



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

January 19, 2009

The Honorable Henry A. Waxman, Chairman
Committee on Energy and Commerce
United States House of Representatives

The Honorable Joe Barton, Ranking Member
Committee on Energy and Commerce
United States House of Representatives

Dear Chairman Waxman and Ranking Member Barton:

Enclosed please find a response to the recent report of the Majority Staff of the
Committee on Energy on Commerce.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Martin", written over a horizontal line.

Kevin J. Martin

**Response of FCC Chairman Kevin J. Martin to
Majority Staff Report of House Energy and Commerce Committee**

I am writing to respond to the allegations and conclusions contained in the Majority Staff Report that was publicly released on December 9, 2008. In my view, the Majority's report ignored relevant information, contained numerous errors and lacked substance.

It is critical to note that the Majority staff did not find any violations of rules, laws or procedures. In fact, I followed the same procedures that have been followed for the past 15 years by FCC Chairmen, both Democratic and Republican alike. Additionally, in nearly all of the instances cited in the report, I acted to put the interests of consumers ahead of those of the industries we regulate. For example, I make no apologies for my commitment to ensuring that deaf and hearing impaired Americans have equal access to communications services and for advocating on behalf of consumers who have seen their cable bills more than double over the last decade. Indeed, most of the criticisms contained in the Majority Staff Report reflect the vehement opposition of the cable and wireless industries to my policies to serve and protect consumers.

I feel it is necessary to respond to and correct many of the staff report's errors and mischaracterizations.

Telecommunications Relay Services (TRS)

The Majority staff alleges that under my chairmanship the Commission spent too much money in order to provide telecommunications services to the deaf and disabled. I disagree. I believe it is in the public interest to ensure that the disabled are able to participate in 21st Century communications and take advantage of changes in technology. Therefore, I have consistently advocated initiatives to expand the ability of people with disabilities to access communications services.

The issue discussed in the Majority Staff Report concerning the amount of compensation received by providers of video relay services (VRS) primarily involves a policy difference. Specifically, while the Majority Staff Report claims that the TRS Fund is only supposed to compensate providers for their marginal costs of providing service, the Commission rejected that interpretation of the statute long before I became Chairman and instead interpreted the statute to allow for the reimbursement of additional costs, such as those for installation, equipment and long distance calls. The Commission, as far back as Chairman Kennard, interpreted the reasonable cost language of the statute as including more than the Majority staff referred to as marginal cost. And the basic cost rules were adopted without dissent under Chairman Powell.

I appreciate that the Majority staff may disagree with the Commission's interpretation of the statute and believe instead that deaf individuals should be required to pay for such costs. But a fair examination of the issue would recognize that this disagreement is with the Commission, rather than me personally, and has little to do with

reimbursement decisions for TRS made in recent years. The Majority Staff Report also omits several critical facts regarding the Commission's recent decision setting compensation rates for video relay services (VRS).

First, contrary to the Report's implication, compensation rates for VRS have gone down rather than up during my tenure. When I became Chairman, the compensation rate for all VRS providers was \$7.293 per monthly minute of use. As a result of reforms instituted during my time as Chairman, the rate now applicable to the largest VRS providers (in terms of monthly minutes of use) has been lowered to \$6.30 per monthly minute of use, a decrease of more than ten percent. To be sure, as reflected in the Report, one CGB staffer believed that VRS compensation rates should be lowered even further. However, many advocates for and members of the deaf community personally contacted me and expressed strong opposition to further cuts in funding for VRS, arguing that such cuts would be "devastating"¹ to deaf individuals and would "effectively cut[] VRS availability for the deaf."² In fact, the Commission received thousands of e-mails objecting to further cuts, and many of these e-mails were produced to the Committee. Given my commitment to expanding communications services for disabled Americans, I was unwilling to risk harming deaf individuals by instituting the drastic rate cuts advocated by the CGB staffer quoted in the Report.

Second, the Commission unanimously adopted the Order in question setting rates for VRS, and no information regarding VRS providers' expenses was withheld from Commissioners in making that decision. Indeed, on July 19, 2007, as documented in records provided to the Committee, the Consumer and Governmental Affairs Bureau (CGB) provided Commissioner Copps's office with detailed projections regarding providers' costs as well as the amount of profit that would be earned by the largest provider, Sorenson, under various proposals.³ Similarly, on October 15, 2007, as documented in records provided to the Committee, CGB provided Commissioner Adelstein's office with information concerning Sorenson's actual cost of service.⁴ Notably, after receiving this information, both Commissioner Copps and Adelstein voted for and praised the Order in question.⁵

Moreover, it should be noted that the staffer in question believed that the "only solution" to the problem he identified was to adopt an "entirely new approach," and he stated that the only approach that could have been implemented absent Congressional

¹ See Appendix, Attachment 1.

² See Appendix, Attachment 2.

³ See Appendix, Attachment 3.

⁴ See Appendix, Attachment 4.

⁵ See, e.g., *id.* at 20193 (Statement of Commissioner Copps) (by adopting tiered-rate approach for VRS, "the Commission encourages competition for services while recognizing that there are efficiencies when larger providers have achieved economies of scale"); *id.* at 20194 (Statement of Commissioner Adelstein) (noting that Order addresses variety of open questions about compensation rates for VRS and other services and commending Chairman and Consumer and Governmental Affairs Bureau for their "efforts to improve our management of the fund through this Order").

action was to require deaf users to pay for VRS services. In particular, he argued that deaf customers should be required to pay "for equipment, installation, maintenance, extra call features, [and] long distance."⁶ I disagreed with this conclusion and stand by my decision not to impose new charges on deaf Americans.

FCC's A La Carte Report and Annual Video Competition Report

While the Majority staff criticizes me for being heavily involved in the production of a report ("the Further Report") that pointed out mistakes made in an earlier Media Bureau report on a la carte cable prices and attempting to manipulate data in order to give the Commission greater regulatory authority to promote competition and diversity, the Majority Staff Report sets forth an incomplete picture of the internal processes that produced both reports and is entirely disinterested in whether the reports themselves were factually accurate. I have consistently advocated for both greater competition in the cable marketplace as well as more consumer choice in picking programming packages.

A La Carte Report

Turning to the A La Carte Report first, the report does note that the initial A La Carte Report "was not required by statute or regulation" and it "was not circulated to the full Commission for review, but was issued at the direction of Chairman Powell." There was no requirement or expectation that the report be put out for public comment or approved by the full Commission. The Further Report criticized by the Majority staff was produced by Commission staff under the same circumstances and adhering to the same process as the initial A La Carte Report.

The Further Report was produced by Commission staff to correct a mistaken calculation and the unsupported problematic assumptions in the initial A La Carte Report. The mistaken calculation I am referring to was not an obscure or minor error but was a mistake that went to the heart of the Initial Report's conclusions. Specifically, the report made a mistake in calculating the number of channels that the average consumer would receive without an increased cable bill under a la carte.

In a letter to the Commission's Chief Economist prior to the issuance of the Further Report, Booz Allen Hamilton (which produced the data on behalf of the cable industry that also formed the basis of the Initial Report,) acknowledged, "revenues from the broadcast basic tier should have been excluded from the operators video average revenue per user (ARPU) before calculating the average cost per channel under a la carte." Thus, both BAH and the Initial Report overstated the cost per channel leading to an incorrect conclusion that consumers would pay more for fewer channels under a la carte. Just correcting this one mathematical error changed the basic finding of the Initial Report. When the price per channel was accurately calculated, in three out of the four scenarios examined by BAH, consumers fared better under a la carte. The Further Report did not conclude that every consumer would pay less for cable under a la carte. Rather it

⁶ House Report, Exhibit 4 at 2.

concluded that given greater choice in the purchasing of channels, consumers would have the option to pay less (and often would pay less). I stand by that conclusion.

The Majority Staff Report also ignores the findings of Congress's own experts. The Congressional Research Service agreed there were significant problems with the BAH study and the initial A La Carte Report. Specifically, CRS points to the same issue addressed by the Further Report; the "breakeven" number of channels a consumer could buy without seeing an increase in their cable bill. CRS concludes, "[I]t may well be that the Booz Allen study and the Initial report overstate the negative impact that a la carte pricing may have on both program networks and operators and, hence, the extent to which that effect might raise a la carte prices. It is not possible to estimate how significant this overstatement might be, but it suggests that the 'breakeven' number of a la carte networks might be greater than indicated by the Booz Allen Study or the Initial Report." CRS goes on to note that corrections to the BAH study have yielded "significantly lower a la carte prices."

