last until the Commission reviews its leased access rules and be reassessed at that time.[30]

B. A Non-Profit Set-Aside Is Consistent with and Furthers the Goals of the First Amendment.

Preferential treatment for non-profit programmers is consistent with the First Amendment because it is a content-neutral, structural regulation founded in the tax classification of the programming entity. A non-profit set-aside breaks no new First Amendment ground. Indeed, when leased access to cable systems by unaffiliated programmers was challenged on the basis of the First Amendment, Congress found that an access scheme that requires operators to set-aside channel capacity for lease could withstand strict scrutiny because it "[promoted]. . .the basic underlying values of the First Amendment." The House Report of the 1984 Cable Act which includes an exhaustive analysis of access channel requirements concludes that:

> [these requirements] fit squarely within the category of limited structural regulation of the media that has been consistently upheld by the courts as a constitutionally-permissible means of encourage a diversity of information sources. Cable access regulations are "content-neutral, yet substantially increase[ ] the number of voices that can reach the homes. . ."[31]

Similarly, the non-profit set-aside would promote the diversity interests underlying the First amendment by ensuring that non-profit programmers, an important source of the diverse viewpoints is not shut out of the cable television medium. The set-aside would be content-neutral because it would be made on the basis of economic status --

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[30] See section VI, infra.

[31] 1984 House Report, quoting D. Bazelon, The First Amendment and the "New Media"--New Directions in Regulating Telecommunications, 31 Fed.Com.L. J. at 210 (1979).

a distinction that Congress has long singled out as a standard for preferential treatment and that courts have upheld against First Amendment challenges.[32]

C. PEG Channels do not Provide an Adequate Leased Access Outlet for Non-Profit Programmers.

The Commission seeks comment on the extent to which non-profit programmers can access cable systems via public access channels.[33]

As the NPRM notes, a minority of cable systems carry public educational and governmental ("PEG") access; the Alliance for Community Media estimates that approximately 2,000 systems have any PEG access, whether public, educational, or governmental.[34] As of 1990, only 16.5 percent of systems had public access channels; one estimate suggests that since then, the percentage has gone down, so that less than 10 percent of cable systems now have any public access capability.[35] Many systems carrying PEG access limit themselves to governmental and/or educational access only, and offer no access at all to non-profit organizations not of the access

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[32] "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market." Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969); 52 F. Supp. 362 (S.D.N.Y. 1943), aff'd sub nom. Associated Press v. United States, 326 U.S. 1, 20 (1945) ("[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."); see generally 1984 House Report at 31, 33-34 (describing First Amendment, diversity considerations behind leased access).

[33] FNPRM at ¶ 112.

[34] See "Declaration of Barry Forbes," ("Forbes") attached as Appendix C, at ¶ 22.

[35] FNPRM at ¶ 105, n.131; see also Aufderheide, *"Cable Television and the Public Interest,"* 42 Journal of Communication, 52 (1990); but see Forbes at ¶ 26 (public access available on less than 10 percent of cable systems).

provider's choosing. This simply does not represent the ready availability of non-profit access to video platforms that was contemplated by Congress.[36] Some major cities, such as Philadelphia, PA, Los Angeles, CA, and Tampa, FL, and five states -- Delaware, Utah, Wyoming, South Carolina and West Virginia -- have no public access facilities whatsoever.[37]

Moreover, public access is intrinsically local in nature. It does not provide the opportunities for national coordination and distribution of non-profit programming that might otherwise be provided by leased-access non-profit programming services. The majority of public access centers, by franchise agreement, local ordinance, or PEG access center policy, require programming to be either locally-produced, or provided under the sponsorship of an individual who is a resident of the cable system's service area.[38] These policies were enacted in order to comport with Congress' intent that PEG access serve local needs.[39] A national non-profit organization wishing to transmit a program on every public access channel would have to engage in the arduous process of finding a local sponsor for every jurisdiction that permitted such sponsorship, and mailing a videocassette tape to that person.[40] The non-profit would of course be barred from showing its program on public access channels which only transmit locally-produced programs. Showing a program in an identical time slot on all public access

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[36] 1984 House Report at 51.

[37] Forbes at ¶ 24.

[38] Id. at ¶ 14.

[39] 1984 House Report at 57-48.

[40] This process is referred to as "bicycling."

channels would be impossible; many public access centers have a "first-come, first-served" scheduling policy that prevents such predictability.[41]

Consequently, relegating all non-profit programming to public access channels effectively impedes mass communication by national non-profit organizations. Failure to provide non-profit leased-access rates limits opportunities for non-commercial speech to the minority of jurisdictions that have successfully negotiated with cable operators to have public access centers provided pursuant to the locality's franchise agreement. This widespread lack of availability of non-profit speech opportunities undermines Congress' intent that non-profit programming be available as a programming choice for cable subscribers.[42]

IV. In addition to Adopting Safeguards to the Cost/Market Rate Formula, the Commission Must Administer the Formula to Favor Maximum Use of Leased Access Capacity.

A. The Commission Should Adopt Procedures for Redesignation and Recalculation of Rates that Favor Long-term Contracts and Promote Stability.

CME agrees with the Commission that it is reasonable to allow operators to recalculate rates and redesignate channels to account for changes in market

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[41] Forbes at ¶ 12.

[42] "Third-party commercial access complements PEG access by assuring that sufficient channels are available for commercial program suppliers with program services which compete with existing cable offerings, or which are otherwise not offered by the cable operator (for political reasons, for instance). 1984 House Report at 30. Congress defined "commercial use" as "the provision of video programming, whether or not the third party providing the program service is a profit or nonprofit entity." Id. at 48. Leased access was further differentiated from PEG in the following excerpt: "The term commercial use is employed to distinguish from public access uses which are generally afforded free to the access user, whereas third party leased access envisioned by this section will result from a commercial arrangement between the cable operator and the programmer with respect to the rates, terms and conditions of the access use." Id

conditions. FNPRM at ¶ 100. At the same time, predictability and reliance on stable conditions is important for any organization, and especially the typical non-profit organization that operates on a thin budget. Leased access programmers need to be able to predict what channels they will occupy and how much they will have to pay for carriage. Therefore, it is vital that the Commission adopt rules in this area that would favor multi-year contracts and promote stability. Annual redesignation and/or recalculation should not require renegotiation of the entire contract.

CME believes that contracts should typically run for three to five-year terms. Rules that favored these longer term contracts would prevent operators from only negotiating short-term leases so as to discourage extended competition with affiliated or established programmers. Short term contracts (contracts of two years or less) probably would not give lessees enough time to amortize their start-up investment.

In this vein, CME agrees that the Commission should allow parties to agree that the maximum rate be cumulative over the life of the leased access contract. FNPRM at ¶ 101. Giving the parties the option of setting the rate below the maximum at first, and higher later would encourage the development of leased access programming. This option would allow less funded programmers to gain carriage on a system, build viewership, and then pay the higher rate when their service is better established. However, CME believes that the Commission should prohibit operators from charging greater than the total maximum rate over the life of the contract, or front-loading the payment terms of the contract, forcing leased access programmers to pay higher rates at the beginning of the contract. Front-loading arrangements have the potential to discourage leased access, essentially by circumventing the maximum reasonable rate.

B. The Commission Should Adopt Channel Allocation Procedures that Encourage Diversity of Programming and Tier Placement Requirements that Help Fulfill the Congressional Intent to Have Leased Access Programming Reach Most Cable Households.

CME agrees in principle with the Commission's tentative conclusion that, to effectuate Congress' intent, leased access channels should be allocated in the order that programmers apply for carriage.[43] However, CME is concerned about the possibility of a single programmer requesting large amounts of capacity early and shutting out other programmers. CME proposes a modified "first-come, first-serve" approach that would have the advantages of reducing the number of disputes about allocation and promoting the diversity goal of the Cable Act on small systems, while providing an easy way to allocate channels on systems with greater capacity. Specifically, CME proposes that one leased access channel, where it is the only channel available for lease on a system, be leased through a process of mediation:

(a) programmers would submit requests to the cable operator to lease a portion of the reserved channel;

(b) no one programmer would be allowed to take more than half of the reserved channel;

(c) if more than one programmer requests the same time slot, those parties would choose a mediator to resolve the dispute;

(d) if a solution is not agreed to within 60 days, then the dispute would be resolved by a lottery conducted by the mediator;

(e) the FCC would intervene only to establish and enforce fair procedures.

