

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:)	
)	
Annual Assessment of the Status of)	MB Docket No. 15-158
Competition in the Market for the)	
Delivery of Video Programming)	

COMMENTS

These comments are submitted by Charles H. “Charlie” Stogner, in his role as President of the Leased Access Producers Association (“LAPA”) in the above referenced proceeding wherein the Commission seeks comment for the 17th Report as to the Status of Competition in the Market for the Delivery of Video Programming. Video programming is defined as: “Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and is exhibited for residential use

LAPA (“Leased Access Programmer Association”) serves as a national trade association to promote the interests of video producers using, or wanting to use, leased access cable TV for the distribution of their programming. Voting membership is open to all persons who use or want to use leased access and associate membership is available to equipment suppliers, attorneys, government officials, cable companies and other persons/entities who do business with or have an interest in leased access video production. Our goal is to promote the use of leased access cable TV, encourage and work with the FCC to develop specific rules and regulations concerning the obligations cable TV companies have in carrying out the mandate of Congress to provide a ‘genuine outlet’ for leased access programming to promote choice, diversity and competition which is beneficial to the public interest. LAPA also attempts to work with the cable companies to resolve problems that arise from programmers exercising the right to leased access as mandated by Congress.

LAPA is concerned about leased access not being seriously considered when determining the status of competition in cable markets.

It's astounding there's no mention of leased access in the Media Bureau announcement seeking comment on the Status of Competition in the Market for the Delivery of Video Programming for the 17th Report. But it should be not be surprising.

In the NOI (notice of inquiry) regarding the 16th report, released January, 2014, leased access is mentioned at paragraph 20 where it states. "*We also request data on the number of channels MVPDs dedicated to must-carry; public interest, including public, educational, and governmental ("PEG"); and leased access programming." On which tiers are these types of channels placed and is extra equipment required to view them?¹ Are there more or fewer PEG and leased access channels carried on cable systems at the end of 2013 than were carried at the end of 2012?*

But the actual report released April, 2015, has no mention of leased access. There is no indication that a single cable operator complied.

The NOI for the 15th report, released July, 2012, asked for the same data but in the actual report, again, there was no follow-up, and no indication a single cable operator complied. In paragraph 63 the NOI reads; "*Leased Access. Section 612 of the Act requires cable operators to designate a portion of their channel capacity for commercial use by unaffiliated parties. The requirement is intended to provide competition and diversity in the video programming marketplace.*" The actual report, released July, 2013, only mentions leased access in paragraph 16, as, "*Leased Access. Section 612 of the Act requires cable operators to designate a portion of their channel capacity for commercial use by unaffiliated parties. The requirement is intended to provide competition and diversity in the video programming marketplace. The Commission regulates the prices, terms, and conditions for access to these channels and reviews petitions for relief from aggrieved parties.*"

The NOI for the 14th report released Jan., 2009, at paragraph 14 reads, "*We also request information on the use of leased access channels and the types of programming distributed on them, and seek comment on whether these channels provide an opportunity for independent programmers to distribute their programming.*" And in Paragraph 39 it adds, "*We seek comment regarding leased access channels, including the number of channels currently being used by cable operators for these purposes and the types of programming offered on such channels. In*

addition, we seek information on the use of commercial leased access channels, either on a part-time or full-time basis. Are these channels accomplishing their intended purpose of providing competition to the programming channels under the control of the cable operator?" However in the actual report released, July, 2012, it only cites Section 612 of the Communications Act and has a footnote referring to the court's stay of new rules.

The NOI for the 13th report, released Oct., 2006, in paragraph 15, says: *"We also request information on the use of leased access channels and the types of programming distributed on them, and seek comment on whether these channels provide an opportunity for independent programmers to distribute their programming."*

The 13th Report released January, 2009, nearly a year after the cable industry persuaded a U.S. District court to 'stay' new rules adopted by the Commission in late 2007, paragraph 216, contains the following: *Charlie Stogner asserts that Congress' goal that leased access would be an outlet for local entities unaffiliated with the local cable operator has never materialized. He also states that the lack of strict Commission rules and guidelines for leased access has created obstacles for programmers trying to obtain leased access carriage.* Other than this quote, there is no mention of what, if anything, cable operators reported in response to the NOI. Even more surprising or astounding, no mention was made of the 'stayed' new rules or any planned action on the part of the Commission to readdress them.

NOTE: In the NOI for the 14th report where FCC questioned if the leased access channels are providing competition to channels controlled by the operator, and the fact there's no mention of this in the report itself makes it appropriate to point out today many, if not most, cable operators have their local ad insert sales operation manage leased access, the epitome of 'having the fox guard the henhouse'. Local cable ad insert and local origination bulk airtime sales are the most direct competition to leased access for local business advertising. Today cable operators realize a significant share of revenue from this source. Most cable sites now place leased access programming on digital tiers while having local origination channels on the basic tiers, the tier received by most subscribers.

It should be of interest to note in CFR Sec. [76.971](#) Commercial leased access terms and conditions. (a)(1) *Cable operators shall place leased access programmers that request access to*

a tier actually used by most subscribers on any tier that has a subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers.

