

Some cable operators also argue that implementation of these rules should be postponed because these rules depend upon actions the Commission must take to implement other sections of the Cable Act of 1992.<sup>1240</sup> Several cable operators ask that the Commission prohibit franchising authorities from regulating basic service, and the Commission refrain from acting on any complaints, for a period of ninety days from the date of issuance of this Report and Order.<sup>1241</sup>

480. Other parties, particularly municipalities, maintain that the need for immediate protection from excessive rates is paramount.<sup>1242</sup> These parties argue that the Commission should not delay the effectiveness of its rules promulgated in this proceeding beyond April 3, 1993.<sup>1243</sup> Austin argues for a tailored approach to implement the rules in this proceeding if its two step rate regulation methodology is adopted by the Commission.<sup>1244</sup> Austin urges that the Commission to make its per channel benchmark approach for basic and cable programming services effective on April 3, 1993, and initiate immediately a Second Further Notice to establish industry normative costs, to be used in future basic cable rate regulation.<sup>1245</sup> Municipal, while against a delay in implementing the rules in this proceeding after April 3, 1993, offers a suggested interim regulatory approach for the Commission to follow if such a delay is found necessary. It argues that the Commission should take the following two steps: 1) existing cable rates should be rolled back to at least October 4, 1992 levels; and 2) these rates should be subject to refund pending an initial review of their reasonableness.<sup>1246</sup>

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<sup>1240</sup> See, e.g., Nashoba Comments at 151; AdelpiaII Comments at 155; and Continental Reply Comments at 88. Some parties, such as Nashoba and AdelpiaII also contend that these rules implementation must be delayed until must-carry retransmission consent election has been made and respective negotiations completed. See Nashoba Comments at 151; AdelpiaII Comments at 155; and Continental Reply Comments at 88.

<sup>1241</sup> See, e.g., CIC Comments at 10; see also Armstrong Comments at 37; and Intermedia Comments at 38.

<sup>1242</sup> See, e.g., Municipal Reply Comments at 11; and NATOA Reply Comments at 35.

<sup>1243</sup> See, e.g., Municipal Reply Comments at 11; NATOA Reply Comments at 35; and Rapids Reply Comments at 8.

<sup>1244</sup> Austin Comments at 11.

<sup>1245</sup> Austin Comments at 11.

<sup>1246</sup> Municipal Reply Comments at 11-12.

481. Some municipalities agree with the cable operators that the Commission should allow a short phase in of the rules adopted in this proceeding. However, their rationale is based upon providing local governments additional time to enact ordinances.<sup>1247</sup> Such a delay, they state, will not adversely impact consumers.<sup>1248</sup>

iii. Discussion

482. Section 3(b) of the Cable Act of 1992 states that the amendments to Section 623 of the Communications Act will take effect on April 3, 1993. Section 623 also requires the Commission to prescribe regulations to govern rates for basic and cable programming services, as well as the prevention of evasions, on or before this date. The adoption of this Report and Order meets these requirements.

483. An issue closely related to the time limits for Commission action imposed in the Act is how quickly the rules we adopt today can become effective so that consumers receive the full protection from unreasonable rates and practices that Congress intended when it passed the Cable Act of 1992. Because we have frozen all rates for basic and cable programming services offered by cable systems not subject to effective competition for 120 days effective April 5, 1993, we assure that cable operators will not raise their rates in the period prior to our rules becoming effective and fully implemented. With this freeze we can comply with all the procedural safeguards imposed by the Administrative Procedure Act and the Paperwork Reduction Act without fear that compliance places consumers at risk of unreasonable behavior by their cable operator. The freeze will also permit franchising authorities and consumers to become familiar with our rules before they become effective.

484. We have also carefully constructed timetables and procedural dates for implementing our rules designed to permit franchising authorities and cable operators a reasonable time to comply with the new rules. The implementation schedules are designed to give parties sufficient time to meet their obligations under the new regulatory scheme. We believe the result will be an implementation that brings consumers the benefits of regulation with minimal rate and service churn, enables franchising authorities and this Commission to meet their new responsibilities under the Act, and permits operators to make a good faith effort to comply with their newly imposed obligations. Therefore, it is not necessary to provide that our

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<sup>1247</sup> See, e.g., Rapids Reply Comments at 8; Watertown Reply Comments at 8-9.

<sup>1248</sup> Id.

rules will become effective earlier than thirty days after Federal Register publication. We anticipate that an effective date of June 21, 1993 will provide adequate time for Federal Register publication and compliance with Paperwork Reduction Act requirements. Accordingly, we will make our regulations effective on that date.

## B. LEASED COMMERCIAL ACCESS

### 1. Leased Access: Background

485. Section 612 of the Cable Act of 1984 established a federal scheme through channel leasing to assure access to cable systems by third parties unaffiliated with the cable operator. Channel set-aside requirements were established, proportional to a system's total activated channel capacity, in order to "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."<sup>1249</sup> Specifically, a cable system with 36-to-54 activated channels was to designate ten percent of its channels not otherwise required for use by federal law or regulation; a 55-to-100 channel system was to designate 15 percent of channels not otherwise required for use by federal law or regulation; and a system with over 100 channels was to designate 15 percent of all channels.<sup>1250</sup> A cable system operator was permitted to use any unused leased channel capacity for its own purposes until such time as a written agreement for a leased channel use was entered into. Each system operator subject to this requirement was to establish "the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."<sup>1251</sup>

486. The House Committee Report on the 1984 statute provided that the operator could look to the following factors in establishing access conditions:

- (1) The nature of the service, although not the specific editorial content of the programming (e.g.,

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<sup>1249</sup> Communications Act, § 612 (a), 47 U.S.C. § 532 (a).

<sup>1250</sup> Communications Act, § 612 (b) (1), 47 U.S.C. § 532 (b) (1). An operator of any cable system with fewer than 36 activated channels was not required to designate channels for leased access use unless required to do so by the terms of a franchise agreement in effect as of the enactment of the 1984 Act.

<sup>1251</sup> Communications Act, § 612 (c) (1), 47 U.S.C. § 532 (c) (1).

the operator can charge more to a movie service than an instructional channel);

(2) The effect of the proposed leased access service on the marketing of the operator's current mix of service;

(3) The potential for market fragmentation due to this leased access programming;

(4) Any effect this service may have on subscriber or advertising revenues.<sup>1252</sup>

Consistent with the above, the Act provided that, in any action brought under this section...

