

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Cable Subscribership Survey for the) MB Docket No. 07-269
Collection of Information Pursuant to)
Section 612 of the Communications Act)



NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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

The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments on the Federal Communications Commission’s proposed Cable Subscriber Survey form.¹ NCTA is the principal trade association of the cable television industry in the United States. Its members include cable operators serving more than 90 percent of the nation’s cable customers.

INTRODUCTION

Section 612(g) – which governs commercial leased access – provides 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 households to which such systems are available,” commonly referred to as the “70/70 Test,” the Commission “may promulgate any additional rules necessary to provide diversity of information sources.”² In its *Thirteenth Annual Report on Competition in the Market for Delivery of Video Programming*,³ the Commission found that the first prong of the test – the “cable availability” prong – was met.

¹ Released Jan. 16, 2009.

² 47 U.S.C. § 532(g).

³ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report* (adopted Nov. 27, 2007; released Jan. 16, 2009) (hereinafter “*Thirteenth Annual Competition Report*”).

The *Thirteenth Annual Competition Report*, however, did not determine whether the second prong of the test was met, *i.e.*, whether cable subscribership exceeded 70 percent of households to which 36 or more activated channels are available. Instead, the Commission decided that “the only way to accurately conclude that the 70/70 Test has been met is to have the cable industry provide [it] with the data with respect to their systems.”⁴ The proposed survey form followed.

We appreciate the opportunity to comment on the survey form. NCTA members commit to provide the information necessary to determine whether the cable industry meets the 70/70 Test criteria. However, as described below, the survey form seeks to gather data in ways that would impose significant new and unnecessary burdens on the entire cable industry. At a time when this data undoubtedly will confirm that cable subscribership is nowhere close to the 70 percent of households that would meet the second prong of the test, such burdens are especially unjustified.⁵

No survey is necessary to prove that a variety of competitors have substantially eroded – and continue to erode – the share of the video distribution marketplace that traditional cable operators serve, which inevitably leads to the conclusion that the second prong of the test is not met. The *Thirteenth Annual Competition Report* documents that cable television faces strong competition from two DBS providers⁶ and that cable subscribership has hovered below 60 percent of homes passed for the last several years. The Commission estimates that “subscribers to systems with 36 or more channels as a percent of the homes passed by such systems is 56.3 percent [based on the 2005 Price Survey data], compared to 58.8 percent using data from the

⁴ *Id.* at ¶ 43.

⁵ Moreover, even in the unlikely event that the 70/70 Test was met, there is no evidence that any additional rules are “necessary to provide diversity of information sources.” As the *Thirteenth Annual Competition Report* shows, cable operators already provide a multitude of diverse sources of programming content to customers nationwide, *id.* at ¶¶ 54-66, and consumers have immeasurable other ways to access diverse information sources.

⁶ *Id.* at App. B and Table B-1.

2004 Price Survey sample.”⁷ Data from cable operators’ Forms 325 “shows that this figure [for 2006] is 54 percent, the same percent as reported last year.”⁸

NCTA research shows similar results for 2008: *overall cable subscribership is well below 70%*. According to SNL Kagan data, cable systems passed 114.1 million occupied homes at the end of 2008, with only 67.5 million – or 59.1 percent – of those households subscribing to cable service (*including three million customers that subscribe to cable service provided by telephone company competitors*).⁹ Nielsen data show similar results: for the more than 5,500 systems reporting complete information, cable subscribership to systems with at least 36 channels is a little over 60 percent.¹⁰

Those data sources, while reliable, are not based on a complete record of every cable system.¹¹ The *Thirteenth Annual Competition Report* expressed concern that the “available data sources have some limitations because the reported cable penetration rates are not calculated from a complete census of cable systems.”¹² However, the Commission already annually collects data on its Form 325, including information on cable subscribers, homes passed and channel capacity, from every cable system serving 20,000 or more subscribers and a statistical

⁷ *Id.* at ¶ 40.

⁸ *Id.*

⁹ SNL Kagan, *Broadband Cable Financial Databook*, 2008 Ed. at 11. Telephone company subscribers from company data.

