well as with Congress' purpose of exempting cable operators whose rates are already being regulated from the Commission's rate regulation rules.[184]

Time Warner's assertion that any rate regulation agreements, whether entered into before or after July 1, 1990, should be fully enforceable by either the franchising authority or the cable operator is further supported by the City of Austin, TX et al.[185] The Commission should recognize the complete enforceability of rate regulation agreements entered into between franchising authorities and cable operators as valid rate regulations for cable systems that may not be subject to effective competition under the Commission's regulations. On the other hand, the Commission must reject the patently self-serving suggestion by some franchising authorities that rate regulation agreements are enforceable only if they provide greater latitude to the regulators, but not less.[186] For example, any franchise agreement whereby the franchising authority and the cable operator have contractually agreed to forbear from rate regulation would be fully enforceable for the life of such contract.

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[184] See House Report at 89; Time Warner at 93-94.

[185] City of Austin, TX et al. at 77 ("The Coalition also asks the FCC to recognize that the terms of rate agreements, whether entered into before or after July 1, 1990, are fully enforceable").

[186] Id. at n. 46.

VI. LEASED COMMERCIAL ACCESS

In its initial comments, Time Warner explained that leased access is a solution in search of a problem.[187] If the evidence adduced over the past nine years weren't sufficient, then plainly the absence of any complaint of denied access by any would-be "lessees" in this rulemaking should convince the Commission and policymakers more generally that there is no "problem" to "fix" here. Simply put, there is very little demand for leased access.

Time Warner appreciates that the Commission is nonetheless under a statutory mandate to promulgate further rules regarding leased access. In its implementation, however, the Commission should be alert to two considerations. First, the potential for overregulating here can result in creating a governmental artifice which bears no relationship to the realities of marketplace demand. Such intervention is typically sought by those simply seeking to have the government redistribute wealth among private parties. Where this happens, taxpayer dollars are consumed merely to promote private agendas. Worse yet, consumers wind up paying, directly or indirectly, for something they neither want nor need.

Second, the opportunities for cable television's competitors to "raise rivals' costs" through ill-conceived governmental regulation are rife. The fact that much of the support for more

[187] Time Warner at 96-98.

intensive leased access regulation has come predominantly from cable rivals is especially telling here.

Only a few programmer interests filed Comments on these issues, all of whom already are carried by cable systems in one form or another. Fox and MPAA assert that billing and collection service obligations should be imposed. Their arguments reveal why they should be rejected. First, their dissection of the statutory language to find a billing and collection obligation proves only that Congress chose <u>not</u> to articulate such an obligation. Plainly, Congress considered doing so; the Commission itself had presented to Congress this possibility. What Congress wrote, however, was an entirely different matter. While plainly subsection 612(c)(4)(A) gives the Commission authority to regulate the terms of billing and collection services <u>when offered</u> by operators, Congress did not take the much more radical step of imposing an affirmative obligation on operators to provide them. Thus, in the context of a complaint in which a lessee alleges that such services have been offered on unreasonable terms, Section 612 grants the Commission authority to review and decide the merits of such complaint. But hard as they try, the commenters cannot find an obligation to provide the services in the first place.

The policy arguments of these commenters are equally bankrupt. Fox, Inc. argues that without billing, collection, and marketing obligations, "the lessee must establish its own infrastructure for such functions."[188] But Fox does not explain why, if this is true, it is of any public interest concern. It explains merely that this would discourage "major programmers" from seeking leased access, and may require them to negotiate carriage agreements with cable operators.[189] While this may be inconvenient for Fox, there is every reason to believe that it is good for consumers. Neither Fox nor its trade association claims to have unsuccessfully tried to negotiate either leased access or carriage arrangements with cable operators.

There are in fact negative consumer effects where a programmer simply tries to use a leased access "threat" to negotiate more favorable terms for voluntary carriage, especially in the case of "major programmers" that would contribute disproportionately to fixed cost recovery. This is because of the negative consequences flowing from the migration or threatened migration of programmers to leased access.[190] Fox is simply asking the Commission to help it cut a better deal; it is offering no public benefits in its proposal. Whatever ambiguities exist in Section 612, there is no basis for inferring a congressional mandate for mere wealth transfers between program networks and cable operators.

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188 Fox at 4.

189 Id.

190 See Besen, Brenner, and Woodbury, An Analysis of Cable Television Rate Regulation, submitted with Comments of TCI at 56-57 ("Besen, et al.).

The remaining programmer interests are represented by either television stations or non-profit programmers. With respect to the former group, both public television and low power stations have stepped forward to demonstrate that not even must-carry will satisfy them. With or without must-carry, meritorious programming which consumers desire will be profitable for cable systems to carry, either through traditional carriage arrangements or negotiated leased access.

In a joint filing made by Citizens Communications Center and a number of associations of self-described "independent media producers," "underserved artists," and "nonprofit media arts organizations," a complex matrix of rates for different types of program sources and services is proposed. The rates vary wildly from revenue-sharing arrangements to explicit subsidies for nonprofits. The rates appear to be taken from the authors' own estimates of the cable business, estimates which are grossly inaccurate. Commission adoption of anything even approaching this scheme would be confiscatory, indeed, tantamount to legislating a separations policy for cable which would remove any cable operator editorial discretion. The proposal represents social engineering at its worst, and should be rejected out of hand as outside the bounds of the statute, the Constitution, and plain old common sense.

