

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 07-269
Competition in the Market for the)
Delivery of Video Programming)

**COMMENTS OF FREE PRESS ON CABLE SUBSCRIBERSHIP SURVEY FOR
THE COLLECTION OF INFORMATION PURSUANT TO SECTION 612(G) OF
THE COMMUNICATIONS ACT**

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I. Introduction

A. The Cornerstone of Good Policymaking is Good Data

We applaud the Commission for acting to improve the collection of cable subscribership data. The controversy that took place over the tentative conclusions within the *Thirteenth Annual Report* illustrates the dangers of relying on data from outside sources.¹ Without the ability to accurately assess the key characteristics of a market, the Commission cannot fulfill its underlying mission. Good policymaking cannot occur without good data. Our efforts in this area have mirrored those of Interim Chairman Copps, who stated:

one of my top priorities here at the Commission has been to improve our data-gathering for *all* the industries we regulate and to ensure that *all* our decisions are grounded in the best available data and analysis.²

We urge the Commission to modernize data gathering efforts across the communications industry. Not only will these efforts inform policymaking, with online availability outside parties can further the benefit to the public.

B. Third-Party Information is not an Adequate Substitute For Commission-Collected Data

In the past, the Commission has recognized the dangers of relying on third party data collection for important policy determinations.³ Such situations leave the

¹ *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report, FCC 07-206 (Jan. 16, 2009) (“*Thirteenth Annual Report*”).

² Statement of Commissioner Michael J. Copps, *Thirteenth Annual Report*. [emphasis in original]

³ *Local Telephone Competition and Broadband Reporting*, Report and Order, (rel. Nov. 12, 2004), WC Docket No. 04-141, ¶7; *1998 Biennial Regulatory Review – “Annual*

Commission with little control over the information they receive. Internal collection was at the heart of requiring the data reported through ARMIS.⁴ Even in the more recent decision to collect broadband data through Form 477, the Commission specifically identified the deficiencies of outside data. The Commission defended this position by noting outside sources to be “incomplete and inconsistent” with the data collected over “incongruent time periods.”⁵ We have similarly expressed concern that these sources lack consistency and detail.⁶ Unfortunately, the Commission witnessed these deficiencies first hand.

The *Thirteenth Annual Report* experienced significant controversy, thanks to reliance on outside data collection. An initial finding that a cable subscribership limit had been reached caused entities on both sides to interpret data from a variety of sources in order to make their case. The controversy originated from the use of data furnished to the Commission by Warren Communications. Two Commissioners requested further information on how the data was collected. The company sought to express confidence on the data provided but was still compelled to note, “data compilations that depend on

Report of Cable Television System”, Form 325, filed pursuant to Section 76.403 of the Commission’s Rules, Report and Order (rel. March 31, 1999), CS Docket No. 98-61, ¶14.

⁴ Automated Reporting Requirements for certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67 and 69 of the FCC’s Rules), Notice of Proposed Rulemaking (rel. May 7, 1986), CC Docket No. 86-182, ¶7 (“Our principal objective in revising the reporting requirements is to ensure that we have the information that this Commission needs to carry out our statutory responsibilities.”)

⁵ *Local Competition and Broadband Reporting*, Report and Order, (rel. March 30, 2000), CC Docket No. 99-301, ¶14.

⁶ See Free Press Reply Comments, WC Docket 08-190, pp. 6-8, Dec. 15, 2008; See also Consumers Union et al. Further Reply Comments, WC Docket No. 07-38, Sept. 2, 2008, pp. 6-7.

the voluntary cooperation of competitive enterprises obviously will have gaps.”⁷ Warren Communications also noted that cable operators “have become particularly reluctant to provide current homes-passed figures.”⁸ This caused all the Commissioners to recognize the importance of Commission-collected information.⁹ The final result of this disorder is a finding in the *Thirteenth Annual Report* that the “only way to accurately conclude that the 70/70 test has been met is to have the cable industry provide us with the data.”¹⁰ The corresponding footnote reminds entities of the power that only the Commission carries in data collection efforts:

Any false certification made to the Commission may be punished by fine and/or or imprisonment under 18 U.S.C. §1001. We also emphasize that any false information provided to the Commission pursuant to the requirements set forth above may be similarly punished under 18 U.S.C. §1621.¹¹

We urge the Commission to be mindful of this experience in determining the merits of Commission data collection in other ongoing proceedings.¹²

⁷ U.S. House of Representatives, Committee on Energy and Commerce, 110th Congress, *Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin*, December 2008, Exhibit 13.

