

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

In the Matter of)
)
Annual Assessment of the Status of Competition) MB Docket No. 05-255
In the Market for the Delivery of Video Programming)
)

**COMMENTS OF CENTER FOR DIGITAL DEMOCRACY,
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AND
THE BENTON FOUNDATION**

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SUMMARY

The Center for Digital Democracy, United States Conference of Catholic Bishops, and the Benton Foundation (“CDD, *et. al*”) believe the “70/70 test” has been met, but even if it has not, the Commission should open a new proceeding exploring the extent to which cable leased access is actually serving Congress’ express purposes. Upon review, it is likely that the Commission will find leased access has failed to ensure the public access to diverse sources of information. Thus, the Commission should amend its rules accordingly.

The FCC should seek comment and collect information on how to amend the Commission’s leased access regulations to meet Congress’ purposes. Both the failure of the FCC’s current rules to advance Congress’ express purposes, as well as changes to cable technology and the cable market require the FCC to review leased access. First, CDD, *et. al* believe that the leased access regulations currently in effect have not met Congress’ purpose to assure viewers diverse sources of programming. Instead of accomplishing this purpose, the regulations appear to have deterred non-affiliated programmers from using leased access, further entrenched cable operators’ hold on video programming, and have not resolved the harms that the leased access provisions were designed to address, such as cable operators’ lack of incentive to provide programming with divergent interests. Second, since the FCC issued its leased access regulations, there have been significant technological and marketplace changes to cable, as the Twelfth Annual Report itself reflects. These changes impact leased access and raise significant questions which the FCC should address.

With these two primary concerns in mind, CDD, *et. al* raise specific critical questions and highlight areas where the Commission lacks vital information. At the outset, the Commission lacks basic, current information about how leased access is used not only by non-affiliated programmers, but also by affiliated programmers. Furthermore, the maximum rate formula

appears to set rates so high that non-affiliated programmers are effectively deterred from using the outlet, and instead cable operators are using the set-aside channels for their own affiliated or chosen programming. Similarly, the Commission has no information about what terms and conditions to which non-affiliated programmers are subject, and whether these also serve as a deterrent to leased access. It is also unclear whether and to what extent qualified minority and educational programmers utilize leased access through a special exception created by Congress as an alternative means to promote diversity. Finally, the Commission should collect information about the effectiveness of its complaint process for resolving conflicts concerning leased access.

CDD, *et. al* applaud the FCC for recognizing the inadequacy of the data it receives for preparing the Annual Competition Report. The Commission appropriately seeks comment both on what additional data the FCC should collect, and what additional rules it should promulgate to further Congress' goal that leased access provide diverse sources of information to the public. These Comments identify additional data the FCC should collect concerning leased access, and urge the Commission to open a proceeding seeking comment on new regulations that meet Congress' statutory purposes.

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Center for Digital Democracy (“CDD”), United States Conference of Catholic Bishops (“USCCB”), and the Benton Foundation (“Benton”), by their attorneys the Institute for Public Representation, respectfully submit these Comments pursuant to the FCC’s Twelfth Annual Report (“Report”) in the above-captioned matter. The Report seeks comments on §612(g), a subsection within the federal cable leased access provision, which provides that the FCC may promulgate additional rules for cable to promote diversity when the “70/70 test” has been met. Report at ¶ 12, 36. The Commission indicated that if its analysis of these comments revealed regulatory action is appropriate, then it will open a new proceeding. Press Release, Federal Communications Commission, FCC Issues 12th Annual Report to Congress on Video Competition (Feb. 10, 2006).

CDD is committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming. The USCCB is a nonprofit corporation organized under the laws of the District of Columbia. All active Catholic Bishops in the United States are members of the USCCB. USCCB advocates and

promotes the pastoral teachings of the Bishops in such diverse areas as education, health care, social welfare, immigration, civil rights, family life, and communications. USCCB is committed to maintaining a place for religion and values on broadcast outlets, cable channels, satellite and the Internet and to programming that inspires, informs and educates. Protection of the public's rights to disseminate and receive information from diverse sources, including local religious entities, on broadcast outlets, cable channels, satellite, and the Internet are matters of particular concern to the USCCB. The Benton Foundation articulates a public interest vision for the digital age and demonstrates the value of communications for solving social problems.

