



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

The Honorable John Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington D.C. 20515

Dear Chairman Dingell:

Thank you for your letter concerning our processes at the Federal Communications Commission. I agree that the Commission should conduct its affairs fairly, openly and transparently to serve the public interest. I appreciate the opportunity to provide an initial response to your questions.

Since I became Chairman, my approach has been to try to address concerns raised by my colleagues whenever possible including those raised a day before or even an hour before a scheduled Open Meeting. I recognize that at times this may result in a delay or in a less orderly process, but I believe it significant that over 95% of Commission items have been adopted by a bipartisan majority of Commissioners.

1) Will you commit to publishing the text of proposed rules sufficiently in advance of Commission meetings for both (i) the public to have a meaningful opportunity to comment and (ii) the Commissioners to have a meaningful opportunity to review such comments? If so, how?

The Administrative Procedures Act ("APA"), which is the law that governs the process when the Commission adopts new rules, requires that we describe in a notice to the public "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). The Commission complies with this requirement by publishing Notices of Proposed Rulemakings ("NPRM") that discuss the specific issues that the Commission intends to resolve and seeks comment on them. In response, members of the public then submit comments and reply comments to the Commission providing their views on the various issues discussed in the NPRMs. Commission staff then reviews this record and uses it to draft a detailed Order that the Commissioners will vote. The Order includes background information, a description of the comments, an explanation of the decisions the Commission is making, and the text of any rules.

The APA does not require that we publish the exact text of a proposed rule, and in

fact, it has not been standard practice to publish separately proposed rules prior to adoption of an Order. Recently, however, because of the unusually controversial nature of the media ownership proceeding, I took the extra step of publishing the actual text of the one rule I thought we should amend in advance of the upcoming Commission meeting on December 18.

2) Will you commit to providing your fellow Commissioners with all of the relevant data and analysis upon which a proposed order or rule is based? If so, how?

Yes, I already provide my fellow Commissioners all of the relevant data and analysis upon which a proposed order or rule is based. Proposed orders that Commissioners receive include background discussion, a detailed review of the record, and the rationale supporting our decisions regarding the implementation of any new rules or changes to existing rules.

The specific issue that may have prompted this question relates to our recent consideration of our annual Video Competition Report. This Report was circulated to my colleagues on October 11, 2007. It was considered for adoption at the November 27, 2007 Commission open meeting, almost 7 weeks later.

In 1998, the Cable industry argued that the Commission should eliminate its own collection of data because the data was already provided by Warren and Nielsen. The industry specifically noted that “Warren’s TV Factbook and online database ... is relied upon by businesses and researchers for system specific information about the cable industry.”¹

In the 2002 Video Competition Report, the Commission specifically noted the differences between data from Warren and Kagan, concluding that “these differences suggest that the Kagan data should be used with a good deal of caution and that they are most reliable as a trend indicator, rather than a precise estimate for only one year.”² Although the Commission continued to cite Kagan data in later years, the Report continued to emphasize the limited nature of its use.³

In 2003, the first year the Commission addressed whether the cable industry had met the “70/70” test, the Commission relied solely on Warren Communications data to determine the test had *not* been met.⁴

In 2004, 2005, and 2006, the Commission’s reports also discussed data from our Price Survey and Form 325 internal data collection. In 2006, several commenters submitted evidence that the 70/70 test had been met; others submitted evidence showing that it had not been met. Warren found that 67.8% households subscribing to cable systems with 36 or more channels. The Commission explicitly recognized then that

¹ NCTA Comments at 7, CS Docket 98-61 (filed June 30, 1998) (“NCTA Comments”).

² 9th Annual Report at para. 18.

³ See 10th Annual Report at para. 21; 11th Annual Report at para. 19; 12th Annual Report at para. 30.

⁴ See 10th Annual Report at para. 22.

