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November 20, 2007

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *Ex Parte:*

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket Nos. 05-255 & 06-189

Dear Ms. Dortch:

On behalf of Time Warner Cable Inc., we would like to amplify two arguments relevant to this proceeding: (1) the Commission must not find that the so-called 70/70 test of Section 612(g) of the Communications Act is satisfied; and (2) even if the 70/70 test were met, Section 612(g) would not give the Commission broad new powers.

1. The Commission Must Not Find the 70/70 Test Satisfied.

We highlight only a few of the numerous reasons why the Commission must not find the 70/70 test met at this time. *First*, we do not see how the Commission could find the 70/70 test met based on the facts. Three commercial data-gathering services have

determined that the test is not met.[1] The Commission and its staff have on numerous occasions in the recent past found that the test was not met.[2] Given that DBS operators have continued to add subscribers, and given that cable operators have lost subscribers since then,[3] it is hard to see how cable penetration could have gone any way but down.

We have seen press reports that the Commission may rely on "raw" data that it recently obtained from Warren Communications. As two members of this Commission have pointed out, however, asking a single data-gathering firm for unverified data is not well calculated to assure the "trustworthiness, truthfulness, and viability of the data in question."[4] At a minimum, the Commission must make any data on which it relies public: the Administrative Procedure Act demands that "critical factual material that is used to support the agency's position" must be exposed to public comment.[5] In addition, if the Commission intends to rely on data that are different in kind from those used in connection with its twelve previous annual video competition reports, the Commission will be required to formulate a powerful justification for the about-face.[6]

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[1] *See generally* Comments of National Cable & Telecommunications Association, MB Docket No. 05-255, at 4 (FCC filed Apr. 3, 2006) ("[U]nder *any* of the relevant independent data sources — Warren, Nielsen and Kagan — the Section 612(g) benchmark on cable penetration has not been met.").

[2] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Service*, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 34 (2006); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Service*, Eleventh Annual Report, 20 FCC Rcd 2755, ¶ 20 (2005); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Service*, Tenth Annual Report, 19 FCC Rcd 1606, ¶ 22 (2004).

[3] *See NCTA Ex Parte Letter*, MB Docket No. 06-189, at 3 (FCC filed Nov. 14, 2007).

[4] *See* Letter from Commissioners Tate and McDowell to Michael C. Taliaferro, November 14, 2007.

[5] *See, e.g.*, *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 38 (D.C. Cir. 2006) ("the critical factual material that is used to support the agency's position on review must be made available for review") (internal quotation marks omitted).

[6] *See, e.g.*, *Telephone & Data Sys. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) ("The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside."); *NAB v. Librarian of Congress*, 146 F.3d 907, 922 (D.C. Cir. 1998) ("the standard to which we hold an administrative decisionmaker may become more rigorous over time as the decisionmaker acquires greater experience with a particular administrative scheme").

In any event, Warren executives have publicly warned that their data "understate the number of homes passed by cable systems," explaining that "not all operators participate in [Warren's] survey."[7] Contrary to AT&T's arguments, cable operators cannot be blamed for failing to participate in voluntary surveys by private data-gathering organizations, particularly when many cable operators do not maintain homes-passed records in the ordinary course of business. Thus, the acknowledged incompleteness of the Warren survey would render any reliance on the raw data arbitrary and capricious.

Nor may the Commission use the approach favored by AT&T. AT&T has calculated a high penetration number by mixing and matching numerators (subscribers) and denominators (homes passed) from different data sets. In particular, AT&T simply took the highest numerator (Nielsen's subscriber count) and the lowest denominator (Warren's home-passed count). AT&T's only defense for its mix-and-match approach is absurdly tautological: "[T]he mere fact, standing alone, that AT&T used different sources of data in the numerator and denominator of a calculation does not repudiate the mathematical result of that calculation."[8] Obviously, if one uses a homes-passed denominator that is understated because of gaps in the data, one must not use a numerator based on a different methodology that does not similarly understate the subscriber count — at least not if one wishes to adhere to basic principles of reasoned decision-making.

Second, in making a determination under Section 612(g), the Commission must count only households passed by and subscribing to incumbent cable operators. When the two conditions of Section 612(g) are met, the statute authorizes the Commission to

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[7] *November FCC Meeting To Focus on Cable Industry*, Communications Daily, Nov. 14, 2007; *see also FCC Relies on Cable Statistics from Surveys*, Communications Daily, Nov. 16, 2007 ("*Factbook* Managing Editor Michael Taliaferro wrote Thursday that he provided only two 'raw' numbers in response to a commission inquiry on Oct. 10 and wasn't asked at the time to provide context or explanation. He said that *Factbook* data are gathered by surveying all cable systems owners and operators, but that some don't respond, so subscriber and homes-passed figures for non-participating systems weren't included in the figures provided."); *Commissioners Skeptical on Cable Data in FCC Report*, Communications Daily, Nov. 15, 2007 ("Warren never gave the FCC any cable penetration rate figures, said Chairman Paul Warren. The company gave the commission only the total number of cable subscribers and total number of homes passed, he said in a written statement. Those numbers are 67.1 million and 94.2 million, respectively. 'As far as we know, we are the only data gatherer who directly contacts each individual cable owner and cable system to gather data,' said Warren. 'However, not every cable owner or system responds to our requests for information, just as not every cable operator responds to the FCC's requests for similar information.'").

[8] Reply Comments of AT&T, MB Docket No. 05-255, at 3 (FCC filed Apr. 25, 2006).

promulgate rules "necessary to provide diversity of information sources."[9] Where there are multiple competing cable operators, just as where there is significant competition from non-cable providers, there could not be any need for rules boosting "diversity of information sources." Thus, the First Amendment — which requires that, at a bare minimum, cable regulation address a non-conjectural problem[10] — would not permit additional regulation. Put simply, "diverse" voices cannot be counted in measuring the volume of supposedly dominant speech.

Quite apart from the First Amendment, the statute itself requires this result. If the two conditions of Section 612(g) are met, the Commission may issue "additional rules necessary to provide diversity of information sources."[11] It is exceedingly unlikely that Congress meant to call for rules further promoting "diversity of information sources" where diverse information sources proliferate. Moreover, the legislative history indicates that, when Congress enacted the 1984 Act, it simply was not clear that one day there might be overbuilders,[12] and Congress specifically prohibited telephone companies from providing video service.[13] Thus, wireline entry on the scale that is now occurring not only was not contemplated but also was not possible: telephone companies were affirmatively barred from entering. Accordingly, the best reading of Section 612(g) is that, where Congress spoke of "cable systems," it meant "incumbent cable systems." Even if that

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[9] 47 U.S.C. § 532(g).

[10] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*") (plurality) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.") (internal quotation marks omitted).

[11] 47 U.S.C. § 532(g).

[12] *See, e.g.*, H.R. Rep. No. 98-934, at 22 (1984) ("*H.R. Rep.*") ("To be sure, . . . over the past five years . . . [n]ew forms of competition to cable were initiated or began to show the promise of emerging . . . . These include the SMATV industry, multi-channel MDS, direct broadcast satellite (DBS), subscription television, and the explosion in home video cassette recorders."); *id.* at 22-23 ("National communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV and subscription television. The public interest is served by this competition, and it should continue.").

[13] *See* 47 U.S.C. § 533(b) (1988).

reading were not compelled by the statutory text alone, it would be compelled by the text as viewed against the backdrop of First Amendment considerations.[14]

Third, in determining whether Section 612(g)'s second condition is met, the Commission must count only video subscribers. Section 612 is about video programming, not Internet or telephone service. Section 612(g)'s second condition asks how many households subscribe to "cable systems *with 36 or more activated channels*,"[15] a limitation that would make sense only if Congress were interested in subscription to video service. That view is further supported by the purpose of Section 612, which is "to promote competition in the delivery of diverse sources of *video* programming."[16] It makes no sense to measure cable's dominance in the delivery of video programming by counting cable's non-video subscribers.

