

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Annual Assessment of the Status of) MB Docket No. 05-255
Competition in the Market for the)
Delivery of Video Programming)

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits reply comments in response to the Commission’s further inquiry in the annual video competition proceeding regarding the so-called “70/70” test in the Section 612 “leased access” provision of the Communications Act, 47 U.S.C. § 532.

**I. ALL INDEPENDENT AND PUBLICLY-AVAILABLE DATA SOURCES
CONFIRM THAT THE 70/70 TEST HAS NOT BEEN MET**

In the Twelfth Annual Report on the status of competition in the market for the delivery of video programming, the Commission asked a very specific question: whether cable’s nationwide availability and penetration rates are sufficiently high to meet the so-called 70/70 test in the “leased access” provision of the Communications Act.¹ The first part of the test, whether cable systems with 36 or more channels are available to 70 percent of U.S. households, is not at issue. The Commission sought comment on the second part of the test, whether 70 percent of

¹ Section 612(g) provides that “at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States and are subscribed to by 70 percent of those households, the Commission may promulgate any additional rules necessary to provide diversity of information sources.” 47 U.S.C. § 532(g). See *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, MB Docket No. 05-255, rel. March 3, 2006 at ¶¶ 29 – 36.

those households subscribe to cable – based on the allegations of one party, SBC (now AT&T), that the test has supposedly been met.

NCTA demonstrated that by any authoritative communications industry data source – Warren Communications, Nielsen Media Research, or Kagan Research LLC – the second prong of the test has *not* been met. Indeed, by the Commission’s own measures, based on the price survey and Form 325 data, the 70 percent benchmark on cable penetration has not been satisfied. Congress was concerned that if the cable industry achieved this degree of penetration, it could constitute marketplace dominance of the kind that might warrant revisiting whether the leased access rules are sufficient to ensure diversity. But, as cable’s competitors have grown in strength and garnered more and more customers while cable’s share of the multi-channel video subscriber universe has steadily declined, it is highly doubtful that the threshold will ever be crossed. And any risk of such dominance has vanished.

Other parties filing in response to this inquiry generally take as given that the 70 percent penetration test has been met or fail to address the quantitative question at all. They provide *no* analysis of the relevant data sources nor any other evidence to refute the finding that the test has not been met, reflecting at best a misunderstanding of the data or at worst a manipulation of the data to reach their desired ends.

AT&T simply reasserts its discredited claim that cable has passed the second threshold. It states that it used “simple arithmetic and the cable industry’s own data” to demonstrate that the second threshold has been met.² But as we showed in our comments, AT&T’s analysis amounts to nothing more than an artificial picking and choosing of data from different sources to inflate

² AT&T Comments at 3.

the percentage of households subscribing to systems with 36 or more channels.³ It took Nielsen data here and switched to Warren data there, and disregarding the fundamental fact that the individual data sets were compiled using *different* methodologies and at *different* times, magically arrived at the number of 77 percent. This disingenuous calculation has no evidentiary value and provides no basis for contradicting the individual findings of the reputable data sources.

AT&T also urges the Commission to establish a single set of metrics and data source for calculating whether the second 70 percent threshold has been reached. As the Commission and NCTA point out, there is no perfect system-by-system census data, but three major media research organizations unanimously confirm that the test has not been met. AT&T and other parties are nevertheless not satisfied with information from *independent* and publicly-available sources.⁴ They seek to impose burdensome reporting requirements on cable operators, including the provision of subscriber data broken down on a demographic and geographic basis. Given that Warren, Nielsen *and* Kagan corroborate the 70/70 finding, such a requirement is completely unnecessary. And given the steady decline in cable's share of MVPD customers, and its share of homes passed, and the likelihood that it will continue to drop further *below* the threshold, imposing certified reporting requirements on cable operators would be an unwarranted and wasteful expenditure of operator and Commission resources.

³ See NCTA Comments at 7–8.

⁴ AT&T Comments at 4-5; AIVF Comments at 6-13.

AIVF, et al.,⁵ a group of public interest and consumer organizations, simply take AT&T's calculation at face value. But they also argue, in the alternative, that if overbuilder subscriber numbers are added to NCTA's subscriber numbers, these combined numbers will exceed the desired 70 percent penetration mark.

AIVF is right that all cable customers, including those of overbuilders, should be included in the calculation. But overbuilders' customers are *already* included in all the calculations relied upon by NCTA. In ascertaining cable's share of the MVPD subscriber universe, NCTA does break out incumbent cable operators versus overbuilders and other MVPDs to obtain an accurate picture of how many customers are subscribing to whose service. But in analyzing the data with respect to the 70/70 test, NCTA has always reported the *combined* incumbent and overbuilder cable customer counts. Indeed, each of the three major data sources, Warren, Nielsen, and Kagan, collect and include overbuilder subscriber information in their databases. Thus, only by double counting overbuilder customers does AIVF reach a penetration number greater than 70%.

