BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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MAY 3 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Leased Commercial Access	)	CS Docket No. 96-60

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REPLY COMMENTS OF TIME WARNER CABLE

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REPLY COMMENTS OF TIME WARNER CABLE

Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner Cable"), hereby submits its Reply Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

In its Comments, Time Warner Cable demonstrated that the Commission's proposal to modify the commercial leased access ("CLA") rules in order to create CLA demand is inconsistent with the underlying purpose of the CLA rules and contrary to the Commission's statutory obligation to administer CLA in a manner that does not harm cable operators. Time Warner Cable further demonstrated that the lack of demand for CLA is the result of the economics of the cable and video programming businesses, not the level of CLA rates, and that the proposed CLA rate formula would

[1] 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, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-122 (released March 29, 1996) ("Notice").

cause serious harm to programmers and consumers, as well as operators.

Comments filed in response to the Notice support these conclusions. Indeed, the majority of commenters either do not endorse the Commission's proposed rate formula, or propose an alternative. The record is replete with evidence, including expert economic analyses, indicating that the proposed formula will harm operators, programmers and consumers. Moreover, the record, including economic analyses, provides convincing evidence that the Commission's concern that its Highest Implicit Fee ("HIF") formula has failed properly to implement the leased access provisions or to stimulate sufficient demand for leased access is unfounded. Thus, the Commission should retain the HIF.

Time Warner Cable also addresses the following issues raised in comments:

- The Commission should retain its current definition of affiliate;
- Cable operators should not be required to allow resale of CLA capacity;
- Part-time CLA rates, in the aggregate, should be allowed to exceed the maximum full-time CLA rate;
- Neither LPTV nor non-profit organizations should be given preferential CLA rates or set-asides of CLA capacity; and
- The Commission may not and should not mandate that CLA programmers be placed on a particular tier.

II. NO CHANGE IN THE COMMERCIAL LEASED ACCESS RATE FORMULA IS JUSTIFIED.

A. The Record Demonstrates That Congress Did Not Intend A CLA Subsidy, That Subsidized CLA Will Not Promote Diversity, And That Lack Of CLA Demand Is Due To The Underlying Economics Of Video Programming.

Time Warner Cable demonstrated in its Comments that (1) Congress intended CLA as a "safety valve" for carriage of unaffiliated programmers, not as a subsidy for unaffiliated programmers; (2) the goal of CLA -- diversity in the content and source of programming -- has already been fulfilled; and (3) little demand exists for CLA because the economics of CLA are inconsistent with the realities of the video programming business.[2] These arguments are widely supported in the comments filed in this proceeding.

The record shows that the proposal to manipulate CLA rates to create "enough" CLA demand is contrary to the statute. For example, ESPN, a programmer unaffiliated with any cable operator, states that "[a]t no time. . . did Congress ever suggest that [CLA] was intended to provide an outlet for programming that could not otherwise generate sufficient marketplace demand to warrant carriage."[3] Other programmers similarly conclude that

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[2] Communications Act of 1934 as amended § 612(a) ("Communications Act"), 47 U.S.C. § 532(a).

[3] ESPN Comments at 2. Continental Cablevision argues that "[s]ection 612 guarantees that leased access programmers prepared to pay a fair market price for access to a cable system cannot be denied such access. It does not guarantee that there will be enough interest in their programming to make paying the

Continued

any attempt to increase CLA demand through subsidized rates is inconsistent with the statute.[4]

Commenters also agree that the diversity goals which underlie CLA already have been achieved and, therefore, there is no need to subsidize CLA rates. Indeed, US West states that "[i]t is interesting to note that the Commission's willingness to change its current rate formulas for leased access is not being driven by a large consumer outcry for additional programming diversity."[5] This should come as no surprise, given that the video programming business is "robustly competitive"[6] and that "[c]able networks compete vigorously with one another and with leased access programmers for both access and audience,"[7] while the number of program networks "has continued to expand rapidly."[8]

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market price worthwhile." Continental Cablevision Comments at 34; see also NCTA Comments at 7-10.

[4] See Shop at Home Comments at 2; Outdoor Life/Speedvision/Golf/BET on Jazz Comments at 8 (statutory authority to set maximum CLA rates is not a license to fill up CLA).

