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December 21, 1992

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By Hand

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-258

Dear Sir or Madam:

I am enclosing for filing in the above-captioned docket an original and nine copies of the Joint Reply Comments of the Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way. Please supply each Commissioner with a personal copy of these filings.

Sincerely,

David A. Bono

DAB:nnv
Enclosures

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

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In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992 Indecent Programming and Other Types of Materials on Cable Access Channels	MM Docket No. 92-258

JOINT REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

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Dated: December 21, 1992

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INTRODUCTION

The Opening Comments of the Alliance for Community Media (formerly the National Federation of Local Cable Programmers), the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way demonstrated many of the ways that Section 10 and the Commission's Proposed Rule are unconstitutional. Various other comments -- of both operators and programmers -- have similarly pointed out the serious constitutional defects of this system of content-based restrictions.[1/] Moreover, a number of comments have

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[1/] These constitutional defects have been recognized by operators and owners of cable systems and their trade associations, see, e.g., Blade Communications, Inc. et al., at 2; Community Antenna Television Association, Inc., at 2-3; Cox Cable Communications, at 2, 4, 14; InterMedia Partners, at 8-9; National Cable Television Association, Inc., at 3-6, as well as programmers and access centers, see, e.g., Ann Arbor Community Access Television, at 1; Boston Community Access and Programming Foundation, at 3-6; Roxie Lee Cole, at 1; Columbia (continued...)

recognized the utility of lockboxes in achieving Section 10's ostensible goal -- protecting children from programming that their parents find inappropriate.[2/] Because this type of content-based regulation of protected expression must use the least restrictive means, see Sable Communications v. FCC, 492 U.S. 115, 126 (1989), any mechanism more restrictive than lockboxes, such as the Proposed Rule's regulatory scheme, fails to pass constitutional muster.

We continue to adhere to our original position that the Commission has embarked on a course to promulgate an unconstitutional final rule. However, there are serious problems with many of the suggestions put forward by several other commenters -- primarily cable operators -- allegedly to minimize the unconstitutional effects that they would feel from the Commission's Proposed Rule. While these operators make a host of suggestions for their own economic or regulatory benefit, their proposals would only exacerbate the

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[1/] (...continued)
Community Access, at 1; Community Access Network, Inc., at 1; Judy D. Crandall, at 1; Defiance Community Television, at 1; Denver Area Educational Telecommunications Consortium, Inc., at 5 n.7; David B. Dreety, at 1; Steven C. Fortriede, at 1; Manhattan Neighborhood Network, at 2-3; Erik S. Mollberg, at 1; Waycross Community Television, at 1.

[2/] Blade Communications, Inc. et al., at 8; Boston Community Access and Programming Foundation, at 5 (noting that lockboxes provide a less restrictive means of protecting children from indecent programming); Community Antenna Television Association, Inc., at 6-7; Local Governments, at 7; Tele-Communications, Inc., at 14 (arguing in favor of lockboxes as a permissible alternative to operator blocking); Time Warner Entertainment Co., L.P., at 10.

burdens placed on programmers' free speech rights, as we discuss in the separate argument sections presented below.

Before examining each of these arguments, we note that several operators have also advanced a different kind of constitutional argument that is seriously in error. For example, Time Warner in both its comments and in separate litigation (Time Warner Entertainment Co., L.P. v. FCC, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992)) argues that it is unconstitutional to require operators to carry access channels because they are thereby associated with messages with which they do not agree.[3/] This argument is necessarily predicated on the notion that, with respect to access channels, cable operators are editors with their own first amendment rights. However, because courts recognize PEG and leased access channels as a public forum, they have explicitly distinguished access from other cable channels and rejected the contention that operators are editors with their own first amendment rights with respect to access channels. See cases cited in Opening Comments at 36 & n.16.

