should consider as an alternative a complaint process alleging that the rates are the problem. A successful prosecution of such a complaint could result in a Commission order that the cable operator utilize the formula rate.

The NPRM also asks whether the proposed cost formula should be phased in for those leased access requests that can only be accommodated by bumping existing non-leased access programming. Such a transition plan would move the leased access rate from the highest implicit fee formula level to the NPRM's proposed new cost formula level over a period of years. Commentors believe that the idea behind this suggestion is valid, but that the NPRM does not go far enough to compensate the cable operator when a non-leased access programmer must be bumped. Commentors instead suggest that the new rate formula should only be applicable in situations where a cable operator would not have to bump an existing non-leased access programmer. In other words, existing services should be "grandfathered" to the extent that, if they are bumped, the channel lessee should have to pay under the highest implicit fee formula. On the other hand, the lease rate for dark channels would be set under the new formula. In order to prevent cable operator manipulation, this grandfathered rate approach could be limited to situations where the cable operator has no choice but to designate some or all occupied channels for its set-aside, i.e., the system has an inadequate number of activated dark channels to meet the set-aside requirement. Precedent for this type of approach can be found in the 1984 Act

which provides that services carried prior to enactment are not even subject to being bumped to satisfy the leased channel set-aside requirement. Commentors believe that the NPRM has given insufficient attention to the problem of bumping non-leased access programmers. Contract provisions may lead cable operators to designate channels for lease based not on which service could be bumped with the least harm to a tier's attractiveness but instead on the penalties or lack thereof for terminating a programming service. Such a result would be totally inconsistent with Congress' overriding goal of promoting program diversity. Allowing the cable operator to charge the highest implicit fee rate in the case of a bumped programmer would at least ameliorate this problem.

2. Part-Time Rates

In the NPRM, the Commission has decided to continue to require proration of the maximum rate with time of day pricing for part-time leased channel use. The NPRM asks whether under a new full-time rate formula there might be a different method for calculating the maximum reasonable rate for part-time use. Commentors submit that the entire concept of part-time use is questionable. Section 612 of the Act does not even mention part-time leasing. Thus, it may be that the requirement even to make a channel available for one or more part-time lessees exceeds the Commission's authority. However, if part-time leasing is legal, even the highest implicit fee formula, when prorated for part-time usage, does not compensate the cable operator unless the

channel being used for part-time leasing is fully occupied. Thus, whatever formula the Commission adopts to determine a full-time lease rate, prorating of this rate is noncompensatory. The NPRM obviously senses a problem in this regard in its proposal to require the guarantee of a minimum time increment of eight hours within a 24-hour period as a precondition for requiring an operator to open up an additional channel for part-time leased access. Even this proposal falls short of what is needed. Such a concept should be applied not only to the opening of an additional channel but also to the opening of the first part-time leased access channel. This would not cure the economic injury which part-time use causes to a cable operator, but it would begin to address the issue.

3. Preferential Access

The NPRM again raises the issue of whether it should establish a special rate category for not-for-profit programmers and whether cable operators should be required to reserve some of their leased access channel set-aside for such programmers. The NPRM appears to be concerned that not-for-profit programmers are being excluded from leased access but has no evidence as to why that may be the case. If the problem is at least partly that rates are unaffordable for such entities, the Commission should do nothing until it has experience under a proposed new rate formula which is designed to produce lower rates. If rates are not the problem, there is no possible reason to consider reserving a portion of the set-aside requirement for not-for-

profit programmers. At the present time, as the NPRM acknowledges, cable operator set-asides are far from being fully utilized. Moreover, if Commentors are correct that Section 612(c) permits cable operators to discriminate among lessees in the matter of rates, the problem of not-for-profit programmers may solve itself. If they offer desirable programming, cable operators would be free to quote them below average rates while charging higher rates to commercial lessees whose programming may not be as desirable.

4. Tier and Channel Placement

The NPRM tentatively concludes that the provision of a "genuine outlet" for leased channel programmers would be satisfied by placing (non-premium) leased channels on the BST and/or the CPST with the highest subscriber penetration. Commentors support the continuation of this existing practice and the retention of the cable operator's discretion as to what channels to designate and on what tiers these channels should be located. The NPRM also seeks comments on whether a CPST which does not boast the highest subscriber penetration could be used and, if so, under what circumstances. It seems obvious to Commentors that channels to be utilized for per-channel or per-program uses need not be on the BST or any CPST. As is the case with programming that cable operators themselves offer in these categories, such channels are unique. Any subscriber who desires to receive such a channel must always have the necessary equipment in its home. These services are never part of a BST or

CPST and therefore these programming services should be an exception to the "genuine outlet" requirement.

