round of comments and only one commenter briefly raised it in reply comments – in a limited context not applicable here.<sup>12</sup> While the idea of a standstill was raised in several *ex parte* letters, those were filed after the formal record had closed and, even then, a standstill was typically presented as a *separate and distinct request* from a substantive rule against retaliation.<sup>13</sup>

For all of these reasons, a final rule adopting a standstill mandate would be “surprisingly distant” from the issues raised in the NPRM and would run afoul of the APA. There is not a hint in the NPRM that the Commission was considering a standstill rule. The Commission’s vastly different treatment of the issue in the program access NPRM showed that this was not an oversight. In the words of the *Council Tree* court, parties truly would have had to “divine [the FCC’s] unspoken thoughts” to comment on the standstill issue – which explains the thinness of the current record.

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<sup>8</sup> See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 ¶ 135 (Oct. 1, 2007).

<sup>9</sup> *Id.* ¶¶ 135-37.

<sup>10</sup> The Commission also expressly raised the issue of a potential standstill in its NPRM on retransmission consent. See *In re Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶¶ 18-19 (Mar. 3, 2011).

<sup>11</sup> See *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520 (D.C. Cir. 1997) (finding that, while interested parties might be aware of comments that proposed ideas not contained in the agency’s notice, “such knowledge alone cannot substitute for notice from the agency”).

<sup>12</sup> See Crown Media Holdings Reply Comments, MB Docket No. 07-42 at 18-19 (Oct. 12, 2007) (proposing a standstill in the context of proposing an arbitration process for resolving program carriage disputes, rather than an FCC complaint process).

<sup>13</sup> See, e.g., Letter from David S. Turetsky, Dewey & LeBoeuf LLP, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 at 1 (Nov. 20, 2007); Letter from Kathleen Wallman, Counsel to WealthTV, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 at 2 (Aug. 4, 2008); Letter from David S. Turetsky, Dewey & LeBoeuf LLP, Counsel for HDNet LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 at 1-2 (June 24, 2011).

During the meeting, we then addressed the issue of whether notice of a standstill rule was required under the Administrative Procedure Act (APA) or whether it would merely constitute an internal FCC processing guideline for which no notice is required. We stated that a standstill rule would have a direct impact on cable operators' substantive rights – e.g., potentially depriving cable operators of bargained-for contractual rights regarding whether and how programmers will be carried – and thus that APA notice and opportunity for comment are required.<sup>14</sup>

Further, even assuming that the Commission possesses some general authority to impose interim relief, there are specific issues regarding the Commission's authority in this context that must be considered before moving to a final rule. Specifically, Section 624(f) of the Communications Act prohibits the Commission from imposing "requirements regarding the provision or content of cable services, except as *expressly provided* in this title."<sup>15</sup> A standstill rule would arguably constitute a "requirement[] regarding the provision or content of cable services," since it would dictate to cable operators whether and how certain programmers must be carried. Absent express statutory authorization, a regulation that would force cable operators to carry particular programming content would run afoul of Section 624(f) because "Congress thought a cable company's owners, not government officials, should decide what sorts of programming the company would provide."<sup>16</sup>

The Commission need not resolve the meaning or application of Section 624(f) one way or the other at this moment. The point here is that it is a significant issue and that there is little or no record on which the Commission could base a decision. We look forward to participating in the debate on that question, just as we look forward to engaging in the debate on a myriad of other issues – including significant constitutional,<sup>17</sup> policy,<sup>18</sup> and implementation<sup>19</sup> issues – that the Commission ought to seek comment on before considering a final standstill rule.

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<sup>14</sup> See Administrative Procedure Act, 5 U.S.C. § 553(b)-(c); *Am. Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (finding that the APA's notice and comment requirements apply when an agency imposes substantive rules, "which grant rights, impose obligations, or produce other significant effects on private interests") (internal citations and quotations omitted).

<sup>15</sup> See Section 624(f), 47 U.S.C. § 544(f) (emphasis added).

<sup>16</sup> *United Video Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989). As to whether a potential standstill is "expressly provided" by the Act, Section 616 states that the Commission may order carriage as a remedy for a "violation" of Section 616. See 47 U.S.C. § 536(a)(5). Likewise, the Commission's implementing order recognized that mandatory carriage was intended to be available as a remedy after a determination on the merits, based on a complete record, that there has been a statutory violation. See *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report & Order, 9 FCC Rcd 2642 ¶¶ 30-31, 33-34 (1993) ("*Second Report & Order*"); see also 47 C.F.R. § 76.1302(g) (providing for the imposition of a carriage remedy "upon completion of ... [an] adjudicatory proceeding"; and, where such remedy would require the deletion of an existing channel, not until "the decision of the staff or administrative law judge is upheld by the Commission").

<sup>17</sup> Since MVPDs are indisputably First Amendment speakers and program carriage regulation directly involves their editorial discretion, the Commission must be especially sensitive to First Amendment concerns. See *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996). As Media Access Project has acknowledged, no court has found that Section 616 comports with the First Amendment, either facially or as applied. See Letter from Andrew J. Schwartzman, Senior Vice President & Policy Director, Media Access Project, to Dave

A meaningful record on these issues does not yet exist and the debate has yet to occur. The good news is that it is not too late. The Commission can and should seek comment on a proposed standstill requirement before moving to a final rule – not only to comply with the legal notice requirements of the APA but also to develop the record it needs to make an informed decision.

