F. Selection of Programmers

127. The Commission has not specifically addressed the manner in which lessees are to be selected for placement on leased access channels. We stated in the *Rate Order* that each lessee will only be allowed to lease up to one channel if there are other leased access programmers demanding use of the additional designated channels.[166] We further stated that this rule is not intended to permit adverse effects on the operation, financial condition, or market development of the cable system.[167] In their petitions, ValueVision and CME propose that leased access channels be provided on a first-come, first-served basis. According to ValueVision, without this scheme, cable operators will impermissibly look to content as a means of allocating scarce leased access channel capacity.[168] HSN, on the other hand, argues that first-come, first-served is not necessary because most operators are looking to elevate revenue potential and not to scrutinize content.[169] CVI and Continental also oppose a first-come, first-served approach because they argue that it will not necessarily promote diversity and in fact may lead to home shopping channels occupying the majority of the leased access channels available.[170]

128. We tentatively conclude that a first-come, first-served approach is preferable so long as available leased access channel capacity is sufficient to accommodate incoming leased access requests. However, if an operator's available leased access channel capacity is insufficient to accommodate all pending leased access requests, we seek comment on whether operators should be allowed to accept leased access programmers on a basis other than one that is strictly first-come, first-served. We believe that allowing cable operators limited ability to make content-neutral selections from among leased access programmers may be appropriate in order to enable them to avoid certain situations that might "adversely affect the operation, financial condition, or market development of the cable system."[171]

129. For example, operators may wish to give priority to leased access programmers that request a full-time lease over a programmer seeking to lease only part-time, thus minimizing the disruption to the subscriber, as well as easing the administrative burdens on the operator. We are not suggesting that an operator would be allowed to completely refuse part-time requests for leased access. The issue here is, when two applicants request leased

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[166] *Rate Order*, 8 FCC Rcd at 5940, ¶ 498. *See also* 47 C.F.R. § 76.971(a)(2).

[167] *Id.* at 5940 n.1284.

[168] Valuevision Petition at 13.

[169] HSN Opposition at 6.

[170] Continental Opposition at 33; CVI Opposition at n.30.

[171] Communications Act, § 612(c)(1), 47 U.S.C. § 532(c)(1).

access time and the operator cannot accommodate them both within the set-aside requirement, should the operator be allowed to select the full-time applicant over the part-time applicant. At the same time, we are concerned that allowing a preference for full-time programmers may not further the statutory goal of promoting the widest possible diversity of programming sources, since encouraging part-time use could result in a wider variety of programmers. To that end, we seek comment on whether certain circumstances favor shifting the preference to the competing part-time applicant, for example if the part-time applicant is a not-for-profit entity. Alternatively, instead of allowing a preference for the last available leased access channel, we seek comment on whether we should require one or two leased access channels to be used exclusively for part-time use. We further seek comment on whether we should allow operators to base their selections on any content-neutral criteria other than the full-time/part-time distinction.

G. Minority and Educational Programmers

1. Background

130. Section 612(i) of the Communications Act[172] permits a cable operator to place programming from a qualified minority[173] or educational[174] programming source on up to 33 percent of the cable system's designated leased access channels. In the *Rate Order*, we stated that we would reflect the provisions of Section 612(i) in our rules.[175] For purposes of the minority programming provision, we concluded that programming that covers "minority viewpoints" or is "directed at members of minority groups" must cover the viewpoints of, or be targeted to, members of minority groups, as defined in Section 309(i)(3)(c)(ii) of the Communications Act.[176] Regarding the appropriate proportion of programming that must be devoted to coverage of minority or educational programming to qualify as "substantially all"

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[172] Communications Act, § 612(i), 47 U.S.C. § 532(i).

[173] Section 612(i)(2) defines a qualified minority programming source as one that "devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned, as the term 'minority' is defined in Section 309(i)(3)(C)(ii)" of the Communications Act. Section 309(i)(3)(C)(ii) identifies Blacks, Hispanics, American Indians, Alaska Natives, Asians and Pacific Islanders as minority groups. *Rate Order*, 8 FCC Rcd at n.1373.

[174] Section 612(i)(3) defines a qualified educational programming source as one that "devotes substantially all of its programming to educational or instructional programming that promotes public understanding of mathematics, the sciences, the humanities, and the arts and has a documented annual expenditure on programming exceeding $15,000,000."

[175] *See Rate Order*, 8 FCC Rcd at 5963-5964, ¶ 541.

