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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

COMMENTS OF
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

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May 15, 1996

SUMMARY

Congress's intention when it created leased access almost twelve years ago, to foster video programming free from the editorial control of system operators and promote diversity and competition in the sources of programming, has not been fulfilled.

This Further Notice provides the Commission with the opportunity to lay a regulatory foundation to ensure that Congress's goals for leased access are achieved. The fundamental principle in establishing leased access rates should be the promotion of diverse sources of programming While a cable operator's costs is an important factor in establishing a maximum leased access rate, the overall regulatory scheme must be designed to compensate an operator for the cost of carrying a leased access programmer, while promoting the goal of diversity.

CME strongly believes that central to the goal of diversity of programming sources is affordable access to cable systems by non-profit programmers. The diverse and public spirited programming that the thousands of non-profit organizations in this country could offer would directly advance Congress's vision of a garden of diverse local and national programming, that would in turn promote and strengthen essential First Amendment values. Therefore, preferential access for non-profit programmers is essential. CME propose that the Commission require operators to reserve the greater of one full-time channel or 25 percent of leased access capacity for non-profit programmers.

CME has always maintained that the maximum rate formula based on the highest implicit fees paid by non-leased access programmers essentially closed cable systems to all but the wealthiest programmers and therefore failed to advance

Congress's objectives. Therefore, CME applauds the Commission's implicit recognition that it is necessary to make rates affordable to prospective lessees in order for leased access to succeed.

CME still believes that the fairest means of setting leased access rates is to charge the incremental cost of adding a leased access channel to a cable system; basing leased access rates on incremental costs recognizes the special concern for non-profit organizations expressed by Congress in creating leased access, and compensates the cable operator for its reasonable costs. However, the Commission's proposal to base maximum leased access rates on the system operator's reasonable and quantifiable opportunity costs plus a reasonable profit has the potential to successfully promote the goals of leased access. As with any solution to a complex problem involving a balance of many parties interests, the Commission's proposed formula contains opportunities for manipulation that system operators could easily exploit. CME believes these difficulties to be surmountable, however, and with carefully crafted safeguards, the proposed opportunity cost/market rate formula could finally make leased access a viable option for most programmers.

Specifically, CME proposes that the Commission:

- Require operators to designate only those channels with the lowest opportunity costs;
- Require cable operators to disclose the information used to calculate their leased access rates;
- Ban migration of commercial services to leased access channels;
- Adopt procedures for redesignation and recalculation of rates that favor long-term contracts and promote stability;

- -- 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;

- -- Establish part-time rates by prorating the maximum 24-hour rate;

- -- Prohibit cable operators from assigning intangible lost opportunity costs for dark channels;

- -- Permit resale of leased access time, only subject to the same conditions as lease by the operator;

- -- 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; and

- -- Adopt a dispute resolution procedure that does not unduly favor the cable operator and fulfills the statutory mandate of expedited resolution.

Finally, given the many uncertainties of how the proposed opportunity cost/market rate formula will work in practice, CME recommends that the Commission review this rulemaking in three years and make any adjustments necessary to fulfill Congress's intent of making leased access a source for rich, diverse programming.

TABLE OF CONTENTS

INTRODUCTION 2

I. The Promotion of Diversity Should be the Fundamental Basis for Establishing Maximum Leased Access Rates. 4

II. The Net Opportunity Cost Formula Solves Many of the Problems of the Highest Implicit Fee Formula, but Without Proper Safeguards it Could Obstruct Leased Access to Cable Systems. 7

A. Cable Operators Could Manipulate the Cost Formula to Maintain Rates that are Prohibitively High for Most Leased Access Programmers. 9

B. The Commission Should Require Operators to Designate Only Those Channels with the Lowest Opportunity Costs. 10

C. The Commission Should Require Cable Operators to Disclose the Information Used to Calculate their Leased Access Rates. 11

D. The Cost Formula May Entice Commercial Programmers Who can Otherwise Successfully Negotiate Carriage to Migrate to Leased Access Channels and Displace Non-Profit Programmers. 13

E. The Commission Should Ban Migration of Commercial Services to Leased Access Channels. 15

III. The Commission Should Reserve Leased Access Channels for Non-Profit Programmers. 15

A. A Non-profit Set-aside is Consistent with the Language of the Cable Acts and Congressional Intent. 15

B. A Non-Profit Set-Aside Is Consistent with and Further the Goals of the First Amendment. 20

C. PEG Channels do not Provide an Adequate Leased Access Outlet for Non-Profit Programmers. 21

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. 23

A. The Commission Should Adopt Procedures for Redesignation and Recalculation of Rates that Favor Long-term Contracts and Promote Stability. 23

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. 25

C. The Commission Should Establish Part-Time Rates by Prorating the Maximum 24-hour Rate. 26

D. The Commission Should Prohibit Cable Operators from Assigning Intangible Lost Opportunity Costs for Dark Channels. 27

E. The Commission Should Permit Resale of Leased Access Time, Only Subject to the Same Conditions as Lease by the Operator. 28

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. 29

G. The Commission Should not Institute a Transition Period. 30

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. 31

VI. The Commission Should Review this Rulemaking in Three Years and Make Any Necessary Adjustments to Effectuate Congressional Intent. 32

CONCLUSION 33

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The Center for Media Education, Alliance for Community Media, Association of Independent Video and Filmmakers, Consumer Federation of America, National Association of Artists' Organizations, and United States Catholic Conference (hereinafter collectively referred to as "CME")[1] respectfully submit Comments in response to the Commission's Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, in the above referenced proceeding, released March 29, 1996, concerning rate regulation of leased commercial access to cable systems ("Further Notice" or "FNPRM"). CME has vigorously participated in the Commission's leased access proceedings to date and urges the Federal Communications Commission ("Commission") to implement rules that will

[1] See Appendix A for a description of the Commenters.

require cable operators to comply with the Cable Acts of 1984 and 1992.

INTRODUCTION

This Further Notice provides the Commission with an opportunity to fulfill Congress' intention when it created leased access almost twelve years ago -- to foster video programming free from the editorial control of system operators and promote diversity and competition in the sources of that programming. CME strongly believes that central to the goal of diversity of programming sources is affordable access to cable systems by non-profit programmers. The diverse and public spirited programming that the thousands of non-profit organizations in this country could offer would directly advance Congress's vision of a garden of diverse local and national programming, that would in turn promote and strengthen essential First Amendment values. Therefore, preferential access for non-profit programmers is essential; a uniform access structure would prevent non-profit programmers from making an invaluable contribution to national discourse.

CME has always maintained that the maximum rate formula based on the highest implicit fees paid by non-leased access programmers essentially closed cable systems to all but the wealthiest programmers and therefore failed to advance Congress' objectives. Therefore, CME applauds the Commission's implicit recognition that it is necessary to make rates affordable to prospective lessees in order for leased access to succeed.

CME still believes that the fairest means of setting leased access rates is to charge the incremental cost of adding a leased access channel to a cable system; basing leased access rates on incremental costs recognizes the special concern for

non-profit organizations expressed by Congress in creating leased access, and compensates the cable operator for its reasonable costs. However, the Commission's proposal to base maximum leased access rates on the system operator's reasonable and quantifiable opportunity costs plus a reasonable profit has the potential to successfully promote the goals of leased access. As with any solution to a complex problem involving a balance of several parties interests, the Commission's proposed formula contains opportunities for manipulation that system operators could easily exploit. CME believes these difficulties to be surmountable, however, and with carefully crafted safeguards, the proposed cost/market formula could finally make leased access a viable option for most programmers.

These Comments argue that Congress intended that the Commission make diversity, rather than cost the fundamental basis for setting maximum leased access rates. The Proposed Cost Rate Formula has the potential to promote diversity in cable television by setting affordable maximum rates for leased access programmers. Specifically, therefore, CME proposes that the Commission (a) grant non-profit organizations preferential access to cable systems, both within and beyond the statutory set-aside and (b) adopt additional safeguards to the proposed cost/rate formula to check the ability of cable operator to frustrate the goals of leased access.

I. The Promotion of Diversity Should be the Fundamental Basis for Establishing Maximum Leased Access Rates.

The Commission's cost/market rate formula and its proposals for administering the formula proceed from the basic principle that cost, and cost alone, should be the fundamental basis for establishing maximum leased access rates. FNPRM at ¶¶ 61 and 66. The Commission seeks comment on this principle and on the conclusion that leased access programmers who cannot afford the rate should not gain access because they would impose a financial burden on the operator. FNPRM at ¶ 66.

