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**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of )  
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DTV Consumer Education Initiative ) MB Docket No. 07-148  
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To: The Commission

**COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION**

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## SUMMARY

The Commission should not impose a mandate on wireline communications providers to provide information about the DTV transition through billing inserts, particularly to Lifeline and Link-Up subscribers. Such inserts would not be well-tailored to the Commission's goals because they rarely would reach their intended audience. There is no demonstrated relationship between Lifeline subscribership (or low-income status more generally) and reliance on analog broadcasting, nor – by definition – do wireline MVPD customers rely on analog over-the-air broadcasting. There are many other, more effective ways to reach consumers that depend on analog over-the-air broadcasting.

Under existing case law, a billing insert mandate would be subject to First Amendment scrutiny as compelled speech, and would not meet the Constitutional standard. Courts have been highly skeptical of regulations that compel speech – even in the commercial context, and even where the information to be distributed might be characterized as “factual.”

The Commission has no express statutory authority to require DTV education through billing inserts, and it lacks ancillary jurisdiction to do so as well. First, the courts have held that the Commission lacks any ancillary jurisdiction to burden free-speech rights. Further, the legislative history strongly suggests that Congress did not intend to grant the Commission this authority. A DTV education mandate also would not be reasonably ancillary to the Commission's jurisdiction over the telephony market, telephony providers, or universal telephone service.

Key stakeholders are already making substantial efforts to educate the public regarding the transition. The wide-ranging DTV Transition Coalition uses a web presence and paid media placements to publicize the transition, and many of its members are making substantial individual efforts as well. These efforts should be encouraged.

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The DTV transition promises to alter the communications landscape fundamentally in the coming years. Freeing 700 MHz spectrum for alternative uses, the transition will not only improve the options of broadcast viewers but also open the door to new sources of competition in the voice and data markets and the deployment of new mobile broadband offerings. To that end, several important stakeholders in the DTV transition have undertaken voluntary efforts to provide end users with information relevant to the transition, and will continue to do so.

While the United States Telecom Association (“USTelecom”)<sup>1</sup> supports the important goals of the transition, it has grave concerns, however, about several specific obligations contemplated by the *Notice*.<sup>2</sup> Specifically, for reasons described below, a governmental mandate requiring carriers receiving low-income universal support funds and/or wireline Multichannel Video Programming Distributors (“MVPDs”) to include inserts in their bills publicizing the

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<sup>1</sup> USTelecom is the nation’s leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom’s carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

<sup>2</sup> *DTV Consumer Education Initiative*, MB Docket No. 07-148, Notice of Proposed Rulemaking (rel. July 30, 2007).

transition would fail to advance the Commission's goals, promoting outreach to parties not likely to be relying on broadcast television and would result in substantial costs for these companies, particularly smaller companies. Such mandates also would violate the First Amendment's speech clause, and would exceed the Commission's lawfully delegated authority. Rather than adopting additional requirements that are likely to be ineffective and possibly unlawful, the Commission should rely on Congressionally mandated National Telecommunications and Information Administration ("NTIA") efforts and voluntary industry activity, or focus its attention on the *Notice's* other proposals – proposals that more accurately target DTV education at those who need it most, and would therefore better serve the Commission's goals.

**I. VARIOUS STAKEHOLDERS ARE TAKING VOLUNTARY STEPS TO EDUCATE THE PUBLIC REGARDING THE DTV TRANSITION.**

As the Commission examines whether government mandates should be adopted in preparation for the DTV transition, it is worth noting that parties with a direct stake in the transition are already engaged in voluntary educational efforts. For example, the DTV Transition Coalition consists of over 150 broadcasters, industry groups, television manufacturers and retailers, and consumer groups.<sup>3</sup> In addition to its website, the Coalition uses paid media placements to educate the public and provides extensive support for members' local education efforts.<sup>4</sup>

Many of the founders of the Coalition have also made extensive individual efforts to educate the public on this issue. The National Association of Broadcasters ("NAB") has invested substantially in public education regarding the transition. Its work in this area involves

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<sup>3</sup> "About the Coalition," avail. at [http://www.dtvtransition.org/index.php?option=com\\_content&task=view&id=18&Itemid=32](http://www.dtvtransition.org/index.php?option=com_content&task=view&id=18&Itemid=32)