[5] US West Comments at 6 (citation omitted). Any argument that revision of the CLA formula is necessary also is undercut by the relative dearth of leased access complaints to date (as of May 8, 1996, only 81 complaints have been placed on Public Notice by the Commission since the CLA rules last were modified).

[6] USA Networks Comments at 5.

[7] Id.

[8] Encore Media Comments at 2.

Moreover, unaffiliated programmers do not merely compete for carriage, they obtain it. Continental Cablevision reports that "[a] typical Continental system offers unaffiliated channels on 94 percent of its channels;"[9] and NCTA indicates that "of the top 25 cable networks (measured in terms of subscribership), nearly one-third are unaffiliated with any cable system owners."[10] Moreover, as Time Warner Cable noted in its comments, the Commission's own rules guarantee that a minimum of 60 percent of an operator's channel capacity be devoted to unaffiliated programming.[11] Programmers variously demonstrate that diversity has already been achieved;[12] that subsidized CLA rates will decrease rather than increase diversity;[13] and that subsidized CLA rates will not lead to increased diversity.[14]

Finally, it is clear that the relative dearth of CLA demand observed to date is a function of the underlying economics of the video programming business, not the price of CLA. First,

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9 Continental Cablevision Comments at 34 (citation omitted).

10 NCTA Comments at 5.

11 See 47 C.F.R. § 76.504.

12 C-Span Comments at 5; ESPN Comments at 3; Encore Comments at 2; Outdoor Life/Speedvision/Golf/BET on Jazz Comments at 12-15; Viacom Comments at 7-8.

13 Faith and Values Comments at 4; Home & Garden Comments at 2; Discovery Comments at 4; USA Network Comments at 3-4.

14 E! Comments at 5; Lifetime Comments at 3-4.

producing quality programming is expensive.[15] Video programmers typically are paid license fees by cable operators for such programming. Indeed, Continental Cablevision reports that carriage of video programming by cable operators resulted in fees paid to cable programmers of $4.963 billion in 1995.[16] Quality national programmers to a great degree are dependent on these license fees. As explained by economists Stanley Besen and Jane Murdoch:

> [M]ost incumbent program services depend for a significant portion of their support on being able to share in direct subscriber payments through the affiliate fees they charge to cable operators. . . An existing subscriber-based program service cannot bid to be a leased access programmer because, by definition, it needs subscriber revenues to survive.[17]

Comments submitted by programmers support this analysis. For example, PBS Horizons states that, like other niche services, it relies on subscriber fees and operator payments to support program production,[18] while Outdoor Life/Speedvision/Golf/BET on Jazz argue that the economics of CLA are not conducive to quality

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[15] Travel Channel Comments at 7 (programmer has invested more than $21 million in past four years to develop its service); Discovery Comments at 2 (one award-winning documentary alone cost $1.5 million).

[16] TCI Comments at 5-6.

[17] An Economic Analysis of the FCC's Cable Leased Access Proposal (Charles Rivers Associates, 1996) at 16-17 (attached to Tele-Communications, Inc. Comments) ("Besen/Murdoch Paper").

[18] PBS Horizons Comments at 3.

programming, because quality programming relies on operator payments.[19]

In sum, low demand for CLA is not caused by rate levels, but by the fundamental economic realities of the programming business. No amount of manipulation of CLA rates will cure this malady; but, as discussed below, modifying the CLA rate formula would cause great harm.

B. Significant Opposition To The Commission's Proposed CLA Rate Formula Exists, Because It Would Harm Consumers, Programmers And Cable Operators.

Opposition to the Commission's proposed cost/market formula for calculating maximum CLA rates is vociferous and widespread. Non-CLA programmers oppose it because lower CLA rates will reduce the amount of channel capacity that is available for such programmers.[20] This will be particularly harmful to new programmers.[21] Indeed, C-SPAN states that "the economics of the video programming business are such that if the overall cost of LCA is lowered. . . the public service programming of the C-SPAN Networks, including the newly-launched C-SPAN 3, will be seriously cutback or disappear entirely from cable systems

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[19] Outdoor Life/Speedvision/Golf/BET on Jazz Comments at 17-20. See also Shop at Home Comments at 3-4.

