d. Signatories

37. A *Signatory to INMARSAT* is an Administration or government, or the telecommunications entity designated as sole operating entity by an Administration or government, which participates in the International Mobile Satellite Organization (INMARSAT) in order to develop and operate a global maritime satellite telecommunication system which serves maritime commercial and safety needs of the United States and foreign countries. A *Signatory to INTELSAT* is an Administration or government, or the telecommunications entity designated as sole operating entity by an Administration or government, which participates in the International Telecommunications Satellite Organization (INTELSAT) in order to develop, construct, operate and maintain the space segment of the global commercial telecommunications satellite system established under the Interim Agreement and Special Agreement signed by Governments on August 20, 1964. For FY 1996, Signatories to INMARSAT and INTELSAT will be assessed an annual regulatory fee of $217,575 in order to recover the cost of the Commission's regulatory activities associated with such entities.

e. International Bearer Circuits

38. Regulatory fees for International Bearer Circuits are to be paid by the facilities-based common carrier activating the circuit in any transmission facility for the provision of service to an end user or resale carrier. Payment of the fee for bearer circuits by private submarine cable operators is required for circuits sold on an indefeasible right of use (IRU) basis or leased to any customer other than an international common carrier authorized by the Commission to provide U.S. international common carrier services. *Compare FY 1994 Order* at 5367. The fee is based upon active 64 Kbps circuits, or equivalent circuits. Under this formulation, 64 Kbps circuits or their equivalent will be assessed a fee. Equivalent circuits include the 64 Kbps circuit equivalent of larger bit stream circuits. For example, the 64 Kbps circuit equivalent of a 2.048 Mbps circuit is 30 64 Kbps circuits. Analog circuits such as 3 and 4 KHz circuits used for international service are also included as 64 Kbps circuits. However, circuits derived from 64 Kbps circuits by the use of digital circuit multiplication systems are not equivalent 64 Kbps circuits. Such circuits are not subject to fees. Only the 64 Kbps circuit from which they have been derived will be subject to payment of a fee. For FY 1996, the regulatory fee is $4.00 for each active 64 Kbps circuit or equivalent. For analog television channels we will assess fees as follows:

Analog Television Channel Size in MHz	No. of equivalent 64 Kbps Circuits
36	630
24	288
18	240

f. International Public Fixed

39. This fee category includes common carriers authorized under Part 23 of the Commission's Rules to provide radio communications between the United States and a foreign point via microwave or HF troposcatter systems, other than satellites and satellite earth stations, but not including service between the United States and Mexico and the United States and Canada using frequencies above 72 MHz. For FY 1996, International Public Fixed Radio Service licensees will pay a $200 annual regulatory fee per call sign.

g. International (HF) Broadcast

40. This category covers International Broadcast Stations licensed under Part 73 of the Commission's Rules to operate on frequencies in the 5,950 khz to 26,100 Khz range to provide service to the general public in foreign countries. For FY 1996, International HF Broadcast Stations will pay an annual regulatory fee of $255 per station license.

[FR Doc. 96–9192 Filed 4–12–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 76

[CS Docket No. 96–60; FCC 96–122]

Cable Television Leased Commercial Access

AGENCY: Federal Communications Commission.

ACTION: Further Notice of Proposed Rulemaking.

SUMMARY: The Commission has adopted an Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking regarding implementation of the leased commercial access provisions of the 1992 Cable Act. The Order on Reconsideration segment of this decision may be found elsewhere in this issue of the Federal Register. The Further Notice of Proposed Rulemaking (''Further Notice'') segment invites comment on whether the Commission should amend its commercial leased access rules regarding maximum reasonable rates, part-time rates, preferential access, tier and channel placement, operators' obligation to open new leased access channels and bump existing non-leased access services, selection of leased access programmers, minority and educational programmers, procedures for resolution of disputes, and resale of leased access time. The Further Notice is intended to respond to certain petitions for reconsideration of the Commission's current leased access rules.

DATES: Comments are due on or before May 15, 1996, and reply comments are due on or before May 31, 1996. Written comments by the public on the proposed and/or modified information collections are due May 15, 1996. Written comments must be submitted by the Office of Management and Budget (''OMB'') on the proposed and/or modified information collections on or before June 14, 1996.