The sizeable growth in telephone company cable customers demonstrates how little relevance the 70/70 Test has in today’s highly competitive video marketplace. Including these competitors in the subscriber calculus distorts the picture. Where there are multiple cable operators competing with each other in local communities, the fact that cable operators serve 70% of all households would hardly be an indication of a lack of competition.

¹⁰ Nielsen Media Research FOCUS data (as of January 31, 2009) (60.7%).

¹¹ It should be noted that Warren Communications Factbook is not a complete data set as it contains partial data for more than 2,000 systems. See 2009 Factbook at p. F-2 (indicating that the Factbook is missing channel capacity data from 2,396 systems).

¹² *Thirteenth Annual Competition Report* at ¶ 41.

sampling of systems serving fewer than 20,000.¹³ While representing a relatively small proportion of the total number of cable systems nationwide, those systems represent the lion's share of cable customers.¹⁴ And based on the data that the Commission already collects, it is mathematically impossible for those small systems that *do not* report Form 325 data materially to change the outcome. *Even if every household passed by cable systems with fewer than 20,000 subscribers subscribed to those systems, cable penetration would still be well below the 70 percent threshold.*¹⁵

Under these circumstances, the benefit of obtaining precise data from every one of the more than 6,000 cable systems in the United States must be weighed against the burden that this cable system-wide information-gathering will impose. To require a 100 percent census of small systems is to reject the long-established validity of statistically significant survey instruments. If the Commission is convinced that this exercise is worth pursuing, at the least, where the Commission already obtains almost all the data it needs through its existing Form 325 data collection effort, it should rely on that data to the maximum extent possible.

Indeed, the Paperwork Reduction Act mandates that the agency “minimize the burden of collection of information on those who are to respond” and certify it “is not unnecessarily

¹³ 47 C.F.R. § 76.403.

¹⁴ See *1998 Biennial Regulatory Review – “Annual Report of Cable Television Systems,” Form 325, filed pursuant to Section 76.403 of the Commission’s Rules*, 14 FCC Rcd. 4720, 4730 (1999) (noting that “systems serving more than 70% of the nation’s cable subscribers will be reporting information”). Likewise, Nielsen FOCUS shows systems reporting roughly 53.9 million total subscribers to systems with 20,000 or more customers.

¹⁵ According to data from Nielsen’s FOCUS database, of those systems that reported subscribers to Nielsen, those with 20,000 or more subscribers covered 53.9 million subscribers (or nearly 83% of total 65.3 million (M) subscribers noted by the FCC in its *Thirteenth Annual Competition Report*). According to the latest data from the FCC Forms 325, the penetration rate for the respondent systems was 54%. *Id.* This translates to approximately 99.8 million homes passed by 20,000+ cable systems (53.9/.54). Assuming the remaining 17% of subscribers were in systems with 100% penetration, the homes passed for systems serving less than 20,000 customers would equal 11.4 million (11.4M/1.0). Therefore, even if all systems serving less than 20,000 customers had 100% penetration, the total penetration would only increase to 58.7% (65.3M / (99.8M + 11.4 M)).

duplicative of information otherwise reasonably accessible to the agency.”¹⁶ To comply with this mandate, the Commission must avoid imposing new burdens on cable operators to provide information that the Commission already collects, albeit in a slightly different form.

Therefore, the Commission should rely on Form 325 data for those systems that are required to file and, to the extent the Commission believes it must collect information from smaller operators, it should use a scaled-down version of Form 325 for that purpose. The Commission can tailor its information request to receive the data it needs to conclude its inquiry without imposing unnecessary and duplicative burdens on the industry. Such a carefully targeted data collection process should be sufficient to assure the Commission, with a high degree of statistical certainty, that the 70/70 threshold has not been met. If in future years the data received suggests that the gap is narrowing, further refinements to the data collection process can then be added.

DISCUSSION

I. THE COMMISSION SHOULD COLLECT CURRENT, RATHER THAN STALE, DATA

The proposed form asks operators for data from a typical day in the last full weeks of December 2006 and 2007. Failure to release the *Thirteenth Annual Competition Report* until *more than a year* after it was adopted explains why the timeframe of this request is off. The Commission should use this opportunity to seek current, rather than stale, data. Even in November 2007, the Commission recognized that cable operators might not have data readily available from the previous year, and permitted an operator to certify that “it does not possess such information for calendar year 2006 and that it is not possible for the operator to compile

¹⁶ 44 U.S.C. § 3504.

such data for calendar year 2006.”¹⁷ At this late date, we submit, no purpose would be served by requiring operators to recreate this data or to certify as to the impossibility of compiling such data.

Regardless of whether historical data might be interesting as an academic matter, it makes no sense to issue a form in 2009 to gather information as of 2006 or 2007 to determine whether the 70/70 Test is currently met. Indeed, by the time the form could be approved by OMB, more months will have gone by, making the data from years past even more irrelevant to today’s inquiry.

II. THE COMMISSION SHOULD MINIMIZE UNNECESSARY PAPERWORK BY ALLOWING OPERATORS REQUIRED TO FILE ANNUAL FORMS 325 TO SUBMIT CURRENT FORMS IN LIEU OF A NEW SURVEY FORM

The *Thirteenth Annual Competition Report* detailed the four pieces of information deemed relevant to determining whether the cable industry meets the second prong of the test:

- (1) total number of homes the cable operator currently passes;
- (2) total number of homes the cable operator currently passes with 36 or more activated channels;
- (3) total number of actual subscribers, including all subscribers in MDUs; and
- (4) total number of subscribers with 36 or more activated channels.¹⁸

The vast majority of this information is already reported on Form 325, which requires all cable operators with 20,000 or more customers, as well as a stratified statistical sampling of smaller systems, to submit such information.¹⁹ The form collects data on homes passed by the system, subscribership to the system, and the number of activated channels.

¹⁷ *Thirteenth Annual Competition Report* at n. 105.

¹⁸ *Id.* at ¶ 43.

¹⁹ *1998 Biennial Regulatory Review – Annual Report of Cable Systems, Form 325, filed pursuant to Section 76.403 of the Commission’s Rules*, 14 FCC Rcd. 4720, 4726 (1999).

(1) Form 325, Section II b (General Information) asks for the “number of potential subscribers” – *i.e.*, “homes passed.”

(2) Form 325, Section III asks for information on analog and digital video channels.

(3) Form 325, Section II asks for the “total number of basic subscribers on the system computed according to the following method: Number of single family dwellings + number of individual households in multiple dwelling units (apartments, condominiums, mobile home parks, etc.) paying at the basic subscriber rate + bulk rate customers + courtesy and free service.”

The Commission recently mailed these forms to cable operators in January 2009, and responses are due in March. By the estimate the Commission gave OMB in securing PRA approval of Form 325, it takes two hours of effort to prepare those responses, which will provide the Commission with virtually all the data it needs to include these systems in the 70/70 Test calculus.

It is possible that the data provided on the Form 325 does not match precisely the data the Commission feels it needs to determine whether the second prong of the 70/70 Test has been met, since it does not capture whether a system has more than 36 channels throughout the system. But there is every reason to presume that operators with 20,000 or more customers provide at least 36 channels to their subscribers. Of the 845 cable headends reporting 20,000 or more subscribers to Nielsen, *none* report systems with 36 or fewer channels. At the very most, then, the Commission could seek to supplement the Form 325 by asking operators to provide additional data if any portion of the system has not been upgraded to offer 36 channels and, if so, to detail how many potential and actual customers receive fewer than 36 channels.

For those smaller systems that do not routinely complete Form 325, the Commission could simply create a new abbreviated version of the same form, focused on gathering data regarding subscribers, homes passed, and channel capacity and modified to separate out below-36 channel households. This solution will easily and quickly provide the Commission with the

data necessary to make the 70/70 Test calculation. By contrast, as described below, the new survey instrument will unduly and unnecessarily burden all operators, large and small alike.

