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November 12, 2008

The Honorable Kevin J. Martin
The Honorable Michael J. Copps
The Honorable Jonathan S. Adelstein
The Honorable Deborah Taylor Tate
The Honorable Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: File Nos. EB-08-SE-1067-1075, 1077-1078

Dear Chairman and Commissioners:

On October 30, 2008, the FCC's Enforcement Bureau issued Letters of Inquiry ("LOIs") to 11 NCTA member companies and, according to press reports, at least two other cable companies. The NCTA member companies are: Bend Cable Communications, Bright House Networks, Cablevision Systems, Charter Communications, Comcast Corporation, Cox Communications, GCI, Harron Entertainment Company, Midcontinent Communications, Suddenlink Communications, and Time Warner Cable. Press reports indicate that RCN Corporation and Verizon Communications also received LOIs.¹ Together these companies serve more than 86 percent of the nation's cable customers.

I am writing to express deep concern with the issuance of these LOIs. NCTA and its members do not contest the Commission's authority to inquire into the cable industry's digital migration and its impact on consumers. Indeed, we welcome the opportunity to describe an evolution that will bring numerous benefits to consumers and are willing, as always, to meet with the Chairman, individual Commissioners, or the Media Bureau to discuss the digital migration, which we believe is plainly in the public interest. That said, we have serious concerns concerning the method selected by the Commission to gather information on this subject, in particular the issuance of LOIs to 13 companies to obtain industry-wide information. The appropriate vehicle for that is a Notice of Inquiry or the Commission's annual Video Competition proceeding.

¹ Lynn Stanton, *FCC Probing Shift of Cable Channels*, TRDAILY (Nov. 4, 2008); Jonathan Make, *Channel Move Inquiry Letters Go To Dozen TV Firms*, COMMUNICATIONS DAILY, at 10 (Nov. 6, 2008).

For the reasons that follow, we believe that the manner in which LOIs are being employed in this case constitutes an abuse of the Commission’s processes and violates the Paperwork Reduction Act. These serious deficiencies render the LOIs unlawful, and we respectfully request that they be rescinded so that a more constructive discussion might occur. While each company will respond individually to the LOI it received, there are serious threshold problems with the LOIs that are common to each of the companies receiving them.²

The LOIs Are an Abuse of the Commission’s Processes

For the multiple reasons detailed below, the issuance of LOIs in this case was an abuse of the Commission’s processes.

First, as evidenced by the numerous questions in the LOIs and the breadth of the companies asked those questions, the LOIs are in essence an industry-wide “Notice of Inquiry” (“NOI”) or reporting requirement disguised as “Letters of Inquiry.” NCTA member companies have fully complied with Commission requests for data as part of general Commission inquiries, *e.g.*, we have responded with extensive data in response to the FCC’s Annual Video Competition Inquiry for nearly 14 years.³ NCTA member companies likewise recognize their obligation to respond to Enforcement Bureau investigations premised on legitimate customer complaints and targeted to specific alleged rule violations, and they have responded routinely to LOIs over the years.

But 13 apparently identical LOIs issued to companies that in total serve over 86 percent of the nation’s cable customers are LOIs in name only. By any calculation, that is an “industry-wide” request which is more appropriate for a Commission-issued NOI or reporting requirement than an Enforcement Bureau-issued LOI. There is, of course, a significant difference between an NOI and an LOI with respect to gathering industry-wide information:

- A Notice of Inquiry must be issued by the full Commission. The LOIs, however, were apparently issued at the direction of the Chairman alone, with no consultation or input from the other Commissioners.
- The Commission usually provides 30 days at a minimum for parties to respond to wide-ranging NOIs or reporting requirements, but here the Bureau has provided only 14 calendar days to respond to extensive questions which require each company to make extremely detailed responses.

² NCTA and individual companies reserve the right to provide more comprehensive responses in the future.

³ It is important to emphasize that much of the information requested in the LOIs could be sought in the context of the Commission’s annual review of the Status of Video Competition. The most recent Commission Video Competition NOI – which will gather data for the Commission’s 14th Annual report – was adopted almost a year ago but has yet to be released. That NOI seeks information that will permit the Commission to compare video distribution alternatives available to consumers and to evaluate competition in the video marketplace and the factors that have facilitated or impeded competition. The same day the Commission voted to adopt that NOI, it voted to adopt its 13th Annual Video Competition Report, but that too has not yet been released. The failure of the Commission to release its video competition NOI is no excuse to gather comparable data via Enforcement Bureau LOIs.