ADDRESSES: Office of Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, NW., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

FOR FURTHER INFORMATION, CONTACT: Lynn Crakes, Cable Services Bureau, (202) 416–0800. For additional information concerning the information collections contained in this Further Notice, contact Dorothy Conway at (202) 418–0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Further Notice of Proposed Rulemaking, CS Docket No. 96–60, adopted March 21, 1996, and released March 29, 1996. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, NW., Washington, DC 20554, and may be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1919 M Street, NW., Washington, DC 20554.

Synopsis of the Further Notice of Proposed Rulemaking

I. Maximum Rate Formula

1. The Commission believes that its goal in determining a maximum reasonable rate should be to promote the statutory objectives of competition and diversity in programming sources without financially burdening the operators, rather than to develop a price that will necessarily be lower or higher than rates derived under the current highest implicit fee formula. The Commission believes that, if the maximum rate for leased access is reasonable, the resulting demand for leased access channels will also be reasonable. It is in this context that the Commission is re-examining the highest implicit fee formula. The Commission believes that the highest implicit fee formula is likely to overcompensate

cable operators and does not sufficiently promote the goals underlying the leased access provisions. The Commission has therefore developed an alternative that it believes may better promote the goals of leased access.

A. Economic Justification for the Proposed Cost/Market Rate Formula

2. The Commission tentatively concludes that its approach to setting a maximum rate should (a) encourage the use of the set-aside channels without giving programmers a subsidy, and (b) allocate the channels to the leased access programmers that value the channels most (i.e., are willing to pay the most) when the demand for leased access channels exceeds the statutory set-aside requirement. The Commission therefore tentatively concludes that the maximum rate for leased access should depend on whether a cable operator is leasing its full statutory set-aside requirement. The Commission requests comment on these tentative conclusions.

3. The Commission also tentatively concludes that, when the set-aside capacity is not fully leased to unaffiliated programmers (or minority or educational programmers pursuant to Section 612(i) of the Communications Act), the maximum rate should be based on the operator's reasonable costs (i.e., the costs of operating the cable system plus the additional costs related to leased access), including a reasonable profit. The Commission believes that a cost-based pricing scheme can promote leased access without providing a subsidy to programmers. The purpose of the cost formula is not to lower rates; it does not ensure that leased access programming will increase or that the maximum rate for leased access programmers will decrease. Programmers who cannot afford the cost-based rate will not and should not gain access because they would impose a financial burden on operators.

4. In addition, the cost formula is not intended to guarantee that all operating costs will be fully recovered, but is intended to permit the operator to continue to recover the same proportion of operating costs from subscriber revenues as were recovered before the channel was used for leased access. Thus, under the proposed cost formula, the operator would not be adversely affected in terms of its ability to pay operating costs. The Commission asks for comment on these tentative conclusions.

5. The portion of the maximum rate for leased access channels included in a tier of programming which the Commission proposes be paid by the leased access programmer (the ''programmer charge'') would be based on the reasonable costs (including reasonable profits) that leased access imposes on the operator. Operators would be allowed to recover only those types of opportunity costs which can reasonably be attributed to carriage of the leased access programming and which are reasonably quantifiable.

6. On the other hand, the Commission tentatively concludes that if the operator satisfies its set-aside requirement, the maximum rate should be a market rate determined by negotiation between the operator and the leased access programmer. The Commission believes that market rates will most effectively determine which programmers should receive leased access on the system when the operator's set-aside is satisfied. Within the leased access market, those programmers who are able to pay the most for channel capacity would presumably be able to acquire the set-aside channels. The higher price which some leased access programmers may offer to pay for the channel capacity reflects the greater ability and willingness of consumers to pay for the programming to be carried on each of these channels. Thus, relying on market prices to allocate channel capacity provides consumers with an efficient mechanism to communicate their preferences about which leased access programming should be carried by the operator. The Commission seeks comment on these tentative conclusions.

