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

In the Matter of:	)	
	)	
Kenney Broadcasting Corporation	)	
	)	CSR 5473-L
v.	)	
	)	
Time Warner Communications	)	
	)	
For Leased Access	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 2001 **Released: September 11, 2001**

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Kenney Broadcasting Corporation ("Kenney") filed a petition alleging that Time Warner Communications ("Time Warner") demanded payment of charges for technical support in connection with proposed commercial leased access programming for presentation on Time Warner's Port Orange-Daytona, Florida cable system, in violation of the Commission's commercial leased access regulations. Time Warner filed a response to the petition, and Kenney filed a reply.

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 of cable operators.[1] 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[2] 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*"),[3] the Commission initially adopted rules for leased access

[1]Pub. L. No. 98-549, 98 Stat. 2779 (1984).

[2]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).

[3]8 FCC Rcd 5631 (1993).

addressing maximum reasonable rates, reasonable terms and conditions of use, minority and educational programming, and procedures for resolution of disputes.[4] The Commission modified some of its leased 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*").[5]

III. DISCUSSION AND ANALYSIS

3. Kenney contends that Time Warner responded to its request for the airing of programming containing political advertising materials by quoting a schedule of rates that included technical support charges in addition to channel charges.[6] Kenney asserts that the technical support charges violate the Commission's rules applicable to commercial leased access services adopted in the *Second Order*. Kenny argues that the rules adopted in the *Second Order* preclude Time Warner from imposing technical support charges in connection with the provision of leased access channels because similar charges are not imposed by Time Warner for certain programming carried on its program origination channel. Kenney alleges further that the unsubstantiated technical support charges rendered its proposed political advertising programming economically infeasible, which eliminated Time Warner's only competitor for political advertising dollars.

4. Kenney requested the airing of a series of programs to run during the period September 28 and October 4, 1999 "on the same [¾ inch] tape format as my current program that runs daily a 6:30 P.M. The new program will be laid on the tape first and [my other programming] will be put on after that."[7] Kenney states that Time Warner's production department assured him that the program could be played without tape insertion for every play by using existing capacity on a tape deck used to air his other programming under an existing leased access contract. Kenney states further that Time Warner employees informed him that Time Warner does not charge a technical services fee to non-leased access customers and that no per play add-on fee of any kind including technical support, tape insertion or monitoring is levied on non-leased access programmers carried on Time Warner. Kenney contends Time Warner charges a flat fee for such programming provided on tape.[8]

5. Time Warner states that the headend of this cable system is three miles from the nearest Time Warner office, requiring technician travel to the site for tape insertion. Time Warner also maintains that it has experienced trouble with play of Kenney's tapes necessitating that a technician remain on site for monitoring tape play and correcting recurring problems.[9] Next, Time Warner states that its "non-leased

[4] *See* 47 C.F.R. §76.970, 76.971, 76.975 and 76.977 (1995).

[5] 12 FCC Rcd 5267 (1997). *See also 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).

[6] The carriage was requested on Time Warner's Daytona Beach-Port Orange cable system. Kenney also alleges that Time Warner responded to the request initially by quoting a schedule of charges that included the technical support charges within the quoted channel charges, and later separated the technical support charges from the channel charges only after Kenney demanded that such charges be separtely shown. Kenney Petition at 1-2.

[7] Kenney Petition, Exhibit A.

[8] *Id*. at 2-3. Kenney requested in writing that Time Warner inform him whether any non-leased access and non-PEG programming is carried on its system for which an insertion fee, technical fee or another fee other than for air time is not charged, but he received no response. *Id*. at 2.

[9] Time Warner maintains that the quoted technical service fees cover only the cost of labor involved and include (continued…)

access programming is received via either off-air antenna or satellite at the head end and automatically retransmitted to subscribers," necessitating no tape insertion.[10] Time Warner states that "the only other video content submitted via video tape and carried on the system is that of local availabilities advertisers, primarily on Time Warner's Local Origination channel. These are not in fact programmers; they are merely advertisers."[11] Time Warner asserts that the programmer is Time Warner's Local Origination Department, an owned but operationally separate entity, and it does not deliver its programming to its system via videocassette. Even if it did, Time Warner argues that it would make no sense for it to charge itself technical service fees.

