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

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

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The initial comments in this proceeding demonstrate that the Commission's proposed new cost formula for leasing channels is fatally flawed. The numerous cable program networks and system operators filing in this proceeding conclusively show that the Commission's proposed formula amounts to nothing more than subsidized rates for access to cable systems, with severe harm to cable program networks in particular, and viewers and operators.

As described in our initial comments, Congress intended no such harm in adopting the leased access provisions of the 1984 Cable Act or in modifying them in 1992. Contrary to the suggestion of some commenters favoring use of systems on a leased access basis, leased access was not concocted as a federal support program for underfunded lessees. Nor did Congress demonstrate any interest in using leased access to open up cable systems to a galaxy of shopping services and infomercials or to give broadcasters that do not have full must carry rights a quasi-must carry regime through subsidized access. Rather, through commercial leased access, Congress intended only to allow access based on rates that fully account for the effect on the market development and financial condition of the cable systems. As described in numerous filings in this proceeding, the Commission's cost formula clearly does no such thing. And the further modifications proposed by several prospective lessees in this proceeding -- such as establishing a preferential flat fee per subscriber for access -- only compounds the unlawfulness of the proposed leased access ratemaking regime.

Furthermore, the initial comments fail to validate the Commission's tentative conclusion that leased access users have a right to be placed on highly penetrated tiers of cable service. Congress left tier placement to operator-lessee negotiation. Any mandated tier placement fails to recognize the value that placement in a neighborhood of attractive services provides, ignores the harm to other programmers on that tier, and provides yet another subsidy for lessees.

Any rate rule the Commission adopts also must factor in the effect of part-time leasing on channel line-ups, and the additional opportunity costs and administrative costs that part-time use imposes. Any formula that forces an operator to make a full-time channel available for part-time use must provide an operator full compensation for the loss of its ability to program that channel.

In sum, cable operators and programmers recognize that the statute intends leased access channels to be made available to lessees willing and able to pay for that channel capacity at commercial rates. But there is no indication, contrary to the suggestion of some commenters, that Congress intended to "stimulate a new industry" for leasing cable channels by providing cut-rate, non-compensatory prices. In any event, the Commission should recognize that any rate rules that do artificially stimulate interest in leasing will harm the public by ensuring carriage of services that may have scant appeal in the marketplace and by mandating replacement of those services that demonstrably do

The Commission can and should avoid this result. If any changes are needed, it should fine tune, rather than radically revise, its rules and adopt NCTA's "average channel rate plus markup" proposal. It also should protect existing program networks against bumping by lessees under any new formula, and should provide an appropriate transition to any new leased access rates.

ARGUMENT

I. LEASED ACCESS RATEMAKING CANNOT BE TRANSFORMED INTO SUBSIDIZED ACCESS TO CABLE SYSTEMS

A. Congress' Interest in Promoting Diversity will not be Served by Lowering Leased Access Rates

The comments filed by a number of leased access users reflect a fundamental misunderstanding of the intent of Congress in adopting leased access provisions. Congress did not direct the Commission to adopt rates to ensure that particular program services are, in the words of Blab TV, "commercially viable".[1] Nor did Congress intend to promote an "independent leased access industry"[2] or for "leased access to become a viable segment of the cable programming market..."[3] in directing the FCC to establish maximum reasonable rates for

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1 Comments of Blab Television Network at 7.

2 Comments of TELEMIAMI at 2.

3 Comments of the Video Information Providers for Non-discriminatory Access at 7 (hereinafter "VIPNA").

leasing. These commenters point to nothing in the legislative history or the statute to support the view that Congress intended to use leased access to facilitate access to more shopping services, infomercials, or to low power television stations that fail to qualify for must carry.[4] And they have no support, for they can find none, for the argument that the Commission's ability to establish maximum reasonable rates should ensure that otherwise unprofitable leased access programmers gain access at rates that make them profitable.[5] The sole question is what is the reasonable fair market value that operators should be compensated for use of these channels.

The commenters' inability to provide support for their reinterpretation of the statute comes as no surprise. Congress' objective, as described in the initial comments of NCTA and several other commenters in this proceeding, was far narrower. Congress' sole concern was that unaffiliated diverse program sources would unfairly be denied access to systems. As described in detail earlier, such a concern, even if accurate at the time, surely has no place in today's diverse marketplace of over 100 national program services from a multiplicity of sources.[6]

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4 Even the Center for Media Education's Comments acknowledge that "certainly, Congress did not intend for leased access to be another, cheaper outlet for the proliferation of home shopping and infomercials." CME Comments at 14.

5 See, e.g., VIPNA at 7. ("We are not opposed to cable operators making a reasonable profit. However, lessees should also make a reasonable profit.")