These operators' erroneous constitutional analysis leads them into misreading Section 10 and offering several highly inappropriate suggestions to the Commission. Because they view themselves as editors of access channels, many operators

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[3/] For other comments arguing that PEG and leased access is itself unconstitutional, see Blade Communications, Inc. et al., at 1-2; Community Antenna Television Association, Inc., at 2-3; National Cable Television Association, Inc., at 3-4 & n.3; Tele-Communications, Inc., at 2.

have forwarded suggestions that would use Section 10 to overwhelm Congress' general intent to preserve access channels as a public forum.[4/] Section 10, however, contains only a narrow exception to the general requirement that speech on PEG and leased access channels remain unedited. While Congress enacted that part of the 1992 Act to afford the Commission a highly limited basis to address sexually explicit or politically controversial speech, it left intact the general command that "a cable operator shall not exercise <u>any</u> editorial control over" PEG or leased access. 47 U.S.C. § 531(e) (PEG; emphasis supplied); 47 U.S.C. § 532(c)(2) (leased access; emphasis supplied). While operators may choose to ignore these general provisions, they remain in force, and the Commission must interpret Section 10 so that it is consistent with the prohibition against operator editing. Thus, the Commission cannot assign to operators the task of defining what material a programmer may not air over a cable system's PEG and leased accessed channels. Rather, it must limit the operator of that system to exercising an option to

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[4/] Perhaps like Time Warner (who advances such an argument in their lawsuit), these operators hope that the result will be that some court will look to the Commission's final rule to find, first, that the newly heightened level of operators' editorial involvement grants them heretofore unrecognized first amendment rights and, second, that those rights are violated by the requirement that operators must carry access programming. <u>Cf.</u> <u>Midwest Video Corp.</u> v. <u>FCC</u>, 571 F.2d 1025 (8th Cir. 1978), <u>aff'd on other grounds</u>, 440 U.S. 689 (1979). We submit that this bootstrapped result was not intended by Section 10, and the Commission must therefore reject this approach to the current rulemaking.

prohibit programmers from airing that material. Similarly, the Commission must also vest the power to police these channels in an entity other than the operator, whom Congress has forbidden from "exercis[ing] any editorial control." Rather, as we pointed out in our Opening Comments (at 58-60), prior restraints are the exclusive domain of the courts. See generally Freedman v. Maryland, 380 U.S. 51 (1965).

This construction of the statute is also mandated by the constraints of the constitution. Even under a view that attempts to gain for operators an unprecedented first amendment right to edit access programming, it remains unconstitutional for the government to lodge censorship authority in operators who may then be subjected to liability if they fail to exercise that authority. For that reason, operators cannot be conscripted as "a corps of involuntary government surrogates . . . without providing the procedural safeguards respecting 'prior restraint' required of the government." Midwest Video v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); see also Opening Comments at 58-60 (noting requirement of prior judicial procedures). To do so would impermissibly "subject[] the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest . . . enlists him on the 'safe' side -- the side of suppression." Midwest Video, 571 F.2d at 1057; see also Opening Comments at

30-34 (noting constitutional problems from liability provision of Section 10(d)).[5]

With this background in mind, we turn to specific proposals made in certain comments. As we show below, many commenters would have the Commission forego the restraint that is required of it under both the statute and the constitution. For that reason, we again urge the Commission to adopt the limiting construction of Section 10 that we offered in our Opening Comments. As we demonstrated in those comments, lockboxes are consistent with the PEG and leased access statutes, and they are the least-intrusive means for the Commission to implement any legitimate governmental interest in restricting children from viewing programming deemed inappropriate by their parents. Any other approach will fall below constitutional minima, as we pointed out in our Opening Comments.

SUMMARY

Even if the Commission fails to follow the constitutionally mandated course of recognizing lockboxes as the least restrictive means to effectively implement Section

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[5] We thus adopt the analysis of Midwest Video that holds that a system for censoring the access channel public forum violates the constitution when it lodges the power to censor with operators who may be held liable for failing to exercise that power. We also recognize that Midwest Video incorrectly determined in dicta that a regulation requiring operators to carry access channels violated the constitution. This incorrect determination has been rejected by the courts in later cases, which have upheld the statutory requirement that operators carry access channels. See cases cited in Opening Comments at 36 n.16.

