A Legal Analysis of the "70/70" Provision of the Cable Communications Policy Act of 1984

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Summary

The Federal Communications Commission (FCC or Commission) recently issued a report requesting data to aid in determining whether the so-called "70/70" test for cable market penetration has been met. Under Section 612(g) of the Cable Communications Policy Act of 1984, when 70% of households in the United States are able to subscribe to cable services of 36 channels or more and 70% of those households actually subscribe to such services, the FCC will be empowered to "promulgate any additional rules necessary to provide a diversity of information sources." A House Report issued when the provision was enacted indicated that 612(g) was intended to provide "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." Subsequent amendments to Section 612 granted the FCC greater power to regulate leased access to cable systems. In fact, all of the powers Congress, in the House Report, had suggested would be conferred upon the FCC under 612(g) were granted expressly to the Commission by the subsequent revisions of Section 612. Congress did not, however, repeal Subsection 612(g). The scope of the FCC's authority under 612(g), therefore, remained an open question.

The FCC has yet to determine whether the level of market penetration required to trigger 612(g) has been met. Consequently, neither the courts nor the FCC has interpreted the extent of the FCC's authority to promulgate new regulations that would "provide a diversity of information sources." Two main arguments have been made regarding the scope of the Commission's power under the 70/70 provision. The first argument would grant the FCC broad authority to promulgate any rule that encourages a "diversity of information sources." The second argument would grant the FCC more narrow authority to promulgate new rules relating to leased access of cable systems by unaffiliated persons. This report will be updated as events warrant.

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Introduction

Section 612 of the Communications Act of 1934, as amended, imposes a requirement upon cable operators to lease a certain percentage of their channel capacity to unaffiliated persons; eliminates a cable operator's editorial control over the content provided on leased channels except in certain narrow circumstances; grants the FCC the authority to set maximum reasonable rates, terms, and conditions for use, and procedures for dispute resolution; and sets out procedures for challenging a cable operator's refusal or failure to make channel capacity available pursuant to Section 612.[1] Subsection (g) of Section 612 states that when cable systems with 36 channels or more reach 70% of U.S. households and 70% of households "passed" by these cable systems actually subscribe to that service, the FCC "may promulgate any additional rules necessary to provide a diversity of information sources."[2] The FCC previously had determined that the first prong of the so-called "70/70" test had been met.[3] However, subsection (g) remains dormant because, though data have suggested that the second prong of the test had been met, the FCC has not made an affirmative finding.[4]

On November 27, 2007, the FCC preliminarily adopted the *13th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*.[5] In this report, the FCC has found that, based on data supplied by Warren Communications News, the second prong of the 70/70 test has been met.[6] Other data sources, according to the FCC, indicate that the second prong has not yet been met.[7] As a result, the FCC is requiring the cable industry to submit further information regarding the number of homes "passed" by their systems and the number of actual subscribers to those services.[8] The FCC asserts that this data will help the agency to accurately measure the percentage of households actually subscribing to cable services and determine if the second prong of the 70/70 test has indeed been met.[9]

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[1] Codified at 47 U.S.C. §532(b)-(f).

[2] Codified at 47 U.S.C. §532(g). The full text of the provision states that

> Notwithstanding sections 541(c) and 543(a) of this title 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. Any rules promulgated by the Commission pursuant to this subsection shall not preempt authority expressly granted to franchising authorities under this subchapter.

[3] *See In the Matter of 12th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, 2512 ¶ 30 (2006).

[4] *Id*. at 2513, ¶ 31-36.

[5] Press Release, FCC Adopts 13th Annual Report to Congress On Video Competition and Notice of Inquiry for the 14th Annual Report (November 27, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

[6] *Id.*

[7] *Id.*

[8] *Id.* The Commission is requiring each cable operator to submit, within 60 days of November 27, 2007, for FY2006: the total number of homes the cable operator currently passes; the total number of homes the cable operator currently passes with 36 or more activated channels; the total number of subscribers; and the total number of subscribers with 36 or more activated channels. *Id.*

[9] *Id.*

If the FCC determines that the test has been met, the Commission will then have the authority to "promulgate any additional rules necessary to provide a diversity of information sources."[10] The scope of authority Section 612(g) grants remains a matter of contention. The FCC has previously solicited comment on the extent of its authority under the subsection.[11] The current Commission, however, remains undecided as to the extent of the authority the provision grants and the continued necessity of the provision itself, in light of increased competition in the market for providing video programming.[12]

On December 6, 2007, H.R. 4307, entitled the Consumer Freedom of Choice in Cable Act, was introduced in the House of Representatives. H.R. 4307 would repeal Subsection 612(g).

History of Subsection 612(g) of the Communications Act

Section 612 originally was enacted as part of the 1984 Cable Communications Policy Act. The 1984 Cable Act was accompanied by a House Report that briefly explained Section 612 and Subsection 612(g). Under the 1984 version of Section 612, the FCC was not permitted to determine maximum reasonable rates cable operators could charge for leased access channels, develop procedures for the expedited resolution of disputes, or promulgate rules related to the terms and conditions of access under the section.[13] The House Report seems to suggest that Subsection 612(g) was intended to grant the FCC power to promulgate such rules in the event the 70/70 test was met.[14] H.Rept. 98-934 states, in pertinent part,

> It is clear that as the cable industry more fully develops, and programming industry desires for pursuing leased access opportunities more fully emerge, new and different requirements relating to leased access may be necessary in order that a nationally mandated leased access scheme fully meet the First Amendment goal of assuring diversity. *Thus, subsection 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.*
>
> At such time as cable systems with 36 or more activated channels are available (*i.e.* households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have availability to them, *the FCC is granted authority to promulgate any additional rules necessary to assure that leased access channels provide as wide as possible a diversity of information sources to the public. Along these lines, the Commission may develop any additional procedures for the resolution of disputes between cable operators and unaffiliated*

[10] 47 U.S.C. §532(g).

[11] *In the Matter of 12th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd at 2513 ¶ 36.

[12] *Compare* Statement of Commissioner Jonathan S. Adelstein, Re: Annual Assessment of Competition in the Market for Delivery of Video Programming, MB Docket 06-189, Thirteenth Annual Report (November 27, 2007) (suggesting that a national baseline public, educational, and government channel requirement could be imposed under 612(g) among other regulations), *with* Statement of Robert M. McDowell, dissenting in part, Re: Annual Assessment of Competition in the Market for Delivery of Video Programming, MB Docket 06-189, Thirteenth Annual Report (November 27, 2007) (questioning the continued relevance of 612(g)).

[13] *See* Cable Communications Policy Act of 1984, P.L. 98-549, §612 (1984).

[14] H.Rept. 98-934, at 52 (1984).

> *programmers and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers.*[15]

In 1992, however, Congress enacted the Cable Television Consumer Protection Act, which amended Section 612 to give the FCC more authority to regulate leased access.[16] Specifically, the FCC was granted the authority to determine the maximum reasonable rates that a cable company could charge for leased access, establish reasonable terms and conditions for such use, and establish procedures for the expedited resolution of disputes concerning rates or carriage.[17] In other words, all of the powers Congress, in the House Report, had suggested would be conferred upon the FCC under 612(g) were granted expressly to the Commission by the 1992 Cable Act revisions of Section 612. Congress did not, however, repeal Subsection 612(g) when it enacted the 1992 Cable Act. Furthermore, in the 1984 House Report, the regulations Congress indicated the FCC could promulgate regarding leased access under 612(g) seemed to be illustrative rather than an exhaustive list. The scope of the FCC's authority under 612(g), therefore, remains an open question.

Opposing Interpretations of Subsection 612(g)

Broad Authority

Some commenters argue that the provision confers upon the FCC broad authority to promulgate any rule that would encourage a diversity of information sources, including those that would apply outside of the channels designated for leased access.[18] However, the legislative history of 612(g) and its context within a provision that solely governs leased access might suggest otherwise.

When the plain language of a statute is unambiguous, courts generally do not find it necessary to look to legislative history to interpret a statute's meaning.[19] Proponents of broad authority under 612(g) argue that if Congress granted the FCC the power to promulgate "any" rule to promote a diversity of information sources, Congress meant to do exactly as it said and did not mean to restrict the FCC's powers to leased access.[20] The word "any," according to the Supreme Court, "has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'"[21] These

[15] H.Rept. 98-934, at 52 (1984) (emphasis added).

[16] Cable Television Consumer Protection Act, P.L. 102-385, §9 (1992).

[17] Cable Television Consumer Protection Act, P.L. 102-385, §9 (1992).

[18] *See* Comments of Association of Independent and Video Filmmakers, *et al.*, MB Docket No. 05-255 (filed April 3, 2006); Comments of AT&T, MB Docket No. 05-255 (filed April 3, 2006); Reply Comments of Association of Independent and Video Filmmakers, *et al.*, MB Docket No. 05-255 (filed April 25, 2006); Reply Comments of Center For Digital Democracy, *et al.*, MB Docket No. 05-255; Reply Comments of Verizon, MB Docket No. 05-255 (filed April 25, 2006); Reply Comments of Echostar Satellite L.L.C., MB Docket No. 05-255 (filed April 25, 2006); Reply Comments of Consumer Federation of America, *et al.*, MB Docket No. 05-255 (filed April 25, 2006).

[19] *See* Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) (noting that the Supreme Court "[does] not resort to legislative history to cloud a statutory text that is clear").

[20] Reply Comments of Verizon, MB Docket No. 05-255, at 2 (citing U.S. v. Labonte, 520 U.S. 751, 757 (1997) (stating that "we assume that in drafting legislation, Congress said what it meant")).

[21] United States v. Gonzales, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)).

commenters argue that under this interpretation of 612(g) the FCC has the authority to promulgate any rule so long as it would promote a diversity of information sources.

Furthermore, proponents of this interpretation argue that a broad grant of authority is consistent with the purpose of Section 612.[22] Section 612(a) indicates that the purpose of the provision 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."[23] The broad intent of the statutory provision coupled with the broad language of Subsection 612(g), some commenters argue, grants the FCC far-reaching regulatory powers.[24] Such powers, if upheld by the courts, would allow the FCC to promulgate many new regulations for the cable industry, above and beyond new rules that would encourage leased access of channels to unaffiliated persons.

Narrow Authority

Other commenters argue that the provision confers upon the Commission only the power to promulgate regulations related to the leased access of cable channel capacity to unaffiliated persons. These commenters argue that the context of Subsection 612(g) and the provision's legislative history make it clear that Congress intended 612(g) to apply solely to leased access and not to grant broad regulatory authority.[25]

Subsection 612(g) appears in a section that governs only leased access to cable channel capacity by unaffiliated persons.[26] Proponents of a narrow reading of 612(g) argue that the explanation of Subsection 612(g) in the House Report accompanying the original legislation and its placement within the leased access section of the statute appears to indicate that Congress intended 612(g) to govern leased access only.[27] The Supreme Court has noted that Congress "does not ... hide elephants in mouseholes."[28] Subsection 612(g), in this line of reasoning, is a small and long-dormant provision in a narrowly drawn section of the statute that should not be read to grant expansive authority to re-regulate an industry Congress has chosen repeatedly to deregulate.[29] If Congress had intended to include a provision that granted the FCC such broad power, it would

[22] Comments of AT&T, MB Docket No. 05-255, at 6-7.

[23] 47 U.S.C. §532(a).

[24] Comments of AT&T, MB Docket No. 05-255, at 6-7; Comments of Association of Independent and Video Filmmakers, *et al.*, MB Docket No. 05-255, at 16-17.

[25] *See* Comments of National Cable and Telecommunications Association, MB Docket No. 05-255 (filed April 3, 2006); Reply Comments of Comcast Corporation, MB Docket No. 05-255 (filed April 25, 2006); Reply Comments of National Cable and Telecommunications Association, MB Docket No. 05-255 (filed April 25, 2006).

[26] 47 U.S.C. §532(a)-(j).

[27] *See* H.Rept. 98-934, at 52 (1984) (suggesting that 612(g) grants power to more tightly regulate leased access, but failing to mention other areas 612(g) would grant the power to regulate); *see also* Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the 'considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'")(internal citations omitted).

[28] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001).

[29] *See* Comments of National Cable and Telecommunications Association, MB Docket No. 05-255 (filed April 3, 2006); Reply Comments of Comcast Corporation, MB Docket No. 05-255 (filed April 25, 2006); Reply Comments of National Cable and Telecommunications Association, MB Docket No. 05-255 (filed April 25, 2006).

have done so expressly and would not have placed the provision in the leased access section of the statute, according to these commenters.

Proponents of a narrow reading of 612(g) further argue that Section 624(f) of the Telecommunications Act makes clear that the FCC's authority to regulate cable programming services is narrow.[30] Section 624(f) provides that "any Federal agency, State or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]."[31] Commenters supporting a narrow reading of 612(g) argue that the placement and legislative history of that provision make clear Congress granted the FCC authority expressly to regulate only leased access under 612(g); and therefore, under 624(f), the FCC does not have the power to read Subsection 612(g) to grant broad authority.[32] If a court adopted this line of reasoning, the FCC would have the power only to regulate more stringently leased access to cable services by unaffiliated persons.

Judicial Review of the Scope of Subsection 612(g)

Judicial review of the scope of the FCC's power to promulgate rules under 612(g) would likely begin with a determination of whether or not the court is required to defer to the agency's interpretation of its authority.[33] The court must first ask "whether Congress has directly spoken to the precise question at issue. If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'"[34] A federal court determining whether Congress has spoken directly to the scope of an agency's authority under a statutory provision likely would begin its analysis with the language of the statute itself.[35]

Statutes must be read as a harmonious whole, and in determining whether Congress has spoken directly to an issue, "a reviewing court should not confine itself to examining a particular statutory provision in isolation."[36] Ambiguity of meaning may be clarified when placed in context. Justice Scalia has stated that "[s]tatutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[37] It seems, therefore, that when an agency's interpretation of the scope of its authority is at issue, a reviewing court will look first to the statutory context in which the provision granting the authority appears (i.e., the intent of the statute as a whole, the

[30] Comments of National Cable and Telecommunications Association, MB Docket No. 05-255, at 11.

