Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
GTE	)
	)
Petition for Expedited Waiver of	)
Part 69 of the Commission's Rules	)
to Offer Switched Access Transport	)
for SONET-based Service	)

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 1997 ; Released: November 4, 1997

By the Chief, Competitive Pricing Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant a request by the GTE Operating Companies and the GTE System Telephone Companies (collectively, "GTE"), for waiver of Sections 69.110, 69.111, and 69.112 of the Commission's rules[1] to permit it to establish new rate elements for provision of Synchronous Optical Network (SONET) Ring and Access Service.

II. GTE'S PETITION

2. On August 14, 1997, GTE filed a petition seeking a waiver to establish four new rate elements to recover the costs associated with new switched transport services that use SONET Ring and Access Service. SONET uses a fiber ring network configuration to provide redundant, reliable, high-speed transmission services. GTE currently offers SONET pursuant to its Special Access services tariff. The four new rate elements for which GTE seeks waiver are J-SONET Transport,[2] Band SONET Transport,[3] Custom Connect-JP,[4] and Custom

[1] 47 C.F.R. §§ 69.110, 69.111, 69.112.

[2] The J-SONET Transport service provides transport between serving wire centers of Customer Designated Locations (CDL).

[3] The Band SONET Transport service provides transport between the serving wire center of the access customer's location and either the end user premise location or end user serving wire centers for switched access services.

Connect-WP.[5] These would be in addition to the two SONET-based transport rate elements established pursuant to a waiver granted to GTE in 1996.[6]

3. GTE asserts that these four new rate elements mirror those that it currently provides under its Special Access services tariff.[7] GTE contends that a waiver of the elements would permit pricing parity between these switched and special access SONET services.[8] GTE states that adding these four new service elements will permit GTE to provide switched access customers more choices and more efficient and reliable service.[9] GTE believes that its four new rate elements are consistent with the public interest, under the standard established in the *Price Cap Third Report and Order*.[10]

III. DISCUSSION

4. In the *SONET Waiver Order*, the Bureau granted waivers to LECs to establish the same rate structure for their SONET-based switched transport tariffs as they had already established for their special access SONET services.[11] The Bureau found that the LECs had demonstrated the special circumstances necessary to justify grant of the various waivers.[12] The Bureau concluded that the existing transport rules would not reflect the way SONET-based switched transport costs were incurred.[13] Thus, the Bureau found that good cause

---

[4] The Custom Connect-JP service provides a connection between GTE's SONET wire center(s) and an access customer's CDL where service is provided by another telephone company.

[5] The Custom Connect-WP service provides a connection to GTE wire centers, an interexchange access customer's CDL, and the access customer's end user CDL(s) via ring topology.

[6] *Petitions for Waiver of Part 69 of the Commission's Rules to Establish Switched Access Rate Elements for SONET-based Service*, 11 FCC Rcd 21010 (1996) (*SONET Waiver Order*). The Common Carrier Bureau determined that it was in the public interest to grant GTE's waiver request for the following two rate elements: Bulk SONET and MetroLAN SONET.

[7] GTE Petition at 5.

[8] *Id.*

[9] *Id.*

[10] GTE Petition at 5 (citing *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Third Report and Order*, CC Docket No. 94-1, 11 FCC Rcd 21354, 21490 (para. 309) (1996) (*Price Cap Third Report and Order*)).

[11] *SONET Waiver Order*, 11 FCC Rcd at 21010. In the Order, the Bureau granted waivers to Bell Atlantic Telephone Company, Pacific Bell, BellSouth Telecommunications, Inc., Southern New England Telephone Company, GTE Service Corporation, U S West Communications, Inc., and Ameritech Operating Companies.

[12] *Id.* at 21020.

[13] *Id.*

existed to grant the various waivers to create new SONET transport elements.[14]

5. The Commission has recently amended Part 69 and established relaxed procedures for establishing rate elements for new switched access services.[15] The relaxed procedures allow for establishing a new rate element by filing a petition based on a public interest standard, rather than requiring a waiver petition.[16]

6. Consistent with the Bureau's previous determinations with SONET Waiver Orders, we find that GTE has demonstrated that establishing four new rate elements will further the public interest and meets the requirements of Section 69.4(g)(1)(i). Our existing transport rules do not adequately reflect the way SONET-based switched transport costs are incurred and the proposed new rate elements will better permit rates to reflect costs. Therefore, we find it in the public interest to grant GTE's petition to create new SONET transport rate elements.

