

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)	
_____)	

COMMENTS OF
ASSOCIATION OF INDEPENDENT AND VIDEO FILMMAKERS
ALLIANCE FOR COMMUNITY MEDIA
BENTON FOUNDATION
CENTER FOR CREATIVE VOICES IN MEDIA
CENTER FOR DIGITAL DEMOCRACY
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COMMENTS OF AIVF, ET AL.

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 submit these comments in response to the Commission's *12th Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 21 FCCRcd ____ (released March 3, 2006).

SUMMARY

AIVF, *et al.*, applaud this inquiry, which marks a watershed for the Commission. The Commission's willingness to address whether the necessary conditions to trigger Section 612(g) of the Communications Act have been met, and to consider what actions are necessary to promote diversity under this authority, hopefully signals an intent to address the dismal reality created by more than 12 years of less-than-benign neglect.

AIVF, *et al.* especially welcome scrutiny into the methodology by which the Commission ascertains cable subscriber numbers and what steps to take to foster diversity in video programming. In numerous proceedings, Media Access Project, on behalf of its clients, has complained to the Commission that its ill-defined approach to gathering vital cable subscribership information has been

used to game the system by self-servingly selecting the most favorable statistics available to suit the needs of the moment. *See, e.g.,* Comments of Common Cause, *et al.*, MM Docket No. 92-264 (Filed August 15, 2005); *Written ex parte presentation of CFA, et al.*, CS Docket No. 98-82 (filed October 11, 2002).

By any measure, competition in the delivery of programming services continues to diminish, and diversity of programming continues to suffer as a result. In the last year, ***less than one-percent*** of national MVPD subscribers left incumbent cable operators to subscribe to a DBS or overbuilder competitor. *12th Annual Competition Report* at ¶11. In the most lucrative urban markets, competitor penetration has slowed even further. GAO, “Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Across Different Types of Markets,” (2005). Study after study has demonstrated that direct broadcast satellite (DBS) has neither curbed cable rate increases nor impacted the diversity of programming to subscribers. Affiliation (or historic affiliation) with a cable operator or broadcast network remains the single most significant factor in gaining carriage on cable or DBS systems.

In addition, the last few years have brought a wealth of new complaints of anticompetitive practices by incumbent cable operators. Increasingly, cable operators have used control over regional sports networks to suppress competition, exploiting the “terrestrial loophole” to deny competitors important programming. Cable operators have used their control of video on demand services to increase the price of the service to rivals or deny them programming. Cable operators have refused to take advertising for political issues on which they disagree, and have refused to allow competitors to advertise competing services or packages.

Access for independent programmers has also suffered. The largest cable operators have increasingly favored their own content over independent content, effectively precluding new independent programmers from market access. At the same time, the largest cable operators have

used their superior bargaining power against local franchises to eliminate or reduce their public, educational and government (PEG) commitments. Finally, the Commission's deregulation of cable and telephone broadband has placed the diversity of content and programming available through the broadband internet at risk of suffering the same fate as independent cable programmers.

The lack of any reliable standard for determining cable subscriber levels has consistently allowed cable operators to downplay the impact of mergers, evade Congressional mandates on ownership limits and price controls, and compromised the ability of the Commission to engage in considered oversight of the cable industry. As the GAO observed:

[The] FCC's findings provide the Congress with information relevant to important policy decisions including regulation of cable rates and/or services and media consolidation and convergence of video, voice and data services. ***The lack of reliable information in the FCC's cable rate report may compromise the ability of Congress to make these important policy decisions and of the FCC to monitor and provide oversight of the cable industry.***

General Accounting Office, "Issues Related to Competition and Subscriber Rates in the Cable Industry," 2003 (emphasis added).

Until now, the Commission has chosen either to turn a blind eye to the evidence before it or to maintain that it lacks authority to address the issues. Given this tacit collusion on the part of the Commission in cable's anticompetitive tactics, the current dismal state of the video programming market comes as no surprise. More than 14 years after Congress initiated a series of sweeping reforms, the cable industry remains dangerously concentrated and possessed of market power inimical to the public's "paramount" First Amendment right "to access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

SBC (now AT&T) correctly observed earlier in this proceeding that cable operators control

the critical information in determining whether the second prong of the test set forth in Section 612(g), the so-called “70/70” test, has been met. Accordingly, if the Commission does not compel cable operators to provide accurate data, and if the Commission does not audit these numbers for accuracy as the GAO has proposed, it should accept the publicly available data AT&T provided in its comments. Furthermore, given the important First Amendment issues at stake, in case of any doubt, the Commission should err on the side of inclusiveness in its tabulation.

There is also an important definitional question in the 70/70 issue, which the Commission thus far has not recognized. The statute speaks of “cable” systems, not “incumbent cable” systems. At the least, overbuilders and telephone companies providing video services should be included in the subscriber counts. Including these subscribers would, by itself, result in meeting the criteria even under the subscriber figures the National Cable Telecommunications Association (NCTA) has submitted.¹

Because the plain language of the statute confers upon the Commission broad authority to act to promote diversity, it is helpful to consider two ways in which the Commission could address the current situation in cable programming. First, the Commission should use the authority of Section 612(g) to augment its existing statutory authority. Under this approach, the Commission should: (a) revise the “leased access” regime to facilitate use of leased access by independent programmers; (b) overrule the Commission’s determination in *Internet Ventures, Inc. Internet On-Ramp, Inc.*, 15 FCCRcd 3247 (2000) (*IVI*), that leased access does not apply to broadband; (c) resolve the pending cable horizontal ownership proceeding; (d) enhance PEG access; and (e) eliminate the “terrestrial loophole” and ensure access to new programming services, such as video on demand (VoD).

¹In addition, given the Commission’s determination to include DBS subscribers as “cable subscribers” for purposes of determining the cable horizontal ownership limit required by Section 613(f)(1), there is a strong argument for including DBS subscribers in the 612(g) count as well.

