establish "what is or is not reasonable conduct" for many abuses that may arise. See supra at 15. The Commission should clarify that it will consider complaints of unreasonable conduct or bad faith on the part of cable operators, even where no specific rule can be cited.

In placing the burden on the lessee of proving a violation by clear and convincing evidence, the Commission misinterprets the statute. Moreover, the high evidentiary standard will encourage cable operators to act unreasonably, safe in the knowledge that lessees are unlikely to complain because of the difficulty in prevailing at the Commission. Thus, Congress' goal to promote competition and diversity through leased access will be undermined. To ensure that the goals of section 612 are achieved, the Commission should reconsider the dispute resolution procedures as originally proposed in the NPRM.

### C. The Rules Adopted by the Commission Will Not Result in the Expeditious Resolution of Disputes.

The time frame the Commission establishes will not result in expeditious resolution of disputes as required by section 612(c)(iii). First, upon the filing of a complaint, the cable operator is granted 30 days to respond to a complaint. Order, ¶ 534. This is too long. CME urges the Commission to reconsider its original proposal that the cable operator be required to respond within 10 to 15 days.[13]

Second, after the Commission receives the complaint and the cable operator responds, it will then determine whether the lessee has established a prima facie violation and it may ask the operator to produce additional information. There is no set period of time in which

[13] The rules also require that a complaint must be filed within 60 days of the alleged violation. Order, ¶ 533. The Commission should clarify when that time period will begin to run.

the Commission must make this determination.

Third, even after the Commission has determined that the lessee has made out a prima facie case, the dispute will not have been resolved. The lessee will then be required to show by clear and convincing evidence that the cable operator has violated the Commission's rules. Order, ¶ 535. Clearly, the resolution of a dispute could take months or even years.

Such a prolonged period of time for resolution of a dispute is particularly troubling given the Commission's decision not to establish procedures for oral rulings in emergency situations. The Commission, responding once again to cable interests, Order, ¶ 532, erroneously concludes that its "expedited leased access procedures may obviate the need for oral rulings or other emergency processing of leased access disputes." Order, ¶ 536. Even if the procedures established were appropriate for the resolution of non-emergency disputes, the procedures are essentially useless for those programmers who are planning to present timely programs, e.g., a live concert, a sporting event, or a political candidate seeking to present his or her views to the public. See CME Reply Comments at 23. If situations like these are not resolved immediately upon the filing of a complaint, the complaint will become moot. The Commission should reconsider its decision not to provide for emergency treatment where needed.

In addition, CME urges the Commission to reconsider its decision to require cable operators to grant access to lessees on the conditions set by the operator, subject to any refund, pending resolution of the dispute. Order at ¶536. Rather, the Commission should require a cable operator to afford access to a lessee on the lessee's terms, if the Commission has not resolved the dispute within 30 days. Without access on the lessee's terms, the cable

operator has an incentive to delay and no incentive to negotiate.

In sum, the procedures established by the Commission for resolving disputes between lessees and cable operators are bound to fail. They cannot result in the fair and expeditious resolution of disputes because lessees may not have access to the information they need to make a prima facie complaint, the lessees are saddled with an impossible and unnecessary evidentiary burden, and there is no time limit in which complaints must be decided.

## V. The Commission Should Adopt Specific Reporting Requirements Now to Ensure that Congress's Goals for Leased Access Are Fulfilled.

The Commission recognizes that "[b]ecause few programmers have exercised their option to lease access since 1984. . . it is important to monitor this market." Order, ¶530. The Commission also notes at various points that its rules are only a starting point to be modified in light of experience. Order, ¶¶ 491, 515. Yet, the Commission declines to adopt specific reporting requirements for leased access. Instead, the Commission believes that it can efficiently collect such information under sections 623(g) (collection of information) and (k) (reports on average prices). Id., ¶530.

In adopting rules to implement Section 623(k), the Commission states that it "will also solicit specific information from cable operators on their leased access channel usage and rates." Order, ¶ 477. The tentativeness of the Commission's decision regarding leased access reporting requirement ignores the argument made by CME that a reporting requirement is the only way to ensure that Congress's goals for leased access are fulfilled. See CME Reply Comments at 25.

The Commission seems to suggest that it might address reporting requirements more specifically in a Second Further Notice. Order, ¶ 447. However, the Commission should

not wait for the completion of another rulemaking before adopting reporting requirements for leased access. In light of the admittedly preliminary nature of its rules on leased access, it is important that the Commission start collecting data as soon as possible. Specifically, the Commission should collect data as suggested in its NPRM: channel capacity required to be designated for leased use; percentage of set-aside capacity used; percentage used by not-for-profit programmers; and actual rates charged leased access users. Order, ¶ 527. In addition, if the Commission decides to continue to use implicit access fees, it should have cable operators file a rate schedule, along with supporting materials, on an annual basis. Collecting and reviewing these rates is the only way that the Commission can assess whether its "maximum reasonable rates" are actually reasonable. As long as the complaint process is so biased against lessees, it will not provide any reliable data about the reasonableness of rates.

Collection of such information will ensure that the Commission is able to measure whether its regulations are fulfilling the statutory objectives of section 612. The Commission's failure to do so would frustrate congressional intent that leased access channels promote diversity and competition and provide a "genuine outlet for programmers."

## Conclusion

CME urges the Commission to reconsider its adoption of the leased access regulations discussed above and to revise those provisions to promote competition and to provide a genuine outlet for diverse programming as Congress intended.

Respectfully submitted,

Angela J. Campbell

Sharon L. Webber
Angela J. Campbell
Citizens Communications Center
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9535

Counsel for CME et al.

June 21, 1993