

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

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

OPPOSITION OF VERIZON¹ TO PETITION FOR RECONSIDERATION

The Commission should reject the request of TVC Broadcasting LLC (TVC) to expand still further its leased access rules – particularly in the case of new entrants or other providers subject to wireline video competition.² TVC has provided no basis for its proposed rules, which would further infringe on the editorial discretion of video providers and impose burdensome, unnecessary, and unlawful new restrictions on their operations. Therefore, the Commission should deny TVC’s Petition.

1. Additional Regulation of Channel Placement or Channel Relocation Is Unnecessary and Would Be Unlawful.

Without providing any evidence of a problem that needs to be addressed, TVC asks the Commission to further interfere with the editorial discretion and operation of cable operators by regulating the channel placement of leased access channels and by restricting channel relocations. These issues are already addressed by the Commission’s rules, and there is no basis for additional restrictions.

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

While seeking new limitations on video providers' discretion in structuring their channel line-ups, TVC ignores completely the Commission's current rules addressing channel placement and fails to show that such rules – or the Commission's case-by-case process for addressing alleged violations – are inadequate to address any legitimate concerns. The Commission's rules already provide that:

Cable operators shall be permitted to make reasonable selections when placing leased access channels at specific channel locations. The Commission will evaluate disputes involving channel placement on a case-by-case basis and will consider evidence that an operator has acted unreasonably in this regard.

47 C.F.R. § 76.971(a)(2). In adopting this rule, the Commission explained that “the cable operator should have the discretion to select the channel location of a leased access channel, so long as the operator's choice is reasonable,” and recognized that “a determination of reasonable channel placement will depend on the particular circumstances of a situation.”³ The Commission concluded that “[o]nce a cable operator has provided leased access programmers with a genuine outlet, we do not believe it is necessary to interfere with that operator's ability to structure channel line-ups.” *Id.* At the same time, the Commission indicated that it would “consider[] evidence that the operator deliberately interfered with potential viewership of the leased access programming in an effort to discourage continued carriage (*e.g.*, by intentionally surrounding a leased access channel with dark channels or by frequently shifting its channel location without sufficient justification).” *Id.* In its recent order, the Commission added to these protections by requiring video providers to give leased access programmers “an explanation and justification of

² Petition for Reconsideration of TVC Broadcasting LLC, *Leased Commercial Access*, MB Docket No. 07-42 (March 31, 2008) (“Petition”).

³ Second Report and Order and Second Order on Reconsideration of the First Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Leased Access Channels*, 12 FCC Rcd 5267, ¶ 89 (1997) (“*Second Report*”).

its policy regarding placement of a leased access programmer on a particular channel as well as an explanation and justification for the cable operator's policy for relocating leased access channels.”⁴

Notwithstanding this existing “reasonableness” requirement and the existing disclosure requirement and complaint processes, TVC asks the Commission “to prohibit cable operators from locating free leased access programming within or among the various subscription cable channels or the pay-per-view channels carried on their cable system.” Petition at 1-2. But TVC does not even allege that cable operators currently are locating leased access channels in “disadvantageous” places within their channel lineup, much less show that there is a problem that would justify the Commission’s intrusion into video providers’ editorial judgments concerning the placement of channels. Nor has TVC shown that a leased access channel located with subscription pay channels or pay-per-view fails to provide a “genuine outlet” for a leased access programmer, or that the current case-by-case approach would be inadequate to address any unreasonable behavior.

TVC’s proposal also fails to take into account the problems of restricting a provider’s freedom to construct its line-up. Decisions concerning a channel line-up are significant, both from a competitive and a legal perspective. Particularly in the case of new entrants or other video providers facing wireline competition, the construction of an attractive and understandable channel line-up, as well as related navigation functions, can be an important differentiator in competing with other providers. *See, e.g.*, Verizon News Release, “Verizon FiOS TV Customers

⁴ Report and Order and Further Notice of Proposed Rulemaking, *Leased Commercial Access*, 23 FCC Rcd 2909, ¶ 31 (2008) (“*Leased Access Order*”).

