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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access	MM Docket No. 92-266 CS Docket No. 96-60

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In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Leased Commercial Access	MM Docket No. 92-266 CS Docket No. 96-60

COMMENTS OF CONTINENTAL CABLEVISION, INC.

Continental Cablevision, Inc. ("Continental") is the third largest multiple system operator in the United States. Continental serves 4.2 million basic subscribers in over 900 communities across the United States. Continental respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") in this matter.[1]

I. INTRODUCTION AND SUMMARY.

Continental respects its obligations to accommodate reasonable requests by potential commercial leased access programmers under the Communications Act. Our goal is to assist the Commission is developing rules which make sense of these obligations. Where we take issue with the Commission, however, is in its apparent intention to immediately saturate

[1] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation: Leased Commercial Access, *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking,* MM Docket No. 92-266, CS Docket No. 96-60 (released March 21, 1996) (hereinafter "NPRM").

cable systems with artificially subsidized leased access programming in order to consume every possible channel which might be devoted to leased access. Continental respectfully submits that this proposal is seriously flawed and should not be adopted.

The NPRM's basic premise is that there is too little leased access programming today, and that the cause of this shortage is high carriage rates. Continental submits that this premise is fundamentally wrong. Quality video programming generally is expensive to produce and to market; if it is to be viable, a programmer needs substantial capital backing in order to develop, market, and maintain enough programming to warrant occupation of channel space even on a part-time basis. The many new programming ventures that have evolved over the last decade have opted for the more conventional carriage arrangement rather than pursue leased access. Based on Continental's experience, the bulk of potential leased access programming today has been in the form of less expensive shopping or infomercial programs for which there is apparently insufficient consumer demand to support leased access arrangements. But whatever the reasons for the dearth of potential leased access programmers, nothing in the language or policy of Section 612 of the Cable Act justifies artificially lowering carriage rates to force feed such programming to consumers. Reducing rates to maximize utilization of leased channel capacity would invite unnecessary and unfortunate consequences.

To gauge part of the potential impact of the Commission's proposed elimination of the highest implicit fee formula, Continental engaged a professional outside marketing firm to survey subscribers in a large Continental system in a bellwether state. Presented with an open-ended question about what they would do if Continental replaced a substantial number of cable program services with leased access channels, more than *thirty percent* of respondents volunteered that they would discontinue service.

Continental submits that any revision of the leased access rules must take account of the real financial effects of leased access on a cable operator's ability to compete in the market and on non-access programmers' efforts to be carried. The major deficiency in the NPRM's proposal is that it totally ignores this market reality. Meeting leased access obligations cannot help but deeply damage cable operators' efforts to maintain and increase subscriber penetration. Yet the formula assumes that subscribers will be utterly indifferent to the loss of quality cable programming in favor of low-budget leased access programming. This erroneous assumption perhaps explains the formula's treatment of subscriber revenues as an offset to leased access costs. However, when account is given to the fact that the number of subscribers will decline as a result of leased access, it becomes clear that the formula offers *no* compensation whatsoever for these losses. This clearly contravenes Section 612(c)(1), which requires leased access rates to be high enough to "assure" cable operators of *full* compensation for them.

The NPRM also fails to account for the impact of undermining the ability of cable operators to maximize subscriber value and hence total return from available channels. Continental invests considerable time and money in an effort to determine what programming customers want and how to get that programming on the system. We believe that it is exactly this attention to programming quality that led Chairman Hundt to praise the industry (in his April 30, 1996 speech at the National Cable Television Convention) for producing children's programming, giving parent's control over television violence, giving candidates opportunities to address the public, creating CNN and C-SPAN, and offering programming like Continental's "View Smart to Vote Smart." This careful attention to the needs and interests of the customer is needed to expand subscribership in all systems. In a competitive environment, meeting customer demand with the right mix of programming is even more critical. With some rivals offering more programming (e.g., DBS) and others less, but at a lower price (e.g., wireless providers), every channel on a Continental system has to add real value for consumers, and Continental has designed its channel line-ups with this market reality in mind. The addition of less desirable programming cannot help but lower customers' estimation of the value they receive from cable; bumping quality services to make room for such programming would be even more problematic, especially where that programming would exist largely as a result of a Commission policy that effectively subsidizes carriage.