7. The Commission recognizes that the market rate may rise above the operator's costs; such prices, however, are the result of competition among unaffiliated programmers to use the statutory leased access channel capacity. The Commission believes that, so long as the operator is accommodating leased access to the full extent required by Congress and Section 612, any price increase would be reasonable. Under the Commission's proposal, the operator cannot charge market rates if the number of channels leased falls below the number designated by the statute. Thus, a higher rate would reflect excess demand by programmers for the operator's statutory channel capacity.

8. In general, market power refers to the ability of a seller to restrict output below the desirable level and to set a price above costs (i.e., to set an unreasonable rate). In the leased access context, Congress has defined the appropriate level of output by establishing the set-aside requirement, and the operator cannot restrict the output below this level. Therefore, even if the market rate rises above the operator's costs, the Commission does not believe that the operator is charging unreasonable rates since Congress has determined the appropriate level of output. The Commission seeks comment on these tentative conclusions.

9. The Commission seeks comment on the extent to which negotiated rates are adequate to address Congress' mandate that the Commission set a maximum reasonable rate and the extent to which negotiated rates could be used to exercise editorial control over the leased access channels, contrary to Congress' intent. The Commission also asks for comment on how operators may choose between competing programmers. For instance, the Commission asks if operators should be required to select the highest bidder. The Commission also seeks comment on any alternatives for setting maximum rates when an operator is leasing its full set-aside capacity.

10. The Commission does not propose to maintain the programmer categories established under the highest implicit fee formula under the proposed cost formula. Our proposed cost formula is based purely on the operator's costs associated with its system and leased access programming. and does not base the maximum rate on the economics which the leased access programmer faces. The Commission therefore does not believe that treating different programmers differently is appropriate under the cost formula. Accordingly, the Commission tentatively concludes that it will not establish programmer categories for implementation of the cost formula, and requests comment on this tentative conclusion.

B. Calculation of the Maximum Rate Under the Proposed Cost Formula

1. Designating Channels

11. The Commission proposes that the cost formula determine a maximum leased access rate based on the cost of the channels designated to be used for leased access by an operator. The opportunity costs would be derived from the programming that is actually bumped from the operator's programming line-up.

12. To derive the channel cost under the proposed cost formula, an operator would first select the specific channels it would use for leased access programming, as demand arises, in order to meet its set-aside requirement. The Commission proposes that the operator would be required to place these channel designations, including the channel numbers and the programming carried on each channel at

the time the operator calculates the maximum rate under the cost formula, in its public file. The operator would be required to designate enough channels to satisfy its full set-aside requirement. Basing the rate on the actual designated channels would be attractive from an economic perspective because the compensation to the operator would be based on its actual costs of leasing the designated channels. The Commission requests comment on this proposal generally. The Commission also requests comment on how the Commission might restrict an operator's ability to manipulate its designation of channels so as to derive a prohibitively high rate in an effort to impede leased access. For example, the Commission asks whether there should be a presumption against an operator designating only its highest valued channels in such a way as to inflate its maximum leased access rate. The Commission also asks whether operators should be permitted to base their maximum rate calculation on affiliated programming, if the operator designates channels that carry such affiliated programming.

2. Operating Costs

13. The first component of the proposed cost formula is the operating costs. The Commission tentatively defines operating costs to include fixed and variable costs that the cable operator incurs regardless of what programming is carried over the channel. Commission data shows that, in the tier context, this component, including a reasonable rate of return, is substantially covered by the revenue the operator receives from subscribers. Using subscriber revenue as a proxy for the operating costs for tiered channels allows the operator to recover its operating costs to the same extent as it did with non-leased access programming on the channel. The Commission therefore tentatively concludes that it is appropriate for purposes of the proposed cost formula to designate subscriber revenue as the operator's payment toward its operating costs. Thus, the operator would not need to calculate its operating costs for channels that are currently on programming tiers (or dark), and would instead use the amount representing the average subscriber revenue per channel as its operating costs per channel in calculating the cost formula.

