

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
**Leased Commercial Access** ) **MB Docket No. 07-42**  
 )  
Development of Competition and Diversity in )  
Video Programming Distribution and Carriage )

To: The Commission

**COMMENTS OF THE COMMUNITY BROADCASTERS ASSOCIATION**

1. The Community Broadcasters Association (“CBA”) hereby submits these Comments in response to the Commission’s Notice of Proposed Rule Making (“NPRM”) in the above-captioned matter, FCC 07-18 (rel. June 15, 2007), 72 FR 39370 (July 18, 2007). CBA is the trade association of the nation’s Class A and Low Power Television (“LPTV”) stations and represents the interests of those stations before judicial, legislative, and regulatory authorities.

2. CBA urges the Commission to recognize that the leased access system as it now exists has never functioned at all beyond a *de minimis* extent, and has certainly not fulfilled the multiple goals of Congress when the system was created.<sup>1</sup> Therefore, a substantial overhaul is needed, with the objective of creating a viable and active market in leased access to cable television channels. The average implicit fee rate cap is big part of the problem, but the active efforts of cable operators to discourage leased access have also contributed to the failure of the system.

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<sup>1</sup> While Section 612(b) of the Communications Act, 47 CFR Sec. 532(b), requires most cable systems to make 10-15% of their channels not devoted to other statutorily mandated functions available for commercial leased access, the Commission has reported that the average number of channels devoted by cable systems to leased access is only **0.7**. That statistic establishes clearly that the leased access system is not working as Congress intended. *See Report on Cable Industry Prices*, 21 FCC Rcd 15087 at Attachment 9 (1996).

3. As discussed in the NPRM, leased access became regulated in the Cable Television Consumer Protection and Competition Act of 1992, when Congress declared its intention to promote "competition in the delivery of diverse sources of video programming" and required the Commission to adopt regulations to help achieve that goal.<sup>2</sup> While the statute also retained prior legislative language indicating that leased access should not adversely affect the operation, financial condition, or market development of cable systems,<sup>3</sup> the term "adversely affect" is not defined.

4. Class A and LPTV stations are largely locally owned and operated; and even though some are not locally owned, the industry is unlike full power television in that there are no dominant national group owners. Class A stations are also the only stations that are by law required to broadcast locally originated programming -- three hours a week.<sup>4</sup> However, Class A and LPTV stations do not have cable must-carry rights below the top 160 Metropolitan Statistical Areas, so only a small number of such stations, located in very small communities, enjoy mandatory cable carriage.<sup>5</sup> Class A and LPTV stations are thus primary candidates for leasing cable access channels, because they are local community voices and usually cannot get on cable any other way.<sup>6</sup>

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<sup>2</sup> NPRM at par. 4.

<sup>3</sup> *Id.*

<sup>4</sup> *See the Community Broadcasters Protection Act of 1999*, codified in Sec. 336(f)(2)(A)(II) of the Communications Act, 47 USC Sec. 336(f)(2)(A)(II).

<sup>5</sup> *See* Sec. 614(h)(2)(E) of the Communications Act, 47 USC Sec. 47.534(h)(2)(E). Class A and LPTV stations are treated the same for must-carry purposes.

<sup>6</sup> Cable television operators are profit maximizers, like any other business. They rarely agree to carry a Class A or LPTV station on a voluntary basis, unless the station is a national network affiliate, because cable operators see no benefit in helping to increase the audience of a locally based broadcaster that competes with the cable operator for local advertising sales.

5. CBA cannot speak definitively to the point of whether the leased access rules have “adversely affected” any cable systems, but it is certainly not aware of any such effect. It is very aware, however, that the goal of promoting competition in the delivery of video services has not been met. Thus the regulatory system is in dire need of overhaul, and the Commission must take a fresh look at what it will take to open up a competitive programming marketplace, notwithstanding the fact that the existing rules were upheld in *ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).<sup>7</sup>

6. Perhaps the best way to elaborate on the failure of the existing system is to cite the Comments of Reynolds Media, Inc. (“RMI”) in this proceeding on July 31, 2007. RMI’s comments explain that it provides a substantial amount of local programming and uses, or attempts to use, leased access to reach cable subscribers. It has faced a myriad of problems, including:

- a. Having to deal with a cable official far from the local community instead of at the local office.
- b. Long delays in receiving responses to inquiries.
- c. Insistence on prohibitively expensive delivery methods, including fiber optic technology that is very expensive (at least in rural areas) when over-the-air pickup, microwave, and coaxial cable were all possibilities.
- d. Insistence on payment for equipment that the leased access provider does not need.

