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The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Deborah T. Tate
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Annual Assessment of the Status of Competition in the Market for the
Delivery of Video Programming, MB Docket No. 06-189**

Dear Chairman Martin and Commissioners:

According to recent press reports, the Commission is currently considering adopting a finding, in the 13th Annual Report on Video Competition, that the so-called “70/70” test in Section 612(g) of the Communications Act has been met and using that finding to assert broad new authority to reregulate the cable industry.

Putting aside the dubious practice of policymaking by press leaks of supposedly confidential FCC documents, the press reports underscore a recurring, disturbing pattern of attempts to set policies that harm consumers.

As in previous instances, important factual inquiries are subject to sudden, inexplicable shifts in the FCC’s methodology and conclusions. Here, too: the Commission in its Eleventh Annual Video Competition Report identified data in the FCC’s cable price survey as the basis for measurement and found that the 70/70 test had not been met.¹ In last year’s Twelfth Annual

¹ Eleventh Annual Report, 20 FCCR 2755, 2767 ¶ 20 (2005).

Report, the staff estimate, based again on the FCC cable price survey data, found that the cable industry was only at 56% market penetration.² This methodology has apparently succumbed to fanciful thinking and a different conclusion. But the only change since the Twelfth Report is that the cable industry has actually lost a small number of basic video subscribers.

Also, as in other instances, rather than reading a statutory grant of authority with an eye toward obvious legislative intent, the broadest conceivable reading – straining credulity – is made to maximize the Commission’s apparent authority. In this case, rather than limiting the effect of the 70/70 test to issues involving leased access, as Congress plainly intended, the Commission is to be asked to conclude that a statutory provision embedded in the 1984 Cable Act (when there was substantially less competition) is now authority for a roving mandate to completely reorder the video marketplace according to . . . whom exactly? Certainly not Congress.

Finally, as in other instances, regardless of what statutory provision is at issue, there is the relentless drive for more regulation and more government micromanagement without looking at what is actually happening in the marketplace. In this case, instead of just simply thinking through the obvious facts that the marketplace is more competitive than ever, more diverse than ever, and provides more services and more value than ever, the Commission is to be asked to endorse a false view of the video marketplace. That fictional view is even more astonishing because it ignores the reality that the marketplace consists of robust competition among cable, telephone, and satellite video providers, all of whom deliver hundreds of channels of programming.

Section 612(g) provides that “at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.” 47 U.S.C. § 532(g). The statute involves two distinct tests. The first test specifies that the first 70 percent is determined by comparing homes passed by cable to “households within the United States.” The second test examines subscription level among those homes passed by 36+ channel cable systems.

Everyone agrees that the first prong of the test – the availability of cable systems with 36 or more channels to U.S. households – has been met. But consistent with the methodology used by the Commission in past reports (i.e., the cable price survey), the FCC’s own data as reported just last year demonstrate that the second prong of the test has not been met. Simply put, the percentage of homes passed by cable that actually purchase cable was far below the 70%

² Twelfth Annual Report, 21 FCCR 2503, 2514 ¶ 34 (2006).

threshold.³ In the past year, as cable's share of the multichannel subscriber universe has continued to decline, and as cable companies have faced actual declines in the number of customers, it is plainly impossible that cable's penetration could have increased at all, much less reached that threshold.

Virtually all the available data confirm that cable penetration remains well below 70%. Data compiled by Nielsen Media Research, SNL Kagan, and Warren Communications – three independent sources of information on cable subscribers and total homes passed by cable – all show that the second test threshold is *not* met.

- According to SNL Kagan's data, cable systems (including systems owned by telephone companies) are expected to pass a total of 113.6 million occupied homes by the end of 2007, with cable service to be purchased by only 66 million (58.1%).
- According to Nielsen Media Research's FOCUS database, based on data as of October 31, 2007, cable penetration for 5,757 systems reporting complete information on subscribers and homes passed is 61.1%.
- According to last year's Video Competition report, Warren Communications estimated that cable passed 93 million homes and was purchased by 67.8% of those households.

Only the Warren data show a penetration figure anywhere near – though still comfortably below – the 70% threshold. But the Warren data are obviously wrong in one important respect. Warren estimates 93 million homes passed by cable. According to public filings, however, the five largest cable operators alone passed nearly 100 million homes, as of June 2007. Indeed, by comparison the Nielsen data show 20 million more homes passed than the Warren data. And the Kagan data show almost 20 million more homes passed than the Warren data. By understating homes passed, the Warren calculation data significantly overstate cable's penetration rate.