Where the two forms diverge in their questions, the proposed survey form is significantly more burdensome and seeks information that operators in many instances do not retain in the ordinary course.

III. THE PROPOSED FORM SEEKS INFORMATION THAT OPERATORS TYPICALLY DO NOT MAINTAIN

In several significant respects, the proposed survey form asks for information that differs from that which operators report on Form 325. Insisting on obtaining this slightly different data, given its costs, is not warranted.

A. Unoccupied/Seasonal Homes

In addition to asking about the number of homes passed, question 5a of the survey form also asks for the “number of unoccupied/seasonal homes” passed, and the method by which an operator has made those determinations. Cable operators typically do not collect information about unoccupied or seasonal homes passed.²⁰

Cable operators maintain billing data on homes that they serve and keep other data regarding potential homes they might serve. But whether the unserved homes that they pass are occupied at any point in time is not relevant to their normal business operation. Therefore, they do not keep any count – much less an accurate count for federal reporting purposes – of occupied vs. unoccupied homes passed. Nor would cable operators maintain historical data that would provide that information. Similarly, operators have no uniform way of tracking whether an account is seasonal for these purposes. Creating a checklist of allowable sources for this

²⁰ Neither the Form 325 nor the annual price survey requires operators to separate out unoccupied or seasonal homes. The annual price survey asks for “the number of households passed,” *i.e.*, “households that ... your system reaches, regardless of whether or not these households subscribe to your service,” while Form 325 similarly asks for “the number of potential subscribers.”

information does not cure the problem – it simply risks introducing further statistical anomalies into the calculation.

To be sure, the Commission in other contexts has sought data only on occupied households. For example, the Commission asks operators to use data that only include occupied dwellings when an operator seeks to demonstrate “effective competition” for rate regulation purposes.²¹ There, the Commission explained that

to permit an operator to include dwelling units that are empty for a significant portion of the year in determining its penetration rate would eviscerate the validity of this measure as an indicator of the presence of effective competition. People who are not present cannot be presumed to be choosing local competitive alternatives. We believe that the best and most constant indicator of local viewers’ choices is represented by the full-time residents of an area. Moreover, it is the full-time residents who are most affected by the determination whether their cable rates are subject to regulation.²²

These considerations do not apply to the 70/70 Test. Where an effective competition finding is at stake, the Commission is focused on competitive conditions in a particular community. The 15 percent threshold in the test is usually, but not always, found in these cases and the Commission wants to be sure that the 15 percent threshold is convincingly met. An effective competition determination has specific consequences for operators, competitors, regulators, and customers, and once such a determination is made, it may take time to revoke it in the unlikely event that competitors’ market share drops back below 15 percent. Therefore, it makes sense for the Commission to exclude units “that are empty for a significant portion of the year.” And because the operator is seeking this relief in a discrete local community, it may be fair to ask the petitioner to harness the resources needed to make a showing on occupied homes – certainly

²¹ *Third Order on Reconsideration*, 9 FCC Rcd. 4316 (1994).

²² *Id.* at 4324.

fairer than to insist that *every* operator, in *every* locale, undertake this survey, especially where the readily ascertainable numbers show the result will likely be nowhere close to 70 percent.

Further, the Commission in the effective competition context assumed that occupancy information “should be easily available from readily available information.”²³ Although the Census Bureau provides information on occupied households, that information does not directly correspond to the households passed by cable systems and, therefore, is of limited utility. Assuming and applying a uniform occupancy rate factor based on census data would fail to yield accurate numbers since occupancy differs from town to town, and seasonal occupancy can vary widely depending on location.

For all these reasons, any obligation to report on unoccupied homes would yield inaccurate information or would be overly burdensome and should not be required for these purposes.

B. The Number of Total Subscribers Is Not Relevant to the Inquiry

Question 5b of the survey form asks operators to list the “number of total subscribers,”²⁴ while question 5c asks for a separate count of the “number of video subscribers.” There is, however, no reason to obtain *total* subscriber information for purposes of this inquiry.