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<sup>7</sup> *ValueVision* only recognized that the Commission could lawfully take into account the economic impact of leasing on cable operators and deferred to the Commission’s judgment in balancing statutory goals given the limited information available at the time. The Court did not say that the Commission’s rules were the only ones that would be upheld; nor did the Court know at the time how poorly the rules would in practice fulfill the important statutory goal of promoting competition and diversity in video programming.

e. Prohibitive technical fees, including \$51.49 to insert a tape in a player when the hourly rate for cable access was only \$12.00, and not permitting the access lessee to insert its own tapes the way it did under a prior owner of the cable system.

f. Insistence on a long-term lease, with the entire term started over again every time a modification of hours of leasing was requested.

7. RMI's story does not stand alone. CBA's counsel is aware of one station that paid an annual fee of almost a million and half dollars for full time leased access for many years and pays well over a half million dollars today, as well as another station operator who is on the verge of being driven out of business because of a major cable operator's flip-flopping policies on carriage of his highly locally oriented programming. Unfortunately, confidentiality clauses in contracts and fear of retaliation preclude providing details in these comments, which are a publicly available document.

8. In sum, to answer questions posed by the Commission in the NPRM, leased access is used much less than it could or should be; and the rates are too high for the market to function properly, because they are out of reach of most prime candidates for leasing. In addition, the amount of time and the cost of obtaining relief from the Commission make it impossible for many Class A and LPTV stations to fight for their leased access rights.<sup>8</sup>

9. CBA thus urges the Commission to re-examine the important Congressional goal of promoting competition and diversity in programming voices and to make a serious effort to

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<sup>8</sup> CBA also believes that the Commission should take a harder line than it has in past cases that have upheld cable operator requirements for channel lessees to obtain liability insurance. Such insurance is not always available and is usually very expensive. It is not clear to CBA that the potential liability of cable operators is as high as the insurance limits they demand, particularly when programming placed on leased channels does not have aggressive content.

achieve that goal. At a minimum, maximum rates should be more in tune with the marketplace,<sup>9</sup> cable operators should be stopped from discouraging leased access by imposing fees and conditions that are not necessary under the circumstances, and dispute resolution should be expedited.<sup>10</sup> There is no reason why avoiding an adverse effect on cable operators must be interpreted to mean making sure that a leased access channel is as or more profitable as other channels. Moreover, there is no evidence that leasing a few channels is threatening the overall business viability of any cable television system -- a test that CBA believes would be more appropriate in light of the multiplicity of Congressional goals that the Commission must strive to meet.<sup>11</sup>

10. CBA also suggests that the Commission encourage, if not require, cable operators to offer leased access on multiple channel tiers, because that practice would likely make a wider range of leased access opportunities available. However, some leased access capacity should

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<sup>9</sup> One non-broadcast buyer of leased access for infomercials has reported that prices as low as \$0.80 per subscriber per year are routinely offered by major cable operators for leasing prime analog channels below Channel 25, with rates as low as \$0.65 per subscriber for higher channels. These rates compare to \$2.40 recently quoted to an LPTV operator who offers significant local programming. This disparity indicates that the rate cap under the Commission's present rules is well above marketplace levels; and cable operators impose the highest legal rate if they do not want to distribute programming they think might compete with their own offerings, with the apparent objective of not making a deal rather than making one.

<sup>10</sup> The Commission has a very expedited system for at least informal dispute resolution for complaints by political candidates about equal time, access, and rate issues. Commission Staff members deal with such disputes by telephone and are often able to resolve disputes on an informal basis, making it unnecessary to invoke formal complaint procedures that remain available if needed. The same system would be very useful for leased access.

<sup>11</sup> CBA is aware of arguments made by cable operators that the ability of major broadcast networks to insist on carriage of multiple less popular programming services as a condition of granting retransmission consent for a highly popular service inhibits cable's ability to make channels available for other uses. The resolution of that problem is not directly relevant to leased access, because leased access channels are explicitly set aside by statute.

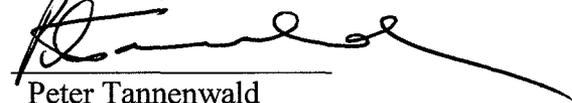
continue to be required on tiers available to more than 50% of a cable system's subscribers, as is the case today, so that leased access remains an avenue to reach a substantial audience.

11. In conclusion, the leased access system has never functioned effectively; and CBA welcomes the Commission's examination of ways to fix it. It does need fixing to fulfill Congressional objectives. CBA hopes that these Comments will help illuminate the problems and find ways to address them.

Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Ave., N.W., Suite 200  
Washington, DC 20036-3120  
Tel. 202-728-0400  
Fax 202-728-0354

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Respectfully submitted,



Peter Tannenwald  
Nathaniel J. Hardy

Counsel for the Community  
Broadcasters Association