

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

In the Matter of)	
)	
StogMedia)	CSR-8083-L
v.)	
Time Warner Cable Inc., Los Angeles)	

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 2009

Released: June 12, 2009

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On November 4, 2008, StogMedia filed the above-captioned petition for relief pursuant to Section 76.975(b) of the Commission's rules, alleging that Time Warner Cable Inc. ("Time Warner") has violated the Commission's leased access rules by charging fees for technical support for StogMedia's programming provided on video tape for broadcast on Time Warner's Los Angeles cable systems.¹ In particular, StogMedia contends that Time Warner's charges for leased access programming provided by video tape violate Section 76.971(c) of the Commission's rules, which bars cable operators from imposing fees on leased access programmers for the same kind of technical support that they provide to non-leased access programmers.² StogMedia requests that the Commission direct Time Warner to provide technical support related to tape insertion at no charge, and to refund past payments.³ On December 4, 2008, Time Warner filed a response to the petition,⁴ with an erratum to the response filed on December 5, 2008.⁵ In response to a February 10, 2009 letter from the Media Bureau, Time Warner filed supplemental information on March 11, 2009.⁶ For the reasons set forth below, we grant StogMedia's petition.

II. BACKGROUND

2. The Cable Communications Policy Act of 1984 imposed on cable operators a commercial leased access obligation designed to assure access to cable systems by unaffiliated third parties that wish to distribute video programming absent the editorial control of cable operators.⁷ The

¹ StogMedia Petition for Expedited Special Relief ("StogMedia Petition").

² 47 C.F.R. § 76.971(c).

³ StogMedia Petition at 6.

⁴ Time Warner Answer to StogMedia Petition ("Time Warner Answer").

⁵ Time Warner Erratum to Answer to StogMedia Petition.

⁶ Time Warner Response to Media Bureau Letter ("Time Warner Letter").

⁷ Pub. L. No. 98-549, 98 Stat. 2779 (1984) ("1984 Cable Act").

leased access provisions in the 1984 Cable Act established channel set-aside requirements proportionate to a system's total activated channel capacity. In the Cable Television Consumer Protection and Competition Act of 1992, Congress revised those provisions and directed the Commission to implement rules governing leased access.⁸ In accordance with this statutory mandate, the Commission adopted rules regarding the rates, terms and conditions under which cable operators must provide leased access pursuant to Section 612.⁹

III. DISCUSSION

3. StogMedia is a Mississippi-based video production company that distributes video programming via leased access capacity purchased from multiple cable systems nationwide.¹⁰ StogMedia states that, while it has been leasing capacity on Time Warner's Los Angeles systems, Time Warner has charged it fees related to the insertion of programming provided on video tape.¹¹ As evidence that Time Warner does not charge the same fees to non-leased access programmers, StogMedia submits what it claims are "published fees that do not include extra insertion fees" for long-form advertising aired on a channel designated for leased access.¹² Accordingly, StogMedia asserts that Time Warner has violated Section 76.971(c) of the Commission's rules, which precludes cable operators from imposing charges for the same kind of technical support that they provide at no cost to non-leased access programmers.¹³

4. In response, Time Warner attempts to characterize the programming for which it declined to impose per insertion fees as local origination programming, which is not considered "non-leased access programming" for purposes of the applicable rules.¹⁴ Thus, Time Warner argues that it "is free to collect technical assistance fees from leased access programmers even if it elects to decline to do so with respect to local origination programming."¹⁵ Time Warner relies on *A+ Video v. Time Warner*

⁸ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993).

⁹ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd at 5941-5942, ¶ 500; Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996); Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267 (1997) ("Second Report and Order").

¹⁰ StogMedia Petition at 1.

¹¹ *Id.* at 4-5. Time Warner has charged StogMedia and other leased access programmers a \$14 "per insertion" technical assistance fee for program material provided to the Time Warner systems in tape or disk format. Time Warner Answer at 1.

¹² StogMedia Petition at 4.

