

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

In the Matter of)	
)	
Real Estate T.V., LLC)	CSR-7133-L
)	
v.)	
)	
Cox Media New Orleans and)	
Cox Communications Louisiana, LLC d/b/a Cox)	
Media)	

MEMORANDUM OPINION AND ORDER

Adopted: February 13, 2008

Released: February 14, 2008

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Real Estate T.V., LLC (“RETV”) filed an emergency petition for relief alleging that Cox Media New Orleans and Cox Communications Louisiana, LLC d/b/a Cox Media (collectively, “Cox”) is in violation of the Commission’s commercial leased access regulations.¹ Cox filed an opposition. As set forth below, we grant the petition in part, principally with respect to certain fees charged to RETV, and deny it in part with respect to complaints about tier carriage and matters outside the Commission’s jurisdiction.

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.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 access rules in *Implementation of the Cable Television Consumer Protection*

¹ See 47 C.F.R. §§ 76.970, 76.971 & 76.975

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

³ 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).

⁴ 8 FCC Rcd 5631 (1993).

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

and Competition Act of 1992, Second Report and Order and Second Order on Reconsideration of the First Report and Order (“*Second Order*”).⁶ The Commission recently issued its Report and Order⁷ on leased access for the development of competition and diversity in video programming, and we note here that rulemaking does not change the outcome of our decision on the four issues presented below and, in any event, the new rulemaking is not yet effective and therefore does not apply.⁸

III. SUMMARY OF PLEADINGS

3. RETV is a limited liability company that was established on November 2, 2006 in the State of Louisiana for the purpose of providing real estate programming over the Cox cable system in New Orleans. On January 24, 2007, RETV and Cox Communications entered into a Leased Access Programming Agreement⁹ and RETV launched its programming service on February 1, 2007.¹⁰ RETV filed its emergency petition for relief on March 7, 2007 alleging specific violations by Cox that caused RETV to suffer financial difficulties.¹¹ Cox filed its opposition on April 6, 2007 alleging that RETV entered the market with a flawed business plan that failed to account for the negative impact of Hurricane Katrina on the real estate market in New Orleans, and that further failed to account for the negative impact of the national slow-down in the real estate market on the New Orleans market.¹²

4. RETV contends that Cox violated the leased access rules by placing RETV’s programming on Cox’s digital tier rather than on Cox’s analog basic tier. RETV states that Cox unduly delayed the assignment of a channel, eventually placing RETV’s programming on digital channel number 198—despite earlier assurances made by Cox that RETV was “[d]efinitely going to be on basic cable, most likely basic cable Channel 78.”¹³ RETV contends that when Cox began airing RETV programming, “dozens of people” could not receive the channel.¹⁴

5. RETV seeks a refund of \$350,000—representing “all money spent thus far,” including a three year lease for office and studio space, a three year lease with Cox Business Services to tie into the system’s headend, monthly rental and franchise fees, advertising, equipment, employees, promotional items, and insurance. RETV also requests that sanctions be imposed against Cox for willful violation of the Commission’s leased access provisions, as well as punitive damages. In addition, RETV seeks injunctive relief in the form of continued carriage of RETV while this proceeding is pending, no rental

⁶ 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).

⁷ The Commission recently adopted a Report and Order and Further Notice of Proposed Rulemaking amending the leased access rules. See *Leased Access Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-208 (adopted Nov. 27, 2007) (release pending); see also *FCC Adopts Rules to Promote Video Programming Diversity* (Nov. 27, 2007) available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278453A1.pdf.

⁸ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) holding that administrative rules may not be applied retroactively absent clear and express statutory authority.

⁹ Petition at 6.

¹⁰ *Id.*

¹¹ See *id.* at 7.

¹² See Opposition at ii.

¹³ Petition at 3.