“[g]iven the circumstances and the fact that all available data sources are imprecise to some extent, it is possible that the second prong of the 70/70 benchmark has been met.” Thus, last year after outlining all the data, the Commission put the public on notice that the 70/70 test might have already been met. Thus, everyone was on notice about this important issue.

In 2007, the Video Competition Report cited Warren’s data that found that 71.4% of households passed by cable systems with 36 or more channels subscribed to those systems. This Report cites data as of 2006.

In considering our most recent report, I provided the Commissioners with the data I determined was most relevant and most accurate for the purpose of determining how many subscribers there were to cable systems with 36 or more channels. The proposed report relied on data from Warren Communications, the only outside data source that distinguished cable systems with more than 36 channels and the data that relied on the largest survey of existing cable systems. In addition, Warren collects its data directly from cable television operators or individual cable systems to create a large database of cable industry information.⁵ Warren states that it is the only research entity that directly surveys every cable system at least once every year, providing the most complete source of cable data.⁶ In fact, the cable systems represented in Warren’s database serve 96% of all subscribers nationwide.⁷ I therefore believe that Warren is the most accurate and reliable source.

In the draft report that was circulated, I included an explanation as to why the Warren data was more reliable than the Kagan data. Specifically, footnote 94 stated “[w]e note that Kagan, unlike Warren, does not report data for cable systems with 36 or more channels and thus does not provide the precise data we need to perform the calculation specified by the statute. We also note that the Kagan estimate regarding the number of households passed by cable, 113,600,000 is greater than the U.S. Census Bureau estimate of 109,450,000 total households. As a result, we find the Warren data to be more reliable in this regard.”

In addition, as I explained in response to a question from Ranking Member Barton prior to adoption of the Annual Report, (see attached) I did not include the Commission’s Price Survey or Form 325 data in my proposal to the Commissioners because they are not as accurate as Warren. Specifically, these two sources represent smaller samples of the cable industry and therefore do not provide as reliable information regarding the number of subscribers to systems with more than 36 channels or number of homes passed by systems with more than 36 channels. The Commission currently sends questionnaires to only 781 cable systems for its Price Survey (representing only 10.2% of the total 7,634 systems in our database and collects Form 325 data from approximately 1,150 cable

⁵ See Letter from Michael Taliaferro, Managing Editor, Television & Cable Factbook, to Commissioners Tate and McDowell, Nov. 15, 2007.

⁶ *Id.*

⁷ See John Eggerton, McDowell, Tate Question 71.4% Cable Subscribership Figure, *Broadcasting & Cable*, Nov. 14, 2007.

systems (representing only 14.4% of the total 7,634 systems in our database). In contrast, Warren sends questionnaires to 7,090 cable systems, and states that it has data representing more than 96% of all cable subscribers.⁸ Indeed, as the National Cable Television Association argued, “Warren’s TV Factbook and online database, not the Commission’s Form 325 data, is relied upon by businesses and researchers for system specific information about the cable industry.”⁹ Moreover, when one Commissioner asked for the most recent Price Survey data, it was provided to him within hours.

In retrospect, given the controversy, I should have included in the item a more detailed explanation of why I believed Warren data was more reliable than other sources we have cited in the past or that were submitted in the record.

3) Will you commit to giving your fellow Commissioners adequate time to review proposed orders and rules? Is so, how?

Yes. Today, Commission processes and decision-making time frames remain essentially the same as the general decision-making procedures established nearly ten years ago under Chairman William Kennard. These procedures were modeled on procedures outlined from the Commission’s then General Counsel William Kennard during Reed Hundt’s tenure as Chairman. During my tenure, I have endeavored to follow these same general procedures and time frames established by my predecessors in order to give Commissioners adequate time to review proposed orders and rules.

The full Commission considers proposed rules or rule changes through one of two methods. Commissioners either vote for proposed rules or rules changes under items that are “on circulation” or they vote for such items at the Commission’s required monthly Open Meeting.