6. While the record here is not entirely clear, it appears that Time Warner, through its cable system's Local Origination Department, accepted tapes from unaffiliated nonleased access users and in turn carried their programming on its cable system.[12] Time Warner apparently carried this nonleased access programming originally "submitted via video tape" without charging the fees that were imposed on Kenney for technical support.[13] Contrary to Time Warner's contention, we cannot find that this is an instance where Time Warner is merely providing its own programming to itself for carriage. The fact that Time Warner's Local Origination Department accepted tapes from nonleased access users does not permit it to treat Kenney any differently regarding technical fees. It is clear that a separate charge for technical support cannot be imposed upon Kenney when Time Warner does not charge similar fees to nonleased access programmers on its cable system.[14] Furthermore, contrary to Time Warner's contention, the content of the programming provided to Time Warner's Local Origination Department by unaffiliated nonleased access users is immaterial to our determination. Despite the nature of the programming provided, Kenny is entitled to equal treatment for technical charges under our rules.

7. Time Warner contends that the system for playing Kenney's tapes pursuant to the existing contract is unreliable and unacceptable going forward, that the system failed nine times during September and October of 1999, and that such failures have resulted in various problems detrimental to the cable system. Kenney disputes these allegations and contends that these few failures during nearly 250 plays of its other programming over the past year occurred as the result of human error and acts of God and not system unreliability as Time Warner contends. In this connection, Kenney attributes some of those failures to timing errors introduced into the system by Time Warner employees and the other failures to severe weather and hurricane conditions during which Time Warner's system experienced wide-spread outages.[15] Time Warner presented no specific evidence that Kenney's tapes caused these distribution failures or any other instances of distribution problems.

8. We also find Time Warner's stated policy that all future leased access contracts will contain a provision for the reimbursement of costs associated with manual insertion and monitoring of programming submitted on videocassette to be arbitrary, unreasonable and inconsistent with the *Second*

(…continued from previous page)
none of the other costs involved, such as vehicle costs. Time Warner Response at 5-6.

[10] *Id*. at 3.

[11] *Id.*

[12] Kenney Reply at 2.

[13] *Second Order*, 12 FCC Rcd at 5324-25. *See also* 47 C.F.R § 76.971(c).

[14] *Second Order*, 12 FCC Rcd at 5325.

[15] Kenney Reply at 1-2.

Report and the commercial leased access regulations.[16] Leased access programmers are required to reimburse cable operators only for "the reasonable cost of any technical support that operators actually provided," and only if such technical support "is not also provided to nonleased access programmers on the system."[17]

9. The Commission's rules provide that during the pendency of a dispute, a party seeking to lease channel capacity "shall comply with the rates, terms, and conditions prescribed by the cable operator, subject to refund or other appropriate remedy."[18] In any event, Kenney does not seek monetary damages, which may have been mitigated by following the procedures provided in Section 76.975(h). Instead, Kenney requests that Time Warner be ordered to provide him with the same kind of equipment usage and technical support provided to non-leased access and non-PEG programmers, and to impose no add-on fees not imposed on such other programmers. Kenney also asks that appropriate sanctions be levied on Time Warner for withholding basic information about non-leased access technical services and charges. Although the Commission's leased access rules do not specifically require cable operators to provide information regarding charges for nonleased access services, cable operators "may not unreasonably refuse to cooperate with a leased access user in order to prevent that user from obtaining channel capacity."[19] While we will not impose a forfeiture in this instance, we expect Time Warner to provide leased access users with the basic information they need to determine their rights under the Commission's leased access rules. Information regarding charges imposed on nonleased access users for technical support is the type of basic information that we expect to be made available on request.

10. Accordingly, **IT IS HEREBY ORDERED** that the petition for relief filed in the captioned proceeding by Kenney Broadcasting Corporation **IS GRANTED IN PART** to the extent indicated in the foregoing Memorandum Opinion and Order and **IS OTHERWISE DENIED.**

11. This action is taken under delegated authority pursuant to the provisions of Section 0.321 of the Commission's rules.[20]

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[16]Time Warner Response at 5.

[17]*Second Order*, 12 FCC Rcd at 5325. *See also* 47 C.F.R § 76.971(c).

[18]47 C.F.R § 975(h).

[19]47 C.F.R. § 76.971(c).

[20]47 C.F.R § 0.321.