

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

In the Matter of

Petition for Relief of

R. K. PRODUCTION COMPANY, ANDREW  
RAYNOVICH, AND FRANK KIRKWOOD,  
Petitioners,

vs.

CSR 4492-L

THE ARMSTRONG GROUP OF COMPANIES,  
d/b/a ARMSTRONG CABLE,  
Respondent,

For Leased Access Channels

**MEMORANDUM OPINION AND ORDER**

Adopted: January 16, 1996; Released: January 26, 1996

By the Chief, Cable Services Bureau

**I. INTRODUCTION**

1. R. K. Production Company, Andrew Raynovich, and Frank Kirkwood (herein "petitioners") filed with the Federal Communications Commission on March 23, 1995 a petition for relief pursuant to Section 76.975 of the Commission's rules alleging violations by The Armstrong Group of Companies d/b/a Armstrong Cable (herein "Armstrong") of statutory and regulatory provisions applicable to commercial leased access channels on cable systems. On April 24, 1995, Armstrong filed a response requesting dismissal of the petition on the grounds that petitioners' allegations have no basis in fact, that the petition is untimely filed, and that petitioners seek relief which the Commission has no authority to grant.

**II. BACKGROUND**

2. 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>1</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.<sup>2</sup> Pursuant to that Congressional directive, the

Commission established regulations, including rate regulations and other terms and conditions 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.

**III. THE PLEADINGS**

3. The petitioners are R. K. Production Company, a Pennsylvania corporation, and Andrew Raynovich, and Frank Kirkwood, residents of Allegheny County, Pennsylvania, who propose to cablecast programs advertising residential real estate properties for sale. The petition asserts that, although several written and oral requests have been made to Armstrong between May 17, 1994 and January 31, 1995, Armstrong has refused to respond to its requests for access to Armstrong's cable system by means of leased access, has failed to designate channel capacity and has failed to provide petitioner with commercial leased access. It asserts that Armstrong's refusal to respond and failure to designate channel capacity and to provide petitioner with commercial leased access constitute a continuing and ongoing violation of 47 U.S.C. § 532 et seq. and Section 76.970 of the Commission's rules. It requests the Commission to require Armstrong to provide leased access to petitioners at rates determined by the Commission and to execute a lease agreement in the form of one attached to the petition. It also requests an order requiring Armstrong to compensate petitioners for out-of-pocket expenses not to exceed \$10,000. Copies of correspondence in which the petitioners made written requests to Armstrong are submitted with the petition.

4. Armstrong asserts that the petitioners' allegations "are replete with inconsistencies" and fail to show that Armstrong has violated the Commission's leased access rules. It asserts that it is unclear when petitioners first requested leased access arrangements, that the requests during May and July of 1994 were only for leased access terms and rates, that "they never made a request or demand for leased access," and that "subsequent contact" showed petitioners' plans for leased access to be vague. Armstrong asserts further that it expressed to petitioners its intent to comply with the statutory leased access requirements and noted to them that, because the Commission's leased access rules were under reconsideration, uncertainty existed regarding how cable operators must provide leased access to programmers.<sup>3</sup> Finally in this regard, Armstrong asserts that it provided to petitioners a proposed leased access agreement on April 10, 1995 and that petitioners have not returned a signed agreement or proposed an alternative agreement.

5. Armstrong also argues that the petition must be dismissed as untimely filed, because it was not filed within sixty days from the alleged violations as required by Section 76.975(d) of the rules. It notes that the petition was filed on March 23, 1995, which is more than sixty days from petitioners most recent correspondence of October 31, 1994 regarding leased access matters. It asserts that, in any

<sup>1</sup> See Section 612 of the Communications Act of 1934, as amended, 47 U.S.C. § 532. The amount of channel capacity an operator must set aside is based on a system's activated channel capacity. See 47 U.S.C. § 532(b).

<sup>2</sup> See Pub. L. No. 102-385, §§ 9, 10(a) and 10(b), 106 Stat. 1460, Oct. 5, 1992. See 47 U.S.C. § 532(c)(4)(A) & (B) (1992).

<sup>3</sup> See Response, p. 2-3.

event, circumstances have changed (referencing the proposed leased agreement provided to petitioners), and that any remedy the Commission may impose would only confer private negotiations already in progress. Armstrong also asserts that the Communication Act's provisions do not grant the Commission authority to grant a request by petitioners for an order that Armstrong compensate them in the amount of \$10,000 for out-of-pocket expenses incurred in this matter.

#### IV. DISCUSSION

6. This case presents the question of whether Armstrong has responded to the requests of petitioners for leased access capacity in a manner that is consistent with the requirements of the statutory and regulatory provisions applicable to leased access. The petition also raises the issue of whether the petition was timely filed and whether the Commission has statutory authority to order payment of expenses of litigation.