¹⁴ *id.* at 6.

fees for the current channel assignment, reassignment to Cox's analog basic cable tier, and allowance to file any and all supplements to show that Cox has violated the leased access rules.¹⁵

6. In opposition, Cox argues that under Commission rules, it had the discretion to assign RETV programming to a channel in the digital tier.¹⁶ In support of this argument, Cox states that it repeatedly informed RETV that there was no guarantee of the availability of Channels 75-78 or any other specific channel assignment for leased access.¹⁷ Cox further asserts that more than 50 percent of its subscribers receive digital cable service and, thus, Cox could make any "reasonable" channel assignment within this digital tier to carry leased access programming.¹⁸ Although Cox acknowledges RETV's complaint about the failure of people to receive Channel 198, Cox asserts that RETV refused to give Cox the names of any individuals experiencing such technical difficulties.¹⁹

7. Cox also asserts that RETV was informed that "a security deposit, insurance, and/or bond may be required," and that "rates are subject to change upon 30 days written notice."²⁰ Cox states that it required RETV to pay a security deposit and advanced payment because of valid business concerns.²¹ Cox also explains that it asked RETV to discontinue reference to the Cox tradename because RETV's advertising created confusion among local realtors as to the source of RETV programming.²² Cox explains that by charging RETV a separate franchise fee rather than relying on the implicit fee rate calculation authorized by the Commission, Cox is actually reducing the price of leased access. Cox also denies any anticompetitive motive, asserting that it had considered and rejected a plan to develop a real estate channel in New Orleans, Louisiana.²³

IV. DISCUSSION

8. The principal issues raised by RETV's petition are whether Cox violated the Commission's leased access regulations by 1) assigning RETV's programming to a digital tier, 2) charging RETV for certain inappropriate fees, 3) refusing to allow RETV to use Cox's name in advertising, and 4) requiring the advanced payment of a security deposit and one month's fees.

¹⁵ See *id.* at 8.

¹⁶ See Opposition at 2 (citing 47 C.F.R. § 76.975(b)(1)). In opposition, Cox argues that the Petition for Emergency Relief filed by RETV is procedurally defective. Specifically, Cox argues that because despite RETV's failure to pay legitimate leased access rates, Cox has continued to carry RETV. Thus, Cox argues, RETV does not have standing to bring the current petition as Cox has neither charged rates in violation of Commission rules nor has Cox refused to make channel capacity available. We disagree with respect to the method by which Cox calculated rates for leased access carriage, and therefore, hold that RETV does have standing in this case. Cox further argues that Petition is procedurally flawed in that it does not contain an affidavit or a certificate of service and is unverified. We note that we received an Affidavit and proof of service of process on March 13, 2007. Because this error appears to be inadvertent and no harm to the parties was caused by this short delay, we will allow correction to the Petition.

¹⁷ See *id.* at 5.

¹⁸ See *id.* at 7 utilizing 47 C.F.R. § 76.971(a)(1) in its analysis.

¹⁹ See *id.* at 10.

²⁰ *id.* at 6.

²¹ *id.* at 8.

²² *id.* at 6.

²³ See *id.*

9. The Commission gave the cable operator the discretion to place leased access programming on any tier with a subscriber penetration of more than 50 percent.²⁴ Although we acknowledged that cable operators may have the incentive to place competitive leased access programming on “unfavorable tiers,” we determined that the 50 percent threshold requirement would adequately protect the interests of leased access programmers while giving cable operators the flexibility to determine the “marketing mix of different tiers.” In the instant case, RETV does not refute Cox’s assertion that its digital tier has a subscriber penetration of more than 50 percent. Therefore, we agree with Cox that assignment of RETV’s programming to the digital tier is not a violation of Commission leased access rules.

10. With respect to the second issue, we conclude that Cox is not entitled to charge RETV a separate franchise fee representing 5 percent of the fees assessed on Cox as a result of its carriage of RETV’s programming.²⁵ As we noted in *Aamen*, cable franchise fees are properly taken into account in the implicit fee system.²⁶ Cox has presented evidence to demonstrate that that by excluding franchise fees from the initial subscriber tier charge and incorporating these fees only after a reduced Average Implicit Fee has been determined, it charges RETV a fee less than the maximum explicit fee. Cox has not presented evidence to demonstrate, however, that it recovers the same amount of franchise fees through its proposed rate methodology as it would applying the average implicit fee formula set forth in Section 76.970 of the Commission’s rules, nor has Cox demonstrated that a waiver of the methodology set forth in our rule for calculating the average implicit fee is warranted. Thus, we will not allow Cox to modify the implicit fee calculation by assessing a separate franchise fee on RETV.

11. In addition, we note that RETV mentions that it has entered into a three-year lease with Cox Business Services for the purpose of access to the cable headend. The implicit fee system was devised to account for all the ancillary costs associated with a leased access provider gaining access to the subject cable system. The only charges that are permitted outside of the implicit fee are those for technical services not provided for free to non-leased access users. Traditionally, cable systems do not require leased access to their headend for non-leased access users. As a result, Cox’s decision to charge for access to the headend represents an additional and improper fee levied against RETV.

12. With respect to Cox’s request that its name be removed from all pre-contract promotional materials, we hold that the matter is outside our jurisdiction. In *Lorilei Communications*, we stated that while a cable system may protect its trade name through contractual restrictions in order to avoid any apparent endorsement of the leased access programming, a cable system may not prohibit a leased access programmer from using a cable trade name in order to advertise the channel’s location.²⁷ This type of pre-contractual dispute, however, is not within the purview of the Commission’s rules. Furthermore, there is no evidence in the record suggesting that after the execution of this agreement, RETV attempted to use Cox’s trade name or that the agreement itself restricted the use of Cox’s trade name in advertising the location of RETV programming.

²⁴ See *Second Report*, 12 FCC Rcd at 5309. See also, 47 C.F.R. § 76.971.

²⁵ We note, however, that cable operators may not charge for equipment if the same type of equipment is used for non-leased access programmers. Cable operators may charge for the use of technical equipment that is provided at no charge for PEG access programming, provided that the franchise agreement requires the operator to provide the equipment, the equipment is not being used for any other non-leased access programming, and the operator's franchise agreement does not preclude such use. See *Second Report*, 12 FCC Rcd at 5324.

²⁶ 15 FCC Rcd at 22249. *Aamen* indicated that Section 76.970(d) contemplates the inclusion of franchise fees “in the total amount the operator receives in subscriber revenue per month for programming,” which is utilized in the average implicit fee formula.

²⁷ See *id.* citing Second order, para 3.

13. With respect to the security deposit and advanced fees that Cox required of RETV, the Commission has allowed cable operators to require reasonable security deposits or other assurances from users who are unable to prepay in full for leased access, and are allowed to impose reasonable insurance requirements on leased access programmers.²⁸ Cox required RETV to pay in advance a \$20,000.00 security deposit and the first month's rental, for a total up-front payment of \$66,852.05.²⁹ By the second month, RETV was already unable to pay the rental in full and had an outstanding balance of \$12,000.00.³⁰ Furthermore, in its Opposition RETV did not dispute the reasonableness of either the insurance requirements or the security deposit. RETV instead alleges that it changed its business plans in detrimental reliance upon Cox's extension of credit and/or assurances that such advanced payments would not be required and the Commission is not the proper forum for resolving this dispute.

V. ORDERING CLAUSES:

14. Accordingly, **IT IS ORDERED** that the petition for relief of Real Estate TV, Inc. **IS GRANTED IN PART and DENIED IN PART.**

15. **IT IS ORDERED** that within 30 days from the release date of this order, Cox Media New Orleans **SHALL CEASE** imposing on Real Estate TV, Inc. a 5 percent franchise fee and shall refund to Real Estate TV, Inc. all franchise fees collected.

16. **IT IS ORDERED** that within 30 days from the release date of this order, Cox Media New Orleans **SHALL CEASE** imposing on Real Estate TV, Inc., separate fees, if any, for access to the cable system headend and shall refund to Real Estate TV, Inc. all monies collected thus far, if any, for the purpose of such attachment.

17. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

²⁸ See *Rate Order*, 8 FCC Rcd at 5942-5943, ¶ 501. See also 47 C.F.R. § 76.971(d).

²⁹ Petition at 6.

³⁰ Petition at 7.

³¹ 47 C.F.R. § 0.283.