[176] *Id.*

under the statute, we stated that programming sources that devote 90 percent or more of their programming to such purposes may qualify as a statutory source of minority or educational programming.[177]

2. *Petitions*

131. Discovery Communications, Inc. ("Discovery") and Black Entertainment Television, Inc. ("BET") ask for further refinement of the rules allowing minority and educational programming to substitute for leased access programs as permitted under Section 612(i).[178] According to Discovery and BET, if qualified minority and educational programming is relegated to a la carte distribution or a CPST with low subscriber penetration, its use as a substitute for commercial leased access will not fulfill the purpose Congress intended. Thus, Discovery and BET request that we require, as a further condition to this "substitution" provision, that programming must be made available as part of either the BST or a CPST with high subscriber penetration in order to qualify as leased access programming.[179]

3. *Discussion*

132. We seek comment on whether the requirements for tier and channel placement, as proposed above in Section IV.D., should apply to minority and educational programming that is carried as a substitute for leased access programming. Specifically, should operators be required to carry minority and educational programming on the BST or a CPST that qualifies as a genuine outlet, if they are claiming it as a substitute for leased access? Discovery and BET have not provided specific evidence that these types of programmers are unable to negotiate for placement on the tier of their choice. Nor is there explicit language in the statute or legislative history stipulating that minority and educational programming should be received by most subscribers. However, language used in the leased access provisions suggests that Congress envisioned that the same channels that would have been used for leased access should be used for any substituted minority and educational programming. Specifically, Section 612(i)(1) provides that "a cable operator required by this section to designate channel capacity for commercial use may use *any such channel capacity*" for minority and educational programming (emphasis added). Moreover, to allow a less stringent standard for minority and educational programming would seem to defeat the use of such programming as a substitute for leased access. Therefore, we tentatively conclude that minority and educational programming should not qualify as a replacement for leased access

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[177] *Id.*

[178] Ex Parte Letter from Barbara Wellbery, Discovery Communications, Inc., and Maurita K. Coley, Black Entertainment Television, Inc., to Alexandra M. Wilson, Federal Communications Commission (March 9, 1994).

[179] *Id.*

programming unless it is carried on the BST or a CPST that qualifies as a genuine outlet. As with leased access, the operator could choose on which qualifying tier to carry the programming.

H. Procedures for Resolution of Disputes

1. Background

133. In the *Rate Order*, the Commission established that disputes over leased access rates or terms and conditions would be resolved through the complaint process.[180] Complaints must be filed with the Commission within 60 days of the alleged violation, must state concisely the facts constituting a violation of the leased access rules and cite the specific rule or regulation allegedly violated.[181] An operator has 30 days from the petition filing date to respond.[182] In the case of a rate dispute, a complaint need only allege that a given rate is higher than the maximum rate permitted under our rules; the operator is then required to submit data showing that the rate charged was not higher than the maximum rate it charged.[183] In order for relief to be granted, the complainant must ultimately show, by clear and convincing evidence, that the cable operator violated our leased access rules or otherwise acted unreasonably or in bad faith.[184]

2. Petitions

134. CME urges the Commission to reconsider its procedures for resolving leased access disputes because it asserts that the procedures adopted in the *Rate Order* will not protect against patterns of abuse or facilitate dispute resolution.[185] CME argues that the Commission's rules impose an overly burdensome standard of proof on leased access complainants and set no time limit in which complaints must be decided by the Commission.[186] Specifically, CME argues that adoption of the "clear and convincing" burden of proof comes from the Commission's misinterpretation of Section 612(f) of the

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[180] *Rate Order*, 8 FCC Rcd at 5958-5959, ¶ 533.

[181] *Id.* at 5955, ¶ 534; 47 C.F.R. § 76.975(c) and (d).

[182] *Rate Order*, 8 FCC Rcd at 5955, ¶ 534; 47 C.F.R. § 76.975(e).

[183] *Rate Order*, 8 FCC Rcd at 5955, ¶ 534; 47 C.F.R. § 76.975(e).

[184] *Rate Order*, 8 FCC Rcd at 5959-5960, ¶ 535; 47 C.F.R. § 76.975(g).

[185] CME Petition at 17.

[186] *Id.* at 17-23.

