

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

DA 95-1353

|                            |   |            |
|----------------------------|---|------------|
| In the Matter of           | ) |            |
|                            | ) |            |
| TONY CHAUNCEY d/b/a/       | ) |            |
| TONY CHAUNCEY PRODUCTIONS, | ) |            |
| Petitioner,                | ) |            |
|                            | ) |            |
| vs.                        | ) | CSR 4430-L |
|                            | ) |            |
| CONTINENTAL CABLEVISION OF | ) |            |
| SOUTHERN CALIFORNIA,       | ) |            |
| Respondent,                | ) |            |
|                            | ) |            |
| For Leased Access Channels | ) |            |

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 14, 1995**

**Released: June 19, 1995**

By the Chief, Cable Services Bureau:

**Introduction**

1. On May 24, 1994, Tony Chauncey, d/b/a/ Tony Chauncey Productions, (herein "Chauncey") filed a petition under Section 76.975 of the rules of the Federal Communications Commission alleging that Continental Cablevision of Southern California (herein "Continental") had denied him leased access channel capacity by insisting upon including terms and condition in its leased access contracts that amount to programming production standards that are higher than those applied to public access channels, by setting terms and condition for leased access channel use based on content, except to establish a reasonable price or to forbid obscene programming, and by failing to provide the minimal level of support necessary to present his programming at the reasonable cost of such support, in violation of Section 76.971 of the Commission's rules.

2. Continental filed a response to the petition on March 24, 1995, in which it asserts that certain terms and conditions of its leased access contract about which Chauncey

complaints are reasonable and were not intended to discriminate against, or impede operation of, leased access users. It asserts that such contract provisions are designed to protect Continental from losses attributable to flaws in a leased access producer's performance.<sup>1</sup> Continental asks the Commission to reject the petition and permit it to continue to use its standard channel lease agreement in leased access situations.

### Background

3. In 1984, Congress amended the Communications Act of 1934 by adding among other things a commercial leased access requirement, pursuant to which cable operators with 36 or more activated channels must set aside part of their channel capacity for use by programmers that are not affiliated with them.<sup>2</sup> The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") revisited the leased access requirement and directed the Commission to establish, among other things, rules for determining maximum reasonable rates for commercial leased access and to establish reasonable terms and conditions for such use.<sup>3</sup> Pursuant to that Congressional directive, the Commission established regulations applicable to leased access channels, in its proceedings in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, MM Docket 92-266, (the *Rate Order*), 8 FCC Rcd 5631 (1993), at ¶¶ 531-538. The new leased access regulations relevant to this case are found at 47 C.F.R. §§ 76.970, 76.971 and 76.975.

4. In the *Rate Order*, the Commission considered whether to adopt regulations governing the technical standards that independent programmers should meet in connection

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<sup>1</sup> Continental did not respond to the petition until after its failure to do so had been called to its attention by the Commission's staff by a letter dated February 22, 1995. While we will not ordinarily take such a step, given that leased access is a new area of responsibility for the Commission, we placed importance in this case to hear both sides before taking action in this matter. We did place the petition on public notice. See Public Notice - Cable Television Service Registration; Special Relief and Show Cause Petitions, No. 1017, dated January 24, 1995. We need not here undertake to determine whether the petition was in fact served on Continental, because that matter has become moot. We do, however, remind cable operators that Section 76.975(e) of the rules provides for the filing of a response within 30 days of the filing of a petition for relief, and caution them to assure that adequate procedures are in place for responding to such petitions on a timely basis. If a response is not filed, a decision may be made on the existing record.

<sup>2</sup> Communications Act of 1934, as amended, § 612, 47 U.S.C. § 532 (1992). The amount of channel capacity an operator must set aside is based on a system's activated channel capacity.

<sup>3</sup> See 47 U.S.C. § 532(c)(4)(A)(i) and (ii).

with their use of leased access channels. It found that the quality of video production equipment is sufficiently high and constantly improving enough to assure that its use today should produce quality programming. It also expressed confidence that leased access programmers would have sufficient incentive to provide quality equal to or greater than that of existing cable services, if they intended to be competitive with them. Accordingly, the Commission declined to impose higher program production standards for leased access than that which cable operators now accept for public, educational and governmental access channels.<sup>4</sup> That standard is embodied in Section 76.971(b) of our rules.<sup>5</sup>