AIVF further maintains that DBS subscribers and non-video broadband customers should be included in the 70/70 calculation. There is no statutory basis for expanding the scope of section 612 in this manner. Title VI of the Communications Act deals with "cable communications," not satellite communications, and Section 612 specifically deals with "cable channels for commercial use." There is no comparable satellite requirement. Moreover, as we discussed in our initial comments, Section 612(g) is focused on leased access services. It gives the Commission authority, in the event that the 70/70 test is met, to modify the rules for

⁵ See joint comments of the Association of Independent Video & Filmmakers (AIVF), Alliance for Community Media, Benton Foundation, Center for Creative Voices in Media, Center for Digital Democracy, Common Cause, Consumer Federation of America, Consumers Union, Hawaii Consumers, National Alliance for Media Arts and Culture and Media Alliance (collectively "AIVF et al.").

“commercial use,” pursuant to Section 612, and “commercial use” is defined as “the provision of *video programming*, whether or not for profit.” 47 U.S.C. § 532(b)(5) (emphasis added).

Therefore, the only relevant analysis under the 70/70 test is whether more than 70 percent of homes passed by cable are relying on a *cable operator* as their source of *video programming*.

This conclusion makes sense as Congress’ desire in adopting the 70/70 test was to provide a safeguard under the leased access rules if cable operators became virtually the sole source of video programming in a community. But, as the Twelfth Annual Report and at least the two previous video competition reports show, this concern has been overtaken by marketplace developments.

Having failed to get over the 70 percent quantitative hurdle, AT&T, AIVF and others attempt to focus the Commission’s attention on a host of issues that largely exceed the scope of the Commission’s authority under Section 612. As we discussed in our initial comments and address below, Section 612(g) does not constitute a sweeping grant of authority to promulgate content rules beyond leased access regulation.

II. THE COMMISSION’S SECTION 612(G) AUTHORITY IS STRICTLY LIMITED TO REGULATION OF LEASED ACCESS CHANNELS

As we showed in our initial comments, Congress made clear in the legislative history of the 1984 Cable Act that if the 70/70 test were somehow ever reached, the Commission would have authority to modify its rules and standards for *leased access* channels to provide more diverse access to the limited number of channels on cable systems. AT&T argues that such a limitation would make no sense:

[S]ince many of the other sub-provisions in Section 612 specifically enumerate leased access requirements applicable to cable operators, and since the Commission already has statutory authority to adopt rules necessary to implement all the requirements and prohibitions of the Communications Act, statutory construction principles suggest that Section 612(g) is not intended to be merely duplicative of the authority already vested in the Commission, but instead is

intended to allow the Commission to go beyond leased access requirements in order to promote diversity of information sources.⁶

AT&T's argument is reminiscent of the sort of time-line error that is suddenly discovered by defense counsel in the last act of a "Perry Mason" episode. For what AT&T overlooks is that many of those "specifically enumerate[d] leased access requirements" were added to Section 612 by the 1992 Cable Act – eight years after Section 612(g) was enacted. Until the 1992 amendments to Section 612, the Commission would not have had authority to adopt those additional requirements – including specifying maximum rates – unless the 70/70 test was met. Thus, it was not at all redundant or duplicative for Congress to limit the Commission's authority under the 70/70 test solely to regulation of leased access channels.

Moreover, AT&T's analysis suggests that Congress buried a broad grant of authority to regulate cable content in the leased access provision rather than enact a separate, stand-alone provision. But, as we pointed out in our comments, Congress made clear in Section 624(f) of the Communications Act that the Commission's authority to regulate the provision or content of cable programming services is limited to the *express* provisions of Title VI of the Act.⁷ If Congress had intended Section 612(g) to confer a broad grant of authority that went beyond the regulation of leased access channels, it would have expressly done so – as it did in other sections of the Act – and not put such authority in the leased access provision of the Act.

Furthermore, AT&T attempts to read something into the House Report language that simply is not there. It asserts that rather than limiting Commission authority to ensure that "leased access channels" provide diverse information sources to the public, the House Report

⁶ AT&T Comments at 6 (emphasis added).

⁷ Section 624(f) provides that "[a]ny Federal agency, State or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." 47 U.S.C. § 544 (f).

merely *included* authority to adopt rules pertaining to leased access and “in no way indicates that the Commission’s authority is *limited* to adopting such rules.”⁸ But the Report clearly states that at such time as the 70/70 test has been met, “the FCC is granted authority to promulgate any additional rules necessary to ensure that *leased access* channels provide as wide as possible a diversity of information sources to the public.”⁹ It goes on to state, “along these lines, the Commission may develop additional procedures for the resolution of disputes between cable operators and unaffiliated programmers, and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers.”¹⁰ Congress also speaks in terms of “any new regulations” in this area relating to “the price charged programmers *for the commercial use of channel capacity designated under this section.*”¹¹

This leaves no doubt that the Commission, then and now, has only narrow authority to promulgate additional rules to promote diversity of information sources under Section 612(g) by adjusting the rates, terms and conditions of “*leased access*” channels, if the 70/70 test was ever met.