The proposed formula is also inadequate because it uses the per-channel benchmark rate as a proxy for the costs cable operators incur in providing leased access. The statutory requirement that leased access rates "assure" no damage to an operator's "financial position" means that those rates must be sufficient to cover all of the costs the operator incurs in providing carriage, freed of any regulatory efforts to minimize subscriber service rates. The economic analysis underlying the benchmarks, however, contains no effort to estimate the full costs cable operators incur in providing service. Indeed, the Commission's analyses have explicitly encouraged cable operators to cover those costs through unregulated uses of bandwidth. The Commission received extensive evidence in its cost-of-service docket regarding cable operator costs. Based on that evidence, monthly costs can be estimated to be in the range of $0.87 per channel per subscriber. As a result, even if deploying significant amounts of leased access would not lead to a loss of subscribers, the formula's use of substantially lower benchmark rates as a starting point is inconsistent with the mandate of Section 612(c)(1).

There are other major problems with the NPRM's proposal. The NPRM fails to recognize the true nature of most part-time leased access programming as infomercials and home shopping programming; in effect, advertising. Thus, part-time leased access rates should reflect that reality. The NPRM also ignores the fact that, once a leased access provider has obtained part-time carriage any unused time on the channel is rendered unsuitable for use by a conventional cable programmer. The viability of conventional programmers depends, in part, upon having a stable and predictable audience to generate advertising revenue. Forcing subsidized leased access programming onto a channel means that the entire channel is less likely to attract an audience on a sustained basis. In these circumstances, the only fair solution is to require all part-time programmers using a channel to share, between them, a pro-rata allocation of the cost of the unused time. Otherwise, the cable operator will experience an entire channel's worth of harm in exchange for only a tiny fraction of a channel's worth of compensation.

Finally, to the extent that the Commission determines to substantially alter the current regime for leased access pricing, it must allow a reasonable transition mechanism that recognizes the marketplace disruption that substantial expansion of leased access usage will cause to cable networks, cable operators and subscribers.

Ultimately, any revision to the current "highest implicit net fee" approach must comply with the statutory framework mandated by Section 612(c)(1) of the Communications Act, that leased access rates be "at least sufficient to assure that [leased access] will not adversely affect the operation, financial condition, or market development of the cable system." Under this standard, the *minimum* acceptable rate is one that will *assure* that the operator is not adversely affected. Any doubts about whether the rate is high enough to compensate for marketplace damage to the cable operator *must* be resolved in favor of the cable operator.

II. THE COMMISSION'S PROPOSED FORMULA IGNORES THE IMPACT OF COMMERCIAL LEASED ACCESS DEPLOYMENT ON SUBSCRIBER REVENUE.

One of the ways that the NPRM's formula artificially reduces leased access rates is by offsetting leased access *costs* with revenue from subscribers that is presumed to be "attributable" to the leased access channel. The NPRM justifies this offset on the grounds that failing to make it would constitute "double counting" of revenue.[2]

The "double counting" that the NPRM perceives, however, is a fiction. It is true as a matter of mathematics that substituting one channel for another on a regulated tier results in the same amount of revenue per channel and per subscriber, all other things being equal. That mathematical tautology, however, only applies if all other things <u>are</u> equal. This can only be true, however, if it is assumed that the content and quality of a cable operator's programming will have no effect on subscriber retention or the cable operator's success in the marketplace.

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[2] NPRM, ¶¶ 29, 93.

Cable operators, like broadcasters and other program distributors, devote significant resources to researching consumer preferences, and to evaluating potential programming in light of that research, because programming choices ***do*** make a difference.

A. The Immediate Forced Dropping Of Cable Networks For Leased Access Programming Will Result In Substantial Losses In Penetration And Subscriber Revenue.