6 The Comments of the Game Show Network erroneously claim that "[w]hile the overwhelming majority of cable networks were independently owned at the end of 1984 when the leased access set-aside was first mandated by Congress, the reverse is now true." GSN Comments at 4.

GSN can reach that conclusion only by using a self-selected sample of cable networks. Looking at the entire universe of cable networks, 27 networks had no known cable investment in 1984. By December 1995, 68 cable networks had no known cable investment. The total number of "independently owned" networks, therefore, increased by 151 percent during this period.

In addition, the Commission's First Annual Report to Congress on the status of competition included a list of 50 national programming services. Its Second Annual Report listed 63 unaffiliated programming services.

And even in 1992, when it amended the Act to give the Commission authority to establish a maximum reasonable rate, Congress acknowledged that "the cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use."[7] The overwhelming comments of the existing and newly-launched program services in this proceeding show why those economics do not work: subscriber fees are critical to their ability to invest in quality programming.[8]

The comments of PBS HORIZONS CABLE, a new program network, succinctly summarize this point: "The FCC might expect that HORIZONS would welcome the opportunity to gain carriage under the lower leased access rates proposed in this docket. Nothing could be further from the truth. In fact, HORIZONS, and niche programming like it, depend on obtaining a portion of the cable subscriber fees aggregated by the cable operator as payment for basic and enhanced tiers to support their services."[9] As four new networks explain in their comments, "the economics of commercial leased access are unworkable for quality networks because, to be economically viable, they must be paid by cable operators for carriage of their programming."[10] MPAA's comments also describe:

Finally, the vast majority of planned cable networks are unaffiliated with cable system operators. As of December 1995, 62 of the 77 planned services (or over 80 percent) were unaffiliated with cable system operators. GSN's statement that "the number of competitive voices in the marketplace, as defined by independently owned networks, has declined considerably," GSN Comments, Exhibit A, is simply not supported by the facts.

7 1992 Senate Report at 31.

8 See e.g., Comments of Lifetime Television at 5-6; Comments of The Travel Channel at 7 ("The low quality nature of CLA programming is rooted in the fact that the CLA regime is at odds with the fundamental economics of the cable programming business. It is very expensive to produce high quality programming.")

9 PBS HORIZONS CABLE Comments at 2.

10 Comments of Outdoor Life Network, Speedvision Network, The Golf Channel and BET on Jazz at 17.

> The absence of such leased access use [by MPAA's members] is no basis for concluding that rates are too high or that leased access is not fulfilling its statutory function. In truth, many programmers do not want to negotiate channel capacity on a system-by-system basis when broad coverage is needed to support high quality programming. Most importantly, the commitment of non-leasing programmers to high quality, innovative programming also requires the active marketing and promotion by the cable operator of the package of cable network services. These program services require a revenue stream provided by affiliate fees from cable operators -- a revenue stream not available in a leased access context.[11]

It is therefore not surprising that the primary beneficiaries of any new leased access rate regime will be programmers with very different economic structures than a typical program network. ValueVision, a home shopping network which favors lower leased access rates, includes in its comments the opinion of an "industry expert," who concludes if the Commission were to adopt its cost formula, "We expect significant activity from home shopping/infomercial providers, substantive use by advertiser supported networks with the right economic structure, possibly some use by well funded non-profits, but probably little or no activity related to the launch of traditional full-time subscription services."[12] Wonderful.

In fact, Shop at Home candidly admits that "since direct sales networks have a very different economic structure than entertainment networks and typically can afford to pay for cable carriage they are, therefore, likely to be the primary beneficiaries of a reduction in leased access rates."[13] Promotion of leased access will lead to a glut of these programmers, crowding

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[11] MPAA Comments at 3.

[12] Comments of ValueVision at Attachment A. (MGR Industry Report) (emphasis supplied).

[13] Comments of Shop at Home at 4. Shop at Home further states "Although Shop at Home might benefit from reduced leased access rates, it strongly opposes the change proposed in the NPRM. The proposed rate change is inconsistent with both the statutory mandate and the public interest. It threatens to disrupt and distort the programming marketplace for no discernible public benefit." (emphasis supplied).

out networks that have invested in quality programming and are competing for scarce channel space: "If the FCC favors those programmers like home shopping channels or program length commercial channels filled with 'infomercials,' whose economics might work under the FCC's proposed scheme, HORIZONS will suffer."[14] Lowering the leased access rates will not only fail to encourage "diversity" in programming; instead, it will likely have the opposite effect.

B. The Cost Formula is Unsupportable

The commenters that support the Commission's proposed cost formula merely repeat the Commission's tentative conclusions without any economic justification. They present no evidence, or economic support, for their allegation that the proposed cost model adequately compensates operators for use of their channel capacity. Several commenters in fact urge the Commission to ignore any negative effects on cable operators caused by leasing in establishing rates.[15]

However, the statute clearly requires that any leasing must be accomplished "in a manner consistent with the growth and development of cable systems", and that any rates, terms and conditions must be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system." The many commenters in this proceeding demonstrate that the threats to cable subscribership caused by

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[14] HORIZONS Comments at 3-4.