<sup>4</sup> *See id.*

media outreach efforts that include the briefing of reporters from all major urban areas, web-based outreach through <http://www.DTVanswers.com>, the use of paid advertisements in major transportation hubs, and the distribution of point-of-sale consumer guides in conjunction with television retailers.<sup>5</sup> NAB also recently announced a comprehensive Public Service Announcement campaign which will include four to six 30-second video spots and at least one 60-second spot for use by all 1,169 member stations. Other contents of the campaign include several 30-second “donut” spots (i.e., advertisements with a “hole” in the middle for insertion of a sound bite from a local official or anchor); “teaser” copy for use in newscasts; video footage of towers, converter boxes and more for use in news stories about DTV; a half-hour educational special on the transition; and foreign language spots.<sup>6</sup> NAB recently moved up the release of these materials; they now will be distributed to member stations by the end of September 2007.<sup>7</sup>

Another founding member of the DTV Transition Coalition, the Consumer Electronics Association (“CEA”), has a long history of educating consumers about the transition, having developed (in conjunction with the Commission) the award-winning “Digital Television: Tomorrow's TV Today” program.<sup>8</sup> CEA operates four websites that educate consumers and dealers about DTV-related issues, and participates in a joint effort with CNET.com to provide consumer guides to purchasing televisions.<sup>9</sup> CEA has also provided DTV information packets to

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<sup>5</sup> Letter from Jack Sander, Joint Board Chair, NAB, to Hon. Kevin J. Martin, Chairman, FCC (Aug. 21, 2007), available at [http://www.nab.org/xert/corpcomm/pressrel/releases/082107\\_Sander\\_FCC\\_DTV.pdf](http://www.nab.org/xert/corpcomm/pressrel/releases/082107_Sander_FCC_DTV.pdf).

<sup>6</sup> NAB: DTV PSAs To Launch in December, *available at* <http://www.broadcastingcable.com/article/CA6463538.html>.

<sup>7</sup> NAB to Launch DTV-Education PSA Campaign This Month, *available at* <http://www.broadcastingcable.com/article/CA6476452.html>.

<sup>8</sup> CEA Wins Award for DTV Educational Efforts, May 24, 2005, [http://www.ce.org/Press/CurrentNews/press\\_release\\_detail.asp?id=10757](http://www.ce.org/Press/CurrentNews/press_release_detail.asp?id=10757).

<sup>9</sup> CEA HDTV Education Efforts, *available at* [http://www.ce.org/CEA\\_HDTV\\_Education\\_Efforts.pdf](http://www.ce.org/CEA_HDTV_Education_Efforts.pdf). *See also* myCEknowhow, <http://www.myCEknowhow.com>; Antenna Web, <http://www.antennaweb.org>; CE Know, <http://www.CEknowhow.com>; The Connections Guide, <http://www.CEAconnectionsguide.com>.

all members of Congress for use in responding to constituent questions on the issue.<sup>10</sup> CEA recently completed a satellite media tour answering basic questions about the transition.<sup>11</sup>

USTelecom stands prepared to work with the Commission on possible voluntary actions that might be reasonably targeted to the appropriate audiences. In lieu of such measures, however, broadcasters, and the consumer electronics industry -- which both have a greater stake in the transition -- have all undertaken voluntary efforts to educate the public regarding the DTV transition, and will continue to do so between now and the transition date.

## **II. THE BILLING-INSERT MANDATES DESCRIBED IN THE NOTICE WOULD NOT ADVANCE THE COMMISSION'S GOALS.**

While USTelecom supports the Commission's DTV education goals, it opposes the imposition of billing-insert requirements on providers of Lifeline and Link-Up services and/or wireline MVPDs.<sup>12</sup> These obligations would violate the First Amendment, would not serve their intended purposes, and would exceed the Commission's statutory authority.

