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 TIME WARNER CABLE INC.

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I. INTRODUCTION AND SUMMARY.

Time Warner Cable Inc. ("TWC"), by its attorneys, respectfully submits the following Reply Comments in the above-captioned proceeding. As TWC established in its initial comments, the program carriage and leased access rules were carefully crafted by Congress to serve as "safety valves" in the event that marketplace forces failed to adequately ensure the availability to the public of diverse sources of programming. Not surprisingly, given the development over the past decade of a video programming marketplace that is more vibrant, more diverse and more competitive than at any time in history, these rules rarely are invoked and their very constitutionality is highly questionable. Based on the factual record, and in light of Congress' express preference for reliance on the marketplace over regulation, there is no reason for the Commission make changes in these rules, particularly changes that would expand the government's role in deciding what programming services get carried and the terms and conditions of such carriage.

II. THERE IS NO EVIDENCE THAT THE CURRENT PROGRAM CARRIAGE RULES ARE FAILING TO SERVE THEIR INTENDED PURPOSE.

The Commission's consideration of proposals to modify the program carriage rules should begin and end with a single fact: since 1992, the number of unaffiliated cable networks has increased by over 400 percent while the percentage of cable-affiliated networks has declined from greater than 50 percent to below 22 percent.[1] This remarkable transformation in the video programming marketplace was expressly cited by the Commission in finding that the program access rules are not inhibiting the creation of new programming.[2] The Commission must similarly find that no changes in the program carriage rules are needed to ensure the development of independent programming sources.

In particular, the Commission must reject as unsupported by both fact and law the proposals made by a small handful of commenters that would have the Commission treat the program carriage rules as a vehicle for government-mandated, universal carriage, thereby ignoring Congress' clear intention to preserve the ability of MVPDs to engage in "legitimate business practices common to a competitive marketplace."[3] For example, to bolster their demands for a major overhaul of the program carriage rules, the NFL and The America Channel ("TAC") each claim, against all evidence, that vertical integration in the cable industry is growing.[4] Furthermore, in an effort to circumvent the factual deficiencies in their arguments,

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[1] *See* TWC Comments at 8, citing Commission annual competition reports.

[2] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, Report and Order and Notice of Proposed Rulemaking, FCC 07-169 at ¶ 66 (rel. Oct. 1, 2007) ("*Program Access Extension Order*").

[3] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, ¶ 15 (1993) ("*1993 Program Carriage Order*").

[4] The NFL's comments focus on the fact that the number of program networks affiliated with the top four MSOs has increased by 14 (from 25 to 39) since 1992, but inexplicably ignores the more salient fact that, over that same period of time, the number of unaffiliated networks increased by more than 400. *See* NFL Comments at 2. For its part, TAC once again relies on analyses and studies that have previously been shown to be fundamentally and pervasively flawed, particularly in their overbroad and irrational definition of what constitutes an affiliated network for purposes of Section 616. *See, e.g, Applications for Consent to the Assignment and/or Transfer of Control of Licenses,* Reply

TAC and the Black Television News Channel ("BTNC") assert that the reason that program carriage complaints are so rarely filed is that programmers are afraid of some unspecified form of "retaliation."[5] Yet, not only do they fail to offer a single example of such retaliation or threat of retaliation (or even a description of what form such hypothetical retaliation might take), but the evidence is to the contrary.[6]

Given the absence of any evidence in the record to support claims that the program carriage rules are failing to serve their intended purpose, TWC submits that the following substantive and procedural modifications proposed by certain commenters are unwarranted and should not be adopted:

The Commission may not expand the rules beyond the specific types of conduct identified by Congress. The NFL complains that it is difficult for programmers to obtain relief under the program carriage rules because those rules require evidence both that a programmer is being discriminated against "on the basis of affiliation or nonaffiliation" and that "the effect of the conduct...is to unreasonably restrain the ability of the complainant to compete fairly."[7] According to the NFL, the Commission should revise its rules to "focus less on an MVPD's misconduct" and more on ensuring that negotiations between MVPDs and programmers are conducted in "good faith."[8] Along somewhat related lines, TAC and BTNC argue that the Commission should redefine what constitutes discrimination under Section 616 to cover any instance in which an MVPD imposes a "requirement" (such as a "launch" or "funding"

Comments of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc., MB Docket No. 05-192 at 80-83 (filed Aug. 5, 2005).

[5] TAC Comments at 9; BTNC Comments at 4.

