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July 13, 2011

## **BY ELECTRONIC FILING**

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

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

Dear Ms. Dortch:

On July 11, 2011, representing HDNet, I had a phone conversation with Austin Schlick, General Counsel at the Commission.

In the conversation with Mr. Schlick, I supported inclusion of a “standstill” provision in any changes to the Commission’s program carriage complaint process, stating that the Commission has statutory authority to adopt that provision, that notice has been adequate, and that NCTA’s arguments to the contrary were misplaced. I briefly described the standstill provision that independent programmers are seeking and the reasons why it is important, as described in the *Ex Parte Notice* by Tennis Channel, HDNet LLC, Media Access Project, and Public Knowledge, MB Docket No. 07-42 (filed June 24, 2011), and then focused on the legal arguments that had been raised. The full substance of the presentation is described below.

## **Statutory Authority**

Section 616 (codified at 47 U.S.C. § 536) provides the Commission with authorization to adopt rules providing for a standstill. The standstill rule most often suggested to the Commission by programmers and public interest groups would only apply to a complaining programmer who is in the limited group of those already being carried and distributed by the MVPD. It would briefly preserve carriage in the tier and on the terms that the MVPD and the programmer had previously agreed. The standstill would be available if a programmer files a complaint alleging that an MVPD will deprive it of carriage entirely, or unreasonably restrain its ability to compete fairly through an adverse change in its distribution (such as ejection to a tier with few viewers), that would be prohibited by the statute.

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The standstill requirement would briefly maintain the distribution that the programmer had already been provided with by the MVPD, until a determination of whether the complaint states a *prima facie* case of a violation. This should be a very brief time indeed, since the statute requires the FCC to provide an “*expedited review* of any complaints...by a video programming vendor...” 47 U.S.C. § 536 (a) (4) (emphasis added). The standstill period would end if the complaint is found not to state a *prima facie* case. It would remain available for the programmer to continue if the complaint is found to state a *prima facie* case, which, again, should not be very long, if the Commission provides an expedited review as explicitly required by the statute.

Section 616 expressly requires the Commission to adopt regulations which are “*designed to prevent*” (emphasis added) an MVPD “from requiring a financial interest in a program service as a condition of carriage...” 47 U.S.C. § 536 (a) (1). The statute directs that the regulations “shall” also “include provisions *designed to prohibit*” an MVPD “*from coercing* a video programming vendor...” and “*from retaliating* against such a vendor” for failing to provide certain exclusive rights...” 47 U.S.C. § 536 (a) (2) (emphasis added). The regulations shall “contain provisions *designed to prevent*” an MVPD from engaging in certain discrimination “on the basis of affiliation or nonaffiliation...in the selection, terms, or conditions for carriage...” 47 U.S.C. § 536 (a) (3) (emphasis added). After also authorizing regulations that provide “appropriate penalties and remedies for violations of this subsection, including carriage...” 47 U.S.C. § 536 (a) (5), the statute strikes the balance chosen by Congress, authorizing “penalties” against anyone filing “a frivolous complaint” under this section. 47 U.S.C. § 536 (a) (6). Today’s regulations simply do not meet that statutory mandate. A standstill rule, along with a “shot clock” that secures an “expedited review” would for the first time help meet the objectives Congress set out nearly twenty years ago.

NCTA is simply wrong to suggest that Congress wrote a statute that cannot reasonably be interpreted to authorize Commission rules that preserve the status quo for a relatively brief time until an initial review of the complaint, and that an MVPD must be allowed to proceed with acts that may constitute impermissible coercion or other wrongful conduct at its option, with Commission rules unable to prevent this. Given the rapidity and severity of the harm to programmers in such circumstances (*see Ex Parte Notice* by Tennis Channel, HDNet LLC, Media Access Project, and Public Knowledge, MB Docket No. 07-42 (filed June 24, 2011)), this makes no sense in a statute that is intended to provide protections to, and prevent certain conduct against, independent programmers.

By adopting a standstill requirement, the Commission would be satisfying its statutory obligation reasonably to enforce Section 616.

NCTA also errs when it states that Section 624(f) (codified at 47 U.S.C. § 544 (f)) limits the Commission's ability to impose a standstill in the context of a program carriage complaint. Section 624(f) states that:

"(1) Any Federal agency...may not impose requirements regarding the *provision or content* of cable services, *except as expressly provided in this subchapter.*"<sup>1</sup> (Emphasis added.)

A standstill provision does not fall under Section 624(f)'s prohibition for the following reasons. First, to the extent that Section 624(f) is relevant at all, Congress also gave the Commission an express statutory mandate in the same subchapter (Section 616) to adopt rules to prevent MVPDs from engaging in certain discrimination, coercion and other practices against independent programmers, and authorized carriage remedies. Congress was interested in more than after-the-fact justice: it wanted the FCC to have rules that prevented discrimination before the harm was visited upon independent programmers. A standstill requirement accomplishes that goal. Thus, Section 616 falls within the express exception to the prohibition in Section 624(f)(1). Second, Section 624(f)(1) prohibits the Commission from imposing "requirements regarding the *provision or content of cable services*;" however, the standstill is reasonably interpreted as falling outside the prohibition because it is not focused on the "provision or content." It is about preserving distribution arrangements previously followed by the MVPD and about preventing an MVPD from engaging in certain conduct and decision making listed and prohibited in Section 616.

