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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

REPLY COMMENTS OF
CENTER FOR MEDIA EDUCATION
ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS
NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATIONS
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE

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SUMMARY

In these reply comments, CME primarily addresses comments filed by cable operators concerning leased access. It is clear from both the tone of the cable operators' comments and the specific recommendations, that cable operators are not serious about making leased access a genuine outlet for diverse programming as Congress intended.

One example of cable operators' attempt to frustrate Congressional intent is the claim that leased access should be regulated only where effective competition does not exist. The 1992 Cable Act requires that the Commission establish maximum reasonable rates for leased access whether or not effective competition exists. Even if this was not the congressional mandate, there is as of yet no competition in the leased access marketplace.

Another example of an attempt to obstruct leased access is the cable operators' proposal that the Commission use the highest implicit access fee as the maximum reasonable rate. This would lead to rates so high that no one - much less non-profit programmers - could afford to lease access. While cable operators point out that lessees are free to negotiate rates lower than the maximum, no incentive exists for cable operators to agree to lower rates, and the maximum rate would become the de facto minimum rate.

Cable operators' further claim that the highest implicit access rate is necessary to bar migration should also be

rejected. Instead, the Commission should simply bar migration of existing cable services.

The cable operators unreasonably suggest that Commission regulations may not alter their financial condition in any way. Competition will necessarily change the financial condition of a monopolistic industry. The Commission is not required to preserve the monopoly position of cable operators while protecting them from any adverse affect on the "operation, financial condition or market development."

Instead of using the highest implicit access fee as the maximum reasonable rate, CME urges the Commission to adopt a rate scheme based on average implicit rates, lowered to eliminate monopoly and monopsony profits and to reflect the value added by the addition of leased access programming. To determine average implicit rates, the Commission should collect rate and cost data and make that data available to the public.

Contrary to the claims of the cable operators, the statutory mandate to encourage diversity and the legislative history of both the 1984 and 1992 Cable Acts gives the Commission the authority to adopt lower maximum reasonable rates for non-profit entities. Without this lower rate, non-profit entities will not be able to gain access as they cannot afford leased access at regular rates. While CME agrees in principle with CFA's needs based test, CME believes that non-profit organizations should receive a rebuttable presumption of entitlement to lower rates.

Contrary to what the cable operators claim, PEG access is

not an adequate alternative means of access for non-profits programmers. PEG channels are not available in all communities, and even where they exist, they are not available on a full time basis to potential programmers.

CME disagrees with the cable operators' suggestion that the terms and conditions of leased access should be left open to negotiations between the operators and access seekers. This approach is contrary to the language of the 1992 Cable Act. Moreover, history shows that negotiation failed to result in significant leased access. Reasonable terms and conditions were not arrived at through negotiation because the bargaining power between lessees and cable operators is unequal and the cable operators had no incentive to negotiate.

CME generally supports the expedited resolution procedures set forth in the Notice. It agrees that the Commission should issue oral rulings in emergency situations. Cable operators seek to delay dispute resolution by opposing oral rulings and recommending that the Commission use the cable television special relief procedures available under 47 C.F.R. §76.7. CME opposes this recommendation, as it is slower than the process proposed by the Commission in the Notice.

CME encourages access at the user's terms and conditions if the Commission fails to resolve a dispute within 30 days. This would shift some negotiating power to the users. CME also supports the use of Alternative Dispute Resolution (ADR) to resolve conflicts concerning leased access, as well as to set

basic service rates.

CME supports the establishment of a reporting requirement to monitor leased access use. The complaint procedure has proved to be an inadequate means of monitoring leased access use in the past. Even with the new expedited process in place, a reporting requirement will provide more useful and complete information about leased access.

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Reply Comments

The Center for Media Education, the Association of Independent Video and Filmmakers, the National Association of Artists' Organizations, and the National Alliance for Media Arts and Culture (hereinafter collectively referred to as "CME") hereby reply to comments submitted in the above referenced proceeding regarding leased commercial access.

Comments from cable operators filed in this proceeding reveal that cable operators are continuing to hinder the growth of leased access. While Congress established leased access requirements in 1984, its intent to promote diversity was frustrated by cable operators' unwillingness to offer leased access at reasonable rates and subject to reasonable terms. With the 1992 Cable Act, Congress sought to remedy this problem by mandating that the FCC establish reasonable maximum rates, set reasonable terms and conditions and provide for the expeditious resolution of disputes. By making outrageous proposals in each of these areas, cable companies have continued their attempt to obstruct the development of leased access.