The vast majority of the FCC’s rules are adopted “on circulation.” Under this process, the Commissioners receive and vote electronically proposed orders which include background discussion, a detailed review of the record, and a thorough explanation of our decisions regarding the implementation of any new rules or changes to existing rules. Items on circulation remain in that status until 3 Commissioners vote electronically to approve proposed orders. If an item has been on circulation for at least 21 days, once a majority of Commissioners have voted to approve a circulate item, the remaining Commissioners have 10 days to register their votes or seek an extension beyond the 10 day voting period.

The other method that the Commission uses to adopt rules is to vote at the Commission’s required monthly Open Meeting. Under the decision-making procedures of the last three Chairman (two Democratic, one Republican), Commissioners’ offices receive items for their review at least three weeks before the open meeting. We have provided to the Commissioners a list of items that we are providing to them that day or that they already have that I would like the Commission to consider at the next open

⁸ *Id.*

⁹ NCTA Comments at 7.

meeting.

Under Commission practice, when an item designated for the meeting has been received by the Commissioners' offices at least three weeks before the meeting, all Commissioners' substantive edits should be provided to the originating Bureau/Office not later than close of business seven days before the meeting. During my tenure, I have not enforced this practice on my fellow Commissioners in order to provide them even more time to consider these items. Unfortunately, many of the delays we have experienced with respect to the starting time of Open meetings have resulted because Commissioners have waited until 24 or 48 hours before the designated start of the Commission meeting to provide input, and have continued to provide edits up to and past the time the meeting was scheduled to begin. While it might be more orderly to enforce the prior, I would be concerned that it would significantly reduce the opportunity to reach a compromise with my colleagues.

As of December 3rd, there were 150 items circulating, waiting for the Commissioners to vote. 136 items were circulating for more than 30 days. Three Commissioners had not yet voted 133 of them. 110 of them had been circulating for more than 90 days. Three Commissioners had yet to vote 107 of them. As of December 9th, there are 154 items circulating, waiting for the Commissioners to vote. 137 items have been circulating for more than 30 days. Three Commissioners have not yet voted 110 of them. 110 of them have been circulating for more than 90 days. Three Commissioners have not yet voted 84 of them. I follow the same practice in place since I was a staffer at the Commission when William Kennard was Chairman of identifying some of these items to be voted at the next meeting. Under the Commission's decision-making procedures, if a circulation item has not been adopted within 30 days, the Chairman may convert it to a meeting item and put it on the Sunshine notice for the next meeting. The practice going back to Chairman Kennard had been to give notice to the other Commissioners at least two weeks before the meeting of an intent to move a circulation item to a meeting. Instead, I have typically provided my colleagues with three weeks notice of my intent to move a circulation item to an Open meeting by including it in the initial list.

Finally, the GAO recently expressed concerns that not all parties are aware of the draft rules and proposals that have been circulated among the Commissioners awaiting a vote. In order to address this concern, last week we posted on our website all of the names of the 154 items that are currently before the Commissioners on circulation and the date the item was originally circulated. This list will be updated on the Commission's website on a weekly basis.

As of December 9th, the oldest item on circulation dates to March 7, 2005.

4) Will you commit to providing your fellow Commissioners and the public with adequate notice of Commission meetings? If so, how?

Yes. I will continue to provide Commissioners with three weeks notice of the upcoming

Open meeting and a list of items that we are providing them or that we have already placed on circulation that I plan to consider at the Open meeting. I would note that, in the past, some Chairmen have only provided Commissioners with 2 weeks notice of items already on circulation that they plan to consider at the open meeting. I have typically provided 3 full weeks and will continue to do so. In addition, as I explained, the Commission will on a weekly basis post to the Internet the names of items that I have put on circulation so that the public has full information regarding what proposals the Commissioners are considering.