Second, the Commission should consider what new regulations are necessary to promote diversity and competition. These should include (a) prohibitions on cable operators from refusing to sell advertising based on political point of view or deny programming for the sale of rival services; (b) regulations to ensure that subscribers can attach whatever devices they wish to the network necessary to podcast or otherwise increase the diversity of content available through cable broadband.²

ARGUMENT

I. THE COMMISSION SHOULD FIND THAT THE 70/70 CRITERIA HAVE BEEN MET.

As the Commission acknowledges, no one seriously questions whether cable systems with 36 or more activated channels are available to 70% or more of households in the United States, meeting the first prong of the Section 612(g) “70/70” test. *12th Competition Report* at ¶32. It therefore remains for the Commission to determine whether “70% of households to which such systems are available” subscribe to such systems.

A proper count of subscribers demonstrates that the second prong of the 70/70 test has, indeed, been met. Whether the Commission adopts the numbers AT&T provided, or whether the Commission augments the totals NCTA has submitted by adding overbuilders’ subscribers, it should find that the subscriber threshold has been met. If any uncertainty remains, the Commission should require that cable operators (including overbuilders and Bell Operating Companies (BOCs)) provide certified subscriber counts. Finally, in light of the difficulties experienced in obtaining accurate numbers in the proposed purchase of cable systems owned by Adelphia, *Application for the*

²While the Commission has ample power to impose such regulations under its existing authority, use of Section 612(g) to impose such regulations on the industry is both warranted and proper.

Assignment and/or Transfer of Control of Licenses Between Adelphia Communications Corporation, Time Warner Cable, Inc., and Comcast Corporation, MB Docket No. 05-192 (“Adelphia Transaction”), the Commission should audit or otherwise verify the subscriber numbers provided as GAO has recommended.

A. AT&T Correctly Argues That The Commission Should Rely Either on the Most Favorable Publicly Accessible Data, or Should Require the Cable Operators to Provide Reliable Data.

SBC (now AT&T) has argued in this proceeding that commercially available and cable industry self-reported subscriber data are inadequate and misleading for purposes of FCC policymaking. This echoes what that the public interest community and the Government Accountability Office have long said. These problems are exemplified by the difficulties Commission staff has encountered in obtaining accurate subscriber data from Comcast, Time Warner, and Adelphia in the course of the proposed Adelphia Transaction. This experience demonstrates why the FCC should to rely upon the publicly available numbers AT&T submitted or require cable operators to provide the Commission with accurate subscriber information.

1. The public interest community has admonished the Commission on numerous occasions that reliance on voluntary industry disclosure of subscriber data is inadequate and misleading.

In 1999, the Commission eliminated the requirement that cable operators provide certified subscriber count showing their national reach. This permitted cable operators to submit subscriber counts from “any published, current and widely cited industry estimate of MVPD subscribership.” *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCCRcd 19098, 19112 (1999). In asking the Commission to reconsider this decision, Consumer Federation of America, *et al.* warned:

The possibilities for abuse are legion....The FCC invites MSOs to shop for

the most favorable data. Given the number of reporting services, cable MSOs will have their pick of a wide field. Indeed, nothing stops cable MSOs from publishing a self-serving “report” which minimizes cable subscribership and inflates non-cable MVPD subscribership.

Petition for Reconsideration of CFA, et al., MM Docket No. 92-264 (filed January 3, 2000) at 14.

Two years later, CFA, *et al.* supplemented the record with an extensive written *ex parte* presentation detailing repeated examples of MVPDs using false or misleading subscriber counts. *Written Ex Parte Presentation of CFA, et al.*, CS Docket No. 98-82 (filed October 11, 2002). CFA, *et al.* noted that Wall Street analysts and other supposed checks upon the authenticity of the data had failed to spot these “funny numbers” until the revelation of corporate scandals prompted action by the SEC and other law enforcement agencies. As a result, CFA, *et al.* urged the Commission to require MVPDs “to regularly file subscriber counts with the Commission under penalty of sanctions for providing false information.” *Id.* at 4.

Most recently, in response to the Commission’s *Further Notice of Proposed Rulemaking* in the cable horizontal ownership proceeding, Common Cause, *et al.* reiterated the continuing problems with the Commission’s collection of data for the purposes of the Annual Competition Report. *Comments of Common Cause, et al.*, MM Docket No. 92-264 (filed August 15, 2006) at 55-61. As Common Cause, *et al.* observed in that proceeding, the Commission’s efforts to avoid a conclusion that the current subscribership numbers have triggered the Commission’s Section 612(g) authority “raise[d] grave concerns as to the Commission’s willingness to discharge its responsibilities to protect the public.” Notably, by “sampling” in some undisclosed way survey data criticized by the GAO as flawed, the Commission reached the plainly erroneous conclusion that only 58.8% of relevant television homes subscribe to cable systems covered by Section 612(g).

2. GAO Criticism of Commission Methodology.

In addition to the repeated filings of the public interest community, the Government Accountability Office has likewise chastised the FCC for its poor performance in monitoring the cable industry. Beginning in 2002-03, the GAO Office began a series of studies examining the enormous disconnect between the FCC's consistently positive reports on the state of competition in the MVPD marketplace and the complete absence of any of the usual indicia of competition (such as lower prices) in the real world. As a by-product of this investigation, GAO identified numerous methodological errors in the FCC's data gathering and data analysis and urged the agency to take corrective action. GAO, "Data Gathering Weaknesses in FCC's Survey of Information on Factors Underlying Cable Rate Changes," (2003). Notably, GAO faulted the FCC for its reliance on voluntary data disclosures from industry that the FCC neither audited nor otherwise validated. As the GAO observed, the unquestioning acceptance by the Commission of voluntary data disclosures from the regulated industry itself, and relying upon this data in preference to contrary data, raised significant concerns with regard to the FCC's conclusions. The GAO recommended several changes, including compulsory data disclosure, auditing information provided by industry, and checking the validity of industry-provided information against other sources.

As the GAO observed in its 2003 report on MVPD competition, the FCC failed to adopt any of these proposals. As a consequence, GAO concluded that the FCC's cable reports were so wholly tainted by inaccurate data and industry bias that the FCC had "compromise[d] the ability of Congress to [regulate the industry] and of the FCC to monitor and provide oversight of the cable industry." GAO, "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," (2003).