- By proceeding under an LOI, the Enforcement Bureau can issue a Notice of Apparent Liability ("NAL") and potentially impose forfeitures for an alleged failure to respond – without the need for the information gathering to be approved by the full Commission and OMB⁴ – in addition to imposing sanctions for violations of the underlying FCC rules with whatever negative consequences such a finding would have at the federal, state or local level for that company.

Second, even if the Enforcement Bureau purports to be conducting “investigations” of individual companies based on allegations of wrongdoing, to the best of the NCTA companies’ knowledge, there is no evidence that the LOIs sent to these companies are premised on any specific, company-focused complaints sent to the Bureau. Rather, they are based solely on unidentified “information” the Bureau claims to have received.⁵ The only basis for the LOIs cited by Chairman Martin is a letter from Consumers Union (“CU”) to the Senate Commerce, Science and Transportation Committee, dated only one day before the LOIs were issued, making a number of unsupported assertions about cable companies’ migration of channels from analog to digital.⁶ NCTA has responded to that letter and we are attaching a copy of that response for the record, but that letter does not constitute a specific complaint against any provider sufficient to give rise to an investigation. In any event, the questions in the LOIs extend well beyond what could credibly be claimed to be necessary to ascertain companies’ compliance with the one statutory provision and three rules that the LOIs reference.

Third, even if the LOIs were otherwise sound, the 14-day deadline for a response is unreasonable for many, if not most, of the companies in view of the voluminous information they request. The LOIs require each company to seek detailed information from all of its cable systems. The significant burden the LOIs put on company personnel (particularly when those same personnel may be occupied preparing for the digital transition and responding to a recent spate of other Bureau LOIs and other Commission initiatives) would be unreasonable regardless of the amount of time permitted to respond. Providing only 14 days to respond to the detailed requests in the LOIs illustrates the punitive nature of this inquiry.

Moreover, a number of questions seek responses that raise obvious confidentiality concerns – in particular, negotiated fees from program suppliers – that are quintessential proprietary business information. Even if one were to assume that the Bureau has the authority to inquire about fees related to program services that Congress deregulated more than a decade ago, the Bureau’s demand triggers private liability questions: for example, might divulging such

⁴ See pp. 5-7, *infra*.

⁵ Indeed, the LOIs themselves ask each company whether they have received any written or oral complaints about “any analog-to-digital channel changes.”

⁶ Lynn Stanton, *FCC Probing Shift of Cable Channels*, TRDAILY (Nov. 4, 2008) (reporting that “FCC Chairman Kevin J. Martin said today that the FCC has launched an investigation of the practices of cable television operators with respect to moving programming to their digital tiers Speaking to reporters who were waiting in the Commission meeting room for the delayed start of today’s open meeting, Chairman Martin noted that Consumers Union had sent a letter to the Senate Commerce, Science and Transportation Committee last week raising concerns about those practices.”). The timing of the CU letter and the detailed nature of LOIs suggests that the Bureau’s “investigation” was orchestrated well in advance of the CU letter, not the other way around.

information in these unprecedented procedural circumstances constitute a breach of contract? And even though the Bureau has outlined rules for confidential treatment of this material, the consequences of disclosure, inadvertent or otherwise, are very significant for the contracting parties, especially the programmers involved, who are not targeted by the Bureau's dragnet but would suffer the consequences of a leak. These are not idle concerns. These proceedings already have been the subject of unprecedented FCC-generated publicity, even though investigative inquiries have traditionally – and properly – been handled confidentially.⁷

Fourth, the unprecedented disclosure of the LOIs to the press and related improprieties call into question the impartiality of the inquiry. Enforcement Bureau inquiries and associated LOIs are not ordinarily released to the press because the complaints on which they are based are merely allegations. The Commission's own rules prohibit the disclosure of nonpublic information.⁸ Prematurely publicizing a federal agency's investigation of alleged law violations can have severe adverse financial and regulatory consequences for the target company whether or not the inquiry is eventually terminated with no Bureau action. And the tenor of some questions (*e.g.*, seeking information about “whether [the] Company has misled subscribers by linking or otherwise suggesting that this channel change was made necessary by the February 18, 2009 transition from full-power analog to digital broadcasting”) strongly suggests that Bureau has reached preordained conclusions.

