

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

ORIGINAL
FILE

RECEIVED

DEC 21 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992)
Indecent Programming and Other Types)
of Materials on Cable Access Channels)

MM Docket No. 92-258

REPLY COMMENTS OF TELE-COMMUNICATIONS INC.

Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20036-3384

Its Attorneys

December 21, 1992

No. of Copies rec'd cf 4
List ABCDE

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C.

RECEIVED
DEC 21 1992
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Implementation of the)
Cable Television Consumer)
Protection and Competition) MM Docket No. 92-258
Act of 1992)
)
Indecent Programming and Other Types)
of Materials on Cable Access Channels)

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), hereby files its reply comments in the above-captioned proceeding.¹ TCI is a multiple systems cable operator providing cable service in 48 states to more than nine million subscribers.

In its Comments, TCI stated that leased access and public, educational, and governmental ("PEG") access are unconstitutional.² The commenters in this proceeding were in near-unanimous agreement with this view.³

TCI also proposed in its Comments that the Commission recognize certain principles in promulgating rules under Section

¹ Notice of Proposed Rulemaking in MM Docket No. 92-258, FCC 92-498 (rel. Nov. 10, 1992) ("Notice").

² Comments of TCI at 2-3.

³ See, e.g., Comments of The National Cable Television Association at 3-5; Comments of Time Warner Entertainment at 4-5; Comments of Cox Cable Communications at 1-2; Comments of Alliance for Community Media et al. at 1-67.

10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Act"), including the following:

- Cable Operators May Require Leased and PEG Access Programmers To Certify That Their Programming Does Not Contain Material Designated By Section 10

Cable operators may require leased access programmers to certify that their programming is not obscene or indecent. Cable operators may require PEG access programmers to certify their programming does not contain obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Certification is a simple and effective method of enabling cable operators to comply with the requirements of Section 10. TCI demonstrated in its Comments that certification would impose no significant burden on programmers and would not violate the provisions regarding editorial control in 47 U.S.C. §§ 531(e) and 532(c)(2).⁴ There was broad agreement with this position among commenters.⁵

⁴ Comments of TCI at 7-8.

⁵ See, e.g., Comments of Continental Cablevision Inc. at 4-5; Comments of Cox Cable Communications at 3-5.

- Cable Operators Have Limited Liability For Carriage Of Leased and PEG Access Programming

The commenters agree that where a leased access programmer certifies that its programming is not indecent, the cable operator should not be liable for failing to carry that programming on a separate blocked channel.⁶ Likewise, in cases where a leased or PEG access programmer certifies that its programming is not obscene, the cable operator should be able to rely on that certification and should not be liable for carriage.⁷

- The Wide Variety of Cable System Configurations Necessitates Flexibility in the Manner of Blocking Leased Access Channels

TCI pointed out in its Comments that there is a broad range of cable system technical configurations and that operators use a number of methods to block subscriber access to a channel.⁸ The commenters agree that the Commission should permit cable

⁶ See, e.g., Comments of Cox Cable Communications at 3-8; Comments of Time Warner Entertainment at 14-20; Comments of The National Cable Television Association at 11-13.

⁷ Comments of TCI at 10-11.

⁸ Comments of TCI at 12-16.

operators to utilize any method of blocking that accomplishes the objectives of the Act.⁹

In addition to recommending the principles set forth above, TCI would like to respond to certain other issues raised in the comments:

1. Preemption. Several commenters urged the Commission to clarify that Section 10 and the Commission's implementing rules preempt all inconsistent state and local laws and regulations regarding leased and PEG access programming.¹⁰ TCI agrees with this view.

Section 10 establishes a comprehensive scheme for dealing with obscene and indecent leased and PEG access programming. The scheme imposes on cable operators a detailed set of requirements regarding leased and PEG access programming. It further allows operators to take certain voluntary actions regarding such programming.

Federal preemption of state and local laws, including franchise regulations, is required when Congress has expressed an intent to "occupy the field" or there is an "actual conflict"

⁹ See, e.g., Comments of The National Cable Television Association at 13-14; Comments of Time Warner Entertainment at 9-10; Comments of Cox Cable Communications at 10-11.

¹⁰ Comments of Continental Cablevision Inc. at 6-7; Comments of Intermedia Partners at 10-11; Comments of Acton Corp. et al. at 5.

between federal and state or local law. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

The Commission should not force cable operators into the position of attempting to comply with the terms of Section 10 in the face of contrary state and local laws. To do so would not only be unfair, it would undermine Congressional intent as reflected in the terms of Section 10 and the legislative history. The Commission should clarify that all inconsistent provisions in franchise agreements and state or local laws and regulations are preempted by Section 10 and the Commission's regulations.¹¹

2. Costs of Compliance With Section 10. There was some disagreement among commenters on the issue of who should bear the costs of compliance with Section 10. As TCI stated in its Comments, leased access programming is a commercial proposition. As a result, if the nature of the programming offered results in special costs of delivery pursuant to Section 10, TCI believes it is appropriate that the programmer should bear those costs.

3. Public, Educational, and Governmental Access. In its comments, the National Association of Telecommunications Officers and Advisors et al. ("NATOA et al.") contend that it would be a

¹¹ Note that 47 U.S.C. § 556(c) states that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."

significant burden to require PEG access programmers to certify on a program-by-program basis that their programming does not contain material designated by Section 10. Instead, NATOA et al. argue that access programmers should only have to certify their programming on an annual basis.

TCI demonstrated in its Comments that certification can be accomplished in a simple, straightforward manner that imposes no burden on programmers.¹² Moreover, TCI is concerned that permitting annual certification is insufficient because some programmers utilize a PEG access channel only on an occasional basis.

NATOA et al. also argue that, with regard to live programming, access programmers should only be required to certify that they have made "reasonable efforts" to ensure the programming does not contain obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.¹³ TCI recognizes that it would be difficult for programmers to guarantee that live programming does not contain such material. As a result, TCI does not object to the proposal of NATOA et al. However, if the proposal is adopted, the Commission must clarify that such certification immunizes cable operators from liability for carriage of the programming.

¹² Comments of TCI at 7-8.

¹³ Comments of NATOA et al. at 5-6.

4. TCI Policy Regarding Indecent Leased Access

Programming. The Denver Area Educational Telecommunications Consortium ("DAETC") notes that "TCI has not supplied DAETC with a written policy pertaining to indecency on leased access channels, despite the fact that the statute authorizes TCI to implement one."¹⁴ It is not surprising that TCI has not yet made a decision on whether to articulate a policy on indecent leased access, because Section 10 of the Act was only recently passed and the Commission's implementing regulations are not required until February 1993.

DAETC further states that, while it "cannot be sure of TCI's stance" on access programming, it "has been informed that highly and unnecessarily repressive policies are under consideration in the industry."¹⁵

TCI has no intention of instituting repressive policies regarding access programming. Moreover, DAETC asserts that isolating and blocking indecent programming and requiring programmer certification would create "draconian consequences."¹⁶ But these are the very requirements specified in the Act and contemplated in the Commission's Notice. Complying with these requirements should not, as DAETC asserts, result in a conclusion that a cable operator is "hostile" to access programming.¹⁷

¹⁴ Comments of DAETC at 7.

¹⁵ Comments of DAETC at 8.

¹⁶ Id.

¹⁷ Id.

TCI respectfully recommends the Commission adopt rules to implement Section 10 of the 1992 Act consistent with the comments contained herein and in its initial comments in this proceeding.

Respectfully submitted
TELE-COMMUNICATIONS, INC.



Michael H. Hammer
Philip L. Verveer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Its Attorneys

December 21, 1992