10, it certainly cannot accept the main proposals forwarded by operators. First, the Commission must reject the suggestions that operators be given the power to edit broadly, pre-screen programming, and/or require certification from programmers. These proposals are either contrary to the statute, unnecessary under it, or potentially violative of the constitution. Second, the Commission must reject the suggestion of operators that they be granted an immunity to censor with impunity. Such an inducement towards widespread censorship fails to afford programmers the first amendment protection they are due. Third, the suggestion for indemnity and proof of insurance from programmers must be rejected because it both is unnecessary under the statute and implicates serious constitutional concerns.

If the Commission decides to wander into constitutionally dangerous territory by rejecting the lockbox course, there are certain suggestions of other commenters it may wish to follow in order to minimize the burden being placed on programmers' first amendment rights. While the Commission should not preempt state and local laws and franchise contracts forbidding operator editing, it should make clear that its national standards preempt state laws with regard to speech not allowed on cable. It should also require operators to unblock a channel upon a phone call from a subscriber. And it should stay the effectiveness of its final rule until courts have completed their review of it. Moreover, if lockboxes are

given due recognition, operators should be forbidden from attributing lockbox costs as a cost of providing access. Instead, as the Commission develops regulations for operators' rates, the costs of lockboxes should be considered as a cost of providing cable.

I. THE COMMISSION WOULD HEIGHTEN THE UNCONSTITUTIONAL BURDEN ON PROGRAMMERS IF IT STRENGTHENED THE ABILITY OF OPERATORS TO CENSOR PROGRAMMING

Most of the operators filing comments have requested that the Commission grant them certain powers, beyond those contained in the Proposed Rule, that would strengthen their ability to keep the programming they choose off of PEG or leased access channels. We strongly oppose any such measure. Congress explicitly provided for PEG and leased access in the 1984 Cable Act, and local franchising authorities have negotiated contractual provisions for such channels, for the specific purpose of facilitating unedited programming.[6/] To now grant the very same operators unbridled editorial discretion would contravene the clear intent of Congress. Moreover, it would exacerbate the unconstitutional burdens on speech that we discussed in our Opening Comments.

The most blatant proposal in this regard comes from operators such as those who filed comments along with Acton

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[6/] Despite these protections, some cable operators have attempted to impede access programming, as is demonstrated by the articles attached as Appendix A to these reply comments. If the Commission were to grant operators editorial power over programming, these instances are likely to multiply.

Corp., who insist that they must have "broad discretion" to both establish and apply censorship standards because "different operators [have] different editorial positions." Acton Corp. et al., at 2, 5. By its very nature, however, such a sweeping proposal would impermissibly allow wholly standardless censorship. The only government interest that even arguably supports Section 10 is the protection of children from programming deemed inappropriate by their parents, not the furtherance of each operator's unique editorial viewpoint. The Commission must therefore reject the proposal that it read Section 10 to abrogate the general prohibition against operator editing, which remains intact.[7]

Certain of the commenters who make this proposal apparently recognize that it would allow censorship beyond constitutionally permissible bounds. Having asked for unbridled discretion, for them "[i]t is then irrelevant under

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[7] In any event, we note that the editorial policies of some operators are to program non-access channels with sexually explicit material even as they seek to ban such material from access channels. For example, although Time Warner lists in its comments a handful of access programs it "would not choose to provide" (at 3-4), it neglects to inform the Commission that the highest rated documentary series carried on its Home Box Office division is called "Real Sex." "Real Sex" has highlighted segments such as, inter alia, a home striptease class and a studio that makes pornographic films for women. See Appendix B. As we discussed in our Opening Comments (at 49-54), the Commission has failed to rectify the constitutional problems of banning material from access channels while allowing it on other channels. If the Commission does not adopt the lockbox approach, it should therefore "prevent operators from prohibiting from access channels the same type of programming it carries on other of its channels." Id. at 50-51.

the statute whether either the Commission or a court would reach the same conclusion as the cable operator." Id. at 3-4. The conclusion that courts would reach is of course relevant, however, for it is only they who can determine what speech is not deserving of constitutional protection. Indeed, as we pointed out in our Opening Comments (at 58-60), the prompt application of such judicial process is a necessary component of any constitutionally permissible content-based prior restraint on speech.