Where two or more channels are available for lease on a system, at least one channel should be made available to for-profit programmers and one to non-profit programmers

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[43] FNPRM at ¶ 128.

through the mediation procedures outlined above. This mediation approach to allocating channel capacity on cable systems with only one non-profit or leased access channel is consistent with the Commission's desire to streamline and privatize its dispute resolution process.[44]

In terms of tier placement, the Commission concludes that, absent some compelling reason, leased access programmers have the right to be placed on a tier, as opposed to being carried as a premium service.[45] CME agrees and also supports the Commission's position that, in most cases, the cable programming service tier (CPST) would constitute a "genuine outlet" for leased access programming, one that "most subscribers actually use."[46] CME believes, however, that any CPST that does not reach at least 90% of subscribers cannot be considered a "genuine outlet."[47] In such situations, the leased access channel must be carried on the basic service tier (BST) to comply with Congressional intent of making varied programming available to most cable subscribers.[48]

C. The Commission Should Establish Part-Time Rates by Prorating the

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[44]See infra Section V.

[45] FNPRM at ¶ 118.

[46] 1992 Senate Report at 79.

[47]The Senate report of 1992 Cable Act notes: "if programmers using these channels are placed on tiers that few subscribers access, the purpose of this provision is defeated. The FCC should ensure that these programmers are carried on channel locations that most subscribers actually use." 1992 Senate Report at 79.

[48] The American Heritage Dictionary defines the word "most" as: "1. Greatest in number quantity, size or degree. 2. The greatest part of". This would indicate that Congress intended "genuine outlet" to mean more than availability to a bare majority of subscribers.

Maximum 24-hour Rate.

CME believes strongly that part-time access to leased access channels is crucial to the effectuation of Congress' purposes under the Cable Acts. Part-time leasing promotes diversity of sources, because it allows leased access programmers, particularly non-profit entities, to gain access without incurring the expense of obtaining a full-time channel. The Commission requests comment on whether proration of the 24-hour rate is appropriate method for establishing part-time rates under the proposed cost formula. FNPRM at ¶ 102. CME believes that prorating the maximum rate with time of day pricing is an appropriate method for establishing part-time rates under the proposed cost formula and that the Commission should retain the restriction that part-time rates for a 24-hour period not exceed the maximum reasonable rate.

The Commission further also requests comment on how "part-time" should be defined. FNPRM at ¶ 102. CME believes that "part-time" should be defined as leases for less than a 24-hour period, which will leave programmers free to make sensible market decisions. Monitoring and regulation of operator conduct in this area is, as always, crucial to the effectiveness of leased access. Operators should be required to strictly adhere to their rate cards, and make not only the card but the information on which these rates are based available to prospective lessees.[49]

D. The Commission Should Prohibit Cable Operators from Assigning Intangible Lost Opportunity Costs for Dark Channels.

The Commission proposes to allow operators to use as a proxy for the opportunity costs of dark channels the positive per channel opportunity cost of the programmed

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[49] See discussion supra at 13.

channels on the system with opportunity costs that have the lowest positive values, excluding must-carry, PEG, or any leased access channel.[50] CME disagrees with this proposal and believes that cable operators should make only a nominal assessment of net opportunity cost unless the operator can show that there are concrete and non-speculative opportunity costs to leasing a dark channel. This approach would be administratively efficient and reflect the true opportunity costs of dark channels. Attempting to value the intangible lost opportunity costs of a dark channel is an exercise in speculation. If the Commission insists upon its proposal, however, operators should be required to use as a proxy channels with a zero net opportunity cost as well as those with positive values. Although the Commission suggests that a channel with negative net opportunity costs may be the result of a deficiency in the formula,[51] CME believes that the net opportunity cost for dark channels should generally be near zero; to exclude channels with zero opportunity costs from the calculation is simply to subsidize the operators.

E. The Commission Should Permit Resale of Leased Access Time, only Subject to the Same Conditions as Lease by the Operator.

At ¶ 141, the Commission requests comment on the resale of leased access time by the lessee, not including advertising time. CME recognizes that substantial benefits can accrue from allowing resale. However, as the Commission acknowledges, resale presents an opportunity for lessees to circumvent the maximum reasonable rate, by reselling limited leased channel capacity at exorbitant rates. FNPRM at ¶ 141. That

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[50] FNPRM at ¶ 87.

[51] FNPRM at ¶ 88.

result would violate the Commission's mandate to establish maximum reasonable rates. Therefore, CME believes that programmers should be are allowed to resell leased access time, subject only to the same regulations as the cable operator originally leasing access. This means that the lessee would be prohibited from exercising editorial control over the sub-lessor and would be held to a single leasing standard, including, maximum reasonable rates and part-time leasing.

