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

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

COMMENTS
of
OUTDOOR LIFE NETWORK
SPEEDVISION NETWORK
THE GOLF CHANNEL
BET ON JAZZ

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COMMENTS OF OUTDOOR LIFE NETWORK, SPEEDVISION NETWORK, THE GOLF CHANNEL, AND BET ON JAZZ

Commenters, Outdoor Life Network, ("Outdoor Life"), Speedvision Network, ("Speedvision"), The Golf Channel, and BET on Jazz ("BET") (collectively, "Commenters"), submit the following comments in response to the *Further Notice of Proposed Rulemaking* ("NPRM") issued by the Federal Communications Commission ("Commission") on March 29, 1996, in the captioned matter.

Commenters are four recently launched, quality programming networks that are competitors in every respect, but that have joined together here to address several particularly disturbing aspects of the Commission's proposed revisions to the commercial leased access ("CLA") rules. Specifically, Commenters disagree with the Commission's proposed CLA rate formula, which would create a substantial subsidy and preference for certain programmers such as home shopping channels and infomercials, at the expense of quality programming networks such as Commenters that have emerged in reliance upon the existing regulatory framework, and the channel capacity presently available to start-up networks on the nation's cable television systems. Commenters also address the issues of part-time programming, preferences for non-profit companies and LPTVs, and the method of selecting CLA programmers. Finally, Commenters propose two alternative approaches for the Commission that would facilitate CLA carriage in a manner that both promotes diversity and competition in programming sources and is consistent with the growth and development of cable systems.

I. INTRODUCTION

The Commission's proposed CLA rate formula will have a disastrous impact on new and developing quality programming networks, such as Commenters, whose success or failure depends upon gaining access to channel-poor cable systems. Over the past several years, these new networks have invested hundreds of millions of dollars in start-up costs in reliance upon the Commission's current CLA rules and the extant channel capacity of cable operators. Now, acting under a misconception that its rules must be modified to ensure that 10 or 15 percent of all cable channels are actually *used* by CLA programmers, as opposed to being merely available for use by them, the Commission has proposed a cost-based formula that artificially suppresses CLA rates in order to boost demand. The inevitable result of these subsidized rates will be a drastic reduction in the amount of channel capacity available to new and developing quality programming networks, such as Commenters, and their ultimate demise.

The Commission's proposed subsidy will primarily benefit undesirable programming such as home shopping and infomercials at the expense of commercially viable, diverse programming and the viewing public. Clearly, this is not what Congress intended. Congress' primary goal in establishing the commercial leased access requirement in 1984 was to ensure that the widest possible diversity of programming sources would be made available to the public. That goal has been accomplished through increased competition among competing multichannel video programming distributors ("MVPDs"), which has prompted cable operators to distribute niche programming to attract and retain subscribers, and through the Commission's vertical integration rules, 47 C.F.R. § 76.504, which require cable operators to devote sixty percent of their channel capacity to unaffiliated programmers. In amending Section 612 of the Communications Act in 1992 and providing the Commission with the authority to establish maximum leased access rates, Congress sought to determine whether increased certainty in the negotiation process would encourage leased access use. Congress did not intend to artificially stimulate demand for CLA through subsidies, and never intended for shopping channels and infomercials to displace quality programming services.

As anticipated by Congress in 1992, the economics of CLA simply do not work for conventional programmers. Emerging quality networks, saddled with heavy program production and acquisition costs, simply cannot afford to pay cable systems for carriage. Moreover, even if CLA channels were free of charge, that model still would not work, for quality programming networks must ultimately receive compensation from cable operators in the form of affiliation fees, if they are to survive. And yet, under the common understanding of CLA, programmers pay the operator for the right to use the cable channel to reach subscribers. The only programmers that can afford to pay for carriage indefinitely and still remain commercially viable are shopping channels and infomercials, which generate revenues from direct sales to subscribers.

The Commission is now faced with the task of promulgating a leased access rate formula that is consistent with its statutory charge and that fulfills Congress' goal of increasing programming diversity. The Commission's current proposal fails to accomplish that objective.

One possible solution is for the Commission to define CLA programming broadly enough so that a cable system's carriage of new, start-up, quality programming networks, such as Commenters, would count towards satisfying the cable operator's leased access carriage requirements, while at the same time giving to cable operators the discretion, afforded to them by Section 612, to consider the content of such programming in setting CLA rates. Nothing in Section 612 or its legislative history prohibits cable operators from paying programmers for programming aired on CLA channels; cable operators may charge some programmers the maximum rate for carriage while not charging, or even paying, others.

