The Companies commend this study and approach to the Commission for consideration, as it takes into account the important revenue-producing capacity or value of channels.

3. <u>Factors to Include in Any Rate Formula</u>:

Either a cost-of-service formula or an implicit channel charge approach will lead to a rate that is reasonable for the channel user but does not adversely affect the financial condition of the system. Whatever approach the Commission selects, however, it should take into account the following factors:

a. For an advertiser-supported service, exposure to a large audience will be worth more than exposure to a smaller audience. The implicit channel charge formula of the Rand Corporation study employs a per subscriber approach so that the channel charge is greater for a system with more subscribers.

b. The cost of making a channel available part-time might be equivalent to or even greater than the cost of making the channel available full-time. Accordingly, the Commission should not assume that the rate for a part-time user is merely a percentage of the rate for a total channel equivalent to the percentage of the total channel time being leased.

c. Placement on one particular channel or tier may be more valuable than placement on another, just as leasing a particular time slot (prime time) may be more valuable than leasing the same amount of time in a different part of the day.

d. Leased access should be self-supporting. Again, the Act does not require cable operators, subscribers or other programmers to subsidize establishment of a programming venture. Subscribers and operators already are subsidizing the ability of public, governmental and educational programmers to distribute their programming. Imposing a similar burden for the benefit primarily of commercial, profit-making entities is neither a wise nor warranted distortion of the programming market.

e. The Commission's rules should not operate to stifle creative, arms-length channel lease arrangements outside the scope of the rules; any rules regarding rates, terms and conditions should be available for the benefit and protection of the potential lessee but should not be exclusive.

E. Terms and Conditions of Leased Access Should Be Left to Negotiation to the Greatest Extent Possible.

Because of the tremendous variety of programmer/lessee needs and operator/lessor needs and resources, it will be nearly impossible for the Commission to fashion terms and conditions for leased access that suit every situation.

1. Channel Placement and Scheduling:

The NPRM asks, for example, whether the Commission should adopt requirements for channel placement or scheduling of leased access programming. Although Section 623(b)(7)(A) the Act provides for PEG access to be on the basic tier, there is no such requirement for leased access programming. In fact, not all programmer/lessees would want, need, or be willing to pay for placement on the basic tier. For instance, a channel lessee providing a subscription service might prefer a non-basic channel for technical reasons. Nor would it be in the majority of subscribers' best interest for one of a limited number of basic channels to be occupied by a "blocked" leased channel dedicated for indecent material pursuant to Section 612(j) of the Act.

In addition, specifying mandatory placement for leased channels almost always will result in disruption of subscriber viewing habits through displacement of other programming. Leased access programming currently is accommodated on channels that were not in use when a lease was requested. Because different channels were available for lease on different systems, there is absolutely no uniformity among cable operators as to what channels are used for commercial lease. Also, because so little leased access developed following adoption of Section 612 in 1984,[20] most

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[20] See ftnt 18, supra.

cable operators were reluctant to leave valuable set-aside channels blank and used them for other purposes. Accordingly, rules mandating placement of leased access on certain channels necessarily would involve displacement and relocation of other programming and could involve disruption of existing contractual arrangements. Furthermore, specific channel numbers selected for leased access by the Commission might not be satisfactory to all programmer/lessees on all systems.

2. Equipment, Facilities and Services:

The regulations should not require cable operators to provide particular equipment, facilities or staffing assistance to channel lessees. To do so might prove a serious hardship for smaller operators that are not required by their franchises to have such facilities available. In addition, inasmuch as many channel lessees are one-time or part-time users, forcing a system to acquire equipment or to increase the size of its staff to accommodate isolated or infrequent usage would hardly be cost-effective. Whether an operator provides such support should be left up to negotiation between the operator and the programmer/lessee.[21]

[21] To the extent that equipment, facilities and staffing for PEG access can be shared with potential leased access programmers, appropriate arrangements can be negotiated as part of the channel lease.

3. Appropriate Lease Provisions:

The Commission can and should identify certain types of lease provisions that are presumptively appropriate. Among them should be:

a. the operator/lessor's right to require payment in full or, if the operator wishes, to require some form of security (a letter of credit, deposit, or comparable instrument) for the payment instead. Even a successful suit against the lessee for breach of contract may not provide adequate compensation for loss of the channel, especially if the lessee lacks sufficient funds to pay a judgement.

b. the obligation of a lessee providing programming that contains indecent material to bear the cost of blocking channels to comply with Section 612(j) of the Act, should the operator select that approach to compliance.

c. the right of the operator to identify the lessee responsible for the programming through on-air program identification on the leased channel as well as in announcements on other channels and in informational or promotional materials.

F. <u>Leased Access Disputes Should Be Resolved at the Federal Level.</u>

The Companies support Commission involvement in resolution of disputes between channel lessees and cable operators. Although the Act provides for judicial resolution, costly and time-consuming litigation could be avoided through Commission interpretations and formal or informal rulings.

While local franchising authorities can resolve disputes between systems and subscribers involving requirements that are locally-imposed, the leased access provisions are purely federal in nature and should be enforced at that level. Most franchising authorities do not have the resources to serve as tribunals for private commercial disputes. Even putting this problem aside, very few cable systems serve just one community. Thus, a dispute between an operator and a channel lessee would implicate several, and in some cases, many jurisdictions. Which one should entertain the complaint? Which one should decide? What if several jurisdictions do not agree?

The Commission should proceed carefully in ordering carriage prior to resolution of a dispute. For situations in which only the rate is at issue, commencing channel use but escrowing payments may be appropriate. Where entitlement to a channel is in dispute, however, the system operator should not be required to make the channel available until the dispute is resolved, especially when doing so would result in displacement of other programming.

VI. Conclusion

In formulating its response to the rate regulation requirements of the 1992 Act, the Commission should be mindful of the admonition that those who do not learn from history are doomed to repeat it. While the Commission does not have a history of direct regulation of cable rates, the cable industry does. That history reflects a checkerboard pattern of regulation, more political than economic, and is seen by many in the cable industry as having been a substantial impediment to its growth. Experience since the 1984 Act indicates that deregulation, for the overwhelming part, has worked well. Consumers have voted with their purchasing dollars; a steadily increasing percentage of households to whom cable is available are taking the service notwithstanding post-1984 rate increases, which largely reflect reinvestment in services, facilities and equipment.

A return to the arbitrary and capricious form of local rate regulation that existed prior to the 1984 Act would cripple the ability of the cable industry to make the kinds and amounts of commitments to programming; construction of new plant and upgrade of existing plant; and development of and investment in advanced and competitive technologies. The

Commission must ensure that its regulations, however well-intentioned, do not allow this to occur.

Respectfully submitted,

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