Communications Act.[187] CME argues that, while prior to the 1992 Cable Act a cable operator's rates, terms and conditions were presumed reasonable and a lessee could only rebut the presumption with a clear and convincing showing that the operator's demands were unreasonable, the 1992 Cable Act directs the Commission to "determine the maximum reasonable rates" and "establish reasonable terms and conditions" for leased access.[188] CME states that the need to rebut applies only if there is a presumption and, because there is no longer a presumption that a cable operator's rates, terms and conditions are reasonable, there is no longer any need for the lessee to show anything by clear and convincing evidence.[189] CME also argues that Commission rules do not give lessees access to information they may need to make a *prima facie* complaint because the Commission appears to be treating the data on which a cable operator relies to set maximum rates as proprietary. CME maintains that, without such data, it will be "virtually impossible" for the lessee to make out a *prima facie* case, much less to prove a violation by clear and convincing evidence. Finally, CME maintains that the leased access rules adopted will not result in the expeditious resolution of disputes because operators are given too much time to respond to complaints.[190] CME argues that the operators' response periods should be shortened from 30 days to 10 to 15 days.[191]

135. In opposition, Continental argues that the dispute resolution procedure for leased access is not burdensome to complainants.[192] Continental asserts that CME misconstrues the burden of proof imposed on lessees.[193] Continental interprets the rules to require that a complainant need only allege that the rate is excessive to satisfy its burden, with the burden then shifting to the cable operator to demonstrate compliance.[194] CVI agrees and states that the *Rate Order* suggests that the pleading requirements for a programmer, at least

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[187] *Id.* at 19-21.

[188] *Id.*, *citing* Communications Act, § 612(c)(4)(A)(i)-(ii); 47 U.S.C. § 532(c)(4)(A)(i)-(ii).

[189] *Id.* at 19-20.

[190] *Id.* at 21.

[191] *Id.*

[192] Continental Opposition at 35.

[193] *Id.*

[194] *Id.*

in the rate dispute context, are not strict.[195] CVI also calls CME's proposal for shortening operators' response time unfair and unnecessary.[196]

3. *Discussion*

136. The statutory presumption is that rates, terms, and conditions for leased access are reasonable unless the complainant demonstrates clear and convincing evidence to the contrary.[197] However, as we indicated in the *Rate Order*, in the case of a rate dispute, a complainant is required only to allege that a given rate is higher than the maximum rate permitted under our rules.[198] After the complaint is filed and served on the operator, the operator then has 30 days to submit data showing that the rate charged was not higher than the permitted maximum rate.[199] After all evidence has been submitted, complainants that are able to demonstrate clear and convincing evidence of a violation have recourse to a variety of relief measures, including refunds, injunctive relief, and even forfeitures.[200] As stated in the *Rate Order*, the availability of refund relief will help a leased access programmer obtain access while a dispute is pending, since any overcharges will be repaid.[201]

137. In order to streamline the complaint process before the Commission, we propose to stipulate that a leased access programmer may not file a complaint alleging that an operator's maximum rate was calculated incorrectly unless an independent certified public accountant has first reviewed the operator's calculations and made an independent determination of the maximum rate. If the operator and leased access programmer cannot agree on a mutually acceptable accountant, the operator may select any independent certified public accountant. The review must be conducted within 60 days of the leased access programmer's request to the operator for a review. The operator would be expected to provide the accountant with all information necessary to support its rate calculation, including an explanation of how the rate was calculated. The findings of the accountant would be certified in a final report and provided to both parties. We seek comment on whether, in the absence of any evidence to the contrary, we should consider a determination by the accountant

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[195] CVI Opposition at 22.

[196] *Id.*

[197] *See* 47 U.S.C. § 532(f).

[198] *Rate Order*, 8 FCC Rcd at 5959, ¶ 534 n.1350.

[199] *Id.* at 5959, ¶ 534.

[200] *Id.* at 5959, ¶ 535.

[201] *Id.* at 5959, ¶ 535 n.1354.

that the operator's rate exceeds the permissible rate to constitute clear and convincing evidence that the rate is unreasonable.

138. We tentatively conclude that, in order to provide notice to other potential leased access programmers, the accountant's final report should be filed in the cable system's local public file. We seek comment on this proposal. Alternatively, we seek comment on whether operators should be required to provide the report upon request to potential leased access programmers. We seek comment on what type of information should be contained in the accountant's final report and what type of information would be proprietary and thus kept confidential. We also seek comment on how the accountant's expenses should be paid. For example, should the parties share the expenses equally or should the full amount be paid by the party that the accountant's report proved was incorrect?

139. We strongly recommend the use of alternative dispute resolution ("ADR") to settle disputes that are not resolved as a result of the accountant's report.[202] ADR is especially suited to resolving leased access disputes since the rate calculations are based largely on questions of fact. Furthermore, ADR could well provide the parties faster relief than agency adjudication. We therefore urge parties to bring complaints to the Commission only as last resort, after all attempts at informal settlement have failed.

140. In light of the streamlining proposed above, and contrary to CME's contention, we do not believe that it is necessary for the Commission to set a time limit within which complaints will be decided by the Commission. Each leased access complaint proceeding differs in complexity and requires varying amounts of Commission time and resources. In addition, we believe that shortening the operator's response period would be unfair to the operator.

