

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

June 23, 2008

The Honorable Kevin Martin  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Dear Chairman Martin:

I am writing to you regarding an issue of long standing concern to me as Chairman of the Subcommittee on Antitrust, Competition Policy and Consumer Rights – the ability of independent programmers to gain carriage on reasonable and nondiscriminatory terms on cable and satellite television. I have long believed that it is vitally important that independent programming channels are offered to the American public, rather than just programming affiliated with the major cable, satellite or broadcast television companies. Our democracy depends on the ability of independent voices to be heard, and increasing the diversity and variety of points of view available on television should be an important objective of both competition and communications policy. For this reason, I have strongly supported the FCC’s program carriage rules and the principle that independent programmers gain access to cable and satellite systems (otherwise known as multi-channel video distributors or “MVPD”) on reasonable and nondiscriminatory terms.

In 2005, the Antitrust Subcommittee held a hearing on the challenges faced by independent programmers in gaining carriage. An independent programmer witness, the America Channel, testified regarding the substantial difficulty that they had in getting carried on the major cable television systems. In the course of preparing for the hearing, the subcommittee heard from several other independent programmers who corroborated this testimony. More recently, members of the National Association of Independent Networks have told us of similar difficulties. Beyond getting carriage, these networks face what they believe is disparate treatment with respect to their channels being placed on the most expensive tiers with minimal distribution. These independent programmers believe that they are being discriminated against with respect to channel placement and conditions of carriage offered to programming channels affiliated with the MVPD companies. Additionally other large programmers, often but not always affiliated with MVPDs, bundle their channels together, tying less desirable channels to certain “must have” channels (such as national sports networks, for example). This bundling causes MVPDs to purchase unwanted channels and occupy limited channel capacity which they might otherwise use to carry channels offered by independent programmers.

I urge that the FCC take action to redress these barriers to independent programmers gaining carriage on cable and satellite systems. Especially important is that the program carriage rules be an effective and timely means for independent

programmers to seek redress. These rules currently mandate that independent programmers be treated fairly and on reasonable and nondiscriminatory terms in seeking carriage agreements, and further prohibit MVPDs from demanding equity interests in programming in return for carriage. However, independent programmers contend that these rules are ineffective as currently applied because program carriage complaints lack timetables, take years to adjudicate, and are governed by uncertain standards.

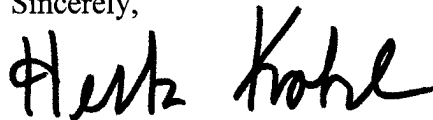
The FCC currently has a rulemaking pending, MB Docket 07-42, addressing these issues, and I urge that it be used to strengthen the program carriage rules and to simplify and make more efficient the process by which program carriage complaints are adjudicated. Specifically, I urge that the FCC set a deadline by which program carriage complaints by programmers be decided in prompt and reasonable time; provide a more certain definition as to what constitutes discrimination in program carriage disputes; provide a procedure for staying adverse action by an MVPD against an independent programmer (such as, for example, moving the independent programmer's channel to a disfavored or costly tier) while that independent programmer's discrimination complaint is being adjudicated; and enact any other rule the FCC believes necessary to strengthen program carriage requirements.

I also urge that the FCC take action on its tying/bundling rulemaking, MB Docket 07-29. Specifically, I urge the FCC to enact rules to prevent programmers affiliated with MVPDs or broadcast networks from unreasonably bundling channels together, when such bundling is done in order to deny independent programmers the channel capacity needed to be carried on MVPD systems.

In sum, I believe it is strongly in the interests of competition policy and the values of democracy and diversity of expression for independent programmers have a fair and equal opportunity to gain carriage on cable and satellite systems. I urge that you use these pending rulemakings to strengthen program carriage and tying/bundling rules so essential to giving independent programs this opportunity.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Herb Kohl". The signature is written in a cursive, slightly slanted style.

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HERB KOHL

Chairman, Subcommittee on  
Antitrust, Competition Policy  
and Consumer Rights

Cc: Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell