Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF

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THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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October 12, 2007

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The National Cable & Telecommunications Association ("NCTA"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

INTRODUCTION

The landscape for cable carriage of unaffiliated programmers has changed dramatically since 1984 – and in the ten years since the FCC last reexamined commercial leased access. But not in the way that certain commenters in this proceeding attempt to portray. The rise of cable television has spawned the creation of a diversity of programming networks unimaginable when Congress first came up with the notion of leased access. Hundreds of new independent program networks have been launched.

Programming at the local level has also expanded, not only through local cable origination programming channels and local video-on-demand, but also through public, educational and governmental access channels. For those programmers interested in using leased access at the local level, administration of leased access has become more routine as operators have developed standard agreements, and as both operators and lessees have gained more experience.

This is not to say that lessees never encounter a delay or that operators are compensated fully for the time and effort that they must expend in leasing capacity to their systems – often in time periods as short as half-hour blocks. But there is no systemic problem that needs to be fixed. The FCC rules already address many of the issues raised by commenters by striking the appropriate balance between the rights of leased access users and cable operators.

With respect to program carriage, the *Notice* sought comment on certain procedural issues in an effort to expedite resolution of program carriage complaints. As documented in the comments, only two such complaints have ever been adjudicated by the Commission. Imposing additional processes – such as mandatory arbitration – will only further delay resolution of the handful of complaints that may arise. Moreover, changing not only the process but the substance of the program carriage rules, as some commenters suggest, would be unlawful. Section 616 does not strip operators of the legitimate, and Constitutionally-protected, ability to exercise discretion over which program services to provide their customers. The existing program carriage rules carefully balance between the ability to negotiate terms and conditions of carriage and unlawful discrimination against unaffiliated programmers. Those rules should be preserved.

DISCUSSION

I. THE GOALS OF LEASED ACCESS HAVE BEEN FULFILLED THROUGH TRADITIONAL CARRIAGE ARRANGEMENTS

NCTA showed in its initial comments that the goals of leased access have been largely achieved through marketplace developments.[1] While Congress in 1984 thought that leased access might be needed as a safety valve for unaffiliated programmers to reach cable audiences, in fact hundreds of unaffiliated programmers have been carried voluntarily by cable systems. And in 2007, unaffiliated programmers have multiple outlets *other* than cable operators through

1 NCTA Comments at 12-14.

which to reach an audience.[2] As Comcast explains, "By all indications, Congress's wishes for a fiercely competitive environment characterized by vast consumer choice of programming have been realized. Instead of needing to rely on agreements with government-dictated terms entered into pursuant to regulatory fiat, a competitive landscape emerged, as Congress intended, through the superior method of voluntary, market-driven deals."[3] Time Warner shows that "the current leased access and program carriage rules were adopted at a time when the competitive environment for video programming distribution was far different than it is today. Channel capacity, the number of service available, the level of vertical integration, and the cable industry's share of the multichannel video subscriber universe have all undergone a radical transformation in the years since Congress adopted and the Commission implemented the leased access and program carriage rules."[4] Independent programmers can and do reach viewers through a variety of means other than commercial leased access.

Even The America's Channel ("TAC") now admits that it is not at all interested in leased access.[5] TAC explains: "[l]eased access is not viewed by independent cable networks (whether national or regional), or the investors that fund them, as an effective means of growing a for-profit business. This is because the established model in the industry is that networks typically secure some form of license fee from cable operators, which fund the operations including the

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2 *See* Time Warner Cable Comments at 9-10 (documenting the rise in available options for video programmers); Comcast Comments at 8-10.

3 Comcast Comments at 11.

4 Time Warner Cable Comments at 7.

5 TAC first, however, sought leased access information from Comcast and Time Warner for each of their hundreds of cable systems. Comcast explains that TAC "requested rate information for a 24-hour, 7-day per week programming network for 'every available Comcast system in the U.S., in a tier actually used by most subscribers.' …Every Comcast system produced the information, which Comcast then organized and provided to TAC. Predictably, TAC never bought so must as a second of leased access time, opting instead to simply toss the binders full of collated information on a scale and attempt to impress the Commission with their weight." Comcast Comments at 15 n. 35.

