

# DEWEY & LEBOEUF

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## **BY ELECTRONIC FILING**

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

Re: MB Docket Nos. 07-42; 10-71, 10-56  
***EX PARTE***

Dear Ms. Dortch:

On July 29, 2010, David Turetsky and J. Porter Wiseman of Dewey & LeBoeuf LLP, representing HDNet, LLC (“HDNet”), spoke by telephone with Sherrese Smith, Legal Advisor for Media, Consumer and Enforcement Issues to Chairman Julius Genachowski. Mr. Turetsky discussed certain issues affecting independent networks that were described in HDNet’s June 17, 2010 *ex parte* filing in MB Docket Nos. 07-42; 07-198; 10-71 and 10-56 and HDNet’s Reply Comments in MB Docket Nos. 07-42 and 10-71.

More specifically, Mr. Turetsky focused on the need to act now to satisfy the unmet obligations of the Federal Communications Commission (“FCC” or the “Commission”) under the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 536). In passing the Cable Act of 1992, Congress recognized the vulnerability of independent

programmers and specifically directed the FCC, in Section 616, to conduct an “expedited review” of complaints submitted by independent programmers which allege that a multi-channel video programming distributor (“MVPD”) has violated certain prohibitions, such as by requiring a financial interest in a programmer as a condition of carriage or unreasonably restraining the ability of an independent programmer to compete fairly by discriminating on the basis of affiliation or non-affiliation. However, in the eighteen years since the passage of the Cable Act, the Commission has failed to comply with Congress’ mandate.

Mr. Turetsky mentioned a recent filing in MB Docket 07-42 by the National Football League, which experienced difficulties and long delays under the FCC’s current rules with its recent complaint, as well as the length of time it has taken the FCC to address other recent complaints. Mr. Turetsky also reiterated the procedural suggestions made in HDNet’s June 5, 2008 ex parte filing in MB Docket No. 07-42, in favor of a “shot clock,” an appropriate “*prima facie*” standard, a “stay,” and a “non-retaliation” provision. *See* HDNet’s Notice of *Ex Parte* Communication of June 5, 2008, MB Docket No. 07-42.

Mr. Turetsky urged the Commission to implement these carriage reforms promptly, and not consider them only in connection with mergers. For example, he noted that HDNet has found Comcast, which is in the process of merging with NBC Universal, to be supportive of HDNet as an independent programmer, initiating carriage well before the merger and continuing to expand it.

Mr. Turetsky also stated that there should be a link between the current retransmission consent proceeding (MB Docket No. 10-71) and the issues raised in MB Docket No. 07-42. He noted that the arguments of several cable companies in MB Docket 10-71 have been strikingly different from their response to similar issues in MB Docket 07-42. Some of these companies are now urging the Commission to make decisions on a rapid time table and adopt dispute resolution procedures which include a provision providing for interim carriage of the broadcast station. This resembles the request for preservation of the status quo during programming disputes, including when independent programmers have carriage when a dispute arises, as HDNet has requested in MB Docket No. 07-42. Likewise, some participants now argue that it is important for the Commission to achieve more certainty, procedural and otherwise, around programming issues and recognize that “free market” negotiations do not solve all issues or negate the need for potential regulatory process, intervention, or decision-making. HDNet is not the only entity to recognize the connection between MB Docket 07-42 and MB Docket 10-71. For example, Public Knowledge, in its Reply Comments in MB Docket 10-71, filed on June 3, 2010, also pointed to the link between these issues.

The jurisdiction of the Commission and obligation of the Commission to act to provide an expedited review of carriage complaints by independent networks is clear in the statute. Quick action by the FCC will make it clear that the Commission doesn’t follow two standards of justice: one that provides a relatively prompt response when powerful MVPDs are among those seeking intervention, as in MB Docket No. 10-71, and another that woefully disregards even

specific statutory mandates intended by Congress to protect less powerful, more vulnerable independent voices, when some of the same MVPDs are on the other side, and are even making inconsistent arguments. Accordingly, HDNet urges the FCC to complete the open rulemaking in MB Docket No. 07-42 now, and certainly no later than it may act on the matters raised in MB Docket No. 10-71, because these issues are intertwined.

HDNet's June 17, 2010, ex parte filing (corrected) is attached for your reference.

Respectfully submitted,

/s/ David S. Turetsky

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cc: Sherrese Smith