

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**OPPOSITION OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its Opposition to the Petition for Reconsideration filed by TVC Broadcasting LLC (hereinafter “Petition” or “TVC”). The Petition is addressed to discrete and limited aspects of the FCC’s 2008 Commercial Leased Access Order¹ – an Order that otherwise greatly expands the burdens of leased access on cable operators and cable programmers, while slashing the rates that cable operators can charge lessees.²

Apparently not content with this dramatic overhaul of the rules in favor of leased access users, TVC Broadcasting asks the Commission to adopt even more burdensome and one-sided rules. The Petition sets forth three basic proposals: (1) that the rules should provide extraordinary protections to leased access programmers against channel changes; (2) that cable operators should be forced to offer leased access programming to targeted areas within a single cable system; and (3) that the Commission should limit operators’ ability to protect confidential information provided to lessees. The Commission was right not to adopt these types of

¹ Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 07-42 (rel. Feb. 1, 2008) (hereinafter “Order”).

² NCTA has petitioned for review of those rules on the grounds that they violate the Communications Act, the Administrative Procedure Act, and the Constitution. *United Church of Christ Office of Communications, Inc. v. FCC*, Consolidated cases numbered 08-3245, 08-3369, 08-3370, 08-3450, and 08-3452 (6th Cir. 2008).

provisions in its Order, and TVC’s Petition provides no new facts or arguments justifying reversal of those decisions. The Petition should be denied.

ARGUMENT

I. COMMERCIAL LEASED ACCESS PROGRAMMERS SHOULD NOT ENJOY SPECIAL PROTECTIONS AGAINST CHANNEL RELOCATIONS

The Order sets forth certain guidelines for leased access use regarding “non-monetary terms and conditions, such as channel and tier placement, [and] targeted programming.”³ Specifically, the FCC requires “cable operators to provide, along with its standard leased access contract, an explanation and justification of 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 The FCC does not identify any source of authority for imposing these burdens on cable operators, which go well beyond what the Act contemplates. TVC, nonetheless, asks the Commission to adopt *additional* rules restricting a cable operator’s ability to relocate a leased access channel.⁵ In particular, TVC asks for an across-the-board rule that would require cable operators to give leased access programmers four months’ notice of a channel change and would prohibit cable operators from relocating a lessee during a ratings period.⁶

³ *Id.* at ¶¶ 30-31.

⁴ *Id.* at ¶ 31.

⁵ Petition at 2.

⁶ *Id.* TVC also seeks specific leased access channel placement requirements. The FCC rules already require cable operators generally to place leased access programmers upon request on a tier that has subscriber penetration of more than 50 percent. Operators are “permitted to make reasonable selections when placing leased access channels at specific channel locations.” 47 C.F.R. § 76.971(a)(1) and (2). To the extent TVC has concerns that placing its programming on a particular channel is not “reasonable,” the rules already provide an avenue for resolving such disputes. *Id.*, § 76.971(a)(2). TVC provides no justification for additional rules that would further restrict operators’ freedom with respect to channel placement.

While TVC claims that it should be accorded this treatment so as to be treated “equitably vis-à-vis other programmers” (Petition at 2) – a concept that has no basis in Section 612 – its Petition in fact seeks regulatory favoritism. Arms-length negotiations between cable operators and programmers lead to a variety of terms and conditions regarding carriage, but TVC points to nothing to suggest there is a standard output of these negotiations of either providing cable programmers carried on the system with four months’ notice or protection during the four Nielsen sweeps periods. Thus, contrary to TVC’s claim, imposing this type of regulatory favoritism would not put TVC on equal footing with other programmers, but would grant preferential treatment to leased access programmers and unfairly disadvantage other programmers voluntarily carried on the system. And those other programmers would be forced to bear the brunt of any unforeseen changes to cable line-ups if leased access programmers were granted these extra protections through government fiat.

Section 612 does not provide for this type of protectionism. Where Congress specifically intended to inhibit cable operators’ freedom to relocate certain channels carried on the system, it expressly did so.⁷ Even there, Congress adopted a significantly more limited period for protecting commercial must-carry stations against channel relocations – 30 days – than the four months sought by TVC here. Moreover, since Congress amended Section 612 at the same time as it adopted these protections for must-carry stations, the absence of any corresponding

⁷ 47 U.S.C. § 534(b)(9) (explaining that a cable operator must provide “written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station” and stating that “[n]o deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations.”).

provisions pertaining to leased access users is conclusive evidence that Congress did not mean to extend these extraordinary protections to all cable system program sources.⁸

The new rules already go too far by requiring cable operators to explain and justify their channel relocation policies. TVC's Petition provides no reason for expanding that requirement to provide even more favorable treatment to lessees.