[T]here shall be a presumption that the price, terms, and conditions for use of channel capacity designated... are reasonable and in good faith unless shown by clear and convincing evidence to the contrary.<sup>1253</sup>

487. Although as discussed below, the commercial access provisions of the Act have been amended in certain respects, the above provisions have not been significantly altered. With respect to enforcement, the 1984 Act also provided that any person aggrieved "may bring an action in the district court of the United States for the judicial district in which the cable system is located...."<sup>1254</sup> Only upon a "showing of prior adjudicated violations" could Commission authority be invoked to assure the availability of access and that the "price, terms, and conditions" involved were consistent with the Act.<sup>1255</sup>

488. In 1990, the Commission issued its report to Congress on the functioning of the 1984 Act as was required by the Act.<sup>1256</sup> Therein the Commission made the following finding:

Although encouraging leased access programming was a key purpose of the Cable Act, existing enforcement provisions are too cumbersome to permit the development of leased access as a promising force in the video market. The lack of adequate remedies for any

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<sup>1252</sup> 1984 House Report at 51.

<sup>1253</sup> Communications Act, § 612 (f), 47 U.S.C. § 532 (f).

<sup>1254</sup> Communications Act, § 612 (d), 47 U.S.C. § 532 (d).

<sup>1255</sup> Communications Act, § 612 (e) (1), 47 U.S.C. § 532 (e) (1). The enforcement powers of the Commission have been expanded by the 1992 Act, as discussed below.

<sup>1256</sup> Report, MM Docket No. 89-600, ("1990 Cable Report"), 5 FCC Rcd 4962 (1990).

programmer denied fair access to local cable distribution has retarded the overall development of leased access programming.<sup>1257</sup>

Based on this finding, the Commission recommended that

Congress should encourage leased access by: (a) adding "the promotion of robust programming competition" to the stated purposes of leased access obligation; (b) changing the burden and standard of proof required to establish a violation of the leased access rules; (c) providing the Commission with original jurisdiction over the provision of leased access channels; and (d) requiring cable operators to provide billing and collection services for channel lessees pursuant to Commission rules.<sup>1258</sup>

489. The 1992 Cable Act amendments to Section 612 where largely consistent with these recommendations. The statutory purpose was broadened to include "the promotion of competition in the delivery of diverse sources of video programming" and the Commission was provided with expanded authority to:

- (i) determine the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use;
- (ii) establish reasonable terms and conditions for such use, including those for billing and collection; and
- (iii) establish procedures for the expedited resolution of disputes concerning rates or carriage under this section.<sup>1259</sup>

The legislative history expresses concern that some cable operators may have established unreasonable terms or may have had financial incentives to refuse to lease channel capacity to potential leased access users out of competitive motives, especially if the operator had a financial interest in the programming services it carried.<sup>1260</sup> However, the Commission's

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<sup>1257</sup> 1990 Cable Report, supra, 5 FCC Rcd at 4973.

<sup>1258</sup> 1990 Cable Report, supra, 5 FCC Rcd at 4976.

<sup>1259</sup> Communications Act, § 612 (c) (4) (A) (i) (ii) (iii), 47 U.S.C. §532 (c) (4) (A) (i) (ii) (iii).

<sup>1260</sup> House Report at 39.

1990 Cable Report recommendation regarding the burden of proof in disputes was not adopted and the provisions of Section 612(f) which establish these burdens were not amended.

490. Under the amendments to Section 612, cable operators were also permitted to place programming from a qualified minority or educational programming source on up to 33 percent of the cable system's designated leased access channels.<sup>1261</sup>

491. It was the Commission's belief, as expressed in its 1990 Cable Report, that commercial leasing of cable channels could serve important diversity and competition objectives and that more centralized regulatory oversight would assist in the achievement of these objectives. Congress, through the amendments adopted, appears to have agreed with this view and thus the Commission will now be in a position to take a more active role in administering these requirements. The specific implementing rules adopted are discussed below. However, understandably given the other matters at issue in this proceeding, we did not receive a large response relating to leased access issues. Thus, the rules we adopt should be understood as a starting point that will need refinement both through the rule making process and as we address issues on a case-by-case basis. In this regard we are aware that leasing issues may need to be addressed in quite different fashions depending upon the nature of the service involved --whether the lease is for a pay channel, an advertiser supported channel intended for wide distribution, a channel for a narrow commercial purpose not relevant to the wide body of cable subscribers, or for a single program or series of programs. Thus, we are not at this time attempting to comprehensively resolve all the issues potentially involved, many of which can better be resolved in a more specific concrete factual setting.

492. In the rules adopted, we set a standard for maximum leased access rates based on the highest implicit fee charged any nonaffiliated programmer within the same program category. We have also addressed issues regarding access terms and conditions, tier placement, technical standards for use, technical support, security deposits, conditions based on content and requirements for billing and collection service. A procedure for the expedited resolution of disputes is also established. In the Notice we tentatively concluded that the leased access requirements and related rate controls were intended to apply to all systems regardless of the "effective competition" test that

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<sup>1261</sup> Communications Act, § 612 (i) (1) (c), 47 U.S.C. § 532 (i) (1) (c).

governs basic tier and programming service rate regulation.<sup>1262</sup> There appears to be no disagreement with this tentative conclusion and the rules adopted will accordingly be applicable to systems without regard to the effective competition test.

2. Leased Access: Reasonable Terms and Conditions of Use

i. Background

493. The Notice observed that in directing the Commission to "establish reasonable terms and conditions"<sup>1263</sup> for commercial use of leased access cable channels, Congress was particularly concerned that leased access programmers be offered a "genuine outlet" for their product.<sup>1264</sup> We sought comment on whether our rules should address tier location, channel position and time scheduling for leased access use. We tentatively concluded that operators should apply the same technical standards to leased access that they apply to programs carried on public, educational and governmental access channels. For programmers who do not prepay in full for the access requested, we sought comment on when an operator should be able to require the posting of a bond or deposit as security for payment.<sup>1265</sup>

494. We also sought comment on our proposal to prohibit operators from setting terms and conditions based on content, except to the limited extent that content may be considered in order to set reasonable prices for commercial use of channels by unaffiliated programmers.<sup>1266</sup> Moreover, we sought comment on our proposal to exempt from this prohibition on operator editorial control, those terms and conditions relating to indecent programming consistent with the Cable Act, Sections 612 (h) and (j),<sup>1267</sup> and our implementing regulations.<sup>1268</sup> We also asked for discussion of whether the Cable Act requires us to continue to

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<sup>1262</sup> Notice, 8 FCC Rcd at 540, para. 146.