A. Maximum Reasonable Rate

Time Warner demonstrated in its Comments that the Commission's obligation to set a "maximum reasonable rate" for leased access must be fulfilled in a manner consistent with the statute's requirement that terms and conditions be set so as not to adversely affect the "operation, financial condition or development" of the cable operator. As explained, the only means by which the Commission can do this is by reference to the highest implicit fee paid by programmers carried on the system.[191] Otherwise, a rate for leased access could induce programmers to migrate to leased access channels, ultimately impeding the recovery of fixed costs. This view was supported by a number of other commenters.[192]

A handful of other commenters propose to tie subscriber tier rates to leased access rates. They do so with no particular rationale or justification.[193] Such an approach is wholly at odds with the requirements of Section 612, however, because it fails to address the central problem of migration. It also invokes a common carrier model for leased access regulation contrary to both Section 612 (providing for a maximum rate) and Section 621(c) (forbidding common carrier regulation of cable television with exceptions not relevant here).

191 See Time Warner at 101-102; Kelley at 41-42.

192 See, e.g., Besen, et al. at 55-59.

193 See, e.g., CFA at 148-155.

Certain commenters also insist that the Commission entwine itself in a series of complex arrangements involving virtually (and perhaps even literally) every other term and condition of leased access arrangements. Other terms and conditions would inject the Commission into a morass of issues which would conflict with the private negotiation process which Congress intended to control leased access arrangements. Commission involvement in such issues such as channel position, marketing, deposits, etc., even if it were feasible, is inconsistent with Congress' design to have a governmentally established ceiling where cable operators and programmers "can bargain for a lower rate."[194]

B. Dispute Resolution

Time Warner supports those Comments recommending the availability of alternative dispute resolution mechanisms to resolve leased access disputes, provided that the parties have such an option but are not required to do so.

A few commenters suggest that local franchising authorities could resolve leased access disputes. Nothing in the new cable law supports this suggestion. Leased access is entirely a federal matter that cannot be relegated to local jurisdictions. The Commission and the federal courts are the exclusive bodies

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[194] Senate Report at 32.

responsible for adjudicating federal access obligations of Section 612.[195]

VII. COST OF FRANCHISE REQUIREMENTS AND SUBSCRIBER LINE ITEMIZATION

The commenters responding to the Commission's inquiries regarding costs of franchise requirements[196] and subscriber bill itemization[197] took sharply contrasting stances on the interpretation of the provisions. Time Warner urges the Commission, in analyzing the conflicting views on the meaning of governmentally imposed cost itemization, to adopt rules that meet Congress' intent with respect to the language actually enacted.

To begin with, the plain language of Section 622(c) states that a cable operator may identify "as a separate line item on each regular bill of each subscriber" the amount of the total bill assessed as a franchise fee, the amount of the total bill assessed to satisfy any franchise requirements to support PEG channels, and the amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the cable operator-subscriber transaction.[198] As Time Warner and several other commenters have asserted, Congress enacted this provision to provide an openness in billing that would result in

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[195] Time Warner also notes that while PEG access obligations are sanctioned by the Cable Act, terms and specific requirements are controlled by franchise agreement.

[196] Communications Act § 623(b)(4); Notice at ¶¶ 72-73.

[197] Communications Act § 622(c); Notice ¶¶ 174-75.

[198] Communications Act § 622(c).

subscriber protection by allowing for greater public knowledge and scrutiny of governmental levies on subscribers of cable service, and greater political accountability for such increased financial burden.[199] Furthermore, if the Commission adopts a benchmark approach to rate regulation, itemized billing will ensure that some cable operators with otherwise comparable circumstances are not prejudiced by significantly higher costs that are the direct result of governmental assessments.[200]

Congress' goals can be realized only through rules that permit cable operators to provide equivalent and enlightened review by consumers of all governmentally imposed costs on their bills.[201] Several commenters oppose this position, and do so by relying solely on language contained in the House Report.[202] In fact, a different itemization provision adopted by the Senate was actually enacted by Congress, and thus the House Report is

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199 See Time Warner at 106-107; Continental at 76-77, 79; MFA at 21 ("One of the best means of addressing this concern of Congress [protection of cable subscribers] is to improve the quality of information that the cable industry makes available to subscribers concerning the costs of cable service").