[20] Travel Channel Comments at 5-6; Liberty Sports Comments at 4-6; Home and Garden Television Comments at 1-2; Lifetime Comments at 3; USA Networks Comments at 4-5; Encore Media Comments at 2.

[21] E! Comments at 4; Outdoor Life/Speedvision/Golf BET on Jazz Comments at 22.

throughout the country."[22] Programmers also will be harmed if low-value or even offensive CLA programming is required to be carried in the same package as non-CLA programming, because the value of the entire package will be reduced.[23] Moreover, because the cable operator cannot effectively monitor CLA programmers' program quality or promotional efforts, CLA programmers benefit from audience spillovers without being required to create similar spillovers for other services.[24] Thus, CLA programmers can free-ride on the promotional efforts and production quality of other programmers in the package, thereby reducing both subscriber and advertiser revenues for programmers and cable operators.[25]

Cable operators oppose the proposed formula for a variety of reasons. Perhaps most importantly, the record indicates that the Commission's inclination to ignore opportunity costs associated with loss of subscriber revenues would fail to "assure that [CLA] use will not adversely affect the operation, financial condition, or market development of [] cable system[s],"[26] and is, therefore, contrary to the Commission's leased access statutory mandate. As described by economists Besen and Murdoch,

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22 C-SPAN Comments at 7-8 (citation omitted).

23 The Impact of the FCC's Leased Access Proposal on Cable Television Program Services, (Charles Rivers Associates, 1996) at 17-18 (attached to Turner Broadcasting System Comments) ("Program Service Impact Analysis").

24 Id. at 12-13.

25 Id.

26 Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

replacement of operator-selected programming with CLA programming will reduce subscriber revenues in two ways.

First, even assuming that net revenue (subscriber revenue + advertising revenue - programming fee) for a given channel is independent of the package of services in which it is offered, cable operators will offer subscribers the mix of services that maximizes total net revenue in order to maximize profits. In other words, if substituting one channel for another increases total net revenue, then the cable operator will add the service.[27] Thus, if total net revenues are maximized using a given package of services, it follows that adding or deleting any service from the package can only reduce net revenues.[28]

Second, cable operators do not simply offer subscribers a random amalgamation of services; rather, operators selectively include programming in a package either due to its universal appeal or because it satisfies highly-targeted or niche interests. Thus, cable operators seek to maximize subscriber demand for its overall service by reflecting a full range of interests in the programming they offer. Programming that

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[27] Channels will only be added if net revenue for the channel is expected to exceed the incremental cost of the channel.

[28] Besen/Murdoch Paper at 10 ("When the optimal mix is offered, even if the net revenue of each service is independent of the presence of all other services, the operator cannot increase total net revenues by deleting one service and replacing it with another, or by adding or deleting any service.").

attracts subscribers in its own right increases the penetration of the package and thereby increases the value of the package to other services, which in turn increases the total value of the package to the cable operator. These indirect, "spillover" effects are "unlikely to be taken into account completely through the revenues apparently generated by that service alone."[29]

That the Commission's proposed cost/market formula will impair the market development of cable operators is further supported by other comments in this proceeding. For example, Shop at Home states that cable operators must be concerned about the mix of programming they offer subscribers, and that replacing high-quality programming with low-quality programming will adversely affect operators.[30] Viacom states that the proposed formula will lead to unjustifiably low CLA rates and make it more desirable for certain less-valued programmers to use CLA, thereby injuring cable operators.[31] Discovery states that the Commission's formula is flawed because it does not account for the loss of subscribers and loss of goodwill resulting from the removal of popular programming,[32] and that "[i]t is axiomatic that displacement of popular programming from a cable system's line-up by programming in which subscribers have little or no

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29 Besen/Murdoch Paper at 12-13.