[15] See e.g., Comments of The Community Broadcasters Association at 8 n. 13 ( ) ("In any event, because Congress mandated leased access without regard to or concern for potential subscriber loss, the Commission should not consider that element in this proceeding."); Comments of Hispanic Information and Telecommunications Network, Inc. at 15 (arguing that the Commission should ignore statutory goal of protecting growth and development of cable systems).

replacing desirable cable networks with less desirable leased services are real.[16] By ignoring these costs, and the other costs not captured by the formula, the Commission's approach is fatally flawed.

Contrary to the statute's mandate, the proliferation of low quality leased access services will adversely affect cable operations. Numerous operators have demonstrated that this negative impact on subscriber revenue, contrary to the Notice's tentative conclusion, is not speculative. Surveys submitted in this proceeding demonstrate that "forcing off current programming in favor of leased access programming would result in massive disaffection with cable;"[17] and that more than half of surveyed customers would "definitely" or "probably" cancel their cable service if channels were dropped and replaced by leased access services offering home shopping or infomercials.[18]

There is no economic basis for ignoring these economic effects in establishing maximum reasonable rates.[19] As the economic analysis prepared for Time Warner Cable by Hatfield Associates concludes, if the Commission were to change its leased access rules:

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[16] ValueVision appears to claim that because "a large number of cable channels have virtually no audience," ValueVision at 7, subscribers would be indifferent to an operator removing those services and replacing them with ValueVision's shopping service. But that view is not based in reality. See Comments of Continental Cablevision at 12-13 (explaining program decision-making).

[17] Id. at 8.

[18] TCI Comments at 17. Moreover, the adverse subscriber reaction if leased access programming fills up 30 to 40 percent of a popular tier should be obvious. See MPAA Comments at 6 n.5.

[19] Comments of NCTA, Attachment A, "An Analysis of the Federal Communications Commission's Maximum Reasonable Leased Commercial Access Rate" at 3. ("While the Commission identifies several sources of opportunity costs, the Commission errs in assuming, without any support or analysis, that some of these costs, indeed likely the most significant costs, are zero. While this assumption simplifies the maximum rate calculation under the Commission's propose formula, the assumption is unrealistic, as the Commission itself recognizes elsewhere in the Notice. The Commission's proposed formula produces a subsidy to leased commercial access programmers, and imposes costs on cable operators and cable subscribers.")

> it would be necessary, at a minimum, to attempt to include in the opportunity cost calculation the negative effects of subscriber loss due to a less competitive channel line-up or a channel line-up that includes programming that some subscribers may find distasteful. It is unreasonable to assume that an increase in the supply of commercial leased access programming will increase subscribership. If there were programming available that would lead to subscriber increases, cable operators have the economic incentive and market expertise to identify that programming and add it to their line-ups voluntarily.[20]

TCI's economic analysis leads to the same conclusion: the proposed cost model is inappropriate for determining the rate for channel leasing.

> First, the basic assumption underlying the Commission's proposed approach -- that subscriber revenues will be unaffected if existing program services are removed to make room or the Basic Service or Cable Program Service tiers for leased access programming -- is false. Subscriber revenues would undoubtedly be affected adversely if this were to occur. The leased access programmer should, according to the Commission's stated goals, compensate the operator for the negative effect on system-wide revenues of carrying its programming.
>
> Second, it may be exceedingly difficult to measure these revenue losses or opportunity costs. This difficulty arises, in part, because the revenues generated by one program service depend on how many and which other services are also being offered.[21]

The failure of the proposed cost model to include these effects leads to <u>subsidized</u> rates.

In addition to its failure to adequately measure all costs caused by leasing, including full opportunity costs, the proposed cost model presents significant administrative and practical problems.[22] For these reasons, while NCTA does not agree that the existing highest implicit fee

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[20] Comments of Time Warner Cable, Appendix A, "An Economic Analysis of Commercial Leased Access Pricing" at 18.

[21] Comments of Tele-Communications, Inc., Attachment A, "An Economic Analysis of the FCC's Cable Leased Access Proposal" at 13-14.