The FCC should open a new proceeding to gather information and seek comment on whether cable leased access is actually serving Congress' purpose of assuring viewers access to programming from diverse sources. Cable has significantly evolved since 1984 when Congress first mandated leased access. For example, there has been a dramatic increase in the number of available channels, as well as a remarkable change in the cable market. In light of these changes, the FCC should reassess whether its regulations serve their important functions. Furthermore, Congress tasked the FCC with an ongoing obligation to issue regulations that meet express statutory purposes. *See* 47 U.S.C. §§532(a), 532(b), 532(g). Thus, while Commenters believe the "70/70 test" has been met, whether it has or not, the Commission still has an obligation to review leased access. If the FCC finds, as Commenters believe it will, that leased access has failed to ensure that the public has access to diverse sources of information, then the Commission should amend its rules accordingly.

I. Congress Intended Leased Access to Serve an Essential Role, Because Leased Access Assures Viewers Diverse Sources of Programming and Promotes Competition.

Congress established leased access to promote diverse sources of information and competition. In 1992, Congress saw its initial attempt at leased access was failing, so it amended the laws to reemphasize the program's importance. Congress gave the FCC the vital task of issuing regulations that promote diversity and competition. Commenters believe that the FCC's regulations have largely failed to meet Congress' express purposes.

A. Congress Has Repeatedly Emphasized the Importance of Leased Access.

Congress expressly stated that the purposes of leased access are to ensure “that the widest possible diversity of information sources are made available,” and to “promote competition in the delivery of diverse sources of video programming.” 47 U.S.C. §532(a). The House Energy and Commerce Committee expounded upon these purposes, explaining that leased access “is fundamental to the goal of providing subscribers with the diversity of information sources intended by the first amendment.” H.R. Rep. No. 98-934, at 31 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4668 (“1984 House Report”).¹ The Senate Commerce, Science, and Transportation Committee also found leased access serves “as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access to be given access on unfavorable terms.” S. Rep. No. 102-92 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1163 (“1992 Senate Report”).²

¹ See also 1984 House Report, at 31, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4668 (Leased access is “consistent with and further[s] the goals of the First Amendment;” it “establish[es] a form of content-neutral structural regulation which will foster the availability of a “diversity of viewpoints” to the listening audience.”) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

² See also H.R. Rep. No. 102-628 (1992), 1992 WL 166238, * 40 (“1992 House Report”) (“The Committee continues to believe that leased access can be effective in fulfilling the Communications

1. 1984 Cable Communications Policy Act Created Leased Access.

The 1984 Cable Communications Policy Act (“1984 Cable Act”) created leased access to fill the gap in cable programming left by cable operators’ lack of incentive to provide diverse sources of programming. Cable operators lack incentive because non-affiliated programmers may represent “a social or political viewpoint that a cable operator does not wish to disseminate, or the[ir] offering competes with a program service” of the operator. 1984 House Report, at 48, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4685.

In response to cable operator’s anticompetitive incentives, and to promote diverse sources of programming, Congress created leased access. Under the law, cable operators must set aside a certain percentage of channel capacity for non-affiliated programmers. 47 U.S.C. §532(b). In this manner, leased access was able to separate the cable operators’ editorial control, programming, and viewpoints over at least some of the channels.

At the same time, Congress recognized that the cable industry was still growing, thus it also included §612(g). 47 U.S.C. §532(g). This subsection allows the FCC, if the “70/70 test” is met, to devise new rules “necessary in order that a nationally mandated leased access scheme fully meet the First Amendment goal of assuring diversity.” 1984 House Report, at 54, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4691.³

Act’s mandate of promoting diversity and ensuring the public access to a wide variety of voices and viewpoints.”)