According to CRS, "Booz Allen's pessimistic projection that half to three quarters of emerging networks would fail, which is based in part on inflated \$4 to \$5 a la carte prices, appears to be an overstatement." The Majority Staff Report accuses me of being outcome driven, claiming that "the outcome of the new report was predetermined," but took no issue with the Initial Report that was based almost entirely on inaccurate data supplied by the cable industry, which certainly had a significant interest in influencing Congress. It is also surprising, given the error acknowledged by Booz Allen and CRS, that the Majority Staff Report claims that Media Bureau staff believed that the Initial Report "contained what they believed to be the best analysis of the issue." This is clearly not true, and had the Majority staff conducted a complete examination of the record, it would have revealed that both Media Bureau staff as well as the Commission's Chief Economist recognized that there were several problems with the Initial Report.

The Majority Staff Report also selectively quotes from e-mails in order to create the misleading impression that the conclusions of the Further Report were manipulated over the objection of staff. In particular, while the Majority staff makes it appear as though Catherine Bohigian told Media Bureau economist Daniel Shiman to stop working on the Further Report because she disagreed with his conclusions, further e-mails reveal that such an impression is entirely inaccurate. Namely, they indicate that there was no disagreement between Ms. Bohigian and Mr. Shiman and that Ms. Bohigian directed him to keep working ("OK, please work with Sarah on the consequences/conclusions. Thanks for all the hard work.").⁷ The Majority staff also distorts the substance of Mr. Shiman's views on providing consumers with a wider range of choice of programming packages. For example, while the Majority staff accurately notes that Mr. Shiman voiced the view that "pure a la carte would most likely raise cable bills, with fewer channels delivered," it omits Mr. Shiman's further view that he was "much more optimistic about the impact of mixed bundling, which allows MVPDs to continue offering bundles at a good price if

⁷ See Majority Staff Report, Exhibit 11.

consumers want it, and of the themed tiers and limited a la carte (i.e., flexible small bundles.”⁸

Annual Video Competition Report

In enacting the Cable Television Consumer Protection and Competition Act of 1992, Congress sought to promote video competition. Competition benefits consumers by delivering lower prices and better services to consumers. In particular, Congress was concerned that cable operators were not subject to sufficient competition and that they could therefore exercise market power to the detriment of consumers and independent programmers. Congress thus sought to provide the Commission with greater regulatory authority in the event that future developments provided cable operators with greater market power. Specifically, if the 70/70 test set forth in section 612(g) of the Communications Act is met (meaning that cable systems with 36 or more channels are available to more than 70 percent of American households and are subscribed to by more than 70 percent of households to which such systems are available), “the Commission may promulgate any additional rules necessary to promote diversity of information sources.”

Unfortunately, Congress’s concerns about the exercise of market power by cable operators has proven to be well-founded as cable subscribers have seen their bills double over the last decade. I therefore remain concerned that there is insufficient competition in the video market and that consumers are literally paying the price.

The Majority staff’s assertions that I relied on “weaker” data and “withheld” other data from the other Commissioners in the development of the 13th Annual Video Competition Report is not consistent with the facts. I did not “manipulate” data in the draft report that I circulated to the other Commissioners but rather used the data I considered to be most reliable to determine the level of competition in the cable industry.

In determining whether the 70/70 test has been met, the Majority staff itself notes, “There is nothing in the relevant statute or regulations that requires the FCC to use any particular data in assessing the level of competition on the cable television industry.” And in my public statement at the time the report was adopted and in a letter to Ranking Member Barton, I provided a detailed explanation of why I felt data from Warren Communications to be best.⁹ In my letter I noted, “the Commission has used Warren’s data for its 70/70 calculations since we started reporting on these benchmarks in the Tenth Annual Report.” I went on to explain that “we rely on Warren data because it provides information on subscribers and homes passed for cable systems with 36 or more channels,” the specific statistics necessary to determine whether the 70/70 test set forth in section 612(g) has been met. Similarly my public statement noted, “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

⁸ See *id.*

⁹ See Appendix, Attachment 5.

directly from cable television operators or individual cable systems to create a large database of cable industry information.” I strongly disagree with the Majority Staff Report’s characterization of the Warren data as being “weaker” as does the cable industry itself. Indeed, NCTA argued to the Commission in years past, “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.”¹⁰ In addition, 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 that the test had not been met.

The Majority staff criticizes the draft video competition report because it excluded data from Kagan, Nielsen, the Cable Price Survey and the Commission’s Form 325. As I explained publicly at the time, however, Kagan and Nielsen, unlike Warren, do *not* report data for cable systems with 36 or more channels which are the systems Congress directed the Commission to examine. Thus, neither company provides the precise data we need to perform the calculation specified by the statute. Moreover, 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.

Similarly, there are significant limitations to data derived from the Commission’s Cable Price Survey and Form 325. These two sources represent extremely small samples and therefore cannot be relied upon for the purpose of determining whether the 70/70 test has been met. 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.

Additionally, the Majority criticizes that all other data was withheld from the other Commissioners until the night before the Video Competition Report was scheduled for a vote. **Rather than being “withheld” from the other Commissioners, the simple fact is that no other Commissioner requested the other data until the night before the vote. Despite the fact that they had the draft item for consideration for several months, it was only the night before the vote that any Commissioner first asked to see the other data.** Had the other Commissioners asked for the other data earlier, they would have received it promptly (as they did when they asked for it the night before the meeting).

Moreover, in the draft report that was circulated, I explicitly included an explanation as to why the Warren data was more reliable than the Kagan data.

¹⁰ NCTA Comments at 7, CS Docket 98-61 (filed June 30, 1998).

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.”

I have already responded to Congress many times on this issue. In particular, I have acknowledged, in a letter to Chairman Dingell, that “[i]n 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.”¹¹

NRIC Advisory Subcommittee Report on 911 Services and Hatfield Report on Enhanced 9-11 Services

The Majority staff report alleges that my office suppressed a report produced by subcommittee 1B of NRIC, which was charged with recommending improvements to emergency and Enhanced-911 services. As the Majority staff notes, I have long supported initiatives to ensure consumers can quickly and reliably access 911 in times of emergency whether they are using a wireline, wireless or VoIP phone. Indeed, some of the issues in the report had already been addressed by the Commission.

In any event, as the staff notes, the report is actually publicly available. It is also important to note that the Majority staff concluded in the report that “there is no requirement that the FCC produce such a report and it appears that withholding the report has no direct regulatory implications.”

In addition, it is alleged on page 16 of the report that I improperly terminated a report on E-911 wireless services by outside consultant Dale Hatfield. The Majority Staff Report states, however, that I have “strongly supported mandatory implementation of E-911 services.”

In conclusion, the Majority staff clearly noted on page 17 that the Commission was justified in canceling Mr. Hatfield’s contract and that there was “no evidence that Chairman Martin canceled the contract because he disagreed with the findings.” Specifically, the report concludes that “Mr. Hatfield made his May 20, 2006, presentation to the Wireless Bureau more than two months after the final report was due, but never produced the final report, even though he was paid most of the money due under the task order. Under the circumstances, it appears that Chairman Martin was justified in canceling the contract.”¹²

¹¹ See Appendix, Attachment 6.

¹² See also Appendix, Attachment 7 (Letter to Congressman Doyle).

Broadband over Powerline (BPL) Engineering Reports

The Majority staff criticizes me for supposedly withholding from the public portions of engineering reports addressing whether Broadband over Powerline (BPL) technology can cause interference to radio signals. First and foremost, the Majority staff failed to share a key fact about this issue; namely, that the Commission orders in question were not issued by me but were issued under my predecessor, former FCC Chairman Michael Powell.

The Office of Engineering and Technology's (OET) decision on the American Radio Relay League's (ARRL) FOIA request for the reports in question was issued **before I became Chairman**. Similarly, the rules establishing the technical requirements for the deployment of BPL technology were promulgated **before I became Chairman**.¹³

Finally, as Chairman, I have consistently permitted the Commission's Office of General Counsel (OGC) to defend in court all decisions made by the Commission under the previous Chairman, even when I disagreed with those decisions.