These conclusions are contrary to Congressional intent. In 1992, Congress gave the Commission the authority to set lower rates. Congress intervened to encourage the use of leased access in order to promote First Amendment values.[2] Although CME recognizes that the cable operator's cost is an important factor, a leased access regulatory scheme must be designed to compensate an operator for the cost of carrying a leased access programmer, while promoting the goals of diversity..

Congress, in passing the Cable Acts of 1984 and 1992, was primarily concerned with how the cable operators' exercise of editorial control (1984 Act) and ability to charge unreasonable and anti-competitive rates (1992 Act) would affect the diversity of programming sources available to public. The express purpose of the 1984 Act was to "assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of

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[2] The 1992 House Report states that the Commission should set maximum reasonable rates to "make leased access a more desirable alternative for programmers." House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. 51 (1992) (hereinafter "1992 House Report") at 50-51 (emphasis added).

[those] systems."[3] Congress declared the leased access provisions to be "fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment." H.R.Rep.No. 98-934, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad.News 4668. Congress also recognized that

> [c]able operators clearly have an incentive to provide a diversity of program services. . . .However, cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system.

It is clear, that Congress embraced the goal of diversity. Congress wanted to "[ensure] the public access to a wide variety of voices and viewpoints;" it was the manner of achieving that goal could not destroy the cable system, the vehicle for providing the access.

Therefore, promoting diversity and competition in cable systems, through leased access, must at least be an equally fundamental basis for establishing leased access rates. The Commission's conclusion that a programmer who cannot afford the rate should not gain access fails to consider that it may be the unreasonableness of the rate that makes it unaffordable. This assumption is surprising given the Congress's finding that cable operators have maintained prohibitively high rates and discouraged the use of leased access on their systems.[4]

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[3] Communications Act, §612(a), 47 U.S.C. § 532(a).

[4] See Section 612(a) of the 1992 Cable Act.

More than twelve years after the creation of leased access and four years after the authorization for rate regulation, Congress's diversity goals have yet to be achieved. It would be a mistake, therefore, for the Commission to establish a rate formula by considering only the operator's cost and reasonable profit and not whether the formula will achieve the goal of diversity. Non-profit organizations have not successfully utilized leased access in the past and diversity has not been achieved not because the organizations lacked programming, but rather because leased access rates were too high.[5] The Catholic Conference recently conducted a survey to assess the interest in and ability of dioceses to use leased access channels. The survey revealed that, while significant amounts of programming have already been created and more is planned, no consistently affordable or feasible outlet for that material has existed.[6] Affordable rates and a non-profit set-aside will help this cause immeasurably.

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[5]The inability to pay to air programs, rather than the availability of programs, is the chief stumbling block to placement of programs funded in whole or in part by the United States Catholic Conference and most dioceses. The United States Catholic Conference must use most of their national collection for communications on production costs of videos, radio programs and print projects. More than three-quarters of the dioceses surveyed have annual incomes for communications projects of less than $75,000 annually (an average diocese covers several counties). That annual budget normally covers public relations activity, local newspapers and salaries.

[6] For example, TTNA, an existing but now dormant non-profit video provider has large amounts of educational programming that it has been unable to air.

Moreover, the United States Catholic Conference and dioceses have frequently encountered a lack of enthusiasm, even hostility, from commercial video distribution systems for independently produced programs with religious themes. For the past two years, United States Catholic Conference has funded public service announcements with general socially beneficial and religious themes. These professionally produced PSA's were altered, and made more generic in response to the objections of television broadcasters, who balked at airing any religiously based programs. Each year for the past decade, the United States Catholic Conference has funded in whole or in part television programs, which are usually aired, when aired by local broadcast stations, in

II. The Net Opportunity Cost Formula Solves Many of the Problems of the Highest Implicit Fee Formula, but Without Proper Safeguards it Could Obstruct Leased Access to Cable Systems.

The Commission generally seeks comment on the implementation of the proposed cost/market formula. Specifically, the Commission asks how the operator could manipulate the designation of channels to inflate leased access rates and frustrate access.[7] The Commission further queries whether averaging the costs of the designated channels is appropriate.[8]

As a threshold matter, CME still maintains that the Commission should establish a maximum reasonable rate for non-profit programmers based on the incremental cost of leasing a full-time channel. As CME has previously suggested, the incremental rate would reflect a cable operator's one-time capital cost of adding a 24-hour leased access channel to a cable system and the annual operating cost of carrying the leased channel.[9] A maximum rate based on incremental cost would allow non-profit

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extremely early morning hours or other unlikely hours. Likewise, a prominent Catholic radio producer whose programs were widely distributed a decade ago, has been repeatedly told by radio broadcasters that they will not air religious programs. The lack of outlets for video and radio productions has resulted in funding challenges for Catholic video production houses and independent producers. The Commission itself has reported on the continued existence of vertical integration in the cable industry in its Second Annual Report on Competition in the Video Programming Distribution Market, 1 CR 530 (1995).

