FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 92–258; FCC 97–156]

Cable Television Consumer Protection and Competition Act of 1992

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Order amends the Commission's rules regarding indecent programming on leased access and public, educational and governmental access channels. This action is necessary to conform the rules to the decision of the Supreme Court in Denver Area Educational Telecommunications Consortium, Inc. v. FCC. The order is intended to amend the Commission's rules to conform them to the Court's decision.

DATES: These rules become effective upon OMB approval of the information collection requirements. The Commission will publish a document in the **Federal Register** confirming the effective date and notifying parties that these rules have become effective. Written comments by the public on the modified information collections are due July 22, 1997.

ADDRESSES: A copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Meryl S. Icove, Cable Services Bureau, (202) 418–7200. For additional information concerning the information collections contained in this rulemaking, contact Judy Boley at 202–418–0217, or via the Internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Order in MM Docket No. 92–258, FCC 97–156, adopted on May 6, 1997, and released on May 7, 1997. The complete text of this Order is available for inspection and copying during normal business hours in the FCC Reference Center (room 239), 1919 M Street, NW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc. (''ITS Inc.'') at (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20017.

Paperwork Reduction Act

This Memorandum Opinion and Order contains modified information collections. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this Memorandum Opinion and Order, as required by the Paperwork Reduction Act of 1995. Public and agency comments are due 60 days from date of publication of this Memorandum Opinion and Order in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0544.

Title: Commercial Leased Access Channels.

Type of Review: Revision to an existing collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 100.

Estimated Time Per Response: 8 hours per response.

Total Annual Burden: 800 hours. Section 76.701(a) states that a cable operator may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards. We estimate that an additional 100 cable system operators each year will choose to adopt a written and published policy of prohibiting offensive programming on leased access channels. The average burden to each respondent to write this policy is estimated to be 8 hours. 100 respondents × 8 hours=800 hours.

Estimated Cost Per Respondent: There are no measurable costs associated with this information collection.

Needs and Uses: Permitting cable operators to adopt policies regarding offensive programming gives operators alternatives to banning broadcasts; for example, by adopting policies to rearrange broadcast times so as to accommodate the desires of adult audiences while lessening the risks of harm to children.

Synopsis of Order

1. As part of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Cable Act''), Congress enacted Section 10 in order to protect children from indecent programming on leased access and public, educational and governmental (''PEG'') access channels. The Commission thereafter established rules to implement Section 10. As required by the statute, these rules provided that cable operators could prohibit such programming on PEG access channels. Also as required by Section 10, the rules provided that, for leased access channels, cable operators had to either enforce a policy prohibiting such programming or segregate and block any programming that was not prohibited. In Denver Area Educational Telecommunications Consortium, Inc. v. FCC (''Denver Consortium''), the Court addressed the constitutionality of Section 10. The Supreme Court found that the PEG access channel provision permitting the refusal to transmit indecency and the leased access channel provision requiring segregation and blocking were unconstitutional. 116 S. Ct. 2374 (1996). In this Memorandum Opinion and Order, we adopt rule changes responsive to the Supreme Court's decision.

2. The statutory provisions on leased access are found in section 612 of the Communications Act. Section 10(a) of the 1992 Cable Act amended Section 612(h) of the Communications Act, adding language to ''permit a 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'' on commercial leased access channels on their systems. Section 10(b) added a new subsection (j) to section 612. Section 10(b) required the Commission to adopt regulations that are designed to restrict access of children to indecent programming on leased access channels (that is not voluntarily prohibited under Section 10(a)) by requiring cable operators to place indecent programming on a ''blocked'' leased access channel. Section 10(c) required the Commission to adopt regulations to enable cable operators to prohibit use of channel capacity on the PEG access channels for programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Section 10(d) of the 1992 Cable Act amended Section 638 of

the Communications Act. Section 76.701 and § 76.702 of the Commission's rules implement Section 10. See 58 FR 7990, Feb. 11, 1993; 58 FR 19623, April 15, 1993. These rules were stayed after the initial decision in Alliance for Community Media v. FCC (''Alliance'') finding them unconstitutional and that stay has been continued in force pending Supreme Court review. Alliance for Community Media v. FCC, 10 F.3d 812 (D.C. Cir. 1993), vacated, 15 F.3d 186 (D.C. Cir. 1994), reh'g en banc, 56 F.3d 105 (D.C. Cir. 1995), aff'd in part and rev'd in part, Denver Consortium, 116 S. Ct. 2374 (1996).