Bright House Networks v. Verizon California

The Majority staff alleges that I improperly reversed a draft Enforcement Bureau decision finding that Verizon had violated Customer Proprietary Network Information (CPNI) rules and instructed the Enforcement Bureau to find in favor of Verizon. While the Majority staff claims that both the Wireline Competition Bureau and the Office of General Counsel agreed with the draft Enforcement Bureau decision, that assertion is incorrect. Neither the General Counsel nor the Wireline Bureau Chief supported the Enforcement Bureau's proposed decision.

I did in fact disagree with the Enforcement Bureau's proposed decision, and most press reports about December's oral argument on this case in the U.S. Court of Appeals for the District of Columbia Circuit indicate that the judges seemed to be sympathetic to my position and perspective. Moreover, as the staff acknowledges, there is nothing improper with me doing so. Indeed, the Majority Staff Report concludes that "Chairman Martin certainly had the right to do so."

Unfortunately, a majority of the Commission voted in this case to allow complainants--players providing a bundle of services over one platform (cable VoIP)--to gain an advantage over their competitors--players providing those same bundled services over a different platform (traditional telephone service). Specifically, they decided to prohibit some companies from marketing to retain their customers, even though the marketing practices prohibited today are similar to the aggressive marketing techniques engaged in by the complainants themselves (when they provide cable video service). To reach this result, they in essence created a new law, holding that these complainants are "telecommunications carriers" for purposes of obtaining this competitive advantage, but

¹³ See Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, 19 FCC Rcd 21265 (2004)

that they are not “telecommunications carriers” for other purposes, such as complying with the obligations of “telecommunications carriers.”

I have consistently maintained that it is important to create a regulatory environment that promotes competition and investment, setting rules of the road so that all players can compete on a level playing field. I am concerned that Commission’s decision here promotes regulatory arbitrage and is outcome driven. It could thwart competition, harm rural America, and frustrate regulatory parity. I stand by my position on this issue and remain hopeful that the courts will have the same concerns and reverse the Commission’s decision.

The Majority Staff Report also insinuates that an unspecified source outside the Commission may have provided my office with a draft revised decision. This allegation is false. Indeed, the Majority Staff Report admits that it found no evidence to support the allegation. The report instead leaves the matter for “speculation” based on the “notion” that no one in my office was capable of producing such a “well-written” decision. I am very proud of the quality of the work produced by attorneys within my office as well as attorneys throughout the Commission for the last four years, and any implication that “well-written” decisions must originate outside of the Commission is an insult to the Commission’s dedicated professionals.

Personnel Decisions and Agency Management

The Majority staff complains that I have engaged in “micromanagement” and transferred various employees.

First, the Majority Staff Report recognizes that “[t]he Chairman of the FCC is clearly authorized by statute to manage the staff and day-to-day operation of the Commission.” With respect to personnel, the Majority staff also concludes that the practice of transferring employees “took place under Chairman Powell and earlier chairmen.” Indeed, I have followed the same procedures that have been followed for at least 15 years, by FCC Chairmen, both Democratic and Republican alike. As Chairman, I have consistently sought to place the best person in each position of significant responsibility at the Commission. I make no apologies for doing so and believe that the record over the last four years demonstrates that I have made wise choices. Indeed, it is striking that the Majority staff nowhere identifies even a single specific personnel decision that was unwarranted.

Furthermore, with respect to the charge of “micromanagement,” the Commission has been very productive under my chairmanship, issuing hundreds of decisions, and I stand by our record of accomplishment.¹⁴ The Majority staff also criticizes the fact that Media Bureau economists were directed to stop working on “unapproved” research and to work only on “official projects.” I find this criticism to be rather remarkable. It is the

¹⁴ See Appendix, Attachment 8 (“Moving Forward: Driving Investment and Innovation While Protecting Consumers”)

job of Media Bureau economists to perform official FCC work assigned by their supervisors; it is not their job to use Commission resources to do "unapproved" work that they might find interesting. It was thus entirely appropriate for the front office of the Media Bureau to remind economists that they should only work on "official projects" during work hours.

White House Demands for Local Television Programming – In Times of Emergency

The Majority staff complains that a White House official contacted the Commission to ask about DIRECTV providing certain local television programming to the White House as part of its satellite television service. I have made national security and homeland security a top priority for the Commission and did ask the staff to work with DIRECTV to try to ensure that the White House Situation Room had access to the information they would need during an emergency and to communicate that the Commission's rules limiting the ability to bring distant broadcast signals into another market were not an impediment to doing so.

In contrast, the Majority staff ignores the national security issues. This was not a complaint about simply getting local broadcast channels into the White House for entertainment purposes. Rather, the White House Situation Room, the operational nerve center in times of national emergency, was concerned about being able to access local broadcast channels during an emergency. For instance, if a bomb was detonated in San Francisco or an earthquake occurred in Los Angeles, it would be critical for our national security and homeland security officials to have instant access to the most current and up-to-date information on the ground. The Commission conveyed to DIRECTV that national security was our top priority and thus making such information available for national security and homeland security purposes was critically important.

The T-Mobile Enforcement Action

The Majority staff alleged that I improperly intervened to reduce a fine imposed on T-Mobile regarding complaints related to the National Do Not Call Registry. The Majority staff also questioned whether it was appropriate for the FCC to notify T-Mobile in advance that a fine was under consideration.

The Office of the FCC Chairman routinely works with the Enforcement Bureau in enforcement cases. It is common for the Commission to notify a party of a potential enforcement action to reach a settlement of the case. It is impossible to reach a consent decree without discussing the scope of the violation and the range of penalties; in fact it is a routine part of the legal process.

Derek Poarch, Chief of the Public Safety and Homeland Security Bureau

The Majority staff alleges that Chief Poarch "routinely violated Government-travel regulations" and maintained inaccurate time and attendance records. I am not

aware of the basis of any of these allegations nor have I been provided with any evidence to support them.

Conclusion

I respectfully request that this official correspondence and attachments be entered into the record.

Appendix

Attachment 1

To Chairman Martin;
Commissioners Tate, Copps and Adelstein

I am Deaf user of relay communications services. I strongly urge you to increase funding for these Services and not cut funding. These services are important to me and to other Deaf individuals, our families and co-workers. Cuts would be devastating. I want more Deaf people to use TTY, VRS and IP Relay, not less.

RECEIVED & INSPECTED
JUN 22 2007
FCC - MAILROOM

ELEANOR ^{AND} RITCHEY } BOTH DEAF!
FERMAN L. RITCHEY }
Print Name } These services indeed are very important to us and other deaf individuals. Please, please don't cut funding. Many Thanks!

Attachment 2

ORIGINAL FILED/ACCEPTED

NOV - 2 2007

Federal Communications Commission
Office of the Secretary

CG Docket No. 03-123, AB VRS

10/25/2007 8:21:25 AM - Email Acknowledgement sent to delusker@aol.com.

DELUSKER@aol.com wrote on 10/24/2007 8:37:37 AM :

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

I am a hard-of-hearing person and use Video Relay Service (VRS) to communicate with other deaf and hard-of-hearing individuals. I was appalled to learn that the FCC staff is intent on drastically cutting the VRS rate, and effectively cutting VRS availability for the deaf. Instead of seeking to limit the number of deaf people with VRS access, the FCC should do everything in its power to make VRS available to more deaf people.

I, along with other hearing and Deaf individuals, use these services in both my work and personal life. It is an important way in which I/we communicate. I urge you to do everything you can to make VRS service available to the many deaf people who currently do not have access to this vital, life-changing service.

The VRS rate should encourage the VRS providers to:

- * Serve more deaf people, not discourage them from reaching out to more deaf people
- * Provide interpreter training programs so that there will be an adequate number of qualified interpreters for VRS and the local Deaf communities
- * Provide service and technology improvements, such as the development of new videophone equipment, fulfilling the Americans with Disabilities Act (ADA) mandate of functionally equivalent telecommunications services

I, along with other hearing and deaf individuals, their families and coworkers, depend on VRS and other relay services.

Please stop any VRS program cuts and fulfill the mandate of the Americans with Disabilities Act (ADA) to provide deaf people with functionally equivalent telecommunications services.