[7] FNPRM at ¶ 76.

[8] FNPRM at ¶ 92.

[9] See Letter to Chairman Reed Hunt and Memorandum in Support, June 1, 1994 (calculating the incremental rate based on a set of assumptions that would maximize the figure and arguing that non-profit organizations would be able to utilize cable leased access at such rates).

programmers, who otherwise will be unable to compete in the market, to utilize cable leased access without the suggestion of a subsidy.

However, if the Commission refuses to adopt what CME believes is an equitable and statutorily-consistent approach to establishing leased access rates, and chooses instead to adopt a rate formula based on the operator's net opportunity cost, CME would support that proposal if the Commission required operators to reserve channel capacity for non-profit programmers and adopted safeguards to prevent cable operators from manipulating the rate formula. Although CME believes that if the Commission's Cost/Market Rate formula is properly administered, it would drastically reduce rates and therefore, promote the goals of the statute,[10] it is impossible to predict

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[10]Specifically, the Commission's acknowledgment of the connection of subscriber revenue to the calculation of maximum reasonable rates is well supported and crucial to achieving reasonable rates. CME also supports the Commission's stance that lost subscribership due to an operator being forced to drop particular programming in favor of a leased access programmer is too speculative (outside of the premium context) to include the Cost Rate Formula. Especially in light of the value that a leased access channel adds to a system, there is little possibility that an operator could demonstrate that lost subscriber revenues are attributable to a leased access programmer.

CME also supports the Commission's proposal not to reduce the opportunity cost for lost advertising revenue by the value of any advertising time the operator may receive from the leased access programmer. The prospective or current lessee should pay no more than the maximum rate. Furthermore, in keeping with the First Amendment reasoning behind leased access, the leased access programmer should not be required to dedicate any portion of its time to the operator's advertising preferences. Should the parties wish to negotiate to sell such time, a rate lower than the maximum allowed under the proposed formula should result.

Additionally, CME agrees with the Commission that the formula will not result in a subsidy to programmers. Cable operators will receive their costs and more. Operators make their money by selling programming to subscribers at high mark-ups; leased access fees result in relatively small increases in the operators total revenue. Leased access programming actually <u>adds value</u> to the cable subscription because subscribers do not differentiate between leased access programming and programming provided by the cable operator; therefore, the addition of these channels produce revenue for the cable operator through <u>increased subscriber penetration</u>, at the same

the formula's effect with certainty.

CME is concerned that the flexibility that the formula gives the operator to designate and average channels could neutralize its effectiveness: (a) operators could easily manipulate the cost formula by designating and averaging several high value channels to inflate the opportunity cost and create a prohibitively high rate, and (b) existing, non-leased access programmers may migrate from channels for which they have to negotiate capacity to leased access channels with attractive low rates, displacing non-profit and other leased access programmers. However, a non-profit set-aside and other safeguards could prevent cable operators from circumventing the Commission's maximum rate formula.

A. Cable Operators Could Manipulate the Cost Formula to Maintain Rates that are Prohibitively High for Most Leased Access Programmers.

Under the proposed cost formula, cable operators will be able to designate any number of tier or premium channels for leased access to create a "basket," and calculate the maximum reasonable rate by averaging the net opportunity costs of the channels in the "basket."[11] The Commission reasons that this averaging or "basket" approach will promote fairness because all lessees will pay the same rate.[12] While all lessees may pay the same rate, it likely will be the same unreasonable rate. Averaging the net opportunity costs of the designated channels will not prevent operators from

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time that the operator collects payments from programmers for carriage.

[11] FNPRM at Appendix B, Step 4.

[12] FNPRM at ¶ 91.

manipulating the formula.

The Commission fails to consider that cable operators will be able to manipulate which channels go into the opportunity cost "basket." For example, an operator could group the three most lucrative pay services with the seven most discardable basic services and average together their individual opportunity costs. This would inflate the net opportunity costs and consequently, the price for leased access, with little risk that a highly profitable channel would actually have to be bumped since leased access programmers would likely be unable to pay the inflated rates. The Commission's formula could, therefore, yield a rate well in excess of the operator's costs and reasonable profit, more even than any absolute economic loss caused by offering a channel for lease.