In order for the Commission to efficiently monitor resale, lessees who choose to resell limited leased access time should be made directly responsible for complying with the Commission's rules, and complaints should flow from the sublessee to the lessee.

F. The Commission Should Permit Minority and Educational Programming to Substitute for Leased Access Only if the Programming Occupies a Position that Would Otherwise be Occupied by a Leased Access Programmer.

CME supports the Commission's basic conclusion that "minority and educational programming should not qualify as a replacement for leased access programming unless it is carried on the BST or a CPST that qualifies as a genuine outlet." FNPRM at ¶ 132. CME also agrees that to do otherwise would defeat Congress's purpose of allowing minority/educational programming to substitute for leased access. Id. However, CME objects to the Commission allowing the operator to have complete discretion to choose on which qualifying tier to place the programming. Allowing minority and educational programming to substitute for leased access would only be fair and consistent with the statute if minority and education programmers enjoyed the same tier and channel placement protections as other leased access programmers. To

qualify as a substitute, the minority or educational programmer must be placed in a position that would otherwise be occupied by a leased access programmer. The operator should not be permitted to avoid its leased access obligations by carrying a minority or educational programmer in a less desirable channel position.

G. The Commission Should not Institute a Transition Period.

At ¶ 99 of the FNPRM, the Commission questions whether transition relief would be appropriate in the case of new leased access requests on systems without dark channels where an existing programmer would have to be bumped. Although a transition period would minimize disruption, such a period would be inequitable since cable operators would essentially be benefiting from obstructing leased access for the last twelve years. CME does not believe that cable operators would be unduly penalized for the decision to use designated channels for non-leased access programming, since the operators stifled the demand for leased access for the very purpose of being able to program those channels.

Furthermore, a transition period that would permit cable operators to charge a rate greater than what the cost/market rate formula allows, would be inconsistent with the Commission's obligation to establish reasonable maximum rates. CME strongly urges the Commission not to implement a transition period or any other type of phase-in of its maximum leased access rate formula. Any rate greater than the maximum rate would discourage potential lessees and allow cable operators to continue to circumvent Congress' goals. Finally, there is no practical reason for giving the operators more time to implement the proposed cost rate formula; the switch from an incumbent programmer or an unused or dark channel can be made almost instantaneously. The

effective date of the Commission's new rule should herald the beginning of affordable leased access rates and diverse cable systems.

V. The Commission Should Adopt a Dispute Resolution Procedure that Does Not Unduly Favor the Cable Operator and Fulfills the Statutory Mandate of Expedited Resolution.

CME disagrees with the Commission's proposed dispute resolution procedure as set out in paragraphs 137 and 138, and reasserts its proposals on this matter made in earlier filings.[52] The Commission's proposed procedure would not only lengthen any rate dispute by the time required for an accountant to make an independent determination of the rate, but if the parties could not agree on an accountant would allow the operator to choose the accountant.[53] A default that allows the party against whom the complaint is being lodged to choose the person to conduct the review, inherently undermines the impartiality of the review. Further, the operator would be allowed to choose what sort of information is "necessary" to the determination of the rate, and to formulate a post hoc explanation for the rate's validity.

Moreover, the Commission's proposal would not provide the sort of access that potential lessees need to determine the adequacy of rates. The accountant's report that is to be placed on public file could easily exclude the data upon which the report is based. To have any chance of serving the statutory purposes, the report must include all the information on which the accountant's conclusions were based. Even this sort of

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[52] See CME Petition at 17-21; FNPRM at ¶ 134. CME would like to register its general support for alternative dispute resolution, and would support a proposal that would provide for more efficient and equitable resolution of leased access rate disputes.

[53] FNPRM at ¶ 137.

disclosure might be leave out crucial data that the operator did not turn over to the accountant. Finally, the idea of an independent accountant selected by one party raises the issue of who pays for the services. It would be unfair to doubly punish a lessee for challenging unfair rates by not only letting the operator choose the accountant, but making the lessee pay for half of his services. Moreover, the operator's share of the costs of the accountant would presumably be transferred to the prospective lessee in the form of administrative costs, to be included in the net opportunity cost calculation.

CME's recommended solution would be to require the operator to select an accountant from a list provided by the programmer and that accountant's costs would be borne by the cable operator.