Alternatively, at a minimum, if the Commission intends to develop a formula that would reduce CLA rates, the Commission should adopt transitional rules that take into account the enormous investment of nearly one hundred new programming networks that have emerged in reliance upon the Commission's current CLA rules and the extant, available channel capacity of the nation's cable systems. Such a transition could take the form of a grandfather clause for programming networks that have emerged since 1993 in reliance upon the Commission's initial CLA rate formula, or some other neutral criteria, such as the future advent of increased channel capacity on cable systems or the passage of an adequate period of time for new networks to acquire a level of distribution sufficient to establish commercial viability. Without such a transition, many new and diverse programming networks would be unable to attain the distribution necessary to recover start-up investments and operation costs, and undoubtedly would be forced to cease operation. A transition would also minimize the inevitable chaos that would occur if cable operators were required, in one, two or even three years, to fill four to ten channels with subsidized CLA programming.

The Commission has the opportunity to fulfill Congress' goal of increasing diverse sources of programming to the public. New, quality programming networks have launched recently, and more are in the wings ready to make their debut. The Commission must not let CLA be the weapon used to destroy the very diversity in programming it was designed to promote.

II. THE COMMISSION'S ROLE IS TO PROVIDE STRUCTURE TO CLA NEGOTIATIONS, NOT TO FILL LEASED ACCESS SET-ASIDES WITH SUBSIDIZED, UNDESIRABLE PROGRAMMING

Section 612 of the Communications Act delegates to the Commission the authority to establish maximum reasonable CLA rates that are consistent with the purpose of Section 612 and that do not adversely affect the operation, financial condition and market development of cable systems. 47 U.S.C. § 612(c)(4)(a)(i). The Commission is also charged with establishing reasonable terms and conditions for CLA use and procedures for the resolution of disputes. 47 U.S.C. § 612(c)(4)(a)(ii) and (iii). Nothing in the language of Section 612 or its legislative history requires or authorizes the Commission to artificially increase demand for CLA through subsidized rates that damage or even destroy non-CLA, quality programming networks, and the Commission is bound by the limits of its delegation.

A. Statutory Origin Of Commercial Leased Access

Congress established the CLA requirement in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) ("1984 Cable Act"). Congress' primary purpose in creating commercial leased access was to increase diversity in programming sources available to the public. 47 U.S.C. § 532(a); H. REP. NO. 934, 98th Cong., 2d Sess. (1984) ("1984 House Report") at 31, 47, 48 and 50. Congress resolved to achieve this objective in a manner that was consistent with the growth and development of cable systems. 47 U.S.C. § 532(a); 1984 House

Report at 50. Accordingly, Congress concluded that cable operators would be responsible for determining reasonable CLA rates, based on marketplace negotiations, as well as reasonable terms and conditions of carriage. 1984 House Report at 50. Congress made it explicitly clear that cable operators could consider the content of programming in establishing rates, terms and conditions of carriage. 47 U.S.C. § 532(c)(2); 1984 House Report at 51.

From 1984 to 1991, cable operators did not experience a significant demand for leased access. S. REP. NO. 92, 102d Cong., 1st Sess. (1991) ("1992 Senate Report") at 30. Several reasons were offered for this low demand. The cable industry suggested that it was already successful in meeting the diverse range of viewing needs and that the economics of leased access were not conducive to its use. *Id.* Congress agreed that the cable industry's suggestions had "foundation" and were "sound." *Id.* at 31. Congress also believed, however, that a lack of certainty in the leased access process could be the cause of low demand. *Id.* Thus, Congress called upon the Commission to establish "parameters" and increase "certainty" through the creation of maximum rates and reasonable terms and conditions for CLA carriage. *Id.* at 32. Essentially, Congress sought to eliminate a variable in the CLA experiment.

In 1992, in enacting the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 98-549, 98 Stat. 2779 (1984), Congress amended Section 612. The amendments directed the Commission to establish reasonable maximum rates, terms and conditions of carriage for CLA. 47 U.S.C. § 532(c)(4). The amendments also permitted cable operators to satisfy up to thirty three percent of a cable system's CLA channel requirement with programming from qualified minority and educational sources. *Id.* § 532(i).

The amendments did not, however, abandon Congress' original market-based approach to establishing CLA rates or its goal of increasing diversity in programming sources. Rather, the Commission was simply to fill the shoes of the cable operator in determining the maximum market value of commercial leased access channels.

