

services; specified persons, including employees of the reviewing parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in the leased access proceeding, other than persons in a position to use the confidential information for competitive commercial or business purposes; and any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.<sup>185</sup> Confidential information shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with the Protective Order.

63. To ensure that confidential information is not improperly used for competitive business purposes, the Protective Order reflects that any personnel, including in-house counsel, involved in competitive decision-making are prohibited from accessing the confidential information. The Protective Order prohibits access to confidential information by specified persons that are in a position to use the information for competitive commercial or business purposes and any counsel, or other persons, including in-house counsel, that are involved in competitive decision-making are prohibited from access to confidential material. We define competitive decision-making to include any activities, association, or relationship with any person, including the complainant, client, or any authorized representative, that involves rendering advice or participation in *any* or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor.<sup>186</sup>

64. The Protective Order states that any personnel, including in-house counsel, (i) that are involved in competitive decision-making, (ii) are in a position to use the confidential information for competitive commercial or business purposes, or (iii) whose activities, association, or relationship with the complainant, client, or any authorized representative involve rendering advice or participation in any

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<sup>185</sup> Before an authorized representative may obtain access to confidential information, he or she must execute a declaration which states that under penalty of perjury he or she has agreed to be bound by the Protective Order. The declaration states that the reviewing party shall not disclose the confidential information to anyone except in accordance with the terms of the Protective Order and that the confidential information shall be used only for purposes of the leased access proceeding. See Appendix C.

<sup>186</sup> Our definition of "competitive decision-making" as such is consistent with federal court cases. See, e.g., *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) (noting that the "competitive decision-making" is a shorthand for a counsel's activities, association, and relationship with a client that are such as to involve counsel's advice and participation in any or all of the client's decisions ... made in light of similar or corresponding information about a competitor); see also *Brown Bag Software v. Symantec Corp.* 960 F.2d 1465, 1470 (9th Cir. 1992), cert. denied 506 U.S. 869 (1992) (defining "competitive decision-making" as advising on decisions about pricing or design made in light of similar or corresponding information about a competitor). This terminology was more recently discussed in *Intervet, Inc. v. Merial Ltd.*, 241 F.R.D. 55 (D.D.C. 2007) as follows: "Thus, U.S. Steel would preclude access to information to anyone who was positioned to advise the client as to business decisions that the client would make regarding, for example, pricing, marketing, or design issues when that party granted access has seen how a competitor has made those decisions. E.g., *Brown Bag Software*, 960 F.2d at 1471 (counsel could not be expected to advise client without disclosing what he knew when he saw competitors' trade secrets as to those very topics); *Matsushita Elec. Indus. Co v. United States*, 929 F.2d 1577, 1579-80 (Fed.Cir. 1991) (determination by agency forbidding access was arbitrary when lawyer precluded from access testified that he was not involved in pricing, technical design, selection of vendors, purchasing and marketing strategies); *Volvo Penta of the Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 242 (E.D.Va. 1999) (competitive decision-making involves decisions "that affect contracts, marketing, employment, pricing, product design" and other decisions made in light of similar or corresponding information about a competitor); *Glaxo Inc. v. Genpharm Pharm., Inc.*, 796 F.Supp. 872, 876 (E.D.N.C. 1992) (improper to preclude in-house counsel from access to confidential information because he gave no advice to his client about competitive decisions such as pricing, scientific research, sales, or marketing)." *Id.* at 57-58.

or all of said person's business decisions that are or will be made in light of similar or corresponding information about a competitor, are prohibited from accessing the confidential information.<sup>187</sup>

65. A Protective Order constitutes both an Order of the Commission and an agreement between the party executing the declaration and the submitting party. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings. We intend to vigorously enforce any transgressions of the provisions of our protective orders.<sup>188</sup>

**vi. Annual Reporting of Leased Access Statistics**

66. We adopt an annual reporting requirement for cable operators to submit information pertaining to leased access rates, usage, channel placement, and complaints, among other leased access matters.<sup>189</sup> In the NPRM, we sought comment on various questions regarding the status of commercial leased access, such as the extent to which programmers are making use of commercial leased access channels, whether cable operators have denied requests for commercial leased access, whether cable operators use commercial leased access channels for their own purposes, and the effectiveness of the complaint process.<sup>190</sup> As discussed throughout this Order, commercial leased access programmers state the difficulties they have experienced under the current leased access regime.<sup>191</sup> These claims are supported by the Commission data indicating limited use of commercial leased access.<sup>192</sup>

67. We did not receive a large number of comments containing industry-wide data regarding use of leased access. Comcast claims that thousands of programmers have used commercial leased access channels since 1997, and hundreds of programmers use commercial leased access channels on Comcast's systems today.<sup>193</sup> TWC estimates that approximately ninety percent of leased access programming is produced locally.<sup>194</sup> TWC estimates further that two-thirds of commercial leased access programming is religious, foreign language, or community programming with the remainder consisting of infomercials.<sup>195</sup> NCTA states that it is unaware of any source that contains statistics about usage of commercial leased access, but notes that the Commission in the *2006 Video Competition Report* concluded that the typical

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<sup>187</sup> See Appendix C, *Standard Protective Order and Declaration for Use in Section 612 Commercial Leased Access Proceedings*.

<sup>188</sup> See Appendix B (adopting 47 C.F.R. § 76.975(f)).

<sup>189</sup> See Appendix B (adopting 47 C.F.R. § 76.978(a)).

