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	)	

COMMENTS OF THE

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits further comments in response to the Commission's Twelfth Annual Report in the above-captioned proceeding.

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing $100 billion over ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to millions of American consumers.

INTRODUCTION AND SUMMARY

In its Twelfth Annual Report on the status of competition in the market for the delivery of video programming, the Commission confirmed that the video marketplace has never been more competitive and that, "competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation."[1] "Almost all consumers," the FCC found, "have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers,"[2] as well as newer delivery media such as video over the Internet and mobile video services.

In the course of reporting this impressive level of competition, the Commission also sought comment on a narrower technical issue regarding the so-called "70/70" test in Section 612 of the Communications Act, which is the "leased access" provision of Title VI of the Communications Act. 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."[3] In response to comments submitted by SBC, the Commission is seeking comments on the "best methodologies and data" for determining whether cable's nationwide availability and penetration rates are sufficiently high to meet that test.

This is an odd time for the Commission to address this issue. The Commission has recognized that competition has irreversibly taken hold in the video marketplace and that cable's share of MVPD subscribers is steadily declining. Thus, even if cable penetration were very close to the 70% threshold (which, by all reasonable measures, it is not), there is every reason to expect that it will drop further and further *below* the threshold. Moreover, the concern that motivated Congress to adopt the 70/70 test – a fear that cable operators would increasingly

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1 *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 ¶ 5.

2 *Id.*

3 47 U.S.C. § 532(g).

become the sole source of video programming in a community – has been overtaken by marketplace developments.

Congress adopted Section 612(g) in 1984 as a safeguard to its then-implemented leased access rules. At that time, there was no such thing as DBS, and most cable systems offered no more than 36 channels of programming. If, instead of steadily declining, cable penetration had continued to grow and eventually reach the 70% threshold, the Commission would have had authority to modify its rules regarding *leased access* channels to provide more diverse access to the limited number of channels on cable systems.

In today's environment, where consumers have 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, modifying the leased access rules would serve little purpose. As we show in these comments, SBC's suggestion that the 70/70 test has been met is at odds with every other available measure and is simply wrong. The Commission should, in this proceeding, put this issue to rest once and for all.

I. BY ALL RELEVANT MEASURES, THE SECOND PRONG OF THE SECTION 612(G) 70/70 TEST HAS NOT BEEN SATISFIED

As the Commission concludes, there is no question that the first prong of the 70/70 test has been met. Cable systems with 36 or more channels have long been available to far more than 70% of households in the United States. It should be equally clear, as NCTA has repeatedly shown in its comments in the annual video competition inquiries, that the second prong of the test – whether 70 percent of those households subscribe to cable – has *not* been met. But on this point the Commission finds that the "record is less clear."[4]

As NCTA reported to the Commission in December 2005, under any of the relevant independent data sources – Warren, Nielsen and Kagan – the Section 612(g) benchmark on cable penetration has not been met.[5] And in light of the steady growth of cable's competitors in the video marketplace and the continued decrease in cable's share of multi-channel video subscribers, it seems highly unlikely it ever will be.

While there is no complete cable system census data source in the industry, Warren Communications, Nielsen Media Research and Kagan Research LLC provide significant information on cable subscribers and total homes passed by cable. NCTA has again analyzed the Warren data, which the Commission has previously relied on in the annual video competition report,[6] as well as data compiled by Nielsen and Kagan. Based on our analysis of each data

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4 Twelfth Report, ¶ 33.

5 *See* Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, NCTA to Marlene H. Dortch, Secretary, Federal Communications Commission, December 15, 2005, filed in MB Docket No. 05-255 ("Dec. 2005 ex parte letter").

6 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, 20 FCC Rcd. 2755, ¶ 20. (2005).

source, as shown below, the penetration rate for those systems under all three sources is below the 70 percent threshold.