B. In Promulgating Commercial Leased Access Rules, The Commission Must Adhere To Its Statutory Charge

The Commission's authority is limited by its enabling legislation, the Communications Act of 1934, as amended, 47 U.S.C. § 521 *et seq.* *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1148-51 (D.C. Cir. 1980) (citing *Real v. Simon*, 510 F.2d 557, 564 (5th Cir. 1975) ("There can be no doubt that the authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations."); *NARUC v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976) ("'wide latitude' in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority.")). Thus, the Commission's authority to regulate CLA both emanates from, and is confined by, the text of Section 612 of the Communications Act of 1934, 47 U.S.C. § 532, and—where the text is unclear or ambiguous—by the legislative history accompanying Section 612. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). The Commission may not, under any circumstances, "fill in" Section 612 where it feels some additional federal action is needed to promote CLA. *Office of Consumers' Counsel*, 655 F.2d at 1152. The resolution of policy issues underlying CLA properly lies with Congress and is beyond the Commission's jurisdiction. *Id.*[1]

[1]The Commission must be mindful of the fact that, "in determining whether the Commission has acted within its legal authority, [reviewing] courts accord only limited deference to an

It is understandable that the Commission feels some pressure to solve the CLA conundrum. Twelve years have passed, and CLA has not proved to be a viable alternative for diverse programming networks. That fact reflects that commercial leased access is not economically feasible when the channel is priced at market rates, and is feasible only for a limited class of programmers, consisting of home shopping and infomercial channels, when the CLA is subsidized. Nonetheless, diverse programming networks, such as Commenters, have made their way onto cable systems via traditional marketplace transactions, not through CLA. And it is precisely these new, diverse programming networks, the ones that Congress sought to promote through CLA, that now oppose the Commission's proposed subsidized rate formula.

The Commission's authority to establish maximum rates, terms and conditions of carriage is not a license or mandate to ensure the full utilization of CLA set-asides. Rather, Congress believed that a potential barrier to the use of CLA was the "uncertainty" caused by the 1984 provision, which delegated to the cable operator the task of initially establishing rates, terms and conditions. 1992 Senate Report at 30-31. Congress hypothesized that the establishment of "parameters" and increased "certainty" in the CLA negotiation process might increase demand. *Id.* at 31. Thus, the Commission's limited role is to determine the fair market value of the channel capacity, establish the maximum rate that cable operators may charge based on the fair market value of the channel, establish other reasonable terms and conditions of carriage, and leave the rest to the marketplace. Essentially, Congress has put the Commission in the position,

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agency's interpretation of its own governing statute" and that "it is the quintessential function of the reviewing court to interpret legislative delegations of power and to strike down those agency actions that traverse the limits of statutory authority." *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1422-23 (D.C. Cir. 1983).

formerly occupied by the cable operator, of establishing *maximum* market-based rates, and has left to the marketplace the determination whether "the economics of leased access are not conducive to its use." *Id.* at 30.

Although the Commission has concluded that the implicit fee formula adopted in the *Report and Order*[2] was conceptually flawed, NPRM ¶¶ 28-31, nonetheless, the formula was consistent with Section 612. The formula established a maximum rate from which cable operators and programmers could then negotiate downward. *Id.* The fact that the demand for CLA channels did not increase dramatically as a result of the implicit fee formula does not mean that the rates produced by the formula were too high.[3]

Congress did not direct the Commission to ensure that CLA set-asides are fully utilized. The Commission appears to acknowledge the restrictions on its rulemaking authority in the text of the NPRM. For example, the Commission admits, as it must, that "as long as the maximum leased access rate is reasonable . . . *minimal use of leased access channels would not indicate that the rate should be lowered.*" *Id.* ¶ 24 (emphasis added) (citing colloquy between Rep. Timothy E. Wirth, Chairman of the Subcommittee on Telecommunications, Consumer Protection

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[2]In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992—Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631 (1993); 47 C.F.R. § 76.970.

[3]Rather, three factors appear to have discouraged negotiation of lower rates. First, despite specific language in Section 612 granting cable operators the right to discriminate in rates, terms and conditions, cable operators have treated the maximum fee as the leased access fee for *all* potential users for fear of being accused of engaging in discrimination. Second, the Commission's rules do not state expressly that quality programming networks qualify for CLA carriage on unaffiliated cable system. Third, it is not clear from the Commission's rules whether CLA programmers must pay for carriage or, instead, may be paid for carriage. Therefore, negotiations for such carriage never occurred between conventional, quality networks and cable systems.

and Finance, and Rep. Thomas J. Bliley, Jr. on Section 612 of the 1984 Cable Act).[4] The Commission also professes that it does not intend for its new formula to subsidize CLA programmers. NPRM ¶ 65. Nevertheless, the Commission's proposed formula does exactly that—it creates a subsidy for CLA programmers and seeks to ensure that CLA channels will be filled. That course is misguided.