[22] <u>See also</u> Comments of Cox Communications, Inc. at 3. ("There are many virtues to the implicit fee approach, including its simplicity and ability to set rates that reflect the actual value of channels in the video programming marketplace. The Commission's cost-based approach, on the other hand, (1) is exceedingly complicated and burdensome to apply; and (2) despite its complexity, fails to measure

formula overcompensates operators, if the Commission feels it necessary to modify its rules, it should do so by adopting the average channel rate plus markup proposal presented in our initial comments. The proposed average channel rate approach avoids these cost-measuring difficulties by providing a formula that is easy to administer. At the same time, it at least compensates operators for the use of their channels by reference to the average value of those channels. A markup over those average rates is necessary to compensate operators for the additional costs imposed by leasing that do not arise in cases of voluntary carriage.[23]

C. The Commission Should Not Adopt Preferential Rates or Channel Set-Asides

NCTA's proposal stands in stark contrast to the suggestions of several prospective lessees, who propose that the Commission adopt flat rates to ensure that leasing is "economically viable"[24] or "affordable."[25] Thus, for example, CBA proposes that the Commission adopt a

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and thus drastically understates the costs associated with leased access because it treats as too speculative most of the true costs of adding leased access programming.")

[23] A markup acts as a surrogate for these additional costs. In the case of small cable operators, these costs -- such as for administration of leased access contracts -- may well exceed the norm for all systems. See Small Cable Business Association Comments at 16-18. Therefore, a higher markup may be appropriate for small systems to ensure they too are fully compensated for the financial impact caused by leasing. Permitting the higher mark-up for small systems would be consistent with the Commission's actions with respect to rate regulation, where the FCC took into account the higher costs of doing business faced by small cable systems. It has permitted them additional flexibility to reflect those higher costs and to reduce compliance burdens. See Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket No. 92-266, 93-215, 10 FCC Rcd 7393, 7402-23 (1995).

Moreover, the Commission should make clear that any technical costs that are caused by leasing (such as labor and equipment) may be charged in addition to the average channel plus markup rate.

[24] See, e.g., Comments of The Community Broadcasters Association at 2 n.2 (hereinafter "CBA") (disagreeing that the "economic viability of leasing activity is not an issue. If leasing is not economically viable, the intent of Congress that programming be presented on cable that is not subject to the cable operator's editorial control will not be fulfilled").

"very low fixed initial rate" of 3 cents per subscriber per month[26]; TELEMIAMI suggests that the Commission adopt a "nominal" rate of one to five cents per subscriber per month[27]; and Blab TV argues for initial leased access rates in the 4 cent to 8 cent per subscriber per month range.[28]

These lessees present no justification for these rates, which apparently have been plucked from thin air. These rates represent a subsidy, pure and simple, for access to cable systems by underfunded commercial programmers. This subsidy cannot be disguised by arguing, as HITN does, that "lower or even nominal rates for non-profits represent not a subsidy but, rather, a reasonable means for cable operators to catch up with their long-neglected statutory, regulatory and societal obligations."[29] Nor can it be dressed up by claiming, as the Association of America's Public Television Stations and the Public Broadcasting Service do, that leased access is intended to be the equivalent to a common carrier's obligation to provide "free or reduced rate communication interconnections services for public television or radio service[]".[30]

Leased access was never meant to be used as a method for social engineering of cable systems. It is not a separate means of "must carry" for stations that fail to qualify for free must carry rights. Nor is it a method for providing local access at free or subsidized rates in

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25 TELEMIAMI Comments at 2; GSN Comments at 6 (the Commission's new rules will result in "far more affordable leased access rates than are possible under the current regime.")

26 CBA Comments at 3.

27 TELEMIAMI Comments at 19.

28 Blab TV Comments at 6 - 7.

29 HITN Comments at 18.

30 Comments of the Association of America's Public Television Stations and the Public Broadcasting Service at 5 (hereinafter "APTS").

communities where local franchising authorities have not sought PEG channels, or where a user would not qualify for PEG access use. Instead, it was intended to allow "commercial" arrangements between an operator and an unaffiliated programmer at compensatory rates.[31] Leased access also was not meant to impose common carrier obligations on a cable operator. The 1984 Act makes clear that a cable operator "shall not be subject to regulation as a common carrier or utility by reason of providing any cable service,"[32] and the leased access rules are no exception to this prohibition. Therefore, the analogies used by commenters to common carrier regulation as justification for their subsidized rate proposals are wholly inappropriate.[33]

Several commenters also suggest that these de minimis rates should be established as a rebuttable presumption, and that an operator could charge higher rates if it could demonstrate that higher rates were cost justified.[34] However, the statute establishes precisely the opposite presumption.

In any action before the Commission or a court, Section 612(f) states "there shall be a presumption that the price, terms and conditions for use of channel capacity designated pursuant to subsection (b) are reasonable and in good faith unless shown by clear and convincing

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[31] See Comments of Comcast Cable Communications, Inc. at 24. ("Congress did not authorize the Commission to maximize the use of leased access by not-for-profit programmers. Once the Commission establishes a fair maximum rate for leased access, its role is complete -- whether not-for-profit programmers choose to pay that rate or not.")

[32] 47 U.S.C. §541(c).