Sincerely,

Diana E. Lusker

See what's new at AOL.com <<http://www.aol.com?NCID=AOLCMP00300000001170>> and Make AOL Your Homepage <<http://www.aol.com/mksplash.adp?NCID=AOLCMP00300000001169>> .

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Attachment 3

Matthew Berry

From: Ian Dillner
Sent: Wednesday, April 23, 2008 11:00 AM
To: GR9-VRS
Subject: FW: Answers to questions regarding TRS cost methodology item (CLAS 070202)
Attachments: TRS Rate order Copps questions - 7.18.07.doc

From: Nicole McGinnis
Sent: Thursday, July 19, 2007 4:47 PM
To: Ian Dillner
Cc: Cathy Seidel
Subject: FW: Answers to questions regarding TRS cost methodology item (CLAS 070202)

as sent to Scott. Thanks!

*** Non-Public: For Internal Use Only ***

From: Nicole McGinnis
Sent: Thursday, July 19, 2007 4:47 PM
To: Scott Deutchman
Cc: Cathy Seidel; Thomas Chandler; Pam Slipakoff
Subject: Answers to questions regarding TRS cost methodology item (CLAS 070202)

Hi Scott -

We wanted to respond to the questions you raised when Cathy and I met with you earlier this month regarding the relay cost recovery methodology order that is on circulation. Our answers are attached. We hope this information is helpful, and please let us know if you have any additional questions.

Thanks!

Nikki
x 2877

*** Non-Public: For Internal Use Only ***

7.18.07

Responses to questions from Commissioner Copps' office on the proposed 2007 TRS Cost Recovery Methodology Order (CLAS No. 070202)

(1) What is Sorenson's profit margin if we adopt the three tiers as suggested by Snap, Sorenson and Sprint Nextel? [tier 1: 50,000 minutes and under; tier 2: 50,001 to 500,000 minutes; tier 3: over 500,000 minutes]

The current regulations and Commission orders state that providers are entitled to their reasonable actual costs of providing service. Commission orders also provide that such costs do not include profit, or a markup on expenses, but rather providers are entitled to an 11.25% rate of return on capital investment. As a practical matter, because the provision of TRS is labor, not capital, intensive this rate of return generally is not a significant portion of the providers' reasonable costs.

Sorenson provides more than 4 million VRS minutes a month. Under the SVRS tiered proposal, all providers get the highest rate for their first 50,000 minutes (\$6.77), the second highest rate for their next 450,000 minutes (\$6.50), and the lowest rate for minutes above 500,000 (\$6.30). There is no way to definitively assess how much profit Sorenson may receive under the proposed rate plan because we would need an accurate estimate of what their costs of providing service will be and how many minutes they will provide. There are, however, several ways we can roughly estimate profit.¹

One way to estimate future profit is to extrapolate from prior years' profits, which we know based on Sorenson's own filings that include past actual data.² First, their 2007 NECA filing indicates that their actual cost of providing service in calendar 2006 (without any cost disallowances) was \$4.06 a minute; they were paid \$6.644 a minute; so their profit for calendar year 2006 was over

¹ Sorenson's own filing suggests that the rate should be slightly higher than the current \$6.644 rate (based on their projected 2007-2008 data alone, with no cost disallowances). Under those set of facts, Sorenson would not receive any profit. This data is not reliable, however, as the providers have a history (as well as an incentive) to both underestimate minutes and overestimate costs, both of which result in a higher rate. For example, Sorenson's filing includes some questionable costs (e.g., \$10 million in financial transactions fees for 2007-2008; over \$24 million in marketing and outreach for 2007-2008). Also, Sorenson seems to materially underestimate minutes of use. It estimated 39 million minutes of use in calendar 2007, but for the first five months of 2007 they have been averaging 4 million minutes a month, which would result in 48 million minutes of use (a nearly 25% increase). Moreover, NECA, using historical growth trends, estimates 65 million minutes of use for the 2007-2008 Fund year. Sorenson predicts that will handle about 41 million minutes in this same time period. But if Sorenson continues to provide 80% of total minutes, it should be providing approximately 52 million minutes. Therefore, compared to NECA's projections, it underestimated its minutes by approximately 25%.

² Basing a rate on prior actual costs, however, even adjusted for inflation, may not reflect that the record indicates that interpreter labor costs, which are a major input cost, are rising due to a shortage of interpreters. Accordingly, actual future costs may be higher than the historical cost data suggests.

\$94 million (or approximately 39%) (calculated by multiplying the total number of minutes compensated, by the \$2.58 difference between the two rates). Their NECA filing also indicates that in 2005 their profit was nearly \$60 million (including the \$40 million they paid as stock options to their employees. (Note that this is non-public information.)

This level of profit is confirmed by NECA's May 1, 2007 filing, which provides that the *average* VRS rate for calendar year 2006 based on all providers' actual costs and minutes was \$4.56 even though the providers were compensated at \$6.66 (that is public information). So, on average, the providers were compensated \$2.10 more than their per minute costs (or approximately 32% more). We know that Sorenson provides about 80% of the minutes, and we also know that in recent years they have been the low cost provider. That confirms that Sorenson reaped well over \$2.10 on each minute of service (and that it provided over 36 million minutes of service).

Another way to estimate future profit is to assume that an accurate approximation of actual costs for the 2007-2008 Fund year would be the weighted average of providers' actual 2006 costs (\$4.56), as reflected in NECA's filing, and upwardly adjust it for inflation. According to NECA, that cost per minute would be \$4.76. Using this figure as the per-minute cost, if Sorenson provides 41 million minutes (or 3.4 million minutes a month), as it projects, then its monthly profit under the tiers and rates noted about would be:

- first 50,000 minutes: \$100,500 (50,000 minutes x (6.77-4.76))
- next 450,000 minutes: \$783,000 (450,000 x (6.50-4.76))
- next 2.9 million minutes: \$4.47 million (2,900,000 x (6.30-4.76))

For the full fund year (assuming that the tiered rates were in effect for the entire year and that last year's fixed rates were not currently in effect on an interim basis), the profit would be approximately \$64 million (total revenue under tiered rates -- \$258 million; less revenue based on per-minute cost of \$4.76 -- \$194 million). That is a 33% profit over costs reflected in a per-minute cost rate of \$4.76 (and the \$4.76 per-minute cost rate is likely too high for Sorenson, since it is based on the average actual cost for all providers).

What is Sorenson's profit margin if we adopt the three tiers as suggested by Hands On? (meaning that the middle tier is expanded to be from 50,001 - 1,000,000 minutes, instead of 50,000 - 500,000 minutes).

The change is not great. As noted above, under the plan all providers get the highest rate for their first 50,000 minutes, the second highest rate for their next 450,000 minutes, and the lowest rate for minutes above 500,000. So, for Sorenson, which provides more than 4 million minutes of service a month, the difference between using a middle tier that ends at 500,000 or 1,000,000 means that, under the latter proposal, for an additional 500,000 minutes, Sorenson (and any other provider offering more than 1,000,000 minutes a month) would receive an extra \$135,000 a month (*i.e.*, 500,000 minutes x \$0.27, the difference between the \$6.77 and \$6.50 rates for the first and second tiers). Over a year, the total would be about \$1.6 million extra if the middle tier went to 1,000,000, instead of 500,000.

The overall percentage profit again depends on their actual costs of providing service and how many minutes they provide. If we assume, for example, that they offer 3.4 million minutes a month, as they project, and that their actual per-minute costs are \$4.76 (average actual 2006 per-minute cost of all providers, adjusted upward for inflation), then the profit would be

approximately 34%. (The 1% increase in profit margin reflects the additional \$1.6 million Sorenson would receive in the middle tier ended at 1,000,000, instead of 500,000.).

What is Sorenson's profit margin if we adopt the following tiers*:

tier one: 100,000 and under

tier two: 100,001 to 1 million

tier three: in excess of 1 million

***these tiers are the same as the tiers proposed by Hands On, but this third variation expands the first tier by 50,000.**

As noted immediately above, the change in the parameters of the middle tier would not have a large effect on Sorenson's profits, given that any rate above the \$4.00 range gives them considerable profit. The change here is simply that second 50,000 minutes offered a month are paid an extra \$0.20 (6.50-6.30). That is \$100,000 a month, or \$1.2 million a year more than in the prior example (or a total of \$2.8 million a year extra compared to the first example).