³ The Commission seeks comment on “the scope of [the FCC’s] authority under Section 612(g).” Report at ¶ 36. As the text and legislative history make clear, §612(g) gives the FCC authority at least to regulate improvements to leased access. However, whether the “70/70 test” is met or not, the FCC has an ongoing obligation to make sure leased access is serving the goals established by Congress.

2. Congress Revitalized and Reemphasized the Importance of Leased Access in 1992.

In 1992, Congress found leased access had hardly been used. 1992 Senate Report, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1163, H.R. Rep. No. 102-628 (1992), 1992 WL 166238, *39 (“1992 House Report”). Congress traced the problem to cable operators’ control over rates and terms, and turned the important responsibility for setting those items over to the FCC.

The 1984 Cable Act had allowed cable operators to set reasonable prices, terms and conditions, because the cable operator’s exercise of economic power was not “of concern to the committee” at that time. 1984 House Report, at 50, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4687. By 1992, however, Committee Reports revealed that leased access was failing due to the cable operator’s ability to set the rates, since the operator’s interests diverged from the interests of programmers seeking leased access. 1992 Senate Report, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1164, 1992 House Report, at * 40.⁴ Exacerbating the problem was the fact that multiple operators must carry a programmer to be successful and, thus, a programmer must negotiate rates, billing, tier access, channel location, and other significant terms multiple times. 1992 Senate Report, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1164.

In response to these concerns, Congress amended the Act by requiring the FCC to take action to ensure leased access became a reality. Congress gave the FCC authority to establish a maximum leased access rate, other terms, as well as procedures for expedited resolution of grievances. The changes were an effort “[t]o make leased access a more desirable alternative for programmers.” 1992 House Report, at *40, 47 U.S.C. §532(c)(4). By clearly establishing rates

⁴ *See also* 1992 House Report, at *39 (“The Committee is concerned that cable operators have financial incentives to refuse leased access channel capacity to programmers whose services may compete with services already carried on the cable system, especially when the cable operator has a financial interest in the programming services it carries.”)

and terms upfront, and “[b]y involving the FCC before leases are negotiated,” Congress reasoned that “programmers will know the parameters of an agreement, increasing certainty and the use of these channels.” 1992 Senate Report, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1165. The Senate Commerce, Science, and Transportation Committee explained, “it is **vital** that the FCC use its authority to ensure that these channels are a genuine outlet for programmers.” 1992 Senate Report, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1212 (emphasis added).

The 1992 amendments also created an exception to leased access that allows cable operators to use leased access channels for the provision of programming from a “qualified” minority or educational source, even if that source is affiliated with the operator, so long as these sources did not exceed 33% of the leased access channel capacity. 47 U.S.C. §532(i). Congress created this exception, because it sought to “increase[e] the availability of minority programming sources” which in turn “would contribute greatly to the diversity of programming available to cable viewers and will help to assure the widest possible diversity of information services to the public.” 1992 House Report, at * 122. The provision “is consistent with FCC and Congressional objectives designed to increase the diversity of viewpoints by encouraging minority ownership of the communications media.” *Id.*

B. The FCC Issued Regulations and Pledged to Monitor the Reasonableness of Leased Access Rates.

As required by the 1992 amendments to the Cable Act, the FCC established rates, terms and conditions for leased access. It issued final regulations in 1997. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access – Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267, 5282 (1997) (“Final Order”). The regulations relied solely on non-price improvements, such as part-time leasing requirements, billing and collection

service, the provision of information about rates, resale, and tier placement, to meet Congress' diversity objectives. In selecting the average implicit fee formula for maximum leased access rates,⁵ the Commission's primary concern was with cable operators' profits, *see Final Order*, 12 FCC Rcd at 5272, not ensuring "a more desirable alternative for programmers." 1992 House Report, at *40.

