

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

In re:)	
)	
Inter-Vision Productions, Inc. and)	CSR-4587-L
Fyng-Eye Productions)	
)	
vs.)	
)	
Adelphia Cable Communications)	
)	
)	
For Leased Access Channels)	

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 1996

Released: September 6, 1996

By the Chief, Cable Services Bureau

INTRODUCTION

1. Inter-Vision Productions, Inc. and its affiliate, Fyng-Eye Productions ("Inter-Vision" or "petitioner"), have filed the above-captioned petition pursuant to the Commission's rules¹ against Adelphia Cable Communications ("Adelphia") alleging violations of the Commission's leased access rules as they relate to the price, terms and conditions promulgated by Adelphia regarding the leased access carriage of their television show entitled "VCTV."² Adelphia filed a response to Inter-Vision's petition.

BACKGROUND

2. The commercial leased access requirements for cable operators were established by the 1984 Cable Act³ and amended by the 1992 Cable Act.⁴ The 1984 Cable Act established

¹ 47 C.F.R. §76.975; 47 U.S.C. §532(c)(4)(A)(iii).

² 47 C.F.R. §§76.970 and 76.971; 47 U.S.C. §532(c)(4)(A)(i)(ii).

³ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. §521 *et seq.*

⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. §521, *et seq.* (1992). The 1992 Cable Act Amends Title 6 of the Communications Act, 47 U.S.C. §521 *et seq.*

a federal scheme through channel leasing to assure access to cable systems by third parties unaffiliated with the cable operator who have a desire to distribute video programming free of the editorial control of the cable operator.⁵ Channel set-aside requirements were established proportional to a system's total activated channel capacity.⁶ The 1992 Cable Act revised the leased access requirements and directed the Commission to implement rules to govern this system of channel leasing. In its 1993 *Rate Order*,⁷ the Commission adopted new 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 recently modified some of its leased access rules in its *Reconsideration Order and Further Notice*.⁹

ARGUMENTS OF THE PARTIES

3. Inter-Vision alleges that Adelphia has not made leased access channel capacity available to it on Adelphia's cable system. In essence, Inter-Vision argues that after contacting Adelphia and asking for channel capacity, it was not given a date on which to begin airing its programming. Inter-Vision claims that it was told by Adelphia personnel that its request was considered to be a "low priority." According to Inter-Vision, Adelphia has not made leased access channel capacity available to any programmer since the passage of the 1992 Cable Act. Inter-Vision also argues that it was quoted an hourly rate of \$891.36 for the airing of its programming on Adelphia's system even though the monthly rate for Adelphia's services is \$80,222.24. Inter-Vision states that by prorating this monthly rate in accordance with the Commission's rules, the proper hourly rate that it should be charged is \$111.42. Inter-Vision states that this means that Adelphia would overcharge leased access users by 700% in the event that it decides to actually provide access to its system.

4. Inter-Vision also argues that Adelphia has mischaracterized its programming under the Commission's leased access rate rules and has improperly assigned it to a category of

⁵ Communications Act of 1934, as amended, ("Communications Act") §612(b), 47 U.S.C. §532(b).

⁶ Specifically, a cable system with 36-to-54 activated channels was to designate ten percent of its channels not otherwise required for use by federal law or regulation; a 55-to-100 channel system was to designate 15 percent of channels not otherwise required for use by federal law or regulation; and a system with over 100 channels was to designate 15 percent of all channels. Communications Act, §612(b)(1), 47 U.S.C. §532(b)(1). An operator of any cable system with fewer than 36 activated channels was not required to designate channels for leased access use unless required to do so by the terms of a franchise agreement in effect as of the enactment of the 1984 Act.

⁷ *Report and Order and Further Notice of Proposed Rule Making*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631 (1993). ("*Rate Order*").

⁸ 47 C.F.R. §76.970, 76.971, 76.975 and 76.977; 47 U.S.C. §532(c)(4)(i)(ii)(iii) and §532(i)(1).