I. Maximum Reasonable Rates

A. Even If Effective Competition Exists As to Cable Operators, The Commission Must Still Establish Maximum Reasonable Leased Access Rates

Many cable operators argue that when a cable system faces effective competition, the Commission should refrain from establishing maximum reasonable rates for leased access.[1] This position is inconsistent with the 1992 Cable Act. Nowhere in the leased access provision of the 1992 Cable Act does Congress tell the Commission not to regulate leased access if effective competition exists.[2]

Even if the Commission had the authority not to regulate if effective competition exists, the existence of competition from the consumer perspective provides no guarantee that potential lessees have an alternative means of reaching subscribers. Service providers like DBS, SMATV and wireless cable are not competitors in the leased access market. There is no legal requirement that they provide leased access channels. Similarly, while video dialtone might lease channels in competition with cable leased channels, it is premature to expect that this will

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[1] Continental Cablevision, Inc. at 80-81 ("Continental"); Cole, Raywid & Braverman for Jones Intercable, et al. at 63 ("CRB").

[2] This is in contrast to subscriber rate regulation where Congress stated that "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation. . . ." 1992 Cable Act § 623(a)(2), 47 U.S.C. § 543 (a)(2) (emphasis added).

happen anytime soon.[3] Thus, even where a cable system faces effective competition, lessees may not have an alternative means of reaching viewers. When and if such alternatives become available, the Commission can consider moving to a marketplace approach. But it cannot ignore the Act's requirement to establish maximum reasonable rates for leased access.

B. There Is Ample Evidence of Unreasonable Leased Access Rates

Time Warner claims that there is no evidence of cable operators charging unreasonable leased access rates.[4] This statement is clearly contrary to the findings of Congress and the Commission:

> [T]he principal reason [why leased access has not been successful] is that the Cable Act empowered cable operators to establish the price and conditions for use of leased access channels . . . . The FCC stated in the FCC Cable Report, however, that some cable operators have established unreasonable terms . . . .[5]

If there was no evidence of unreasonable rates, Congress would not have required the Commission to establish a maximum

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[3] See Consumer Federation of America at 148 ("CFA").

[4] Time Warner Entertainment Company at 96-97 ("Time Warner").

[5] H.R. Rep. No. 628, 102d Cong., 2d Sess. 39 (1992) ("1992 House Report"). See 1992 Cable Act, § 2(a)(4)-(5); S. Rep. No. 138, 102 Cong., 1st Sess. 31-32 (1991) ("1991 Senate Report") ("[T]he existing provision does not work well and requires revisions."); 137 Cong. Rec. S583 (1991) (Statement of Sen. Danforth) ("[T]he right of access has been used infrequently and the goal has not been met, because the cable operator can set any price he wants for the leased access channel."); Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service ("1990 Cable Report") at ¶ 177, 67 RR 2d 1771, 1811-12 (1990).

reasonable rate.

Moreover, comments filed in this proceeding provide additional evidence that cable operators have and continue to try to charge unreasonable rates. For example, Low Power Television Stations ("LPTV") cite instances where cable operators set prices at over a million dollars or refused to even discuss leased access.[6] The suggestion of several cable operators that the Commission adopt the highest implicit access fee as the maximum rate for leased access is also evidence of unreasonable pricing.

C. Adoption of the Highest Implicit Access Fee as the Maximum Leased Access Rate Would be Unreasonable

Many of the cable operators suggest that the Commission adopt an operator's highest implicit access fee as the maximum rate for leased access.[7] Such a rate would be unreasonable because it would bar access in a similar fashion to what happened under the 1984 Cable Act. Adoption of a rate chosen by the cable operator would be contrary to congressional findings regarding leased access.[8]

1. The Maximum Rate Will Become the Defacto Minimum Rate

Many of the cable comments suggest that when a maximum rate is established, cable operators will negotiate with potential

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[6] Community Broadcasters Association at 2 ("CBA").

[7] National Cable Television Association at 90-93 ("NCTA"); TeleCommunications, Inc. at 73-74 ("TCI"); Time Warner at 98-102.

[8] 1991 Senate Report at 31-32 ("To permit the operator to establish the leased access rate makes little sense.").

lessees for lower rates.[9] CME is skeptical, at best, that this will happen in practice. Because lessees have no good alternative, they will be coerced into paying the highest possible rate. Cable operators have no incentive to agree to lower rates if in order to make a prima facie case, lessees are required to show that the cable operator is violating Commission regulations.[10] Thus, the maximum reasonable rate established by the Commission will become the defacto minimum.

