



## FCC ISSUES NOTICE OF PROPOSED RULEMAKING REGARDING PROGRAM ACCESS COMPLAINTS AND COMMERCIAL LEASED ACCESS.

June, 2007

The Commission recently released a *Notice of Proposed Rulemaking* (“NPRM”) regarding its program access complaint process and its leased access rules. The following is a summary of the Commission’s decision:

### COMMERCIAL LEASED ACCESS

The Cable Act and the Commission’s rules require cable operators to set aside channel capacity for commercial use by video programmers unaffiliated with the cable operator. The set-aside requirements are in proportion to a system’s total activated channel capacity. Cable operators with fewer than 36 channels must set aside channels for commercial use only if required to do so by a franchise agreement in effect as July 1, 1984. Operators with 36 to 54 activated channels must set aside 10 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Operators with 55 to 100 activated channels must set aside 15 percent of those channels not otherwise required for use or prohibited from use by federal law or regulation. Cable operators with more than 100 activated channels must designate 15 percent of such channels for commercial use. Cable operators are not required to remove services that were being provided on July 1, 1984 in order to comply with the statute.

In the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress required the Commission: (a) to “determine the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use”; (b) to “establish reasonable terms and conditions for such use, including those for

billing and collection”; and (c) to “establish procedures for the expedited resolution of disputes concerning rates or carriage . . .”.

The Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the “average implicit fee” that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit. The Commission also adopted a maximum rate for a la carte services based on the “highest implicit fee” that other a la carte services implicitly pay, and a prorated rate for part-time programming.

The Commission now seeks comment on the current status of leased access. It questions :

- Whether 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 programmers are using those channels?
- Are programmers using the channels on a full-time or part-time basis?
- For what purposes are leased access channels used?
- Do cable operators turn down requests for leased access? If so, why?
- To what extent and for what purposes do the cable operators use the channels for themselves?
- Does the cable operators’ option to use the channels contribute to programmers’ lack of use of the set-aside channels? Are the terms in leased access agreements the same or similar to those that the cable operator has with its programmers?
- Do cable operators impose different requirements regarding, for example,

insurance or termination provisions? If so, why?

The Commission also seeks comment on the costs associated with its complaint process and whether there should be a defined time period within which cable operators must respond to leased access requests or other aspects of the enforcement process. It also poses a number of questions about the complaint process:

- To what extent do programmers make use of its rules allowing programmers to challenge rates that they believe violate the Commission's regulations?
- Is the process too burdensome?
- Is it effective?
- Should there be changes to the complaint process, such as an expedited complaint process before the Commission?

The Commission also questions whether cable operators are responding to programmer requests for rate information within 15 calendar days as required by the rules and whether such responses include all required information.

Comment is also sought on the Commission's leased access rate formula. If modifications are sought, commenters should describe the specific methodologies and how such methodologies would better serve the public interest.

The rules require cable operators to place leased access programmers that request access to a tier actually used by most subscribers on any tier that has a subscriber penetration of more than 50 percent, unless there are technical or other compelling reasons for denying access to such tiers. The Commission questions whether it should change this rule to give leased access programmers the ability to request carriage on a specific tier – a family tier for example. The Commission also questions whether evidence exists demonstrating that cable operators seek to place leased access programming on digital tiers or other less popular tiers, when leased access programmers would prefer the basic tier.

The Commission also seeks comment on whether cable operators have acted reasonably with respect to channel placement of leased access programming and whether there are any specific reform measures it should consider. It questions on which service tier leased access programs appear, and on which channel within the tier do cable operators place the programming.

The Commission further questions whether leased access applies to video-on-demand or other technologies that do not fit into a traditional "tier" and seeks comment on other ways that advances in technology or marketplace developments should affect its leased access rules.

#### **PROGRAM ACCESS COMPLAINT PROCESS**

In addition to establishing rules governing program carriage, the Commission has established procedures for the review of program carriage complaints, penalties and remedies. In general, the Commission seeks comment on whether and how its complaint resolution processes should be modified. It questions whether it should adopt additional rules to protect programmers from potential retaliation if they file a complaint. It also questions whether the existing penalties for frivolous program carriage complaints are appropriate or should be modified.

With respect to alleged violations of the prohibition on discrimination, the rules currently require complainants to demonstrate that the alleged discrimination is "on the basis of affiliation or nonaffiliation" of a vendor, and that "the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly." In the event the staff finds that the complainant has established a *prima facie* case, it may direct an ALJ to hold a hearing, issue a recommended decision on the facts underlying the discrimination claim, suggest a recommended remedy, if necessary, and then return the matter to the Commission. The Commission seeks comment on these procedures, and, in particular,

questions whether the elements of a *prima facie* case should be clarified.

#### **ARBITRATION**

Finally, the Commission seeks comment on whether it should establish arbitration procedures to resolve leased access and program carriage disputes and, if so, what procedures should be established. It questions whether arbitration should be elective or mandatory, who should bear the costs of arbitration and what standard of review the Commission should employ in reviewing an arbitration decision.

Please let us know if you have any questions or would like a copy of the Commission's *NPRM*.

**Please contact Mark Palchick (202/857-4411) or Howard Barr (202/857-4506) if you have any questions regarding this advisory.**