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

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

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To: The Commission

MAY 31 1996

JOINT REPLY COMMENTS OF INTERMEDIA PARTNERS

AND ARMSTRONG UTILITIES, INC.

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JOINT REPLY COMMENTS OF INTERMEDIA PARTNERS AND ARMSTRONG UTILITIES, INC.

I. INTRODUCTION

InterMedia Partners ("InterMedia") and Armstrong Utilities, Inc., dba Armstrong Cable Services ("Armstrong"), hereby submit reply comments in the above-captioned proceeding.[1]

II. SUMMARY OF DISCUSSION

In comments submitted earlier in this proceeding, InterMedia and Armstrong highlighted a number of marketplace and regulatory changes which have occurred since 1984 that have altered the competitive landscape in which both cable operators and programmers operate. See InterMedia and Armstrong Comments at 6-8. Many other commenters also provided evidence of such changes. See e.g., National Cable Television Association ("NCTA") Comments at 3-5; Tele-Communications, Inc. ("TCI") Comments, Attachment D.

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[1] See Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking ("Reconsideration Order" or "FNPRM"), MM Docket No. 92-266 and MM Docket No. CS 96-60, FCC 96-122, released March 29, 1996.

The common conclusion reached by these commenters is that such changes have achieved the original goal of program diversity set forth in Section 612 of the Communications Act of 1934, as amended ("Communications Act"). See 47 U.S.C. § 532. This has been achieved largely through market forces that have facilitated the growth and development of many new and unaffiliated cable programming networks.

The proliferation of these unaffiliated networks and the programming they provide have developed outside of the control of cable operators. This is precisely what Congress sought to achieve in 1984 through leased access. However, in the leased access FNPRM, the Commission has focused so narrowly on its perceived failure to stimulate "leasehold" arrangements for the carriage of unaffiliated programming that it has failed to take into account these changes. The Commission's only proposed remedy to this perceived failure is to suggest a leased access rate scheme that will increase the number of home shopping and infomercial networks at the expense of maintaining and promoting program diversity. Such a course of action violates the mandates of Section 612 of the Communications Act to promote diversity of programming sources while ensuring the economic viability and development of cable systems. See 47 U.S.C. § 532. The Commission's proposals also fail to fulfill its responsibility under Geller v. Federal Communications Commission ("Geller") to take into account changes when they occur and revise policies and regulations in light of such changes. See Geller, 707 F.2d 1413, 1425 (1983). Ultimately, the Commission's course of action, which furthers no compelling or important government interest, violates InterMedia's and Armstrong's First Amendment rights.

III. DISCUSSION

A. Commenters Have Provided The Commission With Evidence Demonstrating Tremendous Change In The Competitive Environment In Which Cable Operators And Programming Networks Operate.

Since 1984, the number of cable programming networks has grown tremendously, and the number of independent cable networks has kept pace with the number of networks affiliated with cable operators. During this same time period, cable operators also have witnessed a dramatic increase in competition from other multichannel video programming distributors, as well as in the number and scope of regulations affecting the relationships between cable operators and programmers.

According to comments submitted by NCTA, there currently exist 137 national cable networks, compared with only 48 in existence in 1984. See NCTA Comments at 4. Moreover, more than 43% of those 137 national networks are unaffiliated with cable operators. Id. In addition, nearly 33% of the top 25 cable networks are unaffiliated with any cable system operators. See NCTA Comments at 5.

These encouraging numbers do not take into account other cable networks, some of which are local and regional, that are poised to launch in the near future. TCI estimates that there are as many as 89 new unaffiliated services on the horizon, geared toward such diverse topics as career and educational opportunities, politics, children's programming, science, and even news of particular interest to residents of Sarasota, Florida. See TCI Comments, Attachment D.

