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DEWEY & LEBOEUF

June 17, 2010

BY ELECTRONIC FILING

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

Re: MB Docket Nos. 07-42; 07-198; 10-71; 10-56
EX PARTE

Dear Ms. Dortch:

On June 16, 2010, Mark Cuban, Chairman and President of HDNet, LLC ("HDNet"), and David Turetsky of Dewey & LeBoeuf LLP, representing HDNet, held several meetings at the Commission with: (i) Chairman Julius Genachowski, Sharrese Smith, Shomik Dutta and Paul deSa; (ii) Commissioner Meredith Attwell Baker, Brad Gillen and Millie Kerr; (iii) Commissioner Mignon Clyburn and Louis Peraertz; (iv) Commissioner Michael Copps, Joshua Cinelli, Michael Park and Frank Gonzalez; (v) Rosemary Harold, Legal Advisor for Media to Commissioner Robert McDowell; (vi) Jonathan P. Baker, Chief Economist of the FCC; and (vii) Media Bureau staff, including: William D. Freedman, Deputy Bureau Chief, Office of the Bureau Chief; Eloise Gore, Associate Bureau Chief, Media Bureau; David Konczal, Assistant Division Chief, Policy Division; Kris Monteith, Deputy Chief, Office of the Bureau

Chief; Mary Beth Murphy, Division Chief, Policy Division; Nancy Murphy, Associate Bureau Chief, Office of the Bureau Chief; and Diana Sokolow, Attorney Advisor, Policy Division. In addition to Mr. Cuban and Mr. Turetsky, these meetings were also attended by the following employees of Dewey & LeBoeuf: J. Porter Wiseman attended the meeting with Commissioner Clyburn *et al.*; Sara Silverstein attended the meetings with Rosemary Harold, Commissioner Copps *et al*. and Media Bureau staff; and James Montana attended the meetings with Chairman Genachowski *et al*., Commissioner Baker *et al*., the Media Bureau staff, and Jonathan Baker *et al*.

HDNet explained that it is an independent programming company delivering two 1080i high definition ("HD") channels known as "HDNet" and "HDNet Movies." In 2001, before many HD TV sets were even in use, HDNet was a pioneer, making a major investment to bring true HD programming to consumers. Although it was risky to be the first innovator in this field, HDNet recognized that the cost of HD TV sets would decline substantially in the future, leading to a much bigger market for HD content.

HDNet is the exclusive, high definition home for popular and original programming, such as comedy, drama, sports, and music. HDNet also features television's only HD news feature programs: *HDNet World Report* and the Emmy Award-winning *Dan Rather Reports*, featuring legendary journalist Dan Rather. HDNet Movies offers viewers a premium high definition movie experience featuring first-rate films, and is the only network to defy Hollywood

convention by regularly offering its viewers the ability to enjoy full-length feature films in the comfort of their own home *before* the films premiere in theaters.

HDNet is an independent programmer. It is not affiliated with any multi-channel video programming distributor ("MVPD") or with any of the major content companies that provide many channels to MVPDs and operate in a corporate environment. Mr. Cuban personally makes the programming decisions for the HDNet channels.

Multi-channel video programming distributors that currently provide carriage of HDNet and HDNet Movies to many or all of their high definition customers, include: AT&T, Cequel, Charter Communications, Comcast, DIRECTV, DISH Network, Insight, National Cable Television Cooperative ("NCTC") members, and Verizon FiOS.

Since HDNet last visited the Commission, two years ago, there has been a major positive carriage development in the relationship HDNet has developed with Comcast Corporation ("Comcast"). Comcast began to provide carriage to HDNet in several markets (well before its pending transaction with NBCU), and has continued to expand its carriage of HDNet to new Comcast markets. HDNet is also pleased to see that Comcast has committed, in connection with its pending transaction, to add more independent programmers. HDNet has found Comcast to be much more supportive than most of the other large, long-established, wired cable MVPD carriers, such as, for example, Cablevision, Cox, and Time-Warner, which provide very limited or no carriage to HDNet. In HDNet's experience, Comcast has proved to be a strong supporter of independent programming.

Notwithstanding HDNet's carriage by Comcast and the other identified providers, HDNet continues to face the same substantial difficulties as other independent programmers with regard to several other major MVPDs. These challenges effectively prevent HDNet from reaching many potential viewers throughout the nation. These problems endure in spite of the fact that HDNet earns better ratings than many other networks that have much greater carriage.

Among the obstacles that HDNet has faced at various times to obtaining broader carriage commensurate with its ratings have been problems related to the vertical integration of some MVPDs and the bundling of "must have" programming by some large programming providers with networks of little interest to consumers that are under the same ownership. This practice of "bundling" or "tying," is common and uses up valuable channel space which could be used by other more popular networks, including independent programmers. HDNet has also been confronted by MVPDs with an argument about a different kind of bundling that makes little economic sense. These MVPDs claim that they do not pay for HD programming and, therefore should not pay HDNet for its content. That fiction arises because they attribute the price they pay for two products, the standard definition channel and its HD version, entirely to the standard definition channel and say that the other product is free. This description of the arrangement makes no economic sense, let alone when applied to an HD-only network like HDNet.

