March 21, 2007

Chairman Kevin Martin
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Cable Horizontal Ownership Limits*, MM Docket No. 92-264

Dear Mr. Chairman:

The undersigned citizen, consumer, religious, independent content producers and civil rights organizations are pleased about news reports indicating that the Federal Communications Commission will soon issue an order responding to the judicial directive that the Commission must comply with the Congressional mandate to establish a limit on how many cable subscribers any one company can control.

It is disappointing, albeit not surprising, that you and your colleagues have been attacked for doing nothing more than enforcing a clear legislative command. The fact is that there is powerful evidence to support reaffirmation of the 30% limit originally adopted more than six years ago. So, too, is there strong reason for the Commission to adopt regional ownership limits. Indeed, the Commission's own analysis in the recent "*Adelphia Transaction*," *Adelphia Communications Corporation*, 21 FCCRcd 8203 (2006), provides much additional justification for such rules.

Enforcement of the 1992 Cable Act is long overdue. It has been more than 15 years since Congress tried to break the cable monopoly by ordering the FCC to set a limit on national (and, to the extent necessary, regional) cable ownership that would "enhance effective competition." 47 U.S.C. §533(f)(1). Even a brief review of the legislative history and Congressional findings explains why Congress put such a high value on enhancing competition and what Congress intended by "effective" competition. Most importantly, Congress intended to break the stranglehold of cable operators on the programming market and enhance the diversity of voices available to cable subscribers. But Congress also clearly intended the ownership limits to work in tandem with other provisions of the 1992 Cable Act to introduce and improve competition that would lower cable rates, force cable operators to improve their customer service, protect PEG programming, and encourage the deployment of affordable new services to all Americans.

When incumbent cable operators can simultaneously announce both record per subscriber profits ***and*** a rate increase, "effective competition" does not exist. When one considers that many of the same large incumbent cable operators consistently rank near the bottom of every customer satisfaction survey, the self-serving assertion of cable operators that "no real problem exists" and that the Commission therefore "lacks authority" to impose a 30% limit become laughable. We know of no competitive market in which a company can raise rates, mistreat customers, and still show record profits year after year. To the contrary, the ability to raise rates faster than inflation while consistently achieving new lows in customer satisfaction has all the hallmarks of entrenched market power.

As for the claims by cable incumbents that the market for video programming has become independent, vibrant, and reflective of the diversity of American communities, the record before the

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Commission clearly shows otherwise. Rather than an independent and diverse programming market, the largest incumbents have selected a handful of affiliated or otherwise captive channels that purport to meet the needs of all women and people of color. As Commissioner Copps explained in his dissent in the *Adelphia Transaction*:

> If an aspiring cable channel cannot win carriage on these big, concentrated networks, its fate is sealed. It's doomed. And the record is full of examples of channels that will never get to your television and communities – especially minority communities – who struggle for basic access to programming they want and need.

Indeed, as the record in this proceeding and the *Adelphia Transaction* clearly demonstrates, no new cable programming network has succeeded in the last five years without securing carriage on Comcast and/or Time Warner. On the other hand, once Comcast chooses to support a network, its success becomes assured. Only networks affiliated with other cable or broadcasting media giants have managed to "crash the party" and force their way onto cable systems. Comcast's ability to keep out true independents while ensuring the success of affiliated networks would, on its own, justify a national ownership limit that would require Comcast to divest systems as a cure for its existing market power.

While some new competition appears to be emerging, that is hardly the same thing as the ***effective*** competition Congress seeks to establish. To the contrary, cable rates continue to rise far faster than the rates of inflation, the largest incumbent cable operators continue to rank lowest in industry-wide customer satisfaction surveys, and cable programming remains the purview of a handful of vertically integrated media conglomerates that pick and chose what the vast majority of Americans will see and hear over their mass media.

