

**DISSENTING STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

Re: Leased Commercial Access: Development of Competition and Diversity in Video Programming Distribution and Carriage (MB Docket No. 07-42)

Rather few programmers have sought carriage on cable systems through leased access, which was designed by Congress in 1984 to bring about diversity of information sources. By all accounts, there are two primary reasons that leased access has not been more successful. First, leased access may not be economically viable for the vast majority of programmers. Outside of leased access, cable operators generally pay programmers per-subscriber fees for the programming they choose to carry. Those programmers rely on these fees, as well as advertising revenues, to generate enough revenue to develop programming for a full-time channel. Leased access programmers, however, must pay cable operators for access to channels. Therefore, the economics of leasing result in limited use by traditional, full-time programmers. The record indicates that generally, part-time programmers producing home shopping content, infomercials, adult content and, ironically, certain types of religious programs are attracted to this business model because they have other means of generating revenue from their viewers. Leased access channels are also used full-time by low-power broadcast stations, which transmit their programming over-the-air but do not have must-carry rights for cable carriage.

Secondly, outside of the leased access regime, the marketplace has generated an incredible amount of programming diversity as more programmers have created compelling content from all different genres of entertainment, news, sports and culture and gained cable carriage through negotiated deals. Competition has transformed the amount and content of program offerings available to cable subscribers to a degree not envisioned in 1984.

Against this backdrop, the majority today attempts to transform leased access into something that economic reality has shown it cannot be: a viable business model for independent and niche programmers to obtain distribution for their channels. The majority lowers leased access rates dramatically, in contravention of both the law and prior Commission findings. Congress mandated that any leased access rate we establish must be “at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.” Congress also required that cable systems set aside public, educational and governmental access channels for free to the users. Congress, however, did not intend that cable operators subsidize commercial leased access users.

Moreover, the Commission developed the current “average implicit fee” methodology in 1997 after extensive review of the economic studies and policy discussions submitted at that time. The record in this proceeding, and our consideration of it, do not come close to reaching that level of careful analysis. The least we could have done was to seek comment on any changes to the current rate formula. This Order even fails to do that. The result of this radical change in rates, as many independent programmers have stated in the record, will be the opposite of what is intended. The result will be a loss in the diversity of programming as cable operators are forced to drop lesser-rated channels in favor of a flood of leased access requests seeking distribution distorted below cost and market rates.

Perhaps to ameliorate this result, the majority concludes that the new rate methodology will not apply to programmers that predominantly transmit sales presentations, or program-length commercials, and seeks additional public comment on related issues. This too is extremely problematic. I cannot fathom how distinguishing programmers based on the content they deliver can be constitutional. Perhaps the courts will guide us.

The majority goes on to: adopt “customer service standards,” expedite our process for

adjudicating complaints, expand discovery, and require reporting of statistics – all additional regulations aimed at propping up a regulatory regime that is past its prime. I sympathize with programmers, particularly Class A television stations, who struggle for distribution. I also am concerned about programmers “getting the run-around” or being otherwise dissuaded from leasing cable channels. I strongly encourage cable operators to make their leased access rates and terms available to programmers who request information as expeditiously and transparently as possible. The rules set forth in this Order, however, go far beyond what is needed.

Accordingly, I respectfully dissent to this Report and Order.