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

In the Matter of:	)	
	)	
Lorilei Communications, Inc. d/b/a The Firm	)	
	)	CSR 4979-L
v.	)	
	)	
Jones Spacelink	)	
	)	
Application for Review	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2001 **Released: December 21, 2001**

By the Commission:

I. INTRODUCTION

1. Lorilei Communications, Inc. d/b/a The Firm ("Lorilei") filed an application for review[1] of the Memorandum Opinion and Order in *Lorilei Communications, Inc. vs. Yorba Linda Cable TV Co., Inc.*, ("*Bureau Order*").[2] Jones Spacelink ("Jones") filed a response to the application for review.[3] For the reasons set forth below, we deny Lorilei's application for review.

II. BACKGROUND

2. The *Bureau Order* denied a petition for relief filed by Lorilei alleging violations by Jones of the Commission's leased access regulations. In particular, the *Bureau Order* found the fees quoted by Jones for provision of technical services to be reasonable in relation to costs, as well as to charges imposed on commercial programmers for studio time employed in airing commercials.[4] The *Bureau Order* also found that Lorilei's petition failed to demonstrate any pattern of abuse or other justification for relief.[5] Lorilei seeks review of that decision.

3. The commercial leased access requirements for cable operators were established by the Cable Communications Policy Act of 1984 ("1984 Cable Act"),[6] and amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[7] Pursuant to this legislation, the

[1] *See* 47 C.F.R. § 1.115 (1997).

[2] 12 FCC Rcd 9905 (CSB 1997).

[3] According to *Television & Cable Factbook, Cable Volume No. 66* 1998 Edition, p. D-186, Jones Intercable, Inc. operates a cable system serving Yorba Linda and Anaheim Hills, California under the name Jones Spacelink.

[4] 12 FCC Rcd at 9909.

[5] *Id.*

[6] Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. § 521 *et seq.* (1984).

[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.* (1992).

Commission adopted rules for leased access addressing maximum reasonable rates, reasonable terms and conditions of use, minority and educational programming, and dispute resolution procedures.[8] The Commission's leased access rules permit cable operators to charge leased access users for providing the minimal level of technical support necessary to present their material on a cable system.[9] In its *Second Order*, the Commission clarified that cable operators are allowed to charge a fee in addition to the maximum reasonable channel service fee only for the reasonable cost of providing technical support to a leased access programmer that is not also provided to non-leased access programmers on the system. [10] Cable operators may not impose a separate charge for the same kind of technical support that they already provide to non-leased access programmers because the maximum leased access rate represents what non-leased access programmers implicitly pay for carriage, including technical costs common to all programmers.[11]

III. DISCUSSION AND ANALYSIS

4. Lorilei seeks review of the *Bureau Order*'s finding that Jones' technical service fees are reasonably related to costs. Lorilei contends, among other things, that Jones made a material misstatement of fact in opposition to the petition for relief by stating that it charges non-leased access programmers $150 for studio time, and that the *Bureau Order* improperly relied on that figure in finding Jones' technical service fees to be reasonable. We have reviewed the record and conclude that the findings concerning the reasonableness of Jones' technical service fees are supported by the information and data presented by Jones.

5. Contrary to Lorilei's representations, the *Bureau Order* did not rely on the $150 fee that Jones indicated that it would charge non-leased access users for studio time as establishing the reasonableness of Jones' technical fees for leased access. The fees quoted by Jones were based solely upon the hourly wages of its technicians. Jones quoted Lorilei a technical fee of $25 per tape aired before 4:00 p.m. and a fee of $40 per tape aired between 4:00 p.m. and 7:00 p.m.[12] Jones pays its technicians a $9 per hour base rate during regular hours for the three hours of technician time, for a total of $27, and a time and a half rate after 4:00 p.m., for a total of $40.50.[13] Jones also points out that other equipment, vehicle, and overhead costs incurred in airing programming were not included in its quoted fees. In this regard, Jones presented information showing that programming received on tape from leased access programmers, as well as from other programmers, is transferred to a master tape for a number of reasons.[14] Among other things, use of a master tape preserves the programmer's tape for reuse and back-up in case of failure of the master tape. This process permits insertion of time codes that must be changed each time the programming is aired, and it assures a seamless and professional presentation of the programming. Jones also showed that such preparation and airing of the master tape from the cable system headend site requires approximately three hours of technician time, including travel to and from the headend and monitoring play of the tape at the headend site.[15] On this record, we conclude that Jones' proposed technical service fees of $25 per tape aired before 4:00 p.m. and $40