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that, pursuant to Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Petition for Expedited Waiver of Sections 69.110, 69.111, and 69.112 of the Commission's rules filed by GTE Operating Companies and the GTE System Telephone Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

J. D. Schlichting

James D. Schlichting
Chief, Competitive Pricing Division
Common Carrier Bureau

---

[14] *Id.*

[15] Section 69.4(g)(1)(i) of the Commission's Rules, 47 C.F.R. § 69.4(g)(1)(i); *Price Cap Third Report and Order*, 11 FCC Rcd at 21490 (para. 309).

[16] *Price Cap Third Report and Order*, 11 FCC Rcd at 21490 (para. 309). Waivers are generally appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than strict adherence to the general rule.

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

In the Matter of	)	
Petition for Relief of	)	
	)	
FAL-COMM COMMUNICATIONS	)	
Petitioner,	)	
vs.	)	CSR-5042-L
	)	
TIME WARNER CABLE	)	
Respondent,	)	
	)	
For Leased Access Channels	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 1997 **Released: November 6, 1997**

By the Chief, Cable Services Bureau:

I. Introduction

1. Fal-Comm Communications (Fal-Comm) filed a complaint on August 11, 1997, pursuant to Section 76.975(b) of the Commission's Rules,[1] claiming that Time Warner Cable of Dearborn (Time Warner) has violated Section 76.971 of the Commission's Rules[2] pertaining to commercial leased access, in that Time Warner has refused to accept certain adult oriented programming produced by Fal-Comm. Time Warner filed an opposition to the petition.

II. Background

2. It is undisputed that Fal-Comm distributes programming which contains adult contents, i.e., an infomercial for an "adult entertainment lounge." In its complaint, Fal-Comm asserts that Time Warner "conspired" with the City of Dearborn, Michigan in preventing the transmission of said infomercial on Time Warner's "local channel," in violation of Section 76.971 of the Commission's Rules, which applies to commercial leased access terms and conditions, and in violation of Fal-Comm's First and Fourteenth Amendment rights. Fal-Comm states that Time Warner had aired a similar infomercial four times between November of 1996 and February of 1997, but subsequently has refused to carry Fal-Comm's adult programming due to pressure from the City of Dearborn.

3. Time Warner asserts in opposition that it has invoked Section 76.701(a) of the Commission's Rules to refuse to air programming which it deems to be indecent. Time Warner cites Section 76.701(g) of the rules, which defines indecent programming, in determining that the program

[1] 47 C.F.R.§76.975(b).

[2] 47 C.F.R.§76.971.

material submitted by Fal-Comm meets the federal definition of indecency. Time Warner argues that its channel lease agreement with Fal-Comm specifically advises the lessee that Time Warner may refuse to transmit any leased access program that contains indecent material. Although Time Warner has transmitted similar material previously submitted by Fal-Comm, Time Warner states that "it has become clear that the Dearborn community considers such programming to be indecent and offensive."

4. Congress imposed commercial leased access requirements on cable operators when Section 612 was added to the Communications Act of 1934 in 1984.[3] Section 612(b) requires operators of cable systems with 36 or more activated channels to set aside part of their channel capacity for use by programmers that are not affiliated with them.[4] Section 612(c)(2) bars a cable operator from exercising editorial control over, or considering the content of, such programming, with the limited exception that content may be considered for the purpose of establishing the charges for the use of the designated channels.[5]

5. Congress subsequently amended Section 612 by the enactment of Sections 10(a) and 10(b) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act").[6] Section 10(a) of the 1992 Act, codified as Section 612(h) of the Communications Act,[7] provides that cable service offered pursuant to Section 612(b)

> shall not be provided, or shall be provided pursuant to conditions, if such cable service in the judgment of the franchising authority or the cable operator is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States.[8]

Further, this subsection permits the cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator

> reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.[9]

---

[3] *See* Pub. L. 98-547, § 2, 98 Stat. 2782, Oct. 30, 1984.

[4] The amount of channel capacity an operator must set aside is based on a system's activated channel capacity. *See* 47 U.S.C. § 532(b).

[5] 47 U.S.C. § 532(c)(2).

[6] *See* Pub. L. No. 102-385, §§ 10(a) and 10(b), 106 Stat. 1460, Oct. 5, 1992. Section 612 is codified as 47 U.S.C. § 532.

[7] *See* 47 U.S.C. § 532(h).

[8] 47 U.S.C. § 532(h).

[9] *Id.*

Section 10(b) of the 1992 Act, codified as Section 612(j) of the Communications Act,[10] directed the Commission to promulgate regulations designed to limit children's access to indecent programming on cable systems that have not voluntarily prohibited such programming under Section 612(h).[11] Section 612(j) further directs cable operators to comply with such regulations.[12]

6. In a rulemaking proceeding to implement the mandate of Section 612(j),[13] the Commission, after addressing First Amendment challenges to Sections 612(h) and (j),[14] adopted Section 76.701 of the rules to implement Section 612(j), but not to implement Section 612(h) which was self-executing.[15] In this regard, the Commission observed in its *Report and Order* that Section 612(h) permits cable operators to voluntarily enforce a written and published policy for prohibiting programming described in that provision on leased access channels. The Commission read Section 612(h) as expressing a congressional intent that cable operators have wide discretion in establishing policy with respect to the described leased access programming without involvement by the Commission. The Commission concluded that cable operators are not required to prohibit the described programming but are free to ban such programming on leased access channels "as long as they have a written and published policy and, in enforcing such policy, exercise their reasonable belief about which programming fits" the statutory description.[16] It further observed that because Congress appears to have deliberately omitted any role for the Commission in the implementation of Section 612(h) and because programmers may enforce their leased access rights in federal district court, the federal courts, rather than the Commission, are the appropriate fora for resolution of any disputes concerning whether cable operators have properly denied access pursuant to Section 612(h).[17]

7. In the appeal of a decision on the merits from the United States Court of Appeals for the District of Columbia Circuit, which had stayed the Commission's rules pending its decision, the United States Supreme Court, in *Denver Area Educational Tele-Communications Consortium, Inc. v. Federal Communications Commission*,[18] held Section 612(h) of the Communications Act, which permitted cable operators to establish carriage conditions of their own, did not violate the United States Constitution's First

---

[10] *See* 47 U.S.C. § 532(j).

[11] *See* 47 U.S.C.§ 532(j)(1).

[12] *See* 47 U.S.C. S 532(j)(2).

[13] *See In re Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992*; MM Docket 92-258, 8 FCC Rcd 998 (1993), 58 Fed. Reg. 7990, February 11, 1993 (Report and Order).

[14] *Id.* at 999, paras. 5-6.

[15] *See* 47 C.F.R. § 76.701.

[16] *First Report* at 1002-1003, paras. 29-31.

[17] *Id.* at 1003, para. 31.

[18] 116 S.Ct. 2374 (1996).

Amendment,[19] but struck down Section 612(j) of the Communications Act, and our rules implementing Section 612(j), 47 C.F.R. 76.701(b), (c), (g), because Section 612(j) and the above-referenced rules violated the First Amendment.[20]

III. Discussion

8. In this proceeding, the parties dispute whether Time Warner has the right under Section 76.701(a) of the Commission's Rules to reject commercial leased access programming submitted by Fal-Comm. Time Warner contends that it has determined that the programming is indecent based on Section 76.701(g) of the Commission's Rules, and therefore has applied its policy to reserve the right to refuse to air such programming. As discussed above, the Supreme Court struck down Section 76.701(g), as violative of the First Amendment. However, Section 612(h) of the Act, which was upheld by the Supreme Court, permits cable operators to enforce their own written policies imposing conditions on carriage in order to enforce that section.[21] As set forth above, Commission's *Report and Order* interpreted Section 612(h) to leave cable operators the discretion to exercise "their reasonable belief about which programming is or is not indecent," and to determine whether proffered programming should be blocked for the reasons stated in that subsection.[22] The Commission also concluded that the Congress deliberately omitted any role for the Commission in implementing Section 612(h) and that the federal courts are the only appropriate fora for resolution of disputes regarding denial of access pursuant to that section. In its opposition, Time Warner states that it has established policies to preclude the carriage of Fal-Comm's programming. Because the question as to whether Time Warner's policies refusing carriage of Fal-Comm's programming comply with Section 612(h) is one for the courts, and not the Commission, we cannot decide whether Time Warner properly denied carriage of Fal-Comm's programming and therefore must dismiss Fal-Comm's complaint.

9. Accordingly, **IT IS ORDERED,** pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint of Fal-Comm Communications in CSR-5042-L is hereby **DISMISSED.**

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[19] *Id.* at 2390 (plurality opinion).

[20] *Id.* at 2394.

[21] 47 U.S.C. § 532(h).

[22] *See First Report* at 1002-1003, paras. 29-31.