<sup>1263</sup> Communications Act, § 612 (c) (4) (A) (ii), 47 U.S.C. § 532 (c) (4) (A) (ii).

<sup>1264</sup> Senate Report at 79.

<sup>1265</sup> Notice, 8 FCC Rcd at 542, paras. 156-158.

<sup>1266</sup> Notice, 8 FCC Rcd at 542, para. 159.

<sup>1267</sup> Communications Act, § 612 (h), (j), 47 U.S.C. § 532 (h), (j).

<sup>1268</sup> Id. See First Report and Order, MM Docket No. 92-258, 8 FCC Rcd 998 (1993) and Second Report and Order, MM Docket No. 92-258, FCC 93-164 (adopted March 25, 1993).

permit disparate treatment between unaffiliated and affiliated leased access users.<sup>1269</sup>

ii. Comments

495. Cable interests generally oppose the Commission addressing in our rules tier location, channel position, and time scheduling for leased access use.<sup>1270</sup> On the other hand, MEA believes that leased access channels should be carried on the lowest tier possible in order to be widely available.<sup>1271</sup>

496. Cable interests that address what guidelines we should establish for technical standards, generally argue that cable operators should be permitted to require higher technical standards than what is generally accepted for public, educational and governmental access channels.<sup>1272</sup> NATOA, however, opposes the imposition by cable operators of any technical standards on leased access users that would significantly increase the cost of providing programming over such channels.<sup>1273</sup> Regarding the level of technical support that an operator should be required to supply the leased access user, cable interests generally maintain that leased access programmers should be required to pay for whatever support desired and that demands should not extend beyond whatever equipment or facilities are available to the operators.<sup>1274</sup>

497. Cable interests generally argue that cable operators should not be required to provide billing and collection

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<sup>1269</sup> Notice, 8 FCC Rcd at 542-543, para. 160. The legislative history of the 1984 Act indicates that Congress contemplated different treatment of leased access providers, who under Section 612 (b) (1) are unaffiliated with the operator, and of affiliated entities who may lease a channel or have an equivalent arrangement. 1984 House Report at 53.

<sup>1270</sup> See, e.g., Caribbean Comments at 24; Cole Comments at 66-67; Continental Comments at 84.

<sup>1271</sup> MEA Comments at 31-32.

<sup>1272</sup> Continental Comments at 85; Cole Comments at 67-68.

<sup>1273</sup> NATOA Comments at 94.

<sup>1274</sup> Cox Comments at 43; Cole Comments at 67; Blade Comments at 24. Even for satellite-delivered programming, Cole argues that there are vendors available for downlink services and it is up to the lessee to negotiate its own terms for utilization of such services. Cole Comments at 67.

services,<sup>1275</sup> while others, including video programmers, maintain that it is essential that operators provide these services.<sup>1276</sup>

iii. Discussion

498. Leased channel placement The legislative history of the Act indicates that Congress intended for leased access to provide programmers a "genuine outlet" for their product.<sup>1277</sup> Cable interests correctly observe, however, that unlike core PEG channels, Congress did not mandate specific tier location for leased access and did not require that leased access be carried on basic service.<sup>1278</sup> Indeed, in outlining the components of the basic tier subject to rate regulation in Section 623 (b) (7) (A), Congress did not include leased commercial access channels as part of its basic tier definition.<sup>1279</sup> Moreover, Congress intended to balance the needs of leased access users with the legitimate needs of cable operators to market their programming.<sup>1280</sup>

Thus, we believe that channel placement or tier access is a matter that is best left in the first instance to negotiation between the parties bearing in mind the nature of the service

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<sup>1275</sup> Continental Comments at 93; Cox Comments at 39; Time Warner Comments at 101.

<sup>1276</sup> Fox Comments at 4-5; MPAA Comments at 6-8; CFA Comments at 148-149.

<sup>1277</sup> Senate Report at 79. Because neither the Act itself, its legislative history nor the record before us distinguishes among particular terms and conditions appropriate for various types of leasing - e.g., leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use a subscription service, we believe that cable operators should be required to accommodate all such leases in a reasonable manner.

<sup>1278</sup> Caribbean Comments at 24; Cole Comments at 66-67; GTE Comments at 17. Cox asserts that any regulation that impinges upon a cable operator's decisions regarding channel placement could be in derogation of the operator's First Amendment rights. Cox Comments at 42.

<sup>1279</sup> Systems with only a basic tier, of course, would necessarily be required to offer leased commercial access on that tier, pursuant to the requirements of 47 U.S.C. § 612 (b) (1).

<sup>1280</sup> Senate Report at 79.

being offered,<sup>1281</sup> the relationship between the charge imposed and the desirability of the channel,<sup>1282</sup> and the congressionally mandated objectives that leased channels provide competition in the delivery or programming and afford programmers genuine outlets. Given the diversity of possible access uses, we do not believe it desirable at this time to attempt an a priori allocation scheme.<sup>1283</sup> Also, in order to guarantee that a variety of individuals and groups have access to the channels,<sup>1284</sup> each lessee will only be allowed to lease up to one channel's capacity, if there are other users demanding use of the additional designated channels.

**499. Technical quality of programming** With regard to technical standards and conditions, i.e., programming production standards, for leased access, we decline to allow an operator to impose higher standards than those an operator now accepts for public, educational and governmental access channels. We believe that the quality of video production equipment today is generally high and is constantly improving so that the equipment used

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<sup>1281</sup> That is whether the leasing party is seeking a pay channel or channel for more general distribution, a complete channel or an outlet for an individual program.

<sup>1282</sup> The value of a channel would logically vary significantly based on the subscriber base it accessed. Even within tiers, channels may be perceived to have different values as Congress recognized in adopting the broadcast signal on channel carriage requirements.