5. The Commission also recognized that a minimal level of technical cooperation would be necessary in order for a leased access program to be delivered over a cable system. Being concerned that a cable operator may unreasonably refuse to lend such cooperation, the Commission determined to prohibit such conduct by requiring cable operators to provide a minimal amount of support, such as equipment and technology, necessary for the programmer to present its material on the cable.<sup>6</sup> It further provided that leased access users must reimburse cable operators for "the reasonable cost of any technical support that operators actually provide."<sup>7</sup>

### The Pleadings

6. Chauncey states in his petition that, as a "community producer," he is aggrieved by the refusal of Continental to make a leased access channel available to him and to charge him rates for such capacity in accordance with the Commission's regulations. He states that Continental has refused to delete or to change nine sets of conditions that Chauncey finds objectionable in Continental's proposed leased access contract and has thus refused to make a leased channel available without including such conditions in its contract. Chauncey asserts that Continental's imposing of these conditions in four instances violates the Section 76.971(b) prohibition against application of programming production standards for leased access that are higher than those applied to public access channels; in three instances violates the Section 76.971(e)(1) and (2) prohibition against setting terms and condition for leased access use based on program content except to establish a reasonable price or screen obscene programming; and in one case violates the Section 76.971(c) requirement for the provision of

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<sup>4</sup> See Rate Order at ¶ 499.

<sup>5</sup> Section 76.971(b) states, "Cable operators may not apply program production standards to leased access that are any higher than those applied to public, educational and governmental access channels." 47 C.F.R. § 76.971(b).

<sup>6</sup> See Rate Order at ¶ 500.

<sup>7</sup> See 47 C.F.R. § 76.971(c).

minimal technical support.<sup>8</sup>

7. Continental responds that these contract conditions are reasonable, that the contract provisions are all routine commitments which several other leased access programmers have accepted, and that Chauncey is the only programmer who has objected to their inclusion in its leased access contract. The response describes the intended purpose of each provision and defends Continental's right to include them in a leased access contract. It argues that the statutory presumption of reasonableness and good faith embodied in 47 U.S.C. § 532(f) should be applied to Continental's actions in this respect.<sup>9</sup> A copy of what Continental described as its "standard Leased Access Agreement" (herein the "standard agreement") is submitted with its response.<sup>10</sup>

### Discussion

8. The principal issue presented in this case is whether certain conditions included in the contract offered to Chauncey are consistent with the requirements of our rules applicable to the use of leased access channels. As noted above, our rules applicable to use of leased access channels require that the cable operator not demand program production standards from leased access users that are higher than those applied to public access channels.<sup>11</sup> Chauncey asserts that four conditions included in Continental's contract violate this provision. Chauncey first points to language in paragraph 6(a) of the "March 1994 agreement," which states,

Lessee shall pay for and provide all equipment and personnel (who shall be adequately trained to the satisfaction of Lessor) necessary to produce and insert a signal carrying its Service, of a quality satisfactory to Lessor; at an initial point in the system designated by Lessor.

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<sup>8</sup> A copy of an unsigned Channel Lease Agreement, dated March 1994 (herein the "March 1994 agreement"), and an unsigned Leased Access Agreement, dated 3/22/94 (herein the "3/22/94 agreement"), provided by Continental to Chauncey are attached to the petition.

<sup>9</sup> Section 612 (f) of the Communications Act provides, "In any action brought under this section in any Federal district court or before the Commission, there shall be a presumption that the price, terms, and condition for use of channel capacity designated pursuant to subsection (b) are reasonable and in good faith unless shown by clear and convincing evidence to the contrary." 47 U.S.C. § 532(f).

<sup>10</sup> This "standard agreement" contains the same provisions as the "3/22/94 agreement" attached to the petition.

<sup>11</sup> 47 C.F.R. 76.971(b).

Chauncey objects to the parenthetical clause that would require that his personnel be "adequately trained to the satisfaction of Lessor," both because the contract does not define what is considered "adequately trained" personnel and such requirement is not applied to public access programmers, according to an unidentified "public access operating guidelines excerpt" attached to the petition. This clause does not appear in the "standard agreement," that Continental has submitted as its currently applicable contract. Therefore, we find the objection to this clause to be moot.<sup>12</sup>

9. Chauncey also objects to a daily logging clause and an indemnification clause found at paragraphs 4.3 and 6.1, respectively of the "3/24/94 agreement" (which clauses are also found in the "standard agreement") as demanding more than is required for public access channels. As Continental points out, neither of these requirements relates in any way to program production standards. For that reason, these requirements are not inconsistent with Section 76.971(b) of the rules, as Chauncey has alleged. Moreover, the petition presents nothing which shows that these requirements are not reasonable and in good faith. Similarly, paragraphs 4.4 and 5, respectively, of the "3/22/94 agreement," which contain clauses requiring that the programmer obtain appropriate governmental authorizations, permits, etc., and addressing standard lessee representations and warranties, are not shown to be unreasonable or not in good faith. Moreover, none of these clauses imposes any conditions for commercial leased access based on program content that are prohibited by Section 76.971(e)(1) and (2), as suggested by Chauncey.