To compound this problem, the Chairman spoke openly of the inquiry to reporters gathered for a Commission meeting and someone at the FCC apparently provided the LOIs themselves to the media.⁹ Release of the LOIs has resulted in reports about the Bureau inquiry in both the trade and general press.¹⁰ In contrast to this FCC-generated publicity campaign, the Enforcement Bureau has told the companies that received the LOIs that it would not provide any

⁷ See, *e.g.*, 47 C.F.R. § 0.457(g)(2)(investigatory records not routinely available to the public to the extent that disclosure would deprive a person of a right to a fair trial or an impartial adjudication).

⁸ 47 C.F.R. §19.735-203.

⁹ See, *e.g.*, Lynn Stanton, *FCC Probing Shift of Cable Channels*, TRDAILY (Nov. 4, 2008); *FCC looks into cable TV Price Increases*, CHICAGO TRIBUNE (Nov. 5, 2008) (noting that the letter “questioned the companies' practice of moving analog channels into digital tiers to free up bandwidth for other uses, such as high-definition channels”); Deborah Yao, *FCC to probe pricing policies of cable, Verizon*, ASSOCIATED PRESS (Nov. 4, 2008) (reporting that the “FCC wrote to Verizon and 11 cable companies last month about their practice of moving analog channels into digital tiers to free up bandwidth for other uses, such as high-definition channels”).

¹⁰ See *id.*; see also Amy Schatz and Vishesh Kumar, *FCC Opens Investigation Into Cable-TV Pricing*, WALL STREET JOURNAL (Nov. 5, 2008) (noting that the FCC “recently sent letters of inquiry to 11 cable companies and Verizon Communications Inc. asking about pricing and changes they have made to their tiers of service, including details about channels that have been moved to digital service”); Leslie Cauley, *FCC Approves ‘white space’ for broadband*, USA TODAY (Nov. 5, 2008) (noting that the FCC “opened an inquiry into cable TV pricing” and as “part of the inquiry” “sent a letter yesterday to a number of cable companies, including Time Warner, Comcast and Verizon, seeking information about their post-transition pricing plans”); Kim Dixon, *US probes cable pricing ahead of switch to digital*, REUTERS (Nov. 5, 2008) (reporting that the FCC “said on Wednesday it sent letters to 12 companies after receiving complaints that some are ratcheting up prices for programming packages or requiring customers to buy digital set-top boxes for fewer channels, ahead of the change.”); Emi Endo, *FCC Probing Cable Companies’ Pricing Practices*, NEWSDAY (Nov. 5, 2008) (noting that an FCC spokesperson “announced yesterday that it has directed 13 companies to answer questions about their process of dropping analog channels as they move to digital programming.”).

information on any actual complaints that may have been filed¹¹ and that the companies must file Freedom of Information Act requests in an effort to obtain them.¹²

Fifth, the October 30, 2008 “digital migration” LOIs are part of a pattern of recent Enforcement Bureau conduct launching wide-ranging inquiries and imposing unreasonable information requests (and response deadlines) on cable companies via LOIs rather than through more appropriate means. For example, in a 10-day period between October 24, 2008, and November 3, 2008, at least two NCTA member companies have been asked to respond to (1) an LOI regarding their use of switched digital video (“SDV”), (2) the LOI regarding their analog-to-digital migration practices, and (3) an LOI regarding their compliance with the FCC’s digital transition consumer education and outreach requirements – each requiring responses in 14 calendar days. At least six cable companies recently received LOIs dealing with their SDV practices, while two had previously received such LOIs and were the subject of NALs purportedly based on those practices. The notion that some of the LOIs are based on “complaints” the Bureau has received is belied by the fact that several of the companies receiving LOIs instigated by purported complaints received about their deployment of SDV have *never* deployed SDV in any of their systems.

As the foregoing conclusively demonstrates, the LOIs are an abuse of process and part of a continuing pattern and practice of such abuse.