First, the Commission's proposed cost/market formula sets rates below market value until a cable operator's channel set-aside requirement is full and thus creates a subsidy for CLA programmers. Such a subsidy provides an unfair and undeserved advantage to undesirable programming. The result: diverse, start-up, quality full-time programming networks, precisely those that Congress intended to promote through CLA, will be "bumped" (*see* NPRM ¶ 65) or denied access to cable systems altogether. Affidavit of Roger Williams, dated May 15, 1996 ("Williams Aff."); Affidavit of Christopher R. Murvin dated May 15, 1996 ("Murvin Aff."); Affidavit of Jeffri K. Lee dated May 15, 1996 ("Lee Aff.").

Second, it is clear from the NPRM that the Commission intends to subsidize CLA programming in order to ensure that cable operators' set-aside obligations are full. NPRM ¶ 6 ("if the maximum rate for leased access is reasonable, the corresponding amount of leased access demand will also be reasonable") and ¶ 20 ("Congress has defined the appropriate level of output by establishing the set-aside requirement, and the operator cannot restrict output below this level"). Indeed, the Commission's rate formula is predicated on whether an operator has met its

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[4]In that colloquy, Chairman Wirth stated that, under Section 612, "an operator cannot be found to have acted in bad faith or to have established unreasonable rates simply because parties seeking access choose not to meet the offered rate." 130 Cong. Rec. H10441 (Oct. 1, 1984).

full statutory set-aside requirement; only then may the operator establish rates based on market value.

Section 612 does not support a subsidy for CLA programming. Congress intended CLA programming to be commercially viable programming. In this respect, cable operators were permitted to establish, and discriminate in, rates, terms and conditions of carriage. Congress explained that it did not intend for leased access "to adversely affect the cable operator's economic position, since it is not the cable operator's exercise of any economic power" that concerned it. 1984 House Report at 50.

As acknowledged by the Commission in the NPRM, an outlet already exists for programming that is not commercially viable—public, educational and government ("PEG") channels. NPRM ¶ 27. More and more franchising authorities are requiring cable operators to provide PEG channels, and this is the appropriate outlet for programmers that cannot find a distributor for their product because of the quality of the programming, or that cannot afford to compensate the cable operator for the value of the channel space. *See, e.g.*, Peter Lewis, *Local Cable Service May Tie to Internet*, SEATTLE TIMES, Sept. 27, 1995 (discussing Seattle's proposed franchise agreement in which Telecommunications, Inc. was asked to increase its PEG channels from three to ten); *Renewal May Be Near For Century Cable*, HARTFORD COURANT, Dec. 26, 1994 (noting "increasing demand for public access and educational programming"). It is not appropriate, however, for the Commission to impose arbitrary and artificial subsidies that distort the marketplace and that displace new, diverse quality programming networks from cable systems.

III. QUALITY PROGRAMMING NETWORKS EXIST THAT SATISFY CONGRESS' GOAL OF INCREASED DIVERSITY IN PROGRAMMING SOURCES

The Commission must not lose sight of the forest, increased distribution of diverse, programming sources to the public, for the trees, filling leased access set-aside requirements. Nearly one hundred new programming networks have emerged since May 3, 1993, the date the Commission released its original CLA rates, largely in reliance upon the extant channel capacity of the nation's cable systems, and their ability to carry additional program networks. The development of these new networks effectively fulfills Congress' goals for CLA—increased diversity and competition in programming sources. Exhibit 1.[5]

Even Vice President Gore, a former critic of the cable television industry, recently praised the industry on the *diverse* programming that it is now providing. In particular, Mr. Gore commended the cable industry for airing educational shows for children, for taking a leading role against TV violence, and for moving toward connecting the nation's classrooms to cable television free of charge. AP Online, April 30, 1996. Vice President Gore also complimented the industry on its cutting-edge programming, its contribution to the "dialogue of our

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[5]Exhibit 1, "Table of Programming Networks and Launch Status, May, 1996," is a compilation prepared by Commenters from data obtained from the Commission's 1995 Competition Report to Congress, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* CS Docket No. 95-61, 1995 FCC LEXIS 7901 ("1995 Competition Report"), and other reliable industry sources, including National Cable Television Association, CABLE TELEVISION DEVELOPMENTS (Spring 1996) ("NCTA CABLE BOOK"), and these articles: Jim McConville, *New Nets: Tough Act To Open; Cable Television Networks Launches Postponed*, CABLEVISION, Nov. 27, 1995; *Rookies And Wanna-bes: The New Cable Networks*, BROADCASTING & CABLE, Apr. 29, 1996, at 64; *Aspiring Networks—The Latest List*, MULTICHANNEL NEWS, Apr. 29, 1996.

representative democracy," and its "forward-looking pursuit of the public interest." *Gore, Turner Predict Tough Future For Cable*, WASHINGTON TELECOM NEWS, May 6, 1996.