The Commission has, commendably, identified these shortcomings in the most recent Competition Report. *12th Annual Competition Report* at ¶2. The GAO's criticism with regard to reliance

on voluntary disclosures by cable system operators of information potentially contrary to their economic self-interest, with the knowledge that the FCC will make no effort to audit the information for accuracy, remains as potent as ever.

GAO's criticisms align precisely with the course of action that AT&T and the broader public interest community have recommended. The Commission should either accept AT&T's estimates based on publicly available numbers, or must compel cable operators to submit certified, accurate and current subscriber information, subject to scrutiny and verification by both Commission staff and third parties.

3. Issues raised in the Adelphia Transaction demonstrate the problems with relying on cable operator data.

Finally, the Commission's recent experience obtaining reliable subscriber data in the proposed Adelphia Transaction indicates that reliance on cable operators for reliable subscriber counts – particularly regional subscriber counts needed to determine the impacts of clustering and regional market concentration on the delivery of programming services – raises serious concerns as to accuracy of the data and the willingness of cable operators to subject the data to rigorous scrutiny.

As part of the initial application process, on May 18, 2005, the Adelphia Transaction applicants submitted estimates of national subscriber numbers relying on “generally available industry data.” See *Public Notice*, DA-05-1591 (released June 2, 2005). In response to requests from staff and several interested parties, the applicants later supplemented this with a breakdown of subscribers by DMA.

Even this rough, high level summary of subscriber data indicated potential problems with regard to the accuracy of initial submissions, and their usefulness in determining the impacts of the merger on national and regional competition. In particular, as Free Press, *et al.*, have shown, the data

Comcast submitted appeared to be the product of rounding that systemically minimized subscriber counts. Further, in some cases, it appeared that subscribers simply disappeared post-transaction as a product of mathematical errors. While the problems with Time Warner and Adelphia Communications numbers were not nearly so severe, there were sufficient oddities that Free Press, *et al.* urged the Commission to require more detailed subscriber counts.

Over the course of several months, the Commission's staff and the applicants negotiated over the nature and breadth of the supplementary data request. In the course of these negotiations, it emerged that the applicants were reluctant to provide accurate subscriber counts on a per system basis, and that the applicants regarded this data as proprietary and confidential. Finally, however, on December 5, 2005, Commission staff ordered the applicants to produce, "at the most granular level maintained in the ordinary course of business," the number of homes passed by the applicants, and the number of subscribers for each Applicant. *See Information and Document Request*, Docket 05-192 (released December 5, 2005). In other words, staff asked the applicants for precisely the information needed both for purposes of determining application of Section 612(g) and to provide an accurate and comprehensive to Congress generally.

In response, the applicants maintained that such detailed subscriber information was highly sensitive and confidential, and requested that the Commission adopt a second protective order with even more stringent limits on access by interested third parties than those imposed in the first protective order. The applicants maintained that they did not generally keep information at the level of granularity requested by the Commission, and never shared such detailed subscriber information with third parties. On December 21, 2005, Commission staff acceded to this request. *Second Protective Order*, Docket 05-192 (released December 21, 2005).

Grant of the second protective order did not end the matter, however. Commission staff have

continued to negotiate with the applicants for further supplementary information on this issue as problems with the subscriber information provided continue to emerge. Notably, the applicants have discussed with staff the problem of determining accurate subscriber counts in multi-dwelling units (MDUs), condominium associations, and housing associations where the cable operator contracts with the landlord or association rather than maintain individual subscriber records for the building or association residents. *See, e.g., Notice Oral Ex Parte Communication of Adelpia Applicants*, June 12, 2005.

The applicants' response to staff's request for supplementary information indicates that cable operators will resist providing accurate subscriber data on a timely basis in a transparent manner subject to either Commission audit or third-party challenge and verification. Furthermore, as a significant portion of "television homes" are rental units in MDUs, condominiums, and houses in housing associations subject to agreements similar to those described by the Applicants, the Commission would need to determine how to address this issue globally.

Accordingly, the most prudent course for the Commission is to accept the estimate based on public data provided by AT&T and conclude that the subscriber prong of the 70/70 test has been met. Such a conclusion constitutes a rational and well reasoned exercise of agency judgment, given the myriad of problems in relying on the cable operators for more detailed subscriber counts and given that the cable operators themselves chose to make the data available through their trade association web site and to disclose data to Warren Communications News.

Finally, as AT&T argued, the Commission cannot evade its statutory responsibility under Section 612(g) simply by concluding that contradictory subscriber numbers exist and obtaining accurate numbers is just too hard. AT&T has submitted an estimate with far greater indicia of accuracy than the numbers NCTA and other self-interested operators submit. Even if cable operators

can point to minor flaws in AT&T's estimate, it is sufficiently over the 70% threshold and contains sufficient indicia of accuracy to provide comfort to the Commission that the second prong of Section 612(g) has been met.

B. The Section 612(g) Criteria Are Clearly Met, Even Using Data Submitted by NCTA, Once The Calculation Properly Includes All Cable Subscribers.

The statute does not speak of *incumbent* cable subscribers, however, but simply of *cable* subscribers. Calculations counting only subscribers to incumbent cable systems clearly do not comport with what the plain language of the statute contemplates. Even so, in every subscriber data submission to the Commission, the parties have inexplicably excluded overbuilders; and other subscribers not attributable to incumbent cable operators. After adjusting for this omission, it is clear under any party's data, including that of NCTA, that the 70/70 test has been triggered.

The *12th Competition Report* found that overbuilders and other non-DBS MVPDs accounted for 1.5 million subscribers. The addition of these subscribers should more than compensate for any issues raised in the *12th Annual Report* with regard to number of houses passed, whether to include subscribers to cable broadband that do not subscribe to cable video services, etc. When combined with the 69% of homes passed that NCTA acknowledges that incumbents presently reach, these 1.5 million additional subscriber homes provide many more homes than is necessary to conclude that the 70/70 test has been met.