I. Resale of Leased Access Time

141. We seek comment on whether we should permit leased access time to be resold by the lessee. Leased access programmers are of course entitled to sell time to advertisers. The question here is whether we should allow persons unaffiliated with the operator to lease time from the operator and then sell it as programming time to other unaffiliated persons for a profit. This type of resale service might provide substantial benefit to programmers with limited time and resources to conduct transactions directly with operators. In addition, a "mini-tier" that would compete directly with the operator's tiers could be created if several

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[202] A recent Executive Order of the President of the United States ordered federal agencies to encourage appropriate settlement of claims and to use ADR whenever feasible. *See* Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996).

channels were resold by the lessee.[203] On the other hand, it may be just as burdensome for the leased access programmer to conduct business with the lessee as it is with the operator. Also, since the operator lacks editorial discretion over the content of leased access programming, the leased access channels could already be considered a mini-tier that provides competition to the operator's programming. Furthermore, permitting the resale of leased access time may defeat the Commission's mandate to establish maximum leased access rates if lessees were able to extract unreasonable rates for limited leased access space. Given these conflicting considerations, we seek comment on the advisability of allowing the resale of leased access time. If the Commission were to prohibit resale, we ask whether an exception should apply for not-for-profit leased access programmers.

V. REGULATORY FLEXIBILITY ANALYSIS

A. Final Regulatory Flexibility Act Analysis for the *Order on Reconsideration*

142. Pursuant to the Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 ("Regulatory Flexibility Act"), the Commission's final analysis with respect to this *Order on Reconsideration* is as follows:

143. *Need and purpose of this action.* The Commission, in compliance with Section 9 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532 (1992), pertaining to leased commercial access, is required to adopt rules and procedures intended to ensure the availability of and accessibility to leased commercial access on cable systems.

144. *Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis.* There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

145. *Significant alternatives considered and rejected.* Petitioners for reconsideration did not submit comments analyzing the administrative burden of the leased access rules pursuant to the Regulatory Flexibility Act. The Commission nonetheless has attempted to minimize such burdens.

B. Initial Regulatory Flexibility Act Analysis for the *Further Notice of Proposed Rulemaking*

146. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis ("IRFA") of the expected impact

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[203] *But see* Section IV.F. which cites the restriction in the *Rate Order* that each lessee will only be allowed to lease up to one channel if there are other leased access programmers demanding use of the additional designated channels.

of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

147. *Reason for Action.* Section 612 of the Communications Act of 1934, as amended, 47 U.S.C. § 532, requires the Commission to prescribe rules and regulations regarding commercial use of channel capacity for unaffiliated persons. The Commission is using this *Further Notice* to seek comment on various issues concerning implementation of this statute.

148. *Objectives.* To propose rules which implement Section 612 of the Communications Act of 1934, as amended, 47 U.S.C. § 532, and further its goals of promoting competition in the delivery of diverse sources of video programming and 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.

149. *Legal Basis.* Action as proposed for this rulemaking is contained in Sections 1, 4(i), 4(j) and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j) and 532.

150. *Description, Potential Impact and Number of Small Entities Affected.* We anticipate a possible impact on small entities, as defined in Section 601(3) of the Regulatory Flexibility Act, including cable operators and leased access programmers, but we do not currently have information pertaining to the extent of such impact or the number of small entities that may be affected.

151. *Reporting, Recordkeeping and Other Compliance Requirements.* Action as proposed in this rulemaking may impose new reporting requirements on cable operators.

152. *Federal Rules which Overlap, Duplicate or Conflict with these Rules.* None.

153. *Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives.* The *Further Notice* solicits comments on alternatives.

VI. INITIAL PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

154. This *Order on Reconsideration and Further Notice of Proposed Rulemaking* ("*Order and Further Notice*") contains either a proposed or modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on

the information collections contained in this *Order and Further Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on the *Further Notice*; OMB comments are due 60 days from the date of publication of this *Order and Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

VII. PROCEDURAL PROVISIONS

155. *Redesignation of Docket.* We believe that it would facilitate consideration of leased commercial access issues by the Commission if they were separated from MM Docket 92-266 and redesignated as a separate docket. Accordingly, we are redesignating the Commission's consideration of leased commercial access issues as CS Docket No. 96-60. Parties are required to caption filings in response to this *Order and Further Notice* under this new docket number.

156. *Ex parte Rules - Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

157. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 15, 1996 and reply comments on or before May 31, 1996. To file formally in this proceeding, you must file an original plus six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus eleven copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

158. Written comments by the public on the proposed and/or modified information collections are due on or before May 15, 1996. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after publication of the *Order and Further Notice* in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications

Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20054, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain_t@al.eop.gov.