<sup>190</sup> See NPRM, 22 FCC Rcd 11222, ¶ 7. In his Separate Statement, Commissioner Adelstein asked commenters to provide information regarding the rates charged for leased access, whether they are reasonable, how rate variances are justified, the rate formulas effect on anticompetitive practices, its effect on diversity, whether the current rate structure acts as a deterrent, and whether the current methodology is appropriate for digital cable, VOD, and IPTV services. See Separate Statement of Commissioner Jonathan S. Adelstein, MB Docket No. 07-42 (Jun. 15, 2007).

<sup>191</sup> See CaribeVision Holdings Comments at 2-3, 5; CBA Comments at 1; Combonate Media Group Comments at 2; LSPA Comments at 6; PBC Comments at 1; Reynolds Media Comments at 2-3; Shop NBC Comments at 3-4; Reynolds Media Reply Comments at 1-2.

<sup>192</sup> See *2006 Video Competition Report*, 21 FCC Rcd 15087 (2006).

<sup>193</sup> See Comcast Comments at 6.

<sup>194</sup> See TWC Comments at 14-15.

<sup>195</sup> See *id.* Comcast reports that approximately half of the leased access time on its systems is used for infomercials or home shopping. See Comcast Reply Comments at 4.

cable system carries commercial leased access programming on less than one channel.<sup>196</sup> As described below, to ensure that we have sufficient up-to-date information on the status of leased access programming in the future, we adopt an annual reporting requirement for cable operators.

68. *Discussion.* We adopt an annual reporting requirement for cable operators pertaining to leased access rates, usage, channel placement, and complaints, among other leased access matters.<sup>197</sup> We find that gathering up-to-date information and statistics on an annual basis pertaining to leased access is critical to our efforts to track trends in commercial leased access rates and usage as well as to monitor any efforts by cable operators to impede use of commercial leased access channels. This information will allow us to determine whether further modifications to the commercial leased access rules we adopt herein are needed based on a more concrete factual setting. The Annual Report will require each cable system to provide the following information:<sup>198</sup>

- List the number of commercial leased access channels provided by the cable system.
- List the channel number and tier applicable to each commercial leased access channel.
- Provide the rates the cable system charges for full-time and part-time leased access on each leased access channel.
- Provide the calculated maximum commercial leased access rate and actual rates.
- List programmers using each commercial leased access channel and state whether each programmer is using the channel on a full-time or part-time basis.
- List number of requests received for information pertaining to commercial leased access and the number of *bona fide* proposals received for commercial leased access.
- Describe whether you have denied any requests for commercial leased access and, if so, explain the basis for the denial.
- Describe whether a complaint has been filed against the cable system with the Commission or with a Federal district court regarding a commercial leased access dispute.
- Describe whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.
- Describe the extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.
- Describe the extent to which the cable system impose different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions). Explain any differences.
- List and describe any instances of the cable system requiring an existing programmer to move to another channel or tier.

69. Each cable system must submit this report with the Commission by April 30<sup>th</sup> of each year.

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<sup>196</sup> See NCTA Comments at 3 n.5 (citing *2006 Video Competition Report*, 21 FCC Rcd 15087 (2006)).

<sup>197</sup> See Appendix B (adopting 47 C.F.R. § 76.978(a)).

<sup>198</sup> Section 623(k) of the Communications Act requires the Commission to publish annually a statistical report on average rates for basic cable service, cable programming service, and equipment. To implement this requirement, the Media Bureau directs certain randomly selected cable operators to respond to a Cable Price Survey Questionnaire. See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Order, 21 FCC Rcd 1375 (MB 2006). We note that some of the questions listed in the leased access annual report may be similar to those appearing on the Cable Price Survey Questionnaire. We believe that requiring all cable systems to respond to questions pertaining to leased access is critical to ensure we have comprehensive data on leased access usage and trends.

The report will request information for the preceding year.<sup>199</sup> We anticipate that any burdens associated with this annual reporting requirement will be limited, as the information requested should be readily available to cable operators.

70. We provide leased access programmers and other interested parties with an opportunity to file comments on a voluntary basis with the Commission responding to the cable operators' annual leased access reports.<sup>200</sup> These comments should be filed by May 15<sup>th</sup> of each year. We invite commercial leased access programmers to provide information such as the following in these comments:

- List the number of commercial leased access channels leased on each cable system. Indicate the channel number and tier applicable to each commercial leased access channel.
- Describe whether a cable operator has denied any request for commercial leased access and, if so, explain the basis for the denial.
- Describe whether cable operators have responded to requests for information pertaining to leased access within three business days, as required by the Commission's rules.<sup>201</sup>
- Describe whether the programmer has filed any complaints with the Commission or a Federal district court against a cable operator regarding a commercial leased access dispute.
- Describe whether the programmer has sought arbitration with a cable operator regarding a commercial leased access dispute.
- Describe any difficulties the programmer has faced in trying to obtain access to a commercial leased access channel.

### III. CONSTITUTIONAL ISSUES

71. The revisions to the leased access rules we adopt herein withstand constitutional scrutiny.<sup>202</sup> While the leased access provision of the 1992 Cable Act has survived a facial First Amendment

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<sup>199</sup> For example, the report due on April 30, 2008, will pertain to information for the period from January 1, 2007 through December 31, 2007.

<sup>200</sup> See Appendix B (adopting 47 C.F.R. § 76.978(b)).

<sup>201</sup> See Appendix B (adopting 47 C.F.R. § 76.972(b)).