30 Shop at Home Comments at 3.

31 Viacom Comments at 3-4.

32 Discovery Comments at 5.

interest will diminish the overall value which subscribers place on the cable service as a whole and may even cause them to cancel their subscriptions."[33] These comments are consistent with the economic analysis submitted by Time Warner Cable, which stated that "[w]ith the reduced consumer satisfaction that is likely if programs are displaced by leased access, there is an obvious risk of subscription cancellations as programs valued by certain consumer segments are replaced."[34]

Finally, even CLA programmers attacked the proposed formula as too complicated,[35] subject to manipulation by cable operators,[36] or likely to place CLA lessees at a disadvantage.[37] As described below, some CLA programmers propose the adoption of specific CLA rates as an alternative. The absence of widespread unqualified support for the proposed formula among its intended beneficiaries is, in and of itself, a strong indication that the Commission should reconsider its proposal.

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33 Id. at 5-6.

34 A. Daniel Kelley, An Economic Analysis of Commercial Leased Access Pricing, (appended to Time Warner Cable Comments) (Hatfield Associates, 1996) at 14. ("Economic Analysis").

35 See, e.g., Producer Mark Kliem Comments at 3; United Broadcasting Comments at 5.

36 Producer Mark Kliem Comments at 3; United Broadcasting Comments at 4; R.K. Production Company Comments at 2.

37 Viking Communications Comments at 1.

C. Alternative Proposals For Specific CLA Rates Proposed By CLA Programmers Are Arbitrary And Contrary To The Statute.

Although some CLA proponents arbitrarily propose specific per-subscriber, per-month rates (generally in range of 1¢-10¢ per-subscriber/month) in place of the Commission's proposed formula, these numbers are apparently chosen from thin air and are unsupported by any evidence demonstrating that such rates would not "adversely affect"[38] the operation, financial condition, or market development of cable systems.[39] All are proposed by potential CLA programmers with an obvious bias towards a subsidized leased access rate. The Commission should reject these arbitrary proposals as impermissible under the statute and lacking in evidentiary support.

One programmer, United Broadcasting Corporation, advanced its rate proposal as based on the "incremental cost" of carrying a CLA programmer.[40] Such a rate is sufficient compensation in United Broadcasting's view because "the operator will still be receiving per-channel revenue from subscribers."[41] However, and

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38 Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

39 See, e.g., Broadcasting Systems, Inc. Comments at 1-2 (proposed rate justified on basis that current rates are outrageous and not close to fair market value); Blab Television Network Comments at 6-7 (CLA rates higher than 4¢-8¢ "are not commercially viable for local origination programming"); Vacation Channel Comments at 3 (proposed rate is "fair" to cable companies, more simple than the Commission's proposed formula and easy to enforce).

40 See, e.g., United Broadcasting Comments at 17.

41 Id.

quite obviously, a rate based on incremental costs could very well exclude most joint and common costs as well as the substantial opportunity costs demonstrated above.[42] Indeed, as demonstrated above, these opportunity costs include a likely reduction in subscriber revenues. Any proposal which fails to account for these costs would cause serious harm to the "operation, financial condition, or market development of the cable system."[43] The Commission should reject United Broadcasting's proposal as contrary to the statute.

Finally, some CLA programmers argue that the Commission should establish some "initial" or "nominal" rate which would be presumed reasonable unless a cable operator can prove the contrary.[44] These proposals are expressly contrary to specific statutory presumptions within section 612 that favor the cable operator. First, and most importantly, section 612 mandates that CLA rates be "at least sufficient to <u>assure</u> that [CLA] use will not adversely affect the operation, financial condition, or

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42 To the extent that United Broadcasting's proposed rate is based upon the incremental cost of adding a CLA programmer presented by the Center for Media Education and Consumer Federation of America, (United Broadcasting Comments at 19, n. 4, apparently referring to Letter of Jeffrey Chester and Bradley Stillman to Chairman Reed Hundt, <u>ex parte</u>, MM Docket No. 92-266, June 1, 1994), it clearly does not include these costs, and is therefore substantially understated.

43 Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

44 <u>See</u>, <u>e.g.</u>, United Broadcasting Comments at 18; Blab Television Network Comments at 7.

market development of the cable system."[45] Second, Congress gave cable operators the right to establish the rate for individual CLA programmers and attached to that right a presumption of reasonableness.[46] These presumptions are designed to ensure, at the outset, that cable operators are not financially harmed by the imposition of CLA. Any rule instituting a "nominal" maximum CLA rate and requiring operators to prove losses and costs in excess of that rate clearly is contrary to these statutory presumptions and must be rejected.