Finally, it likewise makes no sense to make a Section 612(g) determination in the current procedural posture. In annual video competition reports, the Commission is required to "report to Congress on the status of competition in the market for the delivery of video programming."[17] The Commission is not required to address the 70/70 test of Section 612(g), and there is no reason why it should. Section 612(g) says that the Commission "may" promulgate additional rules — not that it "must." Any determination on whether the 70/70 test is met should accordingly be postponed until the Commission finds that (1) it should, as a policy matter, issue additional regulations, and (2) it lacks, as a legal matter, authority under statutory sources other than Section 612(g) — a time that may (and we believe must) never come. Indeed, the Commission may promulgate additional rules only "at such time as" the two conditions are met. Thus, if the Commission now makes a determination, it will have to make a new determination when it is ready to promulgate rules. Even then, it makes little sense to adopt regulations that, once the penetration count dips back below 70%, must be repealed.[18]

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[14] *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (internal quotation marks and brackets omitted).

[15] 47 U.S.C. § 532(g) (emphasis added).

[16] *Id.* § 532(a) (emphasis added).

[17] *Id.* § 548(g).

[18] *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so"); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 734 (N.D. Ill. 1994) ("When a statute's constitutionality is predicated on a particular state

2. Even If the 70/70 Test Were Met, Section 612(g) Would Not Grant the Commission Broad Powers.

Even if the 70/70 conditions were met, Section 612(g) would not provide the Commission with new authority. *First*, although Section 612(g) speaks of "additional rules necessary to provide diversity of information sources," the statutory context indicates that Congress was referring to additional rules with respect to leased access. Because Section 612 is about leased access, which seeks "to assure that the widest possible diversity of information sources are made available to the public from cable systems,"[19] any subsection calling for "additional rules necessary to provide diversity of information sources" must be read as calling for additional *leased-access-related* rules. Indeed, the legislative history confirms that Congress had in mind leased-access rules only.[20]

Confirmation of that reading is also found in Section 612(g)'s opening words: "[n]otwithstanding sections 621(c) and 623(a)."[21] Under the 1984 Act, the Commission lacked authority to promulgate rules about leased-access rates: Section 612 did not call for regulation of the rates cable operators could charge leased-access programmers, and Section 623(a) arguably prohibited such regulation.[22] Moreover, as specified in the legislative history, Section 612 allowed cable operators to discriminate in rates between programmers,[23] and requiring non-discriminatory rates might run afoul of Section 621(c).[24]

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of facts, that constitutionality 'may be challenged by showing to the court that those facts have ceased to exist.'") (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938)).

[19] 47 U.S.C. § 532(a) (1988).

[20] *See H.R. Rep.* at 54 ("as the cable industry more fully develops, and programming industry desires for pursuing leased access opportunities more fully emerge, new and different requirements *relating to leased access* may be necessary") (emphasis added); *id.* ("subsection 612(g) provides a mechanism to assure there is adequate flexibility to develop new rules and procedures *with respect to the use of leased access channels*") (emphasis added); *id.* ("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.").

[21] 47 U.S.C. § 532(g).

[22] *See id.* § 543(a) (1988) ("Any Federal agency . . . may not regulate the rates for the provision of cable service except to the extent provided under this section.").

[23] *H.R. Rep.* at 51 ("this section does contemplate permitting the cable operator to establish rates, terms and conditions which are discriminatory").

Accordingly, the purpose of Section 612(g) was to enable the Commission to require cable operators to charge non-discriminatory and regulated rates. In other words, Section 612(g) meant to authorize the kinds of rules that Congress later, in the 1992 Cable Act, decided should apply immediately.[25]

A broader reading that would nullify Section 621(c) even outside the context of leased-access rates is simply not plausible. Against the backdrop of applicable First Amendment principles, the 1984 Congress crafted a finely calibrated regime that largely prohibited regulation of the content available on cable.[26] It simply is not plausible that Congress decided that, upon meeting of the 70/70 test, that finely tuned regime should be discarded. It is even less plausible that Congress manifested that intent through a vague subsection buried deep within a provision addressing the esoteric subject of leased access. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[27]

