

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Revision of the Commission's Program)	MB Docket No. 11-131
Carriage Rules)	
)	
Leased Commercial Access;)	
Development)	MB Docket No. 07-42
of Competition and Diversity in Video)	
Programming Distribution and Carriage)	
)	

**REPLY COMMENTS OF
HDNET ENTERTAINMENT LLC**

David S. Turetsky
J. Porter Wiseman
Dewey & LeBoeuf LLP
1101 New York Avenue NW
Washington, DC 20005-4213

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HDNet Entertainment LLC, a Delaware limited liability company, and HDNet Movies LLC, a Delaware limited liability company, (together, "HDNet") provide these Reply Comments in response to Comments filed on November 29, 2011 in MB Docket No. 11-131 by the National Cable & Telecommunications Association ("NCTA") and other companies and associations regarding the Federal Communications Commission's (the "Commission" or the "FCC") Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131 ("NPRM"), adopted on July 29, 2011.

HDNet is an independent programming company delivering two 1080i high definition ("HD") channels known as "HDNet" and "HDNet Movies." HDNet is not affiliated with any multichannel video programming distributor ("MVPD") or with any of the major content companies that provide many channels to MVPDs and operate in a corporate environment. Mark Cuban, the Chairman, Chief Executive Officer, and

President of HDNet, personally makes the programming decisions for the HDNet channels.

HDNet files these Reply Comments primarily to address two issues raised in the comments by various entities. First, HDNet strongly disagrees with assertions that, due to changes in market conditions, there is effectively no need for the Commission to enforce Section 616 of the Cable Act of 1992. Second, HDNet agrees that the Commission should clarify its “statute of limitations” for program carriage complaints should it continue to impose such a restriction. However, taking into account the disparities of information between independent programmers and MVPDs, the revised regulations should specify a generous “statute of limitations” that would begin to run only when an alleged program carriage violation is *discovered* or *should have been discovered* by the complainant.

In addition, after reviewing the comments of a variety of MVPDs and associations, HDNet reiterates that the meaning of "affiliation" discussed in HDNet's comments reflects the coercive reality that many MVPDs regrettably face at the hands of powerful programmers that are often not part of a vertically integrated MVPD. In order for the MVPD to obtain on reasonable terms the "must have" channels owned or controlled by a powerful programmer, the MVPD is effectively forced by those programmers to also carry unattractive and unwanted networks that are affiliated with the programmer. This practice consumes an MVPD's channel space and resources, harming the MVPD, consumers, and the smaller independent programmers who would be able to offer a better product to consumers than these “tied” networks, if the MVPD had the space to carry their programming.

Commission Enforcement of Section 616 Should Be Effective and Expeditious

Some commenters have argued that the Commission should not make various revisions to the program carriage rules implementing Section 616 because market circumstances have rendered the statute obsolete. However, HDNet notes that this is simply a belated attempt to nullify Section 616, the passage of which some of these same entities (or their predecessors in interest) opposed and wanted to prevent almost two decades ago, and the effective implementation of which they have opposed at every opportunity since. Some of these entities argue that Section 616 was unneeded in the first place because, they claim, the problems it addresses never existed. They also argue that, in any event, changes to the market over time mean that these problems could not possibly exist now (notwithstanding the FCC's recognition otherwise in a number of proceedings of various types). They have asserted in comments at various times that the FCC's adoption of program carriage rules, and its implementation and enforcement of the law, has come too early or too late—for them, notwithstanding the statute, it never is, never was, and never will be the right time. But Section 616 is a binding part of the Cable Act of 1992, and cannot simply be disregarded.

To the extent that questions have been raised about whether the FCC must fully implement the statute – and some commenters have effectively suggested that further evidence of Congress' intention to protect the rights of independent programmers is required beyond the wording of Section 616 itself— recent evidence is provided by the House Report on the Fiscal Year 2012 Financial Services and General Government Appropriations Bill (“Report”), as published in 2011. The Report is the most recent legislative history that is arguably significant concerning Section 616, and it reflects in no

uncertain terms that Congress remains concerned with these issues and wants timely compliance with the existing statutory mandates:

[T]he FCC has not completed its 4-year proceeding to improve the carriage complaint process for independent channels, including expedited review, as mandated by statute. The Committee urges the FCC to promptly complete this proceeding to provide an effective complaint process for independent channels.

H.R. Rep. No. 112-136, at 44 (2011).

For almost two decades, the Commission failed to enforce effectively the mandates of Congress that are contained in Section 616, and has only now begun to carry out its obligations more effectively under the statute. It should not be dissuaded from doing so by specious arguments that there is not and never was a need for such a law, presented by the same entities that have opposed the statute from the very beginning.