<sup>202</sup> We also reject Comcast's argument that the *NPRM* failed to provide the specificity required under the Administrative Procedure Act ("APA") and that the Commission must issue another notice before adopting final rules. See Comcast Comments at 14 n.34; Comcast Reply Comments at 39-41. Section 553(b) and (c) of the APA requires agencies to give public notice of a proposed rule making that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal. See 5 U.S.C. §§ 553(b), (c). The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved." See *Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted). In particular, the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the actions proposed. See *Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990). The questions raised in the *NPRM*, as well as the concerns mentioned in the *Adelphia Order* which resulted in the *NPRM*, regarding the adequacy of the current leased access regimes, including the complaint process, were sufficient to put interested parties on notice that the Commission was considering how to revise the leased access rules to effectuate the intent of Congress. See *NPRM*, 22 FCC Rcd 11222, ¶ 1 (citing *Adelphia Order*, 21 FCC Rcd 8203, 8277, ¶ 165; 8367 (Statement of Commissioner Copps); 8371 (Statement of Commissioner Adelstein)); see also *Adelphia Order*, 21 FCC Rcd at ¶¶ 99, 109, 114, 165, 190-91, 298. Because parties could have anticipated that the rules ultimately adopted herein were possible, it is a "logical outgrowth" of the original proposal, and adequate notice was provided under the APA. See *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (discussing APA notice requirements and the "logical outgrowth" test).

challenge,<sup>203</sup> Time Warner argues that changes in marketplace conditions call into question the validity of that decision.<sup>204</sup> Time Warner argues that, to the extent the goal of the leased access is to promote diversity of speech, the rules are content-based and thus subject to strict scrutiny, which requires a “compelling” government interest and “narrow tailoring.”<sup>205</sup> Moreover, Time Warner argues that whatever justification existed for the leased access provisions at the time they were adopted no longer exists today.<sup>206</sup> In response, MAP argues that because the courts have already upheld the leased access provision of the 1992 Cable Act as withstanding intermediate scrutiny, any revisions to the regulation of leased access rates is subject to only rational basis scrutiny.<sup>207</sup>

72. The D.C. Circuit had already decided that the leased access provision of the 1992 Cable Act is not content-based.<sup>208</sup> The leased access provision does not favor or disfavor speech on the basis of the ideas contained therein; rather, it regulates speech based on affiliation with a cable operator.<sup>209</sup> The court held in *Time Warner* that the provisions of the Cable Act that regulate speech based on affiliation with a cable operator are subject to intermediate scrutiny and are constitutional if the government’s interest is important or substantial and the means chosen to promote that interest do not burden substantially more speech than necessary to achieve the aim.<sup>210</sup> The *Time Warner* court found that there is a substantial government interest in promoting diversity and competition in the video programming marketplace.<sup>211</sup> Despite Time Warner’s claim to the contrary, we find that this substantial government interest remains today. While MVPDs note the Commission’s statement in *Program Access Order* that the percentage of all programming networks that are affiliated with cable operators has decreased since 1992,<sup>212</sup> the Commission went on to state that this decrease was not sufficient to conclude that restrictions on cable-affiliated programming should be lifted because competition and diversity in the video distribution market has not yet reached the level which Congress intended in passing the 1992 Cable Act.<sup>213</sup> While MVPDs argue that there are more outlets today for independent programmers, such as the Internet,<sup>214</sup> they fail to demonstrate that these alternative outlets can be considered sufficient to conclude that Congress’s goals of promoting competition and diversity in passing the leased access provisions of the 1992 Cable Act have been achieved. The rules we adopt today simply implement the statutory requirements enacted by Congress.

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<sup>203</sup> See *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (“*Time Warner*”).

<sup>204</sup> See *Time Warner Comments* at 11.

<sup>205</sup> See *Time Warner Comments* at 12.

<sup>206</sup> See *Time Warner Comments* at 11-12; see also *Comcast Comments* at 6-12; *Comcast Reply Comments* at 2-6.

<sup>207</sup> See *MAP Reply Comments* at 3 (citing *Valuevision*, 149 F.3d 1204).

<sup>208</sup> See *Time Warner*, 93 F.3d at 969.

<sup>209</sup> See *id.*

<sup>210</sup> See *id.*

<sup>211</sup> See *id.* (stating that after *Turner*, “promoting the widespread dissemination of information from a multiplicity of sources” and “promoting fair competition in the market for television programming” must be treated as important governmental objectives unrelated to the suppression of speech (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994))).

<sup>212</sup> See *Time Warner Reply Comments* at 2 (citing *Program Access Order*, 22 FCC Rcd 17791, 17838, ¶ 66); see also *Verizon Reply Comments* at 3.

<sup>213</sup> See *Program Access Order*, 22 FCC Rcd 17791, 17810, ¶ 29, and 17837-38, ¶ 65.

<sup>214</sup> See *Comcast Comments* at 10-12; *Time Warner Comments* at 10.

73. We also reject Time Warner's claim that the leased access rules deprive cable operators of the value of their property (*i.e.*, channel capacity) without just compensation in violation of the Fifth Amendment.<sup>215</sup> The Fifth Amendment "takings" clause requires "just compensation" for a government "taking" of private property.<sup>216</sup> Moreover, the leased access provision of the 1992 Cable Act, as well as our rules implementing that provision, provide just compensation to cable operators for use of their channel capacity. While Time Warner argues further that there must be an "essential nexus" between the taking and a legitimate state interest as well as a "rough proportionality" between the taking and the magnitude of the government objective,<sup>217</sup> we conclude that leased access rules satisfy these requirements. As the D.C. Circuit previously held, there is a substantial government interest in promoting competition and diversity in the video programming marketplace, and the provisions of the 1992 Cable Act regulating cable-affiliated programming are narrowly tailored to achieve those goals.<sup>218</sup> Thus, there is no "taking" within the meaning of the Fifth Amendment.

