

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 channels in the case of 36-channel systems.<sup>25</sup> 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."<sup>26</sup> In the future, even if the Commission's proposed net opportunity cost/market rate formula is a success, non-profits are likely to be kept off cable systems as a result of competition from 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 net opportunity 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.*

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<sup>25</sup> Communications Act, § 612(b), 47 U.S.C. § 532(b); see also 1984 House Report at 49.

<sup>26</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984).

It could be argued that a set-aside for non-profit programmers would "adversely affect the operation, financial condition, or market development of the cable system"<sup>27</sup> 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.<sup>28</sup> 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 programmer.

The set-aside would also prevent commercial interests from absorbing channels if a non-profit discontinues programming. Such a set-aside would also give non-profit programmers time to organize and raise the funds needed to launch a new

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<sup>27</sup> 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.

<sup>28</sup> FNPRM at ¶ 114.

programming service.<sup>29</sup> CME believes that the set-aside for last until the Commission reviews its leased access rules and be reassessed at that time.<sup>30</sup>

**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."<sup>31</sup> The House Report of the 1984 Cable Act which includes an exhaustive First Amendment 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 encouraging a diversity of information sources. Cable access regulations are "content-neutral, yet substantially increase[ ] the number of voices that can reach the home. . . ."<sup>32</sup>

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

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<sup>29</sup> See CME Comments, January 27, 1993, at 18-20.

<sup>30</sup> See section VI, *infra*.

<sup>31</sup> 1984 House Report, at 31.

<sup>32</sup> 1984 House Report at 33, 34, quoting D. Bazelon, The First Amendment and the "New Media"--New Directions in Regulating Telecommunications, 31 Fed.Com.L. J. at 210 (1979).

diverse viewpoints are 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 -- a distinction that Congress has long singled out as a standard for preferential treatment and that courts have upheld against First Amendment challenges.<sup>33</sup>

**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.<sup>34</sup>

As the FNPRM 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.<sup>35</sup> 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.<sup>36</sup> Many

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<sup>33</sup> "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).

<sup>34</sup> FNPRM at ¶ 112.

<sup>35</sup> See "Declaration of Barry Forbes," ("Forbes") attached as Appendix C, at ¶ 22.

<sup>36</sup> 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).

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 provider's choosing. This simply does not represent the ready availability of non-profit access to video platforms that was contemplated by Congress.<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> These policies were enacted in order to comport with Congress' intent that PEG access serve local needs.<sup>40</sup> 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.<sup>41</sup> The non-profit would of course be barred

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<sup>37</sup> 1984 House Report at 51.

<sup>38</sup> Forbes at ¶ 24.

<sup>39</sup> Id. at ¶ 14.

<sup>40</sup> 1984 House Report at 57-48.

<sup>41</sup> This process is referred to as "bicycling."

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 channels would be impossible; many public access centers have a "first-come, first-served" scheduling policy that prevents such predictability.<sup>42</sup>

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.<sup>43</sup>

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<sup>42</sup> Forbes at ¶ 12.

<sup>43</sup> "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.

**IV. In addition to Adopting Safeguards to the Opportunity 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 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's intent, leased access channels should be allocated in the order that programmers apply for carriage.<sup>44</sup> 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:

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<sup>44</sup> FNPRM at ¶ 128.

- (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 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.<sup>45</sup>

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.<sup>46</sup> 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."<sup>47</sup> CME believes, however, that any CPST that does

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<sup>45</sup>See infra Section V.

<sup>46</sup> FNPRM at ¶ 118.

<sup>47</sup> 1992 Senate Report at 79.

not reach at least 90% of subscribers cannot be considered a "genuine outlet."<sup>48</sup> 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.<sup>49</sup>

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

CME believes strongly that part-time access to leased access channels is crucial to the effectuation of Congress's 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 the 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 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

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<sup>48</sup>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.

<sup>49</sup> 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.

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.<sup>50</sup>

**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 channels on the system with opportunity costs that have the lowest positive values, excluding must-carry, PEG, or any leased access channel.<sup>51</sup> CME disagrees with this proposal and believes that cable operators should make only a nominal assessment of net opportunity cost for dark channels, 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

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<sup>50</sup> See discussion supra Section II.C.

<sup>51</sup> FNPRM at ¶ 87.

deficiency in the formula,<sup>52</sup> 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 result would violate the Commission's mandate to establish maximum reasonable rates. Therefore, CME believes that programmers should be 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.

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<sup>52</sup> FNPRM at ¶ 88.

**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 net opportunity 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's 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.<sup>53</sup> 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.<sup>54</sup> 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 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

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<sup>53</sup> 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.

<sup>54</sup> FNPRM at ¶ 137.

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 the accountant's costs 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 net opportunity 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 net 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 opportunities 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 divestiture. 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



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.

### *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

## RESPONSES TO CME LETTER

Source for subscriber counts and other information: *1996 TV-Cable Factbook*.

### **Adelphia Cable**

91 Industrial Park Road  
Plymouth, MA 02360

Subscribers: 20,000

Response: Yes (facsimile)

Included:

Leased access rates schedule: Yes

Additional rates associated with technical costs: No

Current unleased capacity: No

Sample contract: Yes

Rates:

Per month: \$9,478.56

Per month/per sub: 47.4 cents

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### **Bresnan Communications Co.**

300 E. Superior Street  
Duluth, MN 55802

Subscribers: 26,551

Response: Late (arrived May 15th)

Included:

Leased access rates schedule: No

Additional rates associated with technical costs: Yes

Current unleased capacity: Yes

Sample contract: No

A letter was received on May 15th, and it stated that leased access rates and copies of a channel lease agreement and application were enclosed. However, the only other document enclosed was a technical and studio cost sheet. Nothing else came in the envelope.

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### **Comcast Cablevision**

6510 Ironbridge Road  
Richmond, VA 23234

Subscribers: 58,211

Response: No

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**Jones Intercable, Inc.**  
2212 McGregor Blvd.  
Fort Myers, FL 33901

Subscribers: 36,056  
Response: No\*

\*On May 14th, 1996 I received a call from a representative of Jones Intercable. She stated that there was no full-time leased access capacity available, but that CME could lease some hourly space on a local origination channel. I asked her if other organizations have leased channel capacity and she said no. She went on to describe that with local affiliates, low power broadcasting stations and regular cable networks like C-SPAN and ESPN, all of her roughly 60 channels were full. She said that she didn't see more space opening up, and they would probably add the History Channel or the Golf Channel in an expansion. I asked her if she could send the standard rate chart and the other information she stated in writing, and if she could fax it to me in the next day. I did not receive anything on May 15th.

Her statement that no full-time channels were available for leasing, even when no other leasee was taking the channel space, was in apparent violation of FCC rules. On a cable system of 60 channels, there should be approximately nine channels available for leasing, since that represents 15 percent of capacity.

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**Jones Intercable, Inc.**  
4331 West Lincoln Highway  
Matteson, IL 60443

Subscribers: 21,575  
Response: No

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**Marcus Cable**  
695 Huntington Avenue  
Waterbury, CT 06708-1491

Subscribers: 45,165  
Response: No

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