Moreover, given the Commission's determination that the "cable subscriber limit" required by Section 613(f)(1) includes not merely cable subscribers, but DBS subscribers as well, a strong argument can also be made that the Commission should include DBS subscribers in determining "cable subscribers" for purposes of Section 612(g).³ Similarly, because the Commission has

³Alternatively, the Commission could achieve a consistent reading of the statute, and one in accordance with the plain language of both Section 612(g) and Section 613(f)(1), by excluding DBS

frequently considered cable broadband a potential competitor to video programming, and because some broadband providers are now offering traditional video programming services *via* broadband, a strong case can be made for including broadband subscribers that do not subscribe to a video programming service. The Commission, however, need not resolve these questions because inclusion of all cable subscribers, not merely incumbent cable subscribers, adds sufficient subscribers to resolve any outstanding questions as to whether the subscriber prong of Section 612 (g) is met.

To give the term “cable subscriber” (rather than “incumbent cable subscriber”) its proper meaning, the FCC should include in its Section 612(g) count subscribers of terrestrial overbuilders, BOCs, and other MVPDs regulated pursuant to Title VI. As virtually all of these systems provide in excess of 36 activated channels, all of the subscribers to these systems contribute to the Section 612(g) “count” toward fulfillment of the second prong of the 70/70 test.

II. SECTION 612(g) CONFERS BROAD AUTHORITY ON THE COMMISSION TO PROMOTE DIVERSITY.

If the Commission determines that the 70/70 threshold of section 612(g) has been reached, the question then arises as to the scope of the Commission’s authority to create rules fostering competition and diversity under Section 612(g). AIVF, *et al.* respectfully submit that the plain language of the statute clearly provides the Commission with broad authority to promulgate *any* regulations that would enhance consumers’ cable experience and ensure that consumers have the ability to access a diversity of information sources. In particular, this power is remedial in nature and, contrary to some suggestions, is not delimited to modifying leased access rules governed by section 612.

subscribers from the ownership calculation required by Section 613(f)(1). *See Petition for Reconsideration of CFA, et al.*, MM Docket No. 92-264 (filed January 3, 2000).

A. The Plain Language of Section 612(g) Provides Broad Authority to Promulgate Rules to Ensure Diversity of Information Sources.

Section 612(g) provides the Commission with the authority to adopt rules “necessary to provide diversity of information sources.” Specifically, “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 the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.” In other words, once this threshold is met, the Commission has the authority to ensure that competition is present and cable providers offer consumers a variety of information sources over its systems.

The plain language of subsection 612(g) unambiguously provides the Commission with broad authority to promulgate “any additional” rules necessary to promote competition and achieve diversity. Simply put, the question is whether the statutory language found in subsection 612(g) actually means what it says, or whether the statutory language should be limited to the specific section of the Act in which subsection 612(g) is contained, the commercial access provision of section 612 (“leased access provision”).

The phrase “any additional rules,” in its plainest sense, can only be construed as to give the Commission a broad grant of authority. In fact, the Supreme Court has noted that “[r]ead naturally, the word ‘any’ has an expansive meaning, that is ‘one or some indiscriminately of whatever kind.’” *United States v. Gonzales*, 520 U.S. 1, 5 (1997) quoting Webster’s Third New International Dictionary 97 (1976). There is nothing in the statute to suggest that the term “any” is not used in its expansive, ordinary sense. Moreover, there is no basis in the plain language of the provision that “any additional rules” are to be limited to any section or subsection of the Act. Therefore, subsection 612(g) cannot be meant to be restrictive in any sense, and in particular, restricted to adopt rules only

as they relate to leased access channels.

Not only is the plain language clear, but what Congress did not say is also noteworthy. Congress could have, but did not, expressly limit the Commission's authority in adopting rules pursuant to 612(g). This is relevant because Congress *expressly* limited the Commission's authority in another respect - it specifically prohibited the Commission from preempting the authority of local franchising authorities ("LFAs"). The omission is thus quite significant, as it clearly evidenced a purposeful decision not to limit the Commission's authority. *See Rusello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

It is equally important that Congress incorporated cross-references to other provisions of the Communications Act within 612(g). This shows that the Commission's authority was not limited to the promulgation of rules relating to leased access. Specifically, 612(g) provides that, "[n]otwithstanding sections 621(c) and 623(a)," the Commission can promulgate additional rules to promote competition and diversity once the 70/70 threshold is met.⁴ If the Commission's scope were limited to regulations relating to leased access provisions, then in addition to expressly so providing, Congress could have withheld from referring to sections of the Act that do, in fact, restrict the nature of regulations that the Commission can adopt. Instead, Congress, *expressly*, stated that these restrictions were not applicable to the regulations the Commission could adopt under section 612(g). Moreover, if the Commission were to only look within section 612 when adopting "any additional rules" to provide for a diversity of views, then there would have been no need to make references to

⁴Section 621(c) is a prohibition on common carrier regulation and Section 623(a) is a prohibition on federal and state rate regulation.

provisions outside of Section 612. Instead, by making reference to the other provisions of the Act, Congress expected the Commission to work within the framework of the Act, not just section 612, in adopting additional rules.

Finally, other language in Section 612 reinforces the fact that the plain language of subsection (g) provides the Commission with broad authority to promulgate rules to promote competition and to ensure that the widest array of information sources are available to the public. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (“The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context on which the language is used, and the broader context of the statute as a whole”). The purpose of section 612 is also evidence of the broad authority conferred onto the Commission. Specifically, section 612(a) provides:

The purpose of this section 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 from cable systems in a manner consistent with growth and development of cable systems.

Based on the purpose of Section 612, it is evident that the leased access provisions were merely the actions that Congress felt were appropriate at the time to promote competition and diversity. Nothing outlined in the purpose of the section suggests that the leased access provisions are the only way for the Commission to further the goals of promoting competition and assuring diversity. The broad language of section 612(g) also supports this reading. As discussed above, subsection 612(g)'s language is quite broad, and it seems unlikely that Congress would use such sweeping language if it intended that the Commission only be able to promulgate rules concerning leased access specifically. *See Cooper Industries, Inc. v. Aviall Services, Inc.* 543 U.S. 157, 167 (2004) (“Court must, if possible, construe statute to give every word some operative effect.”).