B. The Commission Should Require Operators to Designate Only Those Channels with the Lowest Opportunity Costs.

The Commission could retain the "basket" approach and prevent manipulation of the formula, by requiring cable operators to designate only those channels with the lowest opportunity costs, excluding must-carry, other leased access or PEG channels. The Commission has already laid the foundation for this safeguard, by concluding that operators will only designate for bumping those channels that already carry the least valuable programming.[13] CME believes that it is unlikely that cable operators, given their long history of obstructing leased access, would not seek to manipulate the formula to inflate rates. Therefore, it would unwise for the Commission to simply trust them to embrace the concept of leased access and act to promote its use. On the

[13] FNPRM at ¶ 89.

other hand, if the Commission is correct that operators will choose to designate low value channels, this reform would not substantively change the way the designation process operates.

Indeed, requiring operators to designate the channels with the lowest opportunity costs would force them to act in their economic self-interest, rather than try to frustrate leased access; it would force them to act as they would if they were pro-leased access. An operator would only choose to designate a channel with a high opportunity cost in order to increase leased access rates and discourage its use. Therefore, requiring that low value channels are placed in the basket would only adversely affect the operator who was attempting to manipulate the formula.

C. The Commission Should Require Cable Operators to Disclose the Information Used to Calculate their Leased Access Rates.

Leased access programmers, and non-profit programmers in particular, need simple regulations and adequate information to effectively use leased access channels and compete with existing programmers. CME has always maintained that operators cannot be adequately monitored and leased access will not work effectively without making the data upon which the maximum reasonable rate calculation is performed available to the prospective lessee and to the public. Although CME recognizes that the Commission already requires limited disclosure upon request, [14] these disclosure

[14]Cable operators are now required to provide within seven business days of a prospective leased access programmer's request a schedule of full and part-time rates, available leased access capacity, and a sample leased access contract. Order and FNPRM at Appendix F, amending Part 76 of Title 47 of the Code of Federal Regulations.

requirements are often ignored.[15] Even if properly implemented the current disclosure requirements do not go far enough. Public access to and disclosure of the information upon which the maximum reasonable rate is based is not only equitable, but necessary to make the leased access market function. The sophistication of the typical prospective lessee does not begin to approach that of cable operators.[16] Therefore, to effectuate Congress's purposes in the Cable Act, not only must the Commission craft loophole-free, cost-setting mechanisms, but also provide leased access programmers with the ability to help themselves.

Making the information that operators use to calculate the maximum rate available to prospective and current lessees has multiple benefits. First, none of the Commission's reforms will work unless operators can be held accountable for their actions in calculating rates. Programmers who suspect the accuracy of the rate calculation or that the net opportunity cost formula is being manipulated will be unable to establish the prima facie elements of a complaint without the information that is currently considered proprietary. Prospective and current lessees must have access to

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[15] The Center for Media Education recently requested the full-time and part-time leased access rates and the amount of leased access capacity that currently unleased from ten, randomly selected cable systems, pursuant to §76.970(e). Seven of the ten cable systems responded in a timely manner, three never responded, and no response was complete. See Declaration of Anthony E. Wright, and copies of the leased access rate quotes at Appendix B.

[16] A survey conducted by the Catholic Conference is illustrative: The majority of dioceses surveyed have a single communications staff person who is responsible for public relations, fund-raising, placement of video or radio programs, and creation and distribution of print materials. Many dioceses have cut this position in response to shrinking or stagnant budgets and increased basic education, health and human service needs, pushing any communications responsibilities onto another staff member untrained in electronic communications.

the data relevant to calculating leased access rates.

Similarly, the cable industry is increasingly characterized by vertical and horizontal consolidation. Public access will help deter the collusive practices that would endanger open competition. For example, making rate information accessible would help deter operators from using bundled programming packages to disguise the savings generated by bumping a channel that charged license fees. Showing the entire costs of the bundle would allow comparison with individually purchased channels and reveal the true savings to the operator.

Finally, disclosure and public access is consistent with the Commission's policy of streamlining its dispute resolution process. Public access will not only relieve the administrative burden on the Commission of monitoring operator conduct, but will empower leased access programmers to compete on a level field with commercial providers.

