VINCENT A PEPPER
ROBERT F. CORAZZINI
PETER GUTMANN
JOHN F. GARZIGLIA
NEAL J. FRIEDMAN
ELLEN S. MANDELL
HOWARD J. BARR
MICHAEL J. LEHMKUHL *
SUZANNE C. SPINK *
RONALD G. LONDON *

* NOT ADMITTED IN D.C.

PEPPER & CORAZZINI
L. L. P.
ATTORNEYS AT LAW
1776 K STREET, NORTHWEST, SUITE 200
WASHINGTON, D.C. 20006

(202) 296-0600

GREGG P. SKALL
E. THEODORE MALLYCK
OF COUNSEL
FREDERICK W. FORD
1909-1986

TELECOPIER (202) 296-5572
INTERNET PEPCOR@COMMLAW.COM
SITE HTTP://WWW.COMMLAW.COM

DOCKET FILE COPY ORIGINAL

RECEIVED

MAY 15 1996

May 15, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

RE: Eternal Word Television Network, Inc.
Comments in MM Docket No. 92-266
CS Docket No. 96-60

Dear Mr. Caton:

Transmitted herewith on behalf of Eternal Word Television Network, is an original and four (4) copies of its Comments on the Commission's Further Notice of Proposed Rulemaking in the above referenced dockets.

Should any questions arise in connection with this matter, please contact the undersigned.

Respectfully submitted,

Howard J. Barr

No. of Copies rec'd 0+4
List ABCDE

DOCKET FILE COPY ORIGINAL

RECEIVED

MAY 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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

COMMENTS OF ETERNAL WORD TELEVISION NETWORK

ETERNAL WORD TELEVISION NETWORK

Howard J. Barr
Its Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
202/296-0600

May 15, 1996

TABLE OF CONTENTS

SUMMARY . . . . . - i -

I. THE LEASED ACCESS REQUIREMENT IS OUTDATED AND SERVES NO PUBLIC INTEREST PURPOSE . . - 2 -

II. LEASED ACCESS RESULTS IN THE UNLAWFUL REGULATION OF CABLE SYSTEMS AS COMMON CARRIERS . . . . . - 4 -

III. THE COMMISSION'S PROPOSED FORMULA IS FATALLY FLAWED . . . . . - 6 -

IV. NO PREFERENTIAL TREATMENT SHOULD BE AFFORDED TO ANY CLASS OF LEASED ACCESS PROGRAMMER . . . . . - 11 -

V. A LEASED ACCESS CHANNEL SHOULD BE FULLY LEASED BEFORE A CABLE OPERATOR SHOULD BE REQUIRED TO OPEN ANOTHER SUCH CHANNEL . . . . . - 12 -

CONCLUSION . . . . . - 13 -

SUMMARY

Eternal Word Television Network respectfully submits its Comments on various of the Commission's proposed new rules governing leased access.

EWTN submits that commercial leased access serves no public interest purpose. Competition and diversity is thriving. Government intervention is not necessary to such competition and diversity and in fact is deleterious to future growth.

EWTN also submits that commercial leased access requirements are unlawful to the extent such requirements result in regulating cable operators as common carriers. The Cable Act expressly prohibits regulating cable operators as common carriers.

EWTN further submits that the proposed maximum rate formula is inherently flawed. The proposal will result in the prolonged subsidization of an industry that serves no public interest purpose. The Commission has failed to consider the economics of leased access from either a programmer or cable operator perspective. Such an examination is essential to the establishment of a non-discriminatory regulatory regime.

Finally, EWTN submits that no public interest justification exists to preferentially treat non-profit leased access programmers. Such treatment to this class of programmers constitutes further subsidization of underfunded programmers to the detriment of existing and proposed cable networks.