Only *video* subscribers should count toward the Section 612 calculation. That provision deals with cable channels for “commercial use,” defined as the “provision of *video* programming.”²⁵ The 70/70 provision itself speaks to “diversity of information sources.” Thus, the number of non-video subscribers, which could include telephone-only customers, for example, has nothing to do with leased access and is entirely irrelevant to this calculus.

²³ *Id.* at 4325.

²⁴ The draft instructions explain that this requires reporting of “the total number of subscribers within the PSID who have access to the cable plant and receive *any type of service.*”

²⁵ 47 U.S.C. 532 (b)(5) (emphasis supplied).

C. There Is No Reason to Depart from Form 325’s Methodology for Counting Subscribers in Multiple Dwelling Units

For purposes of Commission reporting, cable operators have long used the equivalent billing unit (“EBU”) methodology to determine how many bulk rate customers they serve.²⁶ That methodology, as described in the instructions to Form 325, requires cable operators to divide the total annual bulk-rate charged to a bulk rate customer by the basic annual subscription rate for individual households.²⁷ The proposed survey form, however, offers somewhat different instructions, directing operators to “be sure to count individual homes that receive service even if the service is provided under a bulk rate.” There is no reason to depart from the EBU methodology in this instance or to gather information inconsistent with that which the Commission already collects.

D. The Commission Should Not Request ZIP Code Data on Homes Passed

Question 6 of the survey form asks incumbent cable operators for information on homes passed by the system by ZIP code. But cable systems are designed and built on a franchise basis not by ZIP code, and that is not how cable operators report information on Form 325, which asks for information based on potential subscribers to the *system* for all locations with access to the existing cable plant.

Not surprisingly, operators generally do not maintain homes passed information on a ZIP code basis. Obtaining that data simply for purposes of filling out the form would be a costly and ultimately pointless exercise, even if it could be extracted from existing databases that contain current data.

²⁶ See 1998 Biennial Regulatory Review – “Annual Report of Cable Systems” Form 325, filed pursuant to Section 76.403 of the Commission’s Rules, 14 FCC Rcd. at App. A (instructions for revised Form 325).

²⁷ Cable operators also use the EBU methodology in determining their regulatory fees. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284863A5.pdf.

Moreover, the Commission itself has explained that ZIP code data has its own limitations. For purposes of reporting on broadband deployment, the Commission stated that “Census-based units are more stable and static than ZIP Codes ... and correspond more consistently to actual locations.”²⁸ Moreover, “ZIP Codes are designed ... to deliver efficiently the nation’s mail” and “do not correspond to any commonly recognized boundaries, such as state or county lines, Congressional districts or service territories.”²⁹ Most significantly, ZIP codes do not correspond to franchise or system boundaries and can encompass very large geographic regions, particularly in rural areas. They also change over time. For all these reasons, the proposal to require reporting of homes passed on a ZIP code basis, rather than simply on the current basis of the physical system location, makes little sense.

CONCLUSION

The Commission can complete its task of determining whether the cable industry meets the 70/70 Test criteria without unnecessarily burdening the industry. The optimum way to achieve this goal would be to use the current data that the agency already collects in the Forms 325 that are in the field today. To the extent the Commission believes it must collect data from smaller operators, abbreviated versions of these same forms can be sent to smaller system operators that are not routinely surveyed.

Otherwise, creating a new form for this purpose will impose unnecessary burdens on all cable operators. It will unnecessarily subject operators to a duplicative information-gathering exercise. For the reasons described above, much of the different data sought in the proposed survey form is not currently maintained by cable operators and, even if it could be gathered, it would be costly to do so. The broader public policy goals related to diversity of information

²⁸ *Development of Nationwide Broadband Data*, 23 FCC Rcd. 9691, 9696-7 (2008).

²⁹ *Id.* at 9697.

sources are ill-served by a burdensome survey process that will lead to more confusion and inconsistent data, in contravention of the reason for this exercise.

Respectfully submitted,

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