VIII. ORDERING CLAUSES

159. Accordingly, IT IS ORDERED that the Petitions for Reconsideration in MM Docket No. 92-266 which pertain to commercial leased access are GRANTED IN PART and DENIED IN PART, as provided above herein.

160. IT IS FURTHER ORDERED that Part 76 of the Commission's rules IS HEREBY AMENDED as shown in Appendix F. The amendments to 47 C.F.R. §§ 76.970(a), (b), (c), (d), 76.971(g) and 76.977 shall go into effect 30 days following publication of this *Order on Reconsideration* in the Federal Register. The amendments to 47 C.F.R. § 76.970(e) impose information collections, and will therefore not go into effect until approved by the Office of Management and Budget.

161. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4(j) and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 532, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions, and statement of issues in this *Further Notice of Proposed Rulemaking*, and that COMMENT IS SOUGHT regarding such proposals, discussion, and statement of issues.

162. IT IS FURTHER ORDERED that the Secretary shall send a copy of this *Order on Reconsideration and Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

Petitions for Reconsideration:

Booth American Company, et. al.
Cablevision Systems Corporation
Center for Media Education, et. al.
Comcast Cable Communications, Inc.
Community Broadcasters Association
Continental Cablevision, Inc.
Paradise Television Network, Inc.
SUR Corporation
Time Warner Entertainment Company, L.P.
ValueVision International, Inc.

Oppositions to Petitions:

Bend Cable Communications, Inc., et. al.
Cablevision Industries Corporation, et. al.
Center for Media Education, et. al.
Continental Cablevision, Inc.
Home Shopping Network, Inc.
Time Warner Entertainment Company, L.P.
ValueVision International, Inc.
Videomaker Magazine

Replies to Oppositions:

Cablevision Systems Corporation
Center for Media Education, et. al.
Continental Cablevision, Inc.
Engle Broadcasting
Paradise Television Network, Inc.
SUR Corporation
Time Warner Entertainment Company, L.P.
ValueVision International, Inc.

APPENDIX B

Calculation of Proposed Cost Formula

Step 1: ***Designate Leased Access Channels***

Designate specific channels to be used as leased access channels. The number of channels designated must be at least equal to the system's set-aside requirement set forth in Section 612(a). The channels that are designated for purposes of calculating this formula must be those that the operator actually intends to use for leased access if demand exists. Any type of channels (e.g., those on programming tiers, those offered as premium services, those currently carrying no programming, those carrying non-leased access programming, and those carrying leased access programming) may be designated.

Step 2: ***Calculate the Per Channel Cost for Each Designated Channel Presently on a Tier***

(a) Divide the monthly tier subscriber charge for the relevant tier by the number of channels on that tier to obtain the monthly "average subscriber revenue." This number represents the "operating costs" of the system that are allocated to each channel on the system, regardless of whether leased access or non-leased access programming is carried on the channel.

(b) Calculate the "net opportunity costs" for the channel on a per subscriber per month basis.[1]

(c) Add the average subscriber revenue from Step 2(a) to the net opportunity costs from Step 2(b), and multiply the total by the number of subscribers receiving the relevant tier. The result is the Per Channel Cost.[2]

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[1] See Section IV.A.a.iv. of the text of this *Order on Reconsideration and Further Notice of Proposed Rulemaking* for how to calculate the net opportunity costs for a dark channel.

[2] Note that, in contrast with the highest implicit fee formula, the cost formula is not calculated on a per subscriber basis. While the number of subscribers to the tier or programming service is factored into the maximum reasonable rate, the cost formula results in a rate for one full-time channel for all subscribers on the entire system.

Step 3: ***Calculate the Per Channel Cost for Each Designated Channel Presently Carried as a Premium Service***

(a) Subtract the per subscriber license fee paid by the operator to the programmer from the revenue received by the operator from each subscriber. This net revenue is presumed to cover all operating and opportunity costs; however, if it does not, add any additional opportunity costs associated with leasing the channel.

(b) Multiply this amount derived in Step 3(a) by the number of subscribers currently subscribing to the premium service. The result is the Per Channel Cost.

Step 4: ***Average the Per Channel Cost of All the Designated Channels***

Total the Per Channel Cost of all of the designated channels (including tiered and premium programming services) and divide by the number of channels. The result is the Maximum Monthly Rate for a full-time leased access channel on the system, assuming that the system's leased access set-aside requirement is not being fully used by leased access programmers.[3]

Step 5: ***Calculate the Amount to Be Charged to the Leased Access Programmer***

(a) If a leased access programmer requests a full-time channel on a tier, subtract the total subscriber revenue (the average subscriber revenue from Step 2(a) multiplied by the number of subscribers) for the tier on which the leased access programming is to be carried from the Maximum Monthly Rate in Step 4. The difference is the portion of the Maximum Monthly Rate that the operator may charge the leased access programmer directly.

