

Before the

Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
StogMedia)	CSR-8947-L
)	
v.)	MB Docket No. 17-314
)	
Cox Communications Las Vegas, Inc. d/b/a Cox)	
)	
)	

ORDER

Adopted: February 13, 2018

Released: February 13, 2018

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

I. INTRODUCTION

1. On November 14, 2017, StogMedia filed a petition for relief (Petition) pursuant to Section 612 of the Communications Act of 1934, as amended (Act),¹ and Section 76.975 of the Commission’s rules.² In its Petition, StogMedia alleges that Cox Communications Las Vegas, Inc. (Cox) violated the Commission’s leased access rules by failing to provide adequate proof of the reasonableness of its request for media perils insurance coverage for leased access programming to be provided by a third party on Cox’s Las Vegas cable system.³ Based on this allegation, StogMedia seeks to compel leased access carriage of the programming in question. Cox filed a timely Opposition and Motion to Dismiss (Opposition) to the Petition.⁴ In this Order, we dismiss in part and otherwise deny the Petition.

II. BACKGROUND

2. Section 612 of the Act and the Commission’s leased access rules require cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.⁵ Section 76.971(d) of

¹47 U.S.C. § 532.

²47 CFR § 76.975.

³ Media perils insurance, sometimes called broadcaster's liability or errors and omission insurance, is a specialized type of insurance to protect against liabilities from the content of programming, including advertising, copyright infringement and trademark claims, obscenity allegations, and other content-based claims that are not regularly included in a general liability insurance policy.

⁴StogMedia filed a Reply to the Opposition and Cox filed additional comments. We accept both the Reply and additional comments. Although Section 76.975 of the Commission's rules provides only for the filing of a petition and response, Section 76.7 of the Commission’s rules anticipates a reply. See 47 C.F.R. §§ 76.975 and 76.7. In this case, we will accept the additional pleadings in the interest of a more complete record.

⁵ 47 U.S.C. § 532; 47 CFR §§ 76.970 through 76.977. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, the Commission adopted rules for commercial leased access. See 8 FCC Rcd 5631 (1993) (*Rate Order*) and 12 FCC Rcd 5267 (1997) (*Second Report and Order*); see also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 11 FCC Rcd 16933 (1996).

the rules specifies that cable operators are permitted to impose reasonable insurance requirements on programmers seeking commercial leased access.⁶ The reasonableness of specific insurance terms and conditions is determined on a case-by-case basis.⁷ Although the Commission has not adopted specific conditions or limits regarding the amount of coverage or the type of insurance policy that operators may require, it has clarified that insurance requirements must be reasonable in relation to the objective of the requirement.⁸ Cable operators have the burden of proof in establishing reasonableness.⁹

3. In its Petition, StogMedia argues that Cox violated Section 76.971(d) because it failed to meet its burden of proof with respect to insurance coverage requirements for leased access programming.¹⁰ Specifically, StogMedia challenges Cox's authority to require insurance covering the actual programming to be carried on Cox's cable system.¹¹ The programming at issue is an infomercial type program promoting a restaurant in the Las Vegas area. The programming is not produced by StogMedia.

4. Both parties agree that several attempts were made to resolve the language in StogMedia's insurance policy so that the policy would cover the third-party programming for which StogMedia requested carriage.¹² On September 14, 2017, StogMedia sent an e-mail to Cox stating that StogMedia finally has "a definitive answer from our insurance carrier that says 'because StogMedia is not producing the commercial/advertisement then there is no coverage afforded under this policy and cannot be added via endorsement.'" ¹³ Because both parties agree on the language included in the e-mail, we accept its validity as we would a stipulation of facts. It is therefore undisputed that StogMedia's insurance company conveyed to StogMedia that it was not able to provide insurance for the third-party

⁶ See 47 CFR § 76.971(d) ("Cable operators may impose reasonable insurance requirements on leased access programmers.")

⁷ *Rate Order*, 8 FCC Rcd at 5936, para. 491; *Second Report and Order*, 12 FCC Rcd at 5321, para. 108. For example, the Commission determined that requiring a leased access programmer to obtain reasonable liability insurance coverage does not constitute a violation of the leased access regulations. See *Campbell v. Time Warner Cable*, 13 FCC Rcd 16702 (CSB 1998).

⁸ See *Second Report and Order*, 12 FCC Rcd at 5323, para. 112. Reasonable insurance requirements are based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the nature of 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. *Id.* We note that requesting information on the nature of the programming in order to assess liability does not constitute editorial control.

⁹ *Id.* See *United Productions v. Mediacom Communications Corporation*, 22 FCC Rcd 1224 (MB 2007).

¹⁰ Petition at 1. See 47 CFR § 76.971(d) ("Cable operators may impose reasonable insurance requirements on leased access programmers. Cable operators shall bear the burden of proof in establishing reasonableness.")

