

**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 VERIZON<sup>1</sup>**

**I. INTRODUCTION AND SUMMARY**

The record in this proceeding supports the Commission’s tentative conclusion that its new leased access rate formula should not apply to programmers that predominantly transmit sales presentations or program length commercials.<sup>2</sup> Commenters establish that extending the new, dramatically lower rate structure to home shopping channels and infomercial providers would not further the goals underlying the Commission’s leased access rules, including increased diversity of programming, because these programmers already receive widespread coverage today through commercially negotiated arrangements. A Commission mandate to lower rates to these programmers by extending the new leased access rate formula, however, would financially harm video providers and thus contravene the specific directive of Section 612 to ensure that

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<sup>1</sup> The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

<sup>2</sup> See Report and Order and Further Notice of Proposed Rulemaking, *Leased Commercial Access*, 23 FCC Rcd 2909 (2008) (“*Order*”).

leased access rules do not cause financial harm to video providers.<sup>3</sup>

Expanding leased access obligations by extending the lower leased access rates to home shopping and infomercial programmers would also raise serious First Amendment concerns. Courts have upheld regulations of this ilk only in cases where cable incumbents still possessed their historical bottleneck control over access to consumers. In areas where there is now wireline competition – and certainly in the case of new entrants – there is no bottleneck, and such regulations that infringe on video providers’ First Amendment rights cannot stand. The fact that home shopping and infomercial programming already receive widespread carriage through voluntary arrangements further removes any basis for extending the new rates to these programmers, and exacerbates the First Amendment problems that would result from doing so.

## **II. ARGUMENT**

Extending the new, dramatically lower leased access rates to infomercial providers and home shopping networks would not further the goals underlying leased access, but instead would cause these programmers to migrate from existing commercially negotiated carriage arrangements, causing financial harm to cable providers while providing no diversity benefits to subscribers.

As the record in this proceeding shows, infomercial and home shopping programmers have a very different business model from other independent programmers. *See, e.g.*, Verizon Comments at 3. These providers *already* receive broad carriage today through commercially negotiated arrangements under which these programmers typically pay operators a fee for

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<sup>3</sup> *See* Comments of Verizon, MB Dkt. No. 07-42, at 2-3 (filed Mar. 31, 2008) (“Verizon Comments”) (explaining that home shopping channels and infomercial providers generally pay video providers to obtain coverage).

carriage.<sup>4</sup> For example, Verizon already has voluntary, commercial arrangements with two of the more vocal commenters in this proceeding – Shop NBC and Home Shopping Network – in addition to other commercial home shopping channels. Given their business model, such programmers do not need the benefit of leased access rules – much less artificially low leased access rates – in order to be carried, and the record here shows that these programmers have been able to prosper and proliferate without the need for subsidized, leased access rates.<sup>5</sup>

The record also shows – and at least one home shopping network seems to concede – that even at current leased access rates, home shopping and infomercial providers have made pervasive use of leased access channels.<sup>6</sup> Therefore, the contention that home shopping programmers “have been unable to either obtain leased access at current rates or negotiate carriage with operators in many markets,” Shop NBC Comments at 7, is directly contradicted by the record in this proceeding. Because these programmers are already widely carried – both pursuant to commercially negotiated arrangements and leased access arrangements – there is no reason to extend the new, lower leased access rate to these programmers, and doing so would not serve the goal of increasing programming diversity. As Commissioner Copps observed,

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<sup>4</sup> See, e.g., Comments of the National Cable & Telecommunications Association, MB Dkt. No. 07-42, at 5 (filed Mar. 31, 2008) (“NCTA Comments”); Comments of Shop NBC, MB Dkt. No. 07-42, at 23-25 (filed Mar. 31, 2008) (“Shop NBC Comments”); Verizon Comments at 3-4.

<sup>5</sup> See, e.g., Comments of Home Shopping Network, Inc., MB Dkt. No. 07-42, at 10 (filed Mar. 31, 2008) (“HSN Comments”) (observing that “the types and sources of televised sales programming continue to expand in order to meet robust consumer demand”); Shop NBC Comments at 3 (arguing that home shopping networks have been so successful that “home shopping television networks earned an estimated *ten billion dollars* in sales revenue in the United States in 2007”) (emphasis in original); NCTA Comments at 4-5 (noting that leased access is currently more affordable to shopping networks than to other program networks); Verizon Comments at 5-6.