14. Similarly, the Commission proposes that operators would not need to calculate their operating costs for channels that are currently carried as premium services or on unregulated programming tiers. As with channels carried on regulated programming tiers, the Commission believes that using the subscriber revenue for an unregulated channel as its payment toward its operating costs will allow the operator to recover its operating costs to the same extent as it does with the non-leased access programming carried on the channel. The Commission recognizes that unregulated subscriber revenue might recover more than the operator's operating costs; however, the Commission believes that any profit which is generated from subscriber revenue could be viewed as an opportunity cost imposed on the operator who forgoes these profits when this channel is used to carry leased access programming. For simplicity, the Commission proposes not to require the operator to deduct this lost profit from the operating cost portion of the formula simply to add it back to the opportunity cost portion. The Commission seeks comment on these tentative conclusions.

3. Net Opportunity Costs

15. The Commission proposes that the second component of the cost formula, ''net opportunity costs,'' would include the reasonable costs (or cost savings) that the operator incurs by leasing the channel to the leased access programmer that it would not have incurred had it continued with the current use of the channel. In other words, the net opportunity cost portion of the cost formula would include reasonably quantifiable costs (or savings) associated with carrying the leased access programming instead of other programming. The Commission recognizes that our proposed formula does not incorporate all opportunity costs. As discussed below, some costs are not easily quantified; other costs the Commission does not believe are appropriate to include in the leased access fee. In order to provide some uniformity in the calculation of opportunity costs, the Commission proposes to identify categories of quantifiable costs which operators may include in calculating the cost formula.

16. The first category of opportunity costs for which the Commission proposes to allow recovery is lost advertising revenues. This type of lost revenue would be a quantifiable opportunity cost when the operator is forced to bump a non-leased access programmer to accommodate the leased access programmer, or when the operator is forced to forego placing new programming on a dark channel. The Commission does not propose to reduce the opportunity cost for lost advertising revenue by the value of any advertising time the operator may receive from the leased access programmer. The Commission believes that the leased access programmer is entitled to pay no more than the maximum rate, regardless of whether the operator receives advertising time. If the leased access programmer does not want to give the operator advertising time, the Commission tentatively concludes that the programmer is not required to do so. On the other hand, if the programmer wishes to bargain for a lower rate in exchange for advertising time, the Commission believes such bargaining is fully permitted by our rules and is a matter to be negotiated between the parties. The Commission requests comment on these tentative conclusions.

17. The Commission proposes that the second opportunity cost category should be lost commissions. If, for example, to accommodate a leased access channel, an operator were to bump a direct sales programmer from which the operator receives a percentage of the programmer's revenues, those commissions constitute a quantifiable opportunity cost which the Commission proposes be factored into the cost formula. The Commission requests comment on this proposal.

18. On the other hand, the Commission also believes that any program license fee that the operator does not have to pay because the non-leased access programming is not being carried is a cost savings. The Commission believes that such a cost savings should be factored into the calculation of the operator's net opportunity cost. The Commission tentatively concludes that cable operators should be required to deduct any license or programming fees that the operator does not have to pay due to the carriage of the leased access programming. One possible concern is the extent to which either the operator or the programmer can influence the license fees paid for non-leased access programming. The Commission asks how, if at all, the operator or programmer can influence the programming license fee and how that influence might affect the Commission's measurement of programming cost savings under the proposed cost formula.

19. Another cost category which the Commission believes may be appropriate relates to technical costs (e.g., the cost of scrambling) incurred by the operator in offering leased access programming. If, for example, a programmer asks to lease channel capacity for a premium service, an operator may incur additional costs of

limiting that programming to subscribers of the leased access service. Thus, under our proposed cost formula, those costs could be included in calculating the maximum rate. The Commission proposes to distinguish these technical costs from those for technical support for which the operator is permitted to charge separately. The Commission requests comment on these proposals.

20. Another potential opportunity cost category could be any reduction in the tier charge that the operator charges the subscriber when the reduction is caused by substituting the leased access programming for non-leased access programming. Although the Commission believes that there would be no such lost subscriber revenue under the Commission's going forward methodology, it seeks comment on how an operator might be able to demonstrate that its subscriber revenue is quantifiably reduced on a specific designated channel because of the leased access programming carried on that same channel, and, if this is possible, whether the operator should be permitted to include this loss in the cost formula.