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

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

COMMENTS OF ETERNAL WORD TELEVISION NETWORK

Eternal Word Television Network ("EWTN"), by counsel, hereby submits its Comments on the Commission's Further Notice of Proposed Rulemaking, FCC 96-122, released March 29, 1996, in the above-captioned docket. The following is shown in support thereof:

EWTN is the nation's largest religious cable network, providing programming from a Catholic perspective to over 1400 cable systems and reaching over 40 million homes nationwide. EWTN's twenty four (24) hour programming includes telecasts of religious services, informative talk shows on moral and social issues, thought provoking documentaries, children's programming as well as other programs and specials of interest to those concerned with America's spiritual life of Americans. EWTN is the only religious cable network to offer spanish language programming via SAP.

Public opinion surveys show that a large portion of the populace is concerned with the issues addressed by EWTN. Fully nine (9) out of ten (10) Americans say their

religious faith is an important part of their lives and identify themselves as Christians. Of those, 26% are Catholic, the largest single faith group in the country. EWTN's tremendous popularity among cable viewers is easy to understand given the import the American public places on the subject matter of EWTN's programming.

The American, however, public stands to lose this outlet if the Commission adopts its proposed maximum rate formula for leased access. No public interest benefit is gained by such a loss.

I. THE LEASED ACCESS REQUIREMENT IS OUTDATED AND SERVES NO PUBLIC INTEREST PURPOSE

The cable industry as a whole has literally exploded since passage of the Cable Communications and Policy Act of 1984, which codified the leased access requirement. For example, the number of cable systems, cable employment and subscribership has almost doubled; cable viewing shares have increased more than two fold; and programming expenditures have almost tripled. See Cable Television Developments, Spring 1996, National Cable Television Association pp.2, 4-7.

The number of national video networks has tripled since 1984 with more in the offing each day. Id at p.6. The diversity of these networks and their program offerings is astounding, including, but not limited to, networks and programs devoted to arts, entertainment, religion, children, parenting, movies of all genre, news and information, sports of all genre, health, home, ethnic and foreign language, urban contemporary, music of all varieties, business affairs, public affairs, political affairs, cartoons, comedy, education and instruction, legal proceedings, family, fitness, alternative lifestyles, history, home shopping,

the outdoors, women, science fiction, adults, food, travel, nature, ecology ... Id at pp.29-84.[1]

The list goes on and on. Many of these channels and programs genuinely capture the hearts and minds of Americans. In short, diversity is here and now, it is market driven and it is brought to America's homes by cable operators that carry a broad mix of affiliated and unaffiliated programming.[2]

Distribution of the national cable networks described above is and always has been market driven. Programmers thrive in the marketplace on their product, the efficiency of their business organizations and their ability to attract debt and equity financing. None relies on a federal subsidy. The market for their programs and services, however, is and will be adversely affected by the subsidy the Commission has here proposed. Infra.

Competition between programmers, existing and new alike, for the limited number of available channels is immense. Leased access unnecessarily increases that competition

---

[1] Though EWTN does not approve of or condone certain of the networks and programs carried by cable systems, it nevertheless coexists with such networks and programs.

[2] Most cable operators do not hold significant ownership interests in most programming services they carry. Furthermore possession of an ownership interest is not a prerequisite for carriage. Cable operators with program investments carry numerous services in which they hold no interest and traditionally have not used their cable systems to prop up unpopular services. Indeed, virtually every cable operator carries unaffiliated programming equal to the leased access set aside requirement and arguably could be said to satisfy that requirement but for the fact that such programming was selected based upon its content and, by and large, subscriber wishes.

by reducing the number of available channels. The Commission should not unnecessarily act to increase those competitive pressures by subsidizing underfunded programmers.

Section 612(a)'s purposes have been realized: "competition in the delivery of diverse sources of video programming [exists and diverse sources of video programming] are made available to the public from cable systems in a manner consistent with the growth and development of cable systems." Section 612(a),(b), 47 U.S.C. § 532 (a),(b). Leased access had nothing to do with the realization of that goal. Obtaining channel space or launching a new network is difficult enough. This belated effort to revive the dying (or is it already dead) patient will only result in fewer channels being available on cable systems, making carriage obtainment and the start-up of new networks that much more difficult.

