

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL,
DISSENTING IN PART**

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

Today's Report has taken an interesting journey in the past few weeks. For starters, it is about nine months overdue to Congress. Then it appeared that the Commission was going to ignore a mountain of evidence from independent analysts and prior Commission findings to favor a solitary study. According to press accounts, sometime in October, this lonely study was solicited over the phone from Warren Communications by a FCC staffer. A day or two later, the draft Report was circulated and arrived at a conclusion that was a radical departure for the FCC: that the cable industry had surged past the 70/70 threshold outlined in Section 612(g) of the Act in just one short year.

To reach this previously unattainable figure, the Commission was prepared to omit, or as some have said *suppress*, the FCC's own data as gathered from cable operators on Form 325 in favor of a study that was inserted into the record just last month without the benefit of public notice, scrutiny or comment. The author of this suddenly-dispositive analysis says that it should not be used for the 70/70 test due to large gaps in its evidentiary foundation. But the Commission was prepared to do so anyway because this flawed anomaly was the only fig leaf that could be found in an attempt to trigger an avalanche of unnecessary regulation to cascade down upon an otherwise competitive industry.

Let's compare some recent FCC reports to put this statistical prestidigitation in context. In the past, the FCC has used a variety of data sources, including our own numbers, to estimate cable subscribership. In a transparent fashion that allowed for ample public comment, our Video Competition Report historically has found that subscribership hovers at around 60 percent, falling well short of the second prong of the 70/70 test. The Commission arrived at this conclusion by using and analyzing information from several different sources and seeking public comment on them. For instance, in our Twelfth Annual Report, covering 2005:

- Using data from the FCC's 2005 Cable Price Survey, our staff estimated that 56.3 percent of houses passed subscribed to cable.
- Using data from the FCC's Form 325, our staff estimated 54 percent.
- Relying upon Nielsen and Kagan data, we cited 63.3 and 53.1 percent, respectively.

- The Warren Communications 2005 numbers determined that 67.8 percent of homes passed subscribed to cable.

Moreover, in the Eleventh Annual Report, which examined 2004 data, we similarly cited Kagan, Nielsen, Warren and our own Cable Price Survey sample data and Form 325 sample data in finding that the second prong of the 70/70 test had not been met.

Similarly, numerous independent analyses and studies have corroborated the conclusion that cable subscribership is well below the 70 percent threshold. In fact, incumbent cable operators are losing video subscribers. I do note that the Media Access Project and AT&T filed opinions late in this process claiming penetration above 70 percent, and those filings should be given appropriate consideration. But, even so, the great weight of the evidence strongly indicates otherwise for 2006 and all years prior.

Interestingly, this year, in a disturbing development, the FCC's most recent Form 325 data was not made available to commissioners for review until 7:09 p.m. last night. It was only made available once it was obvious that a majority of the Commission would not support the initial draft of this Report because it was such a dramatic departure based on mysterious statistical manipulation. But why was this data omitted or suppressed to begin with? Was it because it concluded cable penetration was only at 54 percent, just like last year? Similarly, only once it became public that this year's Report was generating controversy, third parties, such as AT&T and MAP, filed fresh *ex parte* opinions and analyses. I value their participation and I'd like to see the Commission encourage such debate during a brightly lit and transparent public comment period before we arrive at our conclusions. Hopefully, today's Report, coupled with our Notice of Inquiry, will allow us to move forward in our quest for the most accurate data we can find.

In the meantime, all indicators point to the conclusion that the video marketplace is more competitive now than ever through the rise of cable over-builders, traditional phone companies offering video, two vibrant DBS providers, free content on the Internet, and, once the digital TV transition is complete, a multitude of free HD and multicast video streams from broadcasters. This Report underscores that cable subscribership has declined over the past year, while the two satellite companies, DirecTV and EchoStar, gained 1.8 million customers and are now the second and third largest MVPDs. America's telecommunications companies are now competing vigorously for video customers, with Verizon alone serving nearly one million video subscribers.

Today, virtually every American enjoys multiple options for the delivery of video programming and more choices in content and services than ever before. I look forward to this trend continuing so that consumers can enjoy even more of the benefits of competition. In fact, one has to wonder whether Section 612(g) is relevant anymore. The provision was enacted in 1984 at a time when only one incumbent cable provider served a local franchise. The legislative history shows us that Congress was concerned that such companies could dominate the video market as the only game in town. But, as the result of responsible de-regulatory policies that have encouraged investment and new entry, the

average consumer has a choice of at least three video providers with over-builders and phone companies increasing that menu of options for millions more consumers. When competition flourishes, the need for regulation diminishes. The Report we adopt today underscores this fundamental point.

Lastly, I am puzzled as to why the majority now want to seek both 2006 and 2007 data in the context of this Report covering only 2006. As always, I fully support seeking any relevant data, provided we give adequate opportunity for public comment. The more data, analysis and public comment, the better. However, we already have the 2006 data from our Form 325 – with the exception that smaller cable operators do not file that form. But it is precisely the smaller operators that do not keep data in the form the Commission is now requesting from them. Smaller operators especially do not have the data from eighteen months ago that the majority wants. So the Commission is requesting data that simply cannot be provided in many circumstances. Will this resulting “gap” in data later be used as a basis to concoct projections that the 70/70 threshold has been met? Stay tuned.

The second most puzzling request is requiring 2007 data to be submitted into a proceeding pertaining to the 2006 video market. Shouldn't 2007 data be included in our 2007 report proceeding? What relevance does 2007 data have to the 2006 video market? Now that all of the 2006 data has finally been brought to light, as of twenty-seven hours ago, we should close the book on 2006. After all, Congress is waiting. At the end of the day, the great weight of the 2006 evidence makes clear that cable penetration falls far short of the 70/70 threshold. Because I find this last-minute maneuver to be illogical, and dubious, I dissent from this portion of today's Report.

I support all other portions of this Report. I thank the team in the Media Bureau for their hard work.