Continental's success in the marketplace depends upon its ability to use its programming to attract and retain subscribers. Programming is what Continental sells, and the quality of what it sells matters in the marketplace.[3]

This would be true even in a hypothetical world of limited competition. Potential subscribers will not buy cable at all, but will instead rely on over-the-air broadcasts and tape rentals for their video programming needs, if cable does not offer quality programming to justify its added cost. But Continental faces an even more competitive world. All of its systems are within the footprint of one or more DBS services, and all of its urban systems face competition from SMATVs. Some of its major systems (e.g., Los Angeles) are subject to direct competition by MMDS operations, often funded by multi-billion dollar entities (e.g., Southwestern Bell/Pacific Telesis). Other systems are facing competition from well-financed overbuilders (e.g.,

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[3] ***See*** Affidavit of Robert A. Stengel, Continental's Senior Vice President — Programming and Advertising ("Stengel Aff."), attached hereto as Attachment 1, at ¶¶ 9-15 & ***passim.*** The discussion to follow shows that selecting programming for a cable system is a complex art of forecasting subscriber demand, license fee arrangements, the current *and future* value of the availability of local advertising to be sold for the channel, the demographic slice of the viewing population that may be delivered by the addition of the channel, compensation for past and current system marketing from which a new programmer benefits, and the programmer's commitment to the long haul.

Plymouth Township, Michigan, where Ameritech has an overbuild in progress). In this environment, Continental's decisions regarding which programs to include on its cable systems have acquired increasing importance.[4]

In order to forecast the impact of a substantial deployment of leased access programming, Continental commissioned a telephone survey of a representative random sample of subscribers to its Broward County, Florida, system. The survey was conducted by The Research Network, a professional public opinion polling and market-research firm. Broward was selected not only for its representative demographics and its present day carriage of leased access programming, but for its location in Florida, which has long been a bellwether state for the cable industry. A copy of this survey and its results is attached to these Comments as Attachment 2.

The survey revealed two dramatic market realities. First, forcing off current programming in favor of leased access programming would result in massive disaffection with cable. More than 60% of respondents stated that replacing existing cable networks with leased access programming would lead to decreased satisfaction with the channels offered on the cable system, while only 6.5% indicated that their satisfaction would be increased. Even more telling, ***more than 30% said they would discontinue service or indicated that they would move to a competing option such as DBS.*** An additional 8% of respondents indicated that replacement of channels with leased access would lead them to downgrade their cable subscription, by cancelling premium services. If only a fraction of these subscribers made good on their threat, the financial and marketplace impact on Continental would be severe. Second, leased access programming

4 Stengel Aff., ¶¶ 32-34.

as it exists in the real world is of virtually no appeal to subscribers. On a scale of 1 (not at all appealing) to 10 (very appealing), more than half of respondents rated typical leased access programming as a "1," and more than two-thirds rated that programming as a "3" or less. Less than 10% of respondents rated such programming as an "8" or higher.

To test these results further, Continental interviewed a broad selection of its operating personnel, including its general managers and comptrollers—the personnel to whom all local programming demands and concerns are directed, and who live with the day in and day out results of marketing. They were each provided the hypothetical opportunity to choose any services on the system which would be displaced by leased access channels, so that they would have every opportunity to mitigate any potential marketplace harm. To a person, every one predicted massive subscriber unhappiness at the loss of channels, even supposedly marginal channels, now carried on systems; and each predicted that if new capacity created by rebuilds were devoted to leased access, rather than to the services long promised to subscribers, customers who had been patient with cable's promises would find this unacceptable, and would turn to the competition.[5]

B. The NPRM's Formula Ignores The Impact Of Leased Access Programming On Subscribership.

As noted above, the NPRM assumes that the revenues that cable operators derive from subscribers should be credited against leased access costs, supposedly in order to avoid "double counting." Both common business sense and the results of Continental's Broward County

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[5] ***See*** Stengel Aff., ¶ 37.

survey show, however, that subscribership will decline in a dramatic fashion if Continental is forced to deploy substantial amounts of leased access programming. In these circumstances, the statutory requirement that leased access rates be "at least sufficient" to "assure" that cable operators will not be "adversely affected" by leased access requires that leased access rates be set high enough to compensate for any customer loss attributable to leased access.