⁸ *Id.*

⁹ See Statement of Chairman Kevin J. Martin, *Thirteenth Annual Report*; Statement of Commissioner Michael J. Copps, *Thirteenth Annual Report*; Statement of Commissioner Jonathan S. Adelstein, *Thirteenth Annual Report*; Statement of Commissioner Deborah Taylor Tate, *Thirteenth Annual Report*; Statement of Commissioner Robert M. McDowell, *Thirteenth Annual Report*.

¹⁰ *Thirteenth Annual Report*, ¶43.

¹¹ *Id.*, fn. 105. Similarly, Commissioner Adelstein specifically noted the importance of this enforcements mechanism. Statement of Commissioner Jonathan S. Adelstein, *Thirteenth Annual Report*, fn. 980.

¹² *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, Report and Order and Further Notice of Proposed Rulemaking (rel. June 12, 2008), WC Docket No. 07-38; *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering*, Memorandum Opinion and

II. Discussion

The Media Bureau has requested public comment on the proposed Cable Subscribership Survey.¹³ We first applaud the Bureau for developing a straightforward form that has the potential to offer reliable, industry-wide data on subscribership to cable services. The data collected will serve as the primary means to assess subscribership levels in the cable industry. While the general design of the survey is satisfactory, certain portions are in need of reform.

Most importantly, the survey should ensure the Commission collects actual data from cable operators. Any possibility of commercial information being used in completing the survey leaves the Commission with the same disorder as the *Thirteenth Annual Report*. To this end, the Commission should remove “Data from commercial sources” as a potential calculation method for all questions under section 5.¹⁴ Furthermore, the Commission should specifically note the inadequacy of relying on such a calculation method. No significant burden would result from taking this action, as a variety of calculation methods are offered to operators. The primary result of such a change would be to ensure that the Bureau would receive a much more reliable dataset.

The survey presents an ideal opportunity to gather comprehensive and accurate information on the level of subscribership to a variety of cable services. Subscribership data is simply the number of customers who have subscribed to a service. A provider of any size can certainly furnish such basic information. The Commission can look to the

Order and Notice of Proposed Rulemaking (rel. Sept. 6, 2008), WC Docket No. 08-190.

¹³ See Public Notice, Media Bureau, FCC, *Media Bureau Seeks Comment on a Cable Subscribership Survey for the Collection of Information Pursuant to Section 612(g) of the Communications Act*, DA 09-44, MB Docket No. 07-269 (Jan. 16, 2009).

¹⁴ *Id.*, Attachment.

type of subscribership information already reported in order to assess the information that would add value to policymaking activities. Multiple commissioners have made note of the data collected in Form 325, the Annual Cable Operator Report.¹⁵ The majority of the Form includes information that can be broadly separated into two main categories, subscribership and infrastructure. We have noted the value of the infrastructure portion in a separate proceeding.¹⁶ Form 325 provides the Commission with a roadmap of the type of subscribership information that would merit inclusion in the survey. Specifically, the Commission should incorporate the following questions into section 5.c:

- The number of digital cable subscribers (if applicable)
 - The number of digital cable subscribers with leased set top boxes (if applicable)
 - The number of digital cable subscribers with digital terminal adaptors (if applicable)
- The number of cable modem subscribers (if applicable)
- The number of telephony subscribers (if applicable)

Through the collection of this information, the Commission will gain valuable resources to inform policymaking in a variety of proceedings.¹⁷ For example, knowing the number of digital subscribers provides the Commission insight into the increasing

¹⁵ See Statement of Commissioner Jonathan S. Adelstein, *Thirteenth Annual Report*; Statement of Commissioner Deborah Taylor Tate, *Thirteenth Annual Report*; Statement of Commissioner Robert M. McDowell, *Thirteenth Annual Report*.

