

Leased Access Order Imposes Significant Regulatory Burdens on Cable Providers

The FCC has drastically reduced the amount cable television operators can charge for leased access channels which may have negative revenue implications for operators and has significantly reduced the amount of time operators have to respond to leased access requests.

On November 27, 2007, the Federal Communications Commission (“Commission” or “FCC”) released an Order and Further Notice of Proposed Rulemaking in its Leased Access Proceeding (“FNPRM”). In the Report and Order, the Commission modified its leased access rules which require cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.

Specifically, § 612 of the Communications Act authorizes the Commission to promulgate leased access rules to promote diversity of programming at reasonable terms and conditions. In its Notice of Proposed Rulemaking sought comment on a number of provisions relating to enforcement, rates and procedural issues. The Commission adopted a plethora of cumbersome new rules in all of these areas that all cable operators must fully comply with, in addition to the already existing regulatory standards. The Commission attempts to justify the rule modifications by claiming that they are necessary in order to create uniformity in customer service standards, negotiation standards, rates, reporting requirements. However, these rules significantly limit the ability of cable operators to carry out their business plans in a manner that is tailored to their specific business needs. These rules become effective 90 days after publication in the Federal Register.

The Commission tried to take a preemptive strike against any challenge by cable operators, claiming that the rules, as adopted withstand constitutional scrutiny. While the DC Circuit has already held that the leased access provisions of the 1992 Cable Act are not content-based, further regulation may not survive the intermediate scrutiny standard of review due to the elimination of public access obligations in the broadcast context and the great possibility of a negative impact on revenue. Further, robust growth in access to the Internet and increasing consumer preference for web-based and other alternative forms of content diminishes the need for access through traditional cable service.

Order

The Commission adopted eleven new customer service standards, requiring that cable operators provide the following information to prospective leased access programmers within three business days of request (¶ 14). The following customer service standards are codified at 47 C.F.R. § 76.972(a)(1) through 76.972(a)(11).

- (1) The process of providing leased access channels (¶ 15);
- (2) The geographic levels of service that are technically possible (¶ 16);
- (3) The number and location and time periods available for each leased access channel (¶ 17);
- (4) Whether the leased access channel is currently occupied (¶ 18);
- (5) A complete schedule of the operator’s statutory maximum full-time and part-time leased access rates (¶ 19);
- (6) A comprehensive schedule showing how rates are calculated (¶ 19);
- (7) Rates associated with technical and studio costs (¶ 20);

- (8) Electric programming guide information (§ 21);
- (9) The available methods of programming delivery and the instructions, technical requirements and costs for each method (§§ 22-23);
- (10) A comprehensive sample leased access contract that includes uniform terms and conditions, insurance requirements, length of contract, termination provisions, and electronic guide availability (§§ 24-31); and
- (11) Information regarding prospective launch dates for the leased access programming (§ 32).

Further, cable operators are required to:

- Maintain contact name, telephone number, and email of an individual designated by the cable system operator to respond to requests regarding leased access channels on its website. (§ 13).
- Respond to proposals for leased access by programmers in a timely manner by accepting or offering alternate terms within 10 days of any request (§ 33); and
- Provide an annual report pertaining to leased access rates, usage, channel placement; complaints, and other leased access information (§ 66-70).

Leased access programmers are required to:

- Submit a written proposal for carriage that includes: (1) desired length of contract term; (2) tier, channel and time slot required; (3) anticipated commencement date for carriage; (4) nature of programming; (5) geographic and subscriber level of service requested; and (6) proposed changes to the sample contract submitted by the operator (§ 33).

With respect to rates:

- The Commission also modified the method for determining the leased access rate for full-time carriage on a tier on a tier-by-tier basis;
- With respect to recovery of rates from subscribers, the Commission drastically cut the maximum allowable recovery rate to \$0.10 per subscriber per month (§ 36); and
- The Commission will cap the maximum rate that cable operators may charge (§ 42).

With respect to procedural issues:

- No modifications to the current complaint process were adopted and the Commission will resolved all complaints with in 90 days of the close of pleadings (§§ 51-54);

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- The Commission eliminated the independent accountant requirement (§ 56); and
- The Commission expanded discovery rules by requiring cable operators to: (1) attached copies of any documents they rely on in their defense to an answer; (2) produce all documents, including those relating to rates and other confidential documents (§§ 57-65).

Further Notice of Proposed Rulemaking

The FNPRM seeks comment on two issues with respect to leased access rates:

- (1) How to apply a new rate methodology, and
- (2) Determine the maximum allowable lease access rate to programmers that predominantly transmit sales presentations or program length commercials.

Comments in this proceeding are due 30 days after publication in the Federal Register (approximately early March) and reply comments are due 45 days after publication in the Federal Register (approximately end of March). If you are interested in appealing the Commission's Order or filing comments in this proceeding, please feel free to contact any one of Womble Carlyle's Communications attorneys: Mark Palchick ([email](#)) or Danielle Benoit ([email](#)).

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