

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, MB Docket No. 06-189, Thirteenth Annual Report (Nov. 27, 2007).

I support the Commission's Thirteenth Annual Report on the state of competition in the video programming marketplace. Every year, the purpose of this report is to provide Congress and the American people with the Commission's best and honest assessment of competition in the evolving video marketplace. I support this year's report, but I write separately to address the important issue of whether the 70/70 benchmark in section 612(g) of the Communication Act has been reached.

The Commission's determination regarding the 70/70 benchmark has critical policy implications but, at the same time, is a question of fact. I would have no hesitation to invoke our authority if the evidence clearly justified that the standard had been breached. Many positive initiatives to promote diversity, such as a national baseline PEG requirement, could result. Yet, it's our job to follow the facts, to find the truth wherever it may lead. Congress did not ask us to impose the outcome we might prefer solely based on policy goals, no matter how admirable they may be. Congress asked for an honest assessment. So, I am pleased that the revised version of this Report seeks further comment on this important question and compels all cable providers to provide their data under penalty of law within 60 days.

In order to base our decision on the facts, Commissioners need access to all the facts. Unfortunately, the most important data we have – the FCC's own numbers – were suppressed from the Commissioners until the last minute. I did not learn until after 7:00 pm last night that the FCC's own 2006 survey found that only 54 percent of homes passed subscribe to cable. Similarly, the FCC's cable price survey came in at 55.2 percent penetration.

Based on these newly unearthed facts and the conflicting evidence on the record, I am unable to support a finding that 70 percent of homes passed subscribe to cable at this time. The data is inconclusive. If we were truly searching for the truth, it is inconceivable that our own data would be cast aside without mention. It was just last year that I called for more rigorous data collection by the FCC. To find that this years' FCC data was suppressed casts a long shadow over this endeavor. They tried to hide the ball from their own team.

In every previous year, the Video Competition Report included data from the FCC's "Annual Report of Cable Television Systems," which solicits from the operators the very data needed to determine if 70/70 is met, including subscribership, penetration rates and number of channels available. Yet, it wasn't until yesterday that it became apparent that the data from this year's survey was mysteriously redacted from the draft report we were reviewing.

The draft attempted to rely solely on data from Warren Communications, while disregarding a multitude of other sources included in previous reports. This was especially troubling with respect to our own data from our Annual Report's FCC Form 325. In fact, in the "Supporting Statement" to FCC Form 325, the Commission justifies its request for this

information by stating explicitly that it is a more appropriate tool to rely upon than Warren data, acknowledging:

“Basic information concerning cable television system operation is available from commercial sources such as A.C. Nielsen and Warren Publishing; however, because this information is not subject to the accuracy and specificity requirements applicable to a governmental reporting system, the Commission continues to need the information that FCC Form 325 provides.”

While there are always issues with the figures reported to the FCC, we certainly should not ignore it. Cable operators who report to us on Form 325 must certify that their data is true.¹ Cable systems that comprise over 50 million subscribers report to us, or over 75 percent of the total number of subscribers who report subscriber data to Warren or Nielsen. This is a large sample by any measure.

Moreover, the Commission’s attempt to rely solely on data from Warren Communications, while disregarding a multitude of other sources, is troubling. A thorough and transparent analysis of the available data – both from the FCC and independent sources – on cable penetration rates was sorely missing from the initial draft of this item. The Commission has in its possession at least four sources of cable penetration rates that were cited in previous reports: Warren, Nielsen, Kagan and FCC Form 325. In blatant contrast to previous reports, no source but Warren was cited in the initial draft, and it took a majority vote to fix that deficiency. While not determinative, it is noteworthy that all of these sources, except Warren, concluded that current cable penetration rates are less than 70 percent. We also must give careful consideration to new data, added at the last minute to the report, supplied by leading consumer advocates finding that penetration rates exceed 70 percent. I appreciate the efforts of these advocates to advance our understanding of the marketplace.