Diversity is the name of the game in cable television programming today, with programmers competing for valuable channel space by targeting niche areas that to date have been underserved. Hal Boedeker, *Cable Brings Diversity To Television Channel-Surfing*, PHOENIX GAZETTE, June 26, 1995 ("Cable can be counted on for news, for variety, for risk-taking programming."); Donna Gable, *Disability Channel Widens Boundaries*, USA TODAY, Mar. 29, 1995 ("Cable television—an oasis for niche programming--is about to get even more diverse."); Richard Katz, *Which Ones Will Fly? Cable TV Programming Concepts*, MULTICHANNEL NEWS, Jan. 22, 1996, at 14A-15A ("the future is in well-branded niche services. . . . When you go past the newsstand and see the magazine rack, our cable guides will look like that"). Today's niche programming networks focus on such diverse interests as health, food, music, sports, the outdoors, ecology, the environment, gardening, art, automobiles, entertainment, comedy, parenting, and various hobbies, ranging from bird-watching to antique collecting. *See* L.A. Lorek, *Niche Channels In Focus; Expanding Cable En Route To 500*, SUN-SENTINEL, May 29, 1994; Mark Lorando, *They're Cable-Ready: Niche Channels Seek Slots in Expanding TV Universe*, TIMES-PICAYUNE, May 22, 1994. The programming that is being developed is largely original programming as opposed to reruns or library material, and the quality of new programming networks is outstanding.

Commenters' programming provides the Commission with excellent examples of the diverse, quality programming sources that are ready to increase distribution, provided that the Commission does not adopt rules that drastically reduce the amount of channel availability

The Golf Channel, which launched on January 17, 1995, offers new and unique programming tailored to golf enthusiasts, 85 percent of which is original programming. Murvin Aff.; *see* Exhibit 2; Mike Celizic, *Cable's Bet On Golf*, RECORD, Feb. 27, 1995. Programs such as "The Golf Channel Academy," which offers instruction from the world's best teaching pros and includes segments specifically tailored to young golfers, "Golf Central," which provides up-to the minute news and features, and exposure to some of golf's overlooked enthusiasts, such as children, minorities and the disabled; and "Profiles of a Pro," which profiles pros on and off the course, are just several examples of the specialized niche programming that The Golf Channel provides to its viewers. Murvin Aff.; Exhibit 2. In addition, The Golf Channel covers over 70 tournaments worldwide, in such distant locations as Dubai, United Emirates, Sun City, South Africa, Cheju Island, South Korea, and New South Wales, Australia, which are not covered by existing broadcast or cable television networks in the United States. Murvin Aff.; Exhibit 2.

BET on Jazz, which launched on January 15, 1996, is the nation's first television programming service dedicated exclusively to jazz music Its programming includes in-studio performances, original music videos produced in the network's own studios, documentaries, concert coverage and celebrity interviews. Lee Aff.; Exhibit 3. Examples of the programming currently offered on BET on Jazz include "Jazz Central," an original two-hour program featuring concerts and in-depth interviews of the top names in jazz; "Jazz Discovery," a daily program that showcases undiscovered jazz talent; "Blues," an hour-long look at legendary Blues artists such as B.B. King; and "Jazz Fest," displaying jazz festivals from around the world. Lee Aff.; Exhibit 3. BET on Jazz conducted extensive research concerning subscriber demand for programming focusing on jazz music and determined that the jazz music niche was currently underserved by existing networks. Lee Aff. BET on Jazz is dedicated to producing high quality, unique programming. *Id.* In the words of President Bill Clinton, BET on Jazz "will help broaden the scope and appeal of jazz, further enriching one of America's most important and original offerings to the arts." *Id;* Exhibit 3.

Outdoor Life, which launched on June 30, 1995, is a 24 hour network devoted exclusively to outdoor recreation, conservation, wilderness, and adventure. Williams Aff.; *see* Exhibit 4. Its programs include, for example, "Nature Watch," a family oriented program that explores various aspects of animal behavior; "Charlie West's Outdoor Gazette," which brings viewers to some of the most spectacular locations in the world and features a wide variety of activities that can be enjoyed in nature, such as hiking historic trails, kayacking remote rivers, and underwater treasure hunting; and "Environmental Forum," a public affairs program produced in Washington, D.C. that examines environmental issues and features such prominent guests as Secretary of Interior Bruce Babbit and numerous members of Congress; "Scouting USA," a monthly program produced in conjunction with the Boy Scouts of America, that features the broad array of scouting programs and activities; and "Echo Forum," a weekly program produced in conjunction with the Massachusetts Institute of Technology and the John F. Kennedy School of Government at Harvard University, which will examine the impact of business and industry on the environment. Williams Aff.; Exhibit 4. Currently, more than 600 hours of Outdoor Life's program line-up consists of original programming, and the network's business plan calls for that amount to increase to 3,000 hours within three years. Williams Aff. Extensive research conducted by Outdoor Life prior to the launch of the network established that this area was underserved by existing broadcast and cable networks, and recent surveys of cable subscribers have confirmed the success of the network in satisfying these viewing needs and interests. *Id.*