[33] For example, the comments of the Video Information Providers for Non-discriminatory Access claim that the Commission should apply the non-discrimination provisions of Open Video Systems to leased access channels. But, unlike OVS, Congress specifically did not apply a non-discrimination requirement to cable leased access. (See NCTA Comments at 31-32).

[34] See e.g., Comments of TELEMIAMI at 19-20

evidence to the contrary."[35] Requiring operators to prove that their rates should be higher puts the shoe on the wrong foot. Moreover, the Commission under the statute must adopt "maximum" reasonable rates. Those rules as a general proposition must "assure" operators of an appropriate rate, taking into account all the statutory factors. Any proposal to lower drastically the existing rate, such as the cost model, would require rates that clearly fail to provide such adequate compensation in all cases, and must be rejected by the Commission.[36]

In addition to subsidized rates, numerous groups of potential leased access users also seek special channel set asides for their own use. APTS asks the Commission to reserve an unspecified amount of channel capacity for certain unspecified "educational and community service" programming that otherwise does not qualify for must carry rights.[37] HITN, which has ITFS licenses to operate cable channels in 41 cities, asks that the Commission set aside one-third of leased access channels for non-profit use.[38] CME urges 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.[39] CBA argues that priority should be given to low power television stations

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[35] Emphasis supplied.

[36] In any event, as the comments of Blab TV demonstrate, cable operators do charge programmers less than the maximum rate established by the existing formula. Blab TV's comments show, for example, that it has been in business for over 12 years, and that it leases full-time channels in three counties in Florida at rates of around 4 cents per subscriber, even though the formula would justify rates several times as high. The Comments of The Vacation Channel, a low power television station, explains that it is carried by three of the four area cable systems -- two at no charge.

[37] APTS Comments at 3.

[38] HITN Comments at 22. HITN itself, however, would qualify for the minority programmer set-aside established by Congress, but apparently would not qualify for the educational set aside because it fails to satisfy the annual budget requirement.

[39] CME Comments at 18.

in the form of at least 25 percent of leased access capacity set-aside "to community-based groups and organizations which originate programming from local sources."[40]

These channel-looting expeditions for priority access to prime cable channel space, just like the arguments in favor of preferential low priced access, are far afield from the purpose of leased access. Congress has determined the parameters of cable operators' obligations to make their channel capacity available to favored groups. It provided that non-commercial and commercial broadcast stations could occupy a significant amount of channel capacity at no charge. Congress also allowed local governments to require operators to set aside capacity for free use by the public, educational organizations, and the government itself.[41]

Leased access was not designed to act as a safety net for entities that failed to qualify for free carriage, and the Commission has no authority to use these provisions to fashion additional obligations to set aside channel capacity, regardless of how worthy the pursuit. When Congress amended the leased access provision in 1992, it permitted operators to make available part of their leased access capacity for minority and educational programmers, regardless of their affiliation, that qualified under the statutory definition (although it required no set-aside for that

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[40] CBA Comments at 11. CBA proposes, if demand exceeds supply, to exclude broadcast stations with must carry rights or entities seeking to lease more than one channel.

[41] CME complains that PEG access is insufficient for their purposes. It alleges that there are not as many PEG channels as Congress envisioned, CME Comments at 22, and that the local nature of PEG in many communities makes it impractical to launch a nationwide non-profit channel. But CME fails to recognize that Congress left to local authorities the issue of whether to require PEG facilities, and specifically did not mandate a PEG set-aside in all communities. If CME has difficulties with the failure of certain municipalities to require PEG channels, then its remedy is to seek such a requirement in those communities -- not to use leased access as a back door to obtaining free PEG access. And CME has not demonstrated that programmers are routinely denied time on PEG channels. For example, even a casual viewing of District Cablevision's access channels shows vast time periods where no user has claimed time.

purpose). And Congress defined "commercial use" to include "the provision of video programming, whether or not for profit." It did not adopt any special provisions for non-profit organizations. In fact, the statutory language demonstrates that Congress intended for profit and non-profit organizations to be treated alike for purposes of access. Congress thus has already decided against preferential set-asides.[42]

Operators may nonetheless wish voluntarily to charge certain lessees less than the maximum rate. Operators will not be able to do so, however, if the Commission, contrary to Congressional intent, provides for first-come, first-serve non-discriminatory access, or allows for resale of leased channels.[43] Therefore, the best way to promote lower-priced access, consistent with the statute, would be to adopt NCTA's average channel rate proposal.[44] In so doing, cable operators voluntarily may make channel capacity available, at rates below the maximum established under the existing rules. However, they also will be able to receive full compensation for use of their channel capacity and therefore can avoid being forced to subsidize certain users.

