

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

In the Matter of:

Frank J. Vitale, d/b/a Fal-Comm Communications

vs.

MediaOne of Metropolitan Detroit, Inc.

For Leased Access Channels

CSR-5208-L & CSR 5210-L

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 1998

Released: October 20, 1998

By the Chief, Cable Services Bureau:

1. Frank J. Vitale d/b/a Fal-Comm Communications ("Fal-Comm") filed the above-captioned petitions pursuant to 47 C.F.R. §76.975 against MediaOne of Metropolitan Detroit, Inc. ("MediaOne"), operator of a cable system serving Dearborn Heights and Westland, Michigan. MediaOne filed responses to both petitions.

2. The 1984 Cable Act imposed on cable operators a commercial leased access requirements 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.¹ Channel set aside requirements were established proportionate to a system's total activated channel capacity. The 1992 Cable Act revised the leased access requirements and directed the Commission to implement rules to govern this system of channel leasing.² In *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rule Making ("Rate Order"),³ 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.⁴ The Commission modified some of its leased access rules in *In the Matter of Implementation*

¹Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

²Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). See Section 612(b) of the Communications Act of 1934, as amended, 47 U.S.C. §532(b).

³8 FCC Rcd 5631 (1993).

⁴See 47 C.F.R. §76.970, 76.971, 76.975 and 76.977 (1995).

*of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order and Second Order on Reconsideration of the First Report and Order ("Second Order").*⁵

3. Fal-Comm, an independent producer of video programming in the Metro-Detroit area, filed two petitions concerning two separate events involving MediaOne's cable system serving Dearborn Heights and Westland, Michigan. Since the same parties and cable systems are involved in both cases, both matters are consolidated and addressed in this order. In File No. CSR 5208-L, Fal-Comm states that it requested the rescheduling of a program from the 10:30 p.m. time slot to the 11:00 p.m. time slot on October 9, 1997, because it had become aware that MediaOne's charge for the later time slot was only \$ 7.48 for one hour compared with \$32 for one hour for the earlier time slot. Fal-Comm states further that when the program tape was tendered for play, MediaOne refused to commit to playing the tape until a check for \$32 was tendered. Fal-Comm alleges that a MediaOne employee, after consulting with a supervisor, confirmed that the tape would not be played unless a check for \$32 was tendered. In File No. CSR 5210-L, Fal-Comm states that MediaOne refused to play on January 1, 1998 a program tape entitled Fantasy Adventure that was tendered for play. Fal-Comm contends that a supervisor attempted to cover up MediaOne's refusal to play the Fantasy Adventure tape by claiming that the programming on the tape may violate the indecency provisions of Section 612(h) of the Communications Act.⁶ Fal-Comm asserts that MediaOne's refusals to play these tapes represent blatant attempts by MediaOne to inflict harm on Fal-Comm in the form of injury to its reputation and credibility. Fal-Comm requests that fines and administrative sanctions be imposed on MediaOne.

4. MediaOne contends that its actions in the matters about which Fal-Comm complains do not call for the imposition of fines or administrative sanctions sought by Fal-Comm. With respect to the matter of the refusal to play a single tape involved in File No. CSR 5208-L, MediaOne asserts that the petition was untimely filed on February 5, 1998, which is more than sixty days from October 9, 1997, the date Fal-Comm's program was to be aired.⁷ On the merits, MediaOne contends that Fal-Comm's rescheduling request was submitted orally to MediaOne's Programming Manager for all of Michigan and not in writing as required by Section 76.970(h) of the Commission's rules, that the oral request was not communicated to the MediaOne employee in the Dearborn Heights/Westland system where the tape was tendered, and that an employee who had not been informed of the rescheduling of the program properly refused to accept Fal-Comm's tape for play at the 11:00 p.m. time slot at the reduced rate. MediaOne states that thereafter Fal-Comm's tapes have been played once a week in the 11:00 p.m. time slot for the reduced rate.

5. With respect to the refusal to play the Fantasy Adventure tape, MediaOne states that it did not have a leased access contract with Fal-Comm on January 1, 1998, but that nonetheless it had been accepting and playing tapes for Fal-Comm on a program-by-program basis while attempting to negotiate an agreement. MediaOne states further that its decision not to air the Fantasy Adventure tape was based

⁵12 FCC Rcd 5267 (1997). See also *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996).

⁶47 U.S.C. § 532(h).

⁷The Commission's rules allow sixty days for the filing of a petition for relief raising a matter not involving the reasonableness of leased access rates. See 47 C.F.R. § 76.975(d).

on subscriber complaints following a prior airing of the program and because the content of the programming was regarded as indecent. MediaOne asserts that it has a right under Section 612(h) of the Communications Act not to air indecent programming.

6. We find that Fal-Comm's petition was untimely filed on February 5, 1998, which is more than sixty days after MediaOne failed to air Fal-Comm's program on October 9, 1997. We also find that Fal-Comm's petition in File No. CSR 5208-L has no merit. The single instance of MediaOne's failing to air a Fal-Comm program involving an orally conveyed program scheduling change does not constitute a violation of MediaOne's commercial leased channel obligations under either Section 612 of the Communications Act or the Commission's regulations adopted pursuant to that provision. Section 76.970(h)(4) of our rules requires that requests for leased access be made in writing. To the extent that this single instance of MediaOne failing to carry Fal-Comm's programming may have involved a breach of any written or oral contract, that is not a matter for the Commission to resolve.

7. Fal-Comm's petition in File No. CSR 5210-L is dismissed. The Commission has concluded that the Congress deliberately omitted it from any role in implementing Section 612(h).⁸ The federal courts are the appropriate forums for resolution of disputes regarding denial of access pursuant to Section 612(h) and, therefore, this petition is dismissed for lack of jurisdiction.⁹

ORDERING CLAUSES

8. For the foregoing reasons, Fal-Comm Communications' petition for relief in File No. CSR 5208-L **IS DENIED**, and its petition for relief in File No. CSR 5210-L **IS DISMISSED**.

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

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief, Cable Services Bureau

⁸See *Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992*; MM Docket 92-258, 8 FCC Rcd 998 (1993)

⁹*Id.*