3. In the Telecommunications Act of 1996 (''1996 Act''), Congress further amended Sections 611 and 612 of the Communications Act. Section 611(e) and Section 612(c)(2) generally provide that a cable operator may not exercise any editorial control over the content on PEG access and leased access channels. The 1996 Act added language to except from this ban on editorial discretion programming which contains obscenity, indecency, or nudity. In Order and Notice of Proposed Rulemaking in CS Docket No. 96–85—Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 (''Cable Act Reform Order''), the Commission amended Section 76.701 and Section 76.702 of its rules to implement the 1996 Act. 61 FR 19013, April 30, 1996, 11 FCC Rcd 5937, 5959–5961 ¶¶ 61–67 (1996).

4. As a result of the Court's decision that Section 10(b) is unconstitutional, we will delete those parts of § 76.701 which implemented the requirement that cable operators not adopting a policy of prohibiting indecent programming on leased access channels must segregate and block such programming. We note, however, that a cable operator voluntarily may segregate, block, and time channel indecent leased access programming under Section 10(a). As we stated when initially implementing section 10(a), ''we believe that cable operators with policies prohibiting indecent programming have, under section 10(a), the discretion to block any such programming, rather than banning it completely, and moreover, they may provide such programming on blocked channels during time periods of their own choosing.'' 58 FR 7992, 8 FCC Rcd at 1005. Further, the Court in Denver Consortium stated that Section 10(a)'s ''permissive nature brings with it a flexibility that allows cable operators, for example, not to ban broadcasts, but, say, to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children.'' 116 S. Ct. at 2387, citing First Report and Order, 58 FR 7991, 8 FCC Rcd. at 1003 (interpreting the 1992 Cable Act's provisions to allow cable operators broad discretion over what to do with offensive materials). It is also the case that, under Section 10(a), cable operators may prohibit some indecent programming, but not all. In the First Report and Order, the Commission, noting that some cable operators suggested that they have the discretion to prohibit some, but not necessarily all indecent programming under section 10(a) as long as they block the rest under section 10(b), stated that ''[g]iven the wide discretion Congress afforded cable operators under this section, we see no reason to dispute this interpretation.'' 58 FR 7991, 8 FCC Rcd at 1003.

5. Finally, as a result of the Court's decision that section 10(c) is unconstitutional, we will amend § 76.702. Insofar as the 1996 Act grants to the cable operator the right to refuse to transmit indecent public access programming, it apparently conflicts with the Court's decision in Denver Consortium that cable operators may not prohibit ''the transmission of 'patently offensive' sex-related materials'' over public access channels. 116 S. Ct. at 2382.

6. Paperwork Reduction Act of 1995 Analysis. The requirements adopted in this Order have been analyzed with respect to the Paperwork Reduction Act of 1995 (the ''1995 Act'') and found to impose modified information collection requirements on the public. Implementation of any modified requirement will be subject to approval by the Office of Management and Budget (''OMB'') as prescribed by the 1995 Act. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to comment on the information collections contained in this Order as required by the 1995 Act.[1] Comments should address: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

[1] Public Law 104–13.

7. Written comments by the public on the modified information collections are due on or before 60 days after publication of the Order in the **Federal Register**. A copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov For additional information concerning the information collections contained herein contact Judy Boley at 202–418–0217, or via the Internet at jboley@fcc.gov.

8. Regulatory Flexibility Act Analysis. Pursuant to Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the Notice of Proposed Rulemaking in MM Docket 92–258. 57 FR 54207, November 17, 1992, 7 FCC Rcd 7709, 7712 (1992). Comments concerning the IRFA were addressed in previous orders. 58 FR 7990, 7992, 8 FCC Rcd at 1010–11; 58 FR 19623, 19626, 8 FCC Rcd at 2643. As discussed above, in this Memorandum Opinion and Order we are amending our rules to conform to the Supreme Court's Denver Consortium decision. Under the rule changes adopted here, a cable operator will no longer be required to segregate and block indecent programming on leased access channels. Further, a cable operator will not be permitted to refuse to transmit indecent PEG access programming. There will be no cost to cable operators as a result of these rule changes, and therefore the amendments will not have a significant economic impact on cable operators. Therefore, we do not believe that the amendments adopted herein will have a significant economic impact on a substantial number of small entities, and no further regulatory flexibility analysis is required. 5 U.S.C. 605(b). A copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

9. Accordingly, *it is Ordered* that, pursuant to the authority contained in Sections 4(i) and 4(j) and 303 of the Communications Act of 1934, as amended, 47 CFR §§ 154(i), 154(j), 303, and the Cable Television Consumer Protection and Competition Act of 1992, Public Law 102–385, Part 76 of the Commission Rules, 47 CFR Part 76, *is amended* as set forth below.