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[42] Preferential rates and set asides for non-profit lessees also adversely impacts non-profit organizations that rely on subscriber fees and cannot gain access through leasing. For example, the Pennsylvania Cable Network ("PCN") is a non-profit organization that distributes educational and public affairs programming 24 hours a day. It would not qualify as an "educational" or "minority" source under Section 612. As PCN comments, "There is no basis for preferential treatment either by way of rates or set asides for nonprofits -- which should properly be supported by their own constituencies rather than subsidized by cable -- nor for minority programmers in view of preferential treatment otherwise provided. Such preferential treatment is an unwarranted further imposition on cable's core capability." PCN Comments at 6. See also Comments of C-SPAN at 10; Comments of Eternal World Television Network, Inc. at 11 (EWTN, a non-profit cable network, argues "[n]o preferential treatment should be afforded to not-for-profit leased access programmers. Traditional cable program networks, for profit and not-for-profit alike, live and die in the marketplace. Non-profit leased access programmers should be held to the same standard.")

[43] The Commission should not mandate the resale of leased access capacity. See NCTA Comments at 33-34; Comcast Comments at 22-23.

[44] See NCTA Comments at 24-25.

II. THE COMMISSION SHOULD NOT REQUIRE PLACEMENT ON TIERS

In our initial comments, NCTA demonstrated that the statute does not mandate that operators place lessees on any tier of service. Instead, tier placement under Section 612 is a matter left to negotiation between the parties. There is no statutory or policy reason why leased access programmers should be given preferential access to highly penetrated tiers of cable service, and good reasons why the Commission should not adopt such a requirement.

The comments of the numerous cable programmers filing in this proceeding demonstrate that requiring placement of leased access programmers on tiers will harm other programmers on that tier. The economic analysis submitted jointly by Turner Broadcasting System, Inc., News Corporation, Ltd. and C-SPAN explains:

> [t]he displacement of valuable programming on basic service tiers, coupled with the inability of the operator to engage in coordination and monitoring cable programming on the leased channels, will harm those incumbent program services that continue to be carried. That is, even the basic cable program services that are not displaced by leased access programmers will be hurt because other programming on their tiers will be weakened; subscribers and advertisers will find that cable is a less attractive product.[45]

Programmers are not compensated under the FCC's formula for this negative impact.[46] Nor are lessees required to pay for the value that being carried on highly penetrated tiers commands. As the comments of Discovery Communications describe:

> Because the continued popularity of basic and enhanced basic packages makes carriage on those tiers extremely valuable, channel placement figures prominently

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[45] "The Impact of the FCC's Leased Access Proposal on Cable Television Program Services" (May 15, 1996) at 2 (attached to Joint Comments of Turner Broadcasting System, News Corp. and C-SPAN).

[46] This harm is in addition to the harm to programmers caused by carriage disruptions that would be caused if the new formula were adopted. See Viacom Comments at 5 ("[c]arriage disruptions -- whether of an advertiser supported or premium service -- would throw into disarray financial projections and potentially threaten the viability of the program service.")

> in program contract negotiations of non-leased access programmers. Networks like Discovery Channel must earn their tier placement through investment in programming and subscriber ratings. Giving immediate and automatic access to such highly coveted channels to leased programmers who have not yet demonstrated their value to subscribers would only add to such programmers' unfair advantage over existing and new non-leased programming services.[47]

Failure to recognize this value would amount to yet another subsidy to leased access users.[48]

Indeed, Game Show Network's Comments essentially admit as much in arguing for placement on a tier that has the highest subscriber penetration. According to GSN,

> [e]ven if re-tiering were not an issue, by placing access programmers on the BST or the CPST with the highest subscriber penetration instead of tiers with more than 50 percent of subscribers that do not have the highest subscriber penetration, the Commission has the opportunity to give leased access programmers a mild "jump-start." The added benefit of being carried on the BST or the CPST with the highest subscriber penetration will not make up for nearly four years of lost opportunities owing to the failure of the implicit fee formula, but it is at least a step in the right direction.[49]

A "jump-start" is just a euphemism for a subsidy. There is no reason why operators and other programmers should be expected to underwrite the Game Show Network's, or any other lessee's, effort to gain customer acceptance.

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[47] Comments of Discovery Communications, Inc. at 5. See also ESPN Comments at 10; Viacom Comments at 11; The Travel Channel Comments at 22.

[48] The Commission also should make clear that in addition to this value for which operators must be compensated, as described supra, lessees also must compensate operators for any technical costs that leasing imposes. In the tier context, this may include the costs of traps, satellite dishes, tape decks, and other hardware and labor costs necessary to reconfigure the system to make room for lessees.

[49] GSN Comments at 23 (emphasis supplied). See also TELEMIAMI Comments at 23 ("[t]he CPS tier with the highest subscriber penetration generally carries a large number of channels and is designed to appeal to a broad spectrum of viewers. Thus, as a practical matter, unless the operator is intentionally trying to marginalize leased access programming, the main CPS tier is probably the best place for the programming.") (emphasis supplied).