costs of production."[6] This view is echoed by two other independent programmers filing in this proceeding. NFL Enterprises makes clear that "[i]ndependent national programmers such as NFL Enterprises cannot rely on leased access to support a vibrant programming service that does not independently generate revenue directly from consumers. Subscription fees are critical to the ongoing viability of independent programming services because advertising revenue alone is insufficient to support the costs of operating a program network and of developing innovative original programming that is attractive to consumers."[7] Black Television News Channel admits that "leased access does not support the development of independent national programming."[8]

Instead, commercial leased access is still mainly the province of non-traditional programmers that rely on support other than license fees – primarily, infomercial providers and home shopping services, like Shop NBC.[9] Comcast reports that approximately half of the leased access time on its systems is purchased to use for infomercials or home shopping.[10] About a third of the usage on Time Warner systems falls into this category.[11]

The Commission should resist the calls to rig commercial leased access to try to artificially induce additional use. Reducing the rate below the existing "average implicit fee" level will simply subsidize leasing, contrary to Congress's intent. Specifically, as described

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6 TAC Comments at 12.

7 NFL Enterprises LLC Comments at 7 n. 26.

8 Black Television News Channel Comments at 3.

9 Shop NBC Comments at 4-5. Shop NBC already is carried nationwide on numerous cable systems through a variety of arrangements. In addition to its commercial leased access usage, its 2006 Annual Report shows that it has "long term cable and satellite affiliation agreements." It also has carriage rights on cable systems – for free – in those markets where it pays to lease *broadcast* television time and where it operates a full power television station. Shop NBC, 2006 Annual Report.

10 Comcast Comments at 17.

11 Time Warner Cable Comments at 14.

below, the Commission must retain its existing fee formula in order to ensure that cable operators are able to recover the real costs of leasing.

II. THE COMMISSION SHOULD RETAIN ITS "AVERAGE IMPLICIT FEE" FORMULA

The *Notice* sought comment principally about procedural issues involving leased access. Nonetheless, some commenters seek to rehash their ten-year-old arguments about why the FCC should reduce the rates that they have to pay cable operators under commercial leasing arrangements. These pleas for additional subsidization by cable operators, cable programmers and, ultimately, cable customers contain no more support than when the FCC thoroughly considered and rejected them ten years ago. Nothing in the record suggests that the rates can be lowered without violating the Cable Act.

NCTA and others showed that the rates produced by the leased access formula are *already* highly discounted. Leased access users brag about the bargain rates produced by the FCC's formula.[12] Comcast demonstrates that leased access rates are significantly below the marketplace price. Thirty *minutes* of leased access time on a cable system cost a mere fraction of the cost of thirty *seconds* of advertising time on broadcast stations or in newspapers.[13]

Certain users, of course, would like the government to reduce the costs of commercial leasing even more. But lowering the maximum rate a cable operator can charge below the "average implicit fee" is not permissible. The statute forbids such discounting. The FCC must balance the interests of leased access users and cable operators, as Congress intended, and not adopt a rate or formula that subsidizes leased access users. As the D.C. Circuit found in upholding the existing formula, "the Act instructs the Commission to set rates sufficient to

[12] NCTA Comments at 10.

[13] Comcast Comments at 18-19.

"*assure* that [leased access] will *not adversely affect* the operation, financial condition, or market development of the cable system. The provision serves as more than a mere 'caveat' to the ultimate goals of promoting leased access. The rates, terms and conditions of leased access must be set within its limits."[14] As Comcast explains, "increasing further the subsidy that leased access users enjoy would directly conflict with Congress's express directives to the Commission."[15]

Certain commenters pick numbers out of a hat, without any justification or relationship to the statutory command.[16] For example, TAC, an admitted leased access *non-user*, proposes a rate formula that is based on minutes of local advertising availabilities.[17] However, such an approach grossly understates the appropriate compensation by ignoring a factor that the FCC considers integral to accurate rate calculation: the subscriber revenue that an operator receives because it carries a particular channel.[18]

Shop NBC also throws out a handful of approaches, including a "flat rate per subscriber per month," or the "net opportunity costs of 'bumping channels to accommodate leased access

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[14] *ValueVision Int'l v. FCC*, 149 F. 3d 1204, 1209 (D. C. Cir. 1998).

[15] Comcast Comments at 16.

[16] Some low power users would like the FCC to establish special rates for them. *See, e.g.*, Comments of The Bruno Goodworth Network, Inc. (providing for 5 leased access channels per tier, with a bidding credit for certain low power stations); Comments of Engle Broadcasting (proposing $.003 per subscriber per month for Class A low power stations). Low power stations already have free carriage rights in some circumstances under Section 614. And all low power stations already enjoy the subsidy of free over-the-air spectrum to reach audiences. Nothing suggests that Congress intended that cable operators, programmers and customers provide an additional subsidy through preferential leased access rates.

