

**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)

REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby replies to the comments submitted in response to the Commission’s inquiry regarding the 70/70 provisions set forth in Section 612(g) of the Communications Act of 1934, 47 U.S.C. § 532(g).¹

I. THERE IS MORE DIVERSITY IN INFORMATION SOURCES AT THE PRESENT TIME THAN AT ANY POINT IN HISTORY AND THE NUMBER OF SOURCES GROWS EACH DAY.

In its *Twelfth Annual Report*, the Commission sought comment on a number of issues regarding the so-called 70/70 test, including what “additional action” is “necessary to provide diversity of information sources” if the test is satisfied.² As the National Cable & Telecommunications Association (“NCTA”) noted in its comments, “This is an odd time for the Commission to address this issue.”³ In today’s dynamic marketplace, the need for “additional action” has never been weaker.

The battle for consumers’ time and attention has always been fierce, but it is even more so now, with unprecedented numbers of video programming networks, intense and still-growing competition among multichannel video programming distributors, and

¹ See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶¶ 31-36 (2006) (“*Twelfth Annual Report*”).

² *Id.* ¶ 36; 47 U.S.C. § 532(g).

³ NCTA Comments at 2.

enormous new quantities of information and programming being offered by broadband and mobile content, service, and application providers. In the video marketplace alone, less than two months ago, the Commission acknowledged that “[c]ompetition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation.”⁴ If anything, this was a significant understatement. In previous reports, when consumers enjoyed far fewer information and entertainment choices than they have today, the Commission recognized that “consumers today have viable choices in the delivery of video programming”⁵ and that “*the vast majority of Americans enjoy more choice, more programming and more services than any time in history.*”⁶

In contrast to 1984 (when consumers’ primary information sources were newspapers, radio stations, and the big three broadcast television networks) and 1992 (when cable was emerging but its two most successful satellite competitors had yet to sign up the first of their now 28 million customers), consumers today have more sources than ever before from where they can obtain a voluminous array of video programming and other print and electronic information. In addition to being able to choose from hundreds of diverse video programmers available from at least three multichannel video providers in almost every market, consumers in the United States can access video from

⁴ *Twelfth Annual Report* ¶ 5.

⁵ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd. 2755 ¶ 6 (2005).

⁶ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004) (emphasis added).

over-the-air broadcasters, Internet sites such as Google Video and iTunes,⁷ and numerous providers of content for mobile devices. Moreover, consumers can now easily create their own content, which can be mass distributed on websites such as YouTube.com.⁸ This content, in turn, can be viewed on any number of consumer electronics, including televisions, wireless phones, PCs, or portable media devices such as video iPods.⁹

And, while cable programming networks comprise only a small fraction of the universe of information sources, they too are *already* infused with diversity, not only in the content they show but in the entities that own them. The number of video programming networks has exploded from a mere 106 in 1994 to an astounding 531 in

⁷ iTunes now carries episodes of popular primetime programming for a small fee. For instance, ABC recently announced that a number of its television shows, including the award-winning programs “Lost” and “Desperate Housewives,” will be available for purchase on iTunes and for free on abc.com. See Allison Romano, *ABC Deal Stuns Affils*, *Broad. & Cable*, Apr. 17, 2006, available at <http://www.broadcastingcable.com/article/CA6325082.html>. Google video has hundreds of thousands of video clips. For example, among others, its “Sports” video category lists 48,741 video clips; its “Comedy” video category lists 68,718 video clips; its “Educational” video category lists 20,817 video clips; and its “News” video category lists 14,322 video clips. See generally Google, *Google Video*, at <http://video.google.com/> (last visited Apr. 25, 2006).