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[8] *Report and Order and Further Notice of Proposed Rule Making*, 8 FCC Rcd 5631 (1993) ("*First Report and Order*"). The Commission modified some of its leased access rules in the *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267 (1997) ("*Second Order*"). *See also Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 16933 (1996). The leased access regulations are codified at 47 C.F.R. §§ 76.970, 76.971, 76.975 and 76.977.

[9] *See First Report and Order* at 5942; 47 C.F.R. § 76.971(c) (1995).

[10] *See Second Order* at 5324-26; 47 C.F.R. § 76.970 (1997).

[11] *Second Order* at 5326.

[12] Jones Application at 5-7.

[13] *Id.*

[14] *Id.*

[15] *Id.*

per tape aired between 4:00 p.m. and 7:00 p.m. are reasonably related to costs, as required by our rules.

6. Review also is requested of the finding that Lorilei failed to demonstrate a pattern of abuse by Jones involving the purported provision of false and erroneous leased access rates and an alleged failure to negotiate. This request is denied. Lorilei has presented nothing in support of its allegation of abuse that has not already been considered. Copies of correspondence exchanged between the parties presented for the record show that Jones responded promptly to each inquiry by Lorilei.[16] In particular, the correspondence shows that Lorilei failed to pursue its request for leased access service from July to December of 1996, and that Jones promptly responded to each subsequent inquiry by Lorilei.[17] The correspondence also shows that Lorilei failed to return a signed channel lease agreement that Jones had provided to Lorilei, along with a current rate card, by letter dated December 16, 1996.[18] Lorilei further failed to provide any information tending to establish that the quoted rates were false or erroneous.

7. Lorilei also seeks revision of the Commission's rules regarding the provision of technical services by cable operators to leased access programmers. Specifically, Lorilei requests that the Commission review its rules on technical assistance and modify them to provide for more detailed regulations for the handling of leased access programmers' tapes. The appropriate vehicle for seeking amendment of the Commission's leased access rules is a petition for rulemaking filed pursuant to Section 1.401 of the Commission's rules, rather than an application for review of an adjudication of a commercial leased access dispute.[19] We therefore decline Lorilei's invitation to modify our rules in this proceeding.

8. Finally, Lorilei asserts that Jones' practice of transferring videotaped leased access programming to a master tape for presentation to subscribers degrades and interferes with the content of such programming; that Jones should be required to employ automated transmitting equipment that does not require costly attendance by technicians; that Lorilei should not be required to pay mileage charges for play of Jones' own master tapes; and that Jones should be required to allocate a channel other than its local origination channel for leased access programming.[20] These matters were not raised in Lorilei's petition for relief and therefore were not considered in the *Bureau Order*. As such, those matters are not appropriate for disposition in an application for review.[21] In any event, the Commission's leased access regulations do not require that cable operators employ any particular facilities, technology, or procedures in preparing leased access programming for presentation to subscribers. Moreover, the record shows that Jones does not charge vehicle mileage for play of master tapes carrying Lorilei's programming. Rather, Jones simply identified vehicle mileage to be among the costs involved in the play of master tapes.[22] Finally, cable operators are permitted to carry other programming, including local origination programming, on otherwise vacant portions of a channel designated for leased access.[23]

[16] *See* MacKinnon Affidavit, Exhibit A attached to Jones' Response to Application.

[17] *Id.*

[18] *Id.*

[19] *See* 47 C.F.R. § 1.401.

[20] Application at 2-3.

[21] An application for review that relies on facts not previously presented to the designated authority (the Cable Services Bureau in this instance) will not be granted. 47 C.F.R. § 1.115(c).

[22] *See* MacKinnon Affidavit, Exhibit A attached to Jones' Response to Application.

[23] *See* 47 U.S.C. § 532(b)(4).

IV. ORDERING CLAUSES

9. For the foregoing reasons, **IT IS ORDERED** that the Application for Review filed by Lorilei Communications, Inc. d/b/a Lorilei **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary