January 21, 2009

MEMORANDUM TO CLIENTS

Re: As Chairman Martin Departs, FCC Issues a Flurry of Items of Interest to Cable Operators (Including Items Relating to PEG Migration, Cable Rates, and Net Neutrality).

On Thursday, January 15, 2009, Chairman Kevin Martin announced that he was resigning from the FCC, effective January 20, 2009. Over the next 96 hours, the Commission's Bureaus, presumably at the direction of the outgoing Chairman, engaged in a flurry of activity, issuing a number of long-delayed and/or controversial items. What action can and will be taken by the cable industry or by the other members of the Commission with respect to any of these items is not yet clear. A brief summary of the most significant of the items released in the final days of the Chairman Martin's term follows:

PEG Migration/Switched Digital Video – On January 19, 2009, the FCC's Enforcement Bureau issued Notices of Apparent Liability ("NAL) and/or Forfeiture Orders to nine cable operators (Bright House, Cablevision, Charter, Comcast, Cox, Harron, Mid-Continent, Suddenlink, and Time Warner) arising out of the Commission's investigation of the "migration" of analog basic service tier channels to a "digital tier" and/or the deployment of switched digital video technology. All nine companies received NALs proposing forfeitures of $25,000 apiece for failing to fully respond to an Enforcement Bureau letter of inquiry issued in October 2008 demanding detailed information allegedly related to analog-to-digital migration. The companies were given 10 days to fully respond to the original inquiry or face further enforcement action. In addition, a number of the companies received one or more additional NALs for amounts ranging from $7,500 to $22,500 for failing to give the allegedly required thirty days advance written notice to subscribers before migrating channels from analog to digital. And Time Warner and Cox each received several NALs and Forfeiture Orders, ranging from $7,500 to $25,000 for various alleged violations of Commission rules arising out of the companies' deployment of switched digital video service.

In addition, also on January 19, 2009, Chairman Martin sent a letter to Senate Commerce Committee Chairman Jay Rockefeller and Ranking Member Kay Bailey Hutchinson informing them of the issuance of NALs to the companies that allegedly failed to respond to the FCC's investigation of analog-to-digital migration. Chairman Martin's letter was sharply critical of the practice of migrating channels, alleging that because the migrated channels may not be available to subscribers without additional equipment, the practice forces those subscribers either to pay more if they wish to continue watching the same channels that they were receiving before the migration, or to pay the same amount but receive less programming. Chairman Martin's letter to

Senators Rockefeller and Hutchinson also cited statistics purporting to show that cable rates have increased dramatically over the fifteen years.

Finally, in a seemingly related action, Monica Desai, Chief of the Media Bureau, sent a letter (dated January 18, 2009) to Joe Van Eaton, counsel for the City of Dearborn, Michigan in a federal district court lawsuit over the legality of Comcast's decision to "migrate" certain PEG channels from the analog basic tier to a digital extension of basic. In November 2008, the judge in that case had issued an order identifying seven questions on which it sought guidance from the FCC. Those questions apparently were presented to the FCC in the form of a request for Declaratory Ruling by the plaintiffs. Although this Declaratory Ruling request apparently has not yet been put on notice for public comment, Ms. Desai's letter indicates that she has drafted responses to the issues raised by the court and has presented them to the FCC for review. Notwithstanding the fact that the FCC has not yet decided how to proceed, Ms. Desai's letter offers her "view" on the legality of the migration of PEG channels from analog basic to the digital extension of basic, stating that "it is my view that Congress contemplated only one basic service tier, to be provided on a non-discriminatory basis to all subscribers, and that if a provider chooses to convert PEG channels, it must convert the entire basic service tier, whether or not the cable system is subject to effective competition." Ms. Desai's letter, which she apparently intends to be forwarded to the court by plaintiffs' counsel, takes a position that we believe is highly questionable as a matter of law.

Annual Competition Report/Survey – On Friday, January 16, 2009, the FCC finally issued the long-delayed 13th Annual Competition Report. This 200 page report, which covers the period through June 30, 2006, was not adopted until November 2007 (more than 21 months after the previous annual report). The FCC also has finally issued the text of its Notice of Inquiry (also originally adopted November 27, 2007) soliciting information and data to be used in the preparation of the 14th Annual Competition Report, which will cover the period through June 30, 2007. Comments are due on February 27, 2009; reply comments will be due on March 27, 2009.

70/70 Data Collection – One of the principal causes of the delay in the release of the 13th Annual Competition Report was a dispute within the FCC over the so-called "70/70" test set forth in Section 612(g) of the Communications Act. That provision states that when cable systems with more than 36 activated channels are available to 70 percent of households and 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." While this provision is found in the section of the Communications Act dealing with commercial leased access, some parties contend that it gives the FCC almost unbridled authority to adopt new regulations, including *a la carte* regulations. Moreover, there is substantial disagreement over how the test is to be applied and whether, based on the available data, it has been met.

On January 16, 2009, the Media Bureau published for comment a "Cable Subscriber Survey" that it proposes to use in order to collect data directly from the cable industry to determine whether the 70/70 threshold has been met. The proposed form would have to be filed for 2006 and 2007 by each cable operator for each "physical system identifier" ("PSID") and

seeks information, by zip code, for the number of homes passed, total subscribers, and total video subscribers. Comments on the proposed form are due February 17, 2009; reply comments are due March 14, 2009.

Cable Price Survey/Public Notice Regarding LFA Rate Regulation of New Entrants – Another long-delayed item issued last week was the annual cable price report. The FCC had failed to issue this annual report for several years. The report issued last Friday covered rates dating back to 2005. Notably, in a break with past practice, the report was issued by the Media Bureau on delegated authority, rather than by the full Commission. The report's findings reflect Chairman Martin's oft-repeated claims that DBS competition does not constrain cable rates and that cable rates have more than doubled over the past decade, even as the prices for all other communications services regulated by the FCC have dropped.

In a separate action relating to cable rates, the Media Bureau issued a Public Notice (i) clarifying that local franchise authorities certified to regulate the rates of an incumbent cable operator may not regulate the rates of a new entrant without filing a separate certification request and (ii) indicating that, in most instances, an LFA cannot rely on the presumption that a new entrant is not subject to effective competition as a basis for seeking such certification.

Net Neutrality Inquiry – Last year, in connection with a dispute over its broadband network management practices, Comcast submitted to the FCC certain information regarding its deployment of a "protocol-agnostic network management practices" and its plans to comply with a Commission order regarding its previous network management approach. In a January 18, 2009 letter jointly signed by the Chief of the Wireline Competition Bureau and the FCC's General Counsel, the FCC has raised questions as to whether Comcast is continuing to differentiate between services provided over its network by third parties and services that it provides itself. In particular, the letter cites information from Comcast's website suggesting that customers who place VoIP calls over Comcast's network at times of network congestion may experience diminished quality of service, while customers using "Comcast Digital Voice" will not encounter such quality issues because Comcast Digital Voice "is a separate facilities-based IP phone service" unaffected by the new network management practices.

The letter demands an explanation from Comcast as to why it omitted from its filings with the FCC a description of the effects of it network management practices on Comcast's voice service compared to it effect on competing voice services accessed over Comcast's network. The letter also indicates that, on the basis of Comcast's characterization of its voice service as a separate "facilities-based" service, cause may exist for regulating Comcast's VoIP service as telecommunications service under Title II of the Communications Act rather as a largely unregulated "information service."

Cablevision Set-top Waiver Extension – On January 16, 2009, the Media Bureau granted Cablevision an extension of a previously granted waiver of the ban on the deployment of integrated set-top boxes. In January 2007, Cablevision was granted a two-year waiver allowing it to use a non-compliant "SmartCard" solution while it transitioned to a compliant separated security technology. Last November, Cablevision asked for an extension of that waiver until

December 31, 2010 in order to give it time to deploy an "open downloadable" security solution. The Media Bureau, over the objections of the CEA, which contended that Cablevision's proposed downloadable security approach was not truly "open" and did not meet the requirement of "common reliance," granted the extension, subject to $5,000/day penalties if Cablevision fails to meet a certain schedule of "milestones" in the deployment of its proposed downloadable security solution.

We would be pleased to respond to any questions regarding these matters.

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