<sup>1283</sup> In the absence of any specific evidence that such action is necessary, we also decline to establish guidelines regarding the time that channel capacity must be made available. Generally, leased access programmers should have access to channel capacity at any time of the day, up to and including the full programming day, subject to the needs of other leased access providers, of qualifying educational or minority programming sources, or cable operator discretion under Section 10 (a) of the Act relating to indecent leased access programming. However, we recognize that different types of programming are best scheduled at different times of day. We expect operators and leased access providers to negotiate in good faith on this issue. Of course, any indecent programming, not prohibited by a cable operator under Section 10 (a), must be blocked in accordance with Section 10 (b) and the Commission's implementing rules adopted in First Report and Order in MM Docket No. 92-258, 8 FCC Rcd 998 (1993).

<sup>1284</sup> This guideline is not intended however, to permit "adverse" effects on the "operation, financial condition, or market development of the cable system." Communications Act, § 612 (c) (1), 47 U.S.C. § 532 (c) (1).

should produce sufficient quality programming. On the other hand, we also believe that a leased access provider with programming intended to be competitive with existing cable services, such as premium channels, would have every incentive to provide quality equal to or greater than the operator's other offerings. In such cases, technical standards would be unnecessary. Operators, therefore, may not require standards for leased access that are any higher than those applied to public, educational and governmental access channels.<sup>1285</sup>

500. Technical support We agree with cable operators that they should not have to provide technical support for leased access programmers where an adequate competitive market exists which can provide such support.<sup>1286</sup> We also believe that leased access programmers must reimburse operators for the reasonable cost of any technical support operators actually provide. We also agree with Cox that an operator is not obligated to invest in equipment or technology not already in its possession.<sup>1287</sup> However, a minimal level of technical cooperation is likely to be necessary in order for a leased access program to be delivered over an operator's system. For example, a leased access provider may have interconnection requirements.<sup>1288</sup> Our concern that an

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<sup>1285</sup> We also agree with NATOA that the imposition by cable operators of higher technical standards could significantly increase the cost of providing programming over leased access channels and ultimately defeat the goal of fully utilizing them for diverse programming. NATOA Comments at 94.

<sup>1286</sup> Continental Comments at 85; Cole Comments at 67. For example, we believe that there is a competitive market for many technical services, including satellite reception facilities, and commercial lessees can negotiate independently to acquire these services if they so desire. We also do not require operators to lease physical space to leased access providers to permit, for example, the placement of a satellite dish on their premises. They would however, have to permit a leased access satellite feed to interconnect so that it can be delivered over the operator's system.

<sup>1287</sup> Cox Comments at 43.

<sup>1288</sup> The interconnection requirements of leased access programmers may not be as complex as those of interested parties seeking interconnection with local telephone company facilities. Local exchange carriers (LECs) are now required to offer physical collocation to all interconnectors that request it, although the parties are free to negotiate satisfactory virtual collocation arrangements. Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd 7369 (1992) petitions for recon. pending, petition for review docketed sub nom. The Bell Atlantic Telephone

operator may unreasonably refuse to cooperate with a leased access provider in order to prevent that provider from obtaining channel capacity, leads us to prohibit such conduct. Thus, an operator will be required to provide the leased access programmer with the minimal amount of technical support, whether it be equipment, technology or other miscellaneous support, which would be necessary for the programmer to present its material on the air.

501. Security deposits We agree with cable operators that they should have discretion to require reasonable security deposits or other assurances from programmers who are unable to prepay in full for access to leased commercial channels.<sup>1289</sup> In this regard, we agree with Cox that our rules should strive to preserve the financial integrity of the operator by allowing for flexible negotiations between the parties.<sup>1290</sup> Furthermore, we agree with Continental that it would be unfair to require the cable company to bear the financial risk of airing leased access programming without the provision of suitable guarantees.<sup>1291</sup>

502. Content restrictions We also prohibit cable operators from setting terms and conditions for leased access use based on content except to the limited extent that it is necessary for an operator to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.<sup>1292</sup> For example, operators may make certain determinations regarding programming based on categorizing leased access contracts according to the scheme we have designed for maximum reasonable rates in Section II.B.3, supra. We also exempt from this prohibition those terms and conditions relating to indecent

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Cos., et. al. v. FCC, No. 92-1619 (D.C. Cir. filed Nov. 25, 1992). While we do not impose the same obligations upon cable operators, we will require the cable operator to offer to leased access programmers the same services as would be offered to comparable programming services that use the operator's non-leased access channel capacity.

<sup>1289</sup> Continental Comments at 85; Cox Comments at 44; Cole Comments at 68.

<sup>1290</sup> Cox Comments at 44.

<sup>1291</sup> Continental Comments at 85-86.

<sup>1292</sup> Communications Act, § 612 (c) (2), 47 U.S.C. § 532 (c) (2).

programming and materials that are consistent with the Cable Act and our related regulations.<sup>1293</sup>

503. Rate discrimination We agree with the majority of commenters who state that nothing in the Cable Act of 1992 changes the 1984 Act's policy of permitting favorable rates, terms and conditions for a party affiliated with a cable operator.<sup>1294</sup> As we indicated in our Notice, the 1984 Act vested operators with the discretion to discriminate in the rates, terms and conditions set for the two classes of programmers. We agree with Cox that Congress's authorizing the Commission to establish maximum rates, terms and conditions for commercial use of leased access cable channels in no way indicates that Congress intended

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<sup>1293</sup> In MM Docket No. 92-258, we adopted rules to implement Sections 10 (b) and (c) of the Cable Act, which among other things, allow cable operators to prohibit indecent programming on leased access and PEG channels. First Report and Order, MM Docket No. 92-258, 8 FCC Rcd 998 (1993) and Second Report and Order, MM Docket No. 92-258, FCC 93-164 (adopted March 25, 1993). We indicated therein that we would address issues relating to who should bear the costs associated with implementation of the blocking mechanisms and restrictions under these sections in this proceeding.

Any costs involved are dependent to some extent on the procedures followed by the system operator and the nature of the channels that are leased. The rules mandated by Section 10 relating to indecent leased access programming, however, have been stayed by the U.S. Court of Appeals for the D.C. Circuit, Alliance for Community Media et al. v. FCC, D.C. Cir. Case No. 93-1169 (April 7, 1993), and a stay request is presently pending before the same court with respect to the rules applicable to the PEG channels, Alliance for Community Media et al. v. FCC, D.C. Cir. Case No. 93-1270 (filed April 16, 1993). As a consequence, we believe we may be in a better position to resolve more specifically issues relating to payment for the costs of these channels after the litigation is complete and the court has addressed the constitutional issues involved.