200 See Time Warner at 106.

201 Continental at 75.

202 See NATOA at 91-92; NY State Commission at 29-30. Political Subdivisions of State of Minnesota ("Minnesota Cities") at 26-27. See also Notice at ¶ 175 (Commission proposes to reflect Congressional intent, as set forth in the House Report, in implementing rules pursuant to Section 622(c)). The House language on itemization was not, however, the language adopted by Congress. Rather, Congress adopted the Senate version of the provision. Conference Report at 84.

irrelevant.[203] Most importantly, regardless of any legislative history, the statutory language is clear on the right of a cable operator to show these costs in a separate line item. For example, the proposition made by the Minnesota Cities is blatantly inconsistent with the plain language of the statute, and contravenes Congressional intent as well.[204] The Minnesota Cities, relying on language contained in the House Report, claim that a subscriber bill may not read:

Bill For Services	$30.00
Franchise Fee	1.50
Total Bill	$31.50[205]

According to the Minnesota Cities, the evidence of governmental costs should be disguised and hidden in ways that will lessen the consumer's likelihood of understanding that significant charges are imposed not by the cable operator but by the government. The Minnesota Cities would have the bill contain one total charge followed by an asterisk which notes that part of the total bill is attributable to a certain percent franchise fee of a given percentage. Such an approach would leave the consumer in the dark as to the actual amount, in dollars and cents, of the total bill which is added by the franchise fee.[206]

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[203] See Conference Report at 84.

[204] Compare Minnesota Cities at 26-27 with 1992 Cable Act § 622(c)(1).

[205] Minnesota Cities at 27.

[206] See id.

The Minnesota Cities' proposition is wholly unsupported by the language of the provision itself, which clearly states that franchise fees and other governmentally imposed cable service-related fees may appear on a subscriber bill "as a separate line item."[207] The statutory language does not limit disclosure of such fees to an asterisk at the bottom of the bill, or to footnotes or fine print. Rather, each relevant government assessment which results in higher costs to the public should appear on a separate line below the cable operator's <u>service</u> rate, but above the total, in the interest of full disclosure to the consumer.[208] Therefore, the Minnesota Cities' example of how a bill may not read is precisely how an itemized subscriber bill may, and should, read.[209]

NATOA's assessment of the limited types of governmental costs that may be identified and itemized pursuant to Sections 623(b)(4) and 622(c) is also patently incorrect.[210] NATOA asserts that the only costs addressed in Section 623(b)(4) are

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[207] Communications Act § 622(c). The term "line item" is one commonly used by Congress and should be interpreted as utilized in the legislative process. For example, a "line item veto" means that items in a bill may be vetoed line by line without affecting other provisions of the bill. <u>See</u> <u>Black's Law Dictionary</u> 1403 (5th ed. 1979). Thus, under Section 622(c), government fees should appear as "separate line items" and not hidden in footnotes or buried in a "legend" which does not clearly disclose the incremental contribution of these charges to the total bill.

[208] <u>See</u> Continental at 79; MFA at 23; Time Warner at 109-10.

[209] <u>See</u> Continental at 79.

[210] NATOA at 52.

"costs attributable to PEG franchise requirements, and that it does not include costs attributable to franchise requirements in general."[211] Time Warner strongly disagrees, and its position is borne out by the statutory language in Section 623(b)(4), which states in no uncertain terms that the Commission shall prescribe regulations that include "standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels <u>or any other services required under the franchise</u>."[212] Furthermore, the plain language of Section 622(c) permits the itemization of "<u>any other fee, tax, assessment, or charge of any kind imposed by any governmental authority</u> on the transaction between the operator and the subscriber."[213]

While NATOA does not want relevant government costs itemized on a cable subscriber's bill as the statute authorizes, it supports expansive disclosure of several other types of costs on the subscriber's bill that are not provided for by any statutory provision, nor even discussed in any legislative history.[214] These suggestions also should be rejected.

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[211] <u>Id.</u>

[212] Communications Act § 623(b)(4) (emphasis added).

[213] <u>Id.</u> § 622(c)(emphasis added). <u>Contra</u> NATOA at 52.

[214] NATOA at 92-93 (the proposed costs for disclosure include programming costs, operating costs, profitability, payments on the cable system's debt service, and any other items a franchising authority believes are appropriate to itemize in order to reflect accurately the costs in a subscriber's bill).

As Time Warner asserted in its Comments, subscriber bill itemization, as proposed in the plain language of Section 622(c), is a highly effective check on runaway government-imposed levies and assessments on cable subscribers which heretofore have been largely hidden from public scrutiny. Unless the public can see the breakdown between cable operator and governmental charges related to cable service, it will never know who is responsible for those charges, and it will continue to question a cable operators' higher rates when, in fact, certain significant costs are solely controlled by their elected representatives.[215] The presentation of these charges, each as a separate line item below the service charge item is precisely the means by which the subscriber will have the ability to veto such charges by petitioning for the elimination of such costs at the local or state government level.[216]

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[215] See Continental at 79.

[216] A statement of each governmental cost in a line item directly under the cable operator's charge as a portion of the total bill will make it clear to the Commission why a particular rate may be in excess of the benchmark rate and thereby make it easy for the Commission to conclude the cable operator's rates are not unreasonable. Moreover, the local or state government, which seeks a rollback and/or refund of a rate above the benchmark will vividly see how much of that rollback

CONCLUSION

For the foregoing reasons, Time Warner respectfully recommends that the Commission adopt rules for the regulation of cable services and equipment consistent with the Comments herein.

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[217] (...continued)
proportionately will have to be taken from each government assessment since these lines are commonly imposed on a percentage of the operator's revenue.