<sup>6</sup> See HSN Comments at 18 (noting that direct sales programmers have “consistently” used leased access “since the implementation of the leased access regime”).

“[m]igrating from one part of the cable platform to another would not increase programming diversity.”<sup>7</sup>

Lowering leased access rates for home shopping and infomercial programmers also would unnecessarily upset the existing commercial carriage arrangements that these programmers have negotiated. This would injure video providers who are denied the benefits of their existing carriage agreements, including the revenue stream typically accompanying the carriage contracts between home shopping channels and video providers. National Cable & Telecommunications Association observes that the Commission’s new rate formula will substantially lower rates and could result in a rate of *zero* for many cable operators.<sup>8</sup> If the Commission were to apply the new rate formula to home shopping channels and infomercials, these providers would have every incentive to obtain free carriage through leased access, rather than pay for carriage through the commercial arrangements that they have today. Not only would such government regulation fail to further the statutory goal of increasing programming diversity, it would also result in simply subsidizing these programmers at the financial expense of video providers. Such rules would contravene Section 612(c)(1), which requires the Commission to ensure that “the price, terms, and conditions of [leased access] use . . . are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.” 47 U.S.C. § 532(c)(1).

Contrary to the claims of some commenters, home shopping programmers would have every incentive to migrate to leased access should the Commission extend its new rate formula.

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<sup>7</sup> Statement of Commissioner Michael J. Copps, *Order* at 80.

<sup>8</sup> See NCTA Comments at 6-7. After reviewing the new “marginal implicit fee” formula, media analyst Larry Gerbrandt has estimated that “the new formula will garner a fee that is likely, in many cases, to be approximately zero.” See *id.* at Attach. A, ¶ 12.

*See, e.g.*, NCTA Comments at 5-8; Verizon Comments at 4-5. For perfectly logical and economic reasons, if the available leased access rate is lower than what these providers already pay today – and especially as the rate approaches zero – they would have every reason to take advantage of a lower price through leased access, thereby reducing their own costs. *See also* NCTA Comments at 6 (suggesting that migration to leased access under a “marginal implicit fee” formula is likely despite any additional benefits of negotiated carriage arrangements). Home Shopping Network’s claim that “no material migration has occurred,” HSN Comments at 16, which was echoed by Shop NBC, *see* Shop NBC Comments at 25, misses the point, as the Commission’s concern in the instant proceeding is whether migration would occur in the future should the new “marginal implicit fee” formula be applied. *See, e.g.*, NCTA Comments at 7 (noting that, even though there have been few instances of migration thus far, there undoubtedly would be under the “marginal implicit fee” formula). Indeed, home shopping programmers’ supposition that migration will not occur are undercut by their continued interest in leased access, despite the fact that they can and do already obtain carriage via negotiated agreements today. *See, e.g.*, HSN Comments at 13-14; Shop NBC Comments at 23-25.

Some commenters suggest that the Commission extend the lower rate formula to home shopping and infomercial programmers, but adopt limitations to ensure that such programming does not crowd out other leased access programmers.<sup>9</sup> These proposals, however, simply confirm that video providers could well be flooded by leased access requests if infomercial and

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<sup>9</sup> For example, Communications Workers of America, *et al.* ask the agency to extend the new rates to sales programmers, but to limit the capacity available to such programmers and reserve the right to foreclose the new rates in the future. *See* Comments of Communications Workers of America, *et al.*, MB Dkt. No. 07-42, at 4 (filed Mar. 31, 2008). Combonate Media Group urges the FCC to distinguish between local and national promotion of products, businesses, and organizations. *See* Comments of Combonate Media Group, MB Dkt. No. 07-42, at 3-4 (filed Mar. 28, 2008).

home shopping programmers are allowed to take advantage of a rate structure that in many cases leads to free carriage. Rather than responding to that situation by including additional, complicated rules to prevent others from being denied carriage as a result of such a proliferation of infomercial and home shopping carriage, the Commission should decline to extend the new rate structure to any additional programmers.