##### A. Cable Operator Responses to Requests for Leased Access Capacity

7. The record before us shows that by letter dated May 17, 1994, to Armstrong's general manager, petitioner Kirkwood Raynovich asked for a rate schedule, the identification of service areas, the number of households in the areas, the channel used for leased access and other start-up fees, studio and equipment charges imposed by Armstrong.<sup>4</sup> No response was received. By subsequent letters dated June 6, 1994, July 14, 1994, July 29, 1994, September 19, 1994, September 30, 1994, and October 31, 1994, petitioner Kirkwood requested the same or substantially the same information either directly or by reference to his earlier requests, to no avail.<sup>5</sup> Indeed, by letter dated September 30, 1994, Armstrong's Vice President and Chief Operating Officer had informed petitioner Kirkwood that "we are not in a position to accommodate you."<sup>6</sup> The reason given was essentially that the leased access rule making proceedings at the Commission have not been completed and that Armstrong has "absolutely no idea what the terms and conditions for leasing channels are."<sup>7</sup> The petition states that between November 1, 1994 and January 31, 1995, and as recently as January 31, 1995, the petitioners have attempted to contact Armstrong by phone but that the calls have neither been returned nor acknowledged.<sup>8</sup>

8. On this record, we cannot accept Armstrong's suggestion to the effect that petitioners' requests did not include "a request or demand for leased access" or were otherwise so vague<sup>9</sup> as not to invoke the obligations of the statutory and regulatory provisions applicable to commercial leased access.<sup>10</sup> To the contrary, this record requires us to reject Armstrong's assertion that its responsiveness was reasonable and consistent with the requirements of Section 76.970 of the Commission's rules. Section 76.970 has been in effect since September 1, 1993 and generally available to the

cable industry since May 3, 1993. Merely because petitions for reconsideration of aspects of the Commission's leased access rules are pending before the Commission does not mean that those rules as published are not in effect.<sup>11</sup> No order has been issued staying the effect of those rules pending Commission consideration of and action on the petitions for reconsideration. Accordingly, those rules may not be simply ignored, as Armstrong suggests.

9. Section 612(b) of the Communications Act requires cable operators to designate the channel capacity for commercial use by programmers unaffiliated with the cable operator.<sup>12</sup> In language that parallels Section 612(b) of the Act, the Commission has brought this channel designation requirement into Section 76.970(a) of its rules. That requirement is reinforced by Section 76.970(e) of the rules, which requires that a cable operator, "[u]pon request," shall provide a schedule of leased access rates to prospective leased access programmers. This record shows that Armstrong failed to provide petitioners with leased access rates and other information until April 10, 1995, well after this petition was filed on March 23, 1995,<sup>13</sup> despite the fact that at least six written requests were made for leased access and other information between May 17 and October 31, 1994, and that subsequently unanswered telephone calls from petitioners to Armstrong continued until January 31, 1995. This record would clearly support a finding that Armstrong has refused to respond to the requests of petitioners for leased access rates and channel capacity, has failed to designate channel capacity, and has denied petitioners access to its cable system, in violation of Section 612(b) of the Communications Act and of Section 76.970 of the Commission's rules, as petitioners have alleged. However, we are constrained not to make such a finding here, solely because the petitioner did not bring those matters to our attention within sixty days as required by Section 76.975(d) of the rules. The casual disregard for the requirements of the statutory and regulatory provisions exhibited on this record could expose a cable operator to forfeitures and penalties, if brought to our attention in a timely filed petition.<sup>14</sup>

10. Section 76.975(d) of the rules requires that a petition for relief be filed within sixty days from the alleged violation. The record shows that petitioners last made a written request for leased access rates and information on October 31, 1994. However, the petition was not filed until March 23, 1995, more than sixty days later. On these facts, we conclude that the petition was not timely filed and must be dismissed for noncompliance with Section 76.975(d) of the rules. The unverified petition describes further efforts that were made to reach Armstrong by telephone that were unsuccessful. However, we decline to conclude on this record that the alleged failure to return these telephone calls constitutes a violation of Section 612 of the Communications Act or Section 76.970 of the Commission's rules.<sup>15</sup>

<sup>4</sup> See Petition, Exhibit A.

<sup>5</sup> See Petition at pp. 3-6 and Exhibits B through E, and G.T

<sup>6</sup> See Petition, Exhibit F.

<sup>7</sup> *Id.*

<sup>8</sup> See Petition p. 7.

<sup>9</sup> See Response, p. 2.

<sup>10</sup> See 47 U.S.C. § 532(b), and 47 C.F.R. §§ 76.970 and 76.971.

<sup>11</sup> See 47 C.F.R. § 1.103.

<sup>12</sup> See n.1 above.

<sup>13</sup> See Response, Exhibits A.

<sup>14</sup> See 47 C.F.R. § 76.9 and 47 C.F.R. §§ 1.91-95.

<sup>15</sup> In the event that a timely filed new petition were to demonstrate that Armstrong had met renewed requests from the petitioners with the same casual disregard for statutory and

**B. Payment of Expenses of Litigation**

11. Petitioners request that the Commission order Armstrong to pay them a sum not to exceed \$10,000 to compensate them for out-of-pocket expenses. Neither the Communications Act of 1934, as amended, the 1984 Act, nor the 1992 Act provides for recovery of costs associated with the filing of a petition for relief with the Commission for alleged violations of the statutory provisions or the Commission's regulations issued applicable to leased access. Accordingly, petitioner's request for compensation for out-of-pocket expenses of litigation will be denied.

**V. ORDERING CLAUSES**

12. For the foregoing reasons, IT IS ORDERED that the petition for relief of R. K. Production Company, Andrew Raynovich and Frank Kirkwood in File Number CSR 4492-L IS DISMISSED as untimely filed.

13. 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 Service Bureau

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regulatory requirements as that shown here, we would have little choice but to issue an appropriate order directing compli-

ance with any statutory or regulatory provision shown to be violated.