5. Opening New Lease Channels

As part of its concern about bumping existing programmers and lighting a dark channel, the NPRM proposes to continue the practice of not mandating the opening of a new part-time leased access channel so long as there is a time slot available which is comparable to the specific time slot requested by a leased access programmer. Commentors support that proposal. In addition, when it becomes necessary to remove an existing full-time programmer or open up a dark channel,[14] the NPRM proposes to require a leased access programmer to agree to a minimum time increment of eight hours within a 24-hour period. A stronger requirement than that is needed. A programmer could commit to eight hours a day for two days this week but make no commitment beyond that. A commitment for a certain number of days of the week and a minimum number of weeks or months should be used to bolster this requirement. This is particularly important where the cable operator is asked to bump an existing non-leased access programmer.[15]

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[14]Commentors ask the Commission to confirm their belief that the addition of a new leased channel programmer, whether on a bumped or dark channel, does not count against a cable operator's going forward quota.

[15]In this regard, Commentors note that both Congress and the Commission require 30 days advance notice for any change in video services. This speaks to a minimum 30-day commitment when an existing service must be bumped.

6. Selection of Programmers

The NPRM tentatively concludes that the first-come, first-serve approach is preferable to giving the cable operator discretion to select among leased access applicants. The NPRM does propose, however, to allow the cable operator to select among applicants if its set-aside capacity is insufficient to accommodate all pending leased access requests. Although Commentors would like to have the discretion to select among leased access applicants in order to select the programming which would be most compatible with the services already being provided, they recognize that this may not be legally permissible but, as explained above, Commentors do believe that cable operators have the discretion under Section 612(c) of the Act to discriminate among lessees as to rates based on programming content. This would give cable operators a modicum of control over the mix of services on their tiers.

The NPRM seeks comment on whether it should require that one or two of a cable operator's leased channel set-aside should be exclusively reserved for part-time use. Commentors believe that this will only magnify the problems involved with part-time use in the first place. Part-time users should be placed on a single channel unless and until comparable time slots are unavailable for part-time use applicants. In addition, full-time applicants should receive preference for set-aside channels, even to the point of allowing part-time users to be preempted.

7. Dispute Resolution

The NPRM proposes to require that a programmer not be permitted to file a complaint alleging an incorrect calculation of a maximum rate unless an independent certified public accountant ("CPA") has reviewed the operator's calculations and made an independent determination of the maximum rate. The cable operator must agree on the identity of the CPA. The NPRM asks whether it should consider the CPA's determination to be dispositive of the question. Commentors believe that the CPA's determination should be presumptively correct, but it should be a rebuttable presumption. The NPRM also asks who should pay the CPA's expenses. Commentors believe that the full amount of the CPA's expenses should be paid by the party seeking to lease a channel unless the accountant's report proved that the operator's quoted rate was more than 10% above the allowable amount. Commentors support the Commission's proposal because it is designed to avoid filing of frivolous complaints and should promote the informal settlement of rate disputes.

8. Resale of Leased Access Time

The NPRM asks whether leased access time should be permitted to be resold by a channel lessee. Whatever the benefit of reselling time might be to programmers, allowing people unaffiliated with the cable operator to lease time from another unaffiliated person is a further attenuation of the relationship between the cable operator and the programming on its cable system. Moreover, the Commission could not establish the rates

for resale of leased time and would therefore not be carrying out the mandate of Section 612 to ensure that leased access time is available at reasonable rates. Indeed, insofar as there was a demand for resale of leased time, this would be strong evidence that the Commission's rate formula was far below the marketplace. Finally, the cable operator could not exercise its discretion to block indecent programming if resale is allowed. Therefore, Commentors submit that the Commission should not permit leased access time to be resold by the lessee. At a minimum, the Commission should allow cable operators to decline to lease time for resale.

E. ISSUES NOT RAISED IN THE NOTICE

1. Cable Operator Liability

The contracts which most cable operators ask channel lessees to sign contain representations that a lessee will not engage in conduct which would create legal liability for the cable operator and that all necessary clearances will be obtained. In addition, the contracts usually require that the lessee indemnify the cable operator against any liability which may nevertheless accrue. These provisions will not, however, protect a cable operator in the event of a successful lawsuit, or even against the cost of an unsuccessful lawsuit, if the channel lessee is not financially able to shoulder significant monetary liability.

Section 638 of the Communications Act attempts to address this problem by providing that cable operators are not liable, either civilly or criminally, for various enumerated types of

conduct by their channel lessees. Unfortunately, the list of subjects in that statutory provision is not inclusive. Thus, although libel and slander are specifically mentioned, for example, the copyright and trademark laws are not named. It may be that Congress intended for a channel lessee not to be exposed to any liability (other than for obscenity) for the conduct of a channel lessee over whose content the cable operator has no control. However, insofar as Section 638 does not literally provide such comprehensive protection for a cable operator, Commentors submit that it is wholly reasonable for a cable operator to ask a channel lessee to adequately protect the cable operator for the content of programming over which it can exercise no control, at least until such time as the scope and validity of a Section 638 defense has been more clearly defined.

Therefore, the Commission should permit cable operators to require evidence from channel lessees that they have the right to transmit any copyrighted material contained in their programming or, in the absence of such a showing, the cable operator should be permitted to require a lessee to secure adequate insurance or post a bond in an appropriate amount as a substitute mode of protection. The central purpose of such requirements is to provide protection for the cable operator in the event that it is required to share the liability of a channel lessee in any proceeding, civil or criminal, or even to defend itself against such claims while this area of the law remains unsettled.

2. Leased Channels in a Digital Environment

With the imminent advent of a digital environment, a number of issues arise which Commentors believe the Commission should be thinking about now. Two of these issues are discussed below.

When cable systems are converted to digital transmission capability, the present definition of an activated channel will lose meaning because of compression, thus raising the question of how to calculate a system's leased access requirement. Available technology permits four video signals to be transmitted in the space of a 6 MHz analog channel. People working with the technology believe that as many as eight video channels can be squeezed into 6 MHz without a noticeable loss of signal quality. Complicating this arithmetic multiplication of channel capacity is the fact that many systems may be partly analog and partly digital for some period of time. In addition, a technology now being tested by a major cable operator would not only expand the number of video signals which could be simultaneously transmitted on a cable system, it would continuously vary the amount of MHz each video signal occupies based on the amount of "information" a particular programming source needed to transmit at a given instant, i.e., a static scene needs less bandwidth than a rapid movement sequence. Should the Commission stay with the 6 MHz analog model for calculating the set-aside? Should it instead use a percentage of activated MHz? Or a percentage of MHz which is activated for video purposes (as opposed to data or other uses)? Or a percentage of the activated video signal capacity a

system is capable of transmitting? Commentors urge the Commission to deal with this question now rather than waiting until the issue is pressing.

With the coming of digital technology, and the likelihood that "channels" will be almost any bandwidth, the Commission should clarify that an applicant wishing to lease time can be restricted to the provision of video programming. Section 612(a) states that "[t]he purpose of this section is to promote competition in the delivery of diverse sources of video programming . . . " To implement that purpose, Section 612(b)(1) states that cable operators must "designate channel capacity for commercial use." Section 612(b)(5) goes on to define "commercial use" as "the provision of video programming." Consistent with that language, the Commission should make it clear that cable operators are not required to lease capacity on their systems for other than video programming uses. Cable operators should not be precluded from allowing leased access time to be used for other than video programming but Commentors submit that Section 612 circumscribes a cable operator's legal obligation. If the Commission were to require cable operators to lease space on their systems for purposes beyond those set forth in Section 612, it would conflict with the proscription in Section 621 of the Act that cable systems "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."

CONCLUSION

Commentors submit that the current highest implicit fee formula is not in need of revision. Commentors believe that the explanation for the limited use of leased channels lies with factors outside of the rate formula. In any event, Congress' original goal of diverse programming sources is being well-served by cable systems. If the Commission still believes that its formula must be revised, Commentors urge the Commission to make a less radical change than the NPRM proposes, perhaps along the lines suggested herein.

Respectfully submitted,

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