### **A. The First Amendment Generally Prohibits Imposition of Billing Insert Mandates on Wireline Providers.**

#### **1. Billing-Insert Mandates Would Be Subject to Strict Scrutiny.**

Whether imposed on recipients of Lifeline and Link-Up funds, wireline MVPDs, or both, billing insert mandates would burden speech rights protected by the First Amendment. That Amendment protects against speech *mandates* to the same extent as it protects against speech restrictions. "The right of freedom of thought protected by the First Amendment against state

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<sup>10</sup> CEA: HDTV: Turn It On!, *available at* <http://www.ce.org/AboutCEA/CEAInitiatives/3617.asp>.

<sup>11</sup> Letter from Gary Shapiro, President and CEO, CES, to Congress (May 8, 2007), *available at* [http://www.ce.org/DTV\\_Letter\\_to\\_Congress\\_050807.pdf](http://www.ce.org/DTV_Letter_to_Congress_050807.pdf).

<sup>12</sup> *See Notice at* ¶¶ 9, 17.

action includes both the right to speak freely *and the right to refrain from speaking at all.*<sup>13</sup> Hence, as the Supreme Court has made clear, the difference between compelled speech and compelled silence “is without constitutional significance,”<sup>14</sup> as “[t]he right to speak and the right to refrain from speaking are complementary components” of the same liberty.<sup>15</sup> Applying these principles, the Supreme Court has invalidated numerous legal mandates, including one requiring public utilities to include bill inserts expressing the views of third parties.<sup>16</sup>

Compelled speech mandates are treated as content-based speech restrictions, and are subject to “strict scrutiny.” The Supreme Court has explained that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech,” and that such mandates are therefore to be treated as “content-based regulation of speech.”<sup>17</sup> Under well-settled First Amendment jurisprudence, content-based speech regulations are subject to “strict scrutiny.”<sup>18</sup>

The billing inserts discussed in the *Notice* would constitute compelled speech. The *Notice* contemplates a regime requiring providers to include messages in the correspondence they send to their customers. The Supreme Court has found on at least two occasions that billing inserts constitute “speech” on the part of the billing entity. In 1980 it struck a state mandate prohibiting utilities from sending inserts in customer bills addressing controversial issues such as

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<sup>13</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (emphasis added).

<sup>14</sup> *Riley v. National Federation of the Blind*, 487 U.S. 781, 796 (1988).

<sup>15</sup> *Wooley*, 430 U.S. at 714.

<sup>16</sup> *Pac. Gas & Elec. Co. v. PUC of Cal.*, 475 U.S. 1 (1986). *See also* *Wooley*, 430 U.S. 705 (invalidating a mandate requiring New Hampshire drivers to display license plates bearing slogan “Live Free or Die”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking the requirement that students utter the Pledge of Allegiance in school); *Riley*, 487 U.S. 781 (rejecting a law requiring charitable fundraisers to make prescribed factual statements before initiating telephone solicitations); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating a law requiring newspapers to print and circulate opinions contrary to their own).

<sup>17</sup> *Riley*, 487 U.S. at 795.

<sup>18</sup> *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001); *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000).

nuclear power.<sup>19</sup> The Court explicitly rejected the argument that the utility’s speech rights did not apply to its billing inserts.<sup>20</sup> In 1986’s *Pacific Gas & Electric Co. v. PUC of California*, the Court rejected a state mandate that required a utility to include inserts expressing certain views in its bills at specified intervals, in lieu of the newsletter it ordinarily distributed.<sup>21</sup> Here, too, the Court found that mandates respecting the billing inserts intruded on the utility’s speech rights.<sup>22</sup>

Similarly, the fact that the wireline providers affected by a billing-insert mandate are businesses does not diminish their First Amendment interests here. Whether or not speech is protected “does not depend upon the identity of its source, whether corporation, association, union, or individual.”<sup>23</sup> While “commercial speech” is subject to more extensive regulation than other speech, the “commercial speech” category includes only “speech that does no more than propose a commercial transaction.”<sup>24</sup> Speech that addresses other topics is subject to the same First Amendment protections as other speech, even if uttered by commercial entities.<sup>25</sup> Thus, for example, the *Pacific Gas & Electric* majority found that the utility’s newsletter, the content of which “range[d] from energy-saving tips to stories about wildlife conservation, and from billing information to recipes,” “extend[ed] well beyond speech that proposes a business transaction,”

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<sup>19</sup> See *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530 (1980).

