Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 07-42
Leased Commercial Access	)	

REPLY COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (NCTA) hereby submits its reply comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.

In its initial comments, NCTA argued that the Commission should adhere to its initial decision not to extend its new commercial leased access maximum rate formula to "programmers that predominantly transmit sales presentations or program length commercials" ("shopping channels"). As the Commission has recognized, shopping channels operate under a different economic model than most other cable programmers. Most cable networks rely at least in part on per-subscriber payments collected *from* cable operators. But shopping channels derive the predominant portion of their revenues from direct sales of products to viewers, and they typically *pay* cable operators a portion of those revenues in return for carriage.

The Commission was reasonably concerned that if the maximum permissible rates for leased access carriage were set at levels significantly lower than the amounts that existing shopping channels typically pay cable operators for carriage, those channels would migrate to leased access. Such a result would do nothing to further the purposes of commercial leased access and would, in fact, be directly at odds with the statutory mandate that leased access rates be "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). Moreover, a rate significantly below the negotiated rates that shopping channels typically pay for carriage would also artificially encourage a flood of new shopping channels to apply for and fill leased access channels.

In our initial comments, we showed that the Commission's new rate formula – which, in most instances, would require channels to be offered at rates approaching or equal to *zero* – would have precisely these undesirable and unlawful results. We showed that the rates that result from the previously existing "average implicit fee" formula were affordable to shopping channels (since such programming is already prevalent on leased access). And we showed that migration of shopping channels carried on a non-leased access basis to leased access would be sure to occur if the new formula were extended to them.

Some shopping channels insist, however, that the Commission should not – and, in their view, constitutionally may not – refuse to apply the new zero-rate formula to shopping channels. Their arguments are wrong in all respects – on the facts, on the statute, and on the Constitution.

First, on the facts: Home Shopping Network, for example, contends that allowing shopping channels to take advantage of the zero rate will *not* result in migration of existing shopping channels to leased access. As evidence, they point out that applying the existing "average implicit fee" rate to all potential leased access programmers – shopping and non-shopping alike – has not resulted in significant migration.[1] But even if there were *no* migration under the existing standard, it would hardly follow that this would be the case under a *zero* standard.

[1] Home Shopping Network ("HSN") Comments at 13.

What matters for purposes of migration is not whether shopping channels are subject to the same maximum rate as other programmers. It is whether the applicable rate is sufficiently lower than the negotiated rates that existing shopping channels pay cable operators so as to make migration economically attractive. And, as the Declaration of Larry Gerbrandt, which was submitted with NCTA's comments, pointed out, although there may have been "few instances of existing home shopping channels migrating to leased access carriage under the FCC's average implicit fee approach[, t]his undoubtedly would not be the case under a marginal implicit fee approach."[2] As Gerbrandt explained, "Under the FCC's marginal implicit fee approach, it would be in the economic interest of a home shopping channel to migrate its service from the current contracts in which it pays cable operators five percent of its sales revenues in return for carriage to an approach which will generate a flat fee of no greater than $0.10 per subscriber (and likely closer to free carriage)."[3]

Second, on the law, the shopping channels wholly misconstrue the applicable statutory standard. Thus, Home Shopping Network argues that distinguishing between shopping channels and other programmers is unlawful because "[s]ome direct sales programmers may not be able to afford more than the proposed maximum leased access rates, and some non-direct sales programmers may be able to afford more than those rates." [4] Therefore, in its view, the distinction is not narrowly tailored to meet the goal of "ensuring that *all* programmers can afford access."[5]

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[2] Declaration of Larry Gerbrandt, Attachment A to NCTA Comments ("Gerbrandt Declaration"), ¶ 17.

[3] *Id.*, ¶ 14.

[4] HSN Comments at 19.

[5] *Id.* (emphasis in original).

But Congress never mandated or expected that commercial leased rates would be affordable to all programmers. To the contrary, as the Commission and the United States Court of Appeals for the D.C. Circuit have recognized, Congress mandated that any rate cap be sufficient to ensure no adverse effect on the operation, financial condition, or market development of the cable system – "*regardless of its effect on demand* for leased access."[6]

Third, on the Constitution, Home Shopping Network and Shop NBC contend that establishing different maximum rates for shopping and non-shopping channels is a content-based distinction that is prohibited by the First Amendment.[7] But Home Shopping Network and Shop NBC overlook the primary effects of leased access on First and Fifth Amendment rights – namely, the forced carriage of programming that cable operators would not otherwise choose to carry and the displacement and deletion of program networks that cable operators *would* otherwise choose to carry. As the Supreme Court has made clear, any such interference with the speech rights of cable operators and programmers is permissible only if it is narrowly tailored to serve an important government interest.[8]

Here, Congress has made clear that whatever interest the government may have in requiring cable operators to relinquish channels for commercial leased access, that interest is

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6 *Valuevision International, Inc. v. FCC,* 149 F.3d 1204, 1210 (D.C. Cir. 1998) (*citing Second Report and Order and Second Order on Reconsideration of the First Report and Order,* 12 FCC Rcd 5267, 5278-79) (emphasis added).

7 HSN Comments at 15-21; Shop NBC Comments at 4-20.

8 *See, e.g. Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 820-21 (Thomas, J., concurring in part and dissenting in part): "There is no getting around the fact that leased and public access are a type of forced speech. Though the constitutionality of leased and public access is not directly at issue in these cases, the position adopted by the Court in *Turner* [*Broadcasting System, Inc. v.* FCC, 512 U.S. 622 (1996)] ineluctably leads to the conclusion that the federal access requirements are subject to some form of heightened scrutiny…. Under that view, content-neutral governmental impositions on an operator's editorial discretion may be sustained only if they further an important governmental interest unrelated to the suppression of free speech and are no greater than is essential to further the asserted interest." Perhaps not surprisingly, HSN and Shop NBC cite a multitude of First Amendment cases but ignore the *Denver Area* case – the one Supreme Court case that specifically deals with the constitutional implications of leased access.

limited to access at rates, terms and conditions that do not adversely affect the cable system's operations and financial condition. Thus, in adopting maximum permissible rates, the Commission *must* tailor its rules to avoid such harm. If the zero-rate formula adopted by the Commission will, as the result of migration, have such an adverse effect on cable systems when applied to shopping channels, the Commission may not constitutionally apply that formula to those channels.

Therefore, even if, as HSN and Shop NBC suggest, it is not constitutionally permissible to distinguish between shopping and non-shopping channels, the only permissible solution is not to apply the zero-rate formula to *all* channels but to apply it to *none*. Indeed, NCTA has argued that, wholly apart from the effects of migration, the zero-rate formula *will* adversely affect cable operators when applied to non-shopping channels as well as when applied to shopping channels and therefore may not lawfully or constitutionally be applied to *any* channels. But in no circumstances does the Constitution require that if a lower maximum permissible rate could conceivably be justified for *some* programmers, that lower rate must be applied to *all* programmers.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in NCTA's initial comments, the Commission should not apply its new rate methodology to programmers that predominantly transmit sales presentations or program length commercials.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Diane B. Burstein
Michael S. Schooler
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

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