VI. The Commission Should Review this Rulemaking in Three Years and Make Any Necessary Adjustments to Effectuate Congressional Intent.

CME recommends that three years from the effective date, the Commission revisit decisions made in the course of this Rulemaking. The propriety of some of the assumptions and data relied upon in regulating leased access channels will presumably be made clear after three years of experience with the new regime. Moreover, inadequacies in the leased access rules, and especially in the Cost/Market Rate Formula, may be identified during their implementation, If further reforms are needed, possibly adopting a rate for non-profits based on incremental cost, the Commission would then have the opportunity to make necessary adjustments to promote leased access and to advance the Congressional purpose of competition and diversity in the sources of video programming.

CONCLUSION

For the reasons stated above, the Commission should adopt appropriate safeguards, including a set-aside for non-profit programmers, to its opportunity cost/market rate formula for establishing a maximum reasonable rate for leased access.

Respectfully submitted,

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May 15, 1996

APPENDIX A

Descriptions of Organizations

CENTER FOR MEDIA EDUCATION

The Center for Media Education ("CME") is a non-profit public interest group which works to increase the diversity of telecommunications providers. CME represents the interest of non-commercial organizations in media policy decision-making, especially as related to the new distribution technologies.

ALLIANCE FOR COMMUNITY MEDIA

The Alliance for Community Media (Alliance) is a national membership organization comprised of more than thirteen hundred organizations and individuals involved in public, educational and governmental ("PEG") access organizations throughout the country. As, such, the Alliance represents the interests of religious, community educational, charitable and other non-commercial, non-profit institutions who utilize PEG access centers and facilities to speak to their memberships and their larger communities and participate in an ever-growing "electronic town hall." The Alliance accomplishes this by creating public education, advancing a positive legislative and regulatory environment, and supporting local organizing.

ASSOCIATION OF INDEPENDENT VIDEO AND FILMMAKERS

With a membership of over 5,000 independent media producers, Association of Independent Video and Filmmakers is a leading advocate for independents' access to public and private funding, and to distribution opportunties through public television and cable systems, as well as to theaters, museums, galleries, educational institutions and community organizations across the country.

CONSUMER FEDERATION OF AMERICA

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy organization, composed of over 250 state and local groups with some 50 million members. founded in 1968, CFA's mission is to represent consumer interest before the Congress, in Courts and at Federal Agencies. CFA has been extremely active on telecommunications matters, having participated in virtually every federal regulatory and legislative proceeding dealing with regulatory structure since divesture. It has provided support to its member local groups in states as diverse as Arkansas, California, Colorado, Maryland, Missouri, New York, Oklahoma, Vermont, and Texas, and has prepared extensive empirical analysis of the current status of the telecommunications network and industry.

UNITED STATES CATHOLIC CONFERENCE

The United States Catholic Conference ("USCC") is a nonprofit corporation organized under the laws of the District of Columbia whose members are the active Catholic Bishops of the United States. The USCC advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, the economy housing and communications.

APPENDIX B

APPENDIX C

DECLARATION OF BARRY R. FORBES

1. I, Barry R. Forbes, declare as follows:

2. My name is Barry R. Forbes. I am over the age of twenty-one and fully competent to make this declaration. I am a resident of the state of Virginia. My home address is 2407 Leslie Avenue, Alexandria, VA 22301. The statements contained in this declaration are within my personal knowledge or opinion, and each is true and correct

3. I am the Executive Director of the Alliance for Community Media ("Alliance"), a non-profit national membership organization which is involved in telecommunications issues. I have served in such capacity since July 15, 1994. I have been associated with a public access center as a program producer and/or member of the center's board of directors since 1989.

4. The Alliance for Community Media is registered as a 501(c)(3) tax-exempt corporation, located in the District of Columbia. Its office address is 666 11th Street, N.W., Suite 806, Washington, D.C. 20001. Its main telephone number is (202) 393-2650.

5. The Alliance was founded in 1976 as the National Federation of Local Cable Programmers. It changed its name to the Alliance for Community Media in 1991, to more accurately reflect its mission and the composition of its membership.

6. The mission of the Alliance is to assure all Americans' access to electronic media. The Alliance accomplishes this by creating public education, advancing a positive legislative and regulatory environment, and supporting local organizing.