Nevertheless, AIVF rides the seriously flawed coattails of AT&T’s quantitative analysis and altogether dismisses the statutory limitation on the Commission’s authority in the leased access provision. They urge the Commission to initiate a rulemaking proceeding under Section 612(g) to address a variety of issues that are either the subject of other ongoing proceedings or have been addressed comprehensively by the Commission and the courts. These include PEG and leased access, horizontal ownership limits, program access, and issues decided in the

⁸ AT&T Comments at 7 (emphasis in original).

⁹ Report of the Committee on Energy and Commerce, H.R. Rep. 98-934, 98th Cong., 2d Sess. 54 (1984).

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

Commission's *Internet Ventures, Inc* proceeding.¹² While we dispute AIVF's assertion that this statutory provision could trigger content regulation in the above areas, there is no reason to decide this matter now as the required 70/70 quantitative test has not been satisfied.

The Center for Digital Democracy, United States Conference of Catholic Bishops, and the Benton Foundation filed joint comments that stay within the "leased access" confines of Section 612. But they too provide no factual basis for establishing that the 70/70 threshold has been met. They urge the Commission to open a new leased access proceeding to determine whether it is serving its purpose under the Communications Act, arguing that the leased access regulations appear to have deterred non-affiliated programmers from using leased access because the maximum rate formula is too high.¹³ In today's intensely competitive video marketplace, where virtually every consumer has a choice of at least three MVPDs (each of which provides hundreds of channels) and can also increasingly access video programming over the Internet and on their handheld devices, there is no reason for the Commission to adopt new regulations in the area of leased access. The 1984 leased access provisions were strengthened under the 1992 Cable Act, and over the past decade there has been dramatic growth in the number and diversity of cable programming networks and other competitive sources of video. The video marketplace is thriving and it is unlikely that any rule changes would be warranted, even if the 70/70 test ever were met.

¹² In the Matter of Internet Ventures, Inc., Internet On-Ramp, Inc., *Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, 15 FCC Rcd 3247 (2000).

¹³ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267 (1997) (noting, *inter alia*, that leased access rules must take into account the effect such rules might have on a cable system's ability to compete with other multichannel video distribution systems and be adopted in a manner consistent with the financial viability of individual cable systems); *Valuevision International, Inc. v. Federal Communications Commission*, 149 F. 3d 1204 (upholding leased access rules).

Finally, Verizon – with no evidence to refute the fact that the 70/70 benchmark has not been met – takes this opportunity to submit a largely unresponsive pleading regarding issues that are pending and comprehensively addressed in the Commission’s Section 621 proceeding regarding video franchising. We urge the Commission to refer to the filings of NCTA and other cable parties in that docket.¹⁴ Verizon and other parties also argue for increased program access regulation, which is the subject of another provision of the Communications Act, Section 628.¹⁵ NCTA addressed this issue in its reply comments in the video competition proceeding.

¹⁴ *See e.g.* In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, NCTA Comments, February 13, 2006; NCTA Reply Comments, March 28, 2006.

¹⁵ The America Channel LLC (“TAC”) filed comments urging the Commission to institute a proceeding to impose conditions on cable operators to “promote programming diversity,” including an arbitrator to review certain carriage decisions and the requirement that 50% of new channel capacity be allocated to independent networks. TAC’s arguments have been raised in this proceeding and the pending Adelphia, Time Warner, Comcast merger proceeding and refuted by cable parties. *See e.g.*, Reply Comments of Comcast Corporation, MB Docket No. 05-255, filed August 8, 2005; Letter from Michael Hammer, Counsel for Adelphia to Marlene H. Dortch, Secretary, Federal Communications Commission, December 9, 2005, MB Docket No. 05-192, Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees; Comcast Corporation, Assignees and Transferees; Letter from James R. Coltharp, Chief Policy Advisor, FCC & Regulatory Policy, Comcast Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192, Ex Parte Notice, January 4, 2006; Letter from Michael Hammer, Counsel for Adelphia to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-192, January 5, 2006.

CONCLUSION

AT&T and other parties have put forth no credible evidence that the second prong of the 70/70 test has been met. Their assertions are at odds with the leading independent and publicly-available data sources, which unanimously confirm that cable penetration has not reached 70%. In light of the steady decline in cable's share of MVPD subscribers, as documented annually by the Commission, it appears improbable that the test will ever be met. And in the very unlikely event that the test is ever met, the Commission's rulemaking authority under Section 612(g) is strictly limited to modifying its leased access rules to ensure diversity of information sources.

Respectfully submitted,

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