D. The Cost Formula May Entice Commercial Programmers Who can Otherwise Successfully Negotiate Carriage to Migrate to Leased Access Channels and Displace Non-Profit Programmers.

CME believes that if the Commission does not implement safeguards to prohibit migration, the Cost/Market Rate formula may have the perverse effect of shutting out the very programmers that the Commission seeks to include and replacing them with existing, commercial providers, like the Home Shopping or Psychic Friends Networks.

Migration would undermine competition in programming, contravening the congressional intent that leased channels provide an outlet for programmers that

cannot otherwise gain carriage.[17] Rather than allowing new providers to access cable and compete with existing programmers, migration would permit existing program providers to utilize the limited number of leased access channels.[18] The Commission has recognized the danger of migration and invited comment in the past.[19] In its 1992 Rate Order adopting the highest implicit fee formula, the Commission noted that it "intended to avoid existing programming services migrating to leased access channels in a way that would not benefit subscribers or 'diverse' entities seeking leased access."[20] CME urges similar protection here, where if the Commission is successful in setting a maximum reasonable rate that non-profit and other leased access programmers can afford, commercial programmers who had negotiated for carriage at comparatively higher prices would dominate leased access capacity. Certainly, Congress did not intend for leased access to be another, cheaper outlet for the proliferation of home shopping and infomercials.

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[17] 1984 House Report at 47 ("Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator may elect not to provide that service as part of the program offerings he makes available to subscribers."); see Senate Report 102-92 at 31 ("The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the programmer owns or controls.").

[18] See CME Comments, January 27, 1993, at 33-35.

[19] See, e.g., Notice of Proposed Rulemaking, released December 24, 1992, FCC 92-544, at ¶ 161.

[20] FNPRM at ¶ 15.

E. The Commission Should Ban Migration of Commercial Services to Leased Access Channels.

The danger of the very sources of programming that Congress sought to encourage being displaced by existing providers can be reduced by simply barring migration. Section 612(c)(3) of the Cable Act bars the migration of services provided as of 1984.[21] The Commission could simply adopt this approach and permanently bar the migration of existing services to leased access. In this manner, lower rates would be available primarily to those programmers unable to afford rates paid by existing commercial services.

If the Commission permits migration, cable operators could easily create sham leased access, by reconfiguring existing contracts to resemble leased access contracts. Congress clearly did not intend for the Golf Channel, for example, to transform itself into a leased access channel; rather the goal was to attract new and diverse programmers.

III. The Commission Should Require Cable Operators to Reserve Leased Access Channels for Non-Profit Programmers.

A. A Non-profit Set-aside is Consistent with the Language of the Cable Acts and Congressional Intent.

Congress clearly contemplated that non-profit programmers should be treated differently than other programmers, and authorized the Commission to act to further

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[21] "Any cable system channel designated in accordance with this section shall not be used to provide a cable service that is being provided over such system on October 30, 1984, if the provision of such programming is intended to avoid the purpose of this section." Communications Act, § 612(c)(3), 47 U.S.C. § 532(c)(3).

Congress imposed the prohibition on classifying services existing in 1984 as leased access services in order to promote diversity. H.R.Rep.No. 98-934, 98th Cong., 2d Sess., reprinted in 1984 U.S.Code Cong. & Ad.News 4691.

that intent.[22] The Commission would be shirking its obligation to set maximum reasonable rates and promote diversity of programming sources if it delegated its authority to a private negotiation process which Congress has determined is characterized by inequality of bargaining power.[23] Since the Cable Acts require operators to lease access, then the Commission is obliged to ensure that the operators do not set rates, terms and condition that either directly or through migration exclude a whole category of potential lessees--non-profit programmers.

Although a maximum rate based on net opportunity costs and eventually on the market may make leased access affordable for most programmers, the reality is that non-profit organizations are likely to be squeezed out of the market, in light of limited number of channels available for leased access

Non-profit organizations exist because of the government determination that the good provided by such organizations merited preferences, including tax exempt status. This structure and the fact that doing what will produce the greatest profit is not their

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[22] The legislative history of the 1984 Act reveals:

> [B]y establishing one rate for all leased access users, a price might be set which would render it impossible for certain classes of cable services, <u>such as those offered by not-for-profit entities</u>, to have any reasonable expectation of obtaining leased access to a cable system.