10. Chauncey also asserts that a 13 week minimum purchase requirement appearing on a September 1, 1993 leased access rate card is not required of public access users. This requirement, Continental states, is needed to maintain order and consistency in its programming line up. It notes that Continental encourages use of its leased access facilities and has a number of leased access programs, including the Cable Russian Network, Russian Television, Thai Television and AMEN TV, that have been carried for two or more years.

11. The leased channel rules accord cable operators a degree of flexibility to establish operating rules and policies to govern commercial leased access programming distribution consistent with the statutory requirement (47 U.S.C. §532(c)(1)), which provides that the price, terms, and conditions of use shall be sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system. Thus, we are not prepared to conclude that a 13 week schedule requirement is *per se* unreasonable. However, the response of Continental as to its reasons for the 13 week schedule requirement, including the reference to subscriber expectation of programming consistency, suggest that grounds for concern as to the reasonableness of this leasing limitation may exist. Although Continental argues that such a requirement is necessary, among other things, to maintain order in the programming line-up, we have no information before us upon which to judge whether such a requirement is reasonably

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<sup>12</sup> Chauncey also objects to paragraph 10 (applicable to Rights, Licenses and Permissions) and paragraph 14 (Insurance) of the "March 94" agreement. These provisions are not included in the "standard Leased Access Agreement submitted with Continental's response. Accordingly, we deem these objections to be moot as well.

necessary for that or any other purpose in terms of other legitimate demands on the channel capacity involved. Accordingly, if Continental should seek to continue to impose such a requirement in response to a bona fide request from Chauncey for a shorter program period, we will expect Continental to justify any scheduling or time limitation on content neutral criteria.

12. Finally, Chauncey alleges that Continental proposes to apply a charge of \$50 per tape for play back and processing of video tapes. He asserts that this charge is unreasonable and violates the requirement of Section 76.971(c) that leased access users reimburse operators for the "reasonable cost of technical support actually provided." He points out that, if this charge were applied to the play back of ten separate one hour tapes in a given day, the total of the charges would run to \$500 per day for tape replay. In defense of this charge, Continental states only that it "believes that its actual cost of overhead, personnel, and dedicated facilities far exceed this \$50 fee."

13. The rules are clear that a reasonable charge may be levied for technical support which would include play back of tapes. Depending on the personnel involved and the nature of the facilities in question a \$50 charge might well be reasonable for the playing of a single tape in isolation. From the information before us, however, we are unable to make any judgment on this matter since Continental provides almost no information regarding the nature of the services provided, including what is meant by "processing" of the tape. Accordingly, we remind Continental of the requirement of Section 76.971(c) that it be reimbursed only for the "reasonable cost" of such technical support as is actually provided for leased access users. Continental should review the charges in question and provide complainant with a breakdown of the services and costs involved. Further, we will require Continental to maintain on file for possible future Commission inspection adequate records showing costs incurred for the provision of technical support to leased access users of its cable system. The Commission will review those charges, if petitioner continues to believe and can demonstrate that such charges exceed what is permitted by the rules.<sup>13</sup>

### Ordering Clauses

14. For the foregoing reasons, IT IS ORDERED that the petition of Tony Chauncey, d/b/a Tony Chauncey Productions, IS GRANTED IN PART and in all other respects is DENIED.

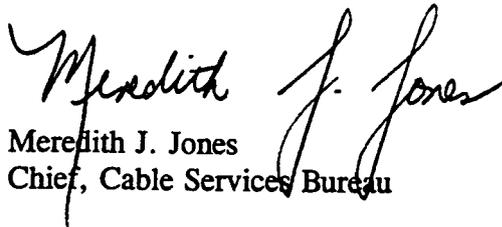
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<sup>13</sup> We have not considered any of the various clauses of any of Continental's leased access agreements submitted with the pleadings in this matter for consistency with our leased access rules or otherwise, except as specifically described herein.

15. IT IS FURTHER ORDERED, pursuant to Section 76.970(e) of the Commission's rules, that Continental shall establish and maintain on file for possible future Commission inspection adequate records showing the costs incurred for the provision of technical support to leased access users of its cable system.

16. 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



Meredith J. Jones  
Chief, Cable Services Bureau