At about the same time that the marketplace was facilitating the growth of new cable networks, Congress also enacted a number of provisions designed, in their view, to prevent cable operators from discriminating against over-the-air television stations and new cable services with which they are unaffiliated. In this regard, broadcast television stations may obtain carriage of their over-the-air programming via must-carry or retransmission consent rules. A substantial number of unaffiliated cable programming networks have gained access to cable systems since 1992 through retransmission consent negotiations involving cable operators and commercial broadcast networks and/or their affiliate stations. In exchange for carriage of their broadcast signals, television networks and their affiliates have negotiated for the carriage of cable networks in which they have an interest. For example, FOX Network negotiated for carriage of their cable programming service FX. Many cable systems carrying NBC affiliates also carry that television network's cable programming service, America's Talking (which will become MSNBC on July 15, 1996). Likewise, cable systems carrying ABC television stations may carry either ESPN2 or the All News Channel, both of which are cable services that are affiliated with the television network. Cable operators have no control over the unaffiliated cable programming in question. In many instances, in order to continue carriage of network broadcast stations, cable operators are required to carry a second affiliated network channel.

In the area of cable-affiliated programming networks, NCTA noted that FCC regulations also include channel occupancy rules that limit the number of channels than can be occupied by affiliated cable programmers. Other rules ensure that operators cannot demand a financial interest in return for carriage or unfairly discriminate against unaffiliated programmers.[2/] See NCTA Comments at 5. These regulations, including retransmission consent, help to promote and maintain diversity by assisting unaffiliated programmers in gaining access to cable systems. At the same time, however, they place tremendous constraints on cable operators by limiting the number of channels over which operators may exercise editorial control.[3/] See InterMedia and Armstrong Comments at 6-7.

Working under these constraints becomes a greater challenge as more and more video competitors enter the marketplace. As

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2/ InterMedia and Armstrong remind the Commission that there are no other video service providers who are subject to the same panoply of regulations. Open video system providers will have some sort of must-carry and leased access obligations.

3/ Cable operators may be forced to pay a price for this lack of control during franchise renewal negotiations. Subscribers simply do not care about federal regulations that take editorial control away from cable operators. Ultimately, they hold cable operators responsible for the programming that is made available, and they make their opinions known during the franchise renewal process.

InterMedia, Armstrong, and numerous other commenters pointed out, the competitive environment facing cable operators has changed dramatically since 1984. With the elimination of the cable-telco cross-ownership rules and passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996), cable is now or soon will be subject to competition from local exchange carriers, DBS, open video systems, wireless cable providers, and utility companies. DBS now is available in every state but Hawaii. See Second Annual Report, CS Docket No. 95-61, FCC 95-491, 11 FCC Rcd 2060, 2080 (1995). Analysts predict that DBS will serve 3 million subscribers by the end of the year. See Second Annual Report, 11 FCC Rcd at 2081. These competitors, free from almost all of the channel access burdens placed on cable operators, have contributed to the growth of programming networks because they have tremendous amounts of alternative channel capacity available for use.

InterMedia and Armstrong believe that the evidence submitted by commenters during this proceeding provides the Commission with a record upon which to gauge whether the goals of leased access, first set forth in 1984, have been met. The evidence outlined above clearly demonstrates that program diversity has been achieved in the marketplace without resorting to artificial regulatory allocations and rate rules. In almost all cases, 10 to 15% of cable systems' channel capacity is already devoted to unaffiliated programming added since 1984. The Commission must now take the appropriate steps necessary to ensure that program diversity continues to thrive at the same time that the cable television industry's dynamic growth and contribution to diversity is not stifled.

B. The Commission Must Acknowledge The Totality Of Changes That Have Occurred Since 1984 And Respond Appropriately By Revising Leased Access Policies and Rules To Account For Diversity In Programming.

As noted above, many commenters have demonstrated conclusively that diversity in programming has been achieved by market forces which have facilitated the creation of numerous unaffiliated cable programmers, by regulations that prevent discrimination in the selection of programming, and by the growth of competitive video service providers who act as alternative outlets for programming. The appropriate response to this evidence calls for the Commission to look beyond the rate issues that it has so narrowly focused on in the FNPRM, acknowledge that diversity goals have been achieved, and revise its leased access regulations to relieve cable operators of the burden of adhering to rigid channel allocation requirements, confiscatory rate formulas, and strict contractual leasehold relationships. Such a response has been contemplated by Congress and is the solution mandated by Geller.