	Warren Communications [7] (September 2005) 36+ channels	Analysis of Nielsen FOCUS Systems that report all Data *N= 6,034* (March 15, 2006) 36+ Channels	Analysis of Nielsen FOCUS Adjusted to Reflect Systems that did not report Homes Passed Data *N= 7,519* (March 15, 2006) 36+ Channels	Kagan Research (Year End 2005)[8] All Cable Systems
Cable Subscribers	63,145,124	52,511,388	69,228,435	65,400,000
Homes Passed	93,077,522	83,782,197	110,444,154	123,000,000
Cable Penetration as Percent of HP	67.8%	62.7%	62.7%	53.1%

Only the Warren data show a penetration figure anywhere near the 70% threshold and even this percentage has declined over the past year.[9] This is because the Warren data appear to seriously understate the number of homes passed by cable systems with more than 36 channels. Specifically, the Kagan data show almost 30 million more homes passed than the Warren data. The Nielsen data, when adjusted to take into account data from 1,485 systems that did not return completed questionnaires, show 17 million more homes passed than the Warren data.[10]

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7 Warren Communications News Custom reports as cited in Twelfth Annual Report at ¶¶ 32 and 34.

8 Kagan Research, LLC, Broadband Cable Financial Databook 2005 at 11.

9 *See* Dec. 2005 ex parte letter that included data from Warren Communications News that indicated that penetration of 36+ channels systems was at 68.9% as of October 2004. By September 2005, it had declined to 67.8%. Therefore, the industry is further from the second prong of the threshold than it was a year earlier based solely on Warren data.

10 According to Nielsen FOCUS data, as of March 15, 2006, there are a total of 7,519 cable systems in the United States with a capacity of 36 or greater channels. The Nielsen FOCUS database compiles system data for all cable headends in the United States, but because a certain percentage of systems surveyed return incomplete questionnaires it contains complete data for only 6,034 "36+ channel" systems. Specifically, the Nielsen FOCUS database is missing "Homes Passed" data from 1,485 "36+ channel" systems. These 1,485 systems comprise subscribers totaling nearly 16.72 million. We know the number of subscribers for the smaller group of systems missing information (16,717,047) but we need to estimate the number of "Homes Passed" (which is a larger number) for these systems. To estimate the number of "Homes Passed" for these 1,485 systems, NCTA used the average penetration rate of the 6,034 systems that reported complete data to Nielsen as a proxy. These systems have a 62.7% penetration rate. So given that "Homes Passed" [X] x "Penetration Rate" [.627] =

Moreover, as the Commission discusses in the Report, several *other* calculations based on various data sources *further* demonstrate that the second prong of the 70/70 test has not been reached. The Commission's analysis of the Warren data is actually lower than the 70% as it finds that 67.8 percent of U.S. households passed by cable with 36 or more channels subscribe to cable. Using alternative data from the 2005 Price Survey, the Commission estimates that the subscribers to systems with 36 or more channels as a percent of homes passed by such systems is 56.3 percent, compared to 58.8 percent using the 2004 Price Survey data. Turning to another source, the Annual Report of Cable Television Systems (FCC Form 325), the Commission estimates that this figure is 54 percent, compared to 54.7 percent reported last year.

As the Commission points out, there is no perfect data source. The reported cable penetration rates are not drawn from a complete census of all cable systems. Some data sources identify cable systems with 36 or more channels, while other data sources report estimates for all cable systems without distinguishing between those with 36 or more channels and those with less than 36 channels.[11] But there is no denying that over the past year, as the Report points out, "cable's share of the MVPD market continued to decline."[12] As of June 2005, 69.4 percent of

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"Number of Subscribers" [16.72 million], NCTA solved "Homes Passed" and estimates that the 1,485 systems that did not report "Homes Passed" data would pass an estimated 26.66 million homes [26.66 x .627=16.72]. Therefore, the 7,519 "36+ channel" systems serve a total of 69.2 million subscribers [52.51 million (6,034 systems) + 16.72 million (1,485 systems)] and pass 110.44 million homes [83.78 million (6,034 systems) + 26.66 million (1,485 systems)].

[11] *See* Twelfth Annual Report, note 33.

[12] *Id*., ¶ 8. The Commission asks whether, in determining how many households passed by cable actually subscribe to a cable system (*i.e.*, the numerator of the 70% penetration test), it should count only households that subscribe to the basic tier of video services and not those that subscribe only to *non-video* services. *Id.*, ¶ 36. The answer clearly is yes. As discussed below, Section 612(g) is focused on video services. It gives the Commission authority, in the event that the 70/70 test is met, to modify the rules for "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). Accordingly, what matters, under the 70/70 test, is whether more than 70% of homes passed by cable are relying on a cable operator as their source of video programming.