The term 'most subscribers' is significant in that local cable ad insert sales reps can offer local businesses 'spots' in network programming on these basic tiers where they may reach up to 49 percent viewers than leased access on the stratospheric digital tier. Charter communications, presently trying to purchase Time Warner and Bright House, actually one cable site, blatantly wrote a local viewer asking the local leased access channel not be changed *saying, while Lake TV (the local leased access programmer) offers a quality advertising product, 'Charter Media (the advertising arm of Charter Cable, the local cable operator) also has a local sales office to help small businesses advertise specifically in the Lake area on major cable networks like ESPN, Fox Sports, TBS, TNT, USA and many, many more.*

In October 2008, after the local cable operator shifted the leased access programmer from the basic tier to an upper digital channel, one LAP'er ("leased access programmer") suffered a nearly fifty percent loss of ad revenue over the previous year.

Presently a LAP'er is being placed on a site's channel 1300, while the cable's own local origination is on channel 4 where they offer half hour airtime slots to local businesses in direct competition with the LAP'er.

It can be documented that following the court's 'stay' of new rules, cable operators have assumed expanded power to set terms and conditions for leased access although the very law itself prohibits such.

Where the FCC seems to hold the opinion leased access carriage is 'negotiated' between operators and users, the reality is those seeing to exercise the right to leased access are presented the equivalent of 'adhesion documents' prepared by the cable company pretty much on a 'take it or leave it' basis. LAP'ers are being forced to sign documents that have conditions beyond what the law and/or FCC rules permit but unless they do so, the LAP'er simply won't get airtime.

In 2009, representatives of the national Leased Access Programmers Association delivered copies of agreements of several cable operators in the hopes Media Bureau staff would review this and take steps. If these were reviewed no mention of such a discussion exists.

The 14th Report, released July 29, 2012 mentions leased access at paragraph 69 saying, *Leased Access. Section 612 of the Communications Act requires cable operators to designate a portion of their channel capacity for commercial use by unaffiliated parties.*² *The requirement is intended to provide competition and diversity in the delivery of video programming.* There is no indication the Commission received any of the requested data much less acted on it.

In a somewhat related matter, Commissioner Clyburn's statement in the report concerning Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, says she takes seriously this mandate and policies to promote “favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.” Leased access is a law that provides for just that yet after the court ‘stayed’ the new rules when OMB ruled they were inconsistent with the Paperwork Reduction Act, FCC, or perhaps the Media Bureau, seemed to ‘sweep leased access under the rug’.

The Leased Access Programmers Association has been unable to get any decent dialog with the Media Bureau ever since. In fact, email efforts to contact the present Bureau Chief are intercepted by Associate Chief Nancy Murphy.

The simple solution to easily seeing that leased access truly becomes that ‘genuine outlet’ that Congress so obviously intended could have long ago been resolved if only the FCC would have had representatives from both the cable industry associations and the leased access programmers representatives meet together with Media Bureau staff and openly, honestly, discuss how to implement the law in a manner suitable to both sides.

A major obstacle to leased access being the ‘genuine outlet’ intended by Congress is cable charging for receiving signals via the Internet. They charge LAP’ers for broadband service in the head-end while providing this same type signal reception to non-leased content providers. In fact, they provide free broadband for delivery of third party ad insert providers that are in direct competition with leased access for local advertising.

In 2009 FCC’s Media Bureau ruled Cable One could charge a LAP’er for broadband service in the head-end where the signal was delivered to the LAP’ers own equipment that provides ‘live TV’ as well as the capability of inserting content on programming being aired. Cable One contended the LAP’er was the only programmer using Internet deliver in spite of published

articles relating how Cable One used the Internet and a piece of equipment basically the same as the LAP'ers to remotely delivery programming to their own local origination channel -- the same type commercial content as produced by leased access programmers.

Today there's overwhelming evidence many cable sites use third party providers of commercial programming delivered by the Internet and do so at no charge to the provider. This in spite of the FCC having clarified that the leased access rates determined under Section 76.970 include the cost of technical support ordinarily provided to other programmers. *The Commission also made it clear that the maximum leased access rate determined under Section 76.970 includes the cost of technical equipment ordinarily provided in common to all programmers. "The Commission further explained ... it would require a cable operator to offer to leased access programmers "the same services as would be offered to comparable programming services that use the operator's non-leased access channel capacity."*

Not only are local ad inserts and commercial airtime slots non-leased, they are the most severe competition to leased access in a local market. Some cable operators permit LAP'ers to deliver programming over the Internet at no charge but require it days before airing. The same sites charge for the broadband modem in the head-end if the LAP'er uses their own equipment.

Live TV permits covering local events, sports, parades, telethons, meetings (government, business, etc.) and gives local communities something broadcast TV and/or cable does not.

Probably the most serious degree of Competition in the Market for Delivery of Video Programming is in the local cable markets where cable operators run roughshod over leased access despite a law and FCC rules written to prohibit this.

We find reference to the Commission's citing concern that a cable operator' market power may be used to the detriment of competing programmers. Today with FCC's apparent approval cable does just that, placing leased access on channels with little over 50 percent of the viewers the site's own ad and time sales offer advertisers. Info is from H.R. Rep. No 92, 102nd Cong., Sess. 23 (1991). Leased access was intended to "remedy market power in the cable industry."

It is clear the Media Bureau has consistently and repeatedly ignored the leased access programmers concerns for many years. The failure of the Media Bureau to even mention leased access in the announcement seeking comment on the Status of Competition in the Market for the Delivery of Video Programming for the 17th Report confirms this fact. No data from cable operators has ever been collected on the status of leased access. Now, no data is even being sought. If the Commission really wants to see competition for the delivery of video programming, it should stop holding in abeyance and resolve the “stayed rules case” and implement the important parts of MB Docket No. 07-42, so that the rules will have some “teeth” in them and allow leased access to become what Congress originally intended.

Respectfully Submitted,

Charles H. “Charlie” Stogner