In other words, the need for the Commission to set strict national and regional ownership limits to "enhance" effective competition has never been greater. To be sure, cable operators repeatedly assert that the presence of direct broadcast satellite providers (DBS), the continued investment and possible entry into video of telephone companies, and other competition for "eyeballs" such as DVDs and video iPods eliminates the need for an ownership cap. None of these developments, however, has increased the availability of independent programming channels that support new programming networks. For this reason, the Commission has repeatedly rejected the efforts by cable incumbents to broaden the scope of the relevant market to iPods, DVDs, broadband delivery of video clips, and other technologies that do not provide a suite of 24/7 programming channels. *See Cable Horizontal Ownership, Further Notice of Proposed Rulemaking*, 20 FCCRcd 9374, 9412. As the Commission properly observed:

> We seriously question, however, whether other physical conduits, such as theatrical showings in movie theaters and sales and rentals of VHS tapes and DVDs, should be included in our analysis of the distribution market. The economics literature indicates that in many cases these conduits merely represent separate exhibition windows and not alternative means of entry.

Repeated invocation by incumbent cable operators of these "alternate windows" therefore has no bearing on the actual legal question before the Commission: the statutory obligation to "enhance effective competition," with a special emphasis on increasing diversity in programming. The

Commission should therefore regard the great bulk of filings in recent days as unresponsive chaff that it must winnow away to reach the kernel of truth it already knows – that large incumbent cable operators continue to exercise market power over programming and prices to the detriment of the public and despite a 15 year old Congressional command to fix this problem by imposing necessary ownership limits.

The Commission need not find that incumbent cable operators have made no competitive response to the possible threat of DBS or other new entrants to find that competition is not yet "effective" and that the Commission must therefore impose national and regional ownership limits to "enhance" competition. To the contrary, because the terms "enhance" and "effective" are inherently ambiguous, the Commission must use its expert judgment to give them meaning. The record clearly demonstrates that incumbent cable operators feel no pressure to reduce prices or improve customer service – two critical benchmarks of "effective competition." The record also demonstrates that Comcast and Time Warner can "unfairly impede, either because of size of any individual operator or because of joint actions" the creation and distribution of new video programming services. 47 U.S.C. §533(f)(2)(A).

As the Commission draws closer to completing its rulemaking action, incumbent cable operators have grown increasingly shrill and insistent that the evidence will not support any commission action. Ignoring the words "enhance" and "effective" in the statute, cable operators continue to submit list after list of devices and technologies that purportedly "compete" with cable operators. The cable operators chose to disregard the fact that supposed alternate distribution channels such as broadband video or Netflix have not launched a single new programming network that has leveraged this success into access on the cable platform. All the videos available from YouTube or from iTunes have done nothing to prevent cable operators from raising rates without regard to this so-called "competition." Nor has the fear of telco entry into video apparently inspired the largest cable operators to improve their customer service. And, in at least one well-documented case, Comcast did not worry that competition from DBS providers or RCN mattered when it chose to "unfairly impede" the flow of Washington Nationals video programming to Washington D.C. area subscribers.

In addition to the realities of the video market apparent to even the most casual observer, the signatories direct the Commission's attention to the following evidence in the record:

The extensive record compiled in the Adelphia Transaction. The Commission compiled an extensive record in the most recent major cable transaction. In its decision approving the merger subject to conditions, the Commission found considerable evidence of the deleterious impact of national and regional concentration. Individual Commissioners likewise highlighted their concerns in their separate statements, although several of those approving the merger preferred to resolve these issues in the instant general rulemaking rather than in the context of a specific merger. Commissioner Tate – generally a staunch advocate against regulation – nonetheless found much in the record to trouble her:

> I am also troubled by the continued reports of difficulty that smaller, independent channels have in getting carriage on cable systems. The names Comcast and Time Warner frequently are invoked by these smaller programmers as – and I'll put it diplomatically here – being difficult to work with on this issue.

Additional evidence submitted in that merger by The America Channel and others likewise demonstrate that when a cable operator reaches 30% of MVPD subscribers, it can "unfairly impede" the flow of video programming and favor its own affiliated programming at the expense of independent programmers.

In particular, the Commission concluded as part of its consideration in the *Adelphia Transaction* that regional concentration matters. In the case of the largest and most regionally concentrated firms – Comcast and Time Warner – the Commission concluded that "even small increases in Comcast's and Time Warner's market shares may increase incentives to increase price of the [Regional Sports Networks]." 21 FCCRcd at 8268.