CME also argues that "any CPST that does not reach at least 90% of subscribers cannot be considered a 'genuine outlet'. 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."[50] CME has no support for this reading of the statute, and it should not be adopted by the Commission. To suggest that only by required tier placement will the FCC have fulfilled the intent to make varied programming available to most subscribers is to ignore 12 years and billions of dollars of program development by operators and cable networks in creating the program diversity of today.

As described in our initial comments, Congress knew how to adopt tier placement requirements when it intended that certain channels be placed in a particular tier. This is evident from its tier placement requirements for PEG and must carry channels. Section 612 contains nothing similar with respect to leased access channels. The Commission cannot manufacture a requirement where Congress has been silent.[51]

III. THE COMMISSION MUST PROTECT AGAINST BUMPING AND MUST PROVIDE AN APPROPRIATE TRANSITION

Our initial comments explained that cable channel capacity is extremely tight. Therefore, should the Commission adopt new rate rules that artificially stimulate increased demand for leased access channels, the effects on channel line-ups will be severe. Subscribers would lose access to numerous program services that they enjoy -- including services recently

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[50] CME Comments at 26.

[51] Moreover, Section 624(f)(1) of the Act restricts the Commission's ability to read into Congress' silence any intent to mandate specific tier placement. Section 624 provides: "Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."

added under the Commission's "going forward" rules. Subscribers also will be unable to receive those new services that they desire. Instead they will see any available channel capacity quickly filled up with services that have failed to attain any marketplace appeal.

It was precisely to protect against these ill-effects that Congress protected subscribers' program line-ups when it adopted leased access requirements in 1984.[52] Congress did not expect that a leased access programmer could "bump" a program service at that time, nor should the Commission adopt such a requirement now.

Certain lessees, in an effort to force their way on to cable systems, claim that no transition relief is warranted. For example, they argue that the FCC's failure to adopt a transition in 1993 somehow shows that no transition is warranted now.[53] But there is no reason why the FCC must be blind to the harms to the public interest that a flash-cut approach would impose. Indeed, a transition is entirely consistent with Commission actions in other areas to protect subscribers' viewing habits against disruption.[54] The FCC has recognized that such dislocations have adverse effects on the viewing public -- a constituency often ignored in the leased access users' comments in their enthusiasm to claim their subsidized berths.

As described in NCTA's initial comments, the Commission should grandfather program networks carried on cable systems and not require their deletion to make room for leased access users gaining access under any new formula. The Commission also should adopt a transition to

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[52] 47 U.S.C. § 532 (b)(1)(E).

[53] ValueVision Comments at 16; GSN Comments at 15.

[54] For example, the Commission did not require bumping when it adopted channel occupancy rules. Horizontal and Vertical Ownership Limits, 8 FCC Rcd 8565, 8604-05 (1993).

any new leased access formula, so as not to stifle the development and growth of new cable program services competing for access to cable systems.[55]

New program networks have significant reliance interests at stake: "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 channel capacity."[56] A radical change in the formula, while advancing the private interests of certain lessees, would not serve the public interest.[57]

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55 It can hardly be said, as the Game Show Network does, that all cable programmers that have come on a cable system since 1984 hold "little more than 'squatters' rights'" and that they all are occupying their channels at the sufferance of GSN and any other entity that wants to lease a channel. Congress gave the Commission authority to establish the maximum reasonable rate, as well as terms and conditions for access. 47 U.S.C. §532 (c)(4)(A)(ii). Surely the Commission has the power to interpret its authority in a way to avoid these anti-consumer readings of the leased access provisions. Protecting against bumping, and providing a reasonable transition to any new rate rules, will also best comport with the statute's requirement that any rates must assure operators of protection against financial harm and must be consistent with the system's operation.

56 Comments of Outdoor Life Network; Speedvision Network; The Golf Channel; and BET On Jazz at 18.

57 It is indeed ironic for ValueVision to baldly claim that no transition is warranted because "many cable networks generate very little subscribership or revenue for cable operators. At bottom, providing for a transition period would merely allow such unpopular programmers to avoid competing with others willing to pay the same rate for carriage." ValueVision Comments at 20-21. First, ValueVision has no interest in paying the same for carriage as other networks -- as it has demonstrated repeatedly throughout this proceeding, it wishes to gain forced access to cable systems through government-set rates, rather than compete in the marketplace for carriage. Second, because ValueVision is in the business of direct sales to subscribers, the economics of its business cannot be replicated by other programmers that provide fiction and nonfiction programming, rather than 24 hour a day shopping and that rely on subscriber fees in order to support that quality programming.

Nor have operators and programmers "assumed the risk" that leased access rate rules would be arbitrarily changed so as to allow operators to charge lessees non-compensatory, subsidized rates for use of their channels.