¹³ *See id.* at 1, 4. Section 76.971(c) of the Commission's rules provides, in pertinent part:

Cable operators are required to provide unaffiliated leased access users the minimal level of technical support necessary for users to present their material on the air, and may not unreasonably refuse to cooperate with a leased access user in order to prevent that user from obtaining channel capacity. Leased access users must reimburse operators for the reasonable cost of any technical support actually provided by the operator that is beyond that provided for non-leased access programmers on the system.

47 C.F.R. § 76.971(c).

¹⁴ Time Warner Answer at 6.

¹⁵ *Id.*

Cable for the proposition that “programming transmitted on a cable operator’s local origination channel, even when that channel is also used for part-time leased access, does not count as ‘non-leased access programming’ for purposes of making the comparison” between technical assistance fees charged to leased access and non-leased access programming.¹⁶ Additionally, Time Warner asserts that the rate schedule for carriage of long-form advertising that was submitted by StogMedia in support of its complaint was merely a proposal that was never implemented, and if it had been implemented, the stated \$100 per half hour all-inclusive fee would have included the technical assistance costs associated with carriage of programs provided via tape or DVD.¹⁷

5. Time Warner concedes that it did not charge any itemized per insertion fee for certain programming that was carried on its local origination channels.¹⁸ Specifically, Time Warner states that instead of charging certain long-form advertising programmers according to a rate schedule, Time Warner required the programmers to purchase 30-second advertisements on other Time Warner channels.¹⁹ Time Warner, in reference to these agreements, notes that it “ceased carriage of all local origination programming that involved a program carriage fee” as of December 28, 2008.²⁰ Time Warner explains that it continues to carry *Jewelry TV*, which is delivered by satellite, and *Revenue Frontier*, which is delivered by satellite to some systems and by tape to others, and that compensation to Time Warner for carriage of these home shopping programs is in the form of sales commissions, as opposed to rate schedule charges or a requirement to purchase advertising on other channels; there are no technical assistance fees.²¹

¹⁶ *Id.* at 7, citing *A+ Video v. Time Warner Cable*, 17 FCC Rcd 4215, ¶ 6 (CSB 2002), *aff’d*, 20 FCC Rcd 10090 (MB 2005) (“*A+ Video*”).

¹⁷ *Id.* at 9.

¹⁸ Time Warner Letter at 2.

¹⁹ *Id.* Time Warner argues that “any necessary technical assistance associated with carriage of these programs was included as part of the overall package fee.” *Id.* It is not clear what comprises the “overall package fee,” as the only charges were for the placement of the 30-second advertisements. Regardless, Time Warner admits that there were no itemized technical assistance fees for the long-form programming placed on a Time Warner local origination channel. *Id.*

²⁰ *Id.* Time Warner previously stated in its Answer that December 28, 2008 was the date on which it would cease carriage of long-form advertising programs on its local origination channels, and that any such programming carried between the date on which Time Warner filed its response and the cessation of carriage would only be carried pursuant to an agreement providing “a separate line-item fee for technical assistance.” Time Warner Answer at 9. It appears that Time Warner did not, in fact, cease carrying long-form advertising programs on its local origination channels as of December 28, 2008, and has continued carrying at least two home shopping services. *See* Time Warner Letter at 2.

²¹ *Id.* Time Warner also provides an extensive explanation of the reasonableness of the \$14 per insertion fee charged by its Los Angeles cable systems to all leased access programmers that provide their programming to the systems via tape or disk. Time Warner Answer at 1-4. Time Warner notes that “[t]echnical and content problems with leased access programming are not infrequent,” such as StogMedia’s failure to include telephone numbers and prices within its infomercial programming that aired on some of Time Warner’s Los Angeles cable systems during the week of October 13, 2008. According to Time Warner, StogMedia refused to compensate Time Warner for rerunning the program with the information included, even though the errors were either at the fault of StogMedia or the infomercial producer. *Id.* at fn. 11. As StogMedia does not refute the reasonableness of a \$14 per insertion fee, we decline to address this issue.