5) Please describe the Commission's document retention policies, including policies relating to the retention of internal and external Commission correspondence, including e-mail. If these policies have changed since you became Chairman, please describe those changes, the date the changes were instituted, any staff education and oversight activities related to the changes, and the rationale behind the changes. Please also describe any changes you are contemplating to the Commission's policies regarding document retention.

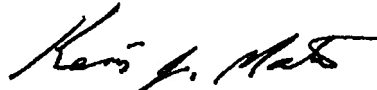
For more than twenty years, the Commission has had a document retention policy responsive to the requirements established by the National Archives and Records Administration (NARA). This policy is memorialized in a Commission policy statement promulgated by the Commission's Office of Managing Director. I have attached a copy of the policy statement.

The Commission's directive requires all Bureau and Offices to retain, according to specified schedules, official items that describe or document the agency's organization, functions, policies, decisions, procedures or operations. "Official" refers to materials created or received by the agency in the conduct of its business and other materials that show how the agency transacted business.

The Commission updates its directives periodically. In March 2007, the Commission updated its previous document retention directive, but the Commission's 2007 document retention directive is substantially the same as the previous directive.

With respect to staff education and oversight activities, the Commission implemented an agency-wide employee training program on its document retention policies in 2007. As of this date, nearly all of the Commission's employees have successfully completed the training.

Sincerely,



Kevin J. Martin
Chairman

cc: The Honorable Joe Barton, Ranking Member
 Committee on Energy and Commerce

 The Honorable Bart Stupak, Chairman
 Subcommittee on Oversight and Investigations

 The Honorable Ed Whitefield, Ranking Member
 Subcommittee on Oversight and Investigations

 The Honorable Edward J. Markey, Chairman
 Subcommittee on Telecommunications and the Internet

 The Honorable Michael J. Copps, Commissioner
 Federal Communications Commission

 The Honorable Jonathan S. Adelstein, Commissioner
 Federal Communications Commission

 The Honorable Deborah Taylor Tate, Commissioner
 Federal Communications Commission

 The Honorable Robert M. McDowell, Commissioner
 Federal Communications Commission

Attachment



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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

The Honorable Joe Barton
Ranking Member
House Energy and Commerce Committee
U.S. House of Representative
2322-A Rayburn House Office Building
Washington, D.C. 20515

Dear Ranking Member Barton:

Thank you for your letter. Attached, please find my answers to your questions.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Martin".

Kevin J. Martin
Chairman

Attachment

cc: The Honorable J. Dennis Hastert The Honorable Ralph M. Hall
 The Honorable Cliff Stearns The Honorable Nathan Deal
 The Honorable John Shimkus The Honorable Vito Fossella
 The Honorable Ed Whitfield The Honorable Steve Buyer
 The Honorable Barbara Cubin The Honorable Michael C. Burgess
 The Honorable Lee Terry The Honorable Mary Bono
 The Honorable Mike Rogers The Honorable John Sullivan
 The Honorable Mike Ferguson The Honorable Sue Wilkins Myrick
 The Honorable Joseph R. Pitts The Honorable Marsha Blackburn
 The Honorable John B. Shadegg The Honorable Greg Walden
 The Honorable Tim Murphy The Honorable George Radanovich

1. Please describe all items regarding government-mandated a la carte, multicast must-carry, program carriage, rate regulation of leased access, interactive set-top box obligations, cable ownership, and the 70/70 provision that are currently circulating or planned for an open meeting. For each, please provide the applicable docket numbers.

Government-mandated a la carte:

- None

Multicast Must Carry:

- Second Order on Reconsideration and Second Further Notice of Proposed Rulemaking in *Cable Carriage of Digital Television Broadcast Signals* (CS Docket No. 98-120), circulated 6/13/2006. The Second Order would require the mandatory carriage of multiple streams of broadcasters' digital transmission.
- Notice of Proposed Rule Making in *Promoting Diversification of Ownership in the Broadcasting Services* (Docket number not assigned until adoption), circulated 3/12/2007. The Notice of Proposed Rulemaking seeks comment on several initiatives designed to increase participation in the broadcasting industry by new entrants and small businesses, including minority- and women-owned businesses.