As a matter of mathematics, very small declines in subscribership will totally swamp any alleged "double-counting," particularly in systems with a large number of channels. This is because, while a leased access provider will only be paying for one channel on the system, a subscriber who disconnects stops paying for *all* of the channels on the system. To see how this works, assume that the leased access provider is paying a cost-based rate that compensates the operator for the use of the system. Assume also, with the NPRM, that subscriber revenues are supposed to be covering those same costs. Finally, assume that there are fifty-six channels on the system (Continental's average). In these circumstances, if subscribership did not change, the per-channel revenue received from each subscriber could be viewed as "extra" revenue to offset the cost-based leased access rate. But each subscriber who disconnects causes a loss of revenue that is *fifty-six times as large* as the "extra" revenue that subscriber was previously contributing. In these circumstances, it takes a decline in subscribership of less than 2% to put the cable operator in the hole, even if the leased access provider is paying a fully compensatory cost-based rate and even if the cable operator retains 100% of subscriber revenues.[6]

[6] The precise "breakeven" percentage — the amount of subscriber loss where keeping all subscriber revenues exactly compensates for the lost subscribers — depends on how many channels there are on the system. The more channels, the more severe the impact of each lost subscriber. The formula for calculating the "breakeven" point is: 1/(1+[total channels]).

Attachment 3 demonstrates that if only 1% of subscribers actually follow through on their surveyed reactions, the loss would amount to $0.21/subscriber/month in a typical system. Yet the Research Network survey indicates that over 30% would drop service. Another 8% would drop premium service. This does not even account for the revenues lost when Continental is prevented from developing new programming and advertising niches.[7] In these circumstances, leased access rates would have to be set substantially *above* cost in order to compensate Continental for the lost revenues that would result from deploying leased access programming on a wide scale.

The NPRM dismisses all of these concerns about declines in subscribership as "speculative."[8] However, the Commission cannot ignore marketplace reality, because the statute requires that cable operators be "assured" against financial and marketplace harm. What is truly "speculative" is the assumption that deployment of leased access programming will have *no* impact on subscribership. Given that the statute entitles cable operators to "assurance," to the extent that there is uncertainty about the size of the impact on subscribership of deploying leased access, that uncertainty *must* be resolved in a way that places the risk on the leased access provider, not the cable operator.[9]

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7 See discussion at pp.14-16.

8 NPRM at ¶ 86.

9 Indeed, the NPRM's approach turns the statutory requirement on its head by using revenues from the market in which the cable operator is going to be harmed — the sale of video programming to subscribers — to provide a subsidy to the activity that will be causing the harm. Compounding the problem, the NPRM seems to suggest that the burden of proving that such harm will occur is on the cable operator. ***Id.*** As noted above, however, the statutory language requires that cable operators be *assured* of compensation for such harms. In any event, The Research Network's Broward County survey meets any reasonable burden of proof that might exist under Section 612.

This shows that allowing cable operators who are forced to deploy leased access programming to retain revenues from subscribers does not "double count" anything. To the contrary, the problem is that allowing cable operators to *only* retain those revenues, without an upward adjustment in leased access rates to compensate for lost subscribers, *fails* to "count" the damage to the operator's "financial condition" and "market development" caused by leased access, in direct violation of the statute. In light of the fact that very small declines in subscribership will more than offset revenues attributable to the leased access channel, the absolute minimum that the statute requires is that subscriber revenues not be used as an offset to leased access costs in setting rates to be paid by leased access providers.