II. LEASED ACCESS RESULTS IN THE UNLAWFUL REGULATION OF CABLE SYSTEMS AS COMMON CARRIERS

Unlike operators in the wireless cable and direct broadcast satellite industries, cable operators are heavily burdened with mandatory carriage or set aside requirements that obligate them to set aside a significant number of channels for virtually all comers. Under Section 612(b)(1), 47 U.S.C. § 532(b)(1), cable operators are required to designate between 10% and 15% of their activated channels, depending upon the number thereof, for commercial leased access. Furthermore, most cable operators are required to set aside up to one third of the aggregate number of usable activated channels for the carriage of local commercial television stations. Section 614 of the Cable Act, 47 U.S.C. § 534. In addition to that, the majority of cable operators are required to carry up to

three (and possibly more) qualified non-commercial television stations. Section 615 of the Cable Act, 47 U.S.C.§ 535.

By way of example, a not atypical cable system with fifty two (52) channels[3] is required under federal law to set aside up to 25 channels, almost half of the system's channel capacity, for use by other, as follows: up to 17 channels for local commercial must carry stations, three or more channels for qualified non-commercial educational stations and 4 channels for leased access.[4] This set aside requirement does not even factor in a likely public, educational and governmental access channel set aside requirement imposed by the system's local franchise authority.

These mandatory requirements, and particularly the leased access requirements, smack against the express prohibition against subjecting cable operators to regulation as common carriers. Section 621(c) of the Cable Act, 47 U.S.C. § 541(c). See also National Cable Television Association v. FCC, 33 F.3d 69 (D.C. Cir. 1994). Leased access requires cable operators to set aside channel capacity for unaffiliated entities and prohibits the "exercise [of] any editorial control over any programming provided pursuant to [§ 621] ..." Section 621(c)(2), 47 U.S.C. §532(c)(2). In short, the leased access

---

[3] The vast majority of cable systems have a channel capacity of between 30 and 53 channels. See Cable Television Developments, Spring 1996, National Cable Television Association at 11.

[4] This calculation is based upon the Commission's clarification that must carry channels are excluded from determining the leased access set aside requirement. Thus, a fifty two (52) channel system with a seventeen (17) channel must carry set aside requirement would have thirty five (35) channels to which the ten (10) percent leased access set aside would be pertinent. The Commission should further clarify that the entire universe of must carry channels should be excluded and not simply the number of local commercial television stations the operator is carrying in satisfaction of its must carry obligation.

provisions require cable operators to hold themselves out indifferently to serve potential users who determine the character of the communications carried over the system, in satisfaction of the two part common carrier test. See National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641-42 (D.C. Cir. 1976) ("NARUC I"), cert. denied, 425 U.S. 992 (1976) and National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir.) ("NARUC II").

That cable operators have control over a portion of their systems makes no difference, since entities may be common carriers for some activities but private carriers for others. See Southwestern Bell Telephone Company v. FCC, 28 F.3d 165 (1994) (although carrier was a common carrier for most services, dark fiber service offered only on individual basis was a private offering). Moreover, the Commission's leased access regulations require cable operators to maintain a schedule of leased access rates and provide the schedule upon request, coming suspiciously close to the common carrier tariffing requirement. Leased access results in common carrier regulation of cable systems and should be deemed unlawful.

III. THE COMMISSION'S PROPOSED FORMULA IS FATALLY FLAWED

Though claiming that its proposed rule does not amount to a subsidization of leased access programmers, the Commission's own formula admits otherwise. Indeed, the Commission's repeated recitation that its proposed formula is not a subsidy, causes one to wonder if the Commission is simply trying to convince itself. A "subsidy" is defined as "a grant of money by government in aid of the promoters of any enterprise, work or improvement in which the government desires to participate, or which is consid-

ered a proper subject for government aid, because such purpose is likely to be of benefit to the public." Blacks Law Dictionary 1280 (5th ed. 1979). Congress has determined (wrongly) that leased access will provide a public benefit. The FCC's proposal, in effect, will put money in the pockets of leased access programmers in aid thereof. Unquestionably the formula establishes a de facto subsidy. The fatal flaw here, of course, is that no public benefit will be achieved as the goal Congress sought to promote through leased access has already been achieved. Supra.