Have a Powerful New Way to Find and Enjoy Home Entertainment.”⁵ Providers’ strive to put together intuitive and logical channel line-ups that will attract customers. In fact, decisions concerning channel placement are important to the look and feel of the provider’s service, and also to the ease with which a customer can navigate the provider’s service, and therefore are central to the service’s attractiveness to consumers and competitive success.

Moreover, the creation of a channel line-up is at the core of a video provider’s editorial discretion, and is thus protected by the First Amendment. As the Supreme Court has recognized, “cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”). Just like newspaper editors protected when deciding how to organize and assemble their papers, video providers engage in protected speech when they “exercise[e] editorial discretion over which stations or programs to include in its repertoire.” *Id.* TVC has provided no basis to justify any infringement on a video provider’s flexibility in making editorial decisions concerning the placement of channels – particularly in the case of new entrants or other providers subject to wireline competition.

Finally, TVC asks the Commission to restrict a video provider’s ability to relocate channel locations, including by requiring a four month notice period for involuntary relocations. Petition at 2. Here again, TVC provides no evidence of a problem or explanation why the Commission’s current case-by-case assessment of reasonableness is inadequate. Indeed, the *Second Report* already suggested that the Commission will address unreasonable channel placement decisions, including “frequently shifting [of] channel location without sufficient justification.” *Id.* ¶ 89. And in one early decision, the Cable Services Bureau did just that when

⁵ Available at: <http://newscenter.verizon.com/press-releases/verizon/2007/verizon-fios-tv->

it held that Comcast was not “authorized to repeatedly change the channel on which such programming is carried without good reason.”⁶ But given the importance of allowing providers’ flexibility in setting channel line-ups – including the First Amendment concerns at issue – the Commission should not adopt the rigid rules proposed by TVC and instead should continue to consider the reasonableness of channel relocation based on particular facts and circumstances and continue to permit video providers substantial flexibility in crafting their channel line-ups. In any event, issues concerning the notifications for channel relocation should be negotiated by a leased access programmer and the video provider in the context of a leased access agreement, rather than the Commission deciding such issues by regulatory fiat.

2. More Localized Leased Access Carriage Would Be Burdensome and Would Provide Carriage Options Not Available to Other Programmers.

The Commission should likewise reject TVC’s proposal to give leased access programmers the option of demanding carriage on a more localized basis than the video provider makes available to any other programmer. Petition at 2-3. Such a requirement would be burdensome and unnecessary.

In the *Leased Access Order*, the Commission already considered and rejected the proposal raised by TVC, concluding that “[w]e will not require, at this time, the operator to allow the leased access programmer to serve discrete communities smaller than the area served by a headend if they are not doing the same with other programmers.” *Id.* ¶ 16. TVC has provided no reason for the Commission to reconsider that decision or to require video providers to offer more localized carriage for leased access programmers than is available for any other programmers on the system.

customers.html.

TVC's proposal that the Commission require leased access carriage in more localized areas if advertising can be targeted to those areas fails to consider the technical and other practical differences between advertising and programming. The available and developing methods for inserting advertising targeted to certain areas does not necessarily or easily translate to the carriage of full streams of programming in those areas. And adapting these methods, or developing new ones capable of targeting programming on a more localized level, would increase the burdens and expense on video providers, simply to accommodate the varying preferences of leased access programmers. This would undermine the efficiency that has led many video providers to operate more centralized headends in the first place, and would add complexity and expense to the provider's operations.

Moreover, the insertion of a 30-second advertisement into a stream of programming does not involve the same level of complexity as requiring a provider to support multiple different channel line-ups within the same cable system – the effect of TVC's proposal. There is no reason for the Commission to go even further than its recent order – which already makes available to leased access programmers localized carriage equal to that available to any other programmer – to impose additional burdens and complexity on video providers.

3. Video Providers Are Entitled to Ensure Confidentiality of Commercially Sensitive Information.

The Commission also should reject TVC's suggestion that the Commission restrict video providers' ability to protect their confidential and competitively sensitive information when negotiating carriage with leased access programmers. Petition at 3-4. Particularly given the

⁶ Memorandum Opinion and Order, *Erwin Scala Broadcasting Corp. v. Comcast Cablevision Co.*, 13 FCC Rcd 1707, ¶ 6 (1997).

heightened disclosure requirements included in the recent rules, video providers' should be permitted to take all reasonable steps to safeguard this type of information.