At issue in Geller was the Commission's decision to deregulate the commercial radio industry. The Court reviewed Commission policy and affirmed the Commission's decision, but it also emphasized the Commission's own responsibility to reevaluate its regulatory standards over time and revise them as changes warrant. See Geller, 707 F.2d at 1425. The Court went on to note the Supreme Court's approval of this important proposition:

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required or supposed to regulate the present and the future within the inflexible limits of yesterday. Id. (citations omitted.)

Pursuant to Geller, therefore, the Commission must respond to the overwhelming evidence in this proceeding which shows that programming diversity has been achieved through market forces. It need not and should not continue to promulgate rigid channel allocation requirements and unworkable leased access rate formulas simply because such regulations currently exist or are proposed. Nor should the Commission focus so narrowly on leasehold arrangements as the only means to promote program diversity through leased access.

It is consistent with Geller, the explicit goals of the 1984 Act, and legislative history for the Commission to permit cable operators to look to the totality of their programming to determine whether they have fulfilled their leased access obligations. InterMedia and Armstrong believe that unaffiliated cable networks added to a cable system after 1984 should count toward cable operators' leased access obligations regardless of the way in which the programmers gain access to the cable systems. Because such programming is unaffiliated with cable operators, it would continue to further the intent of Congress to increase diversity. See House Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. (1984) ("House Report") at 47.

The contractual means by which a programmer gains access to the system is irrelevant to the promotion of diversity. Congress explicitly stated that leasehold arrangements were not the only permissible contractual relationship that could exist between cable operators and programmers working to fulfill the mandates of Section 612 of the Communications Act. See House Report at 48.[4]

The congressional goal of increasing diversity in programming has been achieved by a remarkable number of changes to the competitive landscape in which the cable industry operates. In order to encourage the continued viability of programming diversity, the Commission must revise outdated policies and replace them with new ones that recognize changes since 1984. Such action is consistent with the congressional history discussed above and would fulfill the Commission's responsibility under Geller to take into account changes when

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[4] In 1984, Congress contemplated that other contractual arrangements between cable operators and unaffiliated programmers could exist in harmony with the goals of leased access. See House Report at 55. Congress' only word of caution concerning such arrangements was to warn the Commission and the courts to guard against any abuses that might transpire. Id. The Commission can accomplish this function by monitoring the situation through its annual competition report and through the existing complaint process.

they occur and revise policies and regulations in light of such changes.

C. The Commission's Failure To Account For The Presence of Program Diversity Will Result in Leased Access Regulations That Violate Cable Operators' First Amendment Rights.

Many commenters in this proceeding reminded the Commission that cable operators are entitled to the protection of the speech and press provisions of the First Amendment. See TCI Comments at 40; USA Networks Comments at 8-9; A&E Television Networks Comments at 40-53. See also Turner Broadcasting Sys., Inc. v. FCC ("Turner"), 114 S.Ct. 2445, 2456 (1994). Leased access regulations, like must-carry obligations, regulate cable speech in two respects: 1) they decrease the number of channels over which cable operators may exercise editorial control; and 2) they make it more difficult for cable programmers to compete for carriage on the limited channels remaining. Id. Because leased access regulations, like must-carry rules, impose special obligations on cable operators and special burdens on cable programmers, heightened First Amendment scrutiny is required. See Turner, 114 S.Ct at 2458.

In 1984, Congress anticipated that leased access provisions should undergo the highest level of constitutional scrutiny, reserved for content-based regulations, when it stated that the goals of leased access served a "significant and compelling governmental interest." See House Report at 34. Thus, in order for leased access regulations to be consistent with the First

Amendment, it is necessary to show that the regulations advance a compelling governmental interest. See NAACP v. Button, 371 U.S. 415 438 (1963).

In the alternative, because leased access regulations impose special obligations on cable operators and special burdens on cable programmers, such regulations are at a minimum subject to an intermediate level of First Amendment scrutiny as set forth in United States v. O'Brien ("O'Brien"), 391 U.S. 367, 377 (1968). Under O'Brien, a regulation will be upheld only if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. Id.