[17] TAC Comments at 13-14.

[18] TAC's formula incorrectly assumes that an operator receives only advertising availabilities to compensate for channel carriage. However, certain cable channels carried on tiers, like The Disney Channel and C-SPAN, are carried commercial free – reflecting that advertising availabilities do not reflect the full value of carriage of a program service. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, 12 FCC Rcd. 5267, 5280-81 (1997)(hereinafter "Leased Access Report and Order").

users.'"[19] Media Access Project, too, tries to resurrect its "actual cost" and "flat fee" proposals.[20] But the FCC thoroughly considered – and soundly rejected – these ideas when ValueVision (now Shop NBC) and MAP proposed them ten years ago.

It rejected an "actual cost" approach for reasons unalterably tied to Congress's direction on rate setting. Actual cost fails to "adequately compensate the cable operator and would force cable operators to subsidize leased access programmers, thereby impermissibly affecting the cable system's operation, financial condition or market development."[21] It undervalues the effects where leasing causes a cable operator to bump a program service already carried on the system, which "would be inconsistent with the growth and development of cable systems."[22] The flat fee approach was considered and rejected, too – a judgment approved by the Court of Appeals due to a lack of "empirical evidence demonstrating how their proposed flat rate would promote the statutory objective."[23] Nothing in the comments here remotely suggests why artificially subsidizing leased access use now can satisfy that command.

Shop NBC tries to claim that the formula needs to be changed to account for digital tier carriage.[24] It argues that operators will not incur losses from changing the composition of their digital tiers to accommodate a surfeit of infomercials and home shopping lessees. But artificially packing digital tiers with leased access users, populated by home shopping and other self-generating revenue programming, will adversely affect cable operations just as surely as if they were carried on analog. Forcing operators to subsidize leased access users on the digital tier will

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[19] Shop NBC Comments at 9-10.

[20] MAP Comments at 13-14.

[21] *Leased Access Report and Order*, 12 FCC Rcd. at 5281.

[22] *Id*. at 5282.

[23] *ValueVision Int'l*, 149 F. 3d at 1212 (*citing FCC Rate Order*, 12 FCC Rcd. at 5294).

[24] Shop NBC Comments at 15.

crowd out other digital programming services and will reduce customers' interests in subscribing to the digital tier of service.

And it should be noted that weakening the attractiveness of digital tiers undermines their growth and the industry's ability to move to an all-digital environment. Just as the cable industry has crossed the fifty percent threshold of digital penetration this year, Shop NBC would have the Commission create unlawful rates to help flood these tiers with infomercials and the like.

In any event, Shop NBC's complaints about the rates for digital tier leasing under the existing formula are based on fuzzy math. The average implicit fee formula already measures the opportunity costs of leasing on a tier-by-tier basis, and it already accounts for different tier rates, subscribership, and programming costs. And when a cable operator includes heavily subscribed digital basic tiers in the formula, the rate goes down for use of channels on all tiers, including the analog tier. Digital leased access users already pay less than analog leased access users. Shop NBC fails to demonstrate any legitimate reason to reduce the formula further.

In short, the Cable Act does not permit the FCC to reduce the leased access rates – either on the analog or the digital tiers – to artificially induce increased use.[25]

III. LEASED ACCESS USERS FAIL TO SHOW ANY PROBLEM WITH THE EXISTING PROCEDURES

The FCC's 1997 order also adopted numerous regulations governing the procedures to be used for leased access, and many subsequent FCC interpretations have helped clarify the rules of the road.[26] In fact, leased access generally proceeds smoothly, with few complaints arising.

[25] As shown above, the flimsy proposals for further reducing leased access rates do not justify any changes to the rate formula. And as Comcast points out, the *Notice*, which consists of vague and open-ended questions about leased access, cannot lawfully support any change in the formula. Comcast Comments at 14 and n. 34.

[26] As Time Warner makes clear, "the successful negotiation of leased access agreements is clearly preferable to the resolution of such matters through complaint proceedings and the Commission must be wary of proposal to 'fix' the rules that would, in fact, create uncertainty and increase the number of leased access disputes." Time Warner Cable Comments at 23-24.