2. The Commission Should Bar Migration by Existing Services

Cable commenters attempt to justify high maximum rates on the grounds that they are needed to bar migration of existing services to leased access channels. In contrast, CME recommends that the Commission bar migration.[11] Cable companies will thus retain existing high margin programming; rather than lose existing high margin services, operators will forego or drop the 10-15% of channels which offer them the lowest implicit rates. As long as maximum rates are above current implicit floors, cable operators will benefit initially from leasing to new services because they will lose their lowest implicit rate services (actual or potential) and replace them with services which pay

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[9] TCI at 72; Time Warner at 96.

[10] NPRM at ¶¶ 164-166.

[11] See CME at 33-35. CME recommends this step on diversity as well as economic grounds.

more.[12]

Time Warner states that it would be ill-advised for the Commission to bar migration by fiat.[13] However, a bar on migration would make unnecessary the cable operators' contention that they must be permitted to charge the highest implicit access fee to prevent migration.

D. The Commission Should Adopt a Rate Scheme Based on Average Implicit Rates

While CME rejects using the highest implicit access fee as the maximum rate, it agrees in theory that existing payment arrangements can be viewed as implied charges for access. A variety of cable industry comments observed that leased access rates are implicit in existing business relationships between operators and programmers.[14] CME agrees with this analysis, but applies it in a different manner than does the cable industry, as described below.

The commenters ask that the Commission set maximum rates

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[12] Over time, new leased access services may compete effectively with existing services, including those which pay the high implicit carriage rates. To the degree that cable operators divide retail revenues with high margin services (such as maxi-pay and pay-per-view) which lose customers, the leasing windfall would be reduced. If such competition grows highly effective, the operator could earn less than it does today. This case for economic harm to the operator remains speculative, however. New, more reasonably priced pay TV services available on leased access may achieve higher penetrations than existing services, and thus return more revenue to the cable operator despite lower rates for carriage. See § I(E).

[13] Time Warner at 101, n.239.

[14] Continental at 82; NCTA at 91-92; TCI at 73-74; Time Warner at 101.

according to the highest present implicit rate. This *reductio ad absurdum* industry position is advanced by NCTA, which advocates that:

> . . . the cable operator should in no circumstances be required to provide . . . channels, on a leased access basis, at a rate that is lower than the highest implicit leased access charge 'paid' by any programmer on its system.[15]

In addition, NCTA gives an example of how this would work:

> [A] cable operator pays a premium movie service five dollars per subscriber for its service and resells the service to subscribers for nine dollars. This is, in effect, the same as if the movie service "leased" the channel for four dollars and resold it for nine dollars.[16]

As CME pointed out at length in its comments,[17] different classes of programmers contend with very different economics, and they pay very different implicit fees for carriage. To set the maximum leased access rate at the highest current implicit rate would eliminate all but the highest-paying class of programmer, and could well eliminate all lessees.[18]

Continental advances a more reasonable variant of the NCTA position: "the Commission should set leased access rates at the highest net fee collected for a similar class of channels within

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[15] NCTA at 92.

[16] Id.

[17] CME at 7-18.

[18] For example, it is doubtful that a new pay network would derive subscriber revenues at the same rate as a well-known service such as Home Box Office, or be able to contain its costs as effectively through economies of scale. If the new service were required to pay HBO's implicit lease rate, it probably would never get off the ground.

the previous calendar year."[19] CME agrees with Continental that maximum leased access rates should vary with the class of channel. However, it is not necessary or desirable to use the highest net fee. Simple arithmetic demonstrates that cable companies will suffer no financial reversal if they earn leased access rates equal to current average implicit rates, since the 10-15% of channel capacity devoted to leasing will earn revenue at the same rate that existing channels do.

In a competitive environment, cable operators' margins would be substantially lower then they are currently. The current implicit leased channel rates have been distorted, both by the monopsony relationship between operators and programmers and by the monopoly relationship between operators and consumers. The first relationship has led operators to pay lower wholesale programming costs than they would in a competitive market; the latter has led consumers to pay higher retail costs than they would in a competitive market. Both factors combine to produce a wider "spread" for the cable operator, and thus a higher implicit lease rate than would occur under free market conditions.

As described in Section I(C)(2), in neither the 1984 nor the 1992 Act did Congress intend to lock in monopoly or monopsony rents derived by cable operators, and there is no evidence that cable companies require such rents in order to survive. Therefore, CME believes that maximum leased access channel rates should be lower than current implicit leased access rates so as

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[19] Continental at 82 (emphasis added).

to eliminate the effect of monopoly and monopsony rents.

There is another reason why maximum rates should be set below the average implicit rate for that category of programming. Unlike a common carrier, the fundamental business of the cable operator is to sell programming to subscribers at high mark-ups; leasing 10-15% of its capacity to programmers is a comparatively minor sideline.[20] Leased access programming will add to the value of a cable subscription because subscribers generally will not distinguish between programming on leased channels and those on operator-controlled channels. This will produce revenue to the cable operator through increased penetration, while the operator also reaps payments from programmers for carriage. The Commission must take this economic benefit to the cable operator into account when it considers whether its maximum rates will cause injury to cable systems under the standards set out in Section 612(c)(1) of the Act.

E. The Commission Needs to Collect and Make Public Data on Current Implicit Rates

CME's initial comments set forth a detailed set of maximum rate recommendations based on present implicit rates.[21] As CME

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[20] Cable industry comments agree that such remains the context. See NCTA at 89 ("Section 612 does not seek to eliminate the cable operator's function of selecting and packaging programming for sale to subscribers and to instead require systems to operate in a leased access mode. To the contrary, Congress intended to preserve the traditional editorial and packaging functions of cable operators, while crafting a leased access mechanisms that could co-exist with those functions.").

[21] CME at 7-19.

acknowledged,[22] this process was inexact since most implicit leasing rate information is proprietary and available only to cable operators.

Although various cable operators based their recommendations on implicit leasing rates, and several submitted elaborate economic showings, none of the comments CME reviewed revealed any specific figures on actual industry practices.[23] In contrast, the comments of CFA contained voluminous specific figures, including average subscriber rates per channel.[24] However, CFA obviously lacks the proprietary data needed to compute implicit channel leasing rates. CME adheres to its original recommendations as to variable pricing and revenue splits based on implicit rates as a general guide. We based those recommendations on our best estimate of average current implicit rates, adjusted downward to compensate for monopoly/monopsony rents, and the value of free programming to the cable operator. We expect the resulting rates to be lower than the current average implicit rate, but higher than the minimum current implicit rate.[25] These calculations were admittedly inexact,

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[22] Id. at 8.

[23] See, the study by Stanley M. Besen, et al. submitted on behalf of TCI; the study by A. Daniel Kelley for Time Warner; and the study by Bruce Owen, et al. for NCTA. We speculate that the industry believed that it would not advance its interests by making available detailed revenue and cost data.

[24] CFA at 101-103.

[25] Except for rates for non-profit entities, which were set on a preferential basis.

given the proprietary nature of the figures involved. In order to develop precise rates, we again urge the Commission to collect and make public the necessary data.[26]

F. Section 612(c)(1) Should Not Be Interpreted to Prohibit a Decrease in Operator Profits

Cable commenters have implied that Section 612(c)(1) means that leased access rates must be set in a manner that removes all financial risk to the operator.[27] Although Section 612(c)(1) states that leased access channel rates "will not adversely affect the operation, financial condition, or market development of the cable system,"[28] the legislative history of the statute makes clear that Congress' ultimate concern was to protect the interests of the public rather than those of cable operators:

> If not properly implemented, leased access requirements could adversely impact the economic viability of a cable system, thereby hurting the public.[29]

Given that one of the two cardinal purposes of leased access under the 1992 Cable Act is "to promote competition in the delivery of diverse sources of video programming,"[30] the Commission must expect that properly crafted leased access rules

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[26] CME reiterates the desirability of reducing maximum rates for leases executed after 1994 so as to give an incentive to cable operators to build successful relationships with lessees. CME at 9-10.

[27] See e.g., Cablevision Industries Corporation at 51-52 ("CIC"); Cox Communications at 48 ("Cox"); NCTA at 92-93.

[28] 1992 Cable Act § 612(c)(1), 47 U.S.C. § 532(c)(1).

[29] 1984 House Report at 51 (emphasis added).

[30] 1992 Cable Act § 612(a), 47 U.S.C. § 532(a).

will lead to successful competition and to the consumer benefits which flow from competition. Since the very purpose of competition is to prevent cable operators from continuing to charge monopoly prices, some decrease in cable companies' profits is to be expected. A decrease in cable profits is permissible as long as the cable system remains viable. The cable industry adduces no persuasive information that it cannot operate successfully in the presence of competition such that leased access is not "consistent with growth and development of cable systems."[31] Only such hard evidence should trigger Commission concern, given the underlying principles of Section 612(c)(1).

G. The Commission Should Establish Lower Maximum Rates for Non-Profit Leased Access Programmers

In CME's initial comments, we urged the Commission to adopt lower maximum rates for non-profit leased access programmers. The cable industry generally opposes reduced rates.[32] The Commission must adopt lower maximum rates for non-profit entities in order to promote diversity.

1. The Commission Has the Authority to Set Lower Maximum Rates for Non-Profit Programmers

A number of cable operators claim that the Commission lacks authority to set lower maximum reasonable rates for non-profit

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[31] 1992 Cable Act § 612(a), 47 U.S.C. § 532(a).

[32] CIC at 50-52, Continental at 82-83; CRB at 65; Cox at 46-48; TCI at 75-76; Time Warner at 102-104.

entities.[33] The cable operators also say that Congress did not intend there to be lower non-profit rates.[34] As CME stated in its initial comments, the Commission has the authority to adopt variable rates for leased access, including lower rates for non-profit programmers.

First, the Commission has broad discretion to act within its congressional mandate:

> The power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.[35]

Congress directed the Commission in the 1992 Cable Act to "determine maximum reasonable rates. . . for commercial use of designated channel capacity."[36] Congress did not limit this mandate to the determination of a uniform reasonable rate.

Second, the Commission has the authority to set lower rates

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[33] CIC at 51; Continental at 82; CRB at 65; Cox at 51; TCI at 76-77; Time Warner at 102. However, even the comments of the National Cable Television Association ("NCTA") implicitly find that the Commission has the authority to set lower rates for non-profit entities. In its comments, NCTA states that the Commission should adopt discriminatory rates for leased access based upon the content of programming. NCTA at 89-90 ("[Section 612] specifically permits cable operators to set different rates depending on the content of the programming"). Such a discriminatory rate structure necessarily includes lower rates for non-profit programmers.

[34] CIC at 51; Continental at 82; CRB at 65; Cox at 51; TCI at 75-76, Time Warner at 102.

[35] Morton v. Ruiz, 415 U.S. 199, 231 (1974).

[36] H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess., § 9(b) (1992) ("1992 Conference Report").

for non-profit entities to achieve greater diversity of cable programming as required under the 1992 Cable Act.[37] The legislative history supports the notion that lower rates for non-profits is one way to increase diversity:

> [B]y establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, <u>such as those offered by not-for-profit entities</u>, to have any reasonable expectation of obtaining leased access to a cable system.[38]

Congress indicated the need for lower rates for non-profit entities in the legislative history of the 1992 Cable Act by supporting a discriminatory rate scheme based on the content of the programming.[39]

Third, interpreting the congressional mandate to "establish maximum reasonable rates" to mean uniform rates without lower rates for non-profit entities would be contrary to the leased access provision's purpose of increasing diversity. Uniform rates would limit leased access programmers to those who could afford to pay the one, high rate, thereby doing nothing to increase diversity.[40] Such an interpretation would clearly be incorrect because it would defeat the leased access provision's

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[37] CFA at 151-152.

[38] 1984 House Report at 51 (emphasis added).

[39] 1992 House Report at 39. <u>See</u> CME at 21-24.

[40] 1992 Cable Act § 612(a), 47 U.S.C. § 532(a).

purpose of diversity.[41]

2. Non-Profit Entities Need Lower Rates to Gain Access

Numerous non-profit entities have indicated that lower rates for leased access are necessary.[42] For example, the Independent Television Service expressed fear that uniform leased access rates would be a barrier to independent programmers getting access.[43] The Sierra Club, Yolano Group echoed this fear.[44] Similarly, the College Art Association, the National Association of Artists' Organizations and Video Data Bank express the concern that without lower rates for non-profit programmers, many segments of the population will not receive programming.[45]

California Newsreel sums up the reasons why non-profits need lower rates:

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[41] Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) ("It is a well-established canon of statutory construction that . . . [one] should go beyond the literal language of statute if reliance on that language would defeat the plain purpose of the statute."); See also Lowe v. Securities and Exch. Comm'n, 472 U.S. 181, 219 (1985) ("[it is a] "fundamental axiom of statutory construction that a statute is to be construed so as to give effect to all its language.").

