

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

In the Matter of:	)	
Frank J. Vitale,	)	
d/b/a Fal-Comm Communications	)	
	)	CSR-5376-L
v.	)	
	)	
MediaOne of Metropolitan Detroit, Inc.	)	
	)	
Petition for Leased Access Channel	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 15, 2000**

**Released: June 21, 2000**

By the Deputy Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. Frank J. Vitale d/b/a Fal-Comm Communications (“Fal-Comm”) filed the above-captioned petition pursuant to Section 76.975(b) of the Commission’s rules against MediaOne of Metropolitan Detroit, Inc. (“MediaOne”), operator of a cable system serving Birmingham, Michigan.<sup>1</sup> MediaOne filed a response to the petition.

**II. BACKGROUND**

2. The Cable Communications Policy Act of 1984 imposed on cable operators a commercial leased access requirement designed to assure access to cable systems by unaffiliated third parties who have a desire to distribute video programming free of editorial control by cable operators.<sup>2</sup> Channel set-aside requirements were established proportionate to a system’s total activated channel capacity. The Cable Television Consumer Protection and Competition Act of 1992 revised the leased access requirements and directed the Commission to implement rules to govern this system of channel leasing.<sup>3</sup> In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking (“*Rate Order*”),<sup>4</sup> the Commission adopted new rules for leased access addressing maximum reasonable rates, reasonable terms and conditions of use, minority and educational

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<sup>1</sup> 47 C.F.R. §76.975.

<sup>2</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). See Section 612(b) of the Communications Act of 1934, as amended, 47 U.S.C. §532(b).

<sup>4</sup> 8 FCC Rcd 5631 (1993).

programming, and procedures for resolution of disputes.<sup>5</sup> The Commission modified some of its leased access rules in *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order and Second Order on Reconsideration of the First Report and Order (“*Second Report*”).<sup>6</sup>

### III. DISCUSSION

3. Fal-Comm, an independent producer of video programming in the Metro-Detroit area, states that on January 20, 1999 it submitted a written request for leased access channel placement and time slot on Saturdays from 11:00 PM to Midnight starting on February 6, 1999 and ending April 10, 1999 on respondent’s Birmingham, Michigan system.<sup>7</sup> Fal-Comm submitted the request pursuant to a Channel Lease Agreement with MediaOne.<sup>8</sup> Fal-Comm contends that respondent failed to respond to its written request as of February 8, 1999 and that the failure to respond constitutes non-compliance with the provisions of the Channel Lease Agreement governing channel placement and time slots and with Section 76.971(a)(3) of the Commission’s rules.<sup>9</sup> Furthermore, Fal-Comm contends that this and other violations have increased Fal-Comm’s operation costs, damaged its credibility, customer relations, and ability to solicit customers in the affected viewing area.<sup>10</sup> Accordingly, Fal-Comm requests that the Commission impose fines, penalties, or administrative action on MediaOne.<sup>11</sup>

4. MediaOne contends that the petition should be dismissed in light of its full compliance with the Channel Lease Agreement and with Section 76.971(a)(3). The Channel Lease Agreement provides respondent with the right to place programming on MediaOne’s system on a space-available basis.<sup>12</sup> Section 76.971(a)(3) only requires a cable operator to accommodate leased access requests on systems with available capacity.<sup>13</sup> MediaOne states that it notified petitioner by letter dated February 12, 1999, that the timeslot petitioner sought on MediaOne’s Birmingham, Michigan system was unavailable.<sup>14</sup> MediaOne also notes that this is petitioner’s ninth petition filed in the last two years concerning MediaOne’s leased access practices.<sup>15</sup>

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<sup>5</sup> See 47 C.F.R. §76.970, 76.971, 76.975 and 76.977 (1995).

<sup>6</sup> 12 FCC Rcd 5267 (1997). See also *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996).

<sup>7</sup> Petition at Exhibit A (Letter from Frank Vitale, Business Manager, Fal-Comm Communications, to Program Manager, MediaOne of Metropolitan Detroit, Inc., dated Jan. 20, 1999).

<sup>8</sup> MediaOne Response at Exhibit A (Channel Lease Agreement dated June 15, 1999).

<sup>9</sup> Petition at 1; see 47 C.F.R. § 76.971 (a)(3).

<sup>10</sup> Petition at 2.

<sup>11</sup> *Id.*

<sup>12</sup> MediaOne Response at 1, Exhibit A.

<sup>13</sup> MediaOne Response at 1.

<sup>14</sup> *Id.* at Exhibit B.

<sup>15</sup> *Id.* at 2.

5. Pursuant to Section 76.971(a)(3), on cable systems with available leased access capacity sufficient to satisfy current leased access demand, cable operators are required to accommodate as expeditiously as possible all leased access requests for programming that is not obscene or indecent.<sup>16</sup> On systems with insufficient available leased access capacity to satisfy current leased access demand, cable operators shall be permitted to select from among leased access programmers using objective, content-neutral criteria.”<sup>17</sup> MediaOne states that it notified petitioner by letter dated February 12, 1999 that the timeslot petitioner sought on MediaOne’s Birmingham, Michigan system was unavailable.<sup>18</sup>

6. Fal-Comm’s petition in File No. CSR 5376-L will be granted in part. It is not clear from the record that MediaOne ever responded to Fal-Comm’s January 20, 1999 leased access inquiry. Indeed, to the extent it can be considered a response at all, MediaOne’s February 12, 1999 letter to Fal-Comm was sent 6 days after Fal-Comm’s requested leased access service was to have commenced. Moreover, although MediaOne’s February 12, 1999 letter addresses a number of commercial leased access issues, it fails to address petitioner’s January 20, 1999 request for leased access channel placement and time slot on Saturdays from 11:00 PM to Midnight starting on February 6, 1999 and ending April 10, 1999. Rather, MediaOne’s February 12, 1999 letter indicates why the Birmingham systems’ 1:00 AM - 3:00 AM timeslot is not available. Hence, it was not until MediaOne filed its response to petitioner’s leased access complaint, on March 1, 1999, that petitioner became aware that the requested time slot was unavailable. Clearly, MediaOne’s March 1, 1999 response to petitioner’s leased access petition cannot be deemed an “expeditious accommodation” under §76.971(a)(3). In addition, when MediaOne finally responded to petitioner’s request, it failed to provide any “objective content-neutral criteria” for the time slot’s unavailability.<sup>19</sup> In spite of respondent’s failure to comply with the provisions of this act, we nevertheless decline to impose a forfeiture penalty. The record indicates that there were telephone conversations between the parties regarding leased access matters that may or may not have included the subject matter of the proceeding that are not a part of the record herein. Accordingly, we decline to impose a forfeiture penalty in light of the ambiguous record before the Commission. Consequently, we grant Fal-Comm’s petition in part.

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<sup>16</sup> 47 C.F.R. §76.971(a)(3)

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at Exhibit B.

<sup>19</sup> *See* 47 C.F.R. §76.971(a)(3)

**V. ORDERING CLAUSES**

7. Accordingly, **IT IS ORDERED** that the petition for relief of Fal-Comm Communications (Fal-Comm) in File No. CSR 5376-L **IS GRANTED IN PART** to the extent indicated herein.

8. **IT IS FURTHER ORDERED** that within fifteen (15) days from the release date of this order MediaOne of Metropolitan Detroit, Inc. **SHALL ACCEPT** Fal-Comm's application for the Saturday 11:00 PM to Midnight time slot, or a reasonably comparable time period should this time period not be available, on its Birmingham system.

9. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.<sup>20</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau

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<sup>20</sup> 47 C.F.R. §0.321.