D. The Commission Should Retain The Highest Implicit Fee Formula.

The Highest Implicit Fee ("HIF") formula was criticized in the Notice as resulting in "double billing,"[47] as charging CLA programmers more than cable operators are willing to accept from other programmers,[48] and as "not based on the reasonable costs that leased access programming imposes on operators."[49] The record in this proceeding demonstrates that these concerns are misplaced and that the HIF formula should be retained.

The Commission's double billing argument does not withstand detailed economic analysis. In essence, the double billing

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45 Notice at ¶ 26; Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1) (emphasis added).

46 Communications Act § 612(f); 47 U.S.C. § 532(f).

47 Notice at ¶ 29.

48 Id. at ¶ 30.

49 Id. at ¶ 31.

argument assumes that a cable operator will recover the same subscriber revenues after adding the CLA programmer as before.[50] However, as noted previously, subscribers do not view CLA programming as a substitute for the programming it replaces. Thus, if a CLA programmer is as highly valued by subscribers as a presently carried programmer and would enhance the package created by the cable operator, an operator could increase its profits by substituting the CLA programmer for the existing programmer. Profits would increase because current subscriber revenues will be maintained (because the programming is just as highly valued by subscribers and enhances the package), while the operator gains the CLA fee and saves the program license fee. In this situation, the cable operator's interest would be served by replacing a current programmer with a CLA programmer.[51]

This is not observed in practice, which indicates that the value of leased access programming to subscribers is such that average per-channel tier charges are not reasonably considered a payment for CLA programming. Thus, no double billing occurs.

The Commission's belief that the HIF is not based on the costs CLA imposes on operators is equally unfounded. In fact, while even the HIF may not compensate for all operator costs, it

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[50] See An Analysis of the Federal Communications Commission's Maximum Reasonable Leased Commercial Access Rate, (Economists Incorporated, May 15, 1996) (attached to NCTA Comments) ("Economists, Inc. Analysis").

[51] Economists, Inc. Analysis at 7-8.

does reflect revenue losses resulting from reduced penetration and other, indirect revenue losses. Most importantly, compared to the proposed formula, the present HIF formula more nearly fulfills the statutory mandate that CLA rates "assure that [CLA] use will not adversely affect the operation, financial condition, or market development of the cable system."[52] Even so, in most cases, the HIF formula adopted by the Commission "understates the true maximum implicit access fee that a cable operator currently realizes."[53] Thus, maintaining the HIF, at a minimum, is necessary to safeguard cable operators' "operation, financial condition, or market development."[54]

III. OTHER ISSUES.

A. The Commission Should Not Find An "Affiliation" Between A Cable Operator And A Programmer For The Purpose Of CLA Unless The Cable Operator Is In "Control" Of The Programmer.

ValueVision argues that unless the Commission defines the term "affiliate" to include practically any business relationship beyond that of a "standard affiliation agreement,"[55] then cable

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52 Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

53 Besen/Murdoch Paper at 19 (citation omitted).

54 Communications Act § 612(c)(1); 47 U.S.C. § 532(c)(1).

55 ValueVision Comments at 10. ValueVision proposes that the Commission define the term "affiliate" for the purpose of the CLA rules to "include any financial or business relationships, by contract 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." Id.

"operators may evade their statutory leased access obligations by funding or supporting new programming entities primarily designed to displace leased access competitors or to outbid them."[56] ValueVision's suggestion is without merit and should be rejected.

ValueVision offers nothing but speculation in support of this fear. More importantly, ValueVision's argument would logically lead the Commission to adopt an affiliation standard higher than the standard proposed by ValueVision. This is because cable operators will not be able to require programmers to bid against CLA applicants absent control of the programmer. Thus, the Commission should reject ValueVision and adopt the control standard.

B. Whether Resale Of CLA Capacity Is Allowed Should Be Left To The Discretion Of Cable Operators.

The Notice sought comment on whether its rules should permit CLA time to be resold by lessees.[57] As an initial matter, the fact that resellers are able to resell capacity at a rate higher than the maximum permitted charge is a persuasive indication that the maximum permitted charge understates the value of capacity to programmers. Therefore, resale will merely divert CLA compensation from cable operators to unaffiliated resellers, which is contrary to the Commission's mandate to assure that CLA does not harm the financial condition of cable systems.