For these reasons, the Commission must emphatically reject operator proposals that seek broad editorial discretion. If the least-restrictive lockbox regulatory approach is rejected, the Commission -- in order to avoid promulgating a regulation that is also overbroad -- would have to clarify that programmers may be barred from including in their material only that speech which is constitutionally unprotected, as defined by the Commission.[8] In addition, rather than allowing an operator to make its own determination

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[8] If a lockbox regulatory approach is rejected, confining PEG censorship to Commission-defined speech becomes a necessary implication of Section 10(c) of the statute. Section 10(a), on the other hand, concerns speech over leased access channels that an operator "reasonably believes" is indecent. Nonetheless, the Commission should treat leased access in the same manner that the statute treats PEG to avoid constitutional difficulties. As we pointed out in our Opening Comments, prior restraints can only attach with the guarantee of a prompt court determination that some constitutional standard would otherwise be violated (at 58-60); they cannot be imposed under standards developed by a non-neutral entity whose own liability may prompt it to censor widely (at 30-34). Allowing operators to censor based on their subjective beliefs would violate these first amendment principles.

as to whether a particular program falls outside the scope of constitutionally protected speech, the Commission must clarify that only a court may declare that a program is obscene and order it kept off the air.

No less problematic is the suggestion by several operators that the Commission's final rule contain a provision that would allow them to pre-screen programming before it is aired on PEG or leased access channels.[9] Pre-screening is highly objectionable for several different reasons. First, by allowing pre-screening, the Commission would place operators in the position to make specific editorial demands before giving final approval.[10] Such editorial control flatly contravenes the PEG and leased access statute -- which retains at its core the principle that speakers who use PEG and leased access channels must be allowed to program without regard for the operator's editorial preferences. Second, as we pointed out in our Opening Comments (at 26-27 & 32), any pre-screening requirement would likely eliminate all live programming, including call-in shows, regardless of whether they contained proscribable speech. Third, several operators have noted the

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[9] See Acton Corp. et al., at 5; Blade Communications, Inc. et al., at 12; Continental Cablevision, Inc., at 5-6 (advocating pre-screening if the Commission rejects a certification system); InterMedia Partners, at 4, 18.

[10] The suggestion of some operators that they should "be able to impose monetary penalties on programmers," see Acton Corp. et al., at 8, must be rejected for similar reasons. To give operators the power to penalize programmers would also implicitly grant them the power to make editorial demands in advising programmers how to avoid those penalties.

inordinate expense that pre-screening occasions. See, e.g., Community Antenna Television Association, Inc., at 3-4; Time Warner Entertainment Co., L.P., at 19.

Moreover, pre-screening as proposed by the operators would also violate the first amendment in two ways. First, the pre-screening proposals contain no reasonable time limits. By allowing an operator the power to threaten indefinite delay, such pre-screening would constitute a prior restraint that exacerbates all of the problems of allowing operators to exercise unbridled editorial control over access programming. Put another way, such pre-screening adds the element of unrestrained delay and necessarily places all programs under a prior restraint: even programming that does not contravene an operator's editorial policy will necessarily be delayed from airing, regardless of how timely it is.

Second, the pre-screening proposals forwarded by operators call for unreviewable discretion. For example, InterMedia Partners pronounces that, as part of its proposed pre-screening, "InterMedia's determination as to whether a particular program complies with its policy will be the final determination." InterMedia Partners, at 7 (emphasis added); see also Tele-Communications, Inc., at 2 (urging that no dispute resolution mechanism is necessary because the operator's decision should be final). This unaccountable exercise of power necessarily raises the prospect that arbitrary or irrational decisions will go unchecked. In

contrast, the constitution requires prompt judicial procedures, as we discussed in our Opening Comments at 58-61.[11/] For these reasons, as well, the Commission must reject pre-screening.