C. The NPRM's Formula Would Undermine The Ability Of A Cable Operator To Make Market-Driven Decisions About Programming.

The NPRM's proposal does not reflect the key market reality Continental faces, which is that its customers care about the programming carried on Continental's cable systems. In order to assist the Commission in understanding the problems in the NPRM's proposal, Continental is submitting an affidavit from Mr. Robert A. Stengel, its Senior Vice President, Programming and Advertising. Mr. Stengel is Continental's senior corporate officer responsible for negotiating and contracting with programmers seeking carriage on Continental's cable systems. Among other experience in the television industry, he is a co-author of the Carnegie Commission's *Keeping Pace with the New Television*, a blueprint for several cable television programming ventures for public broadcasting. This affidavit, summarized below, explains the process by which Continental chooses which channels to launch on its systems.

1. Selection and Launch of New Channels on Continental's Cable Systems.

In order to succeed in the marketplace, Continental must offer programming that a substantial number of actual and potential subscribers will find valuable. Yet it must be able to offer that programming under financial terms that make a fair contribution to the extensive fixed costs of operating a cable system. Balancing these concerns leads Continental to consider at least seven interrelated criteria in deciding what new channels to place on its systems.[10]

a. Subscriber Demand.

Continental's key objective is to offer programming that its subscribers will want to watch. The Company's managers regularly collect this information, and will insist, for example, that the next available new launch must be a channel frequently requested by subscribers. In this context, even small audiences will make their tastes well known. Throughout the nation, for example, the Eternal Word Television Network and PTL were launched in response to demands by congregations in local communities.[11] Indeed, it is only logical that most new launches today would be directed towards relatively small "niche" markets, as opposed to the entire viewing public. The reason is that extensive video programming is already available to meet the requirements of the "market as a whole" and most large and easily identified segments of that market. Someone seeking to break into the "market as a whole" would face competition from, for example, the broadcast networks (something for everyone), CNN (news),

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[10] Stengel Aff., ¶¶ 9-16.

[11] Stengel Aff., ¶18.

ESPN (sports), and USA Network (general entertainment), to name some of the more obvious major competitors.[12]

b. License Fees.

New programmers seeking access to Continental systems are typically just beginning their developmental phase. They as yet have no audience or advertiser base, and typically will launch with no license fee to Continental for a certain number of years. During that time, the programmers hope to establish a wide following, both to support advertising sales and to warrant license fees to cable affiliates. Ultimately, the success of cable networks depends on this dual revenue stream, because most believe that there is insufficient video advertising revenue available to sustain singlehandedly all of the cable networks. When Continental considers a launch, it considers not merely the current compensation arrangement this year, but the fees which may be expected over time.[13]

c. Advertising Availabilities.

Offsetting the license fees that Continental might pay a programmer in connection with programming that has, over time, established a solid following in the marketplace are opportunities for advertising revenue for Continental. Advertiser-supported cable networks typically make 2-3 minutes per hour of advertising time available for local insertion. This

[12] Stengel Aff., ¶¶ 17-19.

[13] Stengel Aff., ¶¶ 20-21.

enables a cable operator to sell time to local advertisers and develop third party revenue streams which help to offset subscriber rates. When Continental considers a launch, it considers not merely the current advertising availabilities this year, but the revenues which may be expected from local availabilities over time.[14]

d. Ratings.

Local advertising availabilities are of little value if no one is watching the channel where the ads are to be placed. Continental evaluates customer demand for proposed channels, and what their likely ratings share will be. The judgment Continental makes about the likely appeal of a channel is the very essence of its editorial decision-making. Continental evaluates the markets within which it is operating and projects forward in time to judge likely ratings (and thus likely "value") over time.[15]

e. Demographics.

It is one thing to attract an audience. The type of audience is equally important. Even if a new general entertainment channel has appeal in the face of existing competition, it may merely be diverting the audience currently watching, say, USA Network, and do little to attract new customers who have thus far declined to subscribe to cable due to lack of interest in current programming genres. On the other hand, a channel which develops a new niche will

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[14] Stengel Aff., ¶ 22.

[15] Stengel Aff., ¶ 23.

open new markets for Continental. For example, a channel such as HGTV (a home and garden channel) has the potential for attracting advertisers to video who currently spend the vast majority of their advertising dollars on print and radio. Similarly, a channel such as Encore (family-oriented movies) may reclaim audiences who have disconnected or downgraded their cable service because of objections to the content of other channels. And a channel such as Ovation (arts-oriented programming) might attract a class of customers who have generally chosen not to subscribe to cable at all.[16]

f. Marketing Support.