#### IV. FURTHER NOTICE OF PROPOSED RULE MAKING

74. As noted, for the time being, we have decided not to apply new rate methodology and the maximum allowable leased access rate to programmers that predominantly transmit sales presentations or program length commercials. These direct sales programmers often "pay" for carriage -- either directly or through some form of revenue sharing with the cable operator.

75. Similarly, we are concerned about setting the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements. Accordingly, we seek comment regarding the use of leased access by programmers that predominantly transmit sales presentations and program length commercials. Specifically, is leased access affordable to these programmers at current rates? Will applying the modified rate formula discussed previously in this *Report and Order* cause migration of existing services to leased access? What would be the effect of such a migration? Is a separate category for direct sales programmers appropriate? We note that in our initial adoption of the leased access rules to implement the 1992 Cable Act, the rates were established for three programming categories; programming for which a per-event or per channel charge is made, programming in which more than fifty per cent of the capacity is used to sell products directly to customers, and all other programming.<sup>219</sup> These programming categories were intended to reflect the different economies faced by the different types of programmers.

#### V. PROCEDURAL MATTERS

##### A. Filing Requirements

76. *Ex Parte Rules.* The *Further Notice of Proposed Rulemaking* ("FNPRM") in this proceeding will be treated as "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's Rules.<sup>220</sup> *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex*

<sup>215</sup> See Time Warner Comments at 13 n.51.

<sup>216</sup> See *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (the Fifth Amendment does not prohibit takings, only uncompensated ones).

<sup>217</sup> See Time Warner Comments at 13 n.51 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994)).

<sup>218</sup> See *Time Warner Entertainment Co. L.P.*, 93 F.3d at 969-71, 978-79.

<sup>219</sup> *Rate Order*, 8 FCC Rcd at 5949.

<sup>220</sup> See 47 C.F.R. § 1.1206(b), as revised.

*parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>221</sup> Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

77. *Comments and Reply Comments.* Pursuant to Sections 1.415 and 1.419 of the Commission's Rules,<sup>222</sup> interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.<sup>223</sup>

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

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<sup>221</sup> See *id.* § 1.1206(b)(2).

<sup>222</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>223</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

78. **People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

79. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or [bill.cline@fcc.gov](mailto:bill.cline@fcc.gov). These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12<sup>th</sup> Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com); or via their website at <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

80. *Information.* For additional information on this proceeding, contact Katie Costello, [Katie.Costello@fcc.gov](mailto:Katie.Costello@fcc.gov) of the Media Bureau, Policy Division, (202) 418-2120.

## **B. Initial and Final Regulatory Flexibility Analysis**

81. *Initial Regulatory Flexibility Analysis ("IRFA").* The Regulatory Flexibility Act of 1980, as amended ("RFA"),<sup>224</sup> requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."<sup>225</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>226</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>227</sup> A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>228</sup> As required by the RFA,<sup>229</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in the *FNPRM*. The IRFA is set forth in Appendix F.

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<sup>224</sup> The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>225</sup> 5 U.S.C. § 605(b).

<sup>226</sup> *Id.* § 601(6).

<sup>227</sup> *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

<sup>228</sup> 15 U.S.C. § 632.

<sup>229</sup> *See* 5 U.S.C. § 603.

82. *Final Regulatory Flexibility Analysis ("FRFA")*. As required by the RFA,<sup>230</sup> the Commission has prepared an FRFA relating to the *Report and Order*. The FRFA is set forth in Appendix E.

### C. Paperwork Reduction Act Analysis

83. *Initial Paperwork Reduction Act Analysis*. The *FNPRM* has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),<sup>231</sup> and contains no proposed new or modified information collection requirements. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.<sup>232</sup>

84. *Final Paperwork Reduction Act Analysis*. The *Report and Order* contains both new and modified information collection requirements subject to the PRA. It will be submitted to the OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." In this present document, we have assessed the potential effects of the various policy changes with regard to information collection burdens on small business concerns, and we find that these requirements will benefit many companies with fewer than 25 employees by facilitating the use of leased access channels and by promoting the fair and expeditious resolution of leased access complaints. In addition, we have described impacts that might affect small businesses, which includes most businesses with fewer than 25 employees, in the FRFA in Appendix E, *infra*.

### D. Congressional Review Act

85. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

86. Effective Date. In order to give the industry adequate time to comply with the new rate regulations adopted herein, they will become effective 90 days after publication in the *Federal Register*.<sup>233</sup> Those rules containing information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA") shall become effective upon approval from the Office of Management

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<sup>230</sup> See 5 U.S.C. § 604.

<sup>231</sup> The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

<sup>232</sup> The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); see 44 U.S.C. § 3506(c)(4).

<sup>233</sup> See Appendix B (adopting revisions to 47 C.F.R. § 76.970).

and Budget (“OMB”).<sup>234</sup> The remaining rules will become effective 30 days after publication in the *Federal Register*.<sup>235</sup>

## VI. ORDERING CLAUSES

87. Accordingly, **IT IS ORDERED**, pursuant to the authority found in Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532, this *Report and Order and Further Notice of Proposed Rulemaking IS ADOPTED*.

88. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532, the Commission’s Rules **ARE HEREBY AMENDED** as set forth in Appendix B.