II. CABLE OPERATORS SHOULD NOT BE REQUIRED TO SEGMENT THEIR SYSTEMS TO ACCOMMODATE THE WISHES OF LEASED ACCESS PROGRAMMERS

The Order reaffirmed the FCC precedent that operators need not “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.*”⁹ TVC argues, though, that even-handed treatment is not enough. Even if cable operators are *not* providing other programmers with targeted carriage to particular areas within a larger system, TVC urges that the FCC force operators to do so for leased access programmers if the operator provides targeted *advertising* to discrete portions of its system.¹⁰ But this argument is not new and provides no cause for changing the rules.

As NCTA and other commenters explained in this proceeding, Section 612 envisioned that leased access rules would apply to a “cable system,”¹¹ and the Commission has consistently rejected claims to artificially break up a unitary system to accommodate the desires of leased access users. As NCTA's Reply Comments showed, the FCC rejected similar proposals to segment systems and “interpret[ed] the Section 612 commercial leased access requirements as

⁸ See *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

⁹ *Id.* at ¶ 16.

¹⁰ Petition at 3.

¹¹ 47 U.S.C. § 532(b).

applying on a physical system rather [than] community or franchise-by-franchise basis.”¹² The FCC understood that “for reasons of engineering and economic efficiency, cable facilities generally do not stop and start at political boundaries.”¹³

In yet again urging the FCC to force operators to change their systems to accommodate leased access users, TVC’s proposal reflects a fundamental misunderstanding of cable system architecture. The record demonstrated that, contrary to TVC’s claim here, “targeting advertising to a particular community is a totally different process” than targeted leased access programming.¹⁴ Where operators engage in targeted advertising, they “maintain the same channel line-up, but simply insert different advertising in the few minutes of local advertising availabilities set aside for an operator’s ads.”¹⁵ That process bears no resemblance to what would be required if operators were forced to target leased access programming to particular communities. Comcast demonstrated that “the fact that systems are equipped to distribute advertising on a zoned or subsystem basis does not mean that whole channels or individual programs can be distributed in the same manner without additional equipment, additional costs, and wasted bandwidth (a ‘dark’ or ‘stranded channel’ would be created during periods when programming appearing on a channel in one area of the system does not appear in other areas.)”¹⁶

¹² NCTA Reply Comments at 15 (citing *Roberts v. Houston Division of Time Warner Entertainment Co.*, 11 FCC Rcd. 5999, 6005 (1996)).

¹³ *Id.*

¹⁴ *Id.* at 16.

¹⁵ *Id.* Comcast showed that “commenters’ attempts to compare the ability to localize programming” to Comcast’s ability to localize advertising “is misplaced. Comcast Spotlight merely provides advertisers with the opportunity to purchase a limited number of 30-to 60-second-long advertising availabilities targeted to certain geographic sections of certain Comcast systems during regularly-scheduled cable programming.” Comcast Reply Comments at 18.

¹⁶ *Id.* at 18.

In short, the Commission was right – for legal and technical reasons – to reject this proposal. TVC provides no reason – legal or technical – for providing leased access programmers this preferential treatment on reconsideration.

III. THE FCC SHOULD NOT STRIP OPERATORS OF THEIR ABILITY TO REQUIRE CONFIDENTIAL TREATMENT OF AGREEMENTS

Finally, TVC complains that cable operators have “adopted the practice of placing oppressive ‘confidentiality’ or ‘anti-publicity’ type clauses into leased access agreements.”¹⁷ Its vague claim that operators somehow use these confidentiality provisions in an effort to prevent leased access programmers from filing complaints with the FCC is not spelled out.¹⁸ But there is no merit to TVC’s argument that operators somehow should be prevented from protecting confidential information that they must provide to leased access users.

In this regard, TVC again is seeking an exception from normal business arrangements. There is nothing unusual about confidentiality provisions between content providers and content distributors. To the contrary, to the extent that cable operators and cable programmers enter into agreements that contain confidential information, that highly sensitive information is protected against release. The Petition provides no justification for the FCC to interfere with this usual commercial practice in the case of leased access contracts.

¹⁷ Petition at 3.

¹⁸ *Id.* at 4.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2008, I served a copy of the foregoing Opposition to Petition for Reconsideration via first-class postage pre-paid on the following party:

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