<sup>1294</sup> See, e.g., Cole Comments at 68-69; Continental Comments at 86; Cox Comments at 44-45. Comments submitted by Cole and Continental point out that the 1992 Act amends Section 612 (b) (2) of the Communications Act, which specifically applies to the designation of channel capacity for commercial use by "unaffiliated" persons. 47 U.S.C. § 532 (b) (2). In addition, § 612 (d) of the Communications Act directs any court reviewing an access complaint to disregard "any price, term, or condition established between an operator and an affiliate for comparable services." 47 U.S.C. §532 (d). Thus, the Commission is precluded from establishing rates, terms and conditions for leased access based on transactions with an affiliate.

for the Commission to take this discretion away from cable operators.<sup>1295</sup> Thus, we find that the 1984 and 1992 Acts do not authorize the Commission to require that operators apply the same rates, terms and conditions for the leasing of channel capacity by both affiliated and nonaffiliated programmers.

504. Billing and collection services With respect to the requirement that operators offer billing and collection services for leased access users, we understand Fox's concern that without such a requirement, the lessee might have to develop its own arrangements for these functions in each market, thereby diminishing its incentives to lease capacity.<sup>1296</sup> Indeed, in our 1990 Cable Report, we recommended that Congress require cable operators to provide billing and collection services for channel lessees.<sup>1297</sup> Moreover, the record now before us contains little specific data on the existence of competitive providers of billing and collection services to leased access programmers, or on the likelihood that a competitive market for these services will develop in the future, and most importantly, on whether such services will enable a leased access programmer to compete effectively with other comparable services offered in the system. Therefore, pursuant to our authority under Section 612 (c) (4) (A) (ii), we will require cable operators to provide billing and collection services for leased access cable programmers, unless operators can demonstrate the existence of third party billing and collection services which in terms of cost and accessibility, offer leased access programmers an alternative substantially equivalent to that offered comparable non-leased programming.<sup>1298</sup>

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<sup>1295</sup> Cox Comments at 45.

<sup>1296</sup> Fox Comments at 4-5.

<sup>1297</sup> 5 FCC Rcd 4962, 5051 (1990).

<sup>1298</sup> We have deregulated the provision of billing and collection service provided by a local exchange carrier to third party interexchange carriers. We found that third party billing and collection is not subject to regulation under Title II of the Act, 47 U.S.C. §§ 201-224. We also found that sufficient competition for billing and collection service exists in this area to allow market forces to discipline excessive rates or unreasonable practices, and that the ability of users to do their own billing and collection would have a significant impact on the rates for this service. Detariffing of Billing and Collection Services, 102 FCC 2d 1150, recon. denied, 1 FCC Rcd 445 (1986); see also Public Service Commission of Maryland, 4 FCC Rcd 4000 (1989), aff'd on other grounds sub nom., Public Service Commission of Maryland v. FCC, 909 F.2d 1510 (D.C. Cir. 1990). In the record before us, however, we have little specific data on the existence of competitive providers for billing and collection services for

If an operator can make such a showing, it would still be required to the extent technically feasible, to make available data necessary to enable that third party to bill and collect, e.g., billing name and address of subscribers.

505. We are not adopting specific rules at this time relating to the rates that might be charged for billing and/or collection services. Competition, where it exists, in the provision of services of this type will set an upper bound on charges by cable operators. Moreover, we believe that cable operators will have the incentive to quote reasonable and competitive rates in order to obtain the additional revenues that billing and collection services could generate for them. If disputes arise, however, we will address what constitutes a maximum reasonable rate for billing and collection on a case-by-case basis, bearing in mind statutory objectives in this area and the individual circumstances, e.g., number of subscribers to be billed, implicit charges to non-leased access services for comparable billing and collection, and prices charged by competitive billing and collection providers.

3. Leased Access: Maximum Reasonable Rates

a. Leased Access

i. Background

506. Section 612(c)(4)(A)(i) of the Communications Act requires the Commission to determine the maximum reasonable rates that a cable operator may impose for leased commercial access.<sup>1299</sup> In the Notice we identified, and sought comment on, three alternative basic methodologies for determining the maximum reasonable rates for leased commercial access: benchmark rates based on costs or rates of typical cable systems; reliance on cost-of-service rate-base principles; and market-based approaches. We also discussed and solicited comments on the fourth possibility of establishing a mechanism or formula under which subscriber rates for the basic service tier and/or cable

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leased access cable programmers. Viacom states that it contracts with CableData for its billing and collection services and represents that there is currently a wide variety of billing and collection services in the market. Viacom Reply Comments at 17-19. It does not, however, address what impact forcing a channel user to duplicate this billing system would have on the potential for the creation of programming competition through the use of leased channels. The remainder of the record is silent on this issue.

<sup>1299</sup> See Conference Report at 68.

programming services could be used to compute a rate for leased commercial access.<sup>1300</sup>

ii. Comments

507. While many of the cable operators commenting on this issue support a benchmark approach for basic service tier rates, they reject average benchmarks for leased access, claiming that reliance on benchmarks would ignore critical differences among cable systems and that any average-based methodology will cause programmers who contribute the most financially to cable systems to migrate to leased access channels.<sup>1301</sup> Generally the cable operators support only a system specific maximum reasonable rate that considers the programming on that system, the fees paid by programmers to put such programming onto the system, and the programming that potential leased access programmers intend to put onto the system. Comcast, NCTA, TCI, TimeWarner, and Cole, all propose that the maximum reasonable rate for any system should be no lower than the highest net fee or implicit fee paid by any programmer already on the system. Continental suggests a variation of this that would allow the maximum reasonable rate for a potential leased access programmer on any system to be set at the highest net fee the operator collected for a similar class of channels within the previous year. Both of these methodologies, proponents claim, would prevent migration.

508. CIC and Cox suggest that the Commission should adopt a benchmark approach that would permit the parties to negotiate below the benchmark or to justify charges above the benchmark for identifiable incremental costs of leasing. Under their approach, as a minimum, the operator must be allowed to charge "a monthly lease rate equivalent to its per-channel benchmark for cable programming services multiplied by the number of subscribers to the system," and it must be permitted to claim some percentage of advertising, sales, or other revenues derived by the lessees. It is not clear, however, where the benchmark should be set--for instance, at the highest rate for programming services or at the average rate.<sup>1302</sup>

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<sup>1300</sup> 8 FCC Rcd at 540-541, paras. 147-152.