⁹ *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 (released March 29, 1996), 61 Fed. Reg. 16396 (summarized) (April 15, 1996).

programming in which it does not belong for purposes of fee calculation. According to Inter-Vision, even though its show is a hosted tour of local small businesses, it does not belong in the category of "programming more than fifty percent of the capacity of which is used to sell products directly to consumers."¹⁰ Inter-Vision argues that its programming is designed to encourage people to patronize local businesses and this cannot be equated to selling products directly to customers. Inter-Vision adds that every other cable operator that it has dealt with has categorized its programming under the "all other programming" category.¹¹

5. Inter-Vision also alleges that Adelphia has not provided a "genuine outlet" for its programming. According to the petitioner, if its programming were to be placed on Adelphia's system, it would have to be placed on Channel 62, which Inter-Vision refers to as an "empty channel." Inter-Vision states that there is no other programming on this channel and, therefore, its own programming would be running as a half hour segment in the midst of 23.5 hours of "snow." Inter-Vision notes that the "negotiating" for channel placement on Adelphia's system ended when it suggested that its programming run amidst a channel of computer generated still photo ads and infomercials. The petitioner states that it was told that its show was not qualified to run on this particular channel according to the system's internally generated rules. Finally, Inter-Vision alleges that Adelphia required an excessive security deposit in order for it to obtain leased access time on Adelphia's system. Inter-Vision states that Adelphia required it to pay the full one year contract term in advance.

6. In response, Adelphia states that it operates cable systems that serve several municipalities in the Palm Beach, Florida area on which Inter-Vision seeks leased access capacity for its programming. Adelphia notes that Inter-Vision originally sought placement through local origination for its programming, which Adelphia describes as a series of brief "infomercials" which provide information about the products and services offered by various local businesses, followed by the address and/or phone number of the businesses where the subscribers can then go to purchase products or services. Adelphia states that it told Inter-Vision that it does not have a local origination channel and is not required to have one in the area that it serves. Adelphia then states that the petitioner requested that its programming be aired on its Showcase channel, which is not a leased access channel, but a digital commercial advertising network established by Adelphia to air various still photos, consisting primarily of real estate. Adelphia states that it refused the request because Inter-Vision's programming is not compatible with the type of programming aired on its Showcase channel.

7. Adelphia then states that Inter-Vision requested leased access information regarding its system. Adelphia states that it provided Inter-Vision with the requested information and its leased access rate schedules containing the maximum monthly rates and part-time rates, which it notes were calculated pursuant to Commission guidelines by determining the highest implicit

¹⁰ 47 C.F.R. §76.970(f)(2).

¹¹ 47 C.F.R. §76.970(f)(3).

net fee for each non-affiliated programmer in each relevant category (per-event or per-channel, home shopping, and "all other"). Adelphia contends that it negotiated with the petitioner to determine channel placement and programming time based on type of programming. Adelphia states that it then determined that because Inter-Vision's programming is commercial in nature and consists of a series of infomercials geared to sell the products of local businesses, the appropriate category of programming would be the second category, where 50 percent or more of the capacity is used to sell products to subscribers.

8. With regard to Inter-Vision's specific allegations, Adelphia first states that it has made leased access channel capacity available to the petitioner. Adelphia notes that it responded to Inter-Vision's request by providing the subscriber numbers and appropriate designated leased access channels for Adelphia's systems serving the Palm Beach area. In addition, Adelphia points out that it provided the petitioner with its rate schedules, both monthly and part-time. Adelphia also states that representatives of its company spoke with Inter-Vision to discuss applicable rates and channel placement for its programming and offered to air Inter-Vision's programming on Channel 62, a designated leased access channel on its system.

9. Adelphia also argues that its hourly rates do not exceed maximum allowable rates. Adelphia notes that in more than one instance, the Commission has held that it will not require strict proration of the monthly rate to yield a flat rate for all times of day.¹² Contrary to Inter-Vision's position, Adelphia notes that the Commission has specifically approved part-time rate schedules which contained different rates for different day parts and which were scaled depending on the number of weeks to which the lessee was willing to commit. Adelphia notes that the Commission has determined that so long as different rates have a reasonable basis and so long as a cable operator monitors the revenues collected from part-time leasing to ensure that the total monthly revenue does not exceed the maximum rate for full-time use, such rates are appropriate.¹³ Moreover, Adelphia states that based on its experience as a cable operator, it has determined that in order to fully utilize its leased access capacity, it is better to set rates that vary as opposed to setting a flat rate. Adelphia rationalizes that such rates encourage full utilization of the channel by making available discounts for leasing greater amounts of time and lower rates for non prime-time hours.

10. Additionally, Adelphia argues that it appropriately categorized Inter-Vision's programming for rate purposes as Category 2 programming. Adelphia states that it is clear that Inter-Vision proposes to use all of its leased time to sell products to subscribers. Adelphia states that the programming provides information on various local businesses in order to promote the sale of products through the businesses. Adelphia notes that the Commission has placed programming in Category 2 for "those proposing to use the channel for more than fifty percent

¹² *TV-24 Sarasota, Inc. v. Comcast Cablevision of West Florida, Inc.*, 10 FCC Rcd 3512 (1994); *TV-24 Sarasota, Inc. v. Paragon Communications*, 10 FCC Rcd 991 (1994); *Advantage Video & Marketing, Inc. v. Comcast Cablevision of Lower Merion, Inc.*, 10 FCC Rcd 7569 (1995):

¹³ *Paragon Communications, supra*, at ¶ 13.

of their lease time to sell products directly to customers (e.g., home shopping network, infomercials)."¹⁴ Adelphia emphasizes that infomercials provide information about a commercial product, often including a phone number and/or address where subscribers can receive further information and/or purchase the product. Adelphia points out that the programmer itself may or may not directly sell the product to subscribers.¹⁵ Thus, according to Adelphia, the fact that Inter-Vision is not itself involved in direct selling of the products on its program is irrelevant.

11. Adelphia also contends that it has provided a "genuine outlet" for Inter-Vision's programming. Adelphia notes that the channel it offered to air Inter-Vision's programming on, Channel 62, is a designated leased access channel. Adelphia acknowledges that when it offered to air the petitioner's programming on Channel 62, it was not being utilized by other programmers at that time. Adelphia states that the channel is now being utilized on a full-time basis by a home shopping network. Adelphia notes that the nature of Inter-Vision's programming is more compatible with this type of programming.

12. Adelphia also argues that it did not require an excessive security deposit for its services from the petitioner. Adelphia states that its policy is to obtain payment for programming up front in cases where it does not have an established business relationship with the programmer to guarantee that it will be compensated for the programming that it airs. In line with that policy, Adelphia states that because it is not familiar with Inter-Vision's business practices, it requested payment in advance. Adelphia adds, however, that if the petitioner cannot afford to pay for the programming in advance, it is willing to work out a payment plan or a reasonable security deposit that is affordable to Inter-Vision, but yet ensures that Adelphia will be protected in the event that Inter-Vision ultimately cannot pay for its services.

ANALYSIS AND DECISION

13. Based on the information in the record before us in this proceeding, Inter-Vision's petition will be granted in part and denied in part. We disagree that Adelphia has not made leased access channel capacity available to Inter-Vision on Adelphia's cable system. Adelphia has reported that it responded to Inter-Vision's request by providing the subscriber numbers and appropriate designated leased access channels for Adelphia's systems serving the Palm Beach area. In addition, Adelphia notes that it provided the petitioner with its rate schedules, both monthly and part-time. Adelphia also states that representatives of its company spoke with Inter-Vision about the rates offered and made available Channel 62 on its system, which is a designated leased access channel. From the information before us, it appears that if a date certain to begin

¹⁴ *Rate Order*, 8 FCC Rcd 5631 at ¶516 (1993).

¹⁵ *See Applicability of Commission Policies on Program-length Commercials*, 44 FCC 2d 985,986 (1974); *see also Report and Order* in MM Docket No. 90-570, 6 FCC Rcd 2111, 2118 (1991).

programming on Adelphia's system was not offered to the petitioner, then the matter involved is more one of a lack of agreement between the parties on the particulars of their arrangement rather than a matter of Adelphia not making channel capacity available.

14. We also agree with Adelphia that its hourly rate calculation has not exceeded the maximum allowable rate by virtue of its inclusion of a time of day factor in its proration of the annual or monthly channel rate. In its *Reconsideration Order and Further Notice*, the Commission affirmed previous leased access decisions and determined that operators may establish reasonable time-of-day pricing schedules.¹⁶ The Commission also stated that in order to ensure that operators' part-time rates do not exceed the maximum rate, operators will be required to establish a schedule of rates, or rate card, for different times of day, pursuant to which, if all times were used, the sum of the part-time charges for any single leased access channel within a 24-hour period would not exceed its maximum rate for the leased access channel if the daily rate were prorated evenly from the monthly rate and were calculated in accordance with Section 76.970 of our rules. The Commission in its *Reconsideration Order and Further Notice* is reexamining its current method for determining the maximum reasonable rate for leased access users and requesting comment on its proposal, but with regard to part-time rates, the Commission concluded that proration of the maximum rate with time of day pricing is an appropriate method for establishing part-time rates under the current highest implicit fee formula, at least for the interim time period.