21. The Commission tentatively concludes that the cost formula should not explicitly include revenue lost because of a purported loss in subscribership to a particular tier because particular programming is dropped. The Commission tentatively concludes that, in the tier context, any such subscriber loss is too speculative to measure accurately. In the premium context, however, the Commission believes that this subscriber loss is included by allowing the operator to include an amount in the proposed cost formula equal to the total subscriber revenue for the bumped channel. In addition, operators would be able to consider any potential loss of subscribership in deciding which channels to designate for leased access. Nonetheless, the Commission requests comment on how our cost formula might measure changes in subscriber penetration due to the addition of leased access programming.

22. The Commission also recognizes that there may be opportunity costs associated with using a channel for leased access which does not currently carry programming, i.e., a dark channel. The Commission believes that the presence of dark channels on a system does not necessarily indicate a lack of available programming. As an example, an operator might reserve a dark channel in anticipation of more desirable programming becoming available in the future. The Commission proposes to allow operators to approximate the opportunity costs of dark channels by assigning dark channels the per channel opportunity cost of the programmed channels on the system with opportunity costs that have the lowest positive values, not including programmed channels that the operators are required to carry such as must-carry stations, public, educational and governmental (''PEG'') access channels, or any leased access channels already being carried. If one designated channel is dark, the operator would assign it the opportunity cost of the programmed channel on the system which has the opportunity cost with the lowest positive value; if an operator designates two dark channels for leased access, it would assign the opportunity cost of the two programmed channels on the system which have the lowest opportunity cost with a positive value, and so on. The Commission seeks comment on this proposal.

23. The Commission believes that it is necessary to use only channels with positive opportunity costs as proxies for dark channels, because operators generally will not carry programming that has a negative economic benefit to them, which is what a negative opportunity cost value would indicate. The Commission suspects that, if a channel has a negative net opportunity cost, it may be because the cost formula does not include an approximation of the value of subscriber penetration. Although the Commission does not believe that it can accurately measure loss in subscriber penetration that may be caused by substituting leased access programming for non-leased access programming for purposes of the cost formula, the Commission tentatively concludes that using only those channels with a positive opportunity cost as proxies for dark channels will compensate for this limitation. As also stated above, however, the Commission requests comment on how it might measure changes in subscriber penetration due to the addition of leased access programming. The Commission asks how it might identify which channels should not be deemed to have the lowest opportunity cost for purposes of approximating the opportunity costs of dark channels.

4. Averaging the Per Channel Costs for All Designated Channels

24. Because the operator may select designated channels from the basic service tier (''BST''), any cable programming service tier (''CPST''), or premium services, the Commission believes that the corresponding per channel costs will vary depending on the number of subscribers that receive each service. Consequently, the Commission proposes that all costs must be computed on a per channel basis rather than on a per subscriber basis. As discussed below, the per channel costs for each designated channel could then be used to determine the average channel costs of a designated channel.

25. The Commission tentatively concludes that applying an average channel cost to leased access will promote fairness because all leased access programmers will be subject to the same maximum rate. The Commission notes that an operator's designation of leased access channels is made independently of the leased access programmer's request for access. The Commission does not believe that the operator should be required to bump the same type of service (i.e., a channel on the BST, a CPST, or a premium channel) that is requested by the leased access programmer. The Commission also believes that averaging the channel costs would mitigate against the operator's ability to manipulate the cost formula by designating one high cost channel and requiring a particular leased access programmer that the operator wants to keep off its system to pay the opportunity costs for that particular programming.

26. Therefore, the Commission proposes that, after the operator has calculated the per channel opportunity costs and added the corresponding subscriber revenue (as a proxy for operating costs) to obtain a total per channel cost, the operator should average these per channel costs by adding them all together and dividing by the number of designated channels. The result would be the Commission's proposed cost-based maximum rate for a leased access channel if the operator has not fulfilled its leased access set-aside requirement. The Commission seeks comment on whether averaging the per channel costs is appropriate under the proposed cost formula.