[6] For example, fear of retaliation did not keep various programmers from submitting comments in this proceeding, nor did it keep TAC from filing a program carriage related antitrust lawsuit against Comcast and TWC or from lodging a program carriage complaint against Comcast pursuant to the procedures established in the Commission's order approving the Adelphia/Comcast/Time Warner transactions. *See Comcast Corporation, Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, FCC 07-172 (rel. Sept. 25, 2007).

[7] NFL Comments at 7.

[8] *Id.*

requirement) on a non-affiliated network that is not "equally" imposed on MVPD-affiliated networks.[9]

First, the types of conduct prohibited by the program carriage rules are specifically described in Section 616 and it is not within the Commission's power to ignore, expand, or otherwise alter the statutorily-prescribed standards.[10] Second, when it enacted Section 616, Congress made clear its intent "that the term 'discrimination' [as used in Section 616] is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act" and that, in applying the program carriage rules, the Commission is to be guided by the "extensive body of law...addressing discrimination in normal business practices."[11] Thus, it would be inappropriate for the Commission to adopt proposals that would effectively impose common carrier-like obligations on MSOs or establish a *per se* prohibition on all "unequal" carriage terms and conditions.

The Commission may not employ subjective, content-based "scorecards" for assessing program carriage complaints. BTNC has proposed (and TAC has endorsed) the adoption of a "scorecard" for determining whether an MVPD has violated the program carriage rules.[12] This scorecard would require the Commission to weigh a series of factors, including the qualitative "programming content value" of different channels (requiring the Commission to engage in a subjective assessment of, *inter alia*, a channel's "entertainment" or "educational" value and to assign a higher value to certain types of programming, such as inspirational programming, than to other types of programming).[13] Such an approach not only finds absolutely no support in the

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[9] BTNC Reply Comments at 2; TAC Comments at 10.

[10] Moreover, the FCC itself already has indicated that it will consider whether a cable operator is negotiating in good faith when determining whether Section 616 has been violated. *See 1993 Program Carriage Order, supra*, 9 FCC Rcd at ¶ 17.

[11] *See* H.R. REP. NO. 628, 102d Cong., 2d Sess. 110 (1992).

[12] *See* BTNC Comments at 7-10; TAC Comments at 10.

[13] BTNC Comments at 9.

history of Section 616 (and would involve the Commission in judgments far beyond the scope of its expertise), but also would require the Commission to make content-based distinctions that unquestionably could not survive strict scrutiny under the First Amendment.[14]

The Commission may not force cable operators to offer independent programmers "national" carriage agreements. TAC contends that independent programmers are being discriminated against because they often are offered system-by-system "hunting licenses" rather than "national carriage" agreements.[15] However, as the record establishes, carriage agreements vary widely and both the system-by-system and the national distribution approaches represent "legitimate business practices common to a competitive marketplace."[16] Moreover, contrary to TAC's assertions, not every cable-affiliated network obtains national distribution. As TWC noted in its initial comments, its carriage decisions for each local system are based on its business and editorial judgment regarding such factors as whether a particular channel meets the needs and interests of its subscribers, input from local management, the system's overall product mix and capacity, and the financial terms being offered by the programmer, not on ownership affiliation.[17] Indeed, the vast majority of channels on TWC cable systems are used to provide programming in which TWC has no ownership interest, and numerous TWC systems do not carry particular TWC-affiliated cable networks. Under the circumstances, dictating that cable operators give every independent programmer national distribution, regardless of program quality, local interest, or viewership, would be wholly inappropriate.

There is no need for the Commission to adopt expanded discovery procedures or mandatory arbitration rules for program carriage complaints. Certain commenters suggest that

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[14] As TWC indicated in its initial comments, rather than using the program carriage rules to intrude further into a cable operator's protected speech and editorial decisionmaking, the Commission should be considering whether to curtail or abrogate the rules altogether. *See* TWC Comments at 10-13; *see also* Comcast Comments at 2, 37.

[15] TAC Comments at 10-11.

[16] TWC Comments at 28; Comcast Comments at 34.

[17] TWC Comments at 28.

the Commission should adopt additional "program carriage dispute resolution mechanisms," such as expanded discovery procedures and mandatory arbitration.[18] However, as is clear from the record, there is absolutely no evidence that the current procedures are in any way deficient.