The FCC has already examined many of the practices about which commenters complain. It has approved them in many respects for wholly legitimate reasons. Cable operators have an obligation to reasonably accommodate leased access users – an obligation to which they already devote a significant amount of time and energy. The tens of thousands of hours of leased access programming on cable testify to a system that works. Cable operators should not have to reinvent their operations or system configuration to suit the individual interest of every potential lessee.

A. Simplified Procedures Already Enable Expedited Review of Leased Access Rates

A handful of commenters make the unsubstantiated claim that cable operators charge more than the maximum permitted rate.[27] However, to the extent there are questions about how a particular system calculates its leased access rates, there already are procedures designed to address it. Nothing in the comments suggests that they are inadequate.

Pursuant to Section 76.970(i)(5), operators are required to maintain sufficient supporting documentation to justify their rates, including information that shows the calculations of the implicit fees. This information must be available for demonstration to the Commission. In addition, pursuant to Section 76.975, any leased access user can receive a determination of the operator's maximum permitted rate from an independent accountant. This procedure already is expedited – parties have only 5 days to agree on a mutually acceptable accountant or must each select one on the sixth business day. The accountant must produce a report within 60 days, and if the operator is found to have a rate that exceeds the maximum permitted by more than a *de minimis* amount, the operator must pay the full cost of the review.

[27] *See, e.g.*, Comments of MAP at 2 ("When cable operators do respond, they negotiate from a position of overwhelming strength, using their superior resources and information to charge rates in excess of the Commission's maximum rate formula.").

This procedure has clear benefits for lessees and operators. It provides a low cost, streamlined process for obtaining an independent review of cable operators' rate calculations.[28] Given that the leased access formula uses highly confidential proprietary data as one of its inputs, and that there are any number of potential leased access users that may want to examine that data, this is the best and most equitable way to resolve disputes.

The rules also contemplate a simplified procedure where the accountant's report fails to resolve all outstanding issues. Lessees and operators have the option of agreeing to voluntarily use alternative dispute resolution ("ADR"). In this fashion, disputes can be resolved informally at the local level on a more expedited basis than through filing a formal complaint with the Commission.[29] Commenters provide no reason to adopt yet another layer of process under these circumstances.

B. The Commission Should Avoid Adopting Inflexible Contract Terms and Procedures

Without any substantiation, MAP claims that "as reflected in the record of this proceeding, cable operators rarely provide responses within the mandatory time frame required by the Commission's rules."[30] The Commission should not be misled by this overheated rhetoric. The record shows no such thing. Instead, it appears that leased access generally runs smoothly at the local level. Cable operators are aware of their leased access obligations and make information available to leased access users on a routine basis.

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28 *Leased Access Report and Order*, 12 FCC Rcd at 5320.

29 *Id.* at 5321.

30 MAP Comments at 2.

1. Most Leasing Occurs Pursuant to Standard Contract Terms and Proceeds Quickly

Cable operators typically have standard form contracts that they make available to leased access users within the prescribed 15 day time frame[31] – or sooner.[32] In fact, both Comcast and Time Warner "generally replied within 15 days" to TAC's onerous request for leased access rates for every one of their systems serving millions of customers.[33]

Where delays arise, they typically are due to proposed changes in those contracts sought by lessees. Lessees sometimes request terms different than the norm, and negotiating over proposed changes to the standard contract takes time – just like any other commercial contract negotiation. Thus, it would be unreasonable for the Commission to impose specific timelines on operators' response to leased access users' inquiries.[34] The FCC already requires operators to respond "as expeditiously as possible"[35] under the circumstances. Without knowing in advance what issues may arise, it is impossible to adopt a one-size-fits-all rule governing the timeframe for completing negotiations.

Some leased access users seek disclosure of which specific channel is available for their use when they submit a request for leased access.[36] Where operators already carry leased access programming on a specific channel and the lessee is requesting part-time use of that channel,

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31 47 C.F.R. § 76.970(i)(1).

32 Even CaribeVision admits that "when programmers submit written bona fide requests that comply with the requirements of Section 76.970(i), cable operators generally timely comply with supplying the limited information required." CaribeVision Comments at 2. Other commenters object not to the *absence* but to the *presence* of a contract. Comments of Charles H. "Charlie" Stogner, President, LAPA (claiming that cable operators are "forcing users to accept 'adhesion contracts' on a 'take it or leave it' – 'our way or the highway' basis").

33 TAC Comments at 13.

34 CaribeVision Comments at 9.

35 47 C.F.R. § 76.971(a)(3).