Overall, the statutory language quite clearly shows that Congress intended the Commission's

authority under 612(g) to extend into the broad realm of the goals set forth in 612(a), except as limited by the LFAs. As the Supreme Court has noted, “[w]here a statute contains a grant of power enumerating certain things which may be done and also a general grant of power which, standing alone, would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive.” *Springer v. Government of Philippine Islands*, 277 U.S. 189, 206 (1928). Thus the enumeration in section 612 – the leased access provisions – were not intended to be exclusive. The 70/70 threshold and the broad grant of authority in 612(g) indicate that Congress did not intend for leased access to be the sole source of relief for the Commission to regulate cable channels for commercial use. On the contrary, Congress intended a broad grant of authority to the Commission if and when the 70/70 threshold was met.

B. Section 612(g) Works to Promote Diversity by Lowering Barriers to Entry and Promoting Competition.

The Commission has before it several regulatory mechanisms for promoting diversity of media voices, in keeping with the long-standing goals of the Communications Act generally and the Title VI specifically. Generally, regulations the Commission imposes to promote diversity should lower barriers to entry for independent programmers (both commercial and PEG) and promote competition in the MVPD market. Indeed, when Congress amended Title VI in 1992, it explicitly found that the lack of competition in the MVPD market impeded diversity. *See*, Section 2(a)(4), 1992 Cable Act.

III. THE COMMISSION SHOULD IMMEDIATELY INITIATE A RULEMAKING UNDER ITS SECTION 612(g) AUTHORITY TO RESOLVE OUTSTANDING PROBLEMS IN THE DELIVERY OF VIDEO PROGRAMMING.

The record before the Commission clearly establishes that the deployment of cable systems and subscriber numbers satisfy the 70/70 test of Section 612(g), and that Section 612(g) confers upon

the Commission broad authority to act. In addition, the record established in this proceeding, the pending proceeding on horizontal ownership limits in Docket 92-264, and the pending Adelphia Transaction all demonstrate a clear need for the Commission to act to promote diversity of media views and competition generally. The Commission should therefore, in accordance with the process set forth in the 12th *Annual Report*, issue one or more *Notices of Proposed Rulemaking* to address the problems in the MVPD market.

There is one exception; the Commission's does not need to issue a *Notice of Proposed Rulemaking* with respect to the need to establish national and regional ownership limits on cable system operators. There is an ample, and recently refreshed record, in Docket 92-264, in which the Commission has been considering this very question.

The Commission has no reason to prolong action on Docket 92-264. Five years ago, the decision of the D.C. Circuit in *Time Warner Entertainment Co., LP v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), reversed and remanded the Commission's 1999 adjustments to the 30% horizontal ownership limit. The Commission initiated a rulemaking to address the remand in the fall of 2001. Nearly a year ago, following four years of inaction, the Commission issued a *Second Further Notice of Proposed Rulemaking*, 20 FCCRcd 9374 (2005), to refresh the record.

The fact that Docket 92-264 was initially adopted pursuant to Section 613(f) of the Communications Act does not preclude consideration of adopting ownership limits using 612(g) to augment Section 613(f). At paragraph 163 of the *Second Further Notice*, the Commission explicitly sought comment on the relationship between its authority under Section 612(g) (if the 70/70 test were met) and the ownership limits mandated by Congress under Section 613(f). Accordingly, the Commission may, at any time, act on its Section 612(g) authority as part of its resolution of the *Time Warner Entertainment* remand. Participants cannot claim any lack of notice or surprise in application

of Section 612(g) in MM Docket No. 92-264, given the Commission's explicit invocation of Section 612(g) and solicitation of comments on how to proceed in MM Docket No. 92-264 should the Commission conclude that the two prongs of the 70/70 test are met.

Despite an almost 15 year-old Congressional command to the Commission to establish a cable horizontal ownership limit, the Commission continues to keep the limit in legal limbo. This uncertainty has become increasingly detrimental to the public interest as cable consolidation has continued apace. The Commission should therefore move expeditiously to resolve this long-pending remand and establish national and regional ownership limits.

A. Changes to Leased Access to Promote Diversity and Resolve Abuse of Independent Programmers.

As an initial matter, the Commission should take immediate steps to strengthen leased access as a means encouraging independent programming. As discussed in numerous dockets, programming networks unaffiliated with cable operators or broadcasters generally cannot fight their way onto the cable platform. While a rare exception such as former Vice President Al Gore's "Current" may, from time to time, emerge, this means as little to genuine diversity as lottery tickets do to "wealth creation." That the lottery generates a few lucky winners does not make it a reliable investment. Similarly, that the current system produces the occasional "lottery winner" such as Current does not address the wealth of empirical studies demonstrating the continuing power of incumbent cable operators (now shared with incumbent broadcasting networks) to determine which networks succeed.

Indeed, even such "lottery winners" as Current must rely upon the two industry leaders, Time Warner and Comcast, for success. As described extensively by the America Channel in its filings in the Adelphia Transaction, no network has survived in the last five years without carriage by either Time Warner or Comcast. *Petition to Deny of America Channel*, MB Docket No. 05-192 (filed July

21, 2005). Because a few cable companies control access to the most desirable customers, carriage on these systems has become the *sine qua non* for attracting advertisers and venture capital to develop quality commercial programming.

The leased access rules should provide a means by which programmers can gain access to these valuable markets with certainty. Congress intended this result in 1984 when it created leased access. Unfortunately, cable operators currently have no incentive to lease access to rivals and every incentive to maintain tight control over access to subscribers. As a consequence, Congress sought to address the worst abuses of the leased access system in the 1992 Cable Act.

Unfortunately, the Commission exhibited far more concern that cable operators reap profits from leased access than in promoting competition and diversity. Indeed, the current leased access rules allow cable operators to price leased access beyond the means of independent programmers. See *ValueVision International, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998). Understandably, few programmers have attempted to use leased access to reach subscribers.