Thus, it is clear that the 70% penetration threshold has not been met. And in light of the steady growth of cable's competitors in the video marketplace and the continued decrease in cable's share of multi-channel video subscribers, it seems highly unlikely it ever will be. Indeed, publicly reported data for seven of the top ten cable operators through September 30, 2007 show a net decline, year over year, of nearly 200,000 subscribers. Meanwhile, for that same period, DBS added 1.8 million subscribers.

Nevertheless, even if the cable industry were to reach the Section 612(g) threshold, the Commission's authority under Section 612(g) would be narrowly circumscribed.

³ Last year's Video Competition Report states: "From the 2005 Price Survey sample, the Commission staff estimates that the subscribers to systems with 36 or more channels as a percent of homes passed by such systems is 56.3 percent." The FCC further noted that this penetration rate had declined from 58.8 percent in the previous year. Twelfth Annual Video Competition Report, 21 FCCR 2503 ¶¶ 34. See also *id.* at 33 (SBC uses "all households" passed by cable systems as its denominator). This 2006 staff estimate used the same data source as the Commission had done in its Eleventh Annual Report.

When Section 612 was enacted in 1984, it contained a requirement that cable operators set aside up to 15 percent of their channels for leased access – as it does today – but it set no specific limits on the rates that cable operators could charge for leased access. Operators were required only to impose rates, terms and conditions that were not unreasonable – and there was a statutory presumption that rates, terms and conditions set by the cable operator were reasonable, unless shown by clear and convincing evidence to be unreasonable.

As the legislative history makes clear, Section 612(g) was intended solely to authorize the Commission to regulate the rates, terms and conditions of leased access more extensively, and to impose additional procedures for resolving leased access disputes, if the 70 percent benchmarks were met – and if such changes were necessary to provide greater diversity of information sources:

At such time as cable systems with 36 or more activated channels are available (*i.e.*, households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have availability to them, the FCC is granted authority to promulgate any additional rules necessary to ensure that leased access channels provide as wide as possible a diversity of information sources to the public. Along these lines, the Commission may develop additional procedures for the resolution of disputes between cable operators and unaffiliated programmers, and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers.

In terms of developing any new regulations relating to the price charged programmers for the commercial use of channel capacity designated under this section, prohibitions contained in 621(c) and 623(a) relating to rate regulations and other regulatory authority do not operate as constraints on the possible options available to the Commission in adopting any new rules. However, the Commission should not see its role as that of a traditional common carrier regulator. In any case, the Commission may not increase the number of channels required to be set aside under this section or preempt any authority expressly granted to franchising authorities under the title.⁴

The legislative history could not be clearer: The 70/70 test relates *only* to leased access. Not to cable ownership, not to program access, not to rate regulation, not to wholesale or retail bundling or packaging of cable programming – not to anything else. In the Cable Television Consumer Protection Act of 1992, Congress amended Section 612 to give the Commission new authority to impose maximum rates on leased access. 47 U.S.C. 532(c) (4), and the FCC was upheld on appeal in establishing a revised rate formula. As a result, even with respect to leased access, the Commission already has much of the authority that Section 612(g) was initially intended to confer on it in the event that the 70/70 threshold was ever met. Nothing in the 1992 Act or in its legislative history purported to further expand the limited scope of that authority.

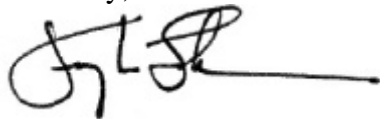
⁴ Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 54 (1984) (emphasis added).

Aside from issues of legislative history, I would urge the Commission to consider one other point. Like any statutory provision, the 70/70 provision was not intended to be viewed myopically, without regard to other laws or marketplace realities. This provision was adopted at a time when the cable industry's market share of the multichannel universe approached 100 percent; at a time when there were few significant multichannel competitors; and at a time when the availability and choice of programming was extremely limited. It was a placeholder in the event competition or program diversity did not emerge and more regulation might be required.

Events in the marketplace since 1984 make that placeholder irrelevant. Cable's share of multichannel customers has dropped below 67 percent; and cable faces significant multichannel video competition throughout the nation from two large DBS providers serving nearly 30 million customers, and, increasingly, from the large incumbent telephone companies. Online and other video competitors increasingly vie for viewer time and spending. As to programming, cable operators and their competitors provide hundreds of channels of program networks and services, including an array of digital and high-definition programming, video on demand and other interactive services – most of which are not owned or affiliated with the distributor. Consistent with Congress's intent, the Commission should view the 70/70 provision as neither triggered, nor relevant, to today's marketplace.

Manipulating data to justify an unsupportable interpretation of regulatory authority does a serious disservice to consumers at a time when the FCC actually has many other important duties it is clearly bound to perform. Real damage is done to the administrative system, and unnecessary litigation is generated, when agency fact-finding and policymaking are conducted in this way.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. E. McSlarrow', with a long horizontal line extending to the right.

Kyle E. McSlarrow