<sup>1301</sup> Armstrong Comments at 38-39; Cablevision Reply at 23-25; CIC Comments at 42-45; Cole Comments at 63-64; Cole Reply at 40; Comcast Comments at 55; Continental Comments at 81-82; Continental Reply at 40; InterMedia Comments at 39-40; Intermedia Reply at 6-7; NCTA Comments at 87-93; TCI Comments at 73-74; TCI Reply at 72-74; TimeWarner Comments at 99-101; TimeWarner Reply at 75.

<sup>1302</sup> CIC Comments at 42-45. Cox Comments at 38-40.

509. MCATC, which filed Comments recommending that the Commission establish a benchmark/maximum rate, in its Reply supports the use of an implicit rate as proposed by NCTA. It recognizes, however, that the implicit rate need not be the same for all programmers; in deriving the rate, a distinction should be made between services to be provided. For example, the rate for a premium cable service should be compared to the rate for premium service, while the rate for programmers offering service to all subscribers should be derived from the implicit rate for programmers providing services to all subscribers.<sup>1303</sup> MEA asserts that a rate methodology based on the nature of the programming and the type of revenues generated, if any, was most likely to gain the support of cable operators in developing the lease access market. It recommends that the Commission establish maximum reasonable rates for various categories of use (e.g., maxi-pay service, pay-per-view, advertiser-supported, not-for-profit), and proposed specific rates for each category. It claims that uniform, cost-based pricing would undermine program diversity, especially for not-for-profit programmers.<sup>1304</sup> In its Reply, MEA agrees with those cable operators proposing that existing payment arrangements between cable operators and programmers on their systems could be viewed as implied charges for access. MEA also stated that the application of the implicit rate methodology to different channel classifications, as proposed by Continental, is a more reasonable approach than those proposals that would apply one implicit maximum rate to all programming. MEA, however, disagrees that each operator's benchmarks should be the highest implicit rate for each programming classification. Rather, it claims, they should be set lower than the maximum.<sup>1305</sup>

510. Both CFA and MEA disagree with operator claims that the Commission must, because of the migration threat, set the maximum reasonable rates no lower than the highest implicit rate currently charged by an operator. CFA and MEA claim that current rates are too high and the implicit rates for leased access would be distorted because of the monopsony relationship between cable operators and programmers and the monopoly relationship between cable operators and subscribers. Both claim that the leased access option is intended to prevent cable operators from maintaining the monopolistic prices they currently charge. CFA claims that migration and the threat of migration would not have the detrimental effects claimed by operators but would effectively provide healthy competition to the cable operator and would be instrumental in permitting the programming

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<sup>1303</sup> MCATC Comment at 40-42; Reply at 6-7.

<sup>1304</sup> MEA Comments at 2-18.

<sup>1305</sup> MEA Reply at 6-12.

market to function more like a competitive market. MEA, however, recommends that the Commission bar migration. Such a bar, it claims, would make unnecessary the cable operators' request that they be permitted to charge the highest implicit access fee to prevent migration.<sup>1306</sup>

511. Several parties support a cost-based approach to setting the maximum reasonable rates. CFA advocated using a per channel pricing mechanism consistent with the cost-based formulaic approach it has proposed in its comments for basic service.<sup>1307</sup> Fox states that rates should not exceed the cost-of-service as outlined in the Notice.<sup>1308</sup> NYNEX claims that a simplified cost-of-service methodology should be applied to initialize rates, after which a price-cap methodology should be applied for increases in rates. NYNEX also contends that rates should be nondiscriminatory. Similarly situated customers, it asserts, should be treated the same, and discrimination based on competitive considerations should be strictly prohibited. NYNEX also states that cable operators should be required to accept any reasonable offer for leased capacity as well as for any excess capacity beyond the set aside.<sup>1309</sup> Similarly, CBA recommends that discrimination should be barred by requiring cable operators to charge all users the same amount for leased access. Further, it argues that, when leased access capacity remains unused because prospective users claim they cannot afford the price, there should be a presumption that the price is unreasonably high and does not meet a market test.<sup>1310</sup>

### iii. Discussion

512. While benchmarking is generally considered a relatively less burdensome ratemaking methodology, little data are currently available for establishing leased access benchmarks. Because there has been scant use of the leased access channels, it is questionable that sufficient data could be obtained to establish effective and fair benchmarks. Further, as observed in comments to the Notice, some migration to leased access is possible. It is uncertain what the effect of such migration will be on the existing structure of the cable industry. Considering the lack of data essential to effectively

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<sup>1306</sup> CFA Reply at 76-79; MEA Reply at 5-12.

<sup>1307</sup> CFA Comments at 151.

<sup>1308</sup> Notice, 8 FCC Rcd at 541, paras. 149-151; Fox Comments at 5.

<sup>1309</sup> NYNEX Comments at 19-22; NYNEX Reply at 19-20.

<sup>1310</sup> CBA Comments at 1-3.

assessing the effect of this option and to calculating the benchmarks, we do not find this option to be feasible at this time.

513. The cost-of-service option would likely require extensive accounting, recordkeeping, and costing requirements. We find that it is difficult to justify the cost of this approach, particularly when we are not also requiring it for basic tier rate determinations. It is also possible that substantial migration will occur under this approach, with uncertain and possibly harmful effects on the structure of the industry.

514. When we solicited comments in the Notice on the possibility of establishing marketplace rates for leased access, we stated that where a competitive market exists for leased commercial access, cable operators would be able to charge the market rates for leased access. No comments were received indicating that any competitive market for leased commercial access exists, and we are not aware of any. Consequently, this option does not appear to offer any promise as a tool for setting rates at this time.

515. The record, however, has revealed a fourth option that we believe will enable us to define maximum reasonable rates that a cable operator may charge for commercial leased access that will assure that "the price...of such use will not adversely affect the operation, financial condition or market development of" cable systems and will still enable commercial leased access to become the source of program diversity and of competition to cable operators that Congress intended it to be.<sup>1311</sup> The option, a variation on the fourth option we discussed in the Notice, uses the subscriber rates for basic, cable programming and premium services and the rates the cable operator pays to obtain the programming on those tiers of services to define maximum reasonable rates. We adopt this standard as an initial guide until we gain more experience in this area.