⁸ See Michael Liedtke, *YouTube.com Offerings Range from TV Clips to Amateur Videos*, *Marshfield News-Herald*, Apr. 10, 2006 (describing the explosive growth of YouTube.com), available at <http://www.marshfieldnewsherald.com/apps/pbcs.dll/article?AID=/20060410/MNH03/604100438/1768/MNHbusiness>. At the beginning of April 2006, “people were posting about 35,000 new videos daily at YouTube.com, luring even more viewers to an audience that’s already watching more than 35 million videos per day, most lasting 30 seconds to 2 1/2 minutes. Just four months ago, YouTube’s visitors were posting about 8,000 videos a day while viewers were seeing 3 million videos daily.” *Id.*

⁹ See *Twelfth Annual Report* ¶ 5 (“In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber to the home, or video over the Internet. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services, consumers are now able to maintain more control over what, when, and how they receive information.”).

2005.¹⁰ Meanwhile, the number of these networks affiliated with a cable operator has dropped dramatically from 53% in 1994 to 21.8% in 2005.¹¹

Cable operators have no choice but to embrace content from unaffiliated programmers. The vast majority of *all* of the programming that Comcast carries is unaffiliated. Comcast owns or has attributable interests in only 10 national networks,¹² owns and manages only 6 regional sports networks,¹³ and is affiliated with only a small number of regional and local news and entertainment networks.¹⁴ In a typical market, Comcast makes available more than 200 channels of video programming that are tailored to the market, but its affiliated content is limited -- at most -- to its 10 national networks, one regional sports network, and possibly a regional or local news or entertainment network. Thus, well over 90% of the programming carried by Comcast is not affiliated with Comcast.

In light of these facts, it is more than a little strange that the Commission would consider invoking 22-year-old statutory authority -- generations ago in the history of the

¹⁰ Compare *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd. 7442 ¶ 224 (1994) (“*First Annual Report*”), with *Twelfth Annual Report* ¶ 157.

¹¹ Compare *First Annual Report* ¶ 161, with *Twelfth Annual Report* ¶ 157. In fact, the decline in vertical integration is even more dramatic than those statistics reflect. The *Twelfth Annual Report* erroneously counts iN DEMAND’s single pay-per-view service as 60 separate networks. When this error is corrected, the number of national networks is approximately 472 and the percentage of networks that are vertically integrated with a cable operator plummets to approximately 12.1%.

¹² These networks are OLN, E!, Style, Golf Channel, G4, TV One, AZN, PBS Kids Sprout, INHD, and INHD2.

¹³ These networks include Comcast SportsNet (“CSN”) -Philadelphia, CSN-Mid Atlantic, CSN-Chicago, CSN-West, CSS, and SportsNet New York. See Reply of Adelphia Communications Corp., Comcast Corp., & Time Warner, Inc., filed in MB Dkt. No. 05-192, at 53 (Aug. 5, 2005).

¹⁴ These networks include CN8, New England Cable News, Comcast Local (Detroit), and Comcast Entertainment TV (Denver).

video media -- to justify any new regulations. It is equally peculiar that any additional government intervention in an incredibly dynamic marketplace would be thought “necessary to provide diversity of information sources.” The past two decades have seen the number of information sources grow enormously. That growth continues at an exponential pace. The free marketplace has proven to be exceedingly successful in facilitating the creation and widespread availability of innumerable diverse sources of information, with the greatest rate of innovation occurring in the marketplace sectors in which the government is *least* involved (broadband services, mobile services, and the Internet). It is inconceivable that greater governmental regulation of the marketplace could possibly make it perform better.

II. THE COMMISSION SHOULD REJECT CALLS TO APPLY SELECTIVE DATA OR A UNIQUE METHODOLOGY TO SATISFY THE 70/70 TEST.

Certain commenters who want to leverage the 70/70 provisions to impose new and utterly unwarranted regulation on the cable industry urge the Commission to pick-and-choose data, adopt methodologies, and torture reality in order to satisfy a claim that the 70/70 test has been met. AT&T blatantly calls for skewed counting, urging the Commission to “establish metrics for the 70/70 thresholds consistent with the goal of promoting diversity of information sources.”¹⁵ In other words, AT&T urges the Commission to bend the facts to satisfy AT&T’s agenda. Similarly, Media Access Project (filing comments on behalf of the Association of Independent Video and