In particular, as directed by Congress, the Commission already has implemented rules that provide for the expedited resolution of program carriage complaints.[19] In adopting these procedures, the Commission correctly concluded that discovery as a matter of right in all cases would not be consistent with the expeditious resolution of program carriage complaints.[20] Indeed, given Congress' express concern about frivolous program carriage complaints,[21] the worst thing the Commission could do is to turn the program carriage complaint procedures into an invitation for independent programmers to initiate proceedings so that they can engage in fishing expeditions for sensitive business information.[22]

With respect to proposals for mandatory "baseball style" arbitration, TWC reminds the Commission that arbitration already is an option in program carriage cases. Specifically, the

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[18] Crown Media Holdings, Inc. *ex parte* letter (dated Oct. 4, 2007); TAC Comments at 11.

[19] *See generally* 47 C.F.R. § 76.1302. *See also* 47 U.S.C. § 536(a)(4).

[20] *1993 Program Carriage Order, supra*, 9 FCC Rcd at ¶¶ 23-25, 29-34.

[21] See 47 U.S.C. § 536(a)(6) (directing the Commission to "provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section"). The Commission initially promulgated a specific rule stating that "it shall be unlawful for any party to file a frivolous complaint" under Section 616 and providing that violation of such rule would "constitute an abuse of process subject to appropriate sanctions." *1993 Program Carriage Order, supra*, 9 FCC Rcd at 2676 (47 C.F.R. § 76.1302(q)). As part of its 1998 biennial review proceeding, the Commission, without specific comment, eliminated this rule in favor of a generally applicable rule prohibiting (and subjecting to appropriate sanctions) frivolous pleadings. *See* 47 C.F.R. § 76.6(c). TWC submits that the Commission should reiterate that the same standards announced in the *1993 Program Carriage Order* will be applied in determining whether a program carriage complaint is frivolous under the generally applicable rule. Thus, a program carriage complaint will be deemed frivolous, and give rise to monetary forfeitures, where the complaint is filed without an accompanying affidavit, is based on arguments that have been specifically rejected by the Commission in other proceedings, or has no plausible basis for relief. *1993 Program Carriage Order, supra*, 9 FCC Rcd at ¶¶ 35-36.

[22] TWC recognizes that the Commission recently adopted expanded discovery procedures for program access complaint cases. *See Program Access Extension Order, supra,* FCC 07-169 at ¶¶ 95-100. However, the number of potential complainants in program access cases is relatively confined, while there are literally hundreds of independent programmers (to say nothing of an unlimited number of potential programmers) that could seek discovery by filing a simple program carriage complaint. Consequently, the concerns expressed by Commissioners Adelstein and Copps about "opening the floodgates" to "unfettered" and "unduly burdensome" discovery requests in program access proceedings are even more real in the program carriage context. *See id.* (separate statements of Commissioners Adelstein and Copps).

Commission's rules authorize the staff to invoke the procedure under Section 76.7(g), whereby the parties are forced to choose between a factual hearing before an administrative law judge or resolution of the matter through alternative dispute resolution.[23] There is no evidence to suggest that this generally applicable procedure, which has worked effectively and efficiently in the only two program carriage cases reviewed by the staff, is in any way insufficient or in need of modification.[24] In any event, as TWC and others established in their initial comments, the Commission does not have authority to mandate arbitration.[25]

III. THE LEASED ACCESS REGIME IS WORKING AS CONGRESS INTENDED.

In response to the Commission's request for comments on the effectiveness of the workings of the current commercial leased access rules, a number of leased access programmers (and would-be leased access programmers) have proposed that the Commission reduce the already below-market rates cable operators may charge for leased access carriage, thereby forcing cable operators to further subsidize the distribution via cable of programming that, for whatever reason, is not commercially viable on its own. These commenters also seek additional restrictions on the universe of permissible terms and conditions that cable operators may establish for leased access carriage.

As the record in this proceeding makes clear, there are undeniable constitutional, statutory and policy reasons why the Commission is barred from taking such actions. Any downward-adjustment to leased access rates would be confiscatory and violate the Takings Clause of the Fifth Amendment.[26] Furthermore, forcing cable operators to subsidize leased access programming, whether directly through lower rates or indirectly through restrictions on

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[23] 47 C.F.R. § 76.7(g).

[24] *See* TWC Comments at 30.

[25] *See id.* at 34-35; Comcast Comments at 35-37; NCTA Comments at 16-17.