When the FCC issued the order establishing the average implicit fee formula, the Commission pledged to "continue to monitor the availability of leased access channels and [to] revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate." *Final Order*, 12 FCC Rcd at 5282. Additionally, when the FCC defended the order before the D.C. Circuit against claims that the rates were too high, the Commission reiterated its pledge to monitor and revisit the rate formula. Brief for Respondent at 21, *ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998) (No. 97-1138) (quoting the agency's pledge as a reason the court should rely upon to uphold the average implicit fee formula).

C. The FCC Must Review the Leased Access Regulations to Achieve Congress' Goals.

The FCC's current leased access regulations do not adequately meet Congress' express purposes, nor have they resolved the harms that the leased access provision was designed to address. This is due to a combination of factors including regulations that have proven deficient, a dearth of information about leased access, and the evolution of cable technology and marketplace rendering the current ineffective rules also obsolete. We urge the Commission to open a new proceeding by its authority under Section 612(g) and its ongoing obligations under

⁵ The FCC established the maximum leased access rate as the "average implicit fee for full-time channel placement on all such tier(s)." 47 C.F.R. §76.970(d). Cable operators may charge part-time lessees different rates for different times of the day; the sum of all the part-time charges must not exceed the maximum rate for the leased access channel. 47 C.F.R. §76.970(h).

47 U.S.C. §532(c)(4) to gain a complete understanding of the status of leased access, and to seek comment on how to update its regulations.

II. The Leased Access Regulations Must be Amended to Reflect the Evolution of Cable.

The Commission needs to update the leased access regulations to reflect and embrace the evolution of cable. Cable television has changed dramatically in several ways that impact leased access. New technologies now allow cable operators to deliver hundreds more channels than when Congress wrote the 1984 Cable Act, or even when the FCC implemented maximum leased access rates in 1997. The cable market also has experienced significant vertical integration and other changes.

A. The Impact of New Technologies on Cable.

New technologies have changed the cable landscape. These changes, in turn, impact leased access and raise questions on which the FCC should seek comment.

Digital technology increased the number of channels on which cable operators offer programming. Cable operators now offer hundreds of channels using the same capacity that had accommodated only a fraction of that number of analog channels. It is unknown whether digital cable operators “with more than 100 activated channels ... designate 15 percent of all such channels,” as they must, to non-affiliated programmers. 47 U.S.C. §532(b)(1)(C).

Video on Demand (“VOD”) and Video over Internet Protocol (“IPTV”) are two other technologies changing the nature of cable. VOD is available from cable providers throughout the United States who use the technology to deliver movies, television shows, and other programming to subscribers on demand. IPTV is similar to VOD, allowing video to stream over cable broadband, but using the IP addressing system to access the Internet to receive the video content. These two new technologies alone raise substantial questions requiring the

Commission's attention, including whether leased access programmers have full access to these new technologies.

Finally, the Commission must ensure that leased programmers have full access to new functionality, such as Electronic Program Guides ("EPG"). EPG's are on-screen guides to scheduled programming that give viewers more options and easier means to navigate, select, and discover programming by using a remote control, keyboard or even a cell phone keypad. Cable operators need to ensure that leased access programming data is sent, along with affiliated and other programming data, to the set-top box that enables the information to be displayed.

B. Changes in the Cable Marketplace.

In addition to technological changes, changes in cable's market structure provide additional reasons for revising and updating leased access regulations. The cable market has undergone a vast transformation in the past twenty years. Cable companies consolidated and clustered. At the same time, there has been increasing vertical integration. Today's cable programming marketplace is dominated by either affiliated cable programmers, or broadcast stations and their affiliates which use retransmission consent power to obtain channel capacity.

These major changes combine to give cable companies a dominant position in negotiations with small leased access programmers. Furthermore, with fewer cable companies controlling greater amounts of programming, these marketplace changes make having functional, and thriving, leased access programming more important than ever. As cable operators realize greater vertical integration, leased access is necessary to "assur[e] that sufficient channels are available for commercial program suppliers with program services which compete with existing cable offerings, or which are otherwise not offered by the cable operator (for political reasons, for instance)." 1984 House Report, at 30, *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.

