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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Rate Regulation)
)

MM Docket 92-266

To: The Commission

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, ValueVision International, Inc. ("ValueVision") submits this Reply to the oppositions to its petition for reconsideration filed by Continental Cablevision, Inc. ("Continental"), Center for Media Education ("CME"), Cablevision Industries Corporation, et al. ("CIC"), Bend Cable Communications, Inc., et al. ("Bend"), Time Warner Entertainment Company, L.P. ("Time Warner") and Home Shopping Network, Inc. ("HSN") with respect to the leased commercial access provisions of the Report and Order issued in MM Docket No. 92-266, FCC 93-177 (released May 3, 1993) ("Report").

I. VALUEVISION IS NOT SEEKING PREFERENTIAL LEASED ACCESS RATES FOR HOME SHOPPING PROGRAMMING

In its petition for reconsideration, ValueVision requested the Commission to clarify that where an explicit market

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rate for channel capacity exists, as it does in the case of home shopping,^{1/} the implicit fee model does not apply. ValueVision Petition at 14. In that event, ValueVision argued that the maximum rate for leased access should be calculated by reference to the highest explicit fee paid by unaffiliated programmers in the same category. Id.^{2/}

Several parties suggest that ValueVision is simply seeking a preferential leased access rate for home shopping programmers by urging the Commission (1) to retain its differentiation of cable programmers into three categories (Report at ¶ 516), and/or (2) to apply the market rate for home shopping programming to leased access.^{3/} These parties contend there should be only two categories of programming - pay per channel or per event and all others, and that home shopping should be subject to the same rate structure as programming in the "all others" category. Id. They therefore dismiss the significance of the fact that home shopping services pay for

^{1/} Home shopping networks QVC and HSN have typically paid cable operators 5% of net sales revenue to obtain carriage. ValueVision Petition at 3.

^{2/} Time Warner erroneously suggests that ValueVision advocates a single, uniform leased access rate for home shopping programmers nationwide. Time Warner Opp. at 33 n.96.

^{3/} See, e.g., Continental Opp. at 30, Bend Opp. at 2 and CIC Opp. at 18, HSN Opp. at 2. In considering HSN's claim that it "has never sought special treatment" (HSN Opp. at 2), one must bear in mind that HSN is now safely ensconced on cable systems throughout the country, it is merging with its largest competitor - QVC (see ValueVision Opp. at 2 n.1), that it is affiliated with major cable MSOs (see ValueVision Petition at 11-12), and that it therefore has a substantial interest in assuring that it faces no competition from new home shopping programmers.

carriage, whereas all other services are paid for their programming (ValueVision Opp. at 5-6). This fundamental economic distinction justifies the Commission's treatment of home shopping as a separate category. Report at ¶ 516.

They also mischaracterize ValueVision's petition. Although ValueVision requests the Commission to apply the market rate to home shopping, we do not seek to obtain a preferential rate. We seek the application of the market rate to home shopping because we concur with other programmer petitioners^{4/} that the implicit fee model will establish rates that will make it economically impossible for prospective channel lessees to obtain access, and thereby to realize congressional objectives.^{5/}

cable operators, that rate should be applied to leased access. ValueVision Petition at 5. As Time Warner states, "looking to the explicit fee currently charged to home shopping programmers makes sense." Time Warner Opp. at 33 n.96.

HSN claims that ValueVision mischaracterizes the rates charged to home shopping networks for carriage, and that it has paid many cable operators significantly more than 5% of net sales for carriage due to its payment of marketing fees and other payments required by its affiliation agreements. HSN Opp. at 5. We have not, however, suggested that there has been no variation from the standard rate of 5%, nor that home shopping programmers should be charged only 5% for leased access, if the market rate for channel capacity is higher. The rate for leased access, however, is intended to compensate cable operators only for the use of channel capacity, and therefore does not, as the Commission properly found, "include . . . fees for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services)." Report at ¶ 518.^{6/}

Continental similarly argues that the market price for shopping channels is not simply 5% of sales, but rather is the

^{6/} HSN argues that ValueVision's proposed low price of 5% would create a powerful incentive for existing home shopping networks to migrate to leased access. HSN Opp. at 5-6. However, ValueVision does not advocate a leased access rate of 5%, unless that is the market rate. Moreover, without knowing what other payments are required by HSN's affiliation agreements, we find it difficult to comprehend how an existing programmer could reduce its cable carriage costs by migrating to leased access, if home shopping programmers are charged the highest market rate for leased access.

actual revenue that percentage represents. Continental Opp. at 30.^{7/} It contends that established networks like QVC and HSN have sufficient sales volume to justify a 5% commission formula, and that if sales were lower, the channel charge (expressed as a percentage of sales) would be higher. Id. Continental asserts that it is unfair to require cable operators to accept unprofitable rates for unsuccessful leased channels. Id. See also HSN Opp. at 5 ("Requiring an operator to lease channel capacity in exchange for 5% of some unknown (and probably low) sales figure will wreak havoc with an operator's ability to engage in meaningful financial planning").

Continental and HSN do not contest ValueVision's assertion that QVC and HSN have, since their inception, paid cable operators 5% of their net sales for carriage. Petition at 3. They also offer no evidence that QVC or HSN has ever paid a higher percentage in commissions upon entering a new market, or that competing home shopping programmers will necessarily have a low sales volume. Thus, they have offered no justification for charging new home shopping programmers a higher than market rate, particularly when new programmers could not otherwise compete with existing home shopping networks.