Several operators have also requested that the Commission allow them to require programmers to certify that their programming does not fall outside of the operator's policy regarding allowable speech. An integral part of this certification proposal would immunize operators from liability for carrying programs certified not to be indecent, but later held to be so. The Commission should reject these proposals because certification should not be necessary to insulate operators from liability when they allow access programming to air, as the PEG and leased access statutes require them to do. At most, the Commission's final rule should state that no liability will attach to an operator if a programmer violates the Commission's rule and an operator's policy against indecent programming.

As an initial matter, we note that the operators' perceived need for certification and its attendant immunity for failing to censor apparently stems from their mistaken

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[11/] Moreover, the NCTA notes that pre-screening would allow an operator to "both prohibit some programming and choose not to prohibit other programming." National Cable Television Association, Inc., at 9 n.8. Such unequal selective screening raises the specter of an unconstitutional system that allows speech to be regulated "based on hostility -- or favoritism -- towards the underlying message expressed." R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2545 (1992) (quoted in Opening Comments at 53 n.25).

assumption that Section 10 has given them editorial control over PEG and leased access channels. However, as we have discussed above, see supra at 3-5, the 1992 Act has not amended the portion of the PEG and leased access statutes that prohibits operators from exercising any editorial control over these channels. Operators are therefore not placed in an active position with regard to editing PEG and leased access. Because liability should only be predicated on operators actively speaking or editing, liability should not lie in this instance. See generally Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525 (1959).

Consequently, to allay the fears of operators concerning liability, the Commission's final rule need only clarify that an operator cannot be held to be a liable party when a programmer violates that operator's policy and the Commission's standards prohibiting the broadcast of indecency. As InterMedia Partners pointed out in its comments (at 15), the Commission has followed a similar approach in Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, 2 F.C.C.R. 2819, 2820 (1987), when it stated that "[u]nless an MDS common carrier has actual notice that a program has been adjudicated obscene . . . it will not be subject to adverse agency action." In the case of access programming, as in the earlier MDS context, there is neither "a high degree of involvement" nor the "actual notice of an illegal use" on which operator liability

may be predicated. Because operator liability thus should not be implicated, there is simply no need for the Commission to require that programmers certify the content of their programs. Even without a certification, the operators should face no liability.[12/]

In any event, a certification requirement such as that proposed by operators may very well be considered vague when viewed from the perspective of a lay programmer who is not tutored in fine first amendment distinctions. For that reason, a court might very well strike down such a requirement under the first amendment. See, e.g., Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 782 (C.D. Cal. 1991) ("'a conscientious applicant who takes the certification seriously is thus compelled to avoid undertaking any project that might even arguably violate' the vague certification requirement" that a production not fall short of the Miller obscenity standard) (citation omitted). Certification in this regard could be likened to an oath, which may similarly be considered unconstitutional if it chills speech by forcing self-censorship on the part of those who are unsure of whether they meet the implicated standard. See, e.g., Baggett v. Bullitt, 377 U.S. 360, 373-74 (1964); Speiser v. Randall, 357 U.S. 513, 526 (1958) (oath takers "steer far wider of the

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[12/] Under the operator's own justification, therefore, if the Commission were to adopt certification, it should at most go only so far as to have programmers certify that they recognize and accept their own liability if they fail to live by an operator's policy and the Commission's standards.

unlawful zone"). Rather than implicating these constitutional concerns, the Commission should reject the operators' certification proposals.

While each of these several different ways of strengthening operators' power to censor programmers is therefore inappropriate, we note that several commenters have urged that the Commission simultaneously adopt several or all of them.[13/] However, viewing these measures as somehow complementary is especially wrongheaded. To the contrary, if the Commission were to consider any one of these proposals appropriate despite the problems it poses, its implementation would negate the need for any other. For example, if certification (with its attendant immunity) were implemented, there would be no need for pre-screening. Because an operator would be held harmless for carrying programming mistakenly certified as not indecent, that operator has no reason to screen certified programming to determine whether or not program content meets operator standards. In this way, each of the operators' proposals are duplicative, and the Commission would be unnecessarily multiplying the burden on programmers' free speech rights if it were to adopt a number of them.