MVPD subscribers received video programming from a franchised cable operator, as compared to 71.6 percent as of June 2004.[13]

While all these calculations and data sources unanimously confirm that the second prong of the 70/70 test has not been met, the Commission points to the comments of a single party – SBC (now AT&T) – which purport to show the contrary. Those comments alone are the basis for the Commission's conclusion that the record is less than clear on this point, SBC's analysis is seriously flawed.

SBC asserts that 77.2 percent of all households passed by cable systems with 36 or more channels subscribe to these cable systems, a much higher percentage than any of the other data sources cited by the Commission. As the Report summarizes SBC's claim:

> Using figures estimated by the Commission and NCTA, SBC asserts that 65,155,440 households subscribe to cable systems with 36 or more channels. SBC derives this figure from NCTA's estimate that 73,219,360 households subscribed to cable as of February 2005 (citing NCTA's website relying on Nielsen Media Research) and the Commission's calculation in [the Eleventh Annual Report], using Warren data as of October 2004, that 8,063,920 households subscribed to cable systems with fewer than 36 channels. SBC subtracts the Commission's estimate from NCTA's estimate (73,219,360 – 8,063,920 = 65,155,440). SBC then divides its estimate of households that subscribe to cable systems offering 36 or more channels by Warren's October 2004 estimate, cited in the 2004 Report, that 84,415,707 households homes were passed by cable systems with 36 or more channels. This calculation produced a figure of 77.2 percent (65,155,440/84,415,707 = 0.772). SBC acknowledges that its data for households passed by cable systems and cable subscribers differ from the data used by the Commission to determine whether the statutory trigger has been met.

It's not hard to see what SBC did in its Rube Goldberg-inspired calculations. It selectively picked and chose data from different sources in a manner that artificially inflated the percentage of households subscribing to systems with more than 36 channels. It relied largely on

[13] *Id*.

Nielsen data to calculate the numerator of the calculation (the number of households that subscribe to such systems). But it switched to Warren data to calculate the denominator (the total number of homes passed by such systems). But the Warren data set is considerably older than the Neilsen numbers. Its calculation of the number of homes passed by channels with 36 or more channels is much smaller than Nielsen's later figures. And its calculation of the number of actual subscribers to such systems is also much smaller than Nielsen's.

SBC's methodology amounts to picking the data set that provided the largest number for the numerator and the smallest number for the denominator. And, presto, the percentage turns out to be far higher than the calculations of either individual data set, or of any other data source. This mixing and matching of data from different sources, compiled at different times and using different methodologies, is of no evidentiary value.

All three relevant data sources and the Commission's own estimates, based on the price survey and Form 325 data, indicate that cable is under the second 70/70 benchmark. SBC's mish-mash is the only "evidence" to the contrary and provides no basis for undermining the findings of the other sources. Since cable's share of MVPD customers, and its share of homes passed, has been steadily declining, there would seem to be little reason to worry about reaching the 70/70 threshold at this time.

It seems unlikely now that the test will *ever* be met. Moreover, as discussed below, the Commission's authority under Section 612(g) is narrowly circumscribed in any event and is limited to promoting diversity under the leased access provisions of the Act and the rules. In light of the vibrant competition that now exists in the video marketplace, and the growth in the diversity and number of program channels available to MVPD households, there would be no reason for the Commission to adopt such additional rules even if the test *were ever* met.