As if this were not enough, the Media Bureau has become notorious for its refusal to enforce provisions of the act against cable operators. Programmers legitimately ask why they should even bother to raise capital and invest in programming in the hopes of using leased access when the Commission will not act on complaints of cable operator abuses? Consider, for example, the pending “emergency” complaint of Mid-Atlantic Sports Network (MASN). Almost a full year after filing a complaint, and with the approach of yet another baseball season, the Commission staff continues to balk at enforcing the law against Comcast. Unsurprisingly, MASN has chosen to invest its money in a direct appeal to the public through an advertising campaign rather than avail itself of the existing leased access rules to reach the over one-million subscribers held by Comcast in MASN’s viewing area.

At the same time, a number of factors indicate that many parties *would* take advantage of leased access if the Commission modified the rules to make them more reasonable. The cost of production for high quality programming has come down significantly, making the economics of programming a network much more feasible if a programmer can access customers. For example, according to the *New York Times*, a programming network can now become profitable with a mere 70 thousand subscribers – provided the network can gain access to customers. See Saul Hansell, “Tuning Into the Potential for ‘Slivercasting,’” *New York Times*, March 12, 2005 at Section 3, p.1. The formation of new trade organizations, such as the Video Access Alliance⁵ and the Leased Access Programmers Association⁶ demonstrate the existence of a constituency of programmers interested in taking advantage of leased access if the Commission makes leased access a viable opportunity for programmers.

The Commission should therefore initiate a rulemaking to set rates and enforcement proceedings for leased access that will facilitate entry by competitors in the video programming market. For example, instead of allowing cable operators to use the complex formula currently provided in the rules, and which incorporates assumptions about imputed cost and the likelihood of “driving away subscribers” that have no empirical basis, the Commission could simply impose a flat per/subscriber rate. Alternatively, the Commission could adopt an arbitration scheme in which parties could force cable operators to arbitrate rates rather than wait for Commission staff to act. See Donna M. Lampert, *Cable Television: Does Leased Access Mean Least Access?*, 44 FED. COMM. L.J. 245 (1992). Such a rulemaking would focus on Section 612(g)’s purposes of increasing diversity and lower barriers to entry by competitors, rather than seeking to guarantee the cable operator the

⁵<http://www.videoaccessalliance.org>

⁶<http://www.leasedaccess.org>

highest rate of return possible under Section 612's "reasonableness" standard.

B. The Commission Should Overrule the *IVI* Decision and Require Cable Open Access.

In *Internet Ventures, Inc. Internet On-Ramp, Inc.*, 15 FCCRcd 3247 (2000) (*IVI*), the Commission refused to allow an ISP to purchase access to cable subscribers pursuant to the Commission's leased access rules. In doing so, the Commission focused on the narrow issue of whether broadband access fit the specific definition of "programming" as defined by Section 612. *Id.*, 15 FCCRcd at 3253, ¶11. The Commission also explicitly left open the question of whether, even under the Section 612 definition of programming, broadband access that provided a traditional cable programming service would become eligible for leased access. *Id.*

The Commission's Section 612(g) authority clearly allows it to overrule the *IVI* decision, and it should act to do so. Competition in the provision of broadband access contributes to the diversity of views Congress intended to promote through Section 612(g). The Commission is therefore free to expand the narrow definition of programming it applied in the *IVI* decision and make competing broadband access available to competitors.

Even if the Commission does not entirely overrule the *IVI* decision, it should expand the prohibition on interfering with content to include broadband content. Video content, flash animation, and other forms of diverse programming have become increasingly cheap and easy to create, prompting the development of new services. Video and audio blogging, for example, now makes it possible for any citizen to become an "eyewitness to history," chronicling news in times of crisis or simply the day-to-day events of interest to family, friends and local communities. Animators create "webtoons" appealing to niche audiences.⁷

At the least, the Commission should resolve the question it explicitly did not address in *IVI*

⁷For example, <http://www.hoodyhoo.com> hosts short animated cartoons based on the comic book, "Knights of the Dinner Table," a parody of the Dungeons and Dragons role-playing game.

and determine that any broadband provider offering a programming service, or at least video content is carrying “programming” within the meaning of Section 612(g). Increasingly, would-be video providers look to the internet to distribute video programming. Several broadband providers now offer or will soon offer traditional cable programming services *via* broadband. AT&T’s “Project Lightspeed” promises to deliver a full suite of cable programming *via* broadband delivery. Cavalier Telephone now advertises that it will soon provide “triple play” voice, data and video service – including 150 channels of traditional cable programming – for \$95/ month.⁸ The Commission should clarify that these traditional programming services may lease access to customers from rival cable companies, pursuant to the Commission’s general Section 612 authority as enhanced by Section 612(g).

In addition to leased access for broadband providers, the Commission should clarify that video programmers may use leased access to deliver broadband content. In some cases, this video programming is indistinguishable from a traditional, linear 24/7 cable programming network and new video services such as video on demand. For example, many programming networks now use the internet to distribute episodes of programming – often with enhanced content such as edited clips, “lost” episodes, or supplementary material explicitly designed as a “tie-in” to the programmer’s traditional video programming.

More importantly for purposes of promoting diversity and competition, an increasing number of video programmers use the growing availability of broadband to distribute 24/7 video programming in the same manner as a traditional cable network, a phenomenon called “slivercasting.” Unlike traditional broadcasting, slivercasting takes advantage of technology that has driven down the cost of video production to create networks that can sustain profitability with only a few thousand viewers, rather than the millions traditionally needed to sustain a national cable network. A recent *New York*

⁸<http://www.cavtel.com/broadbandtv/index.shtml>

Times article highlighted the potential for broadband “slivercasting” to provide precisely the type of competitive and diverse programming Congress envisioned when it created Section 612(g). Saul Hansell, “Tuning Into the Potential for ‘Slivercasting,’ *New York Times*, March 12, 2005 at Section 3, p.1. As explained in the article:

Perhaps more interesting - and arguably more important - are the thousands of producers whose programming would never make it into prime time but who have highly dedicated small audiences....Already there are specialized video services serving hundreds of specialties....There is also a growing market for Webcasts of local news and entertainment from every country and in every language, aimed at expatriates.