89. **IT IS FURTHER ORDERED** that, in order to give the industry adequate time to comply with the new rate regulations adopted herein, the amendments to Section 76.970 adopted herein **WILL BECOME EFFECTIVE 90 days** after publication in the *Federal Register*, and all other rules adopted herein **WILL BECOME EFFECTIVE 30 days** after publication in the *Federal Register*, except for those rules which contain information collection requirements subject to the PRA which shall be effective upon OMB approval.<sup>236</sup>

90. **IT IS FURTHER ORDERED** that the Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Initial and Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

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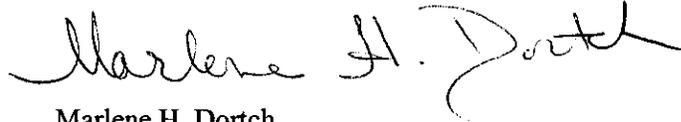
<sup>234</sup> These rules are 47 C.F.R. § 76.972(a), (b), (c), (d), (e), and (g) (adopts customer service standards); second sentence of 47 C.F.R. 76.975(d) (adopts procedure for suspending time limit for filing complaint); 47 C.F.R. § 76.975(e) (adopts discovery procedures); 47 C.F.R. § 76.975(f) (adopts procedures for protection of confidential information); second sentence of 47 C.F.R. § 76.975(g) (requires cable operator to submit certain documents along with response to a leased access complaint); 47 C.F.R. § 76.975(h)(4) (pertains to submission of final offers); 47 C.F.R. § 76.978 (adopts leased access annual report). See Appendix B. The Commission will publish a document in the *Federal Register* announcing the effective date of these rules. Moreover, the rule revisions that eliminate the independent accountant requirement are dependent upon certain other rules that require OMB approval becoming effective. See *supra* ¶ 56. Accordingly, we delay the effectiveness of the revisions to 47 C.F.R. § 76.975(b), (c), and (d) (all of which eliminate the independent accountant requirement, or references thereto) until the following rules take effect: 47 C.F.R. § 76.975(e) (adopts discovery procedures); 47 C.F.R. § 76.975(f) (adopts procedures for protection of confidential information); second sentence of 47 C.F.R. § 76.975(g) (requires cable operator to submit certain documents along with response to a leased access complaint), and 47 C.F.R. § 76.970 (adopting new rate regulations). In addition, we delay the effectiveness of the rule that adopts a forfeiture for violation of the customer service standards (47 C.F.R. § 76.972(f)) until the rules establishing customer service standards take effect (47 C.F.R. § 76.972(a), (b), (c), (d), (e), and (g)). We note, however, that the rule revisions that eliminate the independent accountant requirement and adopt a forfeiture for violation of the customer service standards are not subject to OMB approval.

<sup>235</sup> These rules are the first, third, and fourth sentences of 76.975(g) (currently stated in 47 C.F.R. § 76.975(e)); 47 C.F.R. § 76.975(h)(1) (requires Media Bureau to act on leased access complaint within 90 days after close of pleading cycle); 47 C.F.R. § 76.975(h)(2) (currently stated in 47 C.F.R. § 76.975(f)); 47 C.F.R. § 76.975(h)(3) (currently stated in 47 C.F.R. § 76.975(g)); 47 C.F.R. § 76.975(i) (redesignating paragraph (h) to (i)). See Appendix B. We note that, except for 47 C.F.R. § 76.975(h)(1) (requiring Media Bureau to act on a leased access complaint within 90 days after close of pleading cycle), these substantive rules are already in effect and will remain so pending the effective date of their redesignation to other paragraphs within 47 C.F.R. § 76.975.

<sup>236</sup> The Commission will publish a document in the *Federal Register* announcing the effective date of the rules that require OMB approval.

91. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Marlene H. Dortch". The signature is written in black ink and is positioned above the printed name and title.

Marlene H. Dortch  
Secretary

**APPENDIX A****List of Commenters****Comments filed in MB Docket No. 07-42**

Black Television News Channel  
Bruno Goodworth Network, Inc  
CaribeVision Holdings LLC  
Charles Stogner  
Combonate Media Group  
Comcast Corporation  
Community Broadcasters Association  
Duane J. Polich  
Engle Broadcasting  
Ideal Living Media  
iNFO Channel Group  
Media Access Project  
National Cable & Telecommunications Association  
NFL Enterprises LLC  
Pope Broadcasting Company, Inc  
Positive Media, Inc d/b/a TV Camden  
Reynolds Media Inc  
SHOP NBC  
StogMedia  
The America Channel  
Time Warner Cable Inc.

**Reply Comments filed in MB Docket No. 07-42**

Black Television News Channel  
CaribeVision Holdings LLC  
Combonate Media Group  
Comcast Corporation  
Crown Media Holdings, Inc/The Hallmark Channel  
Engle Broadcasting  
HDNet  
HTV Corporation  
Leased Access Programmers Association  
Media Access Project  
National Cable & Telecommunications Association  
NFL Enterprises LLC  
Pope Broadcasting Company, Inc  
Positive Media, Inc d/b/a TV Camden  
Reynolds Media Inc.  
Time Warner Cable Inc.  
Verizon  
WealthTV

**APPENDIX B****Revised Rules**

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

**AUTHORITY:** 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Amend section 76.970 to revise paragraph (d), revise the first sentence of paragraph (e), revise paragraph (i) and add new paragraph (j) to read as follows:

**§ 76.970 Commercial leased access rates.**

\* \* \* \* \*

(d) The maximum commercial leased access rate that a cable operator may charge to programmers that predominantly transmit sales presentations or program length commercials for full-time channel placement on a tier exceeding a subscriber penetration of 50 percent is the average implicit fee for full-time channel placement on all such tier(s).