¹⁶ Comments of Free Press, WC Docket No. 08-190, Nov. 16, 2008, p. 8.

¹⁷ The Commission recognized this in considering changes to Form 325:

In general, it is vital that the Commission have accurate and timely information regarding the cable television industry, both to assist in the enforcement of existing requirements and for broader rulemaking and policy purposes.

1998 Biennial Regulatory Review – “Annual Report of Cable Television System”, Form 325, filed pursuant to Section 76.403 of the Commission’s Rules, Notice of Proposed Rulemaking (rel. April 30, 1998), CS Docket No. 98-61, ¶6.

adoption of digital video services.¹⁸ Furthermore, as the Commission is well aware, cable operators have begun to implement all digital strategies. This migration frees significant portions of capacity for a variety of services. By staying apprised of these efforts (and the burden of such efforts) the Commission will gain the ability to assess claims of capacity shortage. Indeed, capacity shortages were a common defense of the cable industry's opposition to the dual carriage rule.¹⁹ Furthermore, the Commission will quickly find utility for this information in their efforts to open up the cable set-top box to outside competition.²⁰ Information on adoption rates for Internet and telephony services also have clear benefits for policymaking.

The information collected by the Commission should also be made available to the public. The Commission has long recognized the value of publicly available data.²¹ Interested entities including state agencies and consumer groups would be provided the opportunity to review information that is crucial to Commission policymaking. At the very least, the Commission should consider making the data available in a more aggregated form. Cable operators routinely make these figures publicly available. For instance, Time Warner Cable recently provided figures on the number of digital and

¹⁸ The benefits of digital services are numerous. See *Thirteenth Annual Report*, ¶55. The cable industry also views digital video services as offering significant benefits. See e.g. <http://www.comcast.com/Customers/FAQ/FaqDetails.ashx?Id=214>.

¹⁹ See e.g. Comments of the National Cable & Telecommunications Association, CS Docket Nos. 98-120, 00-96, 00-2, June 11, 2001, p. 17 (“Upgrades notwithstanding, available cable system channel capacity is still in short supply”). See also Reply Comments of Comcast Corporation, WC Docket No. 07-52, Feb. 28, 2008, p. 13; Comments of Time Warner Cable, WC Docket No. 07-52, Feb. 13, 2008, p. 2.

²⁰ *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking (rel. June 29, 2007), CS Docket No. 97-80, PP Docket No. 00-67.

²¹ See Reply Comments of Free Press, WC Docket No. 08-190, Dec. 15, 2008, pp. 8-10.

analog video subscribers, as well as high-speed Internet and digital phone.²² As the

Commission has previously stated:

By making the information available, consumers, investors, and policymakers will be better able to make informed decisions on the development of these markets. Such information has value because a better-informed marketplace promotes a more efficient marketplace. Also, by allowing public release of as much of the information as possible, associations, scholars, and others will be able to use the information in their independent analyses of Commission policies, thereby aiding the Commission in crafting regulations that address specific market problems and eliminating those regulations that have outlived their usefulness.²³

III. Conclusion

We applaud the Commission for acting to ensure future assessments of the cable industry do not rely on commercial data sources. By making the changes outlined above, the Commission can be confident that the data collected will produce the most accurate picture of cable subscribership information.

Respectfully submitted,

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²² See Time Warner Cable, "Time Warner Cable Reports 2008 Full-Year and Fourth-Quarter Results," Feb. 4, 2009, Table 2, available at <http://ir.timewarnercable.com/releasedetail.cfm?ReleaseID=365215>.

²³ *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, (rel. March 30, 2000), ¶96.

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