As noted above, new cable channels frequently waive license fees for an initial period to encourage carriage while viewership is increased. As a result, such channels are almost exclusively advertiser supported. What the programmer wants is the ability to instantly join an already-penetrated package of services, leading to the maximum audience exposure and, ultimately, advertising revenues.

A cable system's penetration, particularly its CPST penetration, is a function of very long term investments by cable operators. As has been thoroughly documented in the Commission's cost-of-service docket, cable operators sustain years of losses and foregone returns

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[16] Stengel Aff., ¶ 24.

as they aggressively market and expand the reach of their systems.[17] The pre-existing base of paying, viewing customers represents a substantial portion of the value of a cable system.

Programmers offering new channels do not expect a free ride on this valuable asset. As a result, they typically pay "marketing support" in order to share some of the past and ongoing marketing costs that cable operators have incurred, and will continue to incur, to build and maintain a large subscriber base.[18]

g. Staying Power.

All of the factors above, explicitly or implicitly, involve an assessment by Continental of how well a new channel will do in the market over the long haul. Just as a cable system itself is a long-term investment, with system coverage, penetration and subscriber loyalty developed over many years, so too is a cable network.

A new channel will only prove its value over the long term. This means that Continental must try to avoid launching channels that may not be backed by adequate commitments on the part of the programmers to long-term quality. If the programmer is not

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[17] ***See, e.g.,*** Comments of Continental Cablevision, Inc., et al., filed in MM Docket No. 93-215 & CS Docket No. 94-28 (July 1, 1994) at 3-16 (explaining the development of ARD and the link between ARD and acquisition premiums); Kane, Reece, Associates, Inc., "Accumulated Return Deficiency Study" (December 1, 1994) (documenting with empirical evidence that cable operators typically require thirteen years or more to fully recover the investment implicit in enduring many years of losses and low earnings and demonstrating that acquisition premiums are not generally excessive in light of those losses and low earnings).

[18] Stengel Aff., ¶¶ 25-27.

committed to providing solid programming for the several years that it typically takes for a channel to build a loyal audience, then Continental could easily do itself more harm than good by launching it, even if the programmer has sufficient financing to produce quality programming for six months or a year.[19]

2. Retention and Renewal of Programming.

The decision to retain and renew a service involves many of the same criteria as apply to new channel launches, but the dynamics change considerably for services that have attracted even a modest audience. Even small audiences will make their presence known if Continental drops a channel. Continental always loses subscribers whenever a channel is dropped; even if it is the third duplicating broadcast network, some core constituents will be avid fans of the M*A*S*H reruns that particular station carries at 4:00 p.m. Moreover, in many cases a cable network that might be dropped is affiliated with one or more programs that are not being dropped. Where possible, programmers will cross-promote channels which have been dropped on those which have not, and will create protests in the community through advertising and other means.

Knowing that the newest entrant is the most vulnerable while it builds its core audience, new entrants typically seek to negotiate long-term carriage agreements to provide

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[19] Stengel Aff., ¶ 28. The FCC should note should note that equity participation by Continental is not even listed as a criterion for channel selection. Ninety-four percent (94%) of the channels on Continental's systems are programmed with services unaffiliated with Continental. Stengel Aff., ¶ 29.

themselves with the running room to build up the audience they need to attract advertisers and a devoted following. They resist any form of part-time carriage or preemptibility, because programmers have found it impossible to sell national advertising on a part-time channel.

