

***Before the
Federal Communications Commission
Washington, D.C. 20554***

In the Matter of)	
)	
Leased Commercial Access)	MB Docket No. 07-42
)	
Modernization of Media Regulation Initiative)	MB Docket No. 17-105

**COMMENTS OF SMALL BUSINESS NETWORK ON
FURTHER NOTICE OF PROPOSED RULEMAKING**

Small Business Network (“SBN”) hereby submits its comments on the proposals to modify the commercial leased access regime set forth in the above captioned Further Notice of Proposed Rulemaking (“FNPRM”) released on Jun 8, 2018 (FCC 18-80).

I. Introduction

SBN is a leased access programmer. It began business as such in January 2017, and is now on 17 Comcast and 2 Cablevision cable systems serving in excess of 900,000 subscribers. SBN was able to negotiate leased access deals with one cable operator with the assistance of the existing leased access rules. Even with the assistance of those rules, its efforts to negotiate deals with other cable operators were unsuccessful, due in large part to a refusal of those operators to follow the rules and to act in a cooperative fashion. Thus, in our experience, the existing leased access rules are not strong enough to incent cable operator compliance and cooperation, absent invoking the complaint procedure which is simply too expensive and time-consuming to serve as an effective enforcement tool. SBN strongly encourages the Commission to strengthen these rules so the benefits of diverse programming from independent sources can be realized to the extent envisioned by Congress when it wrote Section 612 of the Communications Act.

II. Unsuccessful and Successful Efforts to Obtain Commercial Leased Capacity

With the exception of a single cable operator, our efforts to obtain leased access have

been frustrated by cable operators. For example, one cable operator took 5 months to respond to our initial request and only after sending a reminder and having our attorney make several calls to the operator.

Another MSO demanded the following information on us to move forward:

- Our current balance sheet, and profit and loss for the current and the preceding year,
- List all sources of our companies financing,
- All stockholders owning more than 5% of the corporate voting stock,
- Names of all officers and directors,
- Name and address of our bank, and
- Our agreement to allow the operator to complete an investigative report on our company and shareholders.

This MSO also refused to provide us with the subscriber counts that are required to determine whether offering leased access programming on its system would be cost-effective. Needless to say, we never reached an agreement with this cable operator which, in our opinion, was exactly the result the MSO desired.

Our experience with Comcast was the opposite. Requested information was delivered in a timely manner. Comcast assigned us a representative who was very professional and cooperative. We reach leased access deals with Comcast and we now provide leased access programming on a number of their systems.

III. It Is Imperative that the Programmer Interested in Leased Commercial Access Have Rapid Access to the Information Required to Make a Business Decision

While we agree that cable operators should not have to respond to anything but *bona fide* requests for information,¹ it is imperative that the putative programmer have certain gating information on the system before it can decide whether to make a request for information and

¹ The FNPRM suggests the following as the definition of a bona fide request: “(i) The desired length of a contract term; (ii) The time slot desired; (iii) The anticipated commencement date for carriage; and (iv) the nature of the programming.”

pursue a leased access deal.

A programmer needs to know the price for the channel (or channel day part), how many channels (or channel day parts) are available for leased access, the channel numbers that are available, the name and contact information for the employee of the cable operator who is tasked with handling leased access request and negotiations,² and the count of subscribers on that channel tier (which cable operators do not have to reveal). All of the cable companies have websites and there is no reason why most of this information cannot be posted on the website. Subscriber numbers, in particular, are essential to the putative programmer. The earning power of non-premium programming is directly related to the number of subscribers who have access to the programming. A programmer cannot possibly determine the feasibility of providing leased access programming without knowing the number of subscribers who will have access to the programming. If these numbers are (as is so often the case) provided to franchise authorities, then they should be provided on the website. To the extent these numbers are legitimately confidential, then perhaps the FCC could promulgate a rule stating that a prospective leased access programmer has a right to the subscriber numbers but may use this information only in considering whether to proceed to negotiate a leased access contract and for purposes related to its business and financing as a programmer.

The proposal to extend the time for a response to a request for information will make it even harder for programmers to enter into leased access deals, while not serving any substantial need of the cable operator. Cable operators should have the information the programmer requires prepared and in a form easily provided to the leased access programmer. Section 611 is a statutory obligation. The Commission should compare the obligations it places on cable operators to how a cable operator would act if it wanted the leased access business, and reject lax protections that reflect a revulsion to

² This was a requirement of the 2008 Order.

compliance.

IV. Fees and Charges Need to Support the Offer of Leased Access Programming; the Costs to Promote

The idea of allowing cable operators to charge a “nominal” application fee or a request a “nominal” deposit just adds another layer of bureaucracy to further inhibit the programmer and, worse, will engender deal-killing controversies over what fees and deposits are “nominal.” Ultimately, the FCC will find itself dedicating scarce staff resources to litigating what is and what is not “nominal.” Indeed, if the fee or deposit is “nominal,” then why bother with it at all?