Speedvision, which launched on January 1, 1996, offers never-before-viewed programming targeted at boating, aviation, and automobile/motorcycle enthusiasts. Williams Aff.; *see* Exhibit 5. Speedvision provides magazine and lifestyle programs, historical documentaries, current news and information, and instructional how-to programs, which comprise eighty percent of its program lineup. Williams Aff.; Exhibit 5. Speedvision also provides coverage of competition events, which comprise the remaining twenty percent of its programming. Williams Aff.; Exhibit 5. Examples of Speedvision's programs include "planes of Fame," a historical segment on pilots and planes of today and days gone by; "Wild About Wheels," a 13-part series that explores the relationship between man and machine, industrial design and product success in the marketplace; "Sailor's Log," an 18-part series that teaches the basics of sailing; and "American Thunder," an expo on the American motorcycle lifestyle. Williams Aff.

Moreover, the pool of new programming networks is made up of affiliated and unaffiliated programmers alike. The majority of growth in cable programming networks since May 3, 1993, the date on which the Commission released its original CLA rules pursuant to Section 612, has been in programming networks that are *unaffiliated* with any cable television operator. Exhibit 1. Fifty unaffiliated programming networks have launched since May 3, 1993, and 89 more are in the wings ready to launch versus only 12 affiliated planned programming networks. *Id.* The Commission acknowledged as much in its Second Annual Competition Report to Congress, in which it stated that:

> The number of cable programming services increased from 106 to 129 over the past year. Of these 129 services, 66 are vertically

> integrated, representing approximately 51% of all national services, which is a slight decline from last year's figure of 53%. The Commission's program access and program carriage rules, and its decisions applying those rules, seem to have been successful in ensuring the availability to competing MVPDs of programming services produced by affiliates of cable MSOs.

1995 Competition Report, *supra* n.5, ¶ 10.

In summary, diverse quality programming networks—the type envisioned by Congress twelve years ago when it first developed CLA requirements—are now here, ready and able to meet the viewing needs of the nation's cable television subscribers. The Commission should not reverse the strides made by the programming industry, recently lauded by Vice President Al Gore, by adopting a CLA rate formula that drastically reduces the channel capacity available to these new programmers and thereby undermines their ability to become, and remain, commercially viable.

IV. THE ECONOMICS OF COMMERCIAL LEASED ACCESS ARE NOT CONDUCIVE TO USE BY QUALITY PROGRAMMING NETWORKS

In the legislative history accompanying the 1992 amendments to Section 612, Congress admitted that the cable industry had a sound argument that "the economics of leased access are not conducive to its use." 1992 Senate Report at 31. That is an understatement. The economics of commercial leased access are unworkable for quality programming networks because, to be economically viable, they must be paid by cable operators for carriage of their programming.

A. Quality Programmers Need To Be Paid By Cable Operators For Carriage Of Their Programming

The creation and operation of quality programming networks is dauntingly expensive. In the past five years alone, new quality programming networks have invested hundreds of millions of dollars in launching, and then operating, their new networks. Such expenditures, and the business plans pursuant to which they were made, were premised on the Commission's prior interpretation of Section 612, and the regulations promulgated thereunder, as well as on existing and anticipated levels of cable system channel capacity.

Launching a new network generally costs approximately $100 to $125 million, or more. Williams Aff.; Murvin Aff.; Lee Aff.; Richard Mahler, *Struggling To Hook Up With Viewers*, L.A. TIMES, Apr. 29, 1996 (quoting media analyst David Londoner, with Schroder Wertheim, and MTV founder and now CEO of E! Network, Lee Masters); Richard Katz, *Acquired or Original?: New Networks are Making Different Decisions than Their Predecessors*, MULTICHANNEL NEWS, Jan. 16, 1995, at 8A (estimates for investment in Home and Garden Television are near $100 million; HGTV has constructed a 45,000-square-foot production facility). For example, The Golf Channel projects that by the time it hits the break-even point, it will have spent $130 million to launch and operate its network. Murvin Aff. Outdoor Life and Speedvision predict their investment, to reach break-even, will exceed $180 million. Williams Aff.