(b) If a leased access programmer requests that its programming be carried as a premium service, the full Maximum Monthly Rate may be charged to the leased access programmer, as long as all of the monthly subscriber revenue for the channel flows to the leased access programmer.

(c) If a leased access programmer requests less than a full-time channel (i.e., part-time use), the tiered and premium service rates from Steps 5(a) and 5(b) may be prorated (evenly or based on time of day pricing, at the operator's option) to calculate the appropriate rate.

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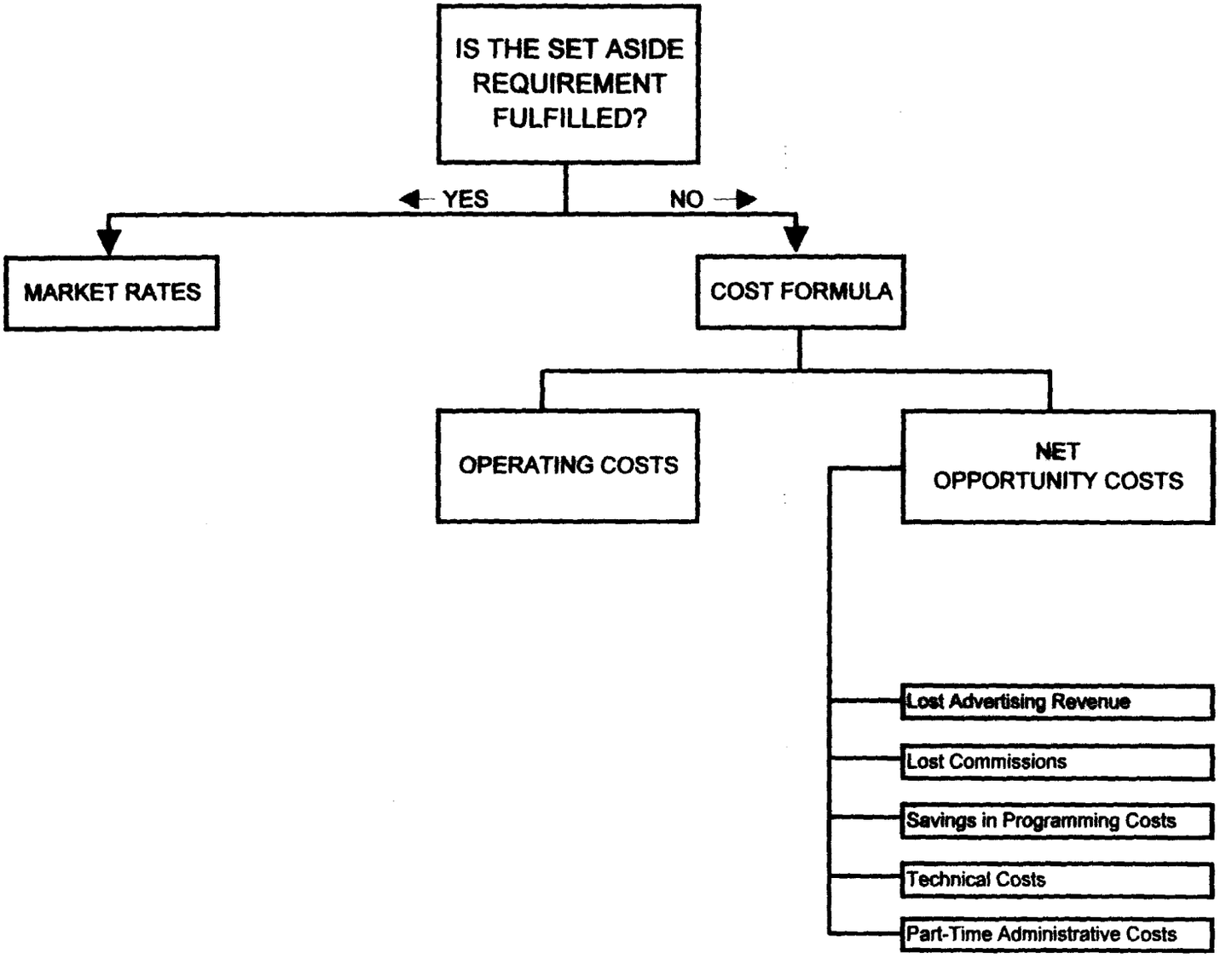
[3] As described in the *Order and Further Notice*, if the set-aside requirement is being fully used by leased access programmers, the maximum reasonable rate is the market rate, i.e., whatever the operator can negotiate and continue to meet its set-aside requirement.