Program Carriage:

- Report and Order in *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage* (MB Docket No. 07-42), circulated 11/6/2007. The Report and Order adopts proposals concerning modifications to the Commission's leased access and program carriage rules.

Rate Regulation of Leased Access:

- Report and Order in *Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage* (MB Docket No. 07-42), circulated 11/7/2007. The Report and Order adopts proposals concerning modifications to the Commission's leased access and program carriage rules.

Interactive Set-top Box Obligations:

- None.

Cable Ownership:

- Fourth Report and Order and Further Notice of Proposed Rule Making in The Commission's *Cable Horizontal and Vertical Ownership Limits* (MM Docket No. 92-264), circulated 3/12/2007. The Fourth Report and Order adopts proposals in

response to the court remand in *Time Warner Entertainment Co. v. FCC* concerning the cable horizontal ownership limit.

70/70 Provision:

- Thirteenth Annual Report in *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* (MB Docket No. 06-189), circulated 10/12/2007. The Thirteenth Annual Report to Congress examines multiple issues concerning the status of competition in the market for delivery of multichannel video programming to consumers.

In addition to these rulemaking items, the Commission frequently submits reports on a variety of topics relating to media, including both broadcast and cable. The 2006 Report on the status of competition in the market for the delivery of multichannel video programming and the Notice of Inquiry to begin the 2007 report are currently circulating before my colleagues and are scheduled to be considered at tomorrow's open agenda meeting. The Commission has also committed to submit a Report on Localism, which is currently pending before my colleagues. These reports touch on a wide range of topics including almost all of the ones listed above.

2. Please describe any data the Commission has received suggesting that the 70/70 provision has been met, the source of the data, and whether that data is of the same type and source the Commission usually relies on in its annual video competition reports.

The Commission has received data from Warren Communications that suggests the 70/70 provision has been met. This data is the same type and from the same source as the data the Commission usually relies on in its annual video competition reports. (See Attachment). Warren is a recognized source of industry data, and the Commission has used Warren's data for its 70/70 calculations since we started reporting on these benchmarks in the Tenth Annual Report. We note that in both the Tenth and the Eleventh Annual Reports, the Commission reported that data from Warren showed that the second prong of the 70/70 test was 68.9 percent; in the Twelfth Annual Report, the Warren data showed that the second prong was 67.8 percent. We rely on Warren data because it provides information on subscribers and homes passed for cable systems with 36 or more channels as specified in the statute. In addition, Warren collects its data directly from cable television operators or individual cable systems to create a large database of cable industry information.¹ Warren states that it is the only research entity that directly surveys every cable system at least once every year, providing the most complete source of cable data.² In fact, the cable systems represented in Warren's database serve 96% of

¹ See Letter from Michael Taliaferro, Managing Editor, Television & Cable Factbook, to Commissioners Tate and McDowell, Nov. 15, 2007.

² *Id.*

all subscribers nationwide.³

Congress required the Commission to monitor cable's penetration into the television market in section 612(g) of the Act. Congress required that: (1) "at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States" and (2) "are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources."⁴ (70/70 test). As discussed below, several commenters, including CFA, MAP, and AT&T argue the test has been met. Others, primarily members of the cable industry and a cable financial analyst, argue it has not been met. For the first time this year, however, data from one of the sources the industry itself relies on, Warren Communications News (Warren), results in finding that the test has been met. As described below, this data appears to be the most reliable.

There is no disagreement among commenters that the first prong of the 70/70 test has been met. As in the *2005 Report*, commenters agree that cable systems with 36 or more activated channels are available to more than 70 percent of households within the United States.