3. **Rebuilds.**

Growing competition — particularly DBS operations — have imposed a dramatic, new dimension on the basic programming calculus described above. At the grassroots, DBS is aggressively marketing to subscribers who are eager to see new channels which are available on satellite but not yet on cable. Even though Continental is among the best of the MSOs in timely system upgrades, capacity for new channels is frequently a year or two away. Continental's loyal customers have been waiting for the completion of rebuilds to see the new channels that have been promised them. Filling that new channel capacity with subsidized commercial leased access channels — which all expect to be largely home shopping and infomercials— would be more than disappointing. Continental would expect to see customer defections to other services.[20]

Artificially-induced broad-based leased access deployment would seriously impair rebuild financing. Where new capacity will be consumed with commercial leased access programmers on short-term contracts at subsidized rates, the financial premise of the rebuild is lost. The system would be unable to market to new classes of advertisers and new classes of subscribers. It would be unable to enhance value with new product in order to retain current subscribers. It would be unable to design program packages to attract those who object to the

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[20] ***See*** Stengel Aff., ¶ 36.

content on current channels. Customer losses might be disguised as a slower rate of growth, but the loss would be real.

4. The Newest and Least Established Channels Would Be Dropped.

It is also significant that subsidized leased access programming would supplant either potential new programming or the most recent program additions. Existing programmers are almost always protected by contract to be carried to a certain number of subscribers, so that dropping a service from a system constitutes a breach of contract. The fact that leased access obligations have been at least potentially present since 1984 does not change this analysis. From the outset, commercial leased access programmers made few requests for channels, so operators could plan their contractual commitments to other programmers.

The addition of new program services in recent years has been augmented by regulatory policies both locally and at the FCC. It is commonplace for renewal franchises to be conditioned on the launch of new channels. Likewise, a major element common to FCC Social Contracts is the commitment to launch new channels. Implementation of broadcast retransmission consent has resulted in carriage of new program services. Moreover, the FCC's "going forward" rules, adopted nearly two years ago, were specifically designed to foster the carriage of new, diverse program services.

For all of these reasons, where new capacity becomes available, Continental would have no realistic choice other than to devote that capacity to leased access, and where new capacity is not available, no choice other than to displace the most recently launched, least established channels.[21] This would, ironically, delete from the channel line-ups some of the more interesting and truly "diverse" programming available today, and replace it with what in most cases consists of low budget infomercials and advertising.[22]

5. Loss of Future Advertising

As described above, part of the value of programming to Continental is its ability to attract new demographics, and new advertisers to cable. This ability, and the ability of such niche channels to build greater audiences in the future, cannot be measured at all in terms of current advertising revenues. Those revenues are reflective only of current demographics—not of the potential of new genres to build greater audiences over time, nor of the potential for an operator to devote new channels to new genres to gain those audiences who, as described above, are disaffected from current programming or whose viewing patterns are so divided among other channels that entire classes of advertisers will not yet advertise on television until a new channel can collect that audience in one place. One of the fundamental costs to a cable operator of commercial leased access is the inability to build such audiences with demographics of its choosing.

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[21] **See** Stengel Aff., ¶¶ 38-39.

[22] Stengel Aff., ¶ 42.

D. Conclusion.

The purpose of the above discussion is not to try to persuade the Commission that it can, or should, simply ignore the Congressional mandate that cable systems above a certain size make 15% of their channels available to leased access providers.[23] It is, instead, to underscore that Congress also directed that the leased access rates the Commission establishes must be sufficient to compensate cable operators for the damage in the marketplace that meeting the leased access requirement will cause.

Prior to the 1992 amendments to the Cable Act, cable operators themselves were empowered to determine, in the first instance, how bad that damage would be and what rates would be sufficient to compensate for it. The 1992 amendments empower the Commission to determine the maximum rate needed to "assure" that cable operators are compensated for such marketplace damage. The key flaw of the proposal in the NPRM is that it presumes that there would be no such marketplace damage.

III. THE FORMULA IN THE NPRM INSUFFICIENTLY RECOGNIZES THE TRUE COSTS OF OPERATING A CABLE SYSTEM.

The NPRM's formula assumes that subscriber rates based on the benchmarks fully reflect cable operators' costs. However, as Continental's experience in Commission cost-of-

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[23] Continental, however, reserves the right to challenge, on any appropriate grounds, the application to it of leased access pricing rules adopted in this proceeding.