III. The Commission Needs to Collect Adequate Information About All Aspects of Leased Access.

The Commission seeks comment on “what action might be warranted to achieve the statutory goals.” Report at ¶ 12. However, the public and the Commission have virtually no information about the current status of leased access programming. This greatly inhibits the public from proposing, and the FCC from implementing, actions to achieve the Cable Act’s goals. Specifically, it is unclear whether non-affiliated programmers can readily use leased access to air their diverse viewpoints. There may be several reasons why leased access is not used, potentially including unreasonable rates, terms and conditions. The Commission should gather additional information through a notice and comment proceeding.

A. What is the Current Status of Leased Access Use?

The 1984 Cable Act and the Commission’s implementing regulations specify how many leased access channels cable operators must provide. 47 U.S.C. §532(b)(1); 47 C.F.R. §76.970(a-c). However, the FCC lacks information about whether, and the extent to which, non-affiliated programmers actually use leased access. Indeed, Commenters believe that few of the channels set aside for leased access are in fact utilized for this purpose because the rates are too high and the cable operators lack incentive to lease the channels to non-affiliated programmers.

The FCC should seek more information about how leased access is used.

- Do non-affiliated programmers actually use leased access channels? To what extent are they able to use the set-aside channels?
- How many leased access channels do cable operators provide?
- Which non-affiliated programmers are using those channels?
- Are non-affiliated programmers using the channels on a full-time or part-time basis?
- What type of programming appears on the leased access channels?
- For what purposes are leased access channels used?
- Do cable operators turn down requests for leased access? If so, why?

Commenters are concerned that non-affiliated programmers are not the primary users of leased access, because cable operators use the channels for their affiliated programmers. If cable operators cannot show that non-affiliated programmers are the primary users of leased access channels, the FCC should seek comment on whether it should issue a new regulation under its §612(g) authority preventing affiliated cable operators from using the set-aside channels.

- To what extent and for what purposes do the cable operators use the channels for themselves?
- To what extent does the cable operators' option to use the channels for their affiliated programmers contribute to non-affiliated programmers' lack of use of the set-aside channels?

Changes in technology raise additional questions requiring the FCC's attention.

- Are digital cable operators setting aside channel capacity for leased access?
- Should cable operators set aside a percentage of capacity used for storing VOD and IPTV programming for leased access programming?
- Should cable operators set aside channel capacity for leased access programmers to provide VOD and IPTV?

In addition to seeking this information now, the public and the FCC maintain an ongoing interest in these and other basic aspects of leased access. The Commission currently has no reporting mechanism to capture the necessary data.⁶ Thus, the Commission should require cable operators to provide periodic reports that address basic aspects of leased access, including who utilizes the leased access channels (affiliated or non-affiliated programmers), rates cable operators charge, number of requests for access, etc.

B. Is the Current Method for Setting Maximum Leased Access Rates Reasonable?

Commenters are concerned that the FCC's method for determining maximum rates sets rates too high, because it appears to deter programmers and further entrench cable operators'

⁶ The regulations only require operators to maintain "sufficient supporting documentation" that justify rates for Commission inspection. 47 C.F.R. §76.970(i)(5).

hold on video programming. Commenters continue to believe that “no consistently affordable or feasible outlet for ... material ... exist[s].”⁷ The Commission should seek information about how the maximum rate regulation has operated since its implementation in 1997, and determine which methods will more effectively meet Congress’ purposes. Not only is this part of the Commission’s ongoing obligation to ensure that the goals of leased access are met, but the Commission has also pledged to review the rate system if it were found to be unreasonable.

The Commission should seek comment on the current maximum rate as it has been almost ten years since the FCC implemented its current formula. The Commission needs to acquire basic information about leased access in order to evaluate its current regulations.