5. Calculating the Leased Access Programmer Charge

27. Under our proposed cost formula, once the operator determines the maximum rate as set forth above, the operator would determine how much of that maximum rate it could charge the leased access programmer. If the leased access programming is to be carried on a programming tier, the proposed cost formula would allow the operator to collect and retain revenue for that channel from the subscribers to the tier as payment for its operating costs. However, to avoid a double recovery by

the operator, the operator would not be permitted to include these operating costs in computing the portion of the maximum rate that the operator may charge the leased access programmer. The operator would therefore be required to subtract the total subscriber revenue for the channel from the maximum rate. The difference would be the programmer charge, i.e., the maximum amount that the operator would be permitted to charge the leased access programmer directly. The Commission requests comment on this proposal.

28. The Commission tentatively concludes that if a leased access channel is to be carried as a premium service, the full maximum rate derived from the cost formula could be charged to the leased access programmer, to the extent that all of the monthly subscriber revenue for the leased access channel flows to the leased access programmer. The Commission believes that this is appropriate because the Commission cannot assume that the leased access premium service will attract the same subscribership as the non-leased access programming. Thus, the operator would be allowed to charge the full maximum rate which recovers its costs. In return, the programmer would receive all the subscriber revenues from its premium service. The Commission requests comment on these tentative conclusions.

6. Adjustment for Part-Time Administrative Costs

29. Regardless of whether the leased access programming is carried on a tier or as a premium service, the Commission recognizes that there may be additional costs associated with part-time leases. The Commission therefore tentatively concludes that operators should be permitted to charge a part-time leased access programmer the actual incurred costs of negotiating and administering the programmer's part-time contract which exceed what normally would be spent in negotiating and administering a full-time leased access programming contract. The Commission does not believe that it is more expensive for an operator to negotiate and administer a full-time leased access programming contract than it is for them to negotiate and administer a full-time non-leased access programming contract. The Commission therefore proposes not to allow operators to charge full-time leased access programmers for administrative costs. Under our proposal, the additional costs associated with part-time leasing would be added to the programmer charge derived in accordance with the procedures described above for determining rates for leased access programming carried on a tier or as a premium service. The Commission asks for comment on these tentative conclusions.

C. Market Rate as the Maximum Rate

30. As discussed above, the Commission believes that, once an operator fulfills its set-aside requirement, the maximum cost-based rate should be replaced by a market based rate and not capped by the proposed cost formula. Under this proposal, the operator would be allowed to charge whatever rate it could negotiate with the leased access programmers, as long as the operator continues to meet its statutory set-aside requirement. Whether the operator retains the subscriber revenue would be a matter negotiated between the parties. Leased access programmers would then be forced to compete against each other for limited channel space, much the same as non-leased access programmers do. The Commission tentatively concludes that the pressure on the operator to meet its set-aside requirement and the competition between the programmers seeking leased access will determine an appropriate market rate.

31. The Commission proposes that operators would be permitted to renegotiate the rate charged leased access programmers upon renewal of each programmer's contract, as long as the operator continues to fulfill its set-aside requirement. Thus, if the set-aside requirement has been filled, a current leased access programmer who gained access at the cost formula rate would have an opportunity at the end of its contract to bid against rival leased access programmers to obtain the right to continue to be carried on the system. If the amount of leased access programming being carried drops below the set-aside requirement, the operator would be required to return to the cost formula to determine the maximum rate on new programming contracts, as well as on contracts that are renewed at any time while the set-aside requirement is not met. The Commission seeks comment on this proposal generally, and asks whether this proposal complies with our statutory mandate to establish maximum reasonable rates. The Commission also seeks comment on whether operators could exercise editorial control over leased access programmers contrary to Congress' intent, if rates for leased access were market based. In addition, the Commission requests comment on alternatives for setting maximum reasonable rates when an operator has satisfied its set-aside requirement.

