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

MAY 15 1996

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992:	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

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COMMENTS OF LIBERTY SPORTS, INC.

Liberty Sports, Inc. submits these comments in response to the Commission's Further Notice of Proposed Rulemaking in this proceeding. The proposed revisions to the leased access rules are likely to:

- yield a negligible "programmer charge" for leased access;
- substantially expand the demand for subsidized or "free" leased access capacity;
- exacerbate the already difficult channel capacity shortage;
- decrease programming diversity by requiring numerous cable systems to delete existing cable programming services; and
- provide leased access programmers with an insurmountable competitive advantage through mandated preferential packaging.

Liberty Sports respectfully submits that the Commission should revise its Maximum Rate Formula to account for critical elements of channel capacity value omitted from its proposal, thereby yielding a more realistic programmer charge and to adopt transition rules which will

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minimize the resulting disruption of any leased access revisions upon the cable programming marketplace.

Liberty Sports owns and/or operates a number of regional sports networks which provide local, regional and national sports television programming to cable operators and other multi-channel video programming distributors. Liberty Sports also has launched Prime Sports Showcase, a 24-hour sports programming service featuring women's sports, nostalgic sports and sports news programming and Prime Deportiva, a 24-hour Spanish language sports television service. Liberty Sports is attempting to obtain national distribution of the Showcase and Prime Deportiva programming services.[1]

1. The Maximum Rate Formula Proposed by the Commission Yields a Subsidized Leased Access Rate.

The Commission has proposed a "programmer charge" based upon the "opportunity costs" associated with "removing or 'bumping' non-leased access programming to accommodate leased access." Further Notice at ¶69. Such costs "are specific to the channels designated for leased access" (id.) and include operating costs, lost advertising revenue and commissions, and any additional technical or administrative costs of leased access.

After carefully reviewing the Commission's proposal and its "Numerical Illustration of the Proposed Cost Formula," Liberty Sports respectfully submits that the Commission's methodology will yield a negligible "programmer charge" for virtually all leased access channels which replace programming services on regulated tiers. The Commission

[1] Liberty Sports recently contributed its assets to a joint venture among Liberty Media Corporation, Fox, Inc., and News America Holdings Incorporated, in which Liberty Media holds 50 percent of the interests through its subsidiaries.

proposes to mandate carriage of all leased access channels on basic service or the most widely-distributed cable programming services tier ("CPST") such that net operating costs typically will approach zero. Because cable operators are likely to delete more recently-launched programming services to accommodate expanded leased access, lost revenues from local ad avails will be minimal. In short, the reasonably-expected inputs to the Commission's proposed formula yield the anomalous result that leased access programmers may secure channel capacity with little or no "programmer charge."

Clearly, the Commission did not intend to propose a leased access charge which effectively is subsidized by cable operators, subscribers and existing programmers. Indeed, the Commission expressly disclaimed any intent to lower the maximum leased access rate in proposing its methodology:

> We believe that the proposed cost/market rate formula represents a pricing scheme that would promote leased access without giving programmers a subsidy. The purpose of the cost formula is not to lower rates. It does not guarantee that leased access programming will increase or that the maximum rate for leased access programmers will decrease.

Further Notice at ¶68.

Liberty Sports respectfully submits that the Commission's valuation methodology should include more than the narrowly-defined "opportunity costs" from the individual channels to be deleted. For example, the Commission tentatively concluded that its "cost formula should not explicitly include revenue lost because of a purported loss in subscribership to a particular tier because particular programming is dropped." Further Notice at ¶86. Although such lost revenue may be difficult to calculate precisely, it is an essential and substantial element of the value of channel capacity. As the variety of competitive alternatives has continued to expand, the contribution of each component channel to tier subscribership has become increasingly

important. Absent a proxy for this contribution, the Commission's proposal necessarily understates the value of channel capacity.

By focusing solely on the current revenues generated by the specific channels to be deleted, the Commission's methodology further underestimates the value of channel capacity. The continuing uncertainty that cable operators may be forced to delete programming services on channels designated for leased access decreases the likelihood that such channels have been deployed to their highest and best use. Marketing and promotional campaigns may have been limited. Typically, cable operators may be expected to delete programming services which have been launched more recently and have yet to develop a strong subscriber viewership in order to accommodate additional leased access channels. Consequently, the deleted services will not have achieved their full revenue-generating potential.

Finally, the Commission questions whether it should further reduce the maximum lease rates for non-profit programmers and certain classes of for-profit entities. However, the legislative history cited by the Commission to support such preferential pricing only suggests that the Commission authorize cable operators to offer different and lower prices to non-profit entities -- not that the Commission mandate lower pricing by regulation. By definition, 47 U.S.C. §532 requires the designation of "channel capacity for commercial use" and does not authorize preferential pricing based upon the nature of the programmer leasing such capacity.

2. Subsidized Leased Access And Mandatory Packaging Will Create an Insurmountable Competitive Advantage for Leased Access Programmers.