<sup>20</sup> See *id.* at 542-43.

<sup>21</sup> *Pac. Gas & Elec.*, 475 U.S. 1 (1986).

<sup>22</sup> The bar against compelled speech applies even where the speech clearly is not that of the entity forced to deliver it. In *Pacific Gas & Electric*, the Supreme Court rejected out of hand the premise that the state might require a private entity to carry a message so long as it was clearly identified as representing the views of a third party. The utility in that instance would still be “required to carry speech with which it disagreed,” and such forced carriage imposed on its speech rights – even where it was obvious that the speech originated from another source. *Id.* at 12 n. 7.

<sup>23</sup> *Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

<sup>24</sup> *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). See also *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 473-474 (1989) (describing this language as “the test”).

<sup>25</sup> For this reason, precedent permitting the government to require inclusion of certain messages in a company’s advertising materials does not apply here, where the speech at issue is not designed to propose a transaction. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985).

and was subject to full First Amendment protection.<sup>26</sup> “For corporations as for individuals, the choice to speak includes within it the choice of what not to say.”<sup>27</sup>

To the extent the Commission ties receipt of Lifeline and Link Up funds to the inclusion of a bill insert, such action cannot be immunized from strict scrutiny by framing it as a “voluntary” condition for the receipt of a government benefit. Under the “unconstitutional conditions” doctrine, “the government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech’ even if he has no entitlement to that benefit.”<sup>28</sup> As described above, the application of billing-insert mandates to wireline providers would violate the First Amendment rights of those providers. This violation would be no less egregious if framed as a “condition” for receipt of a governmental benefit, even if the provider is not otherwise “entitled” to that benefit.

Moreover, the billing inserts at issue here cannot be distinguished from other instances of compelled speech on the basis that they would include “factual” information rather than statements of opinion. In 1988, the Supreme Court considered the Constitutionality of a state law governing charitable solicitations. The law required fund-raisers, among other things, to inform potential donors of the percentage of gross receipts actually remitted to the charities involved. Charities challenged this compelled speech. The state defended the law, arguing that the Court’s previous compelled-speech cases generally involved statements of opinion, whereas the statements required by the challenged provision were factual. The Supreme Court found this distinction immaterial: “[Our prior] cases cannot be distinguished simply because they involved

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<sup>26</sup> *Pacific Gas & Electric*, 475 U.S. at 8-9.

<sup>27</sup> *Id.* at 16.

<sup>28</sup> *U.S. v. Am. Library Ass’n*, 539 U.S. 194, 210 (2003), quoting *Bd. of Comm’rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674 (1996).

compelled statements of opinion while here we deal with compelled statements of “fact”: either form of compulsion burdens protected speech.”<sup>29</sup> Thus, it does not matter whether the inserts at issue were deemed purely “factual” in nature or deemed to express an opinion.<sup>30</sup> In any of these cases, a billing-insert mandate would run afoul of the First Amendment.<sup>31</sup>

## **2. Billing-Insert Mandates Would Not Survive Strict Scrutiny Review.**

As interpreted by the courts, the First Amendment requires that compelled speech requirements be struck unless they can be shown to serve a compelling governmental purpose and to be “narrowly tailored” for that purpose – that is, to burden as little speech as possible. The wireline provider billing-insert requirements contemplated in the Notice would not be narrowly tailored, and would therefore be impermissible.

To survive strict scrutiny, a regulation must be “narrowly tailored to serve a compelling state interest.”<sup>32</sup> Under this test, even if the government’s interest is compelling, the means

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<sup>29</sup> *Riley*, 487 U.S. at 797-98.

<sup>30</sup> “Opinion”-related speech is protected even when not “political” in nature. “Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective ‘political’ can properly be attached to [the beliefs implicated by a particular speech prohibition or mandate] the critical constitutional inquiry.” *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977). See also *U.S. Dep’t of Agricultural Petitioners v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (“We take further instruction ... from *Abood*’s statement that speech need not be characterized as political before it receives First Amendment protection.”).

