

**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)	

AT&T'S COMMENTS

AT&T Inc. (“AT&T”)¹ respectfully submits these Comments in response to the inquiry initiated by the Commission in its *Twelfth Annual Report*, issued March 3, 2006, in this proceeding.² The Commission’s inquiry concerns Section 612(g) of the Act, which, in pertinent part, provides:

[A]t 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 households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.³

The Commission’s inquiry focuses on two aspects of § 612(g): (1) the appropriate data and calculation methodology to be used in determining whether the “70-percent thresholds” have been met,⁴ and (2) the scope of the Commission’s authority to issue rules once those thresholds

¹ SBC Communications Inc. previously filed Comments and Reply Comments in this proceeding. On November 18, 2005, SBC Communications Inc. closed on its merger with AT&T Corp. The resulting company is now known as AT&T Inc. Thus, in these Comments, “AT&T” refers to the merged company.

² See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Twelfth Annual Report*, MB Docket No. 05-255 ¶¶ 31-36 (rel. March 3, 2006).

³ 47 U.S.C. § 532(g).

⁴ *Twelfth Annual Report* ¶ 36.

have been met.⁵ With respect to both inquiries, the Commission must remain focused on the ultimate goal of Section 612: the promotion of diversity of information sources. Diversity of information sources, and the competition for ideas that it promotes, is a critical component of informed and public debate. It is thus imperative that the Commission resolve both aspects of its inquiry in a manner that affords it the opportunity and ability to effectuate the Congressional goal of promoting diversity of information sources.

I. THE COMMISSION SHOULD ESTABLISH METRICS FOR THE 70/70 THRESHOLDS CONSISTENT WITH THE GOAL OF PROMOTING DIVERSITY OF INFORMATION SOURCES

There are two components to the statistical thresholds necessary for the Commission to invoke its authority under § 612(g). First, cable systems with 36 or more activated channels must be available to 70 percent of all households. Second, cable systems with 36 or more activated channels must be subscribed to by 70 percent of those households. With respect to both, the Commission should establish metrics that allow the Commission the freedom to invoke its power to protect diversity of information sources.

There appears to be no dispute with respect to the first component of Section 612(g)'s threshold. In its *Eleventh Annual Report*, the Commission concluded that the first 70 percent statutory threshold has been met: 79.8 percent of all occupied households are now passed by cable systems with 36 or more channels.^{6/} And in its *Twelfth Annual Report*, the Commission found that “cable systems with 36 or more channels are available to 86.3 percent . . . of occupied

⁵ *Id.*

^{6/} Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Eleventh Annual Report*, MB Docket No. 04-227 ¶ 20 (rel. Feb. 4, 2005).

households.”⁷ The cable industry, moreover, agrees that “the first prong of the test – the availability of cable systems with 36 or more channels to U.S. households – has been met[.]”⁸ Accordingly, “there appears to be no serious disagreement that this prong of the analysis has been satisfied.”⁹

The only remaining question is whether cable systems with 36 or more activated channels are subscribed to by 70 percent of those households. In order to resolve that question, the Commission should establish clear rules concerning the appropriate data sources and the statistical methodology that should be used in calculating the percentage of households that subscribe to cable service from cable systems with 36 or more activated channels. In both the *Tenth Annual Report* and the *Eleventh Annual Report*, the Commission found that 68.9% of occupied households passed by cable systems with 36 or more channels subscribed to cable service, indicating that subscribership was very near the 70 percent threshold necessary for the Commission to invoke its authority under Section 612(g).¹⁰ In its Reply Comments in this proceeding, AT&T used simple arithmetic and the cable industry’s own data to demonstrate that this threshold likely had been met since the Commission’s *Eleventh Annual Report*.¹¹ No commenter challenged AT&T’s methodology. Both the Commission and the NCTA, however,

⁷ *Twelfth Annual Report* ¶ 32.

⁸ Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, NCTA to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-255, at 1 (Dec. 15, 2005)(“NCTA Ex Parte”).

⁹ *Twelfth Annual Report* ¶ 32.

¹⁰ See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Tenth Annual Report*, MB Docket No. 03-172 ¶ 22 (rel. Jan. 28, 2004); *Eleventh Annual Report* ¶ 20.

¹¹ See *AT&T Reply Comments* at 15.

referred to a variety statistics from various data sources, producing a range of anywhere from 68.9% to 53.1% for the second 70 percent threshold, and the Commission reached no conclusion as to whether the second 70 percent threshold had been reached.¹² In light of its statutory mandate to promote diversity of information sources, it is imperative that the Commission establish a single set of metrics and source of data for calculating whether the second 70 percent threshold has been reached.