The NPRM’s proposed rules do not include any proposal to change the maximum rate setting rules of 76.970(c) - (h). We have experience with rates set with these formulae and have come to the conclusion that the resulting rates are too high for an independent programmer to launch any programming service, let alone a 24/7 network. To launch a 24/7 network on a sample system with, for example, 138,000 subscribers, it would cost the programmer over \$200,000 a year. Additionally since the dedicated channels are placed at very high locations, the programming must be promoted with paid commercials. These commercials are not discounted, thus adding to the independent producers cost. This cost impedes competition and innovation in the media marketplace.

In the 2008 Leased Access Order, the Commission adopted a three part maximum fee test:

We take several approaches to calculating this maximum rate. For example, we calculate the maximum rate utilizing a methodology based on per-subscriber affiliation fees that compensates systems that must vacate a channel in order to provide capacity to a commercial leased access programmer. We also calculate the maximum allowable leased access rate using a method that follows the one used to calculate the system-specific rates. In both cases, maximum rates for each of the analog and digital tiers are no greater than \$0.10 per subscriber per month. Therefore, the maximum leased access rate will not exceed \$0.10 per subscriber per month for any cable system.³

We believe that a per subscriber cap would promote the availability of leased access programming by using a cap that comports with the industries use of subscriber counts for pricing and for

³ Para. 47.

determining the feasibility of any leased access proposal. Such a could be set at a fixed amount, and adjusted for general inflation on an annual basis and revisited at regular intervals to assure it remains fair to cable operators as well as leased access programmers. Given the need for stability in a leased access deal, our suggestion is to revisit the rate once every 5 years but not to change the rate more than 5% from the preexisting rate (as adjusted for inflation) to avoid rate shock detrimental to established business operations.

We are not suggesting any rate regulation that would be unfair to cable operators. Cable systems pay programmers for content based on subscriber count. It's the reverse with independent producers who have to pay for access. If programmers were charged based on that same cost per subscriber their cost would be much lower. Cable operators should be glad to get programming content for nothing.

In our experience as a leased access programmer, we have found that the channel positions made available by cable operators are the least desired positions and, as the Commission's must carry rules reflect, channel position is critical to the success of a programming network. We are not asking the Commission to mandate better channel positions, but to recognize that leased access programmers have to use promotional commercials to attract viewers due to the substandard channel positions assigned to their programming. As the choice of channel position is the cable operator's choice, we believe that the cable operator should be required to sell promotional commercial time on local avails selected by the programmer at discounted rates. We suggest the rate be the best rate for local promotional commercial offered to any other programmer.

V. Other Proposals

The FNPRM also invites comment on any other ways in which we should modernize our leased access rules.

(a) Applicability of Rules to Telco-owned Systems

The Commission should clarify that independent programmers have the same right of access to

multichannel video systems owned by telephone companies as they have to other cable systems.

(b) Minimum Customer Service Standards

We suggest that the Commission retain the “minimum” customer service requirements adopted in the 2008 Order, as you cannot decide to go forward with a transaction if you cannot determine what you will get for your money. To quote the order:

As stated above, in order to make the leased access carriage process more efficient, we adopt new customer service standards, in addition to the existing standards. These standards are designed to ensure that leased access programmers are not discouraged from pursuing their statutory right to the designated commercial leased access channels, to facilitate communication of these rights and obligations to potential programmers, and to ensure a smooth process for gaining information about a cable system’s available channels. As explained in more detail below, we require cable system operators to maintain a contact name, telephone number and e-mail address on its website, and make available by telephone, a designated person to respond to requests for information about leased access channels. We also require cable system operators to maintain a brief explanation of the leased access statute and regulations on its website. Within three business days of a request for information, a cable system operator shall provide the prospective leased access programmers with the following information: (1) The process for requesting leased access channels; (2) The geographic levels of service that are technically possible; (3) The number and location and time periods available for each leased access channel; (4) Whether the leased access channel is currently being occupied; (5) A complete schedule of the operator’s statutory maximum full-time and part-time leased access rates; (6) A comprehensive schedule showing how those rates were calculated; (7) Rates associated with technical and studio costs; (8) Electronic programming guide information; (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method; (10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and (11) Information regarding prospective launch dates for the leased access programming.⁴

(c) Programming Guides

With the hundreds of channels offered by the typical cable system, it is essential that independent

⁴ 2008 Order, at para. 12 (footnotes omitted).

programmer's channels be listed in all programming guides made available by the cable operator to subscribers and to third party publishers (such as TV Guide). There is no other way that subscribers can find the programming. The 2008 Order adopted program guide requirements that should be retained:

We require a cable system operator within three business days of a request to provide a prospective leased access programmer with all relevant information for obtaining carriage on the program guide(s) provided on the operator's system. Moreover, we expressly require that, if a cable operator does not charge non-leased access programmers for carriage of their program information on a programming guide, the cable operator cannot charge leased access programmers for such service.⁵

VI. Conclusion

Small Business Network is pleased that the Commission is revisiting its leased access regulations and hopes that the Commission will adopt the suggestions in these comments to improve a system that, at present, has too many escape valve for the reluctant cable operator and presents too many hurdles for the independent programmer.

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⁵ 2008 Order, at para. 21.