[31] 47 U.S.C. §544.

[32] Comments of National Cable and Telecommunications Association, MB Docket No. 05-255, at 11.

[33] If Congress has not directly spoken to the matter in question, courts defer to the agency's construction of the statute so long as the construction is permissible. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984).

[34] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)(citing Chevron, 467 U.S. at 843).

[35] *See* Watt v. Alaska, 451 U.S. 259, 266-67 (1981) (noting that the "starting point in every case involving construction of a statute is the language itself").

[36] Brown & Williamson, 529 U.S. at 132.

[37] United Savings Ass'n. v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371 (1988).

structure of the statute, and inferences that can be drawn from the placement of the provision under review) to determine the precise scope of the power Congress has delegated.[38]

With these principles in mind, it seems likely that a court would begin its analysis of the authority Congress granted under Subsection 612(g) by noting the subsection's broad language. On its face the subsection appears to grant broad authority to promulgate any rule that would ensure a diversity of information sources once the statutory test has been satisfied.[39] However, because statutory construction "is a holistic endeavor," the court likely would analyze the broad language of Subsection 612(g) within the context of the entire statute in which the subsection resides.[40] Subsection (g) appears within Section 612, which applies solely to leased access to cable systems. Congress has provided other avenues of access to cable systems in the statute, beyond leased access, such as the provision requiring carriage of local television channels ("must-carry"),[41] the provision requiring carriage of non-commercial educational channels,[42] and the provision requiring carriage of public education and government (PEG) channels.[43] The court would then weigh a narrow interpretation against legal arguments for a broader one.

It should also be noted that Congress in the 1984 Cable Act stated its intent to ease regulatory burdens on the cable industry.[44] If 612(g) grants broad authority, as some commenters argued, it would allow the FCC to regulate many different areas related to the provision of video programming.[45] This result would arguably run contrary to the deregulatory intent of the statute.[46]

Although not beyond question, it appears that a court likely would adopt the narrow interpretation of Subsection 612(g), because the narrow reading appears to "produce a substantive effect that is

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[38] Brown & Williamson, 529 U.S. at 160 (finding that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"). *See also* United States v. American Trucking Assoc., Inc., 310 U.S. 534, 542 (1940) (noting that to find the content of a certain phrase, the phrase must be viewed in its setting); United States v. Boidore's Heirs, 49 U.S. 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

[39] *See* United States v. American Trucking Assoc. Inc., 310 U.S. at 543 (noting that often there "is no more persuasive evidence of the purpose of a statute that the words by which the legislature undertook to give expression to its wishes").

[40] *See* Gustafson v. Alloyd Co., 512 U.S. 561, 571 (1995) (indicating that a statute should be read as a "symmetrical and coherent regulatory scheme"); United States v. Dang, 488 F.3d 1135, 1140 (2007) (noting that courts should "analyze the provision in the context of the governing statute as a whole").

[41] 47 U.S.C. §534.

[42] 47 U.S.C. §535.

[43] 47 U.S.C. §531.

[44] "The purposes of this title are to ... (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521.

[45] *See, e.g.,* Comments of Association of Independent and Video Filmmakers, *et al.,* MB Docket No. 05-255 at 17-28 (arguing that 612(g) grants the FCC the authority to make changes to leased access to promote diversity, allow leased access for broadband providers, impose a national cable ownership limit, protect and enhance PEG access, and eliminate the ability of cable operators to withhold terrestrially delivered programming); Reply Comments of Verizon, MB Docket No. 05-255, at 3-4 (arguing that 612(g) grants the FCC authority to regulate local franchising and to remove barriers to entry for competitive video providers); Reply Comments of Echostar Satellite L.L.C., MB Docket No. 05-255 at 3-4 (arguing that under 612(g), the FCC may clarify that cable bundling is an unfair practice, may ban the practice of cable bundling, and may prevent cable affiliated programmers from imposing penetration requirements as a condition to program accesss).

[46] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.").

compatible with the rest of the law."[47] A narrow reading appears to comport with the entire statute's overarching theme of avoiding unnecessary regulation, and seems consistent with the placement of the subsection within the section dealing exclusively with leased access.

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[47] United Savings Ass'n. v. Timbers of Inwood Forest Associates, 484 U.S. at 371; *see* Green v. Bock Laundry Machine Co., 490 U.S. 504, 528 (1990) (Scalia J. concurring) (arguing that the more favorable interpretation is the one that is "most compatible with the surrounding body of law into which the provision must be integrated").