Market rates are concededly above the rates to be established by the Commission's proposed formula. See NPRM at ¶ 71. While the government is not granting money per se to leased access programmers, by prohibiting market based leased access rates unless and until the cable operator meets and continues to meet its set aside requirement, the government is placing money in the pockets of leased access programmers just the same, creating the functional equivalent of a grant.

Pursuant to a government mandate then, a cable operator's leased access rates will be below market until it reaches and maintains full leased access penetration. The Commission's proposal does nothing less than protect leased access programmers from the forces of the market place, to the detriment of traditional programmers who have and must continue to operate in that market. If it walks like a subsidy and quacks like a subsidy, chances are it is a subsidy.

The Commission's proposal fails to consider leased access' long history. That history supports the conclusion that full penetration will never be reached because the

market simply does not exist. Even the United States Senate acknowledges that "the cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use." NPRM at ¶ 26 (citation omitted). The result; the government's de facto subsidy will continue ad infinitum to the detriment of cable operators and programmers alike. The Commission should rethink its attempt to create a market where palpably none exists.

Furthermore, the Commission fails to adequately explain its tentative conclusion that the maximum rate should depend on whether a cable operator is leasing its full set aside requirement. The question is not whether maximum leased access rates may permissibly be negotiated when the operator has fulfilled its set aside requirement, but why is it not appropriate in the first place. The Commission cannot answer that question because it has no answer.

Its conclusion that a cost/market rate formula "is an economically sound mechanism for determining the appropriate level of leased access demand" only begs the question. NPRM at ¶63.[5] At best, the Commission will determine whether and to what extent demand exists for a subsidized product.

Moreover, the Commission's opportunity cost proposal unreasonably discriminates against programmers such as EWTN. The Commission's first two opportunity cost categories, lost advertising revenues and lost commissions, are demonstrative. Under the Commission's proposal, such channels present high opportunities to cable operators,

---

[5] The Commission has apparently determined that demand is incapable of being determined presently, most likely because demand is minimal to non-existent.

while the opportunities presented by channels such as EWTN, which offer no sales commissions or advertising revenues, are correspondingly low. The simple fact is that cable operators are more likely than not to drop a channel for which the lost opportunities are minimal and less likely to replace a channel from which it obtains advertising revenues or sales commissions, i.e., those for which the lost opportunities are high.

A primary goal in business is to maximize profit while minimizing loss and lost opportunities. While the Commission's formula strives to minimize lost opportunities, cable operators can obtain a greater degree of certainty that such losses will be minimized by dropping those channels for which the opportunities (in terms of advertising or sales commissions) are minimal. Channels, such as EWTN, from which cable operators receive no advertising revenue or sales commissions will be the first to go. Thus, EWTN and programmers like it, even more so than others, clearly stand to be harmed by the Commission's proposed rule.

Perhaps even more problematic is that while the FCC's plan compensates the cable operator for the channel the government has taken, no such compensation is provided to the programmer for the loss of its property interest in the taken channel. This amounts to nothing less than a taking of property without just compensation in violation of the Fifth Amendment's Takings Clause. See Nixon v. U.S., 978 F.2d 1269, 1275 (D.C.Cir. 1992). Whether a purported public interest is being served by the taking is immaterial; property may not be taken without just compensation. Nixon, 978 F.2d at 1275 ("Indeed, it is fundamental that the Constitution requires compensation even where

the conversion of private property for public use is based on a weighty public interest"), citing, U.S. v. Gettysburg E.R. Co., 160 U.S. 668, 16 S.Ct. 427 (1896).

EWTN and programmers like it, which contract with cable operators for carriage, indisputably hold compensable property interests. De Rodulfa v. U.S., 461 F.2d 1240, 1258 n.102 (D.C. Cir. 1972)("contracts are property and create vested rights"). Those rights are taken by the government when the programmer is displaced by a leased access provider; a per se taking. See De Rodulfa v. U.S., 461 F.2d 1240, 1258, n. 102 (D.C.Cir. 1972) ("contracts are property and create vested rights"). Nixon, 975 F.2d at 1284 ("Where the government authorizes a physical occupation of property, or actually takes title, the Takings Clause requires compensation"), citing, Yee v. Escondido, ___ U.S. ___, 112 S.Ct. 1522, 1526 (1992); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435, 102 S.Ct. 3164, 3176 (1982), National Wildlife Federation v. Interstate Commerce Commission, 850 F.2d 694, 706 (D.C.Cir. 1988). This rule applies regardless of the nature of the property. Nixon, 975 F.2d at 1284-85. Displaced programmers must be compensated or the taking is unlawful.

While flaws may exist in the current leased access formula, the Commission should rethink its decision to throw the baby out with the bathwater. Before attempting to establish a new maximum rate formula, "[t]he FCC should examine any existing lease arrangements as indicators of the cost of carriage. The FCC also should consider other evidence of this cost and the cost of billing and collection." Senate Report No. 92, 102d Congress, 1st Sess. at p.79. The NPRM fails to indicate that the Commission performed

any such investigation in support of its proposal. The Commission's proposal is fatally flawed in light of the absence of such a study.

IV. NO PREFERENTIAL TREATMENT SHOULD BE AFFORDED TO ANY CLASS OF LEASED ACCESS PROGRAMMER

Regardless of what formula the Commission adopts for the establishment of leased access rates, no preferential treatment should be afforded to not for profit leased access programmers. Traditional cable programming networks, for profit and not for profit alike, live and die in the marketplace. Non-profit leased access programmers should be held to the same standard.

EWTN, for example, a non-profit traditional cable network, is not affiliated with any cable operator and is neither advertiser supported nor does it require a per subscriber charge from cable operators. Nevertheless, and without any preferential treatment (other than its tax exempt status, a quality it no doubt shares with erstwhile non-profit leased access programmers), EWTN has grown to become the largest religious cable network. EWTN thrives on the quality of its product.

The Commission is already proposing to subsidize leased access programmers. Supra. Preferential treatment to a class of such programmers would only result in a further subsidization of underfunded programmers, to the detriment of networks such as EWTN.

The Commission correctly concluded that access for such entities is provided for under § 611 of the Cable Act, 47 U.S.C. § 531. Any complaints as to the dearth of such channels should be directed at local franchising authorities which possess, and have

possessed since 1984, the discretion to establish requirements in franchises with respect to PEG channels.

As discussed above, current programming services already provide a wealth of diversity. Leased access as a genre significantly negatively affects that diversity by limiting even further the number of already scarce channels. The establishment of a subset of leased access programmers entitled to even greater preferential treatment will only serve to exacerbate the problem.

V. A LEASED ACCESS CHANNEL SHOULD BE FULLY LEASED BEFORE A CABLE OPERATOR SHOULD BE REQUIRED TO OPEN ANOTHER SUCH CHANNEL

No compelling reason exists for departure from the Commission's TV-24 Sarasota v. Comcast, 10 FCC Rcd 3512 (CSB 1994) precedent, except to the extent that the Commission did not go far enough. The Commission should adopt a rule providing that cable operators are not required to open a new leased access channel unless and until an unfilled channel is fully leased.

Anything less invites gaming of the process, drawn out disputes over whether the leased access programmer is being reasonably accommodated, displacement of more non-leased access programmers than necessary, and subscriber confusion. The Commission can avoid these negatives by adopting a bright line test: Where time is available on an existing channel sufficient to satisfy a leased access programmer's requirements, cable operators should not be required to open an additional channel to accommodate the programmer.

Where the leased access programmer's requirements exceed such available channel space, the cable operator should be permitted to fill the available channel and then to place the remainder on a second channel. This will result in the most efficient use of scarce channel space, the least amount of disruption to existing non-leased access programmers and minimize the potential for subscriber confusion.

CONCLUSION

Wherefore, the premises considered, Eternal Word Television Network respectfully requests that the Commission consider its Comments in this proceeding.

Respectfully submitted,

ETERNAL WORD TELEVISION NETWORK

Howard J. Barr
Its Attorney

PEPPER & CORAZZINI, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006
202/296-0600

May 15, 1996

HJB/de
c:\wp\1289\Comments.HJB