36 *See, e.g.*, CaribeVision Comments at 3. Time Warner suggests a helpful revision to the rules. Where a cable system has adequate capacity currently available to meet a prospective lessees' request, it should be unnecessary to precisely quantify the number of leased access channels available. Time Warner Cable Comments at 24-25.

providing that information may be easy. But in other cases operators may not have that information readily available, particularly if the lessee is requesting that an operator open up a *new* channel for leasing.

The addition of a new leased access user may necessitate bumping an existing program service off the analog tier. Cable operators must examine their affiliation agreements to determine which channel(s) can be moved to a different tier or taken off the system; operators must follow contractual restrictions on providing notice to the programmer; and operators must provide notice to both franchising authorities and customers of changes in channel line-ups. All of this can take several months' time.[37] But in that sense, leased access users are treated no differently than any other program network seeking launch on a cable system. Launching any new service is a complicated and time-consuming undertaking.

Likewise, the Commission must continue to give operators flexibility to choose channel positioning and tier placement, so long as more than 50% of customers have access to the tier.[38] Doing so is the only way to minimize disruptions to cable customers, particularly given that capacity on highly penetrated tiers already is occupied with other services.[39]

That flexibility is especially appropriate because of the unique operation of leasing. Only leased access users can show up at any time and demand space on a system. This differs from, say, must carry broadcasters, which make carriage elections and channel selections on a

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[37] For this reason, it would be unreasonable to adopt a rule that required operators to launch no later than 60 days after a request for leased access information. CaribeVision Comments at 12. Leased access users often request information about obtaining time on a cable system and frequently never follow up. It would be enormously disruptive to cable customers if operators were required to prepare for launch of a new service each time a request came in.

[38] *See* Time Warner Cable Comments at 20-21.

[39] The Comments of Charles H. "Charlie" Stogner, President, LAPA, claim that Cox Cable discriminated against a leased access user by placing the lessee on a different tier than the operator's local origination channel. The merits (or lack thereof) of that claim have been fully briefed and there is no reason to address it here. *Real Estate T.V., LLC v. Cox Communications Louisiana*, LLC, CSR-7133-L (filed Mar. 6, 2007).

prescribed schedule every three years. Some lessees gripe about practices that are the inevitable by-product of the inherent flexibility of the leased access system.[40]

For one, leased access programmers operate pursuant to agreements that expire at different times depending on when they began using the system. Yet an operator annually calculates its leased access rates. As a result, *some* leased access users invariably will be in the middle of a contract term when an operator adjusts its leased access rates, and mid-term rate changes are therefore inevitable. While operators strive to maintain the same channel positions for their leased access users throughout the contract term, new lessees may come along that necessitate changing around channel positions to maximize use of existing leased access capacity.

CaribeVision also urges the FCC to adopt a uniform rule requiring operators to agree to a 52- week contract term, with an automatic renewal.[41] Operators already are under an obligation to ensure that leased access contracts contain termination provisions that are "commercially reasonable,"[42] and must not "unreasonably limit the length of a contract with a leased access programmer."[43] The existing policy contains the predictability a lessee may need and the flexibility an operator may want. Lessees who believe an operator has not complied with this requirement can seek FCC redress. There is no need to adopt a hard and fast rule instead.[44]

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[40] *See, e.g.*, CaribeVision Comments at 6-8.

[41] CaribeVision Comments at 6.

[42] *Leased Access Report and Order*, 12 FCC Rcd. at 5322 -23.

[43] *Id.* at 5323.

[44] As for automatic renewals, there may be wholly legitimate reasons an operator might require a leased access user to sign a new contract every year. For example, part-time leased access users may find a particular time slot desirable, and it may be unfair to other users who would like access to that time to guarantee a single user access to that time slot on the basis of an automatic renewal. As another example, an operator may have new policies such as with respect to indecent leased access programming; or the FCC may adopt new rules that would necessitate making changes to the existing agreement.

2. Promotion and Marketing Practices Are Reasonable

Some commenters also would like the FCC to require operators to include specific information about programs on leased access channels in a cable operator's program guide. This is precisely the type of situation that is not susceptible to a rule. Cable operators must be able to differentiate between the program services that they have chosen to be placed on their system based on the operator's editorial choice and those that they are required to carry under leased access requirements.

Even if program guide information were included for lessees that operate on a 24/7 basis, it would be impossible for part-time leased access programming. The programs available may change from day-to-day, half-hour-to-half-hour. Forcing operators to make that type of information available would be enormously burdensome for operators and getting such information on a timely basis to program guide providers for every leased access program on a timely basis might be physically impossible.

3. System-by-System Leasing is Appropriate

Section 612 requires leasing on a cable system basis. Some leased access users, however, ask the FCC to require operators to permit lessees to lease a channel on only a portion of their cable system.[45] However, the FCC has already determined that lessees cannot artificially break up cable systems for these purposes.

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[45] *See, e.g.,* CaribeVision Comments at 12; MAP Comments at 15 (proposing rule that "should require cable operators to allow lease access programmers to target audiences by zip code or other reasonable means so that local and specialty networks can target audiences without incurring excess charges for unwanted subscribers the leased access programmer anticipates will have little interest in its programming.") MAP also proposes that cable operators be required to offer leased access on an "a la carte" basis, perhaps not realizing that the rules already provide for à la carte leased access usage. 47 C.F.R. § 76.970(f).

Section 612 speaks in terms of cable systems, not franchise areas. In that respect, it is similar to other FCC rules, like the must carry rules, that operate on a cable system basis.[46] As the FCC found in rejecting a similar claim, "we interpret the Section 612 commercial leased access requirements as applying on a physical system rather [than] community or franchise-by-franchise basis."[47] The FCC reached this conclusion not only as a matter of statutory construction but also based on "a concern for the practical construction and operation of a cable system."[48] The agency explained that cable systems "[d]o not typically have separate and distinct headend facilities and separately programmable transmission facilities within each city, town, village or county through which the wiring is laid and into which programming is distributed. For reasons of engineering and economic efficiency, cable facilities generally do not stop and start at political boundaries."[49] In fact, configuring a system to operate on a community-by-community basis to accommodate leased access users would significantly increase the costs of leased access in a manner that would "adversely affect the operation, financial condition or market development of the cable system" in contravention of Section 612(c)(1). Operators of a unitary system ordinarily provide uniform channel line-ups throughout the system. They do not maintain equipment at individual points throughout the system that would enable insertion of additional channels.

Where cable systems can accommodate area-specific leased access requests in situations where the necessary technology is in place and operational throughout the entire cable system,

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46 *See, e.g.*, 47 C.F.R. §§ 76.55(b) and (c) (defining rights of local broadcast signals by reference to the principal headend of a particular cable system).

47 *Roberts v. Houston Division of Time Warner Entertainment Co*., 11 FCC Rcd. 5999, 6005 (1996).

48 *Id.* at 6007.

49 *Id.*

the FCC already has said it expects operators to do so.[50] But certain commenters in this proceeding incorrectly assume that operators can accommodate targeted leased access requests simply because they provide zoned advertising or PEG channels.[51] Targeting advertising to a particular community is a totally different process. Operators maintain the same channel line-up, but simply insert different advertising in the few minutes of local advertising availabilities set aside for an operator's ads. Thus, the space already exists in the existing line-up to provide zoned advertising without disrupting any other aspects of the service a customer otherwise would see. And where cable operators offer differentiated government access channels to different community segments, these are typically negotiated for the life of a franchise (as part of an overall franchising agreement) that may last for five, ten or more years. That is a very different arrangement than dividing a system’s network architecture to service a half-hour lessee’s desire to restrict its program to only one neighborhood.

Some commenters also claim that cable operators are somehow restricting the technology they can use to deliver their programming to the cable headend.[52] Upon examination, though, there is nothing to these recycled claims. The FCC already determined that operators “do not have any responsibility for assisting in the delivery of programming from a programmers’ studio

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[50] *Id.* at 6008.

[51] *See, e.g.*, Comments of Charles H. “Charlie” Stogner, President, LAPA; Comments of Duane J. Polich and Leased Access Producers Association.

[52] As is the case with several of the comments filed in this proceeding, there is another side to the story. For example, Reynolds Media (“RMI”) complains about Cox’s purported restrictions on the technical reception of their programming on a uniquely configured Cox system that has a tower remote from its headend. Those comments conveniently omit the fact that RMI has been provided on a leased access basis for 17 years, and that it voluntarily terminated its broadcast signal due to interference complaints from other broadcasters, but yet still sought live delivery of its programming through Cox. Cox ultimately found a workable solution to accommodate RMI’s request, allowing RMI, for the past 6 months, to use a coax feed run by Cox to RMI’s office utilizing equipment purchased by Cox. RMI just notified Cox that its signal is back on the air. Letter to Alysia Long, Senior Counsel, Cox Communications from RMI (dated Sept. 21, 2007).

or production facility to the headend or input point of the cable system."[53] Lessees may prefer a more chauffeured approach from the operator, but that is not what the statute contemplates.