IV. THE COMMISSION SHOULD MODIFY ITS PART-TIME RATES

As noted by several commenters, nothing in Section 612 indicates that Congress ever intended leased access to be provided on a part-time basis. Nonetheless, several prospective lessees have seized on the Commission's Notice in any effort to force operators to open up new and additional channels for part-time use, even when this usage requires bumping a full-time channel.

For example, Lorelei Communications expresses its "[f]eeling ... that when a time request for part-time leased access cannot be accommodated within one hour of the time requested, that another channel be operated for access, so long as the part-time request is for at least a 13 week period (without limitation to the amount of time purchase down to one half-hour per week)." Lorelei also "[f]eel(s) that it is reasonable to require operators to remove current programming from set aside channels upon any request from a leased access programmer, whether full-time or part-time."

Bumping a full-time network in order to make room for a part-time lessee is unfair to operators, programmers, and mostly to subscribers. For example, C-SPAN described how its networks have been "swiss cheesed" by leased access. Two hours of prime time programming is now preempted to make room for a real estate agency's "showcase of homes" program; in other cases, its programming is bumped to make room for a local home shopping service.[58]

The adverse effects caused by bumping existing networks -- either in whole or in part -- to make room for part-time leased access users are not solved by allowing operators to charge time of day pricing. As Comcast describes, "the notion that part-time rates should be set so that,

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[58] Comments of C-SPAN and C-SPAN 2 at 9.

if all time is leased, the operator's total revenues will be no greater than the rate for full-time lessees does not reflect the additional costs inherent in providing part-time leased access."[59] And if a full-time network is displaced by a part-time user, the operator still loses the full use of that channel. The value of a channel for other uses is severely diminished, even if part-time use is only a fraction of a day.[60] Yet an operator under the Commission's formula is only compensated for part of that loss.[61] Many hours of program time may remain fallow. And part-time usage compensates programmers nothing for their losses. A program network may lose access to valuable advertising revenues if it cannot be assured of full-time carriage.[62] And it plays havoc with viewer expectations because program listings can be preempted to carry the lessee's telecast.[63]

As demonstrated in the comments of Access Television Network, moreover, adequate blocs of time may exist -- through "remnant" time on systems -- that would enable lessees to easily purchase time at commercial rates for part-time uses. There is no reason to subsidize such uses by merely allowing proration of a full-time use under whatever formula the Commission establishes. As Access Television Network explains, "should the Commission follow through

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59 Comments of Comcast at 14. See also Comments of Cox Communications, Inc. at 21-24.

60 See e.g., Comments of the Pennsylvania Cable Network at 6.

61 See Comments of Comcast at 16 ("Cable operators should...be allowed to charge higher rates for part-time leased access to account for the likelihood of programming 'gaps' and unused time.")

62 See, e.g., Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, and BET on Jazz at 31; Comments of Shop at Home at 5.

63 The significance of preemption and the absurdity of the demand here, is evident by comparison to the broadcast context. The broadcast networks no longer preempt prime time, even for political conventions or some presidential speeches. And the FCC would never think of ordering preemption. But shop-at-home services expect the FCC to do just that.

with its proposal to apply a pro-rated cost/market rate formula (which will inevitably yield lower rates that the implicit fee formula) to part-time rates, the result will be to create subsidized part-time CLA rates that are far below the market-based rate for commercial advertising."[64] Doing so would again provide a subsidy to access users, would harm cable operators' financial condition through siphoning off advertising revenues and encouraging advertisers' migration to leased access (at rates that are absurdly low), and would provide leased access users an unfair competitive advantage over other part-time users of the systems who receive satisfactory part-time carriage through remnant time.

V. THE COMMISSION SHOULD NOT ADOPT AN OVERBROAD DEFINITION OF "AFFILIATION"

In an effort to craft rules to give its shopping network additional advantages over traditional programmers, ValueVision proposes an overly broad definition of "affiliate" for purposes of the leased access provision.[65] ValueVision proposes a vague, open-ended test for affiliation that appears to have been created out of whole cloth. Its affiliation dragnet would go well beyond anything that the Commission has previously adopted in the cable context. For example, the Commission under Title VI of the Communications Act has focused on whether an operator has a stock ownership interest in excess of a prescribed level in a programmer.[66] There

64 ATN Comments at 7.

65 ValueVision Comments at 9-11. An "affiliate" would include "[a]ny financial or business relationships, by contracts or otherwise, directly or indirectly, between the cable operator and a cable programmer, which result in the potential ability of the cable operator to control or influence the programmer's business affairs. However, neither the lessor-lessee relationship nor a business relationship pursuant to a standard affiliation agreement between a programmer and a cable operator should, but itself, establish an affiliation." ValueVision at 10.

66 See 47 C.F.R. §76.501.