Aside from the fact that home shopping and infomercial programmers do not need subsidized leased access rates in order to obtain carriage, there is good reason to distinguish home shopping and infomercials from other types of programming for purposes of leased access. *See, e.g.*, NCTA Comments at 8-9; Verizon Comments at 2-3. As discussed above, given their additional revenue stream, these programmers are differently situated from others from an economic standpoint – a fact that the Commission has already acknowledged.<sup>10</sup> Moreover, although the Commission previously decided against differential leased access rates in 1997, *see* HSN Comments at 3, 5-8, significant marketplace changes and technological changes over the past ten years support the Commission’s tentative conclusion not to extend the new rate structure to home shopping and infomercial programmers. New video entrants like Verizon and expanding platforms like the Internet have substantially increased the available avenues for these programmers to reach consumers. Similarly, technological changes have greatly expanded the capacity of most providers, including the cable incumbents, thereby increasing the opportunities for these and other programmers to obtain carriage. At the same time, because of the

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<sup>10</sup> The agency previously distinguished programmers using a channel for more than 50 percent of the time to sell products directly to customers, because “leasing issues may need to be addressed in different ways depending on the nature of the service involved.” *See* Second Report and Order and Second Order on Reconsideration of the First Report and Order, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access*, 12 FCC Rcd 5267, ¶ 14 (1997).

proliferation of home shopping channels and infomercials, and because the Commission rate formula results in such low rates, the potential financial harm from lowering rates for home shopping networks and infomercials has increased substantially since the Commission's decision in 1997.

The Commission previously has recognized that leased access issues may need to be addressed in different ways depending on the nature of the service involved when the facts so warrant – the current circumstances justify such differential treatment in the case of home shopping and infomercial programmers. *See Verizon Comments* at 3.

Moreover, because infomercial and home shopping networks receive widespread coverage, expanding the obligation to provide leased access at artificially low rates to these entities would run afoul of the First Amendment – particularly in the case of providers subject to effective wireline competition. The First Amendment calculus in this proceeding weighs decidedly against any expansion of leased access.

As we discussed in our earlier comments, expanding the leased access burden on competitive video providers – especially in the case of new entrants – would run afoul of the First Amendment. Any regulation aimed at expanding the use of leased access – including removing the distinction between sales and other programming – constitutes compelled speech and necessarily restricts the editorial rights of cable providers.<sup>11</sup> The First Amendment concerns are particularly acute – and, indeed, decisive – in areas where there are one or more wireline video providers. Courts have sustained regulations of the protected speech of cable providers in

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<sup>11</sup> *See Verizon Comments* at 8; Ex Parte Letter from William H. Johnson, Assistant General Counsel-Verizon, to Marlene H. Dortch, FCC Secretary (filed Nov. 28, 2007); *see also Verizon's Petition for Clarification and/or Reconsideration, The Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket Nos. 92-264, *et al.*, at 5-8 (filed Mar. 28, 2008) (addressing the constitutionality of the cable horizontal ownership caps).

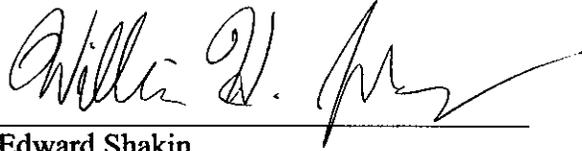
the past *only* where cable incumbents' historical bottleneck monopoly power is present. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 656 (1994). Where two or more wireline video providers compete in an area, however, there is no such bottleneck control and no legitimate basis for regulations such as those at issue here, particularly as applied to new entrants who never possessed any such bottleneck control. Therefore, expanding the use of leased access in competitive areas or in the case of new entrants would violate the First Amendment.

The First Amendment problems that would result from expanding leased access obligations are all the more significant in the case of home shopping and infomercial programming because such programming is already carried widely without subsidized rates or government compulsion. Under these circumstances, expanding leased access by extending artificially low rates to these entities would serve no purpose – much less an important governmental purpose – thus further exacerbating the First Amendment concerns. Therefore, the First Amendment precludes extending compulsory access at artificially low rates to infomercials and home shopping networks – particularly in areas with wireline competition or in the case of new entrants.

### **III. CONCLUSION**

For the foregoing reasons, the Commission should not extend the new leased access rate formula to programmers that predominantly transmit sales presentations or program length commercials.

Respectfully submitted,



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