Again, the overall percentage profit again depends on their actual costs of providing service and how many minutes they provide. If we assume, for example, that they offer 3.4 million minutes a month, as they project, and that their actual per-minute costs are \$4.76 (average actual 2006 per-minute cost of all providers, adjusted upward for inflation), then the profit would be approximately 35%. (The 1% increase in profit margin reflects another additional \$1.2 million Sorenson would receive if the first tier ended at 100,000, instead of 50,000.).

(2) Did the Joint Consumers file anything - do we have the impression they would be OK going straight to order on the VRS cost methodology piece?

The tiered rate proposal for VRS was not made until April 2007 (by CSDVRS), well after the comment period ended for the July 2006 Cost Recovery FNPRM. After that time, the providers have filed numerous *ex partes* on this issue, but not the consumers. Given the relatively high level of the tiered rates proposed, the fact that the providers have agreed to them, and the fact that the consumer groups generally support the providers in cost recovery issues, we do not anticipate that they would be unhappy with adopting these rates now.

As for the comments of the consumers, the Joint Consumer Groups filed comments (10/30/06) and reply comments (11/13/06) to the 2006 Cost Recovery FNPRM. In their comments, they asserted that the Fund should compensate expenses in each of the cost categories raised in the FNPRM: certified deaf interpreters, marketing and outreach, executive compensation, overhead, R&D, and legal and lobbying activities. (Note that because the consumers do not pay for any aspect of this service, they have no apparent reason to oppose more expansive compensation for the providers). In their reply comments, they responded to what they asserted was an overly narrow reading of "functionally equivalent" made by the Florida PSC in its comments; reiterated, in response to the price caps proposal for VRS, that providers should be compensated for their reasonable costs; and asserted that the Commission should not permit CAs to intervene in calls to prevent IP Relay fraud. There are no *ex partes* or other comments from consumer groups on tiered rates specifically.

(3) Who are the providers of STS?

There are seven providers of interstate STS that receive compensation from the Fund: AT&T, Hamilton, MCI, Nordia, Sprint, Kansas Relay (KRSI), and CAC. See <http://www.neca.org/media/0607MaydataTRStatus.pdf>. The Fund pays approximately \$25,000 per month for interstate STS (a negligible amount out of the \$45 million paid in total each month from the Fund).

(4) With respect to branded marketing, what did commenters say in the record? Did anyone suggest a way of allowing some degree of branded marketing -- did anyone suggest a line that would differentiate between permissible branded marketing vs. impermissible branded marketing? (in other words, did anyone suggest a more nuanced approach, something other than "allow all branded marketing" or "don't allow any branded marketing" -- something that would allow some lines to be drawn on branded marketing?)

As an initial matter, we note that no commenters provide suggestions for compensating limited types of branded marketing. HOVRS argues that there is "no practicable means of differentiating between non-branded and branded outreach and marketing."

Verizon states that advertising, "[n]ot designed or directed to increasing market share" should be reimbursable, which suggests that they oppose "branded" marketing. However, CSDVRS argues that "denying compensation for branded marketing will not only hurt competition; it will hurt the ability of VRS consumers to select services and features that can best meet their individualized needs." CAC argues that compensating branded marketing provides an incentive for providers to share information with consumers.

Consumer groups agree, arguing that branded marketing, "provides the deaf and hard of hearing communities and hearing public with the benefits of a competitive TRS market," and that "[t]he development of competitive 'differentiators' brings significant benefits." Consumer groups further explain that branded marketing increases the visibility of providers, and gives them incentive to educate the public more effectively on what they have to offer. STS advocate, Bob Segalman, argues that if only non-branded outreach efforts are compensated from the fund, it will unnecessarily limit the potential of outreach to make TRS more widely utilized.

Note that several providers filing comments in response to NECA's proposed rates (NECA's May 1, 2007 filing) also addressed marketing. Sorenson, for example, argues at length that it is important to compensate marketing and outreach. CSDVRS and Bob Segalman also assert that the Fund should pay for marketing and outreach.

(5) Who is on the TRS Advisory Council? (And what consumer groups?)

The Council members, and the group they represent, are: Warren Barnett (hearing and speech disability community); Clay Bowen (state relay administrator); Larry Brick (TRS user); Monica Martinez (Commissioner of Michigan PUC); Sheila Conlon-Mentkowski (deaf consumer); Phil Erli (interstate service provider that pays into the Fund); Kelby Brick (Hands On); Gail Sanchez (AT&T Relay); Dixie Zeigler (Hamilton Relay); Rebecca Ladew (hearing and speech disability community). See <http://www.neca.org/media/407TRSCouncilMembers.pdf>. As indicated, of these 10 members, 4 represent TRS users or the hearing and speech disability community.

(6) What is Sprint Nextel's position on the MARS plan? They filed comments objecting to the MARS plan earlier in the proceeding, but did they continue to oppose MARS as time passed? Did they ever file ex parte comments softening their position against MARS for TRS and STS?

Sprint Nextel opposes the MARS plan for traditional TRS, asserting that it would create new burdens and uncertainties, may not be based on efficient costs, and the Commission does not have the authority to use the MARS plan because it constitutes a delegation of authority to the states. *See paras. 22-26 of draft item.* In a later *ex parte* (3/13/07), Sprint Nextel asserted that *if* the Commission were to adopt the MARS plan, it should adopt a separate MARS rate for captel (which the item does do). There are no other Sprint Nextel *ex partes* addressing the MARS plan or indicating a change of position.

(7) Can we get a list of which commenters opposed MARS?

Only Sprint Nextel opposes the MARS plan for traditional TRS, asserting that it would create new burdens and uncertainties, may not be based on efficient costs, and the Commission does not have the authority to use the MARS plan because it constitutes a delegation of authority to the states. *See paras. 22-26 of draft item.* Verizon and AT&T support the MARS plan for traditional TRS, but not STS or the other services because, they assert, there are no market based rates for these services (a statement that is not correct for STS, since states pay for this).

While other providers oppose the MARS plan for VRS and/or IP Relay (including Sorenson and Hands On, and, as noted above, Verizon and AT&T), the item does not apply the MARS plan to those services.

(8) Why would providers support MARS if, in each instance, the MARS rate is lower than the lowest NECA rate? What do we think their rationale is for supporting MARS? (As we note in the item, a number of commenters, including AT&T, Ultratel and others, support MARS)

The comments and reply comments addressing the MARS plan, raised in the July 2006 FNPRM, were filed before the providers knew what rates NECA would propose in its May 1, 2007 filing. So their comments to the MARS plan were based on more general factors than whether the rate would be higher or lower than the upcoming rate NECA would propose. Also, the proponent of the MARS plan, Hamilton, is one of the major providers of traditional TRS – so we can assume they would not push for a plan that would under-compensate them. As it turned out, NECA proposed rates in the \$1.70 - \$1.80 range, which is higher than the MARS rate of \$1.59 (based on the 2006 state rates). But the MARS rate of \$1.59 is still significantly higher than the current rate of \$1.29. Also, everyone recognizes that the MARS rate will likely go up over time because the state rates will go up as states re-bid their contracts for intrastate service. As Hamilton notes, the advantage of the MARS plan is that it has a principled basis (competitively bid state rates for the same service, *albeit* interstate rather than intrastate, is easy to administer, and therefore is less subjective than basing a rate on projected costs and minutes and possible cost disallowances).

(9) What comments came in from providers on the NECA filing?

Comments were filed by Ultratec, Hands On, Sprint Nextel, CSDVRS, Hamilton, AT&T, and Sorenson. Reply comments were filed by Hands On, Hamilton, Sorenson, Healinc, and the Joint Providers (Snap, Sorenson, Sprint Nextel). There have also been numerous *ex partes*. These comments are summarized briefly below.

