



November 28, 2007

MEMORANDUM TO CLIENTS

**Re: FCC Meeting Results: (1) Cable Operators Given 60 Days to Submit
Subscribership/Homes Passed Data; (2) New Leased Access Rates and
Procedures Adopted; and (3) No Action Taken on Revised Program Carriage
Rules or Broadcast Multicast "Lease/Must Carry" Proposal**

In a contentious late-night public meeting, the Federal Communications Commission yesterday took several actions of interest to the cable industry, but declined to move forward on other proposals put forward by Chairman Martin. First, the FCC voted to adopt the much-delayed 2006 "Annual Video Competition Report" but rejected Chairman Martin's efforts to include in that report a finding that cable industry penetration meets the so-called "70/70 test" which arguably would expand the FCC's authority to regulate the cable industry. Instead, the FCC voted to require each cable operator to submit subscribership and homes passed data within 60 days of the release of the report. Second, the FCC adopted revised leased access rules, including new reporting obligations, expanded discovery rights for leased access programmers, an expedited complaint resolution process, and a new, presumptive maximum leased access rate of \$0.10 per subscriber. Third, the FCC declined to act on the Chairman's proposed new rules regulating program carriage agreements between multichannel video programmer distributors and unaffiliated programming vendors. Fourth, the FCC also declined to act on the Chairman's proposal to allow broadcasters to lease multicast channel spectrum to minority groups who could then demand mandatory carriage from cable operators.

The 70/70 Test. Section 612(g) of the Communications Act provides that when cable systems with 36 or more activated channels are available to 70 percent of households in the United States and 70 percent of those households subscribe to cable, the FCC is authorized to promulgate "any additional rules necessary to promote diversity of information sources." While the actual scope of this grant of authority is the subject of debate (the provision appears as part of the statutory leased access provision, but consumer advocates argue that it gives the FCC expansive authority to adopt ownership caps, a la carte rules, national PEG standards, etc.), the focus of the debate over the past two weeks has been whether the statutory penetration threshold has been met. Relying on data from Warren Publishing, Chairman Martin claimed that the test had been satisfied and sought to include that finding in the 2006 Annual Video Competition Report.

Ultimately, however, Chairman Martin was forced to back down because of questions raised by Commissioners Adelstein, Tate and McDowell regarding the reliability and accuracy of the Warren data. As a compromise, the FCC voted to require each cable operator to provide the following subscribership and homes passed data: number of homes passed; number of homes passed with 36 or more activated channels; number of subscribers; number of subscribers with 36 or more activated channels. This information must be submitted both for 2006 and for 2007. The information will be due 60 days after the release of the text of the FCC's decision (which should occur within the next week or two) and we will provide you with an update at that time.

Apart from the fight over the 70/70 test, the findings in the 2006 Annual Video Competition Report are consistent with finding from the past few years: competition in the delivery of video programming services is providing consumers with increased choice, better picture quality, and greater technological innovation, but prices continue to outpace inflation.

Leased Access Reform. As expected, the FCC adopted new rules designed to promote the increased use of leased access capacity on cable systems. While the text of FCC's order has not yet been released, the new rules will:

- Establish a presumptive maximum leased access rate of 10 cents per subscriber per month, with a procedure for cable operators to challenge this rate on a case-by-case basis. The new rate will not apply to programming that consists predominantly of sales presentations or program length commercials.
- Condense cable operator response time for responding to leased access information requests – within three business days of an initial inquiry, a cable operator must provide the prospective leased access programmer with complete information about the leased access process and procedures for the specific cable system, the availability of time and leased access channels, the schedule and calculation of rates, and the acceptable methods of delivering leased access programming to the cable operator.
- Expedite the leased access complaint process including requiring the Media Bureau to resolve all leased access complaints within 90 days of the close of the pleading cycle.
- Eliminate the requirement for a complainant to obtain a determination of the cable operator's maximum permitted rate from an independent accountant before filing a complaint alleging a rate violation.
- Create a new discovery process, including a broad "relevance and control" standard for discovery requests.
- Create an annual reporting requirement for cable operators, with opportunity for leased access programmers to comment on the information provided.

Commissioners Tate and McDowell both dissented from the adoption of the new rules, arguing in particular that the specific proposals adopted were not adequately put out for public comment prior to adoption. Although Commissioner Adelstein also acknowledged that the new rate methodology was “invented by staff out of whole cloth without sufficient public input, independent review or any transparency,” he nonetheless agreed to support its adoption subject to a delayed effective date that will give parties 90 days to file petitions for reconsideration. The FCC also indicated that it will seek additional comment on whether to apply the revised rate methodology to programmers transmitting predominantly sales presentations or program length commercials.

Program Carriage. The agenda for yesterday’s meeting included an order, proposed by Chairman Martin, which would have adopted revised rules governing carriage disputes between multichannel video programming distributors and “independent” program networks. These rules reportedly would have made it easier for independent programmers to file complaints alleging discrimination and to obtain FCC-mandated carriage. The FCC, without any comment, did not act on this item. While some public reports indicate that the proposal has been shelved, others believe that it could resurface in the coming weeks.

Multicast Leasing/Must Carry. The meeting agenda also included an order that would have allowed certain minority and underrepresented groups to lease multicast channels from broadcasters and then demand mandatory carriage of those channels from cable operators. This item was formally pulled from the agenda yesterday morning, apparently after it became clear that it did not have the support of a majority of the Commissioners. Again, it is possible that this proposal will reappear in the coming weeks.

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Further details regarding the actions taken (and not taken) by the Commission at yesterday’s meeting are likely to come to light in the coming days and when the texts of the decisions and further notices are released. We will be sure to inform you of relevant information as it becomes available. We would be pleased to respond to any questions regarding these matters.

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