Again without providing any facts or evidence of a problem to be addressed, TVC complains of "oppressive" confidentiality provisions in leased access arrangements, and suggests that such provisions could somehow prevent leased access programmer from pursuing complaints with the Commission. This suggestion is baseless. Parties to complaint proceedings routinely rely on competitively sensitive information of their own or other parties in Commission proceedings, and any steps that the parties agree to take to protect to the confidentiality of such information is not a bar to filing a complaint with the Commission. Indeed, the *Leased Access Order* recognizes this fact and prescribes the use of protective orders to safeguard competitively sensitive information that is the subject of discovery in leased access complaint proceedings. *Id.* ¶¶ 62-65.

The expanded disclosure requirements included in the Commission's revised leased access rules makes the use of non-disclosure agreements and provisions all the more essential. Under the *Leased Access Order*, a video provider may have to provide a would-be leased access programmer with highly sensitive information, both concerning its programming costs and its subscriber data, to explain the basis of its rate calculations. *See, e.g., Leased Access Order* ¶ 19. In response to this concern, the Commission itself recently acknowledged in its briefing to the Sixth Circuit opposing a stay request for the *Leased Access Order* that leased access providers may be required "to execute a reasonable non-disclosure agreement as a condition of obtaining [] information."⁷ The Commission should reject TVC's attempt to undermine video providers'

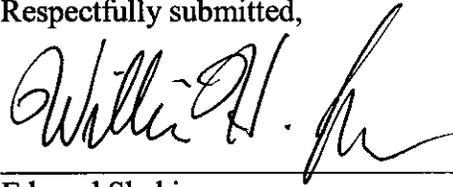
⁷ Opposition of FCC to Emergency Motion for a Stay, *United Church of Christ Office of Communications, Inc., et al. v. FCC*, Case No. 08-3245, at 18-19 (6th Cir., filed May 2, 2008).

ability to protect their competitively sensitive and other confidential information through the use of reasonable non-disclosure agreements and provisions.

4. Expanded Leased Access Obligations on New Entrants or Providers Facing Wireline Competition Infringe First Amendment Rights.

Finally, as we have explained on several previous occasions in this docket, the Commission should not – and, indeed, cannot consistent with the First Amendment – expand the leased access obligations of new entrants or other providers in areas with wireline competition. *See, e.g.*, Reply Comments of Verizon, MB Docket No. 07-42, at 7-8 (Oct. 12, 2007); Verizon Ex Parte Letter, MB Docket No. 07-42, at 2, 6, 8 (Nov. 20, 2007); Comments of Verizon on Further Notice, MB Docket No. 07-42, at 8 (March 31, 2008). Congress was focused on the bottleneck monopoly control over video distribution historically held by cable incumbents when it adopted the leased access regime. *See, e.g.*, H.R. Rep. No. 98-934, at 32 (1984) (discussing concern with “so-called private bottlenecks that impede the free flow of information”). Likewise, to the extent that courts have upheld these or other similar regulations in face of First Amendment challenges, they have done so based on the existence of the same bottleneck. *See Time Warner Entm’t Co. v. FCC*, 211 F.3d 1313, 1317-21 (D.C. Cir. 2000); *see also Turner I*, 512 U.S. at 636. Where no such bottleneck exists – as in the case of new entrants or other video providers in areas with wireline competition – the justification for impinging on a providers’ First Amendment rights, including its editorial discretion in selecting programming and structuring its video offering, no longer exists to the extent that it otherwise did. Therefore, any expansion of leased access obligations, including those proposed by TVC, must not extend to such providers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William H. Johnson", written over a horizontal line.

Edward Shakin
William H. Johnson

Michael E. Glover
Of Counsel

1515 North Courthouse Road
Suite 500
Arlington, VA 22201
(703) 351-3060
will.h.johnson@verizon.com

May 13, 2008

Attorneys for Verizon