Comments

- 1) **Ultratec**
 - Need for separate CapTel rate
 - Lower occupancy rate for CAs
 - CapTel is highly efficient
- 2) **HOVRS**
 - Rate process not transparent
 - NECA's adjustments to HOVRS data are not justified
 - A single VRS rate is problematic
 - All NECA proposed rates are inappropriate
 - Adoption of any of NECA's rates will result in over- or under-compensation
 - FCC should adopt a tiered rate structure
- 3) **Sprint Nextel**
 - NECA's proposed rates are inappropriate
 - FCC should reject NECA's proposed disallowance of Sprint Nextel indirect costs
- 4) **CSD/VRS**
 - Implement tiered rate plan
 - Rates need to be stabilized
 - Outreach and marketing should be compensable
 - R&D should be compensable
- 5) **Hamilton**
 - MARS plan eliminates need for true-ups, formula calculations, and debates over disallowed costs
 - Supports NECA's recommendation regarding payment timing
 - Supports TRS Advisory Council
 - Supports increase in cash working capital factor to 1.6%
- 6) **AT&T**
 - At a minimum, \$25 million of the \$45 million surplus in the Fund for 06-07 should be applied to 07-08 to offset funding requirement
- 7) **Sorenson**
 - \$6.77 should be adopted
 - Rate must be based on reasonable projections

- Inappropriate to disallow interpreter training cost, O&M
- IP Relay rate must be based on avg of projected costs
- Rates based on historical allowable costs decrease efficiency and competition
- Analysis of Cheryl Parrino and Dr. Gregory Rosston included

8) **Verizon**

- Freeze the rate until methodology is determined
- Rates should be based on provider projections, including marketing and outreach

Reply Comments

10) **NECA**

- Does not seek to prejudge FCC final decision- includes formulas based on provider-projected costs and demand
- Request to maintain surplus is prudent

11) **HOVRS**

- \$6.7738 is the only legitimate rate- still inappropriate
- Supports tiered, multi-year rate methodology

12) **Joint Providers (Snap, Sorenson, Sprint Nextel)**

- Dissatisfaction with all 24 alternatives proposed by NECA- only \$6.7738 has minimal support- agrees with Sprint Nextel and Sorenson
- R&D should be compensable

13) **Hamilton**

- Freeze the rate
- A modest increase the rate would be appropriate
- More transparency needed

14) **Sorenson**

- No commenters support any rate other than \$6.7738
- R&D needed to provide functionally equivalent 911 service
- A weighted average improves efficiency- the current methodology, while not optimal, rewards the more efficient
- FCC lacks a procedural basis to consider tiered rate structure which is substantively flawed

15) **Healinc**

- Supports tiered rate methodology
- Proposed NECA methodologies represent status quo based on weighted averages

Ex Partes

- 16) **Ultratec (5/9/07)**
 - Do separate rate for IP CapTel
- 17) **Sprint, Sorenson, Snap (with Ian Dilner) (5/11/07)**
 - Pay for marketing and outreach for VRS
 - Want \$6.77 rate
 - Price caps for VRS
 - No true-up
 - Sprint- no MARS plan unless there is a mid-year adjustment, and separate rate for CapTel
- 18) **Sprint, Sorenson, Snap (with Cathy Seidel et. al.) (5/11/07)**
 - Need marketing and outreach
 - Do not do rate at historical costs
- 19) **CSDVRS, HOVRS, CAC, GoAmerica (5/16/07)**
 - Support tiered rate
 - Allow compensation for R&D and M&O
- 20) **Snap, Sprint Nextel, Sorenson (5/23/07)**
 - Discussed NECA filing and support for price caps
- 21) **Sprint, Sorenson, Snap (with Scott Bergmann) (5/31/07)**
 - Support tiered rates and price caps
- 22) **Sprint, Sorenson, Snap (with Scott Deutchman, Nick Alexander, and John Hunter separately) (6/1/07)**
 - Support tiered rates and price caps
- 23) **CAC (5/31/07)**
 - Cost disallowances for IP are unreasonable
 - Costs associated with R&D should be compensable
 - Costs Associated with M&O should be compensable
 - TRS and IP relay costs are similar
- 24) **Hands On (6/5/07)**
 - Oppose Sorenson non-compete clause
 - Asks FCC to take prompt action on Sorenson non-compete
 - Supports tiered rate
 - Rate should be frozen until new methodology determined
- 25) **UltraTec (6/6/07)**
 - Need for separate Captel rate
- 26) **CDVRS, HOVRS, GoAmerica, CAC (6/12/07)**
 - Prefer utilization of such a tiered structure with the rate levels price capped for three years

- In the alternative, favor a straight price capped rate based on \$6.644
- 27) **Hamilton (with Scott Deutchman and Ian Dillner separately) (6/15/07)**
- Detailed benefits of MARS
 - Encouraged FCC to further examine price caps and tiered rates, and to share information with providers and consumers
- 27) **Snap, Sprint Nextel, Sorenson (6/15/07)**
- a tiered rate would create perverse incentives
 - support a three-year approach
- 28) **CSDVRS (6/16/07)**
- Supports tiered rates
- 29) **HOVRS and Snap (with John Hunter, Scott Bergmann, and Scott Deutchman; also separately with CGB) (6/26/07)**
- Competition has benefited consumers
 - FCC stood by while one provider monopolized the market
 - FCC should declare non-competes invalid for VRS providers
- 31) **Snap, Sprint Nextel, Sorenson (6/27/07)**
- The initial tier level should be \$6.77
 - The second level should be \$6.50
 - The third level should be \$6.30
 - Each would be subject to the price cap plan
 - Growth in VRS penetration could be measured aggregating total VRS minutes in a proceeding year
 - The ASL interpreter pool could be assessed by comparing the number of VRS interpreters employed from one year to the next, and to assess the number of interpreter training programs and participants in the country
 - The industry structure could be assessed by determining the number of providers that enter and exit each year
 - Quality can be assessed by reviewing complaints received each year
 - Costs can be assessed by analyzing the percentage change in average wages, the percentage change in benefits costs, and the percentage change in outreach costs
- 32) **HOVRS (6/5/07)**
- Endorse the S-VRS proposal (by Sprint, Sorenson, and Snap) in all aspects except for the tiers- proposes that the second tier run from 50,001 to 1,000,000 minutes.
 - AT&T, Healinc, and GoAmerica support HOVRS proposed tiers.
 - Sprint, Sorenson, and Snap indicate that they have no objection to the HOVRS proposal.
 - Hamilton has indicated to HOVRS that it does not object.

- Asks the Commission not to seek further comment on the tiered rate proposal, and to take quick action to provide stability for providers.

10) Questions for OGC:

(a) Regarding para. 58 of the item as circulated -- on lobbying and legal fees -- can you please run this by OGC and ask them about the defensibility of our position?

The statute provides only that the Commission prescribe regulations “generally” providing that costs “caused by interstate telecommunications relay services shall be recovered.” Sec. 225(d)(3). In the 2004 TRS Order, the Commission stated that the reasonable costs of providing TRS included only those direct and indirect costs necessary to provide the service. Thus, the Commission has great latitude in determining precisely what costs can be compensated from the Fund. OGC believes it is reasonable and therefore very defensible to limit recovery for lobbying/legal expenses.

Moreover, paragraph 58 does not completely disallow legal or lobbying expenses. Rather it places the burden on the provider to demonstrate that the costs are directly linked to and necessary for the actual provision of service in compliance with the mandatory minimal standards. This is reasonable (and plausibly required) given that the statute prescribes recovery for costs “caused by” interstate TRS.

(b) What is the litigation risk that we are delegating the Commission's obligations under Section 226 to the states by adopting the MARS plan? (see para. 23 of the item)

OGC does not think the MARS plan constitutes a delegation of any kind. As is stated clearly in the order (para 24) the plan directs the Commission to gather and then average state TRS rate data (in addition to other information) to arrive at an interstate rate utilizing the Commission's own methodology. The Commission retains complete responsibility for developing and administering the final rate.

(c) footnote 12, regarding the adjustment to the fund size and the carrier contribution factor -- please run by OGC whether it works to do a mid-year fund adjustment rather than doing so at this time.

Each year, NECA files with the Commission a recommended contribution factor based on the expected size of the TRS Fund. The Commission then issues an order formally establishing the size of the fund and the contribution factor on an annual basis pursuant to 64.604(c)(5)(iii)(B). This occurs on or about July 1. In the draft order, the Commission keeps in place the current fund size but gives notice that it may be changed prior to the conclusion of the funding year. Technically, this is consistent with the rule because the Commission would not be *changing* the fund size/contribution factor more than once a year. Thus, OGC thinks a mid-year correction, if necessary, could be achieved. Moreover, in 2004, when faced with a shortfall due to an unanticipated rise in the number of VRS minutes, the Bureau waived section 64.604(c)(5)(iii)(B) and issued a mid-year correction. 19 FCC Rcd 2993.