With respect to the metric, the Commission should establish a clear and consistent definition of both “subscribed” for use in the numerator as well as “households” for use in the denominator. Such definitions, moreover, should be written so as to best enable the Commission to effectuate its statutory duty to promote diversity of information sources. Thus, the numerator should include subscribers of all cable services as that term is defined in the Act. The denominator should not include households that are unoccupied, and it should not include households without televisions. Including such households in the calculation would be fundamentally inconsistent with the focus of Title VI on cable television service and subscribers.

With respect to the source of information used to determine whether the second 70 percent threshold has been reached, the Commission should require the cable operators themselves to provide such information. Both the Commission and the cable industry agree that publicly available sources of information have limitations with respect to their use in calculating the second 70 percent threshold.¹³ Indeed, as discussed above, the weakness of such publicly available information is readily apparent from the widely divergent results obtained simply by

¹² See *NCTA Ex Parte* at 2-3; *Twelfth Annual Report* ¶ 34.

¹³ See *Twelfth Annual Report* at 35 (“We recognize that the available data sources have some limitations because the reported cable penetration rates are not calculated from a complete census of cable systems.”); *NCTA Ex. Parte* at 2 (“[T]here is no complete cable system census data source in the industry.”).

using statistics from different sources. The cable operators themselves, however, have the data the Commission needs in order to evaluate whether the second 70 percent threshold has been met. Therefore, as it has in other instances in which it required accurate data to effectively implement the Act's statutory requirements,¹⁴ the Commission should establish a program whereby the cable operators provide the Commission with the data necessary to determine whether the second 70 percent threshold has been met.

As it did in its *Broadband Reporting Order*, the Commission should establish a standard form for collecting information. That form should require cable operators to report data broken out by appropriate demographic and geographic criteria. Such a form will ensure that cable operators report data on a consistent and transparent basis. The Commission also should require all cable operators to report on an appropriate periodic basis. Moreover, to encourage all companies to report, the Commission should establish that it will infer a 100% statistic for companies that fail to report (*i.e.*, that 100% of households subscribe to cable services from cable systems with 36 or more activated channels for cable operators who fail to report). Such measures are critical in ensuring that the Commission has the tools necessary to effectuate the statutory goal of ensuring the promotion of diversity of information sources.

¹⁴ See, e.g., Local Competition and Broadband Reporting, *Report and Order*, 15 FCC Rcd. 7717, CC Docket No. 99-301 (rel. Mar. 30, 2000).

II. THE COMMISSION HAS BROAD AUTHORITY UNDER SECTION 612(g) TO ISSUE REGULATIONS TO PROMOTE DIVERSITY OF INFORMATION SOURCES

The Commission has requested comments on the scope of its authority under Section 612(g) to issue additional rules. Based on the plain language of the statute, the answer to that question is clear: the Commission has broad authority to issue “any additional rules” that in the judgment of the Commission are “necessary to provide diversity of information sources.”¹⁵ Other than the requirement that such rules be *necessary*, Section 612(g) contains no specific constraints on what mechanisms the Commission might use to provide such diversity.

Despite the plain language of Section 612(g), NCTA asserts that “the Commission’s authority under Section 612(g) is narrowly circumscribed. In particular, the authority to promulgate rules only applies to the rates for leased access channels.”¹⁶ NCTA’s assertion is contradicted by the plain language of the statute.

NCTA does not dispute that, on its face, Section 612(g) does not circumscribe the Commission’s authority in the manner NCTA asserts. Section 612(g) does not even mention leased access. In fact, since 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. That conclusion is further supported

¹⁵ 47 U.S.C. § 532.

¹⁶ *NCTA Ex. Parte* at 3.

by the fact that Section 612(a) broadly states that the overall purpose of Section 612 is “to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public,” without any reference to leased access.¹⁷ The Commission could hardly achieve this directive if it were limited to only adopting leased access rules.

In support of its assertion that Section 612(g) limits the scope of the Commission’s authority to adopt rules pertaining to leased access, NCTA relies solely on the appearance of a single phrase—“leased access channels”—in the House Report in the legislative history of Section 612(g). The reference to “leased access channels” in the House Report, however, in no way limits the Commission’s authority under Section 612(g). The House Report does not say that the Commission’s authority under Section 612(g) is limited to adopting rules pertaining to leased access. Rather, it says, “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.”¹⁸ While that language certainly indicates that the Commission’s authority under Section 612(g) *includes* authority to adopt rules pertaining to leased access, it in no way indicates that the Commission’s authority is *limited* to adopting such rules. Indeed, as discussed above, any such interpretation would be inconsistent with the broad-sweeping language in Section 612(a) identifying the overall purpose of Section 612.

¹⁷ 47 U.S.C. § 532(a).

¹⁸ Report of the Committee on Energy and Commerce, H.R. rep. 98-934, 98th Cong., 2d Sess. 54 (1984).

Respectfully submitted,

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