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Although the issue was not discussed with Commission staff during the July 1 meeting, we take this opportunity to respond to suggestions in recent *ex parte* meetings that the Commission expand Section 616 beyond its statutory purpose.

MAP urges the Commission to consider extending the reach of the program carriage rules into MVPDs’ “relationships with sports teams or programmers which do not involve ownership” and suggests that the existing program carriage rules could be “interpreted or revised” to examine an MVPD’s “affiliation with a programming vendor that is not a programming network.” These proposals would require the Commission to substantially exceed its statutory mandate under Section 616. At a time when, if anything, the program carriage rules should be scaled back because they have outlived their 19-year-old purpose, the Commission should resist consideration of ever-more-exotic theories of program carriage discrimination.

Section 616 was intended to protect *programming networks* from coercion to hand over equity – or grant exclusivity – as a condition of carriage, and also to protect networks from discrimination on the basis of affiliation that has the effect of unreasonably restraining them from competing fairly. Section 616’s legislative history confirms that Congress intended the statute to apply to program networks, not program suppliers.<sup>20</sup> This core concern about *carriage* of

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Grimaldi, Chief of Staff, Office of Commissioner Mignon Clyburn, FCC, MB Docket No. 07-42 (June 10, 2011).

- <sup>18</sup> For example, a standstill requirement could, in many instances, interfere with bargained-for rights under an existing carriage agreement, such as the right to move a service from one program tier to another. A standstill requirement could also frustrate an MVPD’s ability to make room in its budget or on its systems to carry other networks, or to offer packages of programming in response to changes in the competitive marketplace. Indeed, being forced to continue to carry a network on previously agreed-to terms during the pendency of a complaint could frustrate an MVPD’s ability to provide carriage to other programmers, who may themselves be irreparably harmed by the lost carriage opportunity.
- <sup>19</sup> For example, it is unclear how a “true-up” mechanism would work if the Media Bureau initially imposed a standstill and then later the full Commission were to conclude that no program carriage violation occurred. How can the MVPD be made “whole”? Recent experience with reversals of preliminary determinations suggests that this is not an implausible scenario. A standstill imposed in the early stages of a complaint before the full record can be assessed would require an MVPD to maintain the network’s pre-complaint carriage level, pay license fees for that carriage, and likely pass on those fees to its subscribers. In this scenario, an MVPD and its subscribers could face harm from a standstill that may not be possible to cure retroactively through a financial “true up.”
- <sup>20</sup> See S. Rep No. 102-92, at 73 (1991).

programming networks is referenced throughout the Commission’s original implementing order.<sup>21</sup>

Nothing in Section 616 authorizes the Commission to expand the scope of its program carriage discrimination adjudications beyond such carriage decisions.<sup>22</sup> The terms on which an upstream programming supplier licenses its studio or sports content to other networks (whether affiliated or unaffiliated) is far removed from the statute’s concern with how an MVPD may be improperly discriminating “in video programming *distribution* ... in the selection, terms, or conditions of *carriage*.”<sup>23</sup>

As to MAP’s suggestion that “affiliation” may be broadened to examine “relationships” rather than ownership interests, the attribution standard that the Commission implemented in 1993 was already quite broad, but at bottom it involved actual ownership (even where the interest is very small and non-controlling).<sup>24</sup> There is no basis in today’s marketplace, let alone any statutory authority, to broaden the attribution standard beyond the ownership interests that the Commission settled on in 1993.

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<sup>21</sup> See, e.g., *Second Report & Order* ¶ 2 (“[V]ertically integrated cable operators have the incentive and ability to favor affiliated *programmers* over unaffiliated *programmers* with respect to *granting carriage* on their systems.”) (emphasis added); *id.* ¶ 14 (“we adopt general rules that are consistent with the statute’s specific prohibitions regarding *actions between distributors and program vendors in forming carriage agreements*”) (emphasis added).

<sup>22</sup> See S. Rep. No. 102-92, at 73 (1991) (“The term ‘video programmer’ means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale. This term applies to those video programmers that enter into arrangements with cable operators for carriage of a programming service. For example, the term ‘video programmer’ applies to Home Box Office (HBO) *but not to those persons who sell movies and other programming to HBO*. It applies to a pay-per-view service *but not to the supplier of the programming for this service*.”).

<sup>23</sup> 47 U.S.C. § 536(a)(3) (emphasis added); see also *Second Report & Order* ¶ 29 (instructing that “complaints alleging discriminatory treatment that favors ‘affiliated’ programming vendors . . . must provide evidence that the defendants has an attributable interest in the allegedly favored programming vendor”).

<sup>24</sup> See *Second Report & Order* ¶ 19.

For these reasons, NCTA respectfully urges the Commission to provide a full opportunity to comment on a proposed standstill requirement in the further notice, and to refrain from raising issues in the further notice that are far afield of the intent and purpose of Section 616.

Respectfully submitted,

**/s/ Rick Chessen**

Rick Chessen

cc: Austin Schlick  
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