Start-up costs include research, facilities, program acquisition, program production, marketing and promotion, personnel, and signal transmission. The Golf Channel, for example, has invested over $10 million in a state-of-the-art all-digital production center. Murvin Aff. BET on Jazz has also invested approximately $15 million to create a state-of-the-art television production and distribution facility in which its original programming is produced. Lee Aff.

A programming network's expenses do not end once the network is launched. The annual cost of producing and acquiring programming is generally a network's most significant annual expense. Richard Katz, *Discovery Nets to Spend $160 M on New Shows*, MULTICHANNEL NEWS, May 8, 1995, at 54 ("The Discovery Channel will invest $100 million in its 1995-6 season of programming and sister service the Learning Channel will spend $60 million"); Lou Prato, *After Losing Subscribers, C-SPAN on the Rebound*, MULTICHANNEL NEWS, May 8, 1995, at 88 ("A record $24 million operating budget went into effect on April 1, [as well as] another $2 million in capital expenditures"); Richard Katz, *Lifetime Will Pump $100 M into Shows*, MULTICHANNEL NEWS, Apr. 24, 1995, at 26 ("Lifetime Television pledged to invest $100 million in original series, movies, and specials in the coming year"). The cost to produce one hour of original programming typically exceeds $15,000, and can be as high as $70,000. Murvin Aff.; Lee Aff.; Williams Aff. The Golf Channel, for example, spends approximately $30 million annually on programming (Murvin Aff.), and Outdoor Life and Speedvision are spending $15 million and $17 million per year, respectively (Williams Aff.). In addition to programming costs, networks must service the debt incurred to launch the networks, replace and upgrade facilities, increase personnel, and cover other expenses incurred in the day-to-day operation of a programming network.

The revenues relied upon by programming networks to cover these expenses come from two sources: advertising revenues and affiliation fees. For programmers with fewer than 10 million subscribers, advertising revenues are limited. *See infra* at 23; Murvin Aff.; Williams Aff.; Lee Aff. Thus, programmers are dependent initially, and primarily, upon affiliation fees paid by cable operators, to cover the significant up-front and operating costs. Traditionally, programming networks receive an affiliation fee ranging from 10 cents to 20 cents per subscriber, from cable operators who carry their programming. L.A. Lorek, *Niche Channels In Focus; Expanding Cable En Route To 500*, SUN-SENTINEL, May 29, 1994. Without these affiliation fees, quality programmers cannot recover the costs expended to launch a network or the expenses involved in a network's day-to-day operation.

Because of the limited channel capacity presently available on cable systems, some programming networks, such as BET on Jazz, have entered into agreements with cable systems in which the networks provide their programming to cable systems free of charge for one or two years, after which the cable systems agree to pay for the programming. Lee Aff. However, these agreements generally are limited to one or two years, at most, and are intended only to enable networks to increase subscriber penetration and popularity quickly, with the expectation of being paid for carriage in later years.[6] Moreover, such agreements result in tremendous up-front losses—losses that most new networks, particularly those with original programming, cannot afford to absorb indefinitely.

B. The Economics Of CLA Work Only For Shopping Channels And Infomercials

The only programmers that can afford to *pay* for carriage are channels with substantial revenues from other sources—such as shopping channels and infomercials. These channels have lower programming production costs than conventional, quality programmers, such as Commenters, and also enjoy revenues from sales made over their networks; consequently, they are not dependent upon affiliation fees in the same manner as conventional programmers. Indeed, the majority of CLA complaints pending before the Commission have come from infomercial producers and shopping channels, who view leased access charges as bargain-

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[6]Richard Mahler, *Struggling To Hook Up With Viewers*, L.A. TIMES, Apr. 29, 1996 (quoting Richard Cronin, president of TVLand, as stating that offering programming for free now will produce pay-off in long term).

basement advertising rates.[7] Similarly, the commenters supporting CLA are made up of shopping and infomercial channels. *See, e.g.,* Petition For Reconsideration filed by ValueVision International, Inc., *cited in* NPRM at Appendix A.