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56 Id. at 9-10.

57 Notice at ¶ 141.

Time Warner Cable urges the Commission to allow cable operators to decide whether and on what terms CLA resale will be allowed. There is no statutory requirement mandating resale of CLA. In fact, because unrestricted mandatory resale will not allow cable operators to take into account the nature of the proposed CLA service when establishing the rate, terms and conditions for such service, such a result would be contrary to the statute.[58]

Resale poses other risks to cable operators. For example, unrestricted resale could allow one CLA applicant to "warehouse" CLA capacity, which would deny the capacity to non-CLA programmers and potentially leave the operator with unnecessary (and unwanted) dark channels. Moreover, the reseller's mark-up is not regulated, which could unnecessarily decrease the amount of CLA available at regulated rates. Finally, absent cable operator control, one buyer could acquire significant blocks of time on many systems and then exercise its editorial control over access to the capacity, which could decrease the diversity of sources of programming. Given these concerns, and absent a statutory mandate, the Commission should not require that cable operators allow resale of CLA capacity.

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[58] H.R. Rep. No. 934, 98th Cong., 2d Sess. at 52 (1984) ("1984 House Report").

C. The Commission Should Not Require That Part-Time Rates Be Calculated By Prorating Full-time Rates, And Cable Operators Should Not Be Required To Open A New Channel For Leased Access Absent A CLA Programmer Request For Access Eight Hours A Day, Seven Days A Week.

A few commenters argue that part-time CLA rates should be calculated by prorating full-time rates, or that the sum of part-time rates for a 24-hour period may not exceed the daily full-time rate.[59] Such a requirement can only result in part-time rates which are not compensatory. This is so for a number of reasons. First, the direct costs associated with CLA are still present for each CLA programmer that seeks only 30 or 60 minute time slots. These costs are detailed in Time Warner Cable's Comments. Second, the costs of dealing with many part-time CLA programmers far exceed those associated with one 24-hour programmer. This is because the transaction costs must be repeated for each CLA programmer. Therefore, proration of rates under the proposed formula would result in rates too low to ensure cost-recovery by the operator.

Similarly, the Notice suggests that while cable operators may establish different rates for different day parts, they are limited to a maximum within each 24-hour period established by prorating the monthly maximum fee equally among the days of the month.[60] This approach would prohibit an operator from charging

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[59] See, e.g., Center for Media Education ("CME") Comments at 27.

[60] Notice at ¶ 44.

different rates for different days of the week, which can result in harm to operators. Because there are peak days for cable programming as well as peak hours (weekends, for example, are peak days on many systems), many hours on certain days may go unleased or may be leased for only extremely low rates. Cable operators should be allowed to recover these lost revenue opportunities by charging higher rates on peak demand days.

Finally, the Notice is ambiguous as to whether the Commission proposes to displace existing programming or dark channels on the basis of a CLA programmer's request for merely eight hours one day per week or eight hours a day, seven days a week.[61] The former scenario is obviously unacceptable because it would force cable operators to bump current programming based on nothing more than a commitment to lease 1/21 of a channel. Even the latter interpretation would force cable operators to uproot existing non-leased programming, and may foreclose the operator's ability to attract a full-time lessee, all on the basis of a fractional lease. In such circumstances, the Commission should provide for an extended transition period to minimize the impact of the bumping and to allow the operator time to find a beneficial use for the unused time. Moreover, the Commission should allow the cable operator to price the CLA time in a manner which is not limited to a prorated portion of the maximum monthly

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[61] Notice at ¶¶ 124-25.

fee and which reflects the opportunity cost associated with the part-time lease.

D. There Is No Basis In Fact Or Law To Support CLA Rate Or Capacity Preferences For Particular CLA Programmers.

Preferences and subsidies of any kind in the context of commercial leased access are a vastly overbroad and unjustified remedy for problems which do not exist. Time Warner Cable strongly urges the Commission to reject these proposals because they raise significant policy, statutory and constitutional problems, as well as severe operational and financial consequences for cable operators.