Attachment 4

Matthew Berry

From: Cathy Seidel
Sent: Monday, October 15, 2007 4:35 PM
To: Scott Bergmann
Cc: Nicole McGinnis; Thomas Chandler
Subject: TRS rates

Scott –

As mentioned briefly a moment ago, below is a little more insight regarding the VRS rates in the draft item. Let us know if you need anything further.

You had asked about the Bureau's views regarding the proposed rates for VRS in the TRS cost methodology item on circulation. As you are aware, NECA's filing proposes VRS rates ranging from \$4.55 to \$6.77. The highest rate -- \$6.77 -- represents the weighted average of all the providers' projected costs and minutes of use, using the providers' figures without any adjustments. The lowest rate (\$4.55) is the average of the providers' actual costs of providing service in calendar 2006 (the actual rates for each provider based on their own historical actual cost data ranged from \$4.05 for Sorenson, to \$5.85 for Hamilton, to \$6.15 for Hands On, to over \$10 for Verizon). As a practical matter, because Sorenson has over 80% of the market, their data controls the rate, and therefore the data of the smaller providers is not relevant to NECA's determinations.

The order on circulation adopts the following VRS rates:

1. up to 50,000 minutes -- \$6.77
2. 50,000 to 500,000 -- \$6.50
3. over 500,000 -- \$6.30

We think these rates could be justified as follows: The first rate (6.77) is the rate NECA calculated based on the providers' projected costs and minutes of use, without any disallowances. Because smaller (generally new) providers have higher costs, we use the rate NECA calculated based on the provider's projected data. This rate will make sure new providers can cover all their costs

The second rate (6.50) is the first rate *less* (1) industry forecasted marketing and some costs NECA excluded that the providers did not dispute. It represents a slight decrease from the current rate of \$6.64 and also can be justified based on some economies of scale as minutes get greater.

The third rate (6.30) is based on a reduction from the second level to encourage VRS providers to become more efficient as they handle greater call volume, but not so low as to reduce the incentive to expand their service and reach new deaf users.

Attachment 5



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

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,

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)

Attachment 6



FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

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.

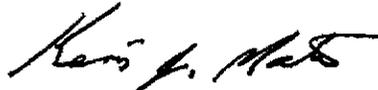
For more than twenty years, the Commission has had a document retention policy responsive to the requirements established by the National Archives and Records Administration (NARA). This policy is memorialized in a Commission policy statement promulgated by the Commission's Office of Managing Director.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



OFFICE OF
THE CHAIRMAN

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,

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 Talliaferro, Assistant Publisher, Directories, WARREN COMMUNICATIONS NEWS to Dana Scherer on Oct. 10, 2007.

¹¹ 2005 Report, 21 FCC Red 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 Rod 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)

Attachment 7



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

April 13, 2007

The Honorable Mike Doyle
United States House of Representatives
401 Cannon House Office Building
Washington, D.C.

Dear Congressman Doyle,

Thank you for your letter of March 13, 2007, concerning the Commission's contract with Mr. Dale N. Hatfield. First, let me say how much I appreciate Dale Hatfield's past work here at the Commission. I have known Dale since I first came to the Commission as a staffer in 1997. He spent many years as a respected member of the Commission staff, including serving as the Chief of the Office of Engineering and Technology, Chief Technologist, and as the head of the Office of Plans and Policy. He is a distinguished engineer, and has made considerable contributions to the field. His work has been valuable to the Commission in the past, and his insights are welcome at the Commission in the future.

I have made 911 a priority for the Commission, and I share your view that the public expects us to get these issues right. One of the first issues that I turned to as Chairman was ensuring that all Americans' 911 calls reach emergency operators regardless of whether they are using a wireline phone, wireless phone, or an Internet phone. I have pursued, and will continue to pursue, the best sources of information to guide the Commission's decision making on emergency 911 issues and to ensure that appropriate actions are taken to safeguard all Americans.

In your letter, which I received the afternoon prior to my appearance before the Subcommittee on Telecommunications and the Internet, you asked that I be prepared to answer questions on this matter at the hearing that following morning. Given your request, I asked my staff to brief me on their recollections of the Hatfield contract and events that occurred more than a year before. You also requested that we gather all contractual materials, and all communications between Mr. Hatfield and the Commission related to the second report. Since then, we have reviewed all contractual materials related to Mr. Hatfield, collected every communication (including emails, memoranda, letters and call logs) between the Commission and Mr. Hatfield related to the second report, and additionally collected every such communication internally within the Commission. I appreciate the opportunity to now provide you with all of the details about the contract and to more fully answer the questions you raised.

In short, in 2001 the Commission entered into a contract with Mr. Hatfield to study E-911 issues, which resulted in 54-page report submitted to the Commission in October 2002. In 2003, the Commission entered into a new contract with Mr. Hatfield to provide assistance to the Commission with the "next steps" identified in his 2002 report. The Commission issued three orders under the 2003 contract in 2003, 2004 and 2005. In the three years since the 2003 contract, however, Mr. Hatfield has not provided any further reports to the Commission. In 2005-06, Mr. Hatfield established a timeline for delivery of a second report, but did not deliver a report under these deadlines. Mr. Hatfield billed \$9,500 of the \$10,000 authorized for the 2005-06 year, but indicated that he still had significant work to do. His contract was suspended in May 2006. Although the Commission is no longer paying for his services, we welcome any data he has compiled or reports that he has completed since that time.

The attached narrative fulfills your request for an "explanation of why Mr. Hatfield's full report was terminated after he presented his findings to Commission staff," and also contains the "detailed timeline of the events surrounding the report and its premature termination." The additional documentary information you requested accompanies this letter, including:

- All contractual materials related to Mr. Hatfield's second report; and
- All communications, including emails, memoranda, letters and call logs between Mr. Hatfield and the Commission related to the second report.

With respect to your request for "a list of tentative findings that Mr. Hatfield presented to Commission staff," Mr. Hatfield did not provide anyone at the Commission with a copy of any conclusions in writing. The few tentative findings presented to the Commission staff are contained in a summary memorandum prepared by Bureau staff of the May 2006 meeting between Mr. Hatfield and Bureau staff, which is appended to this letter as Exhibit E. In addition, in an effort to be as complete as possible, we have also included copies of all other documents produced by Commission staff related to Mr. Hatfield's second report, as well as a report submitted to the Commission that was authored by Mr. Hatfield in his capacity as a consultant on behalf of parties that the Commission regulates. See attached Exhibit G.

Please do not hesitate to contact me if you have any further questions.

Sincerely,



Kevin Martin
Chairman

Timeline and Specific Questions

In October 2001, before I became Chairman, the Commission entered into a contract with Mr. Hatfield to work on E911 issues. The purchase order issued under this contract was initially for \$6,000, and was subsequently increased on three separate occasions in the amounts of \$5,000, \$10,882.00 and \$10,700, for a total authorized amount of \$32,522. Of this amount, \$32,293.70 was paid to Mr. Hatfield. Mr. Hatfield prepared and filed a fifty-four page report with the Commission on October 15, 2002, one year after initially being retained by the Commission, entitled "A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services." His report is publicly available on the Commission's E911 website, and is attached at Exhibit A to this letter.

In September 2003, again before I became Chairman, the Commission entered into a second contract with Mr. Hatfield for consulting services on E911 issues, at a rate of \$250 per hour. In September of 2003, the Commission issued a purchase order under this contract in which Mr. Hatfield was to assist the Commission with "next steps" identified in his 2002 report. The purchase order was funded in the amount of \$27,000, of which only \$3,000 was paid to Mr. Hatfield. Specifically, under this order, Mr. Hatfield's task was described as follows:

"In 2002 Dale Hatfield researched and prepared a key report for the Commission that analyzed the state of E911 deployment across the nation. The report raised several important next steps for the Commission and other stakeholders, including addressing network architecture issues, standards, and protocols. Given Dale's extensive engineering and policy experience, particularly his work on the 2002 report, he is uniquely suited to assisting [sic] the Commission in this effort. In particular, we expect Dale to assist the Commission in establishing and implementing the appropriate technical fora to address E911 network architecture issues. We view Dale's continuing role in E911 policy as critical to advancing U.S. public safety."