Our job of ascertaining the facts was made more difficult because the draft cherry-picked only the data that justified the outcome desired, while suppressing other data. I believe that it is our obligation to ensure that our decisions are objective and based on the facts, not outcome-driven for political expediency. Much like our media ownership studies, which are outcome-driven to support the media consolidation agenda, there was an attempt to cook the books on this report.

Just like what occurred in the media ownership proceeding, where studies were suppressed, and others were structured and conducted with the goal of facilitating consolidation, a lack of transparency will undermine the Commission’s credibility and public confidence in the work we do. I fully support the effort to quickly ask all cable operators for their actual numbers. We should have done that already. Of course, we already have data from the vast bulk of cable operators, but if more data would shed light on this, I think we should pursue it

¹ The operator must certify: “I HAVE EXAMINED THIS REPORT, AND THAT ALL STATEMENTS OF FACT CONTAINED THEREIN ARE TRUE, COMPLETE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF, AND ARE MADE IN GOOD FAITH.” False statement can result in imprisonment for up to 5 years.

aggressively. If the data comes back that the 70/70 test has been met, I would not hesitate to invoke our authority to take positive measures to enhance diversity.

One of the reasons for the embarrassing delay of today's meeting, and the general disarray in working through these issues, was the effort to push through such an aggressive number of controversial items today without sufficient notice to all Commissioners. Short-circuiting Commission procedures short-changes the American public in the end. This is particularly true given that nothing we are considering today requires immediate action. There are numerous items that would have benefited greatly from more deliberation and care.

This is set against a backdrop of unwinding processes here at the Commission. For example, the lack of notice to Commissioners about open meeting dates and items to be considered at these meetings hinders our ability to consider the substantive proposals and to solicit and reflect on public input. Traditionally, going back many years, items are white copied, or identified to Commissioners three weeks in advance so we can prepare, hold proper meetings with affected parties and deliberate among ourselves. Not only were we not white copied for this meeting – the meeting itself was called with less than three weeks notice. The two and a half weeks notice was even far less time than even that, because it included both the Veterans Day and Thanksgiving holidays. It was also truncated by the day we spent on travel for a field hearing in Seattle, which was called with inadequate notice to Commissioners and the public. The problems with the items we consider today were further compounded because massive changes in some items were attempted to be inserted at the last minute.

It may be said that we have a host of issues pending before the Commission and that there is a need to drive our work forward. The Chairman certainly has the right to set the agenda and push us. But given that very volume, and the prodigious work which nobody denies we do given our vast jurisdiction, we need to know in advance which items to focus upon during the short window before open meetings. This is especially true when items are large, complex, and controversial.

Some of the policy goals today are admirable, and I share many of the concerns, for example about cable's market power, that prompted them. But why the rush? Why the effort to steamroll the Commission and the public in order to wrap up a number of items that aren't even time sensitive? Everything could have been done under regular order, with proper notice or on circulation. The only plausible explanation appears to be an obsessive drive to complete the media consolidation agenda by the end of the year, come hell or high water.

But the cover on diversity and localism is a false front. The agenda that was pushed for today was just a fig leaf, it does not provide real answers to the very real problems that permeate the media landscape. And very troubling is the attempt to punish major American companies in the process of dismantling the newspaper-broadcast cross ownership ban. Tribune, long a respected and influential institution of American journalism, has been used as a human shield to provide cover for broader rule changes, even at risk to the life of the hostage itself. Some may ask whether the entire cable industry is a foil today to show we are tough on some big media companies, even as we are forgiving to others.

Were these issues not so important, it might be tempting to admire the improvisational willingness on display here -- using every tool available, abandoning precedent and doing whatever is expedient. But that doesn't mean that there is no alternative.

I came here to be part of the expert agency -- to follow the facts wherever they lead. We cannot cook the books to pursue a political agenda without dismantling our very institution. We simply must act like the expert agency Congress intended, and not squander our precious legacy.