HDNet noted that Congress recognized the difficulties faced by independent programmers when it passed the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. § 536). Congress placed some modest but important limits on the behavior that

MVPDs can engage in when making programming and carriage choices. *See* 47 U.S.C. § 536. Specifically, among other limitations, Congress prohibited MVPDs from requiring a financial interest in a programmer as a condition of carriage and from unreasonably restraining the ability of an independent programmer to compete fairly by discriminating in the selection, terms or conditions for carriage on the basis of affiliation or non-affiliation. *See* 47 U.S.C. § 536 (a) (1) and (3).

In addition to these protections for independent programmers, Congress also recognized the vulnerability of independent programmers by specifically directing the FCC, in Section 616 of the Cable Act of 1992, to conduct an "expedited review" of complaints submitted by independent programmers that allege that these prohibitions have been transgressed. HDNet noted that Congress has already determined what balance to strike: it placed a burden on the Commission by requiring expedited review, but it also protected against abuse of expedited review by providing for penalties against any programmer or other person who files a frivolous complaint.

The Commission, however, has failed to comply with Congress' mandate in the eighteen years since the passage of the Cable Act. The Commission's rules neither guarantee nor provide for expedited review. To HDNet's knowledge, there has *never* been an expedited review of a programmer complaint; the few complaints by programmers that have been brought have dragged out for years before reaching a resolution.

The unpredictable length of these procedures vitiates the right to recourse for abuses by MVPDs established by the 1992 Cable Act. Independent programmers simply cannot commence proceedings against potential carriers, even in cases of clear misconduct, unless these proceedings are truly expedited, as Congress directed, because they risk retaliation and, for some independent programmers, financially ruinous delays in acquiring carriage for their programming. For that reason, HDNet reiterated its support for a "shot clock" provision, which was discussed at greater length in previous filings. *See, e.g.*, HDNet's Notice of *Ex Parte* Communication of September 26, 2008, MB Docket No. 07-42.

HDNet noted that there is a link between the current retransmission consent proceeding (MB Docket No. 10-71) and the issues raised in MB Docket No. 07-42. Yet the response of many of the participants from the cable MVPD industry to these issues in MB Docket 10-71 has been strikingly different from their response to the same issues in MB Docket 07-42. These participants are now urging the Commission to make decisions on a rapid time table and adopt dispute resolution procedures that include a provision providing for interim carriage of the broadcast station. This resembles the request for preservation of the status quo during programming disputes under 47 U.S.C. § 536, which independent programmers 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 regulatory process, intervention, or decision-making.

In each conversation, HDNet reiterated the points made previously in HDNet's June 5, 2008 ex parte filing in MB Docket No. 07-42, reviewing the arguments 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. HDNet urged the Commission to implement these reforms promptly. This will make it clear that the FCC doesn't follow two standards of justice: one that provides a prompt response when powerful media companies 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. 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 also noted that one of HDNet's signature innovations, shooting and broadcasting one hundred percent of its content in true 1080i HD, was being undercut by competitors touting standard definition content as "HD" even though this content was filmed in standard definition and simply "up-converted" to run on HD televisions, resulting in significantly poorer image quality.

HDNet also expressed the view that the future of television is television, and not other media such as the Internet, as demonstrated in part by the success of HD TV sets and DVRs. High-quality content is distributed through television due to the technical advantages of cable transmission and its ability to reach potentially millions of viewers with a single "broadcast."

The Internet, by contrast, requires that programming be multicast, by streaming to each viewer individually. Therefore, the cost to the programmer increases with each individual that wishes to view its content. A service such as TV Everywhere is of value to independent programmers because it involves a cable MVPD picking up the cost, whereas it would be too expensive for an independent programmer to absorb the cost of multicasting. Because the future of television remains with television, HDNet emphasized the importance of maintaining a place for independent voices on television.

Finally, HDNet expressed support for wholesale "unbundling," as reflected in HDNet's November 20, 2008 ex parte filing in Docket No. 07-198, and noted that the practices of "bundling" and "tying" prevent HDNet from obtaining carriage, even when it can deliver more popular, higher rated content at lower prices than larger competitors who strong-arm MVPDs into purchasing unwanted channels. HDNet urged the Commission to forbid broadcasters from tying or bundling channels with the channels that are subject to "must carry" and retransmission consent negotiations.

Leveling the playing field for programming will not just benefit independent programmers: if independent programmers can obtain more carriage, they will be able to invest more resources in diverse offerings which make genuine contributions both to the marketplace and the marketplace of ideas.

A brief history of HDNet and an annotated copy of 47 U.S.C. § 536, which were distributed to the participants at these meetings, are attached for your reference.

Respectfully submitted,

/s/ David S. Turetsky

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