Cable systems already have added a significant number of shopping channels because of the 1992 re-regulation. Many shopping channels were broadcast stations with must carry rights. In addition, cable systems, strapped for cash because of rate regulation, were forced to add channels that brought in revenue unencumbered by the rate caps. Richard Zoglin, *Cable's Big Squeeze; New Ideas Are Lining Up For Space, But Good Ideas Are Being Shoved Aside By*

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[7]*See, e.g., Life Sharing, Inc. v. Time Warner Cablevision Inc., Kimberly, WI,* CSR 4290-L (filed July 11, 1994); *Karl Schroll v. Continental Cablevision, MA*, CSR 4294-L (filed Aug. 5, 1994); *Petition of Karl Schroll*, CSR 4371-L (filed Aug. 22, 1994); *Karl Schroll v. Comcast of Philadelphia*, CSR 4372-L (filed Aug. 22, 1994); *Petition of Karl Schroll*, CSR 4373-L (filed Aug. 22, 1994); *Petition of Karl Schroll*, CSR 4374-L (filed Aug. 22, 1994); *Anthony Giannotti v. Cablevision Systems Corp.*, CSR 4442-L (filed Nov. 29, 1994); *Lorelei Communications v. Scripps Howard d/b/a Lake County Cablevision*, CSR 4487-L (filed Mar. 16, 1995); *Lorelei Communications, Inc. d/b/a THE FIRM v. Tele-Communications, Inc., Florida*, CSR 4501-L (filed Apr. 10, 1995); *Advantage Video and Marketing, Inc. v. Adelphia Cable Communications, PA*, CSR 4520-L (filed Sept. 24 , 1995); *KMR Media v. Cablevision Systems, Long Island*, NY, CSR 4537-L (filed June 13, 1995); *Lorelei Communications v. Continental, Manchester, NH*, CSR 4564-L (filed July 27, 1995); *Lorelei Communications v. Continental, Wilmington, MA*, CSR 4571-L (filed Aug. 9, 1995); *Lorelei Communications v. Columbia Cable of Michigan*, CSR 4573-L (filed Aug. 15, 1995); *Inter-vision Productions v. Tele-Communications, Inc.*, 4574-L (filed Aug. 10, 1995); *Oren Video Productions (Home Vision) v. Continental of Ohio*, 4575-L (filed Aug. 17, 1995); *DJS Productions v. Multimedia Cablevision*, CSR 4577-L (filed Aug. 9, 1995); *Inter-Vision Productions v. Adelphia Cable*, CSR 4587-L (Sept. 8, 1995); *Lorelei Communications v. TeleCable of Columbus, GA*, CSR 4627-L (filed Nov. 23, 1995); *Lorelei Communications v. Adelphia Cable*, CSR 4694-L (filed Mar. 19, 1996); *Lorelei Communications v. TCA Cable*, CSR 4699-L (filed May 8, 1996); *Lorelei Communications v. TCA Cable*, CSR 4700-L (filed May 8, 1996); *Lorelei Communications v TCA Cable*, CSR 4701-L (filed May 8, 1996); *Lorelei Communications v. TCA Cable*, CSR 4702-L (filed May 8, 1996); *Lorelei Communications v. TCA Cable*, CSR 4703-L (filed May 8, 1996); *Lorelei Communications v. TCA Cable*, CSR 4704-L (filed May 8, 1996); *Lorelei Communications v. TCA Cable*, CSR 4705-L (filed May 8, 1996); *Lorelei Communications v Century Communications*, CSR 4716-L (filed Apr. 29, 1996).

More Of The Same Old Thing, TIME 66, June 27, 1994. Filling CLA channels with additional shopping networks and infomercials—channels that offer viewers little in the way of educational, informational or creative content—would not promote Congress' goal of increasing the diversity of programming sources available to subscribers.

V. THE COMMISSION'S PROPOSED SUBSIDY FOR CLA PROGRAMMING WILL SOUND THE DEATH KNELL FOR NEW, QUALITY PROGRAMMING NETWORKS

If the Commission adopts its proposed rate formula, or any formula that subsidizes CLA programmers, the Commission will effectively destroy diverse, new programming networks of the type Congress sought to promote through CLA. A subsidy to CLA programmers will artificially increase demand for CLA channels by shopping networks and infomercials, and reduce the number of channels remaining available for quality programming networks. Faced with restricted distribution and resulting inadequate affiliation and advertising revenues, numerous quality programming networks undoubtedly will be forced to cease operation.

A. Distribution On Cable Is Essential To The Success Of New Programming Networks.

Programming networks need distribution on cable television systems to garner the viewership necessary to attract advertising support. Williams Aff.; Murvin Aff.; Lee Aff.; Jim Cooper, *The Little Guy—Can New, Small Players Compete with the Industry Biggies?*, CABLEVISION—NEW NETWORK HANDBOOK, Spring 1996 ("NEW NETWORK HANDBOOK") at 3A ("distribution is still the name of the game" and "cable homes passed is the measure of success."). Non-cable multichannel video providers, though growing at a healthy pace, still reach only 4.9