II. COMMISSION AUTHORITY TO ADOPT NEW CONTENT RULES UNDER SECTION 612(G) IS NARROWLY CIRCUMSCRIBED

Under Section 612(g), the scope of the Commission's authority to promulgate additional rules to promote diversity of information sources under this statutory provision is narrowly circumscribed. Section 612(g) applies solely to the rates for *leased access channels.*

Section 612 was enacted over twenty years ago as part of the Cable Communications Policy Act of 1984 – the statute that established for the first time a comprehensive federal framework for the regulation of cable television. Congress firmly rejected the notion that cable operators should be treated as common carriers with respect to their provision of cable service. And in Section 621(c), it flatly prohibited any such common carrier regulation. This meant, among other things, that cable operators could not be required to make their channels available to programmers on a nondiscriminatory common carrier basis. Instead, operators were expected to use their editorial discretion to select and package the programming to be offered to their customers.[14]

Congress, however, provided for two statutory set-asides of channel capacity to provide access to cable channels by programmers who might not otherwise be selected for carriage by a cable operator. Section 611 authorized local franchising authorities to require that some channels be made available for public, educational and governmental access. And Section 612 required cable operators to make as many as 15% of their channels available for "commercial use" by programmers unaffiliated with the operator on a leased access basis.

[14] The Supreme Court subsequently held that the exercise of such editorial discretion by cable operators was protected by the First Amendment. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Leathers v. Medlock* , 499 U.S. 439 (1991); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 629 (1994).

As originally enacted, Section 612 did not impose any specific limits on the rates that cable operators could charge for leased access. Operators were required only to impose rates, terms and conditions that were not unreasonable; and there was a statutory presumption that rates, terms and conditions set by the cable operator were reasonable, unless shown by clear and convincing evidence to be unreasonable. But the Commission provided, in subsection (g), that "notwithstanding Section [621(c)]," the FCC could "promulgate any additional rules necessary to provide diversity of information sources," if the 70/70 test were met.

As the legislative history makes clear, Section 612(g) was intended solely to authorize the Commission to regulate the rates, terms and conditions of *leased access* more stringently, and to impose additional procedures, standards and rate limits for leased access channels if the 70 percent benchmarks were met and cable became the overwhelmingly dominant means by which American households obtained their television service. As the Report accompanying the House bill stated:

> At such time as cable systems with 36 or more activated channels are available (*i.e.*, households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have availability to them, 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. 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.
>
> In terms of developing any new regulations relating to the price charged programmers *for the commercial use of channel capacity designated under this section*, prohibitions contained in 621(c) and 623(a) relating to rate regulations and other regulatory authority do not operate as constraints on the possible options available to the Commission in adopting any new rules.[15]

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

Congress not only made absolutely clear that Section 612(g) applied solely to leased access channels. It also confirmed that the Commission had no authority to expand the scope of the leased access requirements beyond the 15% set-aside mandated in Section 612: "In any case, *the Commission may not increase the number of channels required to be set aside under this section*…."[16]

Congress made clear that the Commission's authority to regulate the provision of cable programming services is not to be broadly construed and is narrowly circumscribed. 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]."[17] As discussed above, we believe the legislative history and the placement of Section 612 unambiguously make clear that any contemplated regulation would apply only to leased access channels. But even if the language were ambiguous, if Congress had intended the language of Section 612 to confer a broad grant of authority that went beyond the regulation of leased access channels, it would have expressly said so and would not have put such a provision in the leased access section of the Act.

Accordingly, even if the 70/70 test were ever somehow to be met, the Commission's rulemaking authority would be limited to modifying the rules, standards and maximum rate formulas of its leased access rules. And that authority would be further limited to modifications that are necessary to promote program diversity. This standard is much more difficult to meet in today's environment – where cable operators typically compete with at least two DBS providers and, in some cases, additional wireline alternatives, and where all these providers offer hundreds

[16] *Id.*

[17] 47 U.S.C. § 544.

of channels of programming – than it would have been when Section 612(g) was enacted in 1984.

CONCLUSION

All available sources of data confirm that the 70/70 test has not been met. And, in light of the steady decline in cable's share of MVPD subscribers, as documented annually by the Commission, it appears unlikely that the test will be met in the foreseeable future.

In any event, the Commission's rulemaking authority under Section 612(g) is limited to modifying its leased access rules – and only to the extent necessary to ensure diversity of programming. In light of the modifications already made to the leased access rules pursuant to the 1992 amendments to Section 612, the tremendous expansion in the number of channels and diversity of programming available to cable customers since Section 612(g) was enacted in 1984, and the vibrantly competitive video marketplace that now exists, it is unlikely that any such rule changes would be warranted, even if the 70/70 test ever were met.

Respectfully submitted,

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