6. Time Warner is incorrect in its assertion that programming that airs on a local origination channel cannot be considered “non-leased access programming” for purposes of the leased access rules. In *A+ Video*, we found that, where a cable operator is “required by various franchise agreements to provide local origination programming,” and where the cable operator “selected, packaged and programmed the local origination programming itself,” it would not make sense for the cable operator to charge itself for technical assistance.²² In the present matter, Time Warner states that “[i]n certain cases,” its channels carrying local origination programming “are self-programmed...in order to meet the local origination requirements of local franchise agreements.”²³ However, with regard to other programming that Time Warner carries on its local origination channel, Time Warner has not produced any evidence that it is required under its franchise to carry the programming, nor does the record reflect that Time Warner packaged, and/or programmed such programming. Thus, the latter category of programming must be characterized as non-leased access programming.²⁴ The mere fact that a cable operator chooses to carry particular programming, such as home shopping programming, on a local origination channel does not convert that programming into local origination programming. Contrary to Time Warner’s claim, charging a per insertion fee for unaffiliated programming provided by video tape or disk would not cause Time Warner to charge itself a technical support fee.²⁵ Accordingly, we must conclude that Time Warner accepted tapes from unaffiliated non-leased access users and in turn carried their programming on its cable system, without charging the itemized per insertion fees that were imposed on StogMedia for technical support.²⁶ Section 76.971(c) precludes Time Warner from imposing a separate charge for technical support on StogMedia when Time Warner provides such technical support to non-leased access programmers on its cable systems at no charge.²⁷

7. 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.”²⁸ StogMedia requests a refund of technical support charges that were not also imposed on non-leased access users.²⁹ Accordingly, we hereby require Time Warner to reimburse StogMedia for all per insertion fees paid for inclusion on Time Warner’s Los Angeles cable systems, during such time as comparable fees were not imposed for non-leased access

²² *A+ Video*, 20 FCC Rcd 10090, ¶ 2. Contrary to Time Warner’s assertion, *A+ Video* did not overturn *Kenney Broadcasting Corp. v. Time Warner Communications*, 16 FCC Rcd 16383 (CSB 2001) (“*Kenney Broadcasting*”) on which StogMedia relies; rather, the cases are distinguishable. Unlike in *A+ Video*, we did not find that the facts presented in *Kenney Broadcasting* indicated that it involved a case of the cable operator “merely providing its own programming to itself for carriage.” *Kenney Broadcasting*, 16 FCC Rcd at 16385, ¶ 6.

²³ Time Warner Answer at fn. 6.

²⁴ Although the Commission would have preferred that the parties submit more comprehensive factual information regarding the nature of the programming for which Time Warner did not impose a per insertion fee, the facts presented were sufficient for us to conclude that such programming constituted non-leased access programming.

²⁵ See Time Warner Letter at 1 (stating that “each of these programs was selected by [Time Warner] for cablecast on a [Time Warner] local origination channel, and hence [Time Warner] obviously did not charge itself a technical support fee”).

²⁶ See *id.* at 2.

²⁷ Second Report and Order, 12 FCC Rcd at 5324-25.

²⁸ 47 C.F.R. § 76.975(h).

²⁹ StogMedia Petition at 6.

programming.³⁰

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that, pursuant to Section 76.975 of the Commission's rules, 47 C.F.R. § 76.975, the petition for relief filed by StogMedia **IS GRANTED** to the extent indicated in the foregoing Memorandum Opinion and Order.

9. **IT IS ORDERED** that Time Warner Los Angeles **SHALL CEASE** imposing on StogMedia per insertion fees for commercial leased access programming submitted via video tape or disk if such fees are not imposed on non-leased access programming, and shall within 30 days refund to StogMedia all monies collected to date through such per insertion fees during such time as per insertion fees were not imposed on non-leased access programmers.

10. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

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³⁰ StogMedia requests an order that Time Warner "refund any and all such technical support charges as have been imposed on leased access users where the same charges have not been imposed on non-leased users." *Id.* We decline to order a refund of any technical support charges paid by a leased access programmer other than StogMedia, as StogMedia only has standing to file a petition for leased access relief on its own behalf. *See* 47 C.F.R. § 76.975. StogMedia also requests that we "impose some reasonable penalty on Time Warner and other cable sites that have committed the same act." StogMedia Petition at 6. The parties to this proceeding are StogMedia and Time Warner, and no action will be taken against any cable operator other than Time Warner.