<sup>31</sup> For similar reasons, the unconstitutionality of billing insert mandates is not in any way ameliorated by claims that their *purpose* is not ideological. For example, assessing whether New Hampshire should be required to permit drivers to choose license plates not bearing the slogan “Live Free or Die,” the Supreme Court considered the argument that this logo helped law enforcement officers to differentiate passenger vehicles (which were then required to display the logo) from other vehicles (which were not). The Court found that even if it were to credit this argument and assume that the state’s ends were tied to law enforcement rather than to the ideas expressed by the slogan, “that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Wooley*, 430 U.S. at 716-17.

<sup>32</sup> *Hill v. Colo.*, 530 U.S. 703, 748 (2000). See also *Playboy Entm’t Group*, 529 U.S. at 813; *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983).

chosen cannot stand unless there exists no “less restrictive alternative” for advancing that interest.<sup>33</sup>

Educating owners of analog TV sets of the impending DTV transition is important, as reflected by the current efforts to accomplish this objective. In particular, the targeted efforts of NTIA and NAB are focused on this important goal. NTIA’s converter box program has been carefully and narrowly designed to resolve any technical problems that may arise for the various consumers relying solely on analog over-the-air broadcast television. Moreover, NAB’s efforts, driven by its broadcast licensee members, are specifically targeted to reach the very consumers who will be impacted by the transition. Given these and other focused efforts, it is unlikely that government mandates on Lifeline and Link-Up service providers and wireline MVPDs – neither of which reaches the intended audience – would be found to be either narrowly tailored.

Similarly, the adoption of billing-insert mandates would be impermissible, because there exist numerous less restrictive alternatives that would not burden protected speech. The government could itself conduct advertising over the airwaves or the through the public mail. It could distribute inserts with federal correspondence, such as that regarding the income tax. It could allocate funds – as it has already done in the case of NTIA – to be used by agencies to publicize the transition.<sup>34</sup> In addition, it could encourage voluntary efforts, such as those already being undertaken throughout various industry segments. None of these options would burden any party’s protected speech. In light of these alternatives, a mandate compelling speech cannot be said to be the government’s “least restrictive alternative.” Such a mandate thus is not

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<sup>33</sup> See, e.g., *Playboy Entm’t Group*, 529 U.S. at 813.

<sup>34</sup> See *infra* Part II.C.

“narrowly tailored,” and would fail to survive strict scrutiny. Billing-insert mandates therefore violate the First Amendment.

**B. Billing-Insert Obligations Placed on Wireline Providers Would Not Be Well Tailored to the Commission’s or Congress’s Goals Here.**

There is no record evidence to suggest that inserts in the bills of voice customers relying on the Lifeline and Link-Up programs would be likely to reach individuals relying on broadcast television. A 2006 study examining users of Lifeline and Link-Up services in Florida, for example, found that a majority of low-income families subscribed to cable or direct broadcast satellite<sup>35</sup> In fact, the study’s authors hypothesized that “households that are heavier users of communications services [might be] more likely [than others] to sign up for Lifeline benefits,” suggesting that educational efforts aimed at Lifeline users would target precisely the *wrong* low-income consumers.<sup>36</sup> At best, then, the application of billing-insert mandates on providers of Lifeline and Link-Up services would be simultaneously over-inclusive (because many low-income telephone customers may rely on cable or wireline video products, or may not own a television at all) and under-inclusive (because many broadcast viewers do not rely on the low-income USF mechanisms).

In addition, the imposition of billing-insert mandates on MVPD providers would fail to serve the goals described in the *Notice*. If MVPDs were required to include inserts describing the transition with bills sent to their customers, those notices would, by definition, reach only customers who did not rely solely on broadcast signals – *i.e.*, customers who will not be directly

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<sup>35</sup> 45.6 percent and 13.5 percent, respectively. See Lynne Holt and Marc Jamison, *Making Telephone Service Affordable for Low-Income Households: An Analysis of Lifeline and Link-Up Telephone Programs in Florida* at 29 (2006). See also *id.* at 41 (“Most [Lifeline users] ... subscribe to either cable television or DBS. In addition, nearly half appear to have Internet access at home.”).

<sup>36</sup> See *id.* at 31.

affected by the transition. Thus, even putting aside legal questions discussed below, a policy requiring such inserts would impose significant costs on providers (and their end users), with little prospect of in fact educating the targeted broadcast television viewers.

Finally, such billing-insert mandates would present an expensive and burdensome endeavor for many companies. Billing inserts for any company can be a costly and time-consuming endeavor. In this instance, companies would be forced to identify their Lifeline and Link-Up customers from subscriber rolls and establish appropriate mechanisms to ensure the proposed bill-insert reaches the correct customer. While the costs of such mandates will vary for each company, they would likely be more burdensome for smaller carriers.<sup>37</sup> And because this proposed government mandate would require the inclusion of one form of billing insert over another, many companies would be deprived of additional revenue or advertising as a result of this ‘lost’ advertising space.

Of course, there are far more effective means by which the Commission *could* direct educational efforts such that they reach the target audience. If these efforts are meant principally to reach broadcast viewers, the Commission should focus on ensuring that the message is delivered to viewers of broadcast television who may receive signals on analog TVs. Means that bear an appropriate nexus to the Commission’s stated ends are most likely to succeed (and, as described below, most likely to survive legal scrutiny).

**C. The Commission Lacks Legal Authority to Impose DTV Education Obligations on Wireline Providers.**

The billing insert mandates discussed in the *Notice* – whether placed on providers of Lifeline and Link-Up services, wireline MVPDs, or both – would also be outside the scope of the

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<sup>37</sup> Such companies would not benefit from volume discounts, and may also face increased costs due to the increased man-hours required in order to identify Lifeline and Link-Up customers on subscriber accounts.

Commission's statutory authority. The Commission lacks any express statutory authority to impose such mandates. Nor would the imposition of billing-insert requirements be "reasonably ancillary" to the Commission's other responsibilities, as the Supreme Court has defined that term. In fact, the courts have suggested that the Commission may not enjoy *any* "ancillary jurisdiction" in cases involving burdens on an entity's speech rights. For all these reasons, the Commission lacks legal authority to impose the billing-insert requirements discussed in the *Notice*.

The Commission lacks express statutory authority to require the billing insert notifications discussed, and the Commission does not appear to suggest otherwise. In fact, Congress' decision not to endow the Commission with such authority stands in marked contrast to its treatment of NTIA: In the Digital Television Transition and Public Safety Act, Congress provided that the Assistant Secretary of Commerce for Communications and Information (who heads NTIA) could spend up to \$5 million "for consumer education concerning the digital television transition and the availability of the digital-to-analog converter box program."<sup>38</sup> It made no similar provision regarding the FCC. The Commission must therefore rely on its "ancillary jurisdiction" to impose such a requirement.

The Commission, however, lacks ancillary authority to impose billing-insert mandates on wireline MVPDs or providers of Lifeline or Link-Up services. First, the assessment of whether such ancillary authority exists must be informed by the fact that Congress expressly gave NTIA the authority at issue, and provided funding for NTIA to use in conducting its efforts in ways that would not burden private parties' speech rights. Congress chose *not* to do the same for the

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<sup>38</sup> Deficit Reduction Act, Pub. L. No. 109-171, § 3005(c)(2)(A) (2006).

Commission – much less to authorize actions that would burden such rights. This disparity in treatment creates a strong presumption that Congress did not intend for the Commission to exercise jurisdiction over DTV education.

Second, a mandate that wireline providers of Lifeline and Link-Up services include billing inserts would impose requirements on these carriers that are *not* ancillary to its responsibilities vis-à-vis the wireline telephony markets. As made clear in the series of decisions in which the Supreme Court first enunciated the ancillary jurisdiction doctrine, such an application of the Commission’s authority would be impermissible. In these cases, the Court considered FCC regulations placed on community antenna television (“CATV”) providers that the Commission framed as “ancillary” to its authority over broadcast television. In each case, the Court emphasized that regulation was appropriate – if at all – only because the activities of these CATV providers had a direct impact on the broadcast television markets. As the Court explained in 1968’s *United States v. Southwestern Cable*, CATV systems had two functions: “First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.”<sup>39</sup> Given the impact CATV systems were having on broadcast networks, the Court held, the Commission was authorized to regulate the former on the basis of its authority over the latter. Indeed, the Court emphasized that the authority it was recognizing was “restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities *for the regulation of television broadcasting.*”<sup>40</sup>

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<sup>39</sup> *U.S. v. Southwestern Cable*, 392 U.S. 157, 163 (1968).

