

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 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	)	
	)	
The Commission's Cable Horizontal and	)	MM Docket No. 92-264
Vertical Ownership Limits	)	

**REPLY COMMENTS OF**  
**ASSOCIATION OF INDEPENDENT AND VIDEO FILMMAKERS**  
**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**

The Association of Independent and 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 respectfully reply to NCTA’s comments filed in this proceeding. These Reply Comments address (1) NCTA’s attack on AT&T’s method for calculating the 70/70 threshold and (2) NCTA’s conclusion that the Commission’s authority is limited under Section 612(g).

**I. AT&T’S CALCULATIONS PROVIDE EVIDENTIARY VALUE IN COMPUTING THE 70/70 THRESHOLD.**

NCTA decries as “Rube Goldberg-inspired calculations” AT&T’s use of industry-reported numbers to calculate the second prong of the 70-70 rule. *Comments of the NCTA* at 7. NCTA suggests the results of these calculations are a “mish-mash” and lack any evidentiary value. *Id.* at 8.

Although NCTA now challenges the use of generally available published data, it has previously advocated precisely that. Indeed, NCTA’s position is a complete reversal from the position it advanced in 2000, when it assured the Commission that self-reported data could not be used to “game the system.” *Opposition of the NCTA to Petition for Reconsideration* at 14-17, MM Docket No. 92-264, February 17, 2000. At that time, NCTA assured the Commission that its “decision to allow cable operators to use ‘any published, current and widely cited industry estimate of MVPD subscribership’ clearly serves the public interest.” *Id.* at 16 (internal citations omitted). Consequently, NCTA cannot now have issue with AT&T’s use of “any” published data.

**II. THE PLAIN LANGUAGE OF SECTION 612(g) AND THE LEGISLATIVE HISTORY OF THE ACT CONFERS BROAD AUTHORITY ON THE COMMISSION TO PROMOTE DIVERSITY.**

It is well settled that the legislative history of a statutory provision is not relevant when the actual language of the statute is plain and unambiguous. *Garcia v. United States*, 469 U.S. 70, 76 n.3 (1984) quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951). Yet, NCTA disregards this most basic principle and ignores the plain language of the statute by not even a mere mention of the plain language of the statute. Without even attempting to dispute the clear meaning of the plain language of Section 612(g), NCTA would have the Commission solely rely on the legislative history in determining the scope of the Commission’s authority in promulgating rules

under Section 612(g). *Comments of the NCTA* at 10. NCTA points to one small passage in one of the legislative reports to claim “Section 612(g) was intended solely to authorize the Commission” to regulate provisions relating to leased access channels. *NCTA Comments* at 10. Yet, the purpose, history, and express provisions of the Act clearly suggest otherwise. NCTA’s reliance on the House Report not only ignores the plain, unambiguous language of the statute, but also ignores the true intent of the Act and Section 612(g).

AIVF, *et al.* has already explained in its initial comments that the plain language of Section 612(g) is clear and unambiguous and provides the Commission with broad authority to promulgate regulations to promote diversity. However, even if the Commission were to look at the entire legislative history surrounding the Communications Act and its amendments (the “Act”) and Section 612(g), it must agree that the legislative history also confers broad authority to provide any regulations necessary to promote a diversity of information sources.

First, Congress emphasizes *throughout* the 1984 House Report that the intent and statutory objective of the Act is to provide for a diversity of information sources. For example, the House Report clearly states in its Purpose and Summary that the Act “contains provisions to assure that cable systems provide the *widest possible* diversity of information services and sources to the public consistent with the First Amendment’s goal of a robust marketplace of ideas...” H.R. Rep. 98-934, at 19 (1984) (emphasis added). *See also id.* at 22 (franchise process has significant national impact in “the delivery of the widest diversity of information sources”); *id.* at 30 (a “requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public – the fundamental goal of the First Amendment”); *id.* at 32 (structural regulation “foster[s] a greater diversity of information sources”); *id.* at 35 (access channel requirements “ensure a diversity of

information sources”); *id.* at 36 (consumer access to cable is integral for “requiring diverse information sources and services”); *id.* at 40 (legislation is “intended to assure that cable systems provide the widest possible diversity of information services and sources to the public”); *id.* at 79 (“access by the public to as wide a diversity of electronic information sources and services is critical to” realizing the goals of the First Amendment).

Congress clearly intended the Act to provide the “widest possible” array of services and sources and attempted to accomplish this goal through various ways. For example, the legislature determined that one means of achieving this goal was through public, educational, and governmental (PEG) access channels. The House Report stated that to accomplish the goal of a diversity of sources and services, “[l]ocal governments, school systems, and community groups, *for instance*, will have ample opportunity to reach the public” under the Act. *Id.* at 79 (emphasis added). It is undisputed that the provisions for PEG channels were not the only means established to further the goal of a diversity of information sources, but just one example provided in the House Report. In fact, the Legislature also adopted leased access, consumer access provisions and structural regulations as means to assure a diversity of information and sources.

Thus, as AT&T pointed out in its initial comments, the reference to leased access channels in the House Report is just one example of the Commission’s broad authority under 612(g) and not the exclusive mechanism. *AT&T Comments* at 7. That is, the Commission’s authority merely includes the adoption of rules relating to leased access, but is in no way limited to leased access. *AT&T Comments* at 7. Certainly, limiting the options to leased access would not accomplish the goal of assuring “that cable systems provide the widest possible diversity of information services and sources to the public.” *Id.* at 40.

In addition, the 1984 House Report is not the only relevant legislative history. *See e.g., Amgen, Inc. v. U.S.I.T.C.*, 902 F.2d 1532, 1539-1540) (Fed. Cir. 1990) (reliance on a single sentence of the legislative history is not “sufficient to interpret the statute contrary to its plain meaning” especially in light of the legislative history of the enactment of the provision and its subsequent amendment). The legislative history of the 1992 amendments to Section 612(g) is also relevant and provides further evidence of the Commission’s broad authority under Section 612(g). The Senate Report notes that “[t]hrough greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors. The Committee was sufficiently concerned about this problem that it adopted five provisions.” S. Rep. 102-92, at 23 (1991). The five provisions that were adopted to create diversity were: (1) Section 6's nondiscrimination with respect to video programming; (2) Section 7's leased commercial access; (3) Section 8's limitations on vertical control and utilization; (4) Section 15's retransmission consent and (5) Section 16's carriage of local broadcast signals. *Id.* At 23. It is inconsistent to state now that Section 612(g)’s authority was limited in assuring a diverse set of sources existed, when the legislature did not limit itself is establishing numerous provisions to ensure the public was provided with a diversity of sources and services.

Finally, NCTA’s conclusion that 612(g)’s authority is limited to the regulation of rates, terms, and conditions of leased access is a misguided reading of the legislative history. *Comments of the NCTA* at 10-11. At first glance, NCTA’s reading of the 1984 House Report may seem rational. However, the legislature, in its 1992 amendments to the Act, added specific statutory language authorizing the Commission to establish rates, terms, and conditions for leased access. Thus, if the language in 1984 legislative history, which NCTA relies solely upon in reaching its conclusions, was

indicative of 612(g)'s limited authority to regulate the rates, terms, and conditions of leased access, then surely Congress would have no longer found 612(g) to be necessary. Since Congress failed to repeal 612(g), despite providing specific language authorizing the Commission to determine rates, terms and condition, can only suggest 612(g) was intended to give the Commission broad authority to promulgate "any additional rules necessary to provide diversity of information sources."

Respectfully submitted,

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