

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF ECHOSTAR SATELLITE L.L.C.**

EchoStar Satellite L.L.C. (“EchoStar”) hereby files its reply comments in response to the invitation issued by the Commission on the “70/70” rule.<sup>1</sup> That rule, part of the statute’s commercial leased access provision, broadly empowers the Commission to “promulgate any additional rules necessary to provide diversity of information sources” in the event that “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 the households to which such systems are available.”<sup>2</sup> If the two 70% thresholds are met, the Commission can (and should) make new rules focused on the main problem that has undermined “diversity of information sources” -- the bundling of networks on the part of powerful programmers, many of them cable-affiliated.

The Commission asks whether the second 70% trigger for its authority has set in. EchoStar agrees with the Association of Independent and Video Filmmakers Alliance for

---

<sup>1</sup> 47 U.S.C. §532(g). *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, FCC 06-11, MB Docket No. 05-255, at ¶36 (rel. Mar. 3, 2006) (“Twelfth Annual Report”).

<sup>2</sup> 47 U.S.C. §532(g).

Community Media, *et al*, (“AIVF”), which finds that a “proper count of subscribers demonstrates that the second prong of the 70/70 test has, indeed, been met.”<sup>3</sup> In evaluating this question, EchoStar urges the use of a methodology that is practical, realistic and consistent with the spirit of the statute. Including unoccupied houses or houses without a TV set in the denominator of homes passed would artificially increase the pool of houses on which the second 70% is to be gauged and, therefore, artificially decrease the percentage of homes served by cable.<sup>4</sup> Congress’s intent in prescribing the second 70% ratio appears straightforward: Commission action is warranted when 70% of the homes that can subscribe to cable do so. EchoStar agrees with Verizon and AT&T that neither unoccupied houses nor homes without a TV set should be allowed to dilute that ratio.<sup>5</sup> Indeed, an unoccupied house is not even a “household” within the letter of the law, and a cable system cannot be said to be “available” to a house without a television set even if it passes that house.

In addition, cable operators should not be permitted to hamper the 70% determination by holding back data. EchoStar supports AT&T’s request for the Commission to establish a program that requires cable operators to provide the Commission with the necessary data to determine whether the second 70% threshold has been met.<sup>6</sup>

---

<sup>3</sup> Comments of the Association of Independent and Video Filmmakers Alliance for Community Media, *et al*, filed in MB Docket No. 05-255, 5 (filed Apr. 3, 2006) (“AIVF Comments”).

<sup>4</sup> *Twelfth Annual Report* at ¶36.

<sup>5</sup> Comments of Verizon, filed in MB Docket No. 05-255, 11 (filed Apr. 3, 2006) (“Verizon Comments”). Comments of AT&T, filed in MB Docket No. 05-255, 4 (filed Apr. 3, 2006) (“AT&T Comments”).

<sup>6</sup> AT&T Comments at 5.

The Commission also asks “what, if any, additional action should be undertaken to achieve the statutory goals” if the Commission should find that the thresholds have been met.<sup>7</sup> A glance at a Multichannel Video Programming Distributor’s (“MVPD”) electronic program guide is enough to spot the main problem hampering the statutory goal of programming source diversity. The MVPD offerings are dominated by families of networks controlled by the same entity. Some of these networks are must-see programming for most or many consumers, or answer the strong preferences of a small niche. Others do not fit in any of these categories. Rather, they ride the coattails of their popular siblings into consumer homes: the programmers bundle them with the more popular content. Because of the problem of scarce bandwidth and soaring programming costs, however, there is only a finite number of channels that an MVPD platform can carry in a meaningful way. This means in turn that unwanted or less-wanted fare offered by the large programmers displaces independent networks or thwarts independent programmers from even launching new ventures. Diversity of information sources, the core concern of the statutory provision, suffers as a direct result.

To ameliorate the consumer harm caused by cable bundling practices, the Commission should promulgate at least three types of requirements. First, it should clarify that bundling on the part of cable affiliated programmers is an unfair practice within the meaning of the program access rules. Second, it should prohibit cable operators from entering into bundled carriage agreements with any programmer. Third, cable affiliated programmers should be prevented from imposing penetration requirements on MVPDs as a condition to program access.

---

<sup>7</sup> *Twelfth Annual Report* at ¶36.

