

conclusions on the grounds that it had adopted procedures which reduced the need to specify preferential rates for not-for-profit programmers.⁷¹

The not-for-profit programmers provided no legal or policy analysis that would undercut the Commission's previous conclusion that preferences are unwarranted. For instance, the not-for-profit programmers failed to provide specific examples -- as requested by the Notice⁷² -- that CLA rates are not affordable.⁷³ For example, the Center for Media Education ("CME") provided information concerning the cost of various CLA channels, then simply asserted that "[n]one of the rates [] were affordable for nonprofit organizations such as [CME]."⁷⁴ Undercutting CME's argument is the fact that many not-for-profits earned significant income in excess of \$100 million dollars.⁷⁵ Similarly, CME's

71 Id.

72 See Notice at ¶ 112.

73 APTS and PBS assert that "[p]aying commercial rates for [CLA carriage] is not an option for most public television stations." APTS/PBS Comments at 6. However, they provide no data on either public television revenues or CLA costs for such stations. A somewhat less conclusory (yet unsubstantiated) statement is expressed by HITN which stated that the Notice's CLA formula "might be too high for many not-for-profits to afford." HITN Comments at 18.

74 Declaration of Anthony E. Wright, Project Coordinator for CME, attached to CME Comments as Appendix B.

75 TCI notes that Howard Hughes Medical Institute has a net worth of \$8.2 billion and annual income of \$432 million and that the National Rifle Association has net income of \$148 million. See TCI Comments at 29 (listing numerous large, well-financed, non-profit organizations): see also NCTA Comments at 35

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claim that the United States Catholic Conference and its dioceses are incapable of affording CLA is belied by the fact that other church groups apparently have little difficulty in affording CLA carriage.⁷⁶

Moreover, the PEG provisions provide ample opportunities -- at no cost -- for not-for-profits to obtain carriage. CME, the only not-for-profit to address the PEG provisions, contends that such provisions are inadequate in that PEG is local in nature and does not "provide [] opportunities for national coordination and distribution."⁷⁷ However, CLA also is a system-by-system process.⁷⁸ Thus, PEG does not provide an inferior alternative. To the extent that CME argues that some systems have not instituted PEG access,⁷⁹ the remedy is not to lobby for further federal regulation of CLA but to seek implementation of PEG through their local franchising authority.

Furthermore, a variety of legal obstacles preclude preferential treatment of not-for-profit programmers. First, the Commission is without statutory authority to mandate preferences for not-for-profit programmers because section 612 and its

(mere fact that entity is non-profit does not mean it lacks funds to pay CLA rates).

⁷⁶ See Cox Communications Comments at 29 n.46 (stating that two of its Florida systems have CLA programmers that are church groups).

⁷⁷ CME Comments at 22.

⁷⁸ See Time Warner Cable Comments at 28.

⁷⁹ CME Comments at 21-22.

legislative history indicate that profit and not-for-profit entities are to be treated similarly.⁸⁰ Finally, Time Warner Cable reiterates its belief that a preference would violate the First Amendment in that it would force operators to favor certain programmers over others.⁸¹

E. There Is No Basis To Mandate That CLA Programming Be Provided As Part Of Any Particular Tier

Tier construction and packaging is an integral part of a cable operator's programming selection editorial function, which is protected by the First Amendment.⁸² Thus, because mandatory tier placement for CLA programming effectively would eviscerate cable operators' ability to perform this function, the Commission has little latitude to institute such a requirement. This is especially true considering the fact that Congress plainly has not required that CLA programming be provided as part of any tier. Although tier placement supporters argue that tier placement is required by the legislative history to "ensure that

⁸⁰ It is axiomatic that similarly situated parties must be treated similarly. See McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993); Melody Music Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965). Thus, where, as here, Congress designates certain parties as "similar," the FCC may not treat them dissimilarly. Cf. TCI Comments at 28; NCTA Comments at 35.

⁸¹ See Notice at ¶ 110 (citing Time Warner Cable Opp. at 31-32).

⁸² See Turner Broadcasting System, Inc. v. FCC, 512 U.S. --, 129 L. Ed. 2d 497, 514, 114 S. Ct. 2445 (1994). ("[C]able operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment," citing Leathers v. Medlock, 499 U.S. 439, 444, 113 L. Ed. 2d 494, 111 S. Ct. 1438 (1991).)

the [] channels are a genuine outlet for programmers,"⁸³ this language is merely a general statement regarding the effectiveness of CLA, not a specific mandate for tier placement. It is also a settled principle of law that the Commission may not use legislative history to create rights not granted in the statute.⁸⁴ In any event, mandatory tier placement rights are at odds with the fact that Congress expressly intended for operators to have the right to consider how leased access services "affect the marketing of the mix of existing services being offered . . . to subscribers, as well as potential market fragmentation that might be created and any resulting impact that might have on subscriber or advertising revenues."⁸⁵ Moreover, Congress and

⁸³ Game Show Comments at 23 (citation omitted); see also ValueVision Comments at 23.

⁸⁴ See, e.g., Fawn Mining Corp. v. Hudson, --- F.3d ---, No. 95-7051 (D.C. Cir. April 5, 1996) (rejecting petitioner's attempt to create "new" benefit rights from legislative history that were not granted by the unambiguous terms of the statute); American Civil Liberties Union v. FCC, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (legislative history may not be used to construe unambiguous statute where "resort to legislative history is sought to support a result contrary to the statute's express terms."), cert. denied, 485 U.S. 959 (1988). See also Connecticut National Bank v. Germain, 503 U.S. 249 (1992) (where words of a statute are unambiguous, judicial inquiry is complete).

⁸⁵ 1984 House Report at 51. See also NCTA Comments at 29-30 (pointing out that it would be nonsensical for Congress to have given the FCC authority to determine the rates charged by operators to lessees for billing and collection of subscriber revenues for such lessees if Congress intended lessees to be carried within a tier from which they receive no subscriber payment.).

the Commission elsewhere have recognized that unbundled program offerings are in the consumer's interest.⁸⁶

Were the FCC to adopt the proposed tier placement scheme (which we believe it cannot as argued above), its rate formula must incorporate and pass through the economic value that the CLA user reaps from such placement. As noted by economists Besen and Murdoch, the proposed formula does not take into account the fact that CLA programmers will be able to free ride on the spillover benefits stemming from their placement on the same tier as certain other channels.⁸⁷ Besen and Murdoch also note that the loss of the operators' ability to coordinate and monitor its programming mix will harm those incumbent program services that continue to be carried because CLA programmers will weaken the tier and make cable a less attractive product to subscribers and advertisers.⁸⁸ Such a result would contravene the statutory prohibition that the FCC "do no harm" to cable operators with respect to the implementation of CLA. Consequently, because the tier placement proposal is unlawful and would ill serve the public interest, it must be rejected.

⁸⁶ See Communications Act § 623(1)(2)(B), 47 U.S.C. § 543(1)(2)(B) (exempting video programming offered on a per-program or per-channel basis from rate regulation as a cable programming service); see also 47 C.F.R. § 76.901(b)(1)-(2).

⁸⁷ This point is explained in more detail in TCI's Comments at 25 and in the Besen/Murdoch Paper at 13.

⁸⁸ See Program Service Impact Analysis attached to Joint Comments of Turner Broadcasting System, et. al.

IV. CONCLUSION.

For the reasons set forth above, the Commission should not adopt the proposed cost/market formula.

Respectfully submitted,

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