The Commission has acknowledged the current channel capacity shortage -- the number of existing national programming services far exceeds the channel capacity of the

average cable system. Second Annual Report, CS Docket No. 95-61, FCC 95-491 (rel. Dec. 11, 1995), at ¶17. Recent increases in the number of such services have far exceeded increases in average channel capacity. Id. In the context of this increasingly acute shortage, revised leased access rules yielding a negligible "programmer charge" would result in increased demand for such subsidized leased access capacity. Because cable operators generally are fully utilizing their existing channel capacity, such increased demand will require cable operators to delete numerous existing programming services. As Liberty Sports explained in its March 13 ex parte submission in this proceeding, such deletion can have a debilitating effect on programmers because they "cannot easily recoup or rebuild the goodwill and 'brand' identity" developed with viewers. To the extent that leased access provides additional home shopping, infomercials, low-power television rebroadcasts, and similar programming which does not require subscription revenue, the Commission's proposals are likely to decrease programming diversity.

The Commission's proposal to require cable operators to carry all leased access channels on basic service or the "CPST with the highest subscriber penetration" only exacerbates the competitive disadvantages faced by existing programming services. In proposing such mandatory preferential packaging, the Commission has reversed course completely and inexplicably from its original analysis of the relevant legislative history.[2] Cable

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[2] When the Commission originally analyzed the Congressional directive that leased access provide a "genuine outlet" for programming, the Commission properly balanced the "legitimate needs of cable operators to market their programming." It rejected mandatory packaging requirements, concluding that they were inappropriate and inflexible:

> Thus, we believe that channel placement or tier access is a matter that is best left in the first instance to negotiation between the parties bearing in mind the nature of the service being offered, the relationship between the charge imposed and the desirability of the channel, and the congressionally mandated objectives that leased channels provide competition in the delivery of programming and afford

operators simply cannot expand indefinitely the number of programming services on basic service and the most popular CPSTs. Instead, the mandatory inclusion of numerous leased access channels on such tiers likely will result in the exclusion of a commensurate number of existing programming services from those tiers. Clearly, this would not "promote competition in the delivery of diverse sources of video programming" as envisioned by Congress when it expanded the purpose of leased access in the 1992 Cable Act. 47 U.S.C. §532(a).

Further, such preferential access is not necessary to provide a "genuine outlet" for leased access programming. Cable operators should be able to negotiate with leased access and other programmers in structuring service offerings to cable subscribers, and those subscribers should have reasonable tier choices. Thus, the creation and offering of separate leased access tiers or packages to which viewers could subscribe provides a genuine outlet with which other programmers can nonetheless compete.

3. The Commission Should Adopt Reasonable Transition Rules to Minimize Disruption to the Programming Marketplace If the Leased Access Rules Are Substantially Revised.

As set forth above, revisions to the existing leased access rules which significantly expand the demand for leased access capacity will have a drastic impact on existing programmers -- potentially causing the deletion or retiering of numerous programming services. Therefore, the length of the transition period to any new rules, the minimization of such

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> programmers genuine outlets. Given the diversity of possible access uses, we do not believe it desirable at this time to attempt an a priori allocation scheme.

Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd. 5631 (1993), at ¶498 (notes omitted).

deletions to accommodate part-time leased access, and a revised procedure for designating channels to be deleted should be essential elements in any new rules.

Because of the significant multi-year programming commitments required for sports programming services, those services cannot readjust projections, plans and budgets without a significant transition period. If the Commission were to adopt revised rules which decrease the available channel capacity, particularly on basic service and popular CPSTs, and require cable operators to delete existing services, a multi-year transition period should be incorporated to enable existing programmers to adapt to yet another fundamental change in the regulatory framework for carriage.

Further, the Commission should not require unnecessary deletions of existing programming in order to accommodate part-time leased access carriage. Multiple channels should not be deleted to provide "comparable time slots" for part-time leased access programmers. If a leased access programmer seeks carriage which would require the deletion of an existing programmer, the leased access programmer should bear the cost of leasing the full channel until additional leased access programmers request part-time carriage. Finally, the Commission should authorize cable operators to revise periodically their designations of channels to be deleted for leased access. The Commission's proposal to permit only annual redesignations (Further Notice at ¶76) is unnecessary and precludes programmers from negotiating for continued carriage and redesignation.

Conclusion

The Commission's valuation methodology does not yield a realistic "programmer charge" for leased access. It omits an essential element of value and focuses solely on channels whose revenues are likely to be among the lowest. Coupled with mandatory preferential packaging, the Commission's proposal would result in expanded and subsidized leased access at the expense of existing programming diversity. Liberty Sports respectfully submits that the Commission should substantially revise its valuation methodology, eliminate any mandatory packaging requirements, and adopt transition rules designed to minimize the disruption to and adverse impact on existing programmers resulting from revised leased access rules.

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Respectfully submitted,

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