[13/] See Acton Corp. et al., at 3-5; InterMedia Partners, at 14, 18; Blade Communications, Inc. et al., at 12; National Cable Television Association, Inc., at 8-9.

II. THE COMMISSION WOULD FURTHER HAMPER PROGRAMMERS' FREE SPEECH IF IT IMPLEMENTED SUGGESTIONS REGARDING OPERATOR LIABILITY

Several operators have requested that the Commission expand its Proposed Rule in two ways to minimize the liability operators may face for censoring PEG and leased access programming. First, several operators seek a blanket immunity from liability whenever they act as censors, regardless of the reasonableness of their activities in this regard. Second, many operators propose that the Commission's final rule grant them the power to require programmers to indemnify operators and provide proof that they carry sufficient insurance to cover any such contingent liability. For reasons we now discuss, the Commission must reject all such proposals because they are both contrary to the requirements of the constitution and inappropriate under the statute.

The proposals to immunize operators' censorship add an unnecessary additional burden on the first amendment rights of programmers. All of these immunity proposals would prompt operators to censor as widely as they can in order to avoid even the most remote possibility of liability under Section 10(d) for carrying a program that "involves obscene material." See, e.g., InterMedia Partners, at 6 ("InterMedia will interpret and apply this restriction broadly"). As we discussed in our Opening Comments (at 28-34 & 38-42), the impetus towards broad censorship created by the liability provision of Section 10(d) is not narrowly tailored to

implement a compelling governmental interest, and it therefore contravenes the constitution. For a similar reason, the proposals to grant operators an immunity from liability must be rejected by the Commission: they would create a further incentive for operators to engage in standardless censorship and thereby chill the first amendment rights of access programmers.[14/]

In a similar vein, several of the operator commenters have asked the Commission to include provisions in its final rule that would allow operators to require that programmers guarantee indemnification and provide proof of insurance concerning any possible operator liability. For both statutory and constitutional reasons, the Commission must reject the proposals to enshrine indemnification and insurance provisions in its final rule. First, there is no reason to read into the statute any concern with indemnification or insurance issues. Potential liability from programming arises from a wide variety of theories (such as negligence in the act of filming a show) under which a plaintiff may name the operator. The operators now seeking indemnification and proof of programmer insurance have failed to suggest any basis to

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[14/] We also note that such an immunity is unnecessary under the statute. As we demonstrated above, operators are not active PEG and leased access programmers and hence should not face the risk of liability absent actual notice of a prior court action finding a particular program obscene. Consequently, immunity for censorship -- an activity operators should not be engaged in -- is contrary to the prohibition that they not edit access programs.

differentiate liability with regard to program content from all of the other forms of potential liability, with regards to which indemnification issues have long been successfully handled on a case-by-case basis under the common law.[15/]

Second, the Commission should avoid widening its rulemaking to reach indemnification and proof of insurance issues because such requirements may raise first amendment concerns. A concern with only the content of speech that is to take place in a public forum affords "no justification for insurance or hold harmless conditions . . . [and] they may not constitutionally be imposed" by the government. Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, Md., 700 F. Supp. 281, 286 (D. Md. 1988). When crafted with regard to content-based liability, indemnification and insurance requirements necessitate an impermissible examination of the contents of the proposed speech, and they impermissibly levy a heavier financial burden on controversial speech. Collin v. Smith, 578 F.2d 1197, 1207-09 (7th Cir.), cert. denied, 439 U.S. 916 (1978).[16/] Moreover, the proposals that the operators have forwarded in

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[15/] Insurance is an apt consideration in one regard. Operators who are concerned with liability for censoring PEG or leased access may purchase their own insurance to protect themselves against their own negligence.

