



USTELECOM

UNITED STATES TELECOM ASSOCIATION

WALTER B. MCCORMICK, JR.
President and Chief Executive Officer

December 12, 2007

Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Commissioner Robert McDowell

**Re: DTV Consumer Education Initiative
MB Docket No. 07-148**

Dear Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell:

On behalf of the member companies of the United States Telecom Association, I write to you today concerning the Commission's pending proceeding on the Digital Television Consumer Education Initiative. In particular, we understand that one option under consideration by the Commission would require all telephone companies that receive Lifeline or Link-up support to include, in addition to bill messaging, expensive monthly billing inserts in the bills for those customers. Requiring monthly billing inserts is not a step that was recommended by Congress, would likely result in substantial customer confusion rather than meaningful consumer education, and will impose substantial misplaced burdens on our member companies. Just as importantly, however, and as USTelecom summarized in its *ex parte* of November 21, 2007,¹ such a proposal clearly violates the First Amendment rights of our member companies by requiring them to engage in content-based speech.

While I cannot overstate our member companies' concerns about such Constitutional impairment, we also appreciate that the DTV transition is an issue of great importance to the American public and, of course, to the Commission. We also understand that it is a matter of great importance to many Members of Congress, as evidenced by the letter from Chairmen Dingell and Markey urging the Commission to undertake special educational efforts to provide additional information to consumers about the DTV transition. With respect to telecommunications carriers, Chairmen Dingell and Markey wrote to you that:

the Commission could require, as an interim measure, that telecommunications carriers that receive funds under the Low Income Federal universal service program to notify each of their low income customers of the digital transition

¹ *Ex parte* letter from Glenn Reynolds, VP-Policy, USTelecom Association to Marlene Dortch (November 21, 2007). I note that the Independent Telephone & Telecommunications Alliance (ITTA) recently echoed these concerns. *Ex parte* letter from Curt Stamp, Executive Director, ITTA, to Chairman Kevin Martin (December 4, 2007).

and include such a notice in their required Lifeline and Link-Up publicity efforts.²

Certainly, the request from Chairman Dingell and Markey provides the Commission substantial discretion for tailoring a cost-effective program for reaching out to low-income telecommunications customers in ways that ensure that a clear and useful message is targeted to those customers. I believe that there are alternatives to the current proposal that would be more effective at targeting these difficult to reach consumers, less likely to cause the significant customer confusion that will certainly accompany the current proposal, and at the same time less burdensome on telecommunications carriers. Accordingly, USTelecom would be very interested in discussing alternative measures that might mitigate the unnecessary impact on our member companies while still fully implementing the express recommendations of Chairmen Dingell and Markey.

The Proposed Mandates Are Costly and Poorly-Tailored to Achieving the Commission's Goal

While the First Amendment legal concerns discussed below cannot be overstated, USTelecom and its member companies fully appreciate that the Commission has been asked directly by Members of Congress to take appropriate steps to ensure that all consumers affected by the February, 2009 DTV transition are aware of that event. Nonetheless, the relationship between these companies' Lifeline and Linkup *telephone* customers and the Commission's goal of informing the public about the February 2009 digital *television* transition is tenuous at best, and such notices are likely to create more confusion in the minds of those customers—not less.

First, it should be understood that a large majority of companies that receive Lifeline and Link-up support do not even offer video services. Accordingly, only a fraction of all Lifeline/Link-up customers are currently receiving video services from their telephone company. These customers are almost certainly going to be confused as to why they are receiving information about their *television* service in their *telephone* bills. It will also probably lead many of these customers to call their telephone company for further explanation of the notice and to assume that the telephone company is somehow responsible for this event. To the extent a Lifeline or Link-up customer *is* receiving video services from their telephone company, they are probably already receiving that service in a digital format---so they are already prepared for the mandatory transition.³ Moreover, as noted by ITTA, evidence indicates that the take rate of low income residents is at least as high as other groups with respect to subscription to cable and satellite services—as opposed to over-the-air service-- suggesting that there is no reason to believe that Lifeline/Linkup customers are more likely to be impacted by the DTV transition.

On the other hand, while the potential benefit of this requirement is marginal at best, the costs that will be imposed on the telephone companies by the current proposal are quite large. Indeed, based upon reports, the Commission's proposal appears to be imposing more costs upon

² Letter from Chairman Dingell and Chairman Markey to Charm Martin and Commissioners Copps, Adelstein, Tate and McDowell (May 24, 2007).

³ In fact, some telephone companies that offer video will be undergoing their own "digital transition" separate and apart from the broadcaster's February, 2009 transition. Customers of these services are likely to be even more confused if they start receiving notifications from their telephone company about two separate and inconsistent transitions. *See, ex parte* Letter from Leora Hochstein, Verizon, to Marlene Dortch (November 20, 2007).

the incumbent telephone service industry than upon any other industry segment—despite the fact that these companies are receiving absolutely no benefit from this transition.