Continental also asserts that the market rate is unnecessary to promote diverse home shopping programming, because

^{7/} Even if the market price for shopping channels is the actual revenue generated by sales commissions, Continental has not explained why the "actual" revenue per subscriber should not be the maximum leased rates rather than the implied

home shopping has recently been granted must carry status. Continental Opp. at 31.^{8/} Must carry however is no substitute for leased access in markets where one is not carried on a broadcast channel.

Finally, ValueVision continues to oppose CME's position that the Commission should reject the market rate for home shopping programmers in order to promote diversity and to

this method would ensure the achievement of the congressional objective that cable operators not consider the content of, or exercise editorial control over, leased access programming. 47 U.S.C. § 532(c)(2).

Time Warner, Continental and CIC argue that first come first served would undermine program diversity. Contrary to Time Warner's contention (Time Warner Opp. at 35 n.102),^{10/} Congress did not make a general finding that non-discriminatory access would undermine diversity. Rather, it determined that non-discriminatory rates could prevent certain classes of programmers from obtaining access, by establishing an average rate that would be higher than the fair price for some uses of channel capacity and lower than the fair price for others. H.R. 98-934, 98th Cong., 2 Sess. 51 (1984).^{11/} The differentiation of programmers into three categories, however, will prevent this problem from developing.

Continental asserts that first come first served will result in home shopping programmers occupying numerous leased

^{10/} Time Warner also argues that first come first served is unnecessary for leased access because it is already available for PEG channels. Time Warner Opp. at 35 n.102. This provides little comfort to programmers in the home shopping category, and many programmers in the "all others" category, who do not qualify for public access.

^{11/} Additionally, in 1984, Congress considered that "marketplace negotiation . . . [was] appropriate" to establish rates, terms and conditions. H.R. Rep. No. 934 at 51. By 1992, however, Congress concluded that the Commission should establish maximum rates and reasonable terms and conditions for leased access, because it found reliance on the marketplace would prevent leased access from becoming a reality. See . . .

access channels, thereby foreclosing access to other, diverse lessees. Continental Opp. at 33. It further claims that cable operators "retain[] discretion . . . to control lessee access." Id. at 34. See also CIC Opp. at 20 n.30. Continental's assertion that cable operators retain discretion to control leased access flies in the face of the statutory ban on considering content, except to establish rates. 47 U.S.C. § 532(c)(2).^{12/} Moreover, as ValueVision noted in its opposition, it is the only home shopping programmer currently in operation other than QVC and HSN, and first come first served will ensure that home shoppers and all other programmers will have an equal opportunity to obtain access. Opp. at 5.

CIC argues that the Commission should leave channel allocation to the complaint resolution process for "necessary adjustments." CIC Opp. at 20-21.^{13/} Programmers, however, require clear and unambiguous rules to avoid continued disputes over leased access, which would frustrate Congress' goal of

^{12/} Continental also argues that first come first served violates the prohibition against regulating cable as a common carrier. Continental Opp. at 33. Although cable is not treated as a common carrier under the 1984 and 1992 Acts, certain forms of regulation employed in the context of common carriers are authorized by the 1992 Act. See, e.g., 47 U.S.C. § 532(c)(4)(A) (authorizing the Commission to establish maximum rates for leased access, and to establish reasonable terms and conditions for the use of leased access channel capacity).

^{13/} It also argues that first come first served is inconsistent with the notion that operators should have the ability to encourage the most profitable use of leased access channels. CIC Opp. at 20 n.30. CIC's position is inconsistent with the underlying principle of leased access, and of Congress' decision to regulate rates to make leased access a reality. ValueVision Opp. at 3 n.4. See also Sur Petition at 16-17.

making leased access a genuine outlet for competitive programming. Indeed, Congress found that "the expense of litigation and the high burden of proof on the aggrieved party may limit the extent of use of leased access capacity." H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 40 (1992).

Finally, HSN suggests that first come first served is unnecessarily complex, because it leaves open the question of how to determine who is "first come." HSN Opp. at 7 n.7. This contention is unsound. The Commission could simply provide that the first applicant who demonstrates that it is willing and able to pay the maximum reasonable rate for its category of programming, and to put up reasonable security, will be the first to obtain access.^{14/}

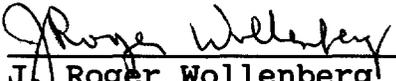
^{14/} HSN also claims that "its experience with cable operators" indicates that cable operators will look to the revenue potential of a leased access applicant rather than content. However, if cable operators are permitted to consider revenue, or the "mix" of their programming, in allocating leased access channel capacity, they will seek to maximize their profits by preventing competitive programmers from obtaining access, as they did prior to the 1992 Cable Act. See H.R. Rep. No. 628 at 39 ("The Committee is concerned that cable operators have financial incentives to refuse leased access channel capacity to programmers whose services may compete with services already carried on the cable system, especially when the cable operator has a financial interest in the programming service it carries.").

CONCLUSION

For the foregoing reasons, we submit that ValueVision's Petition for Reconsideration with respect to leased access should be granted.

Respectfully submitted,

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August 2, 1993

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CERTIFICATE OF SERVICE

I, J. Roger Wollenberg, hereby certify that I have this 2nd day of August, 1993, mailed by first class United States mail, postage prepaid, copies of the foregoing "Reply to Oppositions to Petition for Reconsideration" to the following:

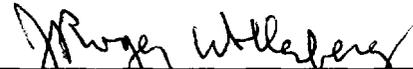
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