[26] *See* TWC Comments at n. 51.

reasonable terms and conditions, would violate Congress' plain directive in Section 612 that the implementation of commercial leased access must not economically harm cable systems.[27]

Even if further adjustments to the leased access formula could survive constitutional scrutiny and avoid conflict with Congress' admonition about not adversely affecting cable systems, the record confirms that such adjustments are unnecessary. The current formula is predictable and fairly simple to calculate, and generally produces rates for leased access carriage, especially for part-time users (the vast majority of users), that are extremely low.[28] By setting the maximum rate that a cable operator may charge for leased access capacity at an amount designed to recoup nothing more than the forgone value of the used channel, the formula prevents any cable operator from overcharging a leased access programmer or realizing an excess return from such carriage.[29]

There are additional policy reasons why the Commission should reject suggestions that it overhaul the current leased access rules. The Commission must be mindful that the leased access carriage model was created by Congress for a very specific purpose – to provide a backstop in the event that marketplace forces were not making a diverse array of programming available to

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[27] Section 612(c)(1) provides that the rules established by the Commission regarding the price, terms, and conditions of leased access must not "adversely affect the operation, financial condition, or market development" of cable systems. 47 U.S.C. § 536(c)(1). Moreover, the record establishes that the harm from the requested subsidization not only would harm cable operators, but also would economically disadvantage non-leased access programmers in competing for valuable channel space and would promote programming of little interest to consumers at the expense of more highly sought-after options. *See* Comcast Comments at 17-20.

[28] TAC disputes the reasonableness of leased access rates under the current formula, citing its calculation of an "aggregate" leased access charge for all of TWC's systems. *See* TAC Comments at 12-14. However, a review of TAC's calculation reveals that its "aggregate" leased access rate calculation wildly overstates the amount that TWC charges for leased access. For example, TAC's calculation assumes that the monthly charge for leased access on TWC's Cleveland system is 100 times higher than it actually is ($6,421,939.00 per TAC's calculation; $64,219.39 per TWC's rate card).

[29] The current "average implicit fee" formula for calculating leased access rates was upheld on review as a reasonable balancing of "the interests of leased access programmers and those of cable operators," where the court expressly affirmed the Commission's determination that, to the extent leased access is to be used as a tool to encourage diversity of programming sources, it must be accomplished "in ways that do not impose adverse financial effects on cable operators." *Valuevision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1209 (D.C. Cir. 1998).

the public.[30] Leased access is not intended to jump-start or guarantee the successful launch of a new programming service, to transform cable operators into "discount" common carriers, or to provide subsidized carriage for programming that has only marginal economic viability. Indeed, as TWC established in its initial comments, given the undeniable fact that the video marketplace is more diverse and competitive than Congress could ever have imagined, there is no basis for expanding the leased access rules in any way.[31]

Furthermore, there is no evidence of any pressing need for such forced subsidization – there are more outlets for video programmers of all types and all degrees of commercial appeal than at any time in history – regular cable system and satellite carriage, leased access, public access, video-on-demand ("VOD"), streaming Internet distribution, YouTube and its kin, to name the most obvious. That leased access capacity is not being used in many systems to the maximum extent provided in the rules does not mean that the rules are failing; rather, it is an indication of the extent to which content that might otherwise be carried pursuant to leased access is finding its way to the public through other means and through economic models that are better suited to nationwide distribution than leased access.[32] Nor is there a compelling policy reason to turn cable operators into discount common carriers of programming services that are otherwise not commercially viable.[33]

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[30] *See, e.g.*, H.R. REP. NO. 98-934, 98th Cong., 2d Sess. 48 (1984) (leased access is designed to address concerns that a cable operator may not "necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system"); S. REP. NO. 92, 102d Cong., 1st Sess. 30 (1991) ("Senate Report") (describing leased access as a "safety valve").

[31] TWC Comments at 7-10, 15-19.

[32] As Congress has acknowledged, "the economics of leased access are not conducive to its use." Senate Report at 30.

[33] If any particular programming service insistent on cable carriage has such limited commercial appeal that it cannot achieve viability at the current leased access rates, it is for the programmer to seek alternative forms of carriage such as on the no-fee, non-commercial public access channels available on the vast majority of cable systems.

Finally, the evidence adduced in the record demonstrates that cable operators are faithfully fulfilling their leased access obligations under Section 612 and the Commission's rules. The leased access programmers universally acknowledge that leased access is widely available and being used.[34] And no commenter has submitted any evidence that any cable operator is: (i) refusing to make channel space available for leasing in accordance with the statute, (ii) intentionally refusing to comply with the maximum rate formula in setting or quoting leased access rates, or (iii) attempting to impose editorial control over any leased access programming. In light of this record, the Commission should reject each of the following proposals for additional government regulation of the contractual terms and conditions for leased access:

The current rules already require that leased access programmers be treated the same as other commercial programmers. Several commenters suggest that the Commission should prohibit cable operators from imposing on leased access programmers terms and conditions not applicable to other programmers.[35] However, as TWC noted in its initial comments, a well-established body of FCC precedent ensures that leased access programmers can obtain carriage on fair and reasonable terms and conditions.[36] For example, in the liability context, cable operators are allowed to require leased access programmers to produce proof of insurance and to agree to indemnification clauses precisely because this is almost always what cable operators

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[34] *See, e.g.*, National Alliance for Media Arts and Culture, et al. Comments at 3-4 ("as the record reflects, a substantial number of low-power television (LPTV) licensees and others... use leased access to provide community-based programming."); StogMedia Comments at 1 (StogMedia, which provides leased commercial access programming through local affiliation agreements in at least sixteen states "is believed to be... the largest single user of leased access in the U.S."). This is entirely consistent with TWC's experience which has seen a modest yet persistent demand for leased access carriage at the local system level. TWC's experience is that the vast majority (typically 90% or more) of leased access programming is locally produced and falls primarily into three general categories: religious (often over 40%); infomercials promoting real estate sales, automobile dealers, and tourism, among other things (about one-third of total leased access programming); and international/foreign language programs (typically accounting for 10-15%). The remaining leased access programming usually consists of community programs featuring local news and sporting events, segments devoted to hobbies such as fishing and cooking, as well as educational, home shopping and entertainment programs.

[35] *See, e.g.*, Leased Access Programmers Association Comments at 3, 9; StogMedia Comments at 7.

[36] TWC Comments at 23, n. 83.

require of non-leased access commercial programmers.[37] Similarly, in the technical assistance context, a cable operator is only allowed to require reimbursement from a leased access programmer when the assistance given is not of the type given to non-leased access programmers.[38] If a non-leased access programmer is not charged for a particular type of technical assistance, then a leased access programmer similarly may not be charged.

There is no compelling reason to change the current tier placement rule. Under the Commission's current rules, leased access programmers are guaranteed access to a majority of a cable system's subscribers. Any expanded mandate that leased access channel space must be available on additional tiers or on every tier would be wasteful, harm popular programmers that occupy negotiated channel positions, and create consumer confusion.[39]

The Commission should reject requests for special leased access treatment from LPTV broadcasters. There is simply no legal justification for singling out LPTV stations for special treatment under the commercial leased access rules. Nothing in the Communications Act requires or supports giving LPTV stations preferred carriage (much less sweetheart rates) over and beyond their limited mandatory carriage rights under Section 614(h)(2).[40] When Congress wanted to single out a particular type of leased access programmer for special treatment, it knew

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[37] Insurance requirements are generally deemed reasonable based on the cable operator's practices with respect to insurance requirements imposed on non-leased access programmers, among other relevant factors. *See, e.g., United Multimedia Productions, Inc. and Hamptons Video Guide, Inc. v. CSC Acquisition-New York, Inc.*, 16 FCC Rcd 5234, ¶ 9 (Cab. Serv. Bur. 2001); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 12 FCC Rcd 5267, ¶ 112 (1997) ("*Second Report*").

[38] A cable system is permitted to charge a separate fee in addition to the lease fee for technical services as long as those services are not already provided to non-leased access programmers carried on the system. *Second Report, supra*, 12 FCC Rcd at ¶¶ 113-15.

[39] There is also neither the need nor the requisite statutory authority for the Commission to mandate leased access carriage on VOD. Section 612 requires cable operators to designate channel capacity for "commercial use," a term defined as the "provision of video programming." 47 U.S.C. § 522(b)(5). *See also Internet Ventures Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 3247, ¶¶ 12-13 (2000). The Commission has found that "video programming" is limited to "programming provided by, or generally considered comparable to programming provided by, a television broadcast station" in 1984. 47 U.S.C. § 522(20). No television broadcast station in 1984 was offering an on-demand type service, but rather television broadcasts were (and remain) entirely linear in that the broadcast time of each program is selected by the station, not by the viewer. Thus, Section 612 cannot be legally stretched to require cable operators to devote VOD capacity for leased access.

[40] 47 U.S.C. § 534(h)(2).

how to do so (as in the case of certain minority and educational programmers) and it did not do so in the context of LPTV programming.[41]

IV. CONCLUSION

The record in this proceeding unmistakably establishes that there is no legal basis nor is there any policy justification for the Commission to amend its rules in an effort to promote the filing of program carriage complaints or the carriage of more leased access programming.

Respectfully submitted,

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[41] *See* 47 U.S.C. § 522(i).