The proposal to mandate monthly billing inserts in addition to billing messages is particularly onerous.⁴ Billing inserts are costly to produce and can add to the mailing costs of the bill. They also typically require much greater lead time to implement than billing messages. Also, the limited space in bills for inserts is limited, and is often reserved by state regulatory authorities. Moreover, the systems for at least some telephone companies are unable to automatically segregate Lifeline/Link-up customers for billing inserts, while this does not appear to be a problem with respect to billing messages. Moreover, billing inserts will not actually reach the growing number of customers who receive and pay their bills on-line. Telephone companies will also incur costs handling calls caused by the customer confusion discussed above. Finally, all of these costs will be multiplied by the requirement that these notices be provided every month for a year leading up to the DTV transition date. Many customers do not like to receive bills stuffed with such inserts (finding them environmentally unfriendly or simply annoying) and may become agitated at their phone companies or the Commission for including the same notice month after month after month.

First Amendment Concerns

If the Commission were to adopt the requirement that telephone companies provide bill inserts and billing messages to all Lifeline and Link-up customers, such a requirement would be subject to substantial legal challenge that could delay or disrupt the Commission's DTV education efforts. The First Amendment prevents the Government from compelling individuals to speak. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 713-17 (1977). In *Pacific Gas & Electric v. Public Utilities Commission of California* ("PG&E"), for example, the Supreme Court held that the government may not require a utility to include a third party's speech in the utility's customer bills. *See* 475 U.S. 1 (1986) (plurality); *accord id.*, at 25 (Marshall, J., concurring in judgment); *see also Central Illinois Light Co. v. Citizens Utility Board*, 827 F.2d 1169 (7th Cir. 1987) (striking down requirement that utilities include government-dictated message in bills even where it was claimed to be "objective" and "informational").

Any requirement that mandates that telecommunications carriers provide messages regarding the DTV transition to Lifeline and Link-up customers would be unconstitutional under such precedents. Any requirement of this kind would be content-based, both because the government would be dictating the substance of the communication and because the justification for the requirement would be based on content (*i.e.*, the desire to inform individuals regarding the DTV transition). Such content-based regulations are subject to strict scrutiny, which requires that the government's regulations "be narrowly tailored to promote a compelling Government interest," that cannot be served by any "less restrictive alternative." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citation omitted).

The Commission's proposed requirement cannot pass that exacting test. Even though the government may have a compelling interest here, the proposed mechanism is poorly tailored to that interest, and is certainly not the least restrictive means of achieving the stated objective. The

⁴ "Billing inserts" is an industry term of art that refers to separate, stand-alone pages that are added to the customer's billing envelope. "Billing messages" is an industry term of art that refers to text added to the customer's actual bill.

requirement would be imposed on providers of a service – local telecommunications service – that is not relevant to the DTV transition. Moreover, many of the carriers that would be required to carry this message do not even provide video service, much less is there any reason to believe that the customers that receive these messages receive video service from these carriers. In such circumstances, the requirement is, if anything, likely to lead to substantial confusion. Further, the government has ample alternative means to advance its interest, including through its own speech and by working with the broadcast companies that are providing analog signals and thus are directly implicated in this transition. *See, e.g., Riley v. National Federation of the Blind*, 487 US 781, 800 (1988) (striking down forced speech requirement where the government itself could “communicate the desired information to the public”).

Finally, because of the nature of the claim, there is a high likelihood that a court would grant preliminary injunctive relief if such mandates were challenged. As outlined above, telecommunications carriers would have a strong case on the merits that the FCC’s proposed requirement would violate the First Amendment. *Second*, the same showing satisfies the next requirement – that carriers would suffer irreparable injury absent a stay. *See Elrod v. Burns*, 427 U.S. 437, 373 (1976) (plurality) (“the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”); *see also Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (expressly applying presumption of irreparable injury to alleged deprivation of commercial speech rights in reversing district court’s denial of motion for preliminary injunction). *Third*, an injunction would cause minimal – if any – injury to the FCC, which is fully capable of reaching low-income households by other means to notify them of the analog signal phase-out. *Fourth*, the public interest would be served by a stay, because “[t]he public interest . . . favors plaintiffs’ assertion of their First Amendment rights.” *See Elam Constr., Inc. v. Regional Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997).

Conclusion

While USTelecom and its member companies appreciate the circumstances surrounding this issue, it is apparent that there are steps that the Commission could take that are significantly less burdensome than the current proposal while still satisfying the worthy goals expressly requested by Chairmen Dingell and Markey. While I do not mean to suggest that these alternatives could eliminate First Amendment concerns, USTelecom’s member companies are prepared to work with the Commission in order to facilitate these public policy goals

Sincerely,



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