The LOIs Violate the Paperwork Reduction Act

The LOIs also constitute clear violations of the PRA, which applies to the Commission.¹³ Indeed, utilization of LOIs to collect the requested information appears to be an attempt to avoid having to obtain OMB approval to collect the requested data by exploiting the exception under the PRA for investigations. But an identical letter sent to 13 recipients representing 86 percent of the industry with no evidence of particular complaints does not qualify under this exception.

Under the PRA, no party may be subject to any penalty for failing to comply with a “collection of information” that is subject to the PRA unless that information collection bears a control number assigned by the Director of the Office of Information and Regulatory Affairs.¹⁴ None of the LOIs bears such a control number. A “collection of information” means “obtaining [or] soliciting ... of facts or opinions by or for an agency, regardless of form or format, calling for ... answers to identical questions posed to ... ten or more persons....”¹⁵ “Person” means “an individual, partnership, association, corporation....”¹⁶

¹¹ In the case of one company which received an LOI related to its deployment of switched digital video, the Bureau provided one “complaint” but that “complaint” had nothing to do with the subject of the LOI.

¹² Even if a FOIA request had been made the very same day the LOI was received, the agency would have been under no obligation to respond until well after the time for response to the LOI was due.

¹³ 44 U.S.C. § 3502(1) (statute covers independent regulatory agencies) & (5) (independent regulatory agencies include FCC).

¹⁴ *Id.* at § 3512(a) (1).

¹⁵ *Id.* at § 3502(3).

¹⁶ *Id.* at § 3502(10).

OMB regulations make clear that, in counting whether ten or more persons are affected by an information collection, one must count “any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information, ... including ... separately incorporated subsidiaries or affiliates.”¹⁷ In addition, “[a]ny collection of information addressed to all or a *substantial majority of an industry* is presumed to involve ten or more persons.”¹⁸

While the PRA does not apply to the collection of information during the conduct of “an administrative action or investigation involving an agency against specific individuals or entities,”¹⁹ the PRA *does* apply to the collection of information “*during the conduct of general investigations ... undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.*”²⁰

The PRA plainly applies to the inquiry being conducted by the Bureau via the October 30, 2008 LOIs.

First, the LOIs were sent to at least ten individual entities (the general PRA standard). As noted above, 11 NCTA member companies received LOIs and press reports indicate at least two additional companies have received LOIs. Even if fewer than ten companies had received LOIs, the threshold PRA standard is met because LOIs clearly went to entities that would in turn have to collect information from ten or more separately incorporated entities, *e.g.*, all of a particular cable company’s subsidiary corporations. In any event, as noted above, LOIs went to companies serving over 86% of cable subscribers in the nation which, by any measure, constitutes all or a substantial majority of the cable industry.

Second, while the PRA does not apply to a *targeted* investigation, focused on “specific individuals or entities,” the LOIs clearly are not part of such an investigation. Given the breadth of the companies which received LOIs, the breadth of the questions asked of each such company, and the utter absence of any specific allegation or evidence of noncompliance with respect to any of these companies, it seems clear that this is at best a “general investigation[] ... undertaken with reference to a category of individuals or entities ... or an entire industry.” Specifically,

- All of the letters are apparently identical except for the addressees and the company names. Indeed, the fact that one letter apparently leaked to the press from the Commission was addressed to a different company than the company referenced in the body of the letter underscores the careless nature of this “inquiry.”

¹⁷ 5 C.F.R. § 1320.3(c)(4).

¹⁸ *Id.* at § 1320.3(c)(4)(ii)(emphasis added).

¹⁹ 44 U.S.C. § 3518(c)(2); *see also* 5 C.F.R. § 1320.4(a)(2).

²⁰ 44 U.S.C. § 3518(c)(2)(emphasis added); *see also* 5 C.F.R. § 1320(b)&(c).