D. Transition Period

32. The Commission tentatively concludes that, on the effective date of the maximum rate-setting rules which the Commission will adopt in response to this Further Notice, operators should be required to implement the adopted formula, whatever it may be, for (a) programmers that are currently leasing channel capacity from an operator and (b) programmers demanding leased access on a system that has unused (or dark) channel capacity. The Commission requests comment on this tentative conclusion. The Commission believes, however, that transition relief may be appropriate in the case of new leased access requests with respect to systems that do not have any dark channels, where operators would be forced to bump existing programming in order to accommodate a leased access request. The Commission recognizes that, when an operator places non-leased access programming on a channel designated for leased access, the operator and programmer generally assume the risk that the programming may have to be bumped for a leased access programmer. The risk of having to bump, however, may increase with the introduction of whatever formula the Commission adopts, depending on the extent to which rates using the adopted formula affect the utilization of leased access. A transition to the new formula might (a) avoid unduly penalizing operators and programmers for decisions to use designated channels for non-leased access programming that were reasonably based on circumstances created by the Commission's previous rules, and (b) mitigate against the sudden disruption to subscribers' programming line-ups. The Commission therefore requests comment on whether it should phase in the proposed cost formula, or any other rate setting formula which the Commission may adopt, for those leased access requests that can only be accommodated by bumping existing non-leased access programming. The Commission also asks whether such transition relief should be applied to dark channels for which the operator has programming contracts in place. The Commission asks for comment on how a transition might be accomplished and the specific mechanism the Commission should employ. In this context, commenters should explain how any proposed transition period would be consistent with the Commission's obligation to establish maximum reasonable rates for leased access.

E. Adjusting Leased Access Rates Over Time

33. As described above, the proposed cost formula would require operators to designate the specific channels they will use to satisfy their set-aside requirement. The Commission proposes that an operator's selections are binding and the designated channels must be the ones that are in fact used to accommodate leased access requests. The Commission does not believe, however, that operators should be required to adhere to their initial designations indefinitely, since the popularity and profitability of a designated channel could unexpectedly increase and the operator might no longer want to use it for leased access. The Commission tentatively concludes that, in order to account for change, operators should be allowed to redesignate their unused leased access channel capacity on an annual basis. The Commission requests comment on these tentative conclusions, and asks how an operator's maximum leased access rates should be adjusted over time. Our presumption in allowing operators this flexibility is that operators generally will want to use their least profitable channels for leased access, and so will redesignate a channel that is less profitable than the one that is being replaced. If an operator redesignates a channel that is significantly more profitable than the previously selected channel, and the redesignation would raise the operator's maximum rate, the Commission tentatively concludes that the redesignation would be evidence of an attempt to inflate the maximum rate in contravention of the purposes of our rules and the statute.

34. In addition to permitting redesignation of leased access channels, the Commission tentatively concludes that operators should be permitted to recalculate their maximum rates annually, in order to account for changes in the allowable opportunity costs of designated channels that currently are not being used for leased access. The Commission requests comment on whether this annual recalculation is appropriate, and on whether it should occur on the anniversary of the effective date of our modified rules, each calendar year, or on some anniversary which is most appropriate for an individual operator (to coincide with its annual audits, for example). The Commission believes that allowing an operator to update its rates will better approximate the operator's changing costs of satisfying its leased access requirement. The Commission requests comment on whether our maximum rate should be cumulative over the life of the leased access contract so that an operator and a leased access programmer have the option, if mutually agreed upon, to establish a rate below the maximum rate during the first part of the contract term and a rate above the maximum rate during a subsequent part of the contract term, and asks whether such an option would provide operators with the opportunity to evade the maximum rate.

II. Part-Time Rates

35. The Commission's current rules permit prorating the maximum monthly rate as one method of deriving rates for shorter periods. The rules the Commission adopted on reconsideration provide that operators may establish a schedule of rates, or rate card, for different times of day, pursuant to which, if all times were used, the sum of the part-time charges for any single leased access channel within a 24-hour period would not exceed its maximum rate for the leased access channel if the daily rate were prorated evenly from the monthly maximum rate and were calculated in accordance with the Commission's rules. The Commission requests comment, however, on whether such proration is appropriate under our proposed cost formula, and, more specifically, if it is, whether the restriction that the part-time rates for a 24 hour time period total no more than the maximum rate is appropriate under the proposed cost formula. The Commission seeks comment on whether, if the cost/market rate formula were to be adopted for full-time leased access use, an entirely different method of calculating the maximum reasonable rate for part-time use would be more appropriate. If so, the Commission requests comment on how to define part-time leased access use, e.g., leases for less than a 24 hour channel, for 12 hours, for eight hours, or fewer.