As an example, the article cites Jumptv.com’s carriage of Bengali TV programming as serving a niche in the United States ignored by cable operators because “[t]he Bengali community in the United States is not as big as the Spanish speaking ones.”

Such programming clearly serves the purpose of promoting diversity and competition as intended by Section 612(g). The Commission should therefore reverse or clarify the *IVI* decision to allow programmers such as Jumptv.com to offer video programming *via* leased access, and providers such as Cavalier to offer cable programming and broadband services *via* leased access.

C. Conclude the Pending Proceeding on Horizontal Ownership Limits By Imposing A Meaningful National Limit and A Regional Limit Based on HHI.

In 2001, the D.C. Circuit found that the Commission could not rely upon “diversity alone” to justify its subscriber limit of 30% required by Section 613(f). *Time Warner Entertainment Co., LP v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). The Court also found fault with the evidence used by the Commission to determine that the limit addressed a “real” rather than “speculative” problem and remanded for the Commission. The Commission continues to struggle with this remand, having issued two notices asking for comment on the meaning of the *TWE* decision and how to craft a limit based on the *TWE* Court’s confused, cramped and contradictory reading of the statute.

Section 612(g) gives the FCC power to alleviate this dilemma, and the Commission should use this flexibility to adopt subscriber limits right away. Using Section 612(g) to augment Section

613(f), the Commission would have clear power to issue the same rules invalidated by the *TWE* decision. Indeed, given the breadth of Section 612(g)'s mandate to promulgate any rules necessary to protect the diversity of voices available through cable, the Commission could reissue its horizontal ownership rules based exclusively on the authority in Section 612(g), without any reference to Section 613(f).

In light of the volumes of evidence collected following the *Second Further Notice*, the Commission should have no difficulty concluding that imposing national and regional ownership limits will further the purpose of Section 612(g) to protect diversity of cable programming. As the Commission already has a pending docket on this matter, in which it explicitly solicited comment on the impact of Section 612(g), the Commission should adopt national and regional limits at once.

With regard to national limits, several of the Commenters here have offered slightly different recommendations. CFA, CU and FP have argued that the Commission must set a national limit of 25%, require divestitures of systems in excess of the limit, and limit cable operators to no more than 50% concentration within a single DMA. *Comments of CFA, et al.*, MM Docket No. 92-264 (filed August 12, 2005). Common Cause and others support the recommendations of CFA, *et al.*, but, in recognition of the political realities, propose a limit of 30%. Further, while Common Cause, *et al.*, support the recommendation for regional limits, they did not propose a specific regional limit.

In addition to endorsing the approach of CFA, *et al.*, Common Cause, *et al.*, also recommended setting regional limits on the basis of the Herfindahl-Hirschfeld Index (HHI). The FCC, the Department of Justice, and the Federal Trade Commission have long relied upon the HHI to determine whether national or regional concentration would present a significant danger from concentration. Indeed, the Commission has used the HHI to require regional divestitures in recent wireless mergers. *Applications of Nextel Communications, Inc. and Sprint Corporation*, 20 FCCRcd 13967 (2005).

An HHI score of 1800 or more indicates a highly concentrated market. Permitting regional concentration above 1800 therefore dangerously reduces the availability of outlets for diverse media voices within a DMA, as well as creating significant negative repercussions for national programming markets. Accordingly, Common Cause, *et al.* recommended that the Commission set a regional limit prohibiting concentration in any DMA in excess of 1800. Furthermore, in light of the evidence submitted in Docket No. 92-264 that regional and national concentration has already done profound harm to the availability of diverse views and the creation of “genuinely antagonistic sources of news and information,” *see Associated Press v. U.S.*, 326 U.S. 1 (1945), Common Cause, *et al.*, recommended requiring immediate regional divestitures to meet the new limit.

D. Protect and Enhance PEG Access.

In *Reply Comments* filed in the Adelphia Transaction, the National Association of Telecommunications Officers and Advisors and other “Local Media and Government” parties submitted extensive materials demonstrating how increases in national and regional concentration have frustrated local franchising authorities’ efforts to protect cable subscribers in the manner Congress has envisioned and interfered with the free flow of locally originated programming on PEG channels. *See Local Media and Government Petitioners Reply Comments in Support of Petitions to Deny*, filed August 5, 2005.

Section 613(f)(2)(A) of the Communications Act requires the Commission to “ensure that no cable operator or group of cable operators can unfairly impede,...the flow of video programming from the video programmer to the consumer....” This includes PEG programming, as well as national and regional commercial programming. See Section 612(f)(2)(C) (mandate to consider “nature... of the local franchise”)

As an initial matter, the plain language of the statute says “programming.” Although the Commission has traditionally looked only at the national commercial programming market, nothing

in the statute defines programming so narrowly. To the contrary, the plainlanguage of the statute says “programming,” without any modifier or limitation.

Cable operators, particularly Comcast, have actively sought to use their national and regional clout to eliminate PEG obligations or to scale them back by reducing both the size of the PEG set aside and the financial support provided to PEG programmers. For example, Comcast unilaterally by closing the local access studio in Brookline, MA in violation of its franchise agreement and against the wishes of the LFA. “Battle Lines Form Over PEG Support Top MSO Comcast Eyes Access-Channel Bandwidth Needed for Local HDTV and VOD Rollouts,” *Multichannel News*, September 29, 2003, p. 26.

Accordingly, the Commission can and should augment its authority under Section 613(f) with its Section 612(g) powers to protect and expand PEG channel authority.

E. Eliminate the “Terrestrial Loophole” and Ensure Access to New Programming Services Such as VoD.

As explained at length in numerous filings in the Adelphia Transaction, the ability of cable operators to withhold terrestrially-delivered regional programming (the so-called “terrestrial loophole”) allows cable operators to suppress competition. An FCC staff study in 2004 found that denial of regional sports programming in Philadelphia reduced the subscribership to competing MVPDs by 50%. See Wise and Duwadi, *Competition Between Cable Television and Direct Broadcast Satellite: the Importance of Switching Costs and Regional Sports Networks*, 4 *JOURNAL OF COMPETITION LAW AND ECONOMICS* 679 (2005). RCN has stated that its Philadelphia subscription rate remains half of that of comparable cities such as Boston and Washington, DC, because Comcast withholds much needed regional sports programming in Philadelphia. See *RCN Written Ex Parte Presentation*, October 28, 2005.