If the Statute of Limitations is Revised, It Should Not Reward MVPDs' Informational and Strategic Advantages

In its Comments, the NCTA argues that the Commission should clarify an “inadvertent ambiguity” in its current regulations establishing a statute of limitations for program carriage complaints. The current rule permits a complaint to be filed within one year of: (1) an MPVD entering into a contract with a video programming distributor that a party alleges to violate one or more of the program carriage rules; (2) an MVPD offering to carry the video programming vendor’s programming pursuant to terms that a party alleges violate one of the program carriage rules; or (3) a party notifying an MVPD that it intends to file a complaint based on a violation of the program carriage rules.¹ As both the Commission and the NCTA observe, the third option, as written, theoretically

¹ See 47 C.F.R. § 76.1302(f).

permits a complainant to delay filing a complaint until many years after the events triggering a complaint.² Therefore, the FCC proposes to “revise our program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the program carriage rules,” either by replacing the current regulation with one broad rule to that effect, or by eliminating the third option from the regulation. The NCTA supports such a revision to limit the filing of complaints to one year after the alleged violation of the program carriage rules.

HDNet disagrees with the proposed limitations period. As discussed in the Comments of HDNet LLC, filed on November 29, 2011 in the above-captioned dockets, independent programmers suffer from a serious informational disadvantage in comparison with MVPDs.³ This disparity in access to information means that a programmer may lack important and valuable information that would affect whether it can file a complaint within one year of a refusal to provide lawful carriage by an MVPD, or whether it would reasonably elect to incur substantial expense and risk to do so. As HDNet explains:

The MVPD often holds all of the “cards” when it comes to information, and actively maneuvers to keep this advantage. For example, MVPDs typically require non-disclosure clauses in connection with their carriage negotiations and in their carriage agreements, which make it hard for independent programmers to learn and compare what terms and conditions are available in the current universe of carriage contracts. The MVPD, by contrast, is intimately familiar with that universe. Not only does it know the terms of its deals with every network it carries and of its offers or negotiations with even more networks, but it may also get information about the deals that programmers have with other MVPDs through “most-

² NPRM at ¶¶ 38-39; NCTA Comments at 26-27.

³ See HDNet Comments at 3-5.

“favored nations” clauses, which MVPDs often insist upon including in their contracts. Furthermore, an MVPD knows its own circumstances and negotiating latitude: budget for programming, channel capacity, schedule of availability, the audience on their systems for the networks that it carries, including, potentially, of the independent network with whom it is negotiating. An MVPD also does not necessarily have to disclose its financial interests or ownership, direct or indirect, in another competing programmer, or any contractual agreements it might have with such a programmer. It also need not disclose its reasons or tell an independent programmer the truth about why it will not provide carriage on particular terms or at all.

Section 616 does not provide for a statute of limitations; the current statute of limitations is a creation of the FCC’s regulations. To the extent that the Commission chooses to preserve or amend its regulations to limit rights of programmers, it needs to be cognizant of the disadvantages that independent programmers face in *discovering* a possible violation of the carriage rule. The FCC should not reward the ability of MVPDs to abuse their negotiating advantage and affirmatively conceal prohibited discrimination by setting a relatively short limitations period to file a complaint.

Nor should the Commission constrain the negotiating process by so limiting the option of an independent programmer to file a complaint. The twists and turns of negotiations require flexibility to maximize the chance of success, and a short limitations period runs the risk that the MVPD could manipulate the negotiations to avoid (or take advantage of) the limitations period. For example, if, in the course of negotiations, an MVPD refuses carriage for discriminatory reasons, and the programmer responds by trying another approach after a cooling off period, only to have the MVPD repeat the discriminatory denial, it is hard to see why it is that the MVPD should be home free and able to discriminate on the second occasion without fear due to the statute of limitations, simply because the programmer chose to negotiate rather than file a complaint.

If the Commission chooses to retain a statute of limitations (if it determines that such a provision is necessary, notwithstanding the existing restrictions on frivolous complaints and the Commission's accompanying enforcement authority) it should rewrite its regulations so that complaints may be filed within a more generous statute of limitations after *discovery* of the facts of the discrimination (and/or when most of the important facts concerning the discrimination should have been readily discovered). Often, some of the key facts relating to a potential discrimination claim may not surface for years. The FCC should not create an ability and perhaps incentive for MVPDs to violate the program carriage rules, knowing that they need only hide their discriminatory motivations or the relevant facts for a year to escape the consequences.

Respectfully submitted,

/s/ David S. Turetsky
David S. Turetsky
J. Porter Wiseman
Dewey & LeBoeuf LLP
1101 New York Avenue NW
Washington, DC 20005-4213
Counsel to HDNet, LLC