<sup>40</sup> *Id.* at 178 (emphasis added).

Several years later, the Court reaffirmed its view that exercises of ancillary authority would only be appropriate when the regulated entity was having a direct effect on the market subject to statutory goal (or requirement) being cited (or applied).<sup>41</sup> As the D.C. Circuit put it later, the Commission's regulations were approved in these cases on the basis that "the service that the FCC was regulating [*i.e.*, CATV] was ancillary to the service that it had been previously regulating, because locally originated programs are indistinguishable from network programs when they arrive on the television receiving set in the home."<sup>42</sup>

Application of billing-insert requirements to providers of Lifeline and Link-Up telephony offerings would wholly sever the Court-mandated link between the regulation to be imposed and the market in which the regulated party operates. The CATV operators considered by the Supreme Court provided services that directly affected the broadcast television market, and were therefore subject to the Commission's authority to regulate broadcast services. Wireline telephony providers, in contrast, operate in markets completely unrelated to the Commission's authority over broadcast television. Application of broadcast-related requirements to these wireline providers would therefore exceed the boundaries of the ancillary jurisdiction doctrine.

Recent D.C. Circuit precedent suggests that the Commission may be flatly forbidden from imposing *any* content-related regulation not expressly contemplated by the Act. In 2002, the court struck down Commission regulations requiring television programmers to offer video

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<sup>41</sup> *U.S. v. Midwest Video Corp.*, 406 U.S. 649, 668 (1972) (emphasizing that the critical question was whether the regulation was ancillary to "the Commission's mandate for the regulation of *television broadcasting*"). See also *id.* at 670 ("In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.'") (emphasis added) (*quoting Sw. Cable*, 392 U.S. at 178).

<sup>42</sup> *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 616 (D.C. Cir. 1976).

description for the sight-impaired.<sup>43</sup> The court determined that such regulation affected program content, and that section 1 of the Act did not confer on the Commission the authority to enact regulation implicating content.<sup>44</sup> That provision, the court noted, “has not been construed to allow the FCC to regulate programming content,” largely “because such regulations invariably raise First Amendment issues.”<sup>45</sup> Here too, the regulation under consideration involves a content-based burden on the speech of a provider, as discussed at length above. Under these circumstances, the Commission’s authority to impose content-related mandates in the absence of explicit statutory authority is questionable at best.

Third, a requirement that wireline MVPDs include billing inserts would not be reasonably ancillary to the Commission’s authority to facilitate broadcast television service. The Supreme Court has held that the Commission’s ancillary jurisdiction can only be invoked to justify regulation that is ‘reasonably ancillary to the effective performance of the Commission’s ... responsibilities.’<sup>46</sup> But application of billing-insert requirements to wireline MVPDs would not promote the effective performance of the Commission’s goals here, because – as discussed above – the customers who would receive those notices *do not rely on the broadcast signals that will cease on the transition date*. Such a requirement therefore cannot be enacted pursuant to the Commission’s ancillary jurisdiction.

## CONCLUSION

For the reasons discussed above, the Commission should refrain from adopting billing-insert mandates relating to the DTV transition. While USTelecom supports the transition and the

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<sup>43</sup> *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

<sup>44</sup> *See id.* at 798-99.

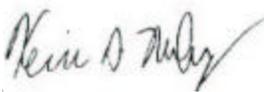
<sup>45</sup> *Id.* at 805.

<sup>46</sup> *Southwestern Cable*, 392 U.S. at 178. *See also Midwest Video Corp.*, 406 U.S. at 662 (quoting same).

goal of educating the public, the link between Lifeline and Link-Up providers and MVPD distributors is far too tenuous. The voluntary efforts being undertaken by broadcasters and consumer-electronics providers – whose customers are more directly affected by the transition – are far more effective than government mandates. The application of mandates – particularly mandates likely to be found unlawful – would disserve the Commission’s interests and those of the public.

Respectfully submitted,

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