7. The Alliance represents the interests of over 950 public, educational and governmental ("PEG") access organizations throughout the country. Many of these organizations are PEG access centers.

8. PEG access centers are organizations that facilitate, produce and/or transmit public, educational and governmental access programming. These centers are created and maintained pursuant to a franchise agreement between a local government entity, usually a city, and the franchisee cable operator.

9. The cable operator provides PEG access capacity, facilities, equipment and services as part of the package of compensation to the government entity for the franchise. Generally, such a franchise includes an easement for use of public rights-of-way for laying coaxial cable and other transmission equipment.

10. PEG access provisions have been included in franchise agreements since the beginning of cable television. Local governments' continuing authority to ask for and receive such access capacity, facilities, equipment and services is protected by Section 611 of the 1984 Cable Act, codified at 47 U.S.C. § 531.

11. Generally speaking, educational and governmental access programming is under the editorial control of an organization selected by the franchising authority. In the case of an educational access channel, such organization is usually a college, university, or school district. In the case of a governmental access channel, such organization is usually a city or county or an agency of such city or county. In both cases, the organization generally maintains control over the material transmitted by that access organization.

12. Public access channels are generally required by franchise agreement, local ordinance or state law to transmit programming supplied by the general public on a first-come, first serve basis. Generally, the organization managing the public access center may not exercise any editorial discretion over selection or content of public access programming, except where such programming is contrary to law (such as obscene or libelous programming). On information and belief, public access centers do not permit discrimination on the basis of viewpoint.

13. On information and belief, many public access centers are authorized by state law, local ordinance, franchise agreement, or center policy to place reasonable content-based restrictions on public access programming. These restrictions are generally limited to time, place and manner restrictions, and restrictions that prohibit commercial programming or commercial messages. These restrictions are consonant with the mission of public access, which is to provide a meaningful platform for local non-commercial voices, including non-profit organizations and individuals, to transmit their views and messages via cable television.

14. On information and belief, many public access centers are authorized by franchise agreement, center policy, state law or local ordinance to restrict the transmission of programming to programs either produced or sponsored by a resident of the franchise area. Such local-production/local-sponsorship requirements are managed on a viewpoint-neutral basis. In jurisdictions where this policy is implemented, only programming provided by a local resident will be transmitted. This policy responds to Congress' concern that public access programming promote the goal of localism.

15. In my opinion, PEG access provides an important resource for local non-profit organizations and governmental units to transmit public service programming of interest to that particular community, and effectively carries out the will of Congress in promoting the building of local communities by allowing local residents the opportunity to speak to each other about local concerns.

16. On information and belief, public access channels do not provide an efficient and effective means for national and state-wide non-profit organizations to transmit programming, because of the difficulty national and regional organizations would have in complying with public access centers' localism requirements.

17. On information and belief, public access channels do not provide an effective means to achieve general distribution of programming, because only a minority of cable systems are required by franchise agreements to provide public access capacity, facilities, services, and equipment.

18. In 1990, Professor Patricia Aufderheide completed a study documenting the prevalence of PEG access on cable systems throughout the country. The results of that study were published as "Cable Television and the Public Interest," in 42 Journal of Communication 52 (1992) ("Aufderheide").

19. According to Aufderheide, only 16.5 percent of cable systems maintained any form of public access channels. On information and belief, a substantial minority of these channels are available for public use are available for only a few hours each week. Consequently, I am of the opinion that public access is neither comprehensively available nor sufficient to meet the needs of non-profit organizations that wish to distribute programming nationally.

20. According to Warren, 63 Cable and Television Factbook at iv, there were 11,351 separate cable operating systems in the United States as of 1995

21. In 1993, the Alliance received a grant from the John D. & Catherine T. MacArthur Foundation to assemble a comprehensive listing of PEG access centers around the country. The survey, which was completed over the course of six months, was able to locate 962 PEG access organizations (including local cable commissions, public service commissions, and non-profit organizations which support film and video arts, but which neither produce nor transmit video programming). These entities are listed in Alliance for Community Media, Community Media Resource Directory (1994) ("CMRD").

22. On information and belief, the survey published in the CMRD located approximately half of the PEG access organizations that exist. Based on the data collected in the CMRD and my personal experience, I would estimate that there are approximately 2,000 PEG access organizations throughout the United States, including those organizations that support and regulate, but do not produce or transmit cable access programming.