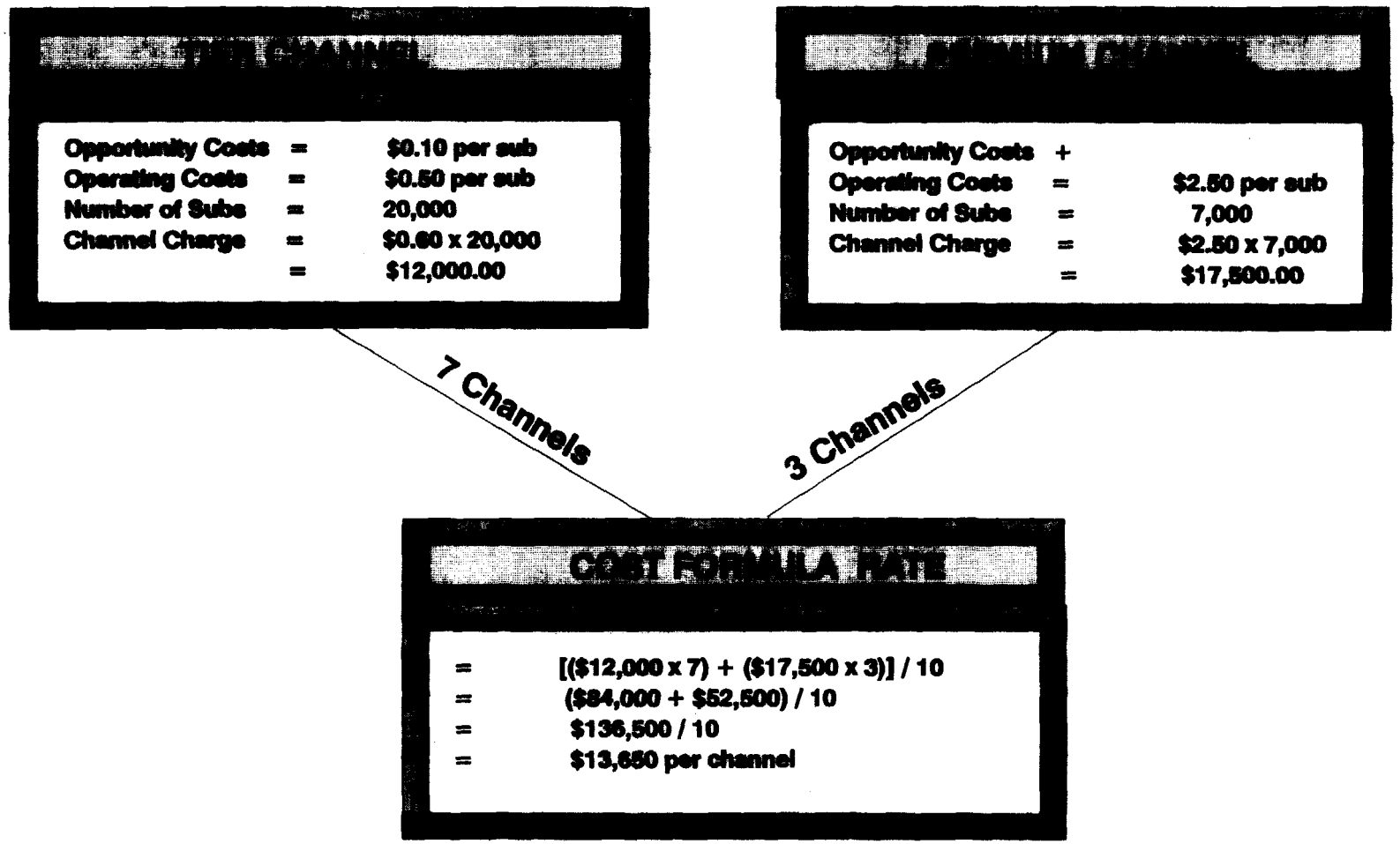
APPENDIX C

Components of the Proposed Cost/Market Rate Formula



APPENDIX D

Numerical Illustration of the Proposed Cost Formula*



* Based on a hypothetical operator with a ten channel set-aside requirement who designates for leased access seven tier channels (all with the same cost) and three premium channels (all with the same costs).

APPENDIX D (Continued)

LEASED ACCESS COST FORMULA PROGRAMMER CHARGE

[illegible] CHANNEL*

Maximum rate	=	$13,650
Subscriber revenue to operator ($.50 x 20,000)	=	-$10,000
Tiered Programmer Charge	=	$ 3,650

PREMIUM CHANNEL*

Maximum rate	=	$13,650
Subscriber revenue to operator	=	-$ 0
Premium Programmer Charge	=	$13,650

(Unregulated subscriber revenue goes to programmer)

* Determined by how the leased access programming is carried, not by the type of channel bumped.