516. As a first step to setting maximum rates that will achieve the potentially conflicting goals of Section 612, we conclude that it is necessary to separate programmers seeking to lease commercial access channels into three distinct categories--those proposing to charge subscribers directly on a per-event or per channel basis to view their programming; those proposing to use the channel for more than fifty percent of their lease time to sell products directly to customers (e.g., home shopping networks, infomercials); and all others. We will require cable operators to charge different maximum monthly access rates to each category of programmers.

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<sup>1311</sup> Communication Act, § 612 (c) (1), 47 U.S.C. § 532 (c) (1).

517. By examining the existing payment arrangement between a cable operator and nonaffiliated providers of programming on the operator's system, it is possible to determine the monthly price per subscriber that a cable operator pays to carry that programming. It is also relatively simple, at least within broad categories, to determine the monthly price subscribers pay to view that programming. With certain refinements, the difference between those two prices can be viewed as an implicit fee that the programmer pays to be carried on that system. For each of the three categories of programmers defined in the preceding paragraph, we will require a cable operator to identify the programmers it carries on non-leased access channels that would also fall into that category. The cable operator must calculate the implicit fee charged each such programmer and identify the highest fee among them. That fee will be the maximum rate that the cable operator may charge a programmer in that category for commercial leased access.

518. The implicit fee for a contracted service should recover the value of channel capacity only. Thus it should not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services). If the contract used to substantiate a maximum reasonable rate requires the cable operator to provide, in addition to channel capacity, other services for which the payment bases are not separately set out in the contract, reasonable adjustments must be made to exclude the value of the other services when the implicit rate is calculated. Once these adjustments are made to the monthly per subscriber rate the operator is paying the programmer to carry its programming, the implicit fee can be determined through a two-step calculation. First the operator should subtract the adjusted rate from the rate per month that a subscriber pays to receive the programming. Then it should multiply this difference by the percentage of its subscribers able to receive that channel or programming. The result is the implicit fee per subscriber for use of the channel.<sup>1312</sup> For each of the three program

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<sup>1312</sup> Thus, if a cable operator pays a premium channel programmer \$4.00 per subscriber for its programming and charges a retail price of \$10.00 to its subscribers, of whom 25 percent subscribe to the premium channel, then the implicit fee per subscriber is:

$$[(\$10.00 - \$4.00 \times .25) = \$1.50.]$$

If a cable operator carries a public broadcasting station on its basic tier, it pays nothing for the programming. Assuming there are 20 channels on the basic tier, and the monthly rate for basic tier service is \$10.00, then a subscriber fee to view this channel is \$.50. Because all its subscribers subscribe to the basic tier,

categories, the highest of these fees would be the maximum monthly leased access rate per subscriber that the operator could charge a programmer. Maximum rates for shorter periods can be calculated by prorating the monthly maximum rate.

519. We conclude that, at least initially, maximum leased access rates based on the highest implicit fee charged any nonaffiliated programmer within the same category constitutes a reasonable approach to determine rate ceilings for commercial leased access.<sup>1313</sup> We believe such rates are fair because they are derived from the highest market value of channel capacity for the system. Notwithstanding the possible existence of a monopsony relationship between the operator and the programmer paying the maximum, the amount paid or otherwise foregone by any unaffiliated programmer would nevertheless substantiate a maximum value of at least that amount for channel capacity. Lower rates could, of course, be negotiated.

520. We are requiring cable operators to calculate the maximum reasonable rates for each rate classification annually based on the contracts in effect in the previous calendar year. A schedule of rates shall be provided on request to prospective leased access programmers. In addition, operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the net implicit fees, and justification for all adjustments.<sup>1314</sup>

521. We expect that setting maximum rates on this basis will eliminate uncertainty in negotiations for leased commercial

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the implicit monthly fee per subscriber for access to this channel is:

$$[(\$0.50 - \$0.00) \times 1.00] = \$0.50.$$

We observe that, where necessary to determine the value to a subscriber of a single channel on a tier, the rate calculation described above contemplates dividing the cost of the total tier by the number of channels located on that tier.

<sup>1313</sup> If the operator carries no unaffiliated programmer in the category for which leased access is sought, the leased access rate may be based on the highest implicit fee charged for that classification by a cable system with the same number of subscribers, of total channels and of satellite channels.

<sup>1314</sup> The Commission will follow its procedures for treatment of proprietary information, see 47 C.F.R. § 0.459, where the cable operator asserts proprietary information is necessary to justify the schedule of rates.

access. It will also automatically lower the starting point for negotiations for a substantial number of potential programmers who are not in the same programming classification as those paying the highest implicit fee, and, in some cases the maximum rate per subscriber will be no more than a small portion of the basic service tier fee. Thus, we are making our decision in this matter based on an expectation that, under these conditions, interest in the use of the leased access market will rise because rates will be low enough to entice programmers, particularly in the programming classifications with the lower implicit fees, to use leased commercial access. Further, as use of lease access capacity at lower rates increases, operators will have an incentive to encourage entrance of new programmers in higher rate classifications in order to maximize the revenue they receive from their leased access capacity.

522. This approach to setting maximum reasonable leased access rates will impose a minimal regulatory burden on cable operators. Maximum rates will not only be readily determinable by each operator with no burdensome accounting and costing requirements, but they will also be easily verifiable by regulators, or by mediators under an Alternative Dispute Resolution proceeding, who will generally need only to review the supporting documentation for rate calculations and, subject to appropriate safeguards to protect proprietary information, the contracts between operators and programmers on non-leased access channels.

b. Access Rates for Not-for-Profit Programmers

i. Background

523. In the Notice, we sought comment on whether the Cable Act of 1992 empowers us to set a lower maximum rate for leased commercial access for not-for-profit programmers, whether lower rates for not-for-profit organizations could help create the diversity of programming sources sought by the drafters of Section 612, and whether there is a need for special rates for not-for-profit programmers. We also asked to what extent we can permit an operator's costs of providing leased commercial access to not-for-profit programmers to be recovered from other leased access customers or from cable subscribers on all tiers generally. Finally, we sought comment on the impact special rates for not-for-profits would have on subscribers and on programmers.<sup>1315</sup>