- What rates do the cable operators charge for full-time and part-time leased access?
- What are the average maximum leased access rates?
- How do cable operators justify any variances in rates?
- Does the current formula “no longer [reflect] a reasonable rate?”⁸
- Are the rates reasonable in light of the fact that cable operators have an exponentially larger channel capacity than they did in 1997, and thus there is less scarcity?
- Has the rate formula decreased anticompetitive practices? Has the rate formula increased use of leased access channels which promote diversity?
- Do the current rates established by cable operators under the Commission’s regulations deter non-affiliated programmers who otherwise would seek access?
- Is the method for calculating the maximum rate appropriate for digital cable, VOD, and IPTV which have enormous channel capacity and limited scarcity concerns?

The Commission’s rules also require a cable operator to respond to a programmer's request for rate information within 15 calendar days. 47 C.F.R. §76.970(i)(1).

- Are cable operators responsive to programmer’s requests? When they respond, do they include all required information?

⁷ Comments of Center for Media Education, *et. al*, MM Dkt. No. 92-266, at 6, filed May 15, 1996 (citing a USCCB survey of dioceses revealing significant programming existed but a lack of affordable channels on which to place the content).

⁸ *Final Order*, 12 FCC Rcd 5267, 5282 (1997) (pledging to “revisit this issue if it appears that the average implicit fee formula no longer reflects a reasonable rate”).

C. Do the Terms and Conditions of Leased Access Agreements Deter Unaffiliated Programmers?

The Commission promulgated rules regarding terms and conditions contained in leased access agreements between programmers and cable operators. 47 C.F.R. §76.971. Like the rates, these terms may be unfair and deter programmers from using leased access. The Commission should seek information about what terms the leased agreements contain.

- Are the terms in leased access agreements the same or similar to those that the cable operator has with its affiliated programmers?
- Do the leased access programmers have the same type of access to facilities that the cable operators' affiliates have?
- With changes in technology, have cable operators updated their terms of access to facilities, allowing programmers to submit video to the operator via the Internet?
- What kind of insurance do operators require leased access programmers to carry, how much does it cost, and what effect does this have on programmers?
- How short or long are the contracts, and are the termination provisions reasonable?
- Are leased access programmers required to disclose their program revenues to the cable operators?
- On which service tier do leased access programs appear, and on which channel within the tier do cable operators place the programming?

D. Is the Qualified Minority and Educational Programming Exception Being Used?

The Qualified Minority and Educational Programming exception to leased access provides cable operators an alternative means to promote diversity, and meet the under-served needs of the public for access to minority and educational programming.

- Are cable operators using the Qualified Minority and Educational Programming exception?
- If they are, which programmers are utilizing the program and what type of programming do they air?
- If they are not, why are they not using it? Is it not being used because operators can use the set-aside channels?
- Does the Commission have sufficient reporting mechanisms in place to understand how or whether this provision is being used?
- Is Congress' intent that minority and educational programmers, whether affiliated or not, use leased access channels frustrated by cable operators' use of these channels?

E. Is the FCC's Complaint Process Effective?

The regulations establish a complex process for bringing a complaint to challenge a cable operator's rates before the Commission. 47 C.F.R. §76.975(b). The Commission should collect more information about the effectiveness of the complaint process.

- To what extent do programmers make use of this provision to challenge rates that violate the Commission's regulations?
- Is the process unduly burdensome, and thus preventing legitimate challenges to exorbitant rates?
- How effective is the complaint process?
- Should there be changes to the grievance procedures?
- Should there be an expedited complaint process before the FCC?

CONCLUSION

The FCC has an ongoing obligation to make sure leased access meets the statute's purposes, and the Commission has repeatedly pledged to readdress leased access if the regulations do not. Due to incomplete and inadequate information about leased access, the FCC currently is unable to assess whether leased access is promoting diverse programming sources. The Commission should seek comment and information on the issues regarding leased access raised in these Comments.

Respectfully submitted,
/s/

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