¹⁵ AT&T Comments at 2. AT&T claims that in its reply comments in the video competition inquiry it “used simple arithmetic and the cable industry’s own data” to demonstrate the 70/70 test has been met. *Id.* at 3. But, as the Commission’s own report noted, AT&T’s calculation was based on selective data from the Commission and NCTA, and even AT&T “acknowledge[d] 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.” *Twelfth Annual Report* ¶ 33.

Filmmakers and others) urges the Commission to rely on the “most favorable” data to determine that the 70/70 test has been met.¹⁶

More specifically, in clear violation of the statutory language, these and other parties urge the Commission to skew both parts of the test: (1) only counting certain households (e.g., households with televisions) as households that “have access” to cable systems with 36 or more channels;¹⁷ and (2) counting DBS subscribers as households that subscribe to a cable system with 36 or more activated channels.¹⁸ In other words, proponents of new and unjustified regulations urge the Commission to selectively choose whatever data will justify the pre-ordained result, in hopes that the Commission will seize the opportunity to adopt regulations that have not been authorized by Congress.

The Commission must reject these arguments and evaluate whether the 70/70 test has been satisfied based on the language in the statute and the facts. Section 612(g) states the applicable test clearly, and under this test only two data sets are relevant to the Commission’s inquiry: (1) the number of *households that are passed by a cable system*

¹⁶ Ass’n of Indep. Video & Filmmakers et al. (“AIVF”) Comments at 6. Although Media Access Project consistently refers to its client, AIVF, as the “Association of Independent and Video Filmmakers,” this construction appears to be erroneous. Media Access Project’s client actually appears to be the Association of Independent Video and Filmmakers, see <http://www.aivf.org/> and <http://www.mediaaccess.org/web/>.

¹⁷ See AT&T Comments at 4; Verizon Comments at 11.

¹⁸ See AIVF Comments at 12 (claiming that “a strong argument can also be made that the Commission should include DBS subscribers in determinating [sic] ‘cable subscribers’ for purposes of Section 612(g)”). Media Access Project also argues that the Commission should count cable Internet customers that do not also subscribe to a cable service “because the Commission has frequently considered cable broadband a potential competitor to video programming, and because some broadband providers are now offering traditional video programming services via broadband.” *Id.* at 12-13. Although the Commission has made clear that cable Internet customers are not subscribers to a cable service and therefore should not be counted in determining whether the 70/70 test has been met, the Commission should take into account the impact of broadband services on the diversity of information sources. The nearly infinite (at least from the perspective of one person’s ability to view all video available online in her lifetime) supply of video online from more sources than can be counted undermines any claim that the Commission needs to adopt regulations under Section 612(g).

that offers 36 or more channels; and (2) the number of those households that *subscribe to cable service*. For purposes of the second prong, the statutory language directs the Commission to determine whether cable systems offering 36 or more channels are subscribed to “by 70 percent of the households to which such systems are available,”¹⁹ *not* “70 percent of the *television-set-owning* households to which [cable] systems are available.” Nor, despite the claims of some commenters, does it instruct the Commission to include households that subscribe to *DBS* service or some other non-cable service in the count of households that subscribe to *cable service*.²⁰

Moreover, in evaluating whether the statutory test has been satisfied, the Commission is not free to pick and choose data from different sources on the basis of a pre-determined objective of wanting to adopt new regulations, rather than on the basis of the data’s reliability. Such a methodology would be arbitrary and capricious, especially were the Commission to choose one source for its data on the number of households that subscribe to cable systems and another source for the number of households passed by such cable systems.²¹

¹⁹ 47 U.S.C. § 532(g). AT&T also urges the FCC to require cable operators to submit detailed subscriber data “broken out by appropriate demographic and geographic criteria.” AT&T Comments at 5. There is no rational basis for requiring such detailed data. As even Media Access Project acknowledges, “the number of homes passed” and “the number of subscribers” are “precisely the information needed.” AIVF Comments at 10. Imposing data filing requirements such as AT&T urges would be overly burdensome and unnecessary.