There has been and continues to be considerable disagreement, however, on the precise level of availability, i.e., the number of homes passed by systems with 36 or more activated channels, and on the exact percent of households that subscribe to such systems.⁵ In the *2005 Report*, we found that alternative estimates yielded different conclusions about whether the 70/70 test had been met. Notably, the Commission explicitly recognized then that "[g]iven the circumstances and the fact that all available data sources are imprecise to some extent, it is possible that the second prong of the 70/70 benchmark has been met."⁶ Accordingly, the *2005 Report* requested further comment on the best methodologies and data for measuring the 70/70 thresholds and what, if any, additional action should be undertaken to achieve the statutory goals, should we find that the thresholds have been met.⁷

In the *2005 Report*, using data from the Census Bureau, we found that there were 107,850,000 households. Using Warren data we found that cable systems with 36 or more channels were available to 93,077,522 households. We therefore determined that 86.3 percent of homes were passed by cable systems with 36 or more channels.⁸ In

³ See John Eggerton, *McDowell, Tate Question 71.4% Cable-Subscribership Figure*, *Broadcasting & Cable*, Nov. 14, 2007.

⁴ 47 U.S.C. § 532(g). This provision was added to the Communications Act by the Cable Communications Policy Act of 1984 ("*1984 Cable Act*"), Pub. L. No. 98-549, 98 Stat. 2779.

⁵ See, e.g., Comments of AT&T, MB Docket No. 05-255 (filed Apr. 3, 2006); Comments of NCTA, MB Docket No. 05-255 (filed Apr. 3, 2006); Reply Comments of NCTA, MB Docket No. 05-255 (filed Apr. 25, 2006).

⁶ *2005 Report* at 2515 ¶ 35.

⁷ *2005 Report* at 2515 ¶ 36.

⁸ *2005 Report* at 2513 ¶ 32.

calculating this figure, the Commission noted that no commenter had provided any conflicting data, and thus concluded that "there appears to be no serious disagreement that this prong of the analysis has been satisfied."

Using these same data sources, current Census Bureau data indicate that there are 109,450,000 households, an increase of almost 2 million homes.⁹ And, according to Warren, 93,373,707 households are passed by cable systems with 36 or more channels, up almost 300,000 subscribers from last year. Thus, based on these data sources, we find that the percentage of availability of cable systems with 36 or more channels has declined slightly to 85.3 percent (93,373,707/109,450,000) of households.

With respect to penetration, the 2005 Report stated that Warren reported that 63,145,124 households subscribed to cable systems with 36 or more channels, resulting in 67.8% (63,145,124 /93,077,522) of households subscribing to cable systems with 36 or more channels.

Again using the same data sources, we find that, according to Warren, as of October 2007 there were 93,373,707 households passed by cable systems with 36 or more channels. Warren reports that there were 66,661,544 subscribers to such systems. Thus, by Warren's measures, 71.4 percent (66,661,544/93,373,707) of households passed by cable systems offering 36 or more channels subscribe to these systems.¹⁰

Commenters disagree about whether the second prong of the 70/70 test has been met. Some commenters urge us to look at other data sources. Of the available sources, Warren appears to be the most reliable data submitted. For the reasons described below, other data sources are not as suitable for this purpose.

Certain commenters urge us to look at Kagan or Nielsen. These companies, unlike Warren, do not report data for cable systems with 36 or more channels. Thus, neither Kagan nor Nielsen provide the precise data we need to perform the calculation specified by the statute. We also note that the Kagan estimate regarding the number of households passed by cable, 113,600,000, is greater than the U.S. Census Bureau estimate of 109,450,000 total households. As a result, while the Commission has cited Kagan data in previous Video Competition reports, it has always been clear that it should be used merely as a trend indicator, rather than as a precise estimate for any particular year.