4. Insurance and Security Deposits are Appropriate

Finally, certain commenters complain about the need to acquire insurance in order to lease time on the system.[54] However, the Commission has consistently permitted operators to require reasonable liability insurance coverage for leased access programming – and for good reason. General liability insurance is required to protect the cable system from property damage, among other things, while media perils insurance protects cable systems from the content of programming, whether such claims are meritorious or not.[55]

The FCC already constrains the ability of cable operators in this area. It has limited those insurance requirements to those "reasonable in relation to the objective of the requirement" and has placed the burden on operators of establishing reasonableness.[56] Given that this requirement has been in place for at least a decade, it strains credulity that lessees are unable to find such insurance. Thousands of leased access users are already on cable systems around the country, and have been able to obtain insurance. Information about how to do so is readily available on the Internet: "You may also be required to provide proof of a $1 million general liability insurance policy (and possibly a $2 million errors & omissions policy) naming the cable system as co-insured. *Once that policy is in place, your insurance agent can add each additional cable*

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[53] *Engle Broadcasting v. Comcast of Southern N.J.*, 16 FCC Rcd. 17650 (2001).

[54] *See, e.g.*, Comments of Engle Broadcasting.

[55] *Campbell v. TW Cable – St. Augustine*, CSR 5234-L (CSB 1998).

[56] *Leased Access Report and Order,* 12 FCC Rcd. at 5323 ("Determinations of what is a 'reasonable' insurance requirement will be based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors.")

system you work with as a rider for a very nominal fee."[57] Commenters present no legitimate reason for stripping operators of their ability to protect their operations against harm from leased access users, just as they can protect themselves against harm from any other programmer carried on their system.[58]

As to security deposits, the Commission already has ruled that reasonable security deposits are permissible. And the Commission has already determined that it would examine the reasonableness of any such requirement on a case-by-case basis.[59] Thus, it makes no sense to adopt a rule that prohibits operators from requiring more than a one month security deposit, as CaribeVision seeks.[60] Cable operators must be permitted to protect themselves against losses due to leased access uses. Commenters provide no reason to believe that in all cases a one month security deposit provides that level of protection.

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In short, commenters seek to reargue rules and policies that the Commission has had in place for more than a decade. Sound reasons justify the existing rules, which provide for case-by-case reviews of cable operator policies to ensure their reasonableness.

IV. PROGRAM CARRIAGE PROCEDURES ARE WORKING

The *Notice* sought comment on a narrow range of issues relating to the resolution of program carriage disputes. Given that only two program carriage complaints have ever been

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57 http://www.videomaker.com/article/8291/.

58 Indeed, low power stations themselves routinely carry insurance. *See* Engle Broadcasting Comments (noting Class A stations "routinely carry [Broadcasters Liability/Errors and Commissions, Commercial General Liability and Workers' Compensation] Insurance").

59 *See, e.g.*, *Lorelei Communications v. Cablevision of Monmouth*, 13 FCC Rcd. 13919 at ¶ 14 (CSB 1998) (approving prepayment and noting that determinations of appropriateness would be made on case-by-case basis).

60 CaribeVision Comments at 8-9.

addressed by the Commission, it is hard to see that there is a problem requiring additional action in this area.

Contrary to the impression one would get from reading MAP's comments,[61] there has not been a single adjudicated violation of the program carriage rules in the fifteen years of their existence. To the extent the internal FCC process has led to any delay in resolving either of those complaints, it has nothing to do with the current pleading cycle or substance of the rules. Nor is there any evidence supporting MAP's claim that programmers fail to avail themselves of these processes due to fear of retaliation.[62] To the contrary, certain program services recently have hardly appeared reticent, but downright eager to avail themselves of existing FCC processes – if only for leverage at the bargaining table.

Whatever the issue with the Commission's internal processes, imposing mandatory arbitration is not the solution. As the cable operators' comments show, not only would mandatory arbitration be unlawful, but it also would simply drag out resolution of any such complaints, serving neither the programmer nor the operator.[63] Moreover, issues raised in the program carriage and leased access context involve policy questions the FCC is uniquely qualified to address. The agency cannot and should not outsource these responsibilities.