[16/] For the same reason, the Commission must also reject as constitutionally infirm the suggestion of operators such as Acton Corp. et al., at 8, that programmers be required to post a bond before being allowed to program on the PEG and leased access public forum.

this docket are not only content-based, but they ask the FCC to adopt a standardless regulation. Under these proposals, both the amount of the insurance demand and the decision of whether or not to make that demand would be left to the unfettered discretion of operators. This standardless discretion is inappropriate in all prior restraint contexts, but especially where the decisionmaker has declared that it will exercise that discretion with the content of speech in mind. Forsyth County, Ga. v. Nationalist Movement, 112 S. Ct. 2395 (1992).[17]

III. WHILE SOME NATIONAL STANDARDS SHOULD BE ADOPTED, OTHERS ARE WHOLLY INAPPROPRIATE

Several programmers also argue that the Commission should adopt uniform national standards on certain matters. While we support some of these efforts, others clearly raise serious problems.

Foremost among the objectionable proposals is that which concerns federal preemption of provisions of state laws, local ordinances and franchise contracts that prevent operators from editing access programs. See Continental Cablevision, Inc., at 6-8. As an initial matter, Section 10 is not phrased in the mandatory terms that would preempt state and local regulation of the franchise process. In other words, while

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[17] The reasoning discussed in text applies equally whether it is the programmer who would be required to provide proof of insurance or, as has also been suggested, an access center that administers the access requirements over a particular cable system. See Blade Communications, Inc. et al., at 14 n.13; InterMedia Partners, at 7.

Section 10 states that an operator may choose to adopt certain censorship policies, it neither vests that choice exclusively with the operators nor removes states and localities from playing their role in the process. Moreover, the preemption that is urged would abrogate existing franchise contracts, whereby operators have voluntarily agreed not to edit access programming. Nothing in Section 10 indicates that it is intended to abrogate existing contracts whereby operators have already exercised their options and decided to allow all types of programming -- including sexually explicit or politically controversial material -- in its access channels.

Preemption may nonetheless be appropriate in one circumstance. If the Commission fails to follow the least-restrictive lockbox approach, it must carefully define the categories of speech which it would allow operators to ban if it is to avoid also violating the constitution through an overbroad regulation. See Opening Comments at 54-57. Thus, as we suggested in our Opening Comments, the Commission should follow its prior indication to narrowly construe "unlawful conduct" and "sexually explicit" in the PEG standard.[18/] In the same vein, the Commission should clarify that those standards preempt any others that may be found in state or local laws or ordinances. Similarly, the Commission should

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[18/] For the reasons expressed in both the Commission's Notice and our Opening Comments, the Commission should reject the broad reading of these terms by InterMedia Partners and Acton Corp. et al.

require that any sexually explicit or politically controversial material be weighed against the value of the programming when taken as a whole, and it should clarify that its mandate in this regard is preemptive. Accord Time Warner Entertainment Co., L.P., at 6-8. It should also define, with preemptive force, the relevant community to be cable subscribers.[19]

Finally, the National Cable Television Association, Inc. ("NCTA") in its comments proposes a national standard with respect to how subscribers may request unblocking of the channel dedicated to indecent leased access programming. As we demonstrated in our Opening Comments, any system of central blocking is unconstitutional in light of the effective, less restrictive, lockbox mechanism. Were it not for lockboxes, we would agree that a uniform national standard for unblocking should be adopted, although we would still oppose the one offered by NCTA, which would delay the viewer's right to receive requested programming for sixty days. Such a burden on viewer's rights is unnecessary and therefore unconstitutional. Rather, if the Commission fails to adhere to the least restrictive lockbox approach, at a minimum it should require all operators to implement an unblocking system that

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[19] Blade Communications, Inc. et al., at 7-8, suggest further segmenting the relevant community by tier of cable service. This approach should be rejected as unworkable, however, because only operators have information regarding the constituents who subscribe to each tier of service. Additionally, it is unnecessary, because access channels are available on several different tiers.