- None of the letters reference specific complaints that the agency is investigating or ask any of the recipients to respond to particular allegations regarding particular developments in particular markets, or the change of a particular channel or group of channels.
- The letters do not seek information about specific events but ask instead about *all* analog-to-digital channel changes on *all* systems for *all* respondents.
- A genuine investigation would be handled confidentially, and fact-gathering would precede pronouncement of judgment. Here, the FCC Chairman has sought and obtained widespread press coverage of his own negative conclusions about cable industry practices at the very outset of the so-called “investigation.”
- The letters impose ongoing reporting requirements into the indefinite future, requiring that responses be supplemented quarterly “until the close of this investigation.” A genuine investigation would ordinarily be focused on events that have already occurred.
- A legitimate investigation would give targets reasonable time to gather and submit required information. As noted, the FCC has given LOI recipients only 14 days to respond, even though it typically provides more than twice that much time for requests that are far less burdensome.

A broad fishing expedition involving substantially an entire industry is not a legitimate investigation but an information collection that is masquerading as an investigation. If time were somehow of the essence, the FCC could seek expedited OMB review, which it has frequently done. The only reason to collect this information through LOIs rather than an NOI or an industry-wide reporting requirement is to avoid the OMB scrutiny required by the PRA.

* * * *

As companies regulated at the Federal, state, and local level, NCTA’s members are well aware of their responsibility to scrupulously abide by FCC law and precedent. But we would also similarly hope for fair and evenhanded treatment from the principal federal agency that oversees our industry. While we recognize that NCTA’s response to the LOIs today is highly unusual, the recent actions by the Enforcement Bureau so diverge from standard practice that we believe a public response is warranted.

For the reasons set out above, the October 30, 2008, LOIs constitute an abuse by the Enforcement Bureau of the Commission's processes, seek highly confidential business information, and violate the Paperwork Reduction Act. They should be rescinded. The appropriate way for the Commission to conduct what is in fact an industry-wide inquiry about cable's digital migration is to proceed in the regular order, by issuing an NOI.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "J. L. ...", with a long horizontal line extending to the right.

cc: Susan E. Dudley, Administrator, OMB Office of Information and Regulatory Affairs

Attachment



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November 6, 2008

The Honorable Daniel K. Inouye
Chairman
Senate Committee on Commerce, Science and Transportation
722 Hart Senate Office Building
Washington, DC 20510

The Honorable Kay Bailey Hutchison
Ranking Member
Senate Committee on Commerce, Science and Transportation
284 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Inouye and Ranking Member Hutchison:

You recently received a letter from Consumers Union arguing that some cable operators “have begun moving cable programming to a digital-only tier” and charging consumers a fee for a digital cable box to receive this programming. Consumers Union suggests that this is simply a way for cable operators to increase the fees that they receive from their customers, and that to undertake these changes at the same time as broadcasters are implementing their own digital migration is somehow misleading or deceptive.

Consumers Union regrettably ignores the broader context in which these changes are taking place. In fact, cable operators have been open about their multi-year transition from analog to digital programming. That transition has and will continue to enhance the value of cable service to the vast majority of cable customers. The cable industry is committed to providing high quality service to all of our customers during cable’s transition to digital technology.

First, let’s make a clear distinction between the “digital *broadcast* transition” – with the Congressionally-mandated “hard date” of February 17, 2009, after which all analog broadcasting must cease – and the digital migration that the *cable* industry is undertaking. The cable digital migration has been underway for many years, wholly separate and apart from the broadcasters’ digital transition. Alone among multichannel video offerings, cable began as an analog service. In the 1990s, however, cable operators foresaw a huge consumer demand for digital video and audio – and especially high definition programming. They have spent more than \$130 billion to upgrade their networks to digital, an investment that also enabled them to provide broadband to more than 90 percent of all households and offer vigorous facilities-based choice in telephone service.

To meet the increasing demand for digital services and higher-speed broadband, and to remain competitive in a vibrant broadband marketplace, cable operators must reclaim bandwidth currently used for analog services. Devoting a large number of channels to bandwidth-intensive analog signals when digital programming – even HD programming – can be provided using much less capacity frustrates cable’s ability to keep up with evolving technology and introduce improvements in its broadband and voice services. Cable operators also need to improve the efficiency of their networks in order to advance the bipartisan goal of universal access to broadband.

It is true that as cable programming moves from analog to digital format, subscribers with analog televisions will need a set top box to view channels that are no longer transmitted in analog. Cable operators recognize that these changes can be disruptive to some customers, and they have instituted a variety of programs designed to ease the transition. Some cable operators are providing these boxes at no charge, at least for the first year after signals have been changed from analog to digital. To suggest, as Consumers Union does, that the transition to digital services is simply a ploy to charge more for the same or fewer services ignores these efforts and the larger context in which the transition is occurring. Our goal is the opposite – to provide consumers with the fullest possible range of choices and the greatest number of opportunities for more savings on video, broadband, and phone services.

