

the cost factors involved. Moreover, existing programming contracts were entered into by cable operators and programmers in good faith in reliance upon existing conditions and demand for leased access under the statutory requirements and the Commission's current rules. Adoption of the 4-year transition period proposed in these comments will alleviate this problem to some degree, but it will not resolve the problems with customers and franchising authorities that will result when an inferior product is substituted for one that consumers have come to recognize and enjoy.

The Joint Commenters also disagree with the Commission's tentative conclusion that a minimum time increment of 8 hours within a 24-hour period is a reasonable pre-condition for requiring the cable operator to open up an additional channel for leased access. As the Commission notes in its NPRM at paragraph 124: "There may be circumstances in which substantially greater harm to the subscribers, the operator and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated." A 12-hour minimum time commitment, between the hours of 11a.m. and 11p.m., should be required before another cable channel must be opened to leased access.

In addition, before displacing an existing program service, a commercial leased access programmer, whether full-time or part-time, must be willing to commit for a minimum of one year. Such a requirement is necessary to avoid subscriber disruption from unnecessary programming changes and to permit the cable operator to provide some stability in its programming schedule.

E. Selection Of Programmer

The cable operator must have flexibility to select programmers, rather than requiring service strictly on a first-come, first-served basis as the Commission has tentatively concluded. Any other approach would "adversely affect the operation, financial condition or market development of the cable system,"³¹ contrary to specific statutory restriction. Giving the cable operator a reasonable role in the selection process will not unduly involve the cable operator in editorial content of particular channels.

A first-come, first-served requirement will compel programmers to request access before they are ready to program the channel for fear that someone else will reserve the time. Thus, the cable operator should be permitted to require that any leased access programmer be prepared to actually utilize the channel within 30 days of making a request. Otherwise, there will be abuses involving warehousing of leased access capacity by access users, and racing to establish a first-in-line position merely for the purpose of selling that right at a profit to some later party.

Particularly if the leased access channel must be provided on basic or the CPS tier, the cable operator must have some right to exclude commercially undesirable programming, such as infomercials, 900 number services and indecent programming, to reduce serious damage to subscriber acceptance of basic or the CPS tier. The cable operator should also have flexibility to evaluate a programmer's financial capability to perform its contractual obligations. Cable operators should be permitted to require deposits, performance bonds or other guarantees of performance where necessary. In numerous other areas the

³¹ *Supra* at n.8.

Commission has recognized that financial qualifications are relevant and can affect the terms and conditions under which services are offered.³²

F. Resale Of Leased Access Time

The Commission should not permit leased access time to be resold by the lessee without the consent of the cable operator. The statute provides that cable operators must be allowed to consider the content of leased access programming in establishing rates. If resale is permitted, the cable operator will have no ability to consider content in establishing rates. Resale will only invite profiteering by unnecessary middle men which will certainly increase leased access rates. Moreover, the resale of time would inject into the process one more completely unregulated entity that would be operating outside the jurisdiction of the Commission's rules with the potential for serious abuse.

VII. Request For Reconsideration

A. Security Deposits

The potential impact that commercial leased access requests have on operators and their subscribers is so great that it is critical that reasonable security deposits be permitted to ensure that the access user is serious and intends to perform under the contract. In its *Order*, the Commission has recognized both the appropriateness and the necessity for security deposits. The Commission was also correct in concluding that determinations as to the

³² See e.g., Program Access Rules which permit "imposition of reasonable requirements for creditworthiness, . . . financial stability and standards regarding character and technical quality." Rule 76.100(2)(b).

reasonableness of the security deposit should be made on a case-by-case basis if and when problems arise.

B. Written Requests and Response Time

In order to avoid complete chaos and unnecessary conflicts, the Commission should require that all requests for commercial leased access be in writing. Any other approach will lead to constant disagreements over what was requested and when the request was made. There is simply no reason not to require written requests for access.

The Commission should change the time period for response from the cable operator from 7 to 15 business days. The 7-business day period established in the *Order* is unnecessarily short and burdensome for the cable operator. No one will be prejudiced by providing for a 15-business day response.

C. Lease Time Increments

Commercial programmers should be required to lease a minimum amount of access time of not less than two hours. Setting one-half hour, or even one hour, as a minimum directly competes with market rates already in place for half-hour and one-hour infomercials and similar services. Setting artificially low rates and allowing commercial leased access programmers to request only one-half hour or one hour of time will seriously impact cable operators' current and future revenues from this growing market. Such an approach is unnecessary and, in addition, would result in taking the cable operator's property without just compensation in violation of the Fifth Amendment (see Section IV, *supra*). The

Commission must recognize that the need for short commercial length television programming is currently being filled by cable operators and broadcast stations at marketplace rates charged for advertising and infomercial services. Moreover, most cable systems have PEG channels which are available, generally without charge, for educational services and the expression of diverse viewpoints.

D. Retransmission Consent Stations

Contrary to the conclusion in its *Order*, the Commission should permit exclusion of local retransmission consent stations in calculating leased access requirements. The Commission does provide for exclusion of "must carry" stations. Local retransmission consent stations which are actually carried on the cable system are nothing more than must carry stations for which money is being paid by the cable operator. The Commission's legal justification, expressly required by federal law,³³ for treating local retransmission consent stations any different from local must carry stations has no practical relevance in the real world.

Conclusion

In view of the foregoing, the Commission should maintain the "highest implicit fee" formula with no tier or channel placement requirements. It is premature to arrive at any conclusions as to the success or failure of the current rules, particularly since the most recent rule changes to encourage access users were adopted less than two months ago. Finally, if

³³ *NPRM* at ¶ 55.

any new rates or channel placement requirements are instituted, the Commission must establish a reasonable transition period of at least 4 years to facilitate their introduction.

Respectfully submitted,

JOINT COMMENTERS

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