10. *It is Further Ordered* that the rule provisions set forth below shall become effective upon approval by the Office of Management and Budget of the modified information collection requirements.

Lists of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76—CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 552, 554, 556, 558, 560, 561, 571, 572, 573.

§ 76.701 [Revised]

2. Section 76.701 is revised to read as follows:

§ 76.701 Leased access channels.

(a) Notwithstanding 47 U.S.C. 532(b)(2) (Communications Act of 1934, as amended, section 612), a cable operator, in accordance with 47 U.S.C. 532(h) (Cable Consumer Protection and Competition Act of 1992, section 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator may refuse to transmit any leased access program or portion of a leased access program that the operator reasonably believes contains obscenity, indecency or nudity.

§ 76.702 [Revised]

3. Section 76.702 is revised to read as follows:

§ 76.702 Public access.

A cable operator may refuse to transmit any public access program or portion of a public access program that the operator reasonably believes contains obscenity.

[FR Doc. 97–13624 Filed 5–22–97; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 101

[CC Docket No. 92–297; FCC 97–166]

Local Multipoint Distribution Service (''LMDS'')

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On May 8, 1997, the Federal Communications Commission adopted an *Order* reconsidering on its own motion its decision in the Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules To Redesignate the 27.5–29.5 GHz Frequency Band, To Reallocate the 29.5–30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; and Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92–297, PP–22, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, FCC 97–82, released March 13, 1997 (''*LMDS Second Report and Order*''). The Commission affirmed its decision to refer CellularVision's Pioneer's Preference request to peer review, in order to clarify the Commission's basis for that decision. The *Order* also amends the LMDS competitive bidding affiliation rule in order to include an exemption for entities owned or controlled by Indian Tribes or Alaska Regional or Village Corporations. This affirmation and the rule change set forth in the *Order* are intended to clarify the Commission's decision and insure Indian tribes and Alaska Native Corporations a meaningful opportunity to participate in spectrum-based services.

EFFECTIVE DATE: June 23, 1997.

FOR FURTHER INFORMATION CONTACT: Mark Bollinger, Wireless Telecommunications Bureau, Federal Communications Commission, (202) 418–0660.

SUPPLEMENTARY INFORMATION: This summarizes the Commission's Order in FCC 97–166, CC Docket No. 92–297 and PP–22, adopted on May 8, 1997, and released on May 16, 1997. The complete text of this *Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. The complete *Order* is also available on the Commission's Internet home page (http://www.fcc.gov/).

Synopsis of the Order

1. In this *Order*, the Commission affirms its decision to refer CellularVision's Pioneer's Preference request to peer review, but clarifies its basis for doing so. Additionally, the Commission amends a rule it adopted in the *LMDS Second Report and Order* (62 FR 23148, April 29, 1997). Specifically, the Commission amends Section 101.1112 to include subsection 101.1112(d)(11) as set forth in Appendix A of the *Order*. Consistent with the Commission's rules governing the Wireless Communications Service (''WCS'') and broadband Personal Communications Services (''PCS''), this new subsection exempts from the affiliation rules entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations for purposes of determining whether an entity meets the definition of a small business or a business with average annual gross revenues of not more than $75 million.

Pioneer's Preference

2. In the *LMDS Second Report and Order,* the Commission ordered the initiation of a peer review process to examine the pending Pioneer's Preference request filed by CellularVision. The Commission stated that it was undertaking this action pursuant to Section 1.402(h) of the Commission's Rules, 47 CFR 1.402(h). On reconsideration, the Commission recognizes that Section 1.402(h) does not apply directly to the request filed by CellularVision. The rule applies only to a Pioneer's Preference request accepted for filing after September 1, 1994, and CellularVision's predecessor in interest, Suite 12 Group, filed its request on September 24, 1991.

3. Nothing in Section 1.402(h) or in the Commission Orders amending the Pioneer's Preference rules pursuant to the legislation conferring competitive bidding authority upon the Commission, and the legislation implementing the General Agreement on Tariffs and Trade (''GATT''), however, precludes the Commission from ordering peer review in cases where applications were filed before that date. While the rule is clear that applications filed after September 1, 1994, must be subject to peer review, the rule is silent with respect to