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OF THE
UNITED STATES OF AMERICA

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November 20, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 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:

The U.S. Chamber of Commerce is troubled that as part of the *13th Annual Report on Video Competition*,[1] the Federal Communications Commission (Commission) may find that the so-called “70/70” test in Section 612(g) of the Communications Act of 1934,[2] has been met and then may exploit that finding to justify increased regulation of the cable industry. The Chamber is the world’s largest business federation representing more than three million businesses and organizations of every size, sector, and region.

I. The Subscribership Percentage Prong of the “70/70” Test Has Not Been Met

Under the “70/70” test, if cable systems with 36 or more activated channels are available to 70% of U.S. households and are subscribed to by 70% of those households, then the “Commission may promulgate any additional rules necessary to provide diversity of information sources.”[3] This provision relates to leased access[4] and to no other aspect of cable regulation. While the first prong of the test has been met, the second prong of test—involving the rate of subscribership—does not appear to be satisfied. However, even if the second prong were

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[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, FCC 06-154, Notice of Inquiry (rel. October 20, 2006).

[2] 47 U.S.C. §151 et seq.

[3] 47 U.S.C. §532(g).

[4] In an attempt to enhance the diversity of program choices available to cable subscribers, Section 612 requires cable operators to provide channels for lease to third parties unaffiliated with the cable operator. The provision is known as “leased access.”

satisfied, there is no justification to regulate the cable industry at a time when there is more competition than ever in the sector.

Nielsen Media Research data shows that 61.1% of U.S. households, as of October 31, 2007, subscribed to cable where the service was available. SNL Kagan estimates a subscription rate of 58.1% by the end of 2007. Therefore, based on the data from these sources, the 70% threshold required by Section 612(g) has not been met.

Press reports, however, indicate that the Commission may be relying solely on data from Warren Communications News showing a subscription rate of 71.4% to find that the second prong of the "70/70" test has been satisfied. Yet, Warren Communications News has acknowledged that it only provided the Commission with the raw number of homes-passed and subscribers for those cable system owners and operators who replied to the publisher's survey. Thus, because the number provided by Warren Communications News of homes-passed by cable is low, the subscribership percentage is overly high.

Moreover, cable subscribership has slightly fallen in the last year. For example, during the third quarter of 2007, subscribers to major cable systems declined by 203,000, according to Wachovia analyst Jeff Wlodarczak. Thus, given that last year's FCC Video Competition Report[5] cites data from Warren Communications News indicating that 67.8% of homes-passed subscribe to cable, it is more likely that this year's subscribership percentage using the publisher's data would be lower, not higher.

In accordance with its own Information Quality Guidelines and Office of Management and Budget requirements, the Commission is required to ensure and maximize the quality, objectivity, utility, and integrity of the information it disseminates. With the majority of sources indicating that the 70% subscription rate has not been met, and with Warren Communications News acknowledging that the data it provided the Commission is incomplete, the Commission has a duty to further examine its misplaced reliance on such data.

II. Congress Did Not Intend Section 612(g) to Authorize the Broad Regulation of Cable

Even if cable subscribership were to cross the 70% threshold, the Commission's ability to regulate cable under Section 612(g) is solely limited to the rates, terms, and conditions associated with leased access. The legislative history of the provision supports this conclusion: "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."[6]

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[5] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, FCC 06-11, Twelfth Annual Report (rel. March 3, 2006), ¶34.

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

Using the provision to justify regulating any other aspect of cable, such as cable ownership or channel bundling, would violate congressional intent. Moreover, imposing broad new regulation on the cable industry would create regulatory uncertainty, which would, in turn, hinder infrastructure investment, harm innovation, reduce consumer choice, and slow the deployment of new technologies.

III. Vibrant Competition Exists in the Multichannel Video Market

When Section 612 was enacted in 1984, cable competition did not exist and cable customers only had access to a limited number of channels. Leased access and the "70/70" test were intended by Congress to ensure the diversity of program choices available to cable subscribers. However, today, consumers can choose among hundreds of channels and can receive their service from cable, DBS, or new entrants, such as their local phone company.

In 2005, the Commission identified 531 satellite-delivered national programming networks, an increase from 388 networks in 2004.[7] Moreover, of the 531 networks, only 116 networks (21.8%) were owned by a cable operator.[8] Therefore, concerns about vertical integration do not justify regulation.

The Internet is changing how people view video. Streaming video from established sites, like CNN, and user-generated content available on sites, such as YouTube, are creating new distribution channels for content. According to a recent In-Stat survey, 30% of respondents said they would drop their pay TV service and rely on the Internet for TV entertainment.

The marketplace is working. There is no market failure that justifies placing new, burdensome regulations on the cable industry. Therefore, the Chamber strongly urges the Commission to reexamine the data that it is using to determine if the second prong of the "70/70" test has been met and strongly opposes using the "70/70" finding to rationalize the imposition of additional regulations on the industry.

Sincerely,

William L. Kovacs

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell

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[7] Twelfth Annual Report, ¶21.

[8] *Id.*