(e) The average implicit fee identified in paragraph (d) of this section for a full-time channel on a tier with a subscriber penetration over 50 percent shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on all such tier(s), and then subtracting the total amount it pays in programming costs per month for such tier(s) (the "total implicit fee calculation").

\* \* \*

\* \* \* \* \*

(i) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement, except to programmers that predominantly transmit sales presentations or program length commercials, is the lower of the marginal implicit fee for a full-time channel placement on the tier where the leased access programming will be placed or \$0.10 per subscriber per month.

(j) (1) (i) The marginal implicit fee identified in paragraph (i) of this section for a full-time channel shall be calculated by first determining the mark-up of the tier where the leased access programming will be placed. The mark-up is calculated by determining the total amount the operator receives in subscriber revenue per month for the tier, and dividing by the total amount it pays in affiliation fees for the channels located on the tier. The resulting figure is the mark-up. In cases where the cost and channels of one tier are implicitly incorporated into a larger tier, the larger tier price is equal to the larger tier price minus the smaller tier price and the channels on the larger tier are those that are not available on the smaller tier. (ii) The monthly gross subscriber revenue per channel is obtained by multiplying the monthly per subscriber affiliation fee for each channel by the mark-up for the tier. The net subscriber revenue per channel per month for each channel is the difference between the monthly gross subscriber revenue per channel and the monthly per subscriber affiliation fee paid for that channel by the cable operator. This value represents the implicit fee for the individual channel. (iii) To determine the marginal channels on the tier for systems with 55 or more activated channels, multiply the number of non-mandated channels on the tier by 0.15 and round to the nearest number. To determine the marginal channels on the tier for systems with 54 or less activated

channels, multiply the number of non-mandated channels on the tier by 0.10 and round to the nearest number. That is the number of marginal channels. Next identify the channels with the lowest implicit fee until that number is reached. These are the marginal channels. (iv) Finally, calculate the marginal implicit fee by taking the mean of the implicit fees of the marginal channels by summing the implicit fees of the marginal channels and dividing by the number of marginal channels. The result is the marginal implicit fee.

(2) The affiliation fees for channels used in determining the marginal implicit fee are the contractual license fee or retransmission consent fee representing the compensation per subscriber per month paid to the programmer for the right to carry the programming. It excludes fees for services other than the provision of channel capacity, such as marketing, and excludes revenues. The affiliation fees for channels used in determining the marginal implicit fee shall reflect the prevailing affiliation fees offered in the marketplace to third parties. If a prevailing affiliation fee does not exist, the affiliation fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The marginal implicit fee calculation shall be based on affiliation fees in contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(3) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(4) Cable operators are permitted to negotiate rates below the maximum permitted rates.

3. Add new section 76.972 to read as follows:

**§ 76.972 Customer service standards.**

(a) (1) A cable system operator shall maintain a contact name, telephone number and e-mail address on its website and available by telephone of a designated person to respond to requests for information about leased access channels.

(2) A cable system operator shall maintain a brief explanation of the leased access statute and regulations on its website.

(b) Cable system operators shall provide prospective leased access programmers with the following information within three business days of the date on which a request for leased access information is made:

(1) The cable system operator's process for requesting leased access channels;

(2) The geographic and subscriber levels of service that are technically possible;

(3) The number and location and time periods available for each leased access channel;

(4) Whether the leased access channel is currently being occupied;

(5) A complete schedule of the operator's statutory maximum full-time and part-time leased access rates;

(6) A comprehensive schedule showing how those rates were calculated;

(7) Rates associated with technical and studio costs;

- 
- (8) Whether inclusion in an electronic programming guide is available;
- (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method;
- (10) A comprehensive sample leased access contract that includes uniform terms and conditions such as tier and channel placement, contract terms and conditions, insurance requirements, length of contract, termination provisions and electronic guide availability; and
- (11) Information regarding prospective launch dates for the leased access programmer.
- (c) A *bona fide* proposal, as used in this section, is defined as a proposal from a potential leased access programmer that includes the following information:
- (1) The desired length of a contract term;
  - (2) The tier, channel and time slot desired;
  - (3) The anticipated commencement date for carriage;
  - (4) The nature of the programming;
  - (5) The geographic and subscriber level of service requested; and
  - (6) Proposed changes to the sample contract.
- (d) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.
- (e) A cable system operator must respond to a *bona fide* proposal within 10 days after receipt.
- (f) A cable system operator will be subject to a forfeiture for each day it fails to comply with Sections 76.972(a) or 76.972(e).
- (g) (1) Operators of systems subject to small system relief shall provide the information required in paragraph (b) of this section within 30 calendar days of a *bona fide* request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either:
- (i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or
  - (ii) Have been granted special relief.
- (2) *Bona fide* requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:
- (i) The desired length of a contract term;
  - (ii) The time slot desired;
  - (iii) The anticipated commencement date for carriage; and

(iv) The nature of the programming.

4. Section 76.975 is amended to revise paragraphs (b) through (h) and to redesignate old paragraph (h) as new paragraph (i) to read as follows:

**§ 76.975 Commercial leased access dispute resolution.**

\* \* \*

(b) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act, or our implementing regulations, §§ 76.970, 76.971, and 76.972 may file a petition for relief with the Commission.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's Rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator.

(d) The petition must be filed within 60 days of the alleged violation. The time limit on filing complaints will be suspended if the complainant files a notice with the Commission prior to the expiration of the filing period, stating that it seeks an extension of the filing deadline in order to pursue active negotiations with the cable operator, and the cable operator agrees to the extension.

(e) *Discovery.* In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a leased access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

(f) *Protective Orders.* In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of leased access complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.