In September 2004, the Commission issued another order under the September 2003 contract, in which Mr. Hatfield was again to assist the Commission with "next steps" identified in his 2002 report. The 2004 order was initially funded in the amount of \$21,000. None of this amount was paid to Mr. Hatfield, as he did not submit any invoices for payment that year. Specifically, under this order, Mr. Hatfield's task was described as follows:

"In the continuing need for accurate assessment of the state of E911 deployment across the nation [sic]. Mr. Hatfield's prior work raised several important next steps for the Commission and other stakeholders, including addressing network architecture issues, standards, and protocols. Given Dale's extensive engineering and policy experience, he is uniquely suited to assisting [sic] the

Commission in this continuing effort. In particular, we expect Dale to assist the Commission in defining the appropriate technical fora to address E911 network architecture issues. We view Dale's continuing role in E911 policy as critical to advancing U.S. public safety."

In September 2005, the Wireless Telecommunications Bureau issued a further order under the 2003 contract with Mr. Hatfield. Under this order's statement of work, Mr. Hatfield was to provide:

"Follow up on status of suggested Commission actions identified in his October 2002 report, including what remains undone and whether a need continues to exist for such actions given the current status of e-911 [sic] deployment and other technology developments, and an assessment of whether there are new actions recommended to be taken in light of today's environment;
Provide an independent view of the technical and other challenges faced by smaller carriers/telecommunications providers in deploying Phase II service, as referenced in the Tier III Order, which was released by the Commission earlier [in 2005], as well as any problems with urban canyon and in-building settings;
Evaluate the current state of location technologies, including fore [sic] each of the switch, network, and handset elements; [and]
Provide an independent assessment/view regarding methods of verifying compliance with the Commission's accuracy requirements."

This order was extended specifically at the request of the Wireless Telecommunications Bureau. At the time, the Bureau recognized that Mr. Hatfield had not performed any work during the 2004-05 year. Nonetheless, the Bureau sought extension of Mr. Hatfield contract and identified the specific tasks that Mr. Hatfield was to perform, which were incorporated directly into the statement of work. The Bureau suggested that Mr. Hatfield's work would be particularly relevant "in light of a major upcoming e-911 [sic] deadline in early FY06." In addition, the Bureau suggested that "Mr. Hatfield's expertise would be helpful as the Commission proceeds to deliberate next steps regarding the [National Reliability and Interoperability Council] recommendation and any future NRIC or [Emergency Services Interconnection Forum] efforts regarding establishment of e911 standards." See attached email at Exhibit B.

Although I was not personally aware of the contract extension, the 2005 extension was approved by my Chief of Staff in the context of 264 routine contracting actions during the month of September 2005, the last month of the fiscal year, 66 of which were for the Wireless Telecommunications Bureau. Even when the contract was extended, there was some concern regarding whether an extension of Mr. Hatfield's contract was justified. In particular, concern was expressed that Mr. Hatfield had failed to produce any further data to the Commission since his initial report in 2002, and had failed to submit any invoices to the Commission under the order issued in September 2004. See attached email Exhibit

C. Nonetheless, an additional order was issued in September 2005 in the amount of \$10,000 at the request of the Wireless Telecommunications Bureau.

In February 2006, Mr. Hatfield met with several staff members in the Wireless Telecommunications Bureau to address the scope of his work and provide an outline of a proposed report. A summary of the February 2006 meeting drafted by Bureau staff was provided to Mr. Fred Campbell of my offices. See attached email Exhibit D. At that time, there were no findings or conclusions included beyond: "V. Principal findings and conclusions." In that summary, Mr. Hatfield provided a schedule for completion of his work. He was to provide a draft of his report by March 1, 2006 for review and comment. Consistent with his original contract, the Commission was provided an opportunity for review and comment. Specifically, the FCC could provide "its feedback (including an opportunity to remove any discussions of a sensitive nature)" by March 15, 2006. His final report was to be completed and submitted by March 22, 2006. Mr. Hatfield later indicated that he would not meet that deadline but that he could complete the report by the end of March. See attached email at Exhibit E.

By May 2006, Mr. Hatfield had still not completed his report. He met again with staff from the Wireless Telecommunications Bureau on May 10, 2006, to provide an update. A summary of the May 2006 meeting with the Bureau was also prepared by Bureau personnel, but was not provided to me or my staff. See attached email Exhibit F. At that meeting, Mr. Hatfield apparently provided some brief tentative conclusions and recommendations, which are recited in the summary memorandum. However, Mr. Hatfield also suggested that additional work was necessary. In particular, he indicated that an ongoing APCO-International study (Project LOCATE) would provide him with specific additional information needed to form his conclusions, and that once he had this information a delivery date for his report could again be set. We also do not have copies of any slides used during these meetings, but would welcome their submission to the Commission. On April 10, 2007, APCO-International publicly released and filed their Project LOCATE report.

In late May 2006, I learned about the existence of the new order from my personal staff and the fact that Mr. Hatfield was working on another report. My personal staff contacted Mr. Hatfield and asked him about the nature of his work and his proposed report. Mr. Hatfield declined to indicate to my personal staff what tentative conclusions, if any, he had reached. He declined to provide a summary of his findings. He also declined to provide a draft of his proposed report to my personal staff at the time. To this date, Mr. Hatfield has not provided the Commission with a draft of his report or a copy of his conclusions in writing.

By this time, the Commission had already acted on several 911 issues. For example, from December 2005 to March 2006, the Commission acted upon more than a dozen E911 handset penetration deadline waiver requests, and was continuing to address implementation of the 911 rules adopted in June 2005 for interconnected voice over Internet protocol providers.

In addition, in March 2006 I announced plans to create a new Public Safety and Homeland Security Bureau that would focus on all of the various technical issues relating to E911, including the issues Mr. Hatfield had been examining. Given the recent Commission actions on VoIP 911 and pending wireless E911 issues, and my plans to create the new Bureau, I concluded that it was not in the public interest to continue to pay an outside third-party to address wireless E911 issues. Moreover, more than three years had lapsed since he was initially retained to assist the Commission in addressing the next steps identified in his 2002 report. He had not done any additional work in 2004-05. In 2005-06, he had not produced the promised draft report to the Commission and suggested that significant additional work remained to be done. Mr. Hatfield ultimately billed the Commission \$9,500 of the \$10,000 budgeted for his task in 2005, and as such should have been in the very final stages of his work. In light of all of these factors, the contract was suspended in May 2006 and Mr. Hatfield was instructed to compile his final invoices and cease billing the Commission for his E911 work.

In your letter, you cited several tentative conclusions from Mr. Hatfield regarding rural E911 deployment, E911 coverage in indoor environments, and location accuracy methods. While these topics may have been within the scope of Mr. Hatfield's proposed report to the Commission, Mr. Hatfield did not present any tentative conclusions to me or members of my personal staff, and as such they did not impact the decision to suspend Mr. Hatfield's contract. To the extent he provided such tentative conclusions to Bureau staff, they are contained in the memorandum summarizing Mr. Hatfield's May 2006 meeting with them. We also do not have copies of any slides used during these meetings, but would welcome their submission to the Commission.

Neither Mr. Hatfield's research nor his proposed report was suppressed by suspension and non-renewal of the contract. Nor was the suspension of the contract related to any tentative conclusions he may have reached. Nor was it ever indicated to Mr. Hatfield that he could not pursue work on E911 issues on his own. Although we are not currently paying Mr. Hatfield for his advice, we would welcome any report he may have now finished. We understand that Mr. Hatfield may have approached other parties about contracting him to further study these issues and finish any reports. Again, we would welcome any reports he may finish if others choose to pay him for that work. To the extent Mr. Hatfield wishes to use any data he may have developed pursuant to the canceled contract for other purposes, including issuing a report, he may do so. Even under the most restrictive interpretation of his contract, Mr. Hatfield could seek written permission from the Commission to disclose any data generated under the contract.

While there was one inquiry from an outside party about that possibility, Mr. Hatfield has not made any such official request to date; I would, however, grant any such request he makes.

Attachment 8