APPENDIX E

An Example Transition to the Proposed Cost Formula

The following is one example of how a transition to the cost formula could be implemented. For the first year of the transition from the highest implicit fee to the cost formula, the maximum charge to the leased access programmer would be the highest implicit fee reduced by one-fourth of the difference between the highest implicit fee and the programmer charge using the cost formula. For the second year, the maximum charge would be the highest implicit fee reduced by one-half of the difference between the highest implicit fee and the programmer charge using the cost formula. For the third year, the maximum charge would be the highest implicit fee reduced by three-fourths of the difference between the highest implicit fee and the programmer charge using the cost formula. Beginning on April 1, 1999, the maximum programmer charge would be derived using the cost formula.

In other words, the per channel transition rates would be as follows (where HIF = highest implicit fee multiplied by the applicable number of subscribers,[1] and CF = programmer charge using the cost formula):

Effective date of revised rules to March 31, 1997	= HIF - [.25 x (HIF - CF)]
April 1, 1997 to March 31, 1998	= HIF - [.50 x (HIF - CF)]
April 1, 1998 to March 31, 1999	= HIF - [.75 x (HIF - CF)]
April 1, 1999 and thereafter	= CF

[1] See Section III.A.3.c. of the text of this *Order on Reconsideration and Further Notice of Proposed Rulemaking* for clarification regarding the number of subscribers by which to multiply the highest per-subscriber implicit fee, depending on whether the leased access programming is placed on a tier or is offered on a per-channel/per-event basis.

APPENDIX F

Revised Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 535, 542, 543, 552, as amended, 106 Stat. 1460.

2. Section 76.970 is amended by revising paragraphs (a), (b), (c), (d), and (e) to read as follows:

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the requirement of 47 U.S.C. 532. For purposes of 47 U.S.C. 532(b)(1)(A) and (B), only those channels that must be carried pursuant to 47 U.S.C. 534 and 535 qualify as channels that are required for use by Federal law or regulation.

(b) The maximum commercial leased access rate that a cable operator may charge is the highest implicit fee charged any unaffiliated programmer (excluding leased access programmers, non-retransmission consent broadcasters and public, educational and governmental access programmers) within the same programming category.

(c) The per subscriber implicit fee charged an unaffiliated programmer shall be calculated by determining the monthly price a subscriber pays to view the programming of the unaffiliated programmer and subtracting the monthly price per subscriber that the operator pays to carry the programming of the unaffiliated programmer. The implicit fee is determined by multiplying the per subscriber implicit fee by:

(1) If the leased access programming is carried on a programming tier, the number of subscribers that subscribe to the programming tier on which the leased access programming is carried; or

(2) If the leased access programming is carried as a premium service, the average number of subscribers that subscribe to unaffiliated non-leased access programming services that are carried as premium services.

The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(d) For each of the three programming categories as defined in paragraph (f) of this section, the highest implicit fee charged any unaffiliated programmer (excluding leased access programmers, non-retransmission consent broadcasters and public, educational and governmental access programmers) in each category shall be the maximum monthly leased access rate per subscriber that the operator could charge a commercial leased access programmer in the same category. The highest implicit fee shall be based on contracts in effect in the previous calendar year. Maximum rates for shorter periods can be calculated either by prorating the monthly maximum rate uniformly, or by developing a schedule of and applying different rates for different times of day, provided that the total of the rates for a 24-hour period does not exceed the maximum rate for one day of a full-time leased access channel (prorated evenly from the monthly rate derived in accordance with paragraphs (b), (c), and (d) of this section).

(e) Within seven business days of a prospective leased access programmer's request, a cable system operator must provide such programmer with the following information: (1) a complete schedule of the operator's full-time and part-time leased access rates; (2) how much of the operator's leased access set-aside capacity is available; (3) rates associated with technical and studio costs; and (4) if specifically requested, a sample leased access contract. Requests under this paragraph (e) may be made by any reasonable means (e.g., in person, by telephone, by facsimile or by mail), and the information shall be deemed provided when the operator sends or gives the information to the programmer. Operators shall maintain, for Commission inspections, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

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3. Section 76.971 is amended by adding new paragraph (g) to read as follows:

§ 76.971 Commercial leased access terms and conditions.

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(g) Operators are not required to accept leases which are for less than a one-half hour interval.

4. Section 76.977 is amended by revising the heading to read as follows:

§ 76.977 Minority and educational programming used in lieu of designated commercial leased access capacity.

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