(g) The cable operator or other respondent will have 30 days from the filing of the petition to file a response. To the extent that a cable operator expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a response is submitted, the staff

finds a *prima facie* violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(h)(1) The Media Bureau will resolve a leased access complaint within 90 days of the close of the pleading cycle.

(2) The Media Bureau, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. 503, denying the petition, or issuing a ruling on the petition or dispute.

(3) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. 532 or §§ 76.970, 76.971, or 76.972, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(4) As part of the remedy phase of the leased access complaint process, the Media Bureau will have discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute. The Commission will have the discretion to adopt one of the proposals or choose to fashion its own remedy.

5. Section 76.978 is added to read as follows:

#### **§ 76.978 Leased Access Annual Reporting Requirement**

(a) Each cable system shall submit a Leased Access Annual Report with the Commission on a calendar year basis, no later than April 30<sup>th</sup> following the close of each calendar year, which provides the following information for the calendar year:

(1) The number of commercial leased access channels provided by the cable system.

(2) The channel number and tier applicable to each commercial leased access channel.

(3) The rates the cable system charges for full-time and part-time leased access on each leased access channel.

(4) The cable system's calculated maximum commercial leased access rate and actual rates.

(5) The programmers using each commercial leased access channel and whether each programmer is using the channel on a full-time or part-time basis.

(6) The number of requests received for information pertaining to commercial leased access and the number of bona fide proposals received for commercial leased access.

(7) Whether the cable system has denied any requests for commercial leased access and, if so, with an explanation of the basis for the denial.

(8) Whether a complaint has been filed against the cable system with the Commission or a Federal district court regarding a commercial leased access dispute.

(9) Whether any entity has sought arbitration with the cable system regarding a commercial leased access dispute.

(10) The extent to which and for what purposes the cable system uses commercial leased access channels for its own purposes.

(11) The extent to which the cable system impose different rates, terms, or conditions on commercial leased access programmers (such as with respect to security deposits, insurance, or termination provisions) with an explanation of any differences.

(12) A list and description of any instances of the cable system requiring an existing programmer to move to another channel or tier.

(b) Leased access programmers and other interested parties may file comments with the Commission in response to the Leased Access Annual Reports by May 15th.

## APPENDIX C

**Standard Protective Order and Declaration for Use in Section 612 Commercial Leased Access Proceedings**

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

In the Matter of )  
 ) Docket No. \_\_\_\_\_  
[Name of Proceeding] )

## PROTECTIVE ORDER

1. This Protective Order is intended to facilitate and expedite the review of documents obtained from a person in the course of discovery that contain trade secrets and privileged or confidential commercial or financial information. It establishes the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

## 2. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph 7.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

3. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 2.c of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R. §§ 0.459 and 0.461, determine that

all or part of the information claimed as “Confidential Information” is not entitled to such treatment.

4. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, “CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE.” Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

5. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

6. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement the scope of which includes the Confidential Information, or if they execute the attached Declaration.

7. Disclosure. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 8 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

8. Authorized Representatives shall be limited to:

a. Subject to Paragraph 8.d, counsel for the Reviewing Parties to this proceeding, including in-house counsel, actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Subject to Paragraph 8.d, specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding; and

c. Subject to Paragraph 8.d., any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper; except that,

d. Disclosure shall be prohibited to any persons in a position to use the Confidential Information for competitive commercial or business purposes, including persons involved in competitive decision-making, which includes, but is not limited to, persons whose activities, association or relationship with the Reviewing Parties or other Authorized Representatives involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or any other person's

business decisions that are or will be made in light of similar or corresponding information about a competitor.

9. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

10. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding. Authorized Representatives must maintain a written record of any additional copies made and provide this record to the Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly and fully secured from access by unauthorized persons at all times.

11. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

12. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

13. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notations required by this Paragraph 13 are not removed.

14. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

15. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall, at the direction of the Submitting Party, destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 10 and 12 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

16. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

17. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

18. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

19. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).

## Attachment A to Section 612 Protective Order

## DECLARATION

In the Matter of )  
[Name of Proceeding] ) Docket No. \_\_\_\_\_

I, \_\_\_\_\_, hereby declare under penalty of perjury that I have read the Protective Order that has been entered by the Commission in this proceeding, and that I agree to be bound by its terms pertaining to the treatment of Confidential Information submitted by parties to this proceeding. I understand that the Confidential Information shall not be disclosed to anyone except in accordance with the terms of the Protective Order and shall be used only for purposes of the proceedings in this matter. I acknowledge that a violation of the Protective Order is a violation of an order of the Federal Communications Commission. I acknowledge that this Protective Order is also a binding agreement with the Submitting Party. I am not in a position to use the Confidential Information for competitive commercial or business purposes, including competitive decision-making, and my activities, association or relationship with the Reviewing Parties, Authorized Representatives, or other persons does not involve rendering advice or participating in any or all of the Reviewing Parties', Associated Representatives' or other persons' business decisions that are or will be made in light of similar or corresponding information about a competitor.

(signed) \_\_\_\_\_

(printed name) \_\_\_\_\_

(representing) \_\_\_\_\_

(title) \_\_\_\_\_

(employer) \_\_\_\_\_

(address) \_\_\_\_\_

(phone) \_\_\_\_\_

(date) \_\_\_\_\_

## APPENDIX D

## Example Calculation of the Leased Access Rate

## I. Example of the Marginal Implicit Fee Calculation

The following table illustrates the channel line-up of a tier with greater than 50% subscriber penetration. The tier consists of 26 channels. We will assume that 100 subscribers purchase this tier and that they all pay the retail price of \$18.95.