²⁰ See Verizon Comments at 11-12 (agreeing that the Commission should not count customers that do not subscribe to a cable service). In the cable ownership context, Media Access Project advocated that DBS subscribers should not be counted in the denominator, i.e., the total number of multichannel video subscribers, when determining what a “reasonable limit on the number of cable subscribers a person is authorized to reach.” 47 U.S.C. § 533(f)(1)(A). Thus, it is clear that in both this inquiry and the cable ownership context, Media Access Project favors a construction of the statute that is most inconsistent with the statutory purposes.

²¹ As NCTA explained in its comments, this is the approach that AT&T took in concluding that the 70/70 test is met. See NCTA Comments at 7-8. “This mixing and matching of data from different sources, compiled at different times and using different methodologies, is of no evidentiary value.” *Id.* at 8. In

III. THE COMMISSION'S AUTHORITY IN SECTION 612(g) IS NARROWLY PRESCRIBED TO THE LEASED ACCESS CONTEXT.

Certain commenters assert that the authority conferred to the Commission under Section 612(g) provides it with broad authority to write any new regulations that purportedly will promote “diversity of information sources.”²² This is plainly not the case. As NCTA explained in its comments:

[T]he 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.²³

contrast, in its comments, NCTA showed that four different sets of data -- from three independent sources - - prove that the 70/70 Test has not been met. *See id.* at 4-5 (“Based on our analysis of each data source, . . . the penetration rate for those systems *under all three sources is below the 70 percent threshold.*” (emphasis in original)). Cable operators’ own publicly available information confirms that they provide cable service to significantly fewer than 70% of the households that have access to their cable systems, which is consistent with NCTA’s results. *See* Press Release, Comcast Corp., *Comcast Reports Fourth Quarter and Year End 2005 Results* 11 (Feb. 2, 2006) (providing cable service to 51.5% of the households its cable systems pass); Press Release, Charter Communications, Inc., *Charter Reports Fourth-Quarter and Full-Year 2005 Financial and Operating Results* (Feb. 28, 2006) (providing cable service to 47% of the households its cable systems pass); Press Release, Insight Communications Co., *Insight Communications Announces Fourth Quarter and Year-End 2005 Results* 13 (Mar. 7, 2006) (providing cable service to 52.9% of the households its cable systems pass); Press Release, Cox Communications, Inc., *COX Communications Announces Fourth Quarter and Full-Year Financial Results for 2005* (Mar. 28, 2006) (providing cable service to 58.4% of the households its cable systems pass). Even Cablevision and Time Warner, which both have substantial customer bases in the highly-concentrated NY market, only provide cable service to 67.5% and 59%, respectively, of the households that have access to their cable systems. *See* Press Release, Cablevision Sys. Corp., *Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2005 Results* (Feb. 27, 2006); Time Warner, Inc., *2005 Trending Schedules*, Schedule 5 (2006), available at http://ir.timewarner.com/downloads/2005trending_020106.pdf.

²² *See* AT&T Comments at 6; AIVF Comments at 14-17; Verizon Comments at 4-11. Among other things, these commenters point to Section 612(g) as granting the Commission authority to take a bevy of actions, including revision of the franchising process, modification of the program access regime, prohibition of exclusive multiple dwelling unit access arrangements, and resolution of the pending cable horizontal ownership proceeding. *See, e.g.*, Verizon Comments at 4, 5, 7-11; AIVF Comments at 17-19, 27-28.