Several low power television stations ("LPTVs") request that the Commission adopt preferential CLA rates for LPTVs and, in addition, reserve a portion of all CLA channels for LPTV use.[62] Nothing in the LPTVs' comments warrants deviation from the Commission's earlier conclusion that "there is insufficient evidence on the record for us to adopt [] recommendations. . . that LPTV stations . . . should receive preferential treatment."[63]

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62 See, e.g., Community Broadcasters Comments at 10-12; WEVU-LP Comments at 2; Landmark Broadcasting Comments at 2; Vacation Channel at 2-4; Beach TV Comments at 1-2; Vacation Channel Comments at 2-5; Viking Communications at 2 (seeking only preferential CLA rate). In contrast, Time Warner Cable notes that several other LPTVs filing comments in this proceeding did not seek preferential rates or a reserve. See, e.g., Broadcasting Systems Comments at 1-3 (arguing only that CLA rates should be lowered) & Adirondack Comments at 4 (stating that there was no need for "preferential treatment").

63 Notice at ¶ 115.

Rather than furnish the required "specific evidence why a preference for [LPTVs] may be appropriate,"[64] LPTV commenters provided only self-serving unsubstantiated claims that carriage of LPTVs would enhance diversity in a manner that other non-LPTV programmers could not.[65] Similarly, LPTV commenters provide no policy basis -- other than naked allegations -- for a special CLA rate, nor do they provide any analysis that would explain their proposed special rate. In fact, the LPTV commenters evidenced significant disagreement as to what constitutes an unreasonable price.[66] Finally, the LPTV commenters furnished no legal basis to justify their extraordinary preference request. Not only is there no such basis in section 612, but Time Warner Cable believes that an LPTV preference would not survive scrutiny under the First Amendment.[67]

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64 Id.

65 See Community Broadcasters Comments at 10 ("There can be no greater diversity than local programming provided by an LPTV station.") Landmark Broadcasting, for example, alleges that LPTVs focus their programming on the neighborhoods they serve. See Landmark Broadcasting Comments at 2. However, Landmark provides no details whatsoever concerning the type and nature of its "focus[ed] programming." Those stations that did discuss the unique nature of their programming acknowledged that they had little difficulty in obtaining carriage. See Adirondack Comments at 1-3.

66 Compare Broadcasting Systems Comments at 1 (willing to pay $120,000 per year to obtain CLA channel) with Vacation Channel Comments at 2-3 (noting that $115,000 annual CLA charge was 17.5% of gross revenues).

67 See Notice at ¶ 110 (citing Time Warner Cable Opp. at 31-32).

Similarly, certain not-for-profit programmers propose that they be given an entitlement to a CLA set-aside and preferential rates on the basis of an assertion that existing CLA rates are too high.[68] However, in the Rate Order, the Commission rejected arguments that CLA rates were unreasonably high with respect to not-for-profit programmers or that such programmers deserved a set-aside.[69] The Commission explained that the CLA formula was expected to provide "reasonable rates" for not-for-profit programmers and that there was no need to provide such programmers with a CLA set-aside because "adequate provision has been made for not-for-profit programmers under Section 611 of the Communications Act,"[70] the public, educational and government access provision ("PEG"). The Commission further supported its

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68 See, e.g., Joint Comments of The Association of America's Public Television Stations ("APTS") and The Public Broadcasting Service ("PBS") at 2 & 5-8; Hispanic Information and Telecommunications Network ("HITN") Comments at 7 & 17-18; CME Comments at 7-8 & 16-19. Additionally, APTS and PBS jointly contend that not-for-profit programmers are entitled to preferential treatment because such entities may receive preferential access to common carrier facilities. See Joint Comments of APTS and PBS at 5-6. Because cable systems are not subject to common carrier regulation, that claim is without merit. See 47 U.S.C. § 541(c) ("[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.")

69 See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5954 ¶¶ 525-26 (rejecting claim that "not-for-profit organizations need lower rates and that Congress intended that lower rates be set for them") ("Rate Order").

70 See Rate Order, at 5954, ¶ 526.