The 2005 Comments of Media Access Project on behalf of Common Cause, et al., and the Reply Comments filed of Consumers Union, Consumer Federation of America, and Free Press. In response to the Commission's call to refresh the record in the summer of 2005, Media Access Project filed extensive comments providing legal arguments, empirical evidence, and economic analysis supporting a national ownership limit of no more than 30%, and on the need for regional ownership limits. Separately, Consumers Union, Consumer Federation of America, and Free Press filed comments in support of 25% national ownership limit and submitted significant empirical evidence and economic analysis in support of mandating divestitures of cable systems.

Academic Studies. The Commission has before it three academic studies submitted by Dong Chen, of the Peking University School of Economics, and David Waterman and Jun-Seok Kang of the Department of Telecommunications at the University of Indiana. Professor Waterman's 1996 paper, *Local Monopsony and Free Riders* (Waterman, 1996), provides a theoretical structure that explains the relationship between national and regional concentration and control of programming. The two additional empirical studies submitted into the record, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study,*"(Kang, 2005) and *Vertical Foreclosure in the U.S. Cable Television Market: An Empirical Study of Program Network Carriage and Positioning* (Chen & Waterman, 2005), demonstrate the continued validity of Waterman's theoretical framework and the need for a national and regional ownership limit that prevents further concentration.

FCC Studies. The FCC's own independent research further validates the need to set a limit on horizontal and regional ownership to enhance effective competition. In *Competition Between Cable Broadcast Television and Direct Broadcast Satellite, It's More Complicated Than You Think,* Andrew Wise & Kiran Duwadi (FCC 2005), Wise & Duwadi demonstrate based on empirical evidence and economic theory that DBS competition alone cannot provide "effective" competition to cable. This conclusion was affirmed and buttressed by subsequent exploration of the two-sided nature of the market for cable programming. *Competing on Quality: Two-Sided Markets, the Sutton Paradigm and the Multichannel Video Industry*, Jerry B. Duvall and Andrew Stewart Wise (FCC 2006) (finding that cable is highly unlikely ever to respond to competition from DBS by reducing price).

In addition, in 2002, the Commission published two studies demonstrating conclusively that cable operators that control 30% or more of MVPD subscribers can exercise significant market power over the programming market. *See* Public Notice, *FCC Releases Two Staff Research Papers Relevant to Cable Ownership and Rulemaking and AT&T-Comcast Merger*, 17 FCCRcd 19608

(2002). Despite persistent attempts by the cable industry to call these papers and their conclusion into doubt, they continue to predict real world outcomes far better than the rosy, competitive scenarios described by the cable industry.

GAO Studies. As the Commission is well aware, several GAO studies have found that cable operators will respond to competition from terrestrial overbuilders only after terrestrial overbuilders achieve measurable market penetration. Neither existing DBS competition nor the potential for ILEC competition in video has shown any impact on prices, customer service, or the emergence of independent video programming.

Again, the evidence makes clear that what competition does exist in the MVPD market is not "effective" as intended by Congress. The Commission should therefore more expeditiously to "enhance effective competition" by imposing national and regional ownership limits.

Conclusion

The signatories urge the Commission to impose a national ownership limit and regional ownership limits that will enhance effective competition as Congress commanded more than 15 years ago. In the six years since the D.C. Circuit remanded the cable limits for further review, the MVPD market and the record in this proceeding have continued to reflect the dismal reality that incumbent cable operators continue to exercise market power over subscribers and programmers. We applaud the Commission for its decision to move forward with an item that can only help the cause of diversity of video voices, consumer protection, and MVPD competition.

Sincerely,

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On Behalf of Common Cause, et. al.

SIGNATORY ORGANIZATION

Common Cause

United States Conference of Catholic Bishops

United Church of Christ Office of Communication, Inc.

Consumers Union

Consumer Federation of America

Free Press

U.S. PIRG

National Hispanic Media Coalition

Media Alliance

Center for Creative Voices in Media

Center for Digital Democracy

National Alliance for Media Arts and Culture

CCTV Center for Media and Democracy

Reclaim the Media