Recently, as new services such as video on demand (VoD) have become available, cable operators have used their control of VoD provider iNDEMAND, their libraries of content, and their

market power over programmers to deny VoD programming to competitors or increase the price competitors must pay for identical services. For example, Comcast persuaded PBS Kids to withhold VoD PBS Kids programming from competitor RCN for several months, causing RCN's VoD usage to drop by over 80%. *Id.* DirecTV and Echostar have both filed complaints with the Commission because iNDEMAND charges them discriminatory rates. See "Echostar Echoes FCC Complaint on Cable's INHD," July 13, 2005, accessed at http://www.tvtechnology.com/hd_notebook/one.php?id=331

These facts demonstrate the need to close the terrestrial loophole, and to apply the program access rules to other forms of video programming. Section 612(g) now gives the Commission clear authority to impose rules making access to programming available to competing MVPDs. The Commission should therefore move expeditiously to do so.

IV. THE COMMISSION SHOULD ADDRESS PROBLEMS RAISED IN THE COMCAST/TIME WARNER/ADELPHIA TRANSACTION THAT HAVE NOT HITHERTO BEEN THE SUBJECT OF COMMISSION REGULATION.

In the course of reviewing the proposed Adelphia Transaction, Free Press, *et al.*, have raised issues relating to the exercise of cable market power in ways never addressed by the Commission.

A. The Commission Should Impose Regulations That Protect Political Advertising and Subscriber Access to Information About Rival Services and Programming.

Cable advertising has become increasingly important as a means of communicating with the public on political issues, and of informing the public about the availability of competitive goods and services. At the same time, the increasing regional consolidation of cable systems places greater power in a single cable operator to control debate and block advertising of competitive services by refusing to carry specific advertising. Worse, cable operators use their ownership of regional sports programming, or market power over same, to impose restrictions on who may advertise on popular local programming.

To take but one example, the *Washington Post* recently reported that cable operators have

refused to sell advertising to telephone companies seeking to lobby for changes in the Communications Act. Arshad Mohammed, "Phone, Cable Trade Fire Over Ads," *Washington Post*, March 28, 2005, p. D5. This conduct mirrors what has happened in Texas, where cable operators refused to run Verizon and AT&T advertising in support of a pending bill on video franchising while simultaneously running their own advertisements against the proposed bill. Claudia Grisales, "Ad War Erupts in Fight Over Telecom," *Austin American-Statesman*, April 28, 2005, p. D1. Similarly, cable operators have refused to run advertisements for DSL or other competing products.

The cable operator arguments that First Amendment protects such anticompetitive conduct have no merit. Since 1945, the Supreme Court has ruled that the First Amendment does not shield speakers from rules designed to foster competition and diversity of views. *See Associated Press v. U.S.*, 326 U.S. 1 (1945). To the contrary, the Court has ruled that rules designed to limit the ability of speakers to use market power to suppress the speech of others serve the goals of the First Amendment. *See FCC v. NCCB*, 436 U.S. 775 (1978). Most recently, a district court ruled that the First Amendment did not protect Cablevision from an antitrust law suit when Cablevision refused to accept advertising from parties favoring a stadium deal that Cablevision opposed and lobbied hard against. *See New York Jets, L.L.C. v. Cablevision Systems Corp.*, 05 Civ. 2875, 2005 WL 2649330 (S.D.N.Y. Oct. 17, 2005).

If a court can apply the antitrust rules in such a situation without running afoul of the First Amendment, the Commission can certainly use its broad authority under Section 612(g) to prevent such behavior from occurring in the first place. The numerous documented incidents of this conduct ensure that such rules would survive even intermediate scrutiny under the evidentiary standard of *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

Nor can the government's interest in ensuring a robust political debate and an informed electorate, an interest "of the highest order," be served in any less restrictive way. For example, post-

blocking enforcement would allow cable operators to block critical political speech at the time the electorate most needs to hear it. No remedy can possibly repair the damage done if the public decides a pressing issue based only on the side of the story the cable operators chose to air. Only rules prohibiting such conduct, rather than *post-hoc* antitrust actions or other after-the-fact remedies, can protect the government's interest in an informed citizenry and the purpose of Section 612(g)

B. The Commission Should Protect The Rights of Subscribers to Attach Devices to Cable Networks.

Finally, the Commission must protect the rights of citizens to attach any device to cable networks that does not damage the network. Congress has taken piecemeal steps to protect subscribers from the anticompetitive impacts of cable control over customer premise equipment, but technology has surpassed Congress' predictions. In an age where devices such as Slingbox, DVRs, and wireless routers constantly enhance the ability of subscribers to enjoy ever more diverse programming options and communicate freely, the Commission cannot continue to give cable operators freedom to use their market power to control access to these devices.

The Commission should therefore establish a rule pursuant to its Section 612(g) authority that provides the same rights to cable subscribers that telephone subscribers have enjoyed since the days of the Carterfone case. This rule produced significant social benefits to the public by introducing new services, lower equipment costs, and *via* the modem, the internet. Adopting such a rule with regard to cable networks, under which cable networks would have to permit and facilitate the ability of manufacturers to create network devices attachable to the cable network without permission of the cable operator, would have similar salutary effects.

CONCLUSION

AIVF, et al. recognize that the primary obstacle to enforcement of Section 612(g) is political; there is an understandable reluctance to change course and adopt sweeping regulations. However,

in this instance, the law could not be more clear. Moreover, the facts clearly establish that the Section 612(g) criteria have been met, and that there are significant and growing anti-competitive effects of the cable industry's national and regional dominance of the MVPD markets.

AIVF, *et al.* believe the Commission has the courage to employ the powers Congress directed it to exercise.

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