15. We do agree, however, with Inter-Vision that Adelphia has improperly assigned its programming to a category in which it does not belong for purposes of fee calculation. Inter-Vision describes its programming as a show that is a "hosted tour of local businesses." Inter-Vision argues that its programming does not fall into the category where "more than fifty percent of the capacity of which is used to sell products directly to customers."¹⁷ Inter-Vision argues that its show encourages people to patronize local businesses which is not the same as selling products directly to customers. Inter-Vision also argues that other cable operators have placed its programming in the "all other programming" category.¹⁸ On the other hand, Adelphia describes the show as a series of infomercials which provide information about the products and services offered by various local businesses, followed by the address and/or phone number of the businesses where the subscribers can then go to purchase products or services. Adelphia points out the similarities between infomercials and Inter-Vision's programming and contends that the fact that Inter-Vision is not directly involved with the selling of products is irrelevant.

¹⁶ *Reconsideration Order and Further Notice* in MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 at 19 (released March 29, 1996); See also *TV-24 Sarasota, Inc. v. Comcast Cablevision of West Florida, Inc.*, 10 FCC Rcd 3512, 3521 (1994), *TV-24 Sarasota, Inc. v. Paragon Communications*, 10 FCC Rcd 991, 993 (1994), *Advantage Video & Marketing, Inc. v. Comcast Cablevision of Lower Merion, Inc.* 10 FCC Rcd 7681, 7683 (1995).

¹⁷ 47 C.F.R. 76.970(f)(2).

¹⁸ 47 C.F.R. §76.970(f)(3).

16. Based on the information before us, Adelphia has not demonstrated that Inter-Vision's programming is "programming more than fifty percent of the capacity of which is used to sell products directly to customers."¹⁹ We disagree with Adelphia that the fact that Inter-Vision is not directly involved with the selling of products is irrelevant for purpose of designating programming as that which belongs in Category 2. Inter-Vision describes its programming as a show that hosts a tour of local small businesses which only encourages local residents to patronize local merchants and in no way involves selling products directly to customers. It is clear from the Commission's discussion of direct sales or "home shopping" programming²⁰ that a component of the calculation of the charges for home shopping channels consists of payments, based on percentages of revenues earned, made by the programmer to the cable operator. There is no indication from the information before us that Inter-Vision is engaged in the sale of products directly to customers rather than in the more traditional sale of advertising time. Therefore, Adelphia has not convinced us that Inter-Vision's programming constitutes programming that involves direct sales or "home shopping" programming within the meaning of Section 76.970(f)(2) of the Commission's rules.²¹ Inter-Vision's programming should be properly categorized for purposes of fee calculation as Category 3 programming, i.e., "all other programming."²²

17. We disagree with Inter-Vision that the channel position proposed by Adelphia does not provide a "genuine outlet" for the programming involved. Adelphia has made available a leased access channel to Inter-Vision on which to air its programming. If the channel in question is generally available to subscribers, the system operator is under no additional obligation to attract an audience for the programming in question. Further, while the channel may have been empty at the time Inter-Vision was seeking placement on the channel, it is currently being utilized by a home shopping network and no longer can be described as an empty channel.²³

18. Finally, with regard to the issue of a security deposit, Adelphia has stated that if the petitioner cannot afford to pay for the programming in advance, it is willing to work out a payment plan or a reasonable security deposit that is affordable to Inter-Vision, but yet ensures that Adelphia will be protected in the event that Inter-Vision cannot pay for services rendered. In its *Reconsideration Order and Further Notice*, the Commission states that it declines to set

¹⁹47 C.F.R. 76.970(f)(2).

²⁰See e.g., *Reconsideration Order and Further Notice* at 15 and 16.

²¹ 47 C.F.R. §76.970(f)(2).

²² Because we have determined that Adelphia improperly categorized Inter-Vision's programming as Category 2 programming, we will not discuss the correctness of Adelphia's hourly rate under that category except to say that the Commission has approved part-time rates calculated in accordance with its rules. See 47 C.F.R. §76.970(d), as amended.

²³ Inter-Vision's argument that Adelphia has not made leased access channel capacity available to any programmer since the passage of the 1992 Cable Act is now moot.

specific monetary guidelines in this area and believes that the term "reasonable" should be interpreted in relation to the objective of the deposit. In that regard, the Commission states that the deposit should be sufficient to insure the payment of lease rates, without discouraging leased access use.²⁴

ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED**, pursuant to §612 of the Communications Act of 1934, as amended (47 U.S.C. §532), that the petition (CSR-4587-L) filed by Inter-Vision Productions, Inc. and its affiliate, Fyng-Eye Productions, on September 8, 1995, **IS GRANTED** to the extent indicated above, and in all other respects **IS DENIED**.

20. This action is taken pursuant to authority delegated by §0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

²⁴ *Reconsideration Order and Further Notice at 22 and 23.*