¹¹ *Id.* StogMedia argues that Cox is "requiring additional named insured/coverage outside the scope of reasonable".

¹² See Opposition, Exhibit 6, e-mail dated Friday, August 25, 2017 2:52 PM and multiple e-mail excerpts provided by StogMedia as an attachment to its Petition. We note that while Cox's e-mail exhibits include the original headings and are accompanied by a sworn declaration of validity, StogMedia has submitted selected excerpts of extensive e-mail chains with neither the original headings nor a sworn declaration. Because StogMedia's attached exhibits lack the indicia of reliability necessary for a factual determination, we treat the exhibits as part of StogMedia's argument and accordingly assign them an appropriate weight in our deliberations. In any event, we note that the relevant facts presented in the e-mails are not in dispute.

¹³ See Opposition, Exhibit 6 at e-mails dated Thursday, September 14, 2017 4:35 PM and Friday, September 15, 2017 9:33 AM; Petition, second to last page at September 14 mark. We request both parties in the future to paginate exhibits containing multiple documents.

programming under its existing policy covering programming produced by StogMedia. As a result of these events, Cox denied StogMedia's leased access application and StogMedia filed the instant Petition.¹⁴

III. DISCUSSION

5. Because Cox is not required to carry leased access programming on its cable system without reasonable insurance that covers the specific programming to be carried, we deny StogMedia's Petition. Since its adoption of the commercial leased access rules, the Commission has resolved numerous questions concerning the reasonableness of insurance requirements for commercial leased access programming and held cable operators responsible for establishing reasonable limits.¹⁵ However, in this case, StogMedia misconstrues our rules. The threshold issue of whether a cable operator may require insurance coverage for leased access programming is settled.¹⁶ Our rules explicitly state that cable operators "may impose reasonable insurance requirements on leased access programmers."¹⁷ In fact, StogMedia executed a leased access agreement with Cox that set forth Cox's insurance requirements.¹⁸ StogMedia attempted to comply with the insurance requirements, but was unable to provide a policy and a certificate of insurance that covered the actual programming that was being produced and provided by the third party for leased access carriage on Cox's system.¹⁹

6. Given our conclusion that Cox was reasonable to require insurance coverage in this instance, we deny the request to compel carriage and do not reach the question of the reasonableness of the specific terms of the insurance coverage Cox requested.²⁰ We also dismiss the various other issues raised by StogMedia in its Petition because our determination of the threshold issue renders any additional arguments moot.²¹

¹⁴ *Id.*

¹⁵ See, e.g., *Fal-Comm Productions v. TCI*, 12 FCC Rcd 10293, 10297, para. 10 (CSB 1997) (requirement that cable operator be named as additional insured is a reasonable requirement) and *United Productions v. Mediacom*, 22 FCC Rcd 1224, 1226, para. 5 (MB 2007) (cable operator failed to provide evidence supporting the amount of insurance required).

¹⁶ *Second Report and Order*, 12 FCC Rcd at 5323, para. 112, citing *Anthony Giannotti v. Cablevision Systems Corporation*, 11 FCC Rcd 10441 (CSB 1996) (operators have a right to require reasonable liability insurance coverage for leased access programming).

¹⁷ 47 C.F.R. § 76.971(d).

¹⁸ Opposition at 2; Opposition Exhibit 5 at 4 and 12.

¹⁹ Indeed, the record in this proceeding provides numerous examples of Cox working closely with StogMedia to try to overcome StogMedia's difficulty in obtaining an insurance policy that would satisfy Cox's insurance requirements. That StogMedia was ultimately unable to obtain such a policy is no fault of Cox.

²⁰ Based on the evidence before us, StogMedia never questioned the specific terms of the insurance requirement. Cox notes in its Opposition that, had StogMedia requested justification of the reasonableness of the terms of the insurance requirements, Cox could have justified its request. See Opposition at 3, n.7 and 10, n.52. Because we do not address the reasonableness of the specific insurance terms, nothing in this Order precludes StogMedia from raising the issue of reasonableness of the specific terms should StogMedia at some point meet the threshold requirement of obtaining insurance that covers the programming at issue.

²¹ For example, in its Petition, StogMedia states that Cox "demanded excessive credit and security requirements", "made excessive and forceful demands regarding content as if to exercise editorial control" and attempted to "prohibit the resale of leased access capacity." Petition at 1-2. These issues were contested by Cox but we dismiss them because they are not relevant unless and until StogMedia can obtain insurance coverage that includes the programming at issue.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED**, pursuant to Section 612 of the Communications Act, 47 U.S.C. §532, and Section 76.971(d) of the Commission's rules, 47 CFR §76.971(d), that the petition for relief of StogMedia in File No. CSR 8947-L, MB Docket No. 17-314 **IS DISMISSED IN PART** and otherwise **DENIED**.

8. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²²

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
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²² 47 CFR § 0.283.