

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

In the Matter of:)	
)	
John Broyles d/b/a United International)	
Broadcasting Network)	CSA 5563-L
)	
v.)	
)	
InterMedia)	
)	
Petition for Leased Access)	

MEMORANDUM OPINION AND ORDER

Adopted: July 12, 2000

Released: July 13, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. John Broyles d/b/a United International Broadcasting Network (“UIBN”) filed a request for relief pursuant to Section 76.975 of the Commission’s rules¹ alleging violations of the Commission’s commercial leased access regulations by InterMedia in Franklin County, Tennessee. UIBN subsequently filed an amendment to its petition. InterMedia filed a response to the petition and amended petition, and UIBN submitted a letter in reply to InterMedia’s response.

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 of cable operators.² Channel set-aside requirements were established proportionate to a system’s total activated channel capacity. The Cable Television Consumer Protection and Competition Act of 1992³ revised the leased access requirements and directed the Commission to implement rules to govern this system of channel leasing. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rule Making (“Rate Order”),⁴ the Commission initially adopted rules for leased access addressing maximum reasonable rates, reasonable terms and conditions of use, minority and educational programming, and procedures for resolution of disputes.⁵ The Commission modified some of its leased

¹47 C.F.R. § 76.975.

²Pub. L. No. 98-549, 98 Stat. 2779 (1984).

³Pub. 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).

⁴8 FCC Rcd 5631 (1993).

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

access rules in *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 Order*").⁶

II. DISCUSSION AND ANALYSIS

3. UIBN entered into a contract with InterMedia in March of 1999 for the provision of commercial leased access services in Franklin County, Tennessee for the purpose of promoting local churches and local businesses. UIBN contends that InterMedia has not acted in good faith in implementing the contract, has provided poor picture quality and frequently not run its programs. UIBN asserts that although InterMedia promised on several occasions to install new tape decks for play of its video tapes, that has not been done. UIBN contends that InterMedia nonetheless refused to permit installation of upgraded UIBN tape decks on InterMedia premises, and that the poor picture quality continued. UIBN contends further that InterMedia refused to use an idle second tape deck for play of UIBN tapes on the grounds that the tape deck would be used only for other new leased access. UIBN asserts that it should be entitled to credit for fourteen months of very poor picture quality considering InterMedia's breach of contract.⁷

4. In its amended petition UIBN asserts that subsequent to the filing of the original petition InterMedia shifted its programming from Channel 9 on basic cable to Channel 40 on expanded cable, which requires subscribers to have expanded cable in order to view its programming. UIBN claims this channel change should have resulted in a reduction in charges for leased access but that an increase in rates for UIBN was imposed instead. The amended petition requests the Commission to require that InterMedia supply the necessary equipment such as quality VHS tape decks to service leased access in a timely manner, open a second leased access channel to accommodate community needs, and negotiate in good faith a reasonable new contract. UIBN alleges that a requirement for an insurance certificate imposed as a condition of a new leased access contract presented by InterMedia is unreasonable.⁸ UIBN requests an injunction to preclude a suspension of service on July 7, 2000, which InterMedia states will occur absent return to InterMedia of a signed new contract together with a certificate of insurance.⁹ Finally, UIBN requests imposition of unspecified sanctions on InterMedia.

5. InterMedia states in response that although the original leased access contract with UIBN has expired, it has continued to carry UIBN's leased access programming while attempting to finalize a new contract.¹⁰ In response to the request for opening a new leased access channel, InterMedia states that demand for a second leased access channel has not materialized. With UIBN's lease and two others, InterMedia states that the total current demand stands at only ten and one half hours per day. An operator is not required to open a second leased access channel for part time service when less than 18 hours of an existing channel is occupied or unless there is a demand for eight contiguous hours for the same time slot

⁶12 FCC Rcd 5267 (1997).

⁷Any issue concerning whether InterMedia has breached its contract with UIBN must be resolved in a local court of competent jurisdiction.

⁸See InterMedia letter dated June 6, 2000 attached to the Amended Petition.

⁹*Id.*

¹⁰InterMedia deferred suspension of service until July 14, 2000 at the request of Commission staff to provide time for consideration of the pleadings before us.

for at least a year.¹¹ Therefore, we will not require InterMedia to open a second leased access channel.

6. InterMedia states that as part of a recent channel realignment all leased access programming, including that of UIBN, was shifted to Channel 40, which has a subscriber penetration rate of 90%. Under the Commission's regulations, a channel with subscriber penetration of over 50 percent qualifies as a genuine outlet because it consists of a channel location that most subscribers use. As long as a cable operator provides a leased access programmer with a genuine outlet that provides access to more than 50 percent of the cable operator's subscribership, the operator may place the programmer on any reasonable channel location.¹² We find that InterMedia has satisfied the leased access channel placement requirements with respect to its carriage of UIBN's programming on Channel 40, which has a subscriber penetration rate of 90%.

7. InterMedia states that the contract with UIBN did not contain a general liability insurance requirement. InterMedia defends the inclusion in the new contract presented to UIBN of an insurance clause on the grounds that it requires the same standard type and amount of insurance carried by all other leased access programmers and upheld in numerous instances by the Commission.¹³ UIBN's principle objection to signing this new contract is the inclusion of the insurance clause. A cable operator's right to require reasonable liability insurance coverage for leased access programming was initially discussed in *Anthony Giannotti v. Cablevision Systems Corporation*.¹⁴ The Commission subsequently confirmed that the regulations concerning reasonable terms and conditions of use for commercial leased access do not deny cable operators the right to require reasonable liability insurance coverage for leased access programming.¹⁵ Specific conditions or limits regarding the amount of coverage or the type of insurance policy that operators may require are not specified in the regulations, because "a specific restriction might not be appropriate for all situations."¹⁶ Instead, the Commission stated that insurance requirements must be reasonable in relation to the objective of the requirement. The Commission further stated that determinations of a "reasonable" insurance requirement will be based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors.¹⁷ The burden of proof in establishing reasonableness was placed on cable operators.¹⁸ We find that InterMedia has failed on this record to meet its burden of proof with respect to its proposed imposition of unspecified insurance requirements on UIBN. InterMedia's statement that insurance requirements are the same standard type and amount of insurance carried by all other leased access programmers and upheld in numerous other instances fails to address any

¹¹See 47 C.F.R. § 76.971(a)(4).

¹²See 47 C.F.R. § 76.971(a). See also *Second Order*, 12 FCC Rcd at 5310-12.

¹³InterMedia Response at 2.

¹⁴11 FCC Rcd 10441 (CSB 1996) (Operator's right to require reasonable liability insurance coverage for leased access programming confirmed).

¹⁵See *Second Report*, 12 FCC Rcd 5267, 5324 (1997).

¹⁶*Id.*

¹⁷*Id.*

¹⁸See *Second Report*, 12 FCC Rcd at 5324 and Appendix D, Revised Rules, Section 76.971(d).

of the factors considered by the Commission to be relevant to the reasonableness of insurance requirements for commercial leased access programmers. Accordingly, InterMedia may not include the unjustified insurance requirements in the new leased access contract presented to UIBN.

8. Responding to UIBN's complaint about rates, InterMedia states that UIBN was charged \$530 for 126 and 1/2 hours of service during June 2000 for an average hourly cost of \$4.19. InterMedia stated that, for the first time since August 1997, leased access rates were reviewed along with the channel realignment described above. As a result UIBN would be charged \$453.98 for 69 hours of service proposed for July 2000, for an average hourly cost of \$6.50. UIBN disputed the number submitted by InterMedia, contending that the average hourly cost for the 126 hours was \$4.95 and for the 69 hours would be \$8.27.¹⁹ The dispute resolution procedures adopted in the *Second Report* require that a cable operator's maximum leased access rate be determined by an independent accountant prior to the filing of a petition for relief alleging that a cable operator's leased access rate is unreasonable. In the event that the parties cannot agree on a mutually acceptable accountant, the rules require that the parties each select an independent accountant, who must then select a third independent accountant to perform the review.²⁰ The record does not show that these procedures have been followed in this case. More particularly, a determination by an independent accountant of whether InterMedia's leased access rate was established in compliance with the Commission's regulations was not made prior to the filing of UIBN's petition as required by the Commission's dispute resolution procedures. The record shows instead that InterMedia submitted new rates to UIBN, who then filed the instant petition with the Commission. Accordingly, any issue concerning whether InterMedia's new rates comply with the Commission's leased access regulations will not be considered in this Order.

9. Finally, with respect to UIBN's request for additional equipment, InterMedia states that with one exception not involved here, all leased access programming is presented via videotape. With four VCRs available for such use, InterMedia contends that existing equipment is more than adequate to handle leased access user demand. InterMedia states that no complaints from other leased access clients about picture quality have been received except an instance where low quality tapes were being reused. InterMedia further states that UIBN has been offered permission to install its own video equipment if InterMedia's equipment does not meet its requirements. On this record and in view of InterMedia's offer, we decline to take action on this aspect of the petition.

¹⁹InterMedia also submitted a letter indicating that a UIBN request for time slots different from that previously requested accounts for the apparent rate discrepancies mentioned in the UIBN Reply. Although the leased access regulations do not provide for pleadings beyond a petition for relief and a response, we consider this letter along with the UIBN reply to InterMedia's response for purposes of a more complete record.

²⁰See *Second Report*, 12 FCC Rcd at 5320-5322. Each of these steps is subject to specific time limitations, and the accountant's report must be signed, dated, certified by the accountant, and maintained in the cable operator's public file. *Id.* See also 47 C.F.R. 76.975(b).

III. ORDERING CLAUSES

10. In view of the above, **IT IS HEREBY ORDERED** that the petition for relief filed in the captioned proceeding by John Broyles d/b/a United International Broadcasting Network (“UIBN”) **IS GRANTED IN PART** and InterMedia **SHALL DELETE** from the new contract presented to UIBN the clause requiring UIBN to provide an insurance certificate.

11. **IT IS HEREBY FURTHER ORDERED** that the petition for relief filed by UIBN **IS HEREBY DENIED** in all other respects.

12. This action is taken under delegated authority pursuant to the provisions of Section 0.321 of the Commission’s rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

²¹47 C.F.R § 0.321.