524. We observed in the Notice that the legislative history of the Cable Act of 1984 indicates that Congress may have contemplated that cable operators be permitted to establish separate leased commercial access rate ceilings for different

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<sup>1315</sup> 8 FCC Rcd at 541, para. 153.

categories of programmers. We noted that Congress' stated intent was not to impose on cable operators the requirement that they make set-aside capacity available on a non-discriminatory basis. Additionally, Congress specifically indicated its concern that one rate for all leased access users would render it impossible for certain classes of service, "such as those offered by not-for-profit entities," to have any reasonable access to a cable system.<sup>1316</sup>

ii. Comments

525. Cable operators responding on the not-for-profit programmer issues generally agree that there is no evidence that the Cable Act of 1984 or the Cable Act of 1992 authorizes the Commission to set preferential rates for the not-for-profit programmers or to cause operators to receive anything less than a fair profit for the use of channel capacity.<sup>1317</sup> Other respondents, however, indicate that they do not oppose discriminatory pricing for not-for-profits or state their belief that the Commission is authorized to set preferential prices for not-for-profit programmers.<sup>1318</sup> CFA assures that discriminatory pricing is permitted in order to effectuate Congress' intent of increased diversity, not merely to bestow a benefit on all non-profit programmers, and it urges the Commission "to adopt, where necessary[,] lower maximum rate ceilings for qualified non-profit programmers."<sup>1319</sup> MEA states that not-for-profit organizations need lower rates and that Congress intended that lower rates be set for them. MEA also recommends that, to further implement congressional intent, there should be a temporary (three year) set-aside of capacity for not-for-profits. This is necessary, it claims, to assure leased access capacity will be available to them once they have raised the necessary funds to begin program delivery over leased access channels.<sup>1320</sup> CBA states that cable

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<sup>1316</sup> See 1984 House Report at 51.

<sup>1317</sup> CIC Comments at 51; Comcast Comments at 56; Cole Comments at 65; Cole Reply at 40; Continental Comments at 82-83; Continental Reply at 40; Cox Comments at 47; TCI Comments at 75-76; TCI Reply at 78-80; TimeWarner Comments at 102-104.

<sup>1318</sup> APTS Comments at 2-7; MAAC Comments at 4; NATOA Comments at 93.

<sup>1319</sup> CFA Comments at 151-155; CFA Reply at 79-80.

<sup>1320</sup> MEA Comments at 17-19; MEA Reply at 12-15; MEA observes as well that letter filings to the Commission attesting to the need for lower rates to allow non-profit organizations to gain access number over 100. MEA Reply at 15, n. 42. Additionally, Denver and USCC have filed replies attesting to this need and generally

operators should be required to charge all users the same amount for leased access, but adds that local programming by low power television stations is of such public importance that leased access for stations with a significant amount of such programming should be provided at the preferential rates charged non-profit and other groups whose service provides special public interest benefits.<sup>1321</sup>

iii. Discussion

526. The procedure we adopt in this proceeding for determining the maximum reasonable leased commercial access rates, reduces the need to specify any preferential rates for not-for-profit organizations. We believe that the maximum reasonable rates we have authorized for leased commercial access are responsive to the intent of Congress that leased commercial access be available to all potential programmers in a manner that will encourage diversity of programming and in the sources delivering that programming. At the same time, it responds to those who believe that special rates are required for not-for-profit programmers. Our rules, we believe, will define reasonable rates for potential new, not-for-profit programmers that will be lower than those for most, if not all, commercial programmers. We expect that these rates should generally be the lowest maximum rate of any potential leased access programmers on any system or will, at any rate, be sufficiently low as to attract potential not-for-profit programmers. This expectation, along with the expectation that adequate provision has been made for not-for-profit programmers under Section 611 of the Communications Act, also precludes the need for any interim special set aside for not-for-profit organizations as suggested by MEA.

4. Leased Access Reporting Requirements

i. Background

527. The Notice solicited comment on whether we need to require annual reporting of limited data for monitoring the effectiveness of the leased commercial access rules. Specifically, we proposed collecting the following: channel capacity required to be designated for leased use;<sup>1322</sup> percentage

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supporting MEA's Comment filing. Denver Reply at 6-7; USCC Reply at 1-2.

<sup>1321</sup> CBA Comments at 1-4.

<sup>1322</sup> Section 612(b)(1) requires that the leased access capacity designated for commercial use by unaffiliated persons be in specified amounts determined as a percentage of the total activated

of set-aside capacity used; percentage used by not-for-profit programmers; and actual rates charged leased access users. We proposed imposing these reporting requirements on all cable operators, but we requested specific comment on whether small systems should be exempt from compliance with some of these reporting requirements.

ii. Comments

528. We have received little comment on this issue; the requirements appear not to be controversial. Among cable operators, Armstrong and InterMedia, observing that there is no generally available information on leased access, state that the collection of leased access data over the next several years will be helpful for determining the reasonableness of rates and the feasibility of developing a benchmark for leased access.<sup>1323</sup> Similarly, MEA observes that no data on leased access were filed in this proceeding. MEA urges, as a minimum, the collection of the data proposed in the Notice. Such data, it states, should be used to monitor leased access activity and should be made publicly available.<sup>1324</sup> CFA also supports the collection of leased access data for monitoring purposes.<sup>1325</sup>

529. Parties responding to the Notice did not directly comment on whether small systems should be exempt from any leased access reporting requirements. NCTA does comment generally, however, that small systems, those with 1000 or fewer subscribers, should be exempt from burdensome accounting and data collection requirements.<sup>1326</sup> Similarly, CATA, making a direct reference to the kind of requirements laid out in Appendix B to the Notice, but not to the leased access reporting proposal, states generally that the kind of cost justification questions posed in this proceeding should not apply to small cable television systems.<sup>1327</sup> Neither, however, states whether the proposed leased access reporting requirements would be burdensome for small systems.

iii. Discussion

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channels on the system. Communications Act, § 612 (b) (1), 47 U.S.C. § 532 (b) (1).

<sup>1323</sup> Armstrong Comments at 38-39; InterMedia Comments at 39-40.

<sup>1324</sup> MEA Comments at 8 and 28; MEA Reply at 10-11.

<sup>1325</sup> CFA Comments at 155.

<sup>1326</sup> NTCA Comments at 82-84.

<sup>1327</sup> CATA Comments at 23.