

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

In the Matter of)
King Kong Broadcasting, Inc.) CSR-5388-L
v.)
Cox Communications Las Vegas, Inc. d/b/a Cox)

ORDER

Adopted: November 8, 2013

Released: November 13, 2013

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

I. INTRODUCTION

1. King Kong Broadcasting, Inc. ("King Kong") has filed a petition for relief pursuant to Section 612(c)(4)(A)(iii) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.975 of the Commission's rules. King Kong alleges that Cox Communications Las Vegas, Inc. ("Cox") has refused to provide a commercial leased access channel in Boulder City, Nevada in violation of Section 612(a) of the Communications Act. Cox filed an opposition to the petition. In this Order, we deny King Kong's petition for relief.

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. Channel set-aside requirements were established proportionate to a system's total activated channel capacity. The

147 U.S.C. § 532(c)(4)(A)(iii).

247 C.F.R. § 76.975 (October 1, 2013).

347 U.S.C. § 532(a).

4Cox filed a supplement to its opposition, King Kong filed a supplement to its petition, and Cox filed an opposition to King Kong's supplement. King Kong filed a request for status to which Cox filed a reply. Subsequently, the case was closed administratively in error and remained closed until 2013 when a representative from King Kong contacted FCC staff for a status update. By letter dated May 31, 2013, the parties were asked to update their pleadings. King Kong filed a letter updating its petition and Cox filed an opposition and motion to dismiss. King Kong next filed a response and Cox filed a motion to strike. King Kong filed a response and opposition to the motion to strike. Although Section 76.975 of the Commission's rules provides only for the filing of a petition and response, we will accept these pleadings filed through September 17, 2013, in order to have a more complete record before us and in light of the delayed resolution of this matter.

5Pub. L. No. 98-549, 98 Stat. 2779 (1984).

Cable Television Consumer Protection and Competition Act of 1992⁶ 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*,⁷ 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.⁸ The Commission modified some of its leased access rules in the *Second Rate Order*.⁹

III. DISCUSSION

3. King Kong requests a commercial leased access channel from Cox on the portion of Cox's Las Vegas cable system serving Boulder City, Nevada. King Kong asserts that programming insertion at Boulder City would provide a feasible alternative to service from the Las Vegas headend where the lease rate would be substantially higher. Higher leasing costs for the whole system would flow from the fact that one parameter for determining the maximum leased access channel rate pursuant to the Commission's average implicit fee formula is the number of subscribers served.¹⁰ Therefore, the maximum reasonable rate for service only to Boulder, with a subscriber base of approximately 3,500 subscribers, would be substantially less than for service to all of Cox's approximately 320,000 subscribers served from Cox's Las Vegas headend. King Kong asserts further that Cox has the technical ability to accept a leased access channel at the Boulder City facility, as made evident by its acceptance at that location of Boulder City PEG programming.¹¹

4. Cox denied King Kong's request because Cox's Las Vegas cable system, which serves Las Vegas, North Las Vegas, Clark County, Henderson and Boulder City, Nevada, is a technically integrated system not required to accommodate the request to provide service only to Boulder City. Cox cites *Roberts v. Time Warner*¹² as support for refusing the request.¹³ Cox maintains that the Las Vegas headend of its cable system is the integrated system's only headend, and that costly modifications of its cable facilities at Boulder City would be required to accommodate King Kong's request. More particularly, Cox states that the Boulder City PEG programming is created on facilities owned by Boulder City and inserted into the Boulder City portion of the system by means of an A/B switch under the City's control, which preempts Las Vegas PEG programming that otherwise utilizes the channel. Cox cannot provide access at Boulder City because it does not maintain a headend there and would be required to reconfigure its system at significant cost and operational and administrative burdens.¹⁴ Inserting Boulder City specific leased access programming would create subscriber confusion, program guide complications, and other programming coordination problems that would be compounded should such precedent require similar

⁶Pub. L. No. 102-385, 106 Stat. 1460 (1992). See 47 U.S.C. §532(b).

⁷8 FCC Rcd 5631 (1993) ("Rate Order").

⁸See 47 C.F.R. §76.970, 76.971, 76.975 and 76.977.

⁹12 FCC Rcd 5267 (1997) ("Second Rate Order"). See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 11 FCC Rcd 16933 (1996).