<b>Programming</b>	<b>Affiliation Fee Paid by Cable Operator to the Programmer (monthly amount per subscriber )</b>	<b>Implicit Fee (net revenue)</b>
Broadcast Station 1	\$ 0.00	\$ 0.000
Broadcast Station 2	\$ 0.05	\$ 0.082
Broadcast Station 3	\$ 0.00	\$ 0.000
PEG 1	\$ 0.00	\$ 0.000
Leased Access 1	\$ 0.00	\$ 0.000
Cable Network 1	\$ 0.12	\$ 0.196
Cable Network 2	\$ 0.34	\$ 0.556
Cable Network 3	\$ 0.05	\$ 0.082
Cable Network 4	\$ 0.07	\$ 0.114
Cable Network 5	\$ 0.01	\$ 0.016
Cable Network 6	\$ 0.04	\$ 0.065
Cable Network 7	\$ 0.05	\$ 0.082
Cable Network 8	\$ 0.27	\$ 0.442
Cable Network 9	\$ 0.00	\$ 0.000
Cable Network 10	\$ 0.10	\$ 0.164
Cable Network 11	\$ 0.48	\$ 0.785
Cable Network 12	\$ 2.19	\$ 3.582
Cable Network 13	\$ 1.10	\$ 1.799
Cable Network 14	\$ 0.57	\$ 0.932
Cable Network 15	\$ 0.15	\$ 0.245
Cable Network 16	\$ 0.41	\$ 0.671
Cable Network 17	\$ 0.19	\$ 0.311
Cable Network 18	\$ 0.06	\$ 0.098
Cable Network 19	\$ 0.21	\$ 0.343
Cable Network 20	\$ 0.11	\$ 0.180
Cable Network 21	\$ 0.62	\$ 1.014

**Step 1: Determine Monthly per-subscriber Affiliation Fees for each Channel on the Tier**

The preceding table presents the monthly per-subscriber affiliation fee paid by the cable operator to the programmer. These values are those contractually agreed to and paid by the cable operator. As illustrated, this hypothetical cable operator carries three broadcast stations. Two of the broadcast stations do not receive a monthly per-subscriber payment from the cable operator, while "Broadcast Station 2" receives \$0.05 per month per subscriber from the cable operator. In addition, "Cable Network 8" and "Cable Network 9" are sold by the programmer on a bundled basis in a contract which does not specify individual affiliation fees for each network, but instead specifies a rate of \$0.27 for carriage of both

networks. "Cable Network 8" is the higher rated of the two networks and therefore the affiliation fee is allocated to it and the affiliate fee for "Cable Network 9" is set equal to zero.

### **Step 2: Determine the Mark-up of the Tier**

The mark-up is equal to the total subscriber revenue for the programming tier ( $100 \times \$18.95 = \$1,895$ ), divided by the total of the affiliation fees the cable operator pays to the programmers for the channels on the tier ( $100 \times \$7.19 = \$719$ ). In the example the mark-up is equal to 2.636.

### **Step 3: Determine the Implicit Fee of each Channel on the Tier**

The implicit fee, or net revenue, is equal to the gross revenue from the channel less the affiliation fee of the channel. The gross revenue is obtained by multiplying the affiliation fee by the mark-up of the tier.

### **Step 4: Determine the Number of Marginal Channels on the Tier**

The number of marginal channels is equal to 15% of the non-mandated channels on the tier. In this case, the tier contains 5 mandated channels: "Broadcast Station 1," "Broadcast Station 2," "Broadcast Station 3," "PEG 1," and "Leased Access 1." Therefore there are 21 non-mandated channels on the tier. The number of marginal channels is  $0.15 \times 21 = 3.15$ . The result should be rounded to the nearest positive integer. This tier has three marginal channels.

### **Step 5: Determine the Marginal Channels**

The marginal channels are the three non-mandated channels with the lowest implicit fee. In this example, those channels are: "Cable Network 5," "Cable Network 6," and "Cable Network 9."

### **Step 6: Calculate the Marginal Implicit Fee**

The marginal implicit fee is the mean of the implicit fees of the three marginal channels. The marginal implicit fee is  $(0.000 + 0.016 + 0.065)/3 = 0.027$ . The monthly rate for a leased access programmer on this tier is \$0.027 per subscriber.

## **II. Alternative Methods for Calculating the Maximum Allowable Leased Access Rate**

1. We use several methods to examine aggregate information on the cable industry and develop a maximum allowable leased access rate. All of our methods begin with the construction of hypothetical analog and digital tiers based upon the 194 most widely distributed networks.<sup>1</sup> We base the sizes of the hypothetical analog and digital tiers on data collected via the FCC's Cable Price Survey. The survey indicates that the average analog tier contains 54.9 non-mandated channels and the most highly subscribed digital tier contains 33.7 additional channels.<sup>2</sup> The most widely distributed networks were

<sup>1</sup> We obtain the number of subscribers to the most widely distributed programming networks from SNL Kagan, *Economics of Basic Cable Networks, 13th Ed.* (at 36-40) and SNL Kagan, *Media Trends, 2007 Edition* (at 58). Affiliation fees for these networks are from SNL Kagan, *Economics of Basic Cable Networks, 13th Edition* (at 60-62); SNL Kagan, *Media Trends, 2007 Edition* (at 59); and SNL Kagan, *Cable Program Investor*, October 18, 2007 (at 2-3).

<sup>2</sup> *Report on Cable Industry Prices*, Table 4, 21 FCC Rcd 15087 (released December 27, 2006).