As described in the 2005 Report, AT&T submits that the second prong of the 70/70 test has been met.¹¹ In doing so, AT&T mixes data from different sources. If possible, the calculation of the second prong, which compares the number of subscribers to the number of households passed, should use the same data source for both the

⁹ U.S. Census Bureau, *Census Bureau Reports on Residential Vacancies and Homeownership* (press release), July 27, 2007, Table 3. See <http://www.census.gov/hhes/www/housing/hvs/qtr207/q207press.pdf> (visited Oct. 10, 2007).

¹⁰ Warren Communications News, *Custom Report: from Television and Cable Factbook Datasets*, Oct. 10, 2007. E-mail from Michael Taliaferro, Assistant Publisher, Directories, WARREN COMMUNICATIONS NEWS to Dana Scherer on Oct. 10, 2007.

¹¹ 2005 Report, 21 FCC Rcd 2514 ¶ 33.

numerator and denominator. In this way, the numerator (number of cable subscribers) is derived from the same households that are used for in the denominator (number of households passed by cable systems), and a valid comparison can be made between the number of subscribers and the household passed. Using Warren data for both the numerator and denominator remedies the deficiency in the estimate submitted by AT&T.

Other commenters concur with AT&T that the second prong of the 70/70 test has been met. For example, CU uses various public sources to conclude that there are 63 million cable subscribers served by cable systems offering 36 or more channels and 88 million households passed by cable systems offering 36 or more channels. CU then relies on its own assumptions to arrive at its estimate of 71.6 percent (63 million/88 million = 71.6%) for the second prong of the 70/70 test.

MAP submits a report by Dr. Gregory Rose. Dr. Rose used data from ABI Research which reports 133.71 million households passed by cable systems and 99.61 million cable subscribers for North America (U.S., Canada, and Mexico). Estimates for the U.S. were derived by subtracting from the ABI data estimates for Canada and Mexico based on data from Paul Budde Communications. Dr. Rose calculates a total of 110.91 million households passed by cable systems and 85.99 million cable subscribers in the U.S. Thus, Dr. Rose estimates 77.53 percent (85.99 million / 110.91 million = 77.53%) for the second prong of the 70/70 test. However, the estimate is for all cable systems, not those that offer 36 or more channels. We note that the Communications Works of America agrees with MAP's conclusions.¹²

Alternatively Bernstein and NCTA argue that the second prong of the 70/70 test has not been met. Sanford C. Bernstein and Company believes that Warren undercounts the number of households passed by cable systems with 36 or more channels. However, Bernstein does not break out data for cable systems with 36 or more channels, as the statute requires. It derives an estimate of total households passed by cable, 106 million, based on SEC filings for companies that are publicly traded and those that issue public debt. In addition, it estimated subscriber counties for non-publicly traded companies based on data from SEC filings for companies that are publicly traded, filings for companies that issue public debt, MDC Corporation, and NCTA. It estimates that the total number of U.S. cable subscribers is 63,512,700 million households. We are not able to confirm the reliability of these estimates.

MAP and the Consumer's Union argue that publicly available documents undercount subscribers because they do not distinguish multiple dwelling units. Since 30 percent of Americans live in MDUs, the actual number of cable subscribers who subscribe to cable systems with 36 or more channels could be significantly higher. A higher number of subscribers results in a higher percentage of households who subscribe to cable systems with 36 or more channels.

In addition, NCTA submitted analysis of the Warren data by Michael G. Baumann. Dr. Baumann reviewed the on-line version of the Warren data and found 909 cable systems report subscribers but not homes passed and 401 systems report homes passed but not subscribers. Dr. Baumann estimates 66.1 percent for the second prong of

¹² See CWA letter dated Nov. 20, 2007.

the 70/70 test using only Warren data for cable systems that reported both homes passed and subscribers. We cannot verify that after NCTA has subtracted over 1300 systems, the remaining cable systems.