¹⁰See 47 C.F.R. § 76.970(e).

¹¹King Kong Petition at 3-5. Public, educational, and governmental access programming provided on behalf of local franchising entities is known as PEG programming.

¹²*Kathleen Ballanfant Roberts and Sidney T. Roberts v. The Houston Division of Time Warner Entertainment Company, L.P.*, 11 FCC Rcd 5999 (CSB 1996) (*Roberts v. Time Warner*).

¹³Cox Opposition at 4.

¹⁴Cox Opposition at 8.

program insertions at other points of its cable system.¹⁵

5. Although disputing its relevance, Cox concedes that certain planned unit developments (“PUDs”) served by its Las Vegas system are permitted “to program on a single channel a community bulletin board or similar information of the PUD’s selection.”¹⁶ According to Cox, the PUD programming is inserted by means of a channel splitter “without any interruption of the programming carried on the System’s basic tier and cable programming service tier (“CPST”).”¹⁷ A channel formerly used for pay per view programming is used for this purpose.¹⁸ Cox represents that the technical configuration of the hub sites serving a PUD “is identical to those hub sites serving the remainder of the system.”¹⁹

6. The statutory leased access requirements and the implementing Commission rules, including those that specify the methodology for calculating leased access rates, generally contemplate the leasing of channels on systems. Nothing in these rules address the leasing of channels on portions of systems. We have previously addressed this issue in *Roberts v. Time Warner* wherein we found the pivotal issue to be “whether a cable operator may be required to provide leased access service within discrete franchise areas that lie within the cable operator’s larger service area or whether the cable operator may require that leased access programmers provide service for the entire group of subscribers served from the cable system’s principal headend over its technically integrated cable facility.”²⁰ We concluded that Time Warner’s cable system fit the statutory definition of a “cable system” because “the entire system is fed signals from a single facility, and constitutes a single integrated set of closed transmission paths and associated equipment” even though the physical plant crossed several jurisdictions.²¹

7. While issues may arise as to how the boundaries of a system are properly determined, the Cox Las Vegas system, including the portion at issue here has generally been treated as a single system. Cox maintains that the Las Vegas system is served from one headend and could not be divided in the manner suggested without considerable additional expense. Indeed, although King Kong represents that it is capable of delivering programming to Cox’s Boulder City facility in proper format for cable system carriage, Cox indicates that modifications at Boulder City, to introduce that programming into the system there, would cost approximately \$40,000 and that introduction of the programming in this fashion would interfere with reception of programming regularly available to subscribers in Boulder City in a manner not contemplated by the leased access rules.²²

8. In *Roberts v. Time Warner*, we noted that requiring a cable operator to reconfigure its system and incur the significant costs such area-specific lease agreements might involve could entail costs inconsistent with Section 612(c)(1) of the Communications Act. Section 612(c)(1) provides that cable operators should not be burdened by leased access that adversely “affect the operation, financial condition, or market development of the cable system.”²³ While that decision also recognized that there

¹⁵Cox Opposition at 5-8.

¹⁶See Supplement to Cox Opposition at 2.

¹⁷*Id.*

¹⁸*Id.*

¹⁹Cox Opposition to Supplement to Verified Petition at 4.

²⁰*Roberts v. Time Warner*, 11 FCC Rcd at 6004.

²¹*Id.* at 6007.

²²*Declaration of George Noel*, Cox Second Opposition, Exhibit 5.

²³*Id.* at 6008.

might be situations where the statute's leased access mandate would require a system to accommodate "area-specific leased access if necessary technology is in place and is operational throughout the cable system," we do not find that to be the case here.²⁴ Providing a single PEG channel pursuant to a franchise agreement and allowing minor insertion of information by a few PUDs does not give rise to a finding that there is technology in place and operational throughout the cable system that would enable the insertion of leased access programming on portions of the system without significant additional expense. Based on this record, we conclude that King Kong has failed to establish that it is entitled to leased access on only the Boulder City portion of Cox's Las Vegas cable system.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for relief of King Kong Broadcasting, Inc. in File No. CSR 5388-L **IS DENIED**.

10. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Senior Deputy Chief
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²⁴ *Id.*

²⁵ 47 C.F.R. § 0.321.