[42] The Commission has received over 100 letters from non-profit organizations expressing interest in leasing access if lower rates for non-profit entities are adopted. See e.g., the attached letters.

[43] Letter of the Independent Television Service (Jan. 27, 1993).

[44] Letter of Sierra Club, Yolano Group (Jan. 23, 1993).

[45] Letter of College Art Association (Jan. 26, 1993); National Association of Artists' Organizations (Jan. 15, 1993); Letter of Video Data Bank (Jan. 14, 1993).

> . . . non-profit agencies exist precisely to promote public services which are not commercially viable and which therefore cannot be asked to compete with commercial ventures for limited channel capacity.[46]

The statements of the non-profit community indicate a need for lower rates for non-profit leased access and if this need is ignored, leased access will not promote diversity.

3. PEG Access Will Not Enable Non-Profits to Gain Access

Many of the commenters suggest that PEG channels are an alternative for those non-profit entities that can not afford to pay leased access rates.[47] Unlike leased access channels, PEG channels are not statutorily mandated. Section 611 merely provides that cable franchise authorities may require cable operators to require PEG access channels.[48] Many franchise authorities do not require PEG channels. In fact, one survey has estimated that only a total of 368 government access channels, 464 educational access and 716 public access channels exist nationwide.[49] Since there are some 10,823 operating cable systems within 28,798 communities, only a small percentage of communities have PEG channels available. [50]

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[46] Letter of California Newsreel (Jan. 22, 1993). See also Letter of Headlands Center for the Arts (Jan. 19, 1993); Letter of the City of Bandon (Jan. 22, 1993); Letter of H. Hoover (Jan. 20, 1993).

[47] Continental at 82-83; CRB at 65; TCI at 76.

[48] 1984 Cable Act § 611, 47 U.S.C. § 531 (1992).

[49] Gregory Epler-Wood and Paul D'Ari, Cable Programming Resource Directory 1987 D-150 (1987).

[50] 1991 Broadcasting Cable Yearbook (1991).

Even where PEG channels exist, they do not provide a good substitute for leased access channels.[51] First, franchise authorities typically designate the programmers for governmental and educational access channels in the franchise. Thus, if the programmer is not designated in the beginning, the programmer can not gain access except through the public access channels, if any. Second, not all non-profit programmers will qualify to use PEG channels. They are not governmental organizations. They are often not educational organizations. Thus, they are limited to public access channels. Because public access only allows the programmer part-time limited access on a rotating basis, the user would be denied the full time channel recognition and audience exposure that leased access would provide.

4. Lower Rates for Non-Profit Entities Will Not Harm Cable Operators

CIC and Cox state that it would be inconsistent with congressional intent for the Commission to limit the profits of cable operators by adopting a lower maximum rate for non-profit entities.[52] The cable operators' concerns are not borne out by the numbers. Cable operators will still make a total amount of profits equivalent to what they would make if they charged everyone the same amount. Commercial and high pay programmers would be charged higher rates, making up for the alleged losses

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[51] Even franchise authorities that require PEG channels would require programmers to negotiate on a system by system basis.

[52] CIC at 51-52; Cox at 48.

that would be incurred from these lower rates. Additionally, Congress passed the 1992 Cable Act not to assure the profits of the cable operators, but to provide cable subscribers with a diversity of programming. Without discriminatory lease rates, cable will not provide a diversity of programming.

5. CME Would Not Object to A Needs Based Test

CFA suggests a needs based test which would be narrower than the IRS Code § 501(c)(3) definition proposed by the Commission.[53] CME agrees in principle with CFA's proposal. However, while there may be some non-profit organizations that could afford to pay the regular rates,[54] it is our experience that most cannot. We are not aware of any non-profit programmers that have paid for leased access. Thus, CME believes that non-profit organizations should receive a rebuttable presumption of entitlement to lower rates. If a cable operator believes that the non-profit programmer could afford to pay the regular rate, it would have the opportunity (through the expedited complaint process) to rebut the presumption.[55] This process would also deter and uncover potential abuses, such as the possibility that underfunded non-profit affiliates might be set up to take

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[53] CFA at 152-153.

[54] CFA at n. 172. The ability of a non-profit organization to pay for access, of course, depends upon how reasonable the regular rates are.

[55] Information about the finances of non-profit organizations is publicly available, so that a cable operator could make showing where appropriate.