23. Of the 962 organizations listed in the CMRD, 524, or slightly more than half, offer public access.

24. The survey published in the CMRD was unable to locate any public access centers in five states -- Delaware, South Carolina, Utah, West Virginia and Wyoming. On information and belief, there is no public access in these five states. In a number of major cities, such as Tampa, FL, Philadelphia, PA, and Los Angeles, CA, public access services are currently nonexistent.

25. Based on the foregoing, I believe that public access centers currently serve a smaller percentage of cable systems than the 16.5 percent found by Prof. Aufderheide in 1990.

26. On information and belief, public access is available on less than ten percent of all currently operating cable systems in the United States. What public access exists is inadequate to meet local and national demand.

27. Based on the foregoing, I conclude that public access is inadequately available to satisfy the demand of national non-profit organizations to transmit programming on a nationwide or regional basis.

I declare under penalty of perjury that the above is true and correct. Signed the 14 day of MAY, 1996, in WASHINGTON, DC

Barry R. Forbes

APPENDIX B

C E N T E R F O R M E D I A E D U C A T I O N

DECLARATION OF ANTHONY E. WRIGHT

In support of Comments by

Center for Media Education
Alliance for Community Media
Association of Independent Video and Filmmakers
Consumer Federation of America
National Association of Artists' Organizations
United States Catholic Conference

1. My name is Anthony Wright, and I coordinate the Future of Media Project for the Center for Media Education. I work on cable leased-access issues for CME. I recently examined the cable industry's compliance with new leased-access rules, and the current rates for leasing cable channels.

This experience provides evidence that nonprofits face many barriers in the leasing of cable channels, from the cable operators' violation of Commission rules to the high charges for leasing channels.

The Letters

2. On May 2, 1996, I sent the attached letter to ten cable systems, asking for the following, within the seven business day limit established by Section 76.970(e) of FCC rules: "a complete schedule of the System's full-time and part-time leased access rates; any additional rates associated with the System's technical costs; an accounting of the amount of the System's leased access set-aside capacity which is currently unleased; and a sample leased access contract."

3. The ten cable systems were selected by choosing the second-to-last listing on each column of the *1996 TV-Cable Factbook*'s listing of "Largest U.S. Cable Systems" which is ordered by system size and includes all systems with over 20,000 subscribers. This method of selection produced a list of systems of varying sizes.

4. I sent the letters by Federal Express. All ten packages were received at their intended destinations—the cable system offices—on May 3, 1996.

5. According to revised rules that the Commission adopted on March 21, 1996, cable operators should have returned information to me in seven business days—by May 14th at the latest.

1511 K Street, NW Suite 518 Washington, DC 20005 202-628-2620 · Fax: 202-628-2554 · cme@access.digex.net

The Responses

6. By May 15th, I only received rate sheets from half of the ten systems to which I sent letters. I received six written responses (two late), as well as one verbal response.

7. The phone response is described in the chart below. A cable system representative said that no full-time leased-access capacity was available. She also said that no programmers are leasing full-time channels. Systems that refuse to lease full-time channels are in clear violation of Commission rules.

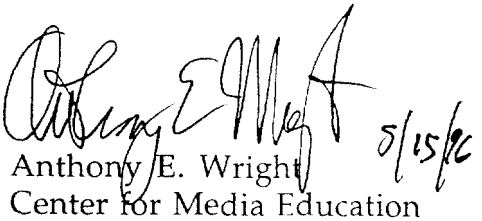
8. All of the the six written responses were incomplete. Only one included an accounting of the amount of the System's leased access set-aside capacity which is unleased, as requested by our letter and required by Commission rules. Some did not detail the additional technical costs that would be charged. Some did not offer a sample leased-access contract. Not one system fully complied with the Commission's rules

The Rates

9. None of the rates provided were affordable for nonprofit organizations such as the Center for Media Education. It would cost CME $460,421 to lease one channel for a year on the expanded basic tier of TCI's Lexington, Kentucky system. The total cost could reach a half-million dollars or more, when insurance and technical costs are included.

10. CME could not afford to pay the $460,421 (the reported rate of $38,368.43/month times twelve) which represents significantly more than half of our organization's budget. The costs of such capacity far exceed the benefits given the channel would only reach an estimated 78,000 households.

10. The letter sent to the cable operators and their responses are attached. Their responses are summarized below.



Anthony E. Wright
Center for Media Education
May 15, 1996