III. Preferential Access

36. The Commission is concerned that not-for-profit programmers are being excluded from leased access, but the record lacks sufficient evidence to make a determination of whether the goal of diversity is being achieved and, if it is not being achieved, whether one of the reasons is that rates are unaffordable for not-for-profit entities. The Commission therefore invites interested parties to demonstrate, with specific examples, whether current leased access programming sources are sufficiently diverse and whether preferential treatment for not-for-profit programmers would significantly affect the diversity of current programming sources. The Commission requests commenters to provide precise data indicating whether or not rates charged to leased access programmers are affordable for not-for-profit entities. Commenters in support of preferential treatment for not-for-profit programmers should explain their position within the context of our previously stated belief that operators should not have to subsidize leased access programmers and the statutory requirement that leased access use should not adversely affect the operation, financial condition, or market development of the cable system. Those commenters should also address the extent to which preferential treatment is necessary given that public access is already provided for under current PEG requirements.

37. The Commission seeks comment on whether, if the Commission concludes that some form of preferential treatment is appropriate, a lower maximum rate should apply to not-for-profit leased access programmers, and if so, what rate should apply and why. Alternatively, if the proposed cost formula is adopted, the Commission seeks comment on whether operators should be required to exclude lost advertising revenues or lost commissions from maximum rates charged to not-for-profit leased access programmers. In addition, the Commission solicits comment on whether not-for-profit leased access programmers should be entitled to preferential rates during any transition period that might be adopted for the cost formula.

38. Preferential rates, if adopted, would provide no relief if not-for-profit leased access programmers are denied access to a system because the operator has met its set-aside requirement. The Commission seeks comment on whether the statute would permit us to consider a set-aside requirement for not-for-profit programmers. If so, the Commission asks whether the public interest would be served by such a set-aside requirement and how it should be structured. For example, would a reservation of 25% of leased access capacity be appropriate? Should a set-aside requirement be temporary or permanent, and if temporary, what length of time would be appropriate? Furthermore, if the proposed cost formula were adopted, how would the need for a set-aside requirement be affected, given that the formula allows market rates to prevail when demand for leased access exceeds an operator's set-aside requirement? If a such a set-aside requirement were imposed, the Commission would stipulate that until a

not-for-profit leased access programmer demanded access to a not-for-profit set-aside channel, the operator must use the channel for for-profit leased access programming, unless no demand exists, in which case it may use it for its own programming.

39. The Commission also seeks comment on whether preferential treatment should be limited to not-for-profit programmers or whether certain types of for-profit programmers should also receive preferential treatment. The Commission believes that there is insufficient evidence on the record for us to indicate that LPTV stations and minority and educational programmers should receive preferential treatment, but the Commission invites commenters to demonstrate with specific evidence why a preference for certain types of for-profit programmers may be appropriate. The Commission also seeks comment on whether a ''not-for-profit programmer'' should be defined as a programmer with Section 501(c)(3) tax-exempt status or whether another classification should apply.

IV. Tier and Channel Placement

40. The statutory commercial leased access provisions are intended to provide programmers with a ''genuine outlet'' for their programming. According to the legislative history of the 1992 amendments to Section 612, the Commission should ensure that programmers are carried on channel locations that ''most subscribers actually use,'' a guideline that should be interpreted in light of the statutory provision that leased access use should not adversely affect the market development of a cable system. The Commission tentatively concludes that, absent some compelling reason (such as technical considerations), leased access programmers have the right to be placed on a tier, as opposed to being carried as a premium service. The Commission believes that, if an operator were permitted to force leased access programming to be offered as a premium service, the programmer would not be assured access to most subscribers.

41. Our 1995 Competition Report states that a large percentage of subscribers (more than 90%) receive CPSTs. The Commission tentatively concludes that both the BST and the CPST with the highest subscriber penetration qualify as genuine outlets because most subscribers actually use them. However, the Commission seeks comment on whether a CPST that does not boast the highest subscriber penetration could qualify as a genuine outlet, and under what circumstances. For example, should the Commission interpret the term ''most subscribers'' as greater than 50%? In order to permit flexibility in the market development of an operator's cable system, the Commission would allow the operator to decide whether it is appropriate for its particular system to carry