In the past, the Commission has referenced data from its price survey data or Form 325. This year, using data from the Price Survey would lead to a figure of 56.3 percent of households passed by cable systems offering 36 or more channels subscribe to these systems. Based on the data from the Form 325, the same figure would be 54 percent. These two sources represent extremely small samples and therefore cannot be relied upon for this purpose. The Commission currently sends questionnaires to only 781 cable systems for its Price Survey (representing only 10.2% of the total 7,634 systems in our database and collects Form 325 data from approximately 1,100 cable systems (representing only 14.4% of the total 7,634 systems in our database). In contrast, Warren sends questionnaires to all 7,090 cable systems, and states that it has data representing more than 96% of all cable subscribers.¹³ Indeed, as NCTA has argued, "Warren's TV Factbook and online database, not the Commission's Form 325 data, is relied upon by businesses and researchers for system-specific information about the cable industry."¹⁴

In addition, commenters, such as AT&T, the Association of Independent and Video Filmmakers et al., and CBA, argue that competitors to incumbent cable systems (e.g., overbuilders, DBS operators, and Internet providers) should be included in the calculation of the 70/70 test.¹⁵ DBS operators and Internet providers do not meet the statutory definition of a cable system and, therefore, should not be included in the 70/70 calculations. An overbuilder, however, meets the statutory definition of a cable system and, therefore, should be included in the 70/70 calculations. Warren includes most overbuilders in its estimates of cable subscribers, but does not include subscribers to one notable cable provider, Verizon.¹⁶ Doing so would increase the total number of cable subscribers to systems with 36 or more channels by 717,000, thereby increasing the percentage of households subscribing to systems with 36 or more channels to 72.1%.¹⁷

¹³ John Eggerton, "McDowell, Tate Question 71.4% Cable-Subscribership Figure," *Broadcasting & Cable*, 11/14/2007.

¹⁴ See NCTA Comments at 7, CS Docket 98-61 (filed June 30, 1998).

¹⁵ See AT&T Comments at 4, AIVF Comments at 5, and CBA Reply at 3-4 filed in response to request for additional information in the 2005 Report, 21 FCC Rcd 2515 ¶ 36.

¹⁶ See 2007 edition of Warren Television and Cable Factbook at D-7. Warren uses the Commission's definition of a cable system in Sec. 76.5 of our rules, including overbuilders. Moreover, this approach is consistent with our construction of the term in other cable related settings. In the "effective competition" test relevant to cable rate regulation under Section 623 of the Act, the Commission has distinguished between vacant and occupied housing units, declining to include vacant housing units within the term "households" as used in that analysis. Therefore, we conclude here that the calculation of the second prong should include only occupied housing units in the denominator and only subscribers from such units in the numerator.

¹⁷ Verizon 9-30-07, SEC Form 10-Q. Adding Verizon's subscribers does not increase the denominator because doing so would double count homes already passed by cable.

ATTACHMENT

WARREN NUMBERS PUBLISHED PREVIOUSLY IN 70/70 SECTIONS OF VIDEO COMPETITION REPORT

10th Annual Report (as of December 1, 2003):

- o 82,506,311 households passed by cable systems with 36 or more channels.
- o 56,859,607 households subscribe to cable systems to these systems
- o Prong II = 68.9% (56,859,607/82,506,311)

11th Annual Report (as of Oct. 19, 2004):

- o 84,415,707 households passed by cable systems with 36 or more channels
- o 58,177,885 households subscribe to these systems
- o Prong II = 68.9 % (58,177,885/84,415,707)

12th Annual Report (as of Sept. 21, 2005):

- o 93,077,522 households passed by cable systems with 36 or more channels
- o 63,145,124 of those households subscribe to these systems
- o Prong II = 67.8% (63,145,124/93,077,522)

DRAFT 13th Annual Report (as of Oct. 10, 2007)

- o 93,373,707 households passed by cable systems with 36 or more channels
- o 66,661,544 of those households subscribe to these systems
- o Prong II = 71.4% (66,661,544/93,373,707)