<u>Id.</u> (emphasis added). In its FNPRM, the Commission agreed with this position, stating, "In adopting the 1984 Cable Act, Congress contemplated that operators would be permitted to offer preferential leased access rates to not-for-profit entities." FNPRM ¶ 111. <u>Id.</u>

[23] Indeed, Congress intended the 1992 amendments to the Cable Act "to remedy market power in the cable industry" and to act as "an important safety valve for anticompetitive practices" by the cable operator. 1992 Senate Report at 30; FNPRM ¶ 25.

primary purpose make non-profit organizations fundamentally incapable of competing with commercial entities for limited channel capacity.[24] Non-profit programmers, who are not driven by the economics of the market are exactly the kind of programmer that can increase diversity; commercial programmers are far less likely to offer the sort of diverse, challenging material that Congress sought to cultivate when it created leased access -- the very material that cable operators may consider risky for their business and seek to keep off their systems. It is essential to the fulfilling the intent of Congress that the Commission ensure that non-profit programmers have access to cable systems.

Given the scarcity of leased access channels, non-profit programmers are likely to quickly face real market competition from for-profit leased access programmers. By statute, there are relatively few leased access channels open on any cable system. Under Section 612(b) of the 1984 Cable Act, systems are required to lease between 10 and 15 percent of their channel capacity -- which means as few as two or three

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[24] Within the universe of non-profit organizations are those exempt from federal taxes under section 501(c)(3) of the Internal Revenue Code. That section defines those entities exempt from federal taxation as corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, and which does not use its net earning to benefit any private shareholder of individual (26 U.S.C. §501(c)(3)). "Charitable exemptions are justified on the basis that the exempt entity confers a public benefit--a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues." Bob Jones University v. United States, 461 U.S. 574, 591 (1983). While eligible organizations need not be limited to tax-exempt organizations, such organizations must be included within the definition of eligible organizations.

channels in the case of 36-channel systems.[25] In the past, the scarcity of leased access channel capacity and high rates charged by cable operators has resulted in an anti-competitive market that makes preferential treatment necessary if there is to be "any reasonable expectation of [non-profit entities] obtaining leased access to a cable system."[26] In the future, even if the Commission's proposed cost/market rate formula is a success, non-profits are likely to be kept off cable systems as a result of competition from for for-profit leased access programmers. Therefore, the Commission should require operators to reserve the greater of one full-time channel or 25 percent of leased access capacity for non-profit programmers. This preference would not subsidize non-profit programmers; the programmer would still pay the cost rate, which the Commission has already determined fairly compensates cable operators.

The Commission also seeks comment on which non-profit programmers should receive preferential access. FNPRM at 115. CME proposes that "non-profit" be defined as a programmer with Section 501(c)(3), Internal Revenue Code, 26 U.S.C. § 501(c)(3), tax-exempt status both to eliminate the specter of content-based regulation and for administrative convenience.

It could be argued that a permanent set-aside for non-profit programmers would "adversely affect the operation, financial condition, or market development of the cable

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[25] Communications Act, § 612(b), 47 U.S.C. § 532(b); see also 1984 House Report at 49.

[26] H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984).

system"[27] because the channels, if unclaimed, would lay fallow. Non-profit programmers are ready and willing to make use of leased access, provided that the rates are low enough. For example, the United States Catholic Conference has an available library of hundreds of hours of educational video programs, and co-produces and funds educational videos on an ongoing basis (which production activities have occurred for more than fifteen years). Additionally, more than fifteen dioceses produce programs for local distribution, and are willing to syndicate those among the 185 dioceses in the United States and Puerto Rico. Therefore, while CME does not believe a problem will arise of non-profits not claiming set-aside channels, CME agrees with the Commission's that, until a non-profit demanded access, the cable operator could use the channel for for-profit leased access programming.[28] When a non-profit programmer seeks to claim a reserved channel, the cable operator would be able to recover any non-speculative opportunity costs of bumping the for-profit but unaffiliated programmer.

The set-aside would prevent commercial interests from absorbing channels if a non-profit discontinues programming after a temporary set-aside expires. Such a set-aside would also give non-profit programmers time to organize and raise the funds needed to launch a new programming service.[29] CME believes that the set-aside for

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[27] Communications Act, § 612(a), 47 U.S.C. § 532(a). See Ex parte Communication of Jeffrey Chester, Center for Media Education to Honorable Reed Hundt, Chairman FCC, June 1, 1994.

[28] FNPRM at ¶ 114.

[29] See CME Comments, January 27, 1993, at 18-20.