Congress advanced a legitimate government interest - promoting diversity in programming - when it adopted leased access provisions in 1984. Nonetheless, the government must still demonstrate that the recited harms to be addressed, i.e., lack of programming diversity, are real and that the regulations will in fact achieve their stated goal. "When a government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985). The government must show "that the regulation will in fact alleviate these harms in a direct and material way." Id. (citations omitted.)

In the present proceeding, commenters have provided more than enough evidence to create a solid record upon which the Commission can reasonably conclude that the goal of leased access has been achieved. The evidence confronting the Commission, therefore, is that the disease has been cured - and programming diversity is a marketplace reality which no longer needs to be advanced by governmental intrusion into cable operators' freedom of speech. Therefore, to avoid violating cable operators' First Amendment rights, the Commission must cease further inquiry into rigid leased access channel allocation requirements and unworkable rate formulas that will do nothing to sustain and promote programming diversity, and it should forbear from enforcing current regulations that similarly impinge on cable operators' First Amendment rights.[5/]

D. The Commission Must Give Cable Operators More Flexibility In Determining Part-Time Leased Access Rates, Terms And Conditions.

Many commenters, including InterMedia and Armstrong, urged the Commission to permit cable operators to give priority to full-time leased access programmers over part-time programmers

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[5/] The Commission cannot ignore the economic harm that such regulations will inflict upon cable operators. InterMedia already has experienced direct economic harm in the form of lost subscribers as a result of complying the must-carry obligations. See InterMedia and Armstrong Comments at 7, n. 3. The same harm will result from compliance with leased access rules if popular programming must be dropped to accommodate leased access users.

and provided evidence of the way in which part-time programmers adversely affect subscribers and cable system operations. See InterMedia and Armstrong Comments at 14; TCI Comments at 33-34; Continental Cablevision, Inc. ("Continental") Comments at 27-29; U S West, Inc. ("U S West") Comments at 9-10. In addition, many commenters presented the Commission with specific proposals to amend the methods used to establish part-time rates, terms and conditions. InterMedia and Armstrong believe that many of these proposals should be incorporated into the Commission's leased access rate methodology if the Commission continues to apply some sort of leased access rate regulation.

As demonstrated by TCI, the current method of calculating part-time rates does not compensate cable operators for the costs incurred when other programming is displaced for part-time leased access use because the method does not account for the impact upon the value of the remaining channel time available to cable operators. See TCI Comments at 31. The value of the channel decreases when part-time leased access users gain access because: 1) a majority of other cable programmers seek only full-time carriage on cable systems and have no interest in sharing channel space; 2) preemption of current programming results in subscriber confusion; and 3) leased access programming that is incompatible with existing programming can result in the loss of subscribers. Id.

To remedy this problem, TCI suggests that for any leased access programming running less than 24-hours per day, cable operators be allowed a sliding percentage increase to whatever full-time rate formula is adopted by the Commission. See TCI Comments at 32. If the Commission were to adopt a 10% increase on the maximum charge, for example, then a leased access user programming only 12 hours a day would be subject to a 120% increase in the maximum leased access rate. Id. InterMedia and Armstrong believe that such a sliding scale could reasonably compensate operators for the loss in channel value caused by part-time leased access use.

Other commenters suggest alternative approaches that also allow cable operators to be reasonably compensated for the use of their channels by part-time leased access users. Continental, for example, suggests that the Commission deregulate part-time leased access rates charged to users whose programming consists of advertising. See Continental Comments at 27. InterMedia and Armstrong support Continental's suggestion based upon prior Commission decision and congressional approval of such action.

In the past, the Commission has recognized that cable operators have no undue power over advertising rates in markets where they face competition from local television broadcast stations and other video service providers. See Second Report and Order, MM Docket No. 92-264, FCC 93-456, 8565, 8573 (1993). In addition, both the Communications Act and legislative history explicitly authorize cable operators to develop different leased access rates for different types of programmers. See 47 U.S.C. § 532(c)(2); House Report at 51. This authorization, combined with the knowledge that cable operators are constrained by competition in setting advertising rates, allow the Commission to reasonably conclude that advertisers who seek part-time leased access will not face unreasonable rates. Consequently, such rates should be deregulated.