In addition to critiquing program carriage processes, some commenters try to use this proceeding to completely rewrite the purpose and substance of the program carriage rules. They argue for program carriage rules that would insert the government deeply into the business of choosing which cable programming since an operator must show. For example, the Black Television News Channel submits a several page checklist of factors – factors including the

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[61] MAP Comments at 18.

[62] *Id.*

[63] Comcast Comments at 35-37; Time Warner Cable Comments at 34-36.

network's signal quality, program production value, program content value, economics, and market demographics – that it claims the FCC or arbitrator should use for evaluating a complaint.[64] TAC proposes that the rules consider whether the programming: "offers redeeming social value;" not consist of more than 6 hours daily of infomercials, shopping programming "or other programming to be determined in the rulemaking;" and is of "cultural significance," among other factors.[65] Both proposals are totally at odds with the statute and the FCC's rules.

The Commission made clear in implementing Section 616 that it should not "unduly interfer[e] with legitimate negotiating practices between multichannel video programming distributors and programming vendors."[66] And Congress also instructed the Commission to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of diverse programming sources.[67] Commenters point to nothing that suggests that Congress intended to provide the Commission authority to force cable operators to carry any particular non-affiliated program service. And, as Time Warner's comments show, any such requirement would raise serious constitutional concerns.[68]

Now seems hardly the moment to consider this reinvention of the program carriage rules. Competition has increased dramatically, and vertical integration has declined.[69] As Comcast

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[64] Black Television News Channel at 8-13.

[65] TAC Comments at 9-10.

[66] *Second Report and Order*, 9 FCC Rcd 2642, 2643 (1993).

[67] 1992 Cable Act, Section 2(b)(2).

[68] Time Warner Cable Comments at 12 ("Rules that force an MVPD to carry services that it would not otherwise have carried, or to carry them on different terms than it chooses, require a constitutionally sufficient justification. Whether or not such a justification may have existed at one time, it clearly does not exist any longer.").

[69] NFL claims that vertical integration is on the rise. NFL Comments at 2. But the facts show otherwise. As the Commission just found, "the percentage of all satellite-delivered national programming networks that are vertically integrated with cable operators has declined since 2002, from 35 percent to 22 percent." *Report and Order and Notice of Proposed Rulemaking*, MB Docket No. 07-29 (rel. Oct. 1, 2007) at ¶ 18. Even that percentage may be overstated. *See id.*

points out, the presence of robust competition from DBS and others "provides powerful marketplace discipline that reduces the need for regulation. An MVPD that fails to provide consumers with the programming they demand will be quickly left behind for MVPDs that do."[70] Under these circumstances, there is no reason for the Commission to intrude further into the legitimate exercise of editorial discretion by cable operators in the manner commenters propose.

TAC also errs in suggesting that the FCC should allow an unaffiliated programmer to make a *prima facie* case of discrimination simply by arguing that an operator is imposing different requirements on it than on an affiliated programmer.[71] Under Section 616(a) (3) governing a discrimination claim, a complainant must show the "the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly."[72] Thus, there is no inherent obligation in the Act to treat affiliated and unaffiliated programmers *identically* and any *prima facie* standard based on that erroneous reading must fail. Moreover, it rejects decades of Commission and public policy that encourages the efficiencies borne of vertical integration in MVPD programming. TAC's legal formulation would cancel the FCC's statutory duty to consider whether the statute's standard of "unreasonably restrain" has been met.

CONCLUSION

The comments in this rulemaking demonstrate that the leased access and program access provisions of the statute are working. Programmers have an ever-expanding array of available distribution models, a world apart from the video environment that led to leased access in the

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70 Comcast Comments at 24.

71 TAC Comments at 10 ("any requirements imposed on independent channels before being considered for carriage, which are not similarly imposed on affiliated channels, are discriminatory.").

72 *Second Report and Order*, 9 FCC Rcd. at 2648.

1984 Act. The Commission's complaint procedures provide programmers under both statutes timely and effective paths to resolving disputes with operators.

Rhetoric from some commenters is accompanied by no facts; instead they present a glass menagerie of harms belied by the thousands of hours of leased access programming and hundreds of unaffiliated programmers being carried at this very moment you are reading these words. Given the intensely competitive video market today, rule changes would be unwise policy and raise serious constitutional concerns.

Respectfully submitted,

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October 12, 2007