Given their legacy of analog service, cable operators have implemented their digital migration gradually. Consumers Union neglects to mention that cable operators continue to offer a large, diverse array of programming in analog format. That programming remains available to consumers without the need for a set top box or a digital television. In many cases, operators are even simulcasting programming in *both* analog *and* standard definition digital format, maximizing the options available to customers with analog sets.

Moreover, in order to facilitate and ease the broadcasters’ transition, cable – *and only cable* – will be carrying *both* analog and HDTV versions of most broadcast channels, even though broadcasters themselves are only transmitting a single signal. Most operators also continue to offer a low-cost analog lifeline service consisting of broadcast signals and other programming, which can be received without any additional equipment. By contrast, cable’s competitors, including direct broadcast satellite (DBS) and telephone companies, provide service only in digital format, requiring *all* DBS and telephone customers with analog television sets (and in some cases even customers with digital televisions) to obtain and pay for digital set-top boxes to receive *any* programming from these providers.

It’s clear that an increasing number of cable customers recognize the value offered by cable’s digital services. More than 60 percent of all cable homes subscribe to digital service. These customers have access to tiers of exciting digital programming, including HDTV signals, video-on-demand, and digital video recorders. Cable operators are also offering attractive digital service bundles of television, telephone and Internet services. Customers who choose to purchase the “Triple Play” of such bundled services pay 31% *less* today, on an inflation-adjusted basis, than they paid for the three services 12 years ago – and the quality of all three services is significantly better.

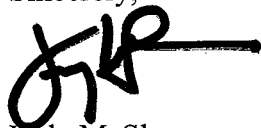
Even a gradual transition to digital requires some readjustment and disruption for some customers (though not in as abrupt a way as the broadcasters' transition imposes on over-the-air viewers). But Consumers Union is off-base in suggesting that cable's digital migration is "deceptive" or "misleading." We do not, we should not, and we will not portray the digital migration as something that is required by the broadcasters' digital transition – and if anyone has, they should be called on it. The fact is that cable operators have taken extensive steps to make sure that consumers are fully informed of both, and have provided advance notice of service changes as required by FCC rules.

Consumers Union also criticizes the deployment by some cable operators of a technology known as "switched digital" because it prevents some consumers from receiving programming over television sets that are not equipped for interactive services. In fact, switched digital technology makes it possible for cable operators to provide more and enhanced services to the vast majority of cable subscribers. Switched digital technology expands cable system capacity by transmitting channels to subscribers on an as-needed, on-demand basis rather than delivering all channels at all times to all subscribers. The bandwidth savings associated with switched digital enables cable operators to increase the amount of high definition programming they offer; introduce other diverse content, including Spanish-language programming; boost broadband speeds; and, perhaps most significantly, meet their obligation to carry broadcast signals in analog and digital formats ensuring that cable customers have a seamless transition. Because these service enhancements typically are not accompanied by any price increase, their effect is the *opposite* of what Consumers Union asserts: switched digital allows cable operators to deliver more programming, improved services, and better value to the vast majority of their subscribers.

There is a special irony in the suggestion that cable's actions with respect to the broadcasters' digital transition is in any way "misleading." No industry has done more – *voluntarily* – to make sure that the public knows and understands how the *broadcasters'* digital transition will – or won't – affect them. NCTA and its member companies have voluntarily spent more than \$200 million on a massive campaign to educate the public about what they need to do to continue being able to watch broadcast television stations when the transition is completed. *All of that money was spent not to encourage consumers to subscribe to cable service, but specifically to inform them about the government's converter box and coupon program that would enable consumers to view broadcast signals without signing up for cable.*

The cable industry is committed to cutting costs, rolling out more efficient and more innovative digital technology, and delivering the products and services consumers want. We're also committed to keeping our customers fully informed of the changing and increasing options available to them. We look forward to continuing to work with you to ensure that *both* digital transitions go as smoothly for consumers as possible.

Sincerely,



Kyle McSlarrow