²³ NCTA Comments at 11 (emphasis added); *see also* H.R. Rep. No. 98-934, at 54 (1984), as reprinted in 1984 U.S.C.A.N. 4655, 4691 (“[S]ubsection 612(g) provides a mechanism to assure there is adequate flexibility to develop new rules and procedures *with respect to the use of leased access channels* as the cable industry develops and serves more citizens in the future.”) (emphasis added).

Comcast agrees: the authority granted in Section 612(g) only applies to rules for leased access.

AT&T, too, has supported NCTA's analysis. As the Commission reported in its *Seventh Annual Video Competition Report*:

AT&T supports NCTA's conclusions with respect to the 70/70 benchmark asserting that the statute applies solely to modifications to the leased access requirements and cannot be the basis for promulgating rules unrelated to leased access.²⁴

Yet now AT&T argues the opposite position -- without even acknowledging, much less explaining away, its previous advocacy.

Although the Commission cannot ignore the fact (as some would have it do) that the authority granted it in Section 612(g) is in the leased access section of Title VI and cannot ignore the legislative history of that section, it is also noteworthy that all of the regulations that proponents of new and unnecessary regulation urge the Commission to adopt under Section 612(g) address issues that are already addressed by other provisions of the Act.²⁵ There is no evidence whatsoever that Congress intended to empower the Commission to use Section 612(g) as authority to rewrite these separate statutory provisions or the rules the Commission has adopted thereunder. As the Supreme Court has explained, "Congress . . . does not . . . hide elephants in mouseholes."²⁶

²⁴ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd. 6005 ¶ 194 (2001) (citing AT&T Reply Comments filed in CS Dkt. 00-132, at 2).

²⁵ *See, e.g.*, 47 U.S.C. § 533 (ownership); *id.* § 541 (franchising); *id.* § 544 (inside wiring); *id.* § 548 (program access).

²⁶ *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

IV. COMMENTERS' LITANY OF GRIEVANCES AND ALLEGATIONS IS WHOLLY IRRELEVANT TO THIS INQUIRY.

A number of commenters have decided to reiterate allegations and grievances they have made repeatedly in other proceedings and that are completely unrelated to the issues in this inquiry. The Commission's task in this inquiry is clear. It must: (1) determine whether the 70/70 test has been met; and (2) if the test has been met, determine what, if any, fact-justified modifications to the leased access rules are "necessary to provide diversity of information sources." It is unreasonable, wasteful, and reckless to let this become a proceeding driven by a cacophony of regurgitated and inapposite arguments.

From the outset, commenters admit that they have raised the self-same issues in other Commission proceedings: The America Channel and Media Access Project repurpose claims raised *ad nauseum* in the review of the Adelphia transactions; Media Access Project reiterates its tired arguments about cable ownership rules; and Verizon recites entreaties made in the franchising rulemaking. Not surprisingly, none of these commenters explain why their repetitious arguments are in any way relevant to the Commission's inquiry in this proceeding. Exhaustive records have been developed on these issues in other proceedings, and the Commission should reject commenters' efforts to import them into this inquiry. For similar reasons the Commission should refuse to consider the misplaced, vague, and unsubstantiated program access and program carriage grievances raised by The America Channel, Media Access Project, and Verizon. The Commission has established complaint procedures to address conduct that violates the program access and carriage rules, and if these commenters believe their grievances have any merit, they should file complaints under the Commission's existing procedures.

V. CONCLUSION

Americans have access to more diverse sources of information than ever before. It is extremely puzzling for the Commission to be looking for new ways to intervene in the free marketplace that has produced that diversity. What is clear is that Section 612(g) sets forth an unambiguous test for the Commission to follow and, if that test is satisfied, provides the Commission authority to adopt only those regulations that are “*necessary to provide diverse sources of information*” in the leased access context. The Commission should reject certain commenters’ attempts to rewrite the test Congress set forth and to have the Commission adopt broad regulations wholly unrelated to leased access. Even if the test were satisfied, marketplace evidence leaves little doubt that no new regulations are “*necessary to provide diverse sources of information.*”

Respectfully submitted,

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