### Notice

The Commission has provided more than adequate notice concerning adoption of a standstill requirement, which is especially well evidenced by the fervent discussion and debate about the standstill issue in the record not only recently, but frequently over the past four years.

The Third Circuit's recent opinion in *Prometheus Radio Project v. FCC*, Nos. 08-3078, et al. (3d Cir. 2011) does not support the NCTA's position that the notice in this proceeding is insufficient. In *Prometheus*, the court found that interested parties were prejudiced by the Commission's failure to provide adequate time for comment, where, after the Commission issued a broad NPRM, the Chairman proposed a new rule in a *New York Times* Op-Ed. *Id.* at 20-23. The Commission allowed only twenty-eight days for comment after the Op-Ed, and the court found that during this period, almost no comments were filed on the relevant aspect of the proposal, and that the comments filed showed that interested parties were prejudiced by the short comment period. *Id.* at 28-29. The court also indicated that the rule adopted by the Commission was not a logical outgrowth of its NPRM. *Id.* at 24-25, n. 23. See also *Texas Office of Public Utility Council v. FCC*, 265 F.3d 313, 326 (5<sup>th</sup> Cir. 2001) (noting that a new comment period is not required if the modified rule is a "logical outgrowth" of the notice of proposed rulemaking, and

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<sup>1</sup> Section 624(f)(2) also provides that "Paragraph (1) shall not apply to – (A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order, (i) was in effect on September 21, 1983, or, (ii) may be amended after such date if the rule, regulation, or order as amended, is not inconsistent with the express provisions of this subchapter; and (B) any rule, regulation, or order under title 17."

finding that petitioners did not show that they were prejudiced by the FCC's failure to solicit further comments).

In contrast, in this proceeding a standstill provision is a logical outgrowth of the Commission's 2007 NPRM, which sought comment on various issues, including "how [the Commission's] processes for resolving carriage disputes should be modified," "whether the Commission should adopt rules to address the complaint process itself," and "whether [the Commission] should adopt additional rules to protect programmers from potential retaliation if they file a complaint." *Notice of Proposed Rulemaking, In the Matter of Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 07-42 (Released June 15, 2007) 6-7. Furthermore, the filings in the record of this proceeding show that interested parties have been well aware for a long time that a standstill has been under consideration in this proceeding, and they have had ample opportunity to address it.

The record for the 07-42 proceeding shows that at least 16 *ex parte* comments, filed between 2007 and 2010 alone, and reporting on 32 different meetings or conversations with the Commission, directly addressed the adoption of a standstill rule.<sup>2</sup> Participation in these *ex parte* meetings and conversations included an MVPD and an MVPD trade association, independent programmers and their informal trade association, and public interest groups. *See e.g. Ex Parte re: 07-42*, by WealthTV, the National Association of Independent Networks, HITN, Free Press, Media Access Project, and the American Cable Association (filed December 11, 2008). Nor does the NCTA contend that the record is devoid of references to a standstill requirement during the initial comment and reply period earlier in 2007. In addition, since May of 2011, 15 more *ex parte* comments, representing 20 meetings or conversations with the Commission, have been filed in this proceeding and expressly address a standstill requirement.<sup>3</sup>

NCTA's argument that notice has been inadequate is odd not only because of the large number of meetings, conversations, and filings with the Commission about a standstill requirement by parties of all kinds over a period of several years, but also because over the last couple of months, before the Commission has issued any new rules or orders, the NCTA and others have been discussing their legal and policy views on this issue with the Commission and incorporating those views into the record in this proceeding. *See e.g. Ex Parte Letter Re: MB Docket No. 07-42*, by NCTA (filed July 1, 2011 (describing a June 29 meeting)).<sup>4</sup>

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<sup>2</sup> In addition to these filings reflecting thirty-two *ex parte* meetings and conversations, there are a number of other filings in the same period that reflect meetings and conversations in this proceeding that appear to address a standstill provision indirectly.

<sup>3</sup> Four other *ex parte* comments filed since May 2011, representing another 7 meetings or conversations with the Commission, address a standstill provision indirectly.

<sup>4</sup> It is uncertain whether NCTA may have previously presented views on whether the Commission could adopt rules that include a standstill provision, given that many of its filings, made while others were addressing a standstill, are

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For these and other reasons, the Commission has ample authority to adopt rules implementing a standstill based on the record in this proceeding. A standstill also is a needed procedural step to make the complaint process practically and effectively available to independent programmers. There is no excuse for further delay in implementing the 1992 Cable Act.

Respectfully submitted,  
/s/David S. Turetsky  
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cc: Austin Schlick (by email)

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vague, e.g.: "They also discussed limits of the Cable Act's jurisdictional authority to regulate program agreements."  
*See e.g., Ex Parte Notice*, by NCTA, MB Docket No. 07-42 (filed December 8, 2008).