Second, even insofar as Section 612(g) empowers the Commission to make rules about leased access, the Commission may not override express statutory limitations. Section 612(g) speaks of "additional rules" — *i.e.*, rules in addition to, not in lieu of. Consistent with that language, the House Report explained that, for example, "the commission may not increase the number of channels required to be set aside under this section."[28] That explanation is in keeping with the established principle that an agency "cannot rely on its general authority to make rules necessary to carry out its functions

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[24] *See* 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

[25] *See* H.R. Rep. No. 102-628, at 39 (1992) ("[T]he Committee believes that leased access has not been an effective mechanism for securing access for programmers to the cable infrastructure or to cable subscribers. In the Committees view, the principal reason for this deficiency is that the Cable Act empowered cable operators to establish the price and conditions for use of leased access channels.").

[26] *See, e.g.*, 47 U.S.C. § 532(b)(2) ("Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified in paragraph (1), except as otherwise provided in this section."); *id.* § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."); *id.* § 544(f)(1) ("Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.").

[27] *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[28] *See, e.g.*, *H.R. Rep.* at 54 ("the commission may not increase the number of channels required to be set aside under this section").

when a specific statutory directive defines [its] relevant functions . . . in a particular area."[29]

Section 612 limits the Commission's authority in a number of specific ways, including by limiting the number of channels that cable operators can be required to make available, by allowing cable operators to use empty leased-access channels for other purposes, and by stating that rate regulation must not "adversely affect the operation, financial condition, or market development of the cable system."[30] Those limitations must be respected even when the Commission makes rules pursuant to Section 612(g). Assuming (wrongly) that Section 612(g) authorizes the Commission to make rules about subjects other than leased access, the Commission likewise may not disregard specific provisions governing those areas. For example, the Commission could not make rules requiring cable operators to carry video-programming services absent a showing of affiliation-based discrimination,[31] and generally may not "impose requirements regarding the provision or content of cable services."[32]

Third, if the Commission finds the second condition to be met by (wrongly) counting subscribers of ILECs and overbuilders, the rule must apply equally to all cable operators — incumbent or not. By listing two conditions in Section 612(g), Congress indicated that satisfaction of those conditions posed a problem that the Commission might solve through the promulgation of additional rules. If the Commission concludes that households passed by and subscribing to non-incumbents add to the problem requiring a solution, then that solution (the rules) must tackle incumbents as well as non-incumbents. Any other view would run counter to the statutory design and would be arbitrary and capricious.

Finally, any rules adopted must be consistent with the First Amendment. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."[33] Thus, insofar as rules are meant to increase "diversity of information sources,"[34] they are inherently suspect: if their point is to "improve" cable speech, the Supreme Court would

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[29] *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995); *see also Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998) (same).

[30] *See* 47 U.S.C. § 532(b)(1); *id.* § 532(b)(4); § 532(c)(1).

[31] *See id.* § 536(a)(3).

[32] *Id.* § 544(f)(1).

[33] *Turner I*, 512 U.S. at 641.

[34] 47 U.S.C. § 532(g).

find them content-based and thus subject to strict scrutiny.[35] Cable is now subject to competition from numerous sources: DBS operators are serving almost a third of MVPD households, telephone companies are making massive investments and quickly adding subscribers, and more and more consumers are accessing video via the Internet and cellphones. At this level of competition, it is hard to see how regulations justified under the banner of "diversity of information sources" could be anything other than an attempt to alter content available on cable simply for its own sake.

Very truly yours,

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[35] *See, e.g.*, *Turner I*, 512 U.S. at 658 ("were the expenditure limitation unrelated to the content of expression, there would have been no perceived need for Congress to 'equaliz[e] the relative ability' of interested individuals to influence elections."); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality) ("the State cannot advance some points of view by burdening the expression of others"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.30 (1978) ("One might argue with comparable logic that the State may control the volume of expression by the wealthier, more powerful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members. Except in the special context of limited access to the channels of communication, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this concept contradicts basic tenets of First Amendment jurisprudence."); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (stating that government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").