E. The Commission Should Reject Suggestions To Establish Fixed Leased Access Rates Applicable To All Cable Operators, Require Minimum Contractual Terms, And Adopt Additional Procedures That Will Burden Cable Operators and Programmers.

Some leased access programmers have suggested that all cable operators be limited to charging only nominal leased access rates ranging between $0.01 and $0.05 per subscriber per month. See United Broadcasting Corporation, dba Telemiami ("Telemiami") Comments at 19; Community Broadcasters Association ("CBA") Comments at 3. Others urge the Commission to involve itself in private negotiations and impose minimum leased access contractual terms, see CBA Comments at 9, or require cable operators to follow burdensome procedures, such as a lottery, to allocate available channel capacity. See Game Show Network, L.P. Comments at 26. The Commission should reject outright these suggestions as unsupported and unworkable, and because they violate explicit mandates of the Communications Act.

Commenters who suggest that the Commission establish fixed leased access rates do so without offering any economic support for the artificially low rates they arbitrarily suggest. See CBA Comments at 3; Telemiami Comments at 19. Rather, their only attempt at justification is to claim that administrative convenience would be served by having a single rate applicable to all operators. Telemiami takes this arbitrary approach one step further by arguing that cable operators should be required to file a petition with the Commission in order to charge rates higher than the fixed rate it proposes. See Telemiami Comments at 19-20.

These commenters, in addition to ignoring a basic responsibility to factually support the rates they propose, also ignore explicit congressional mandate which requires cable operators to be compensated for leased access channels in a manner that does not adversely affect their operation, market condition, or market development. See 47 U.S.C. § 532(c)(1). Fixed rates applicable to cable operators nationwide cannot possibly take into account the difference in costs attributable to different market conditions and geographic locations in which cable operators do business. Therefore, such rates would not compensate cable operators in the manner required by statute, and the Commission should reject such suggestions as well as the entire concept of applying a single leased access rate applicable to the entire cable industry.

Furthermore, Telemiami's suggestion to require cable operators to justify higher rates also must be rejected outright as incompatible with the law and Commission practice. Section 612(f) of the Communications Act provides that leased access rates established by cable operators are presumed reasonable, and the Commission already has assigned to programmers the burden of showing otherwise by clear and convincing evidence. See 47 U.S.C. § 532(f); Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5959 (1993).

Suggestions by other commenters to require minimum terms for leased access contracts or to require cable operators to conduct lotteries for leased access channels do nothing to advance the goal of diversity and ignore both business and practical reality. Fixed lease terms would lock both operators and leased access programmers into contracts that would not take into account changing market conditions, e.g., increases or decreases in the number of subscribers to the cable system. Such contracts also fail to promote diversity by necessarily precluding other programmers from gaining access to leased access channels. Finally, imposing such rigid requirements upon the parties would inevitably leave the Commission in the position of having to review such contracts if one or parties act inconsistently with their terms. For policy and practical reasons, the Commission should decline to involve itself so deeply in the business relationships that exist between cable operators and leased access programmers.

Likewise, the Commission should decline to create more burdensome procedures, like lotteries, in order to allocate leased access channel capacity. The Communications Act requires only that cable operators designate channel capacity for leased access use, and the Commission's regulations encourage private negotiations for the placement of leased access programming. _See_ 47 U.S.C. 532(b); 47 C.F.R. § 76.971(a). The Commission should continue to adhere to these principles and allow the parties to the leased access agreement to determine where programming will be placed.

IV. CONCLUSION

Commenters in this proceeding have provided more than enough evidence to demonstrate that the goal of programming diversity has been achieved. The Commission must broaden its focus beyond promulgating rigid rate and channel allocation regulations to acknowledge that, based upon the record now before it, such regulations are unnecessary to advance the goals of the Communications Act and infringe upon cable operators' constitutional right to free speech.

Respectfully Submitted,

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May 31, 1996

CERTIFICATE OF SERVICE

I, Gwen L. Webster, a legal secretary for the law firm of Ross & Hardies, hereby certify that a copy of the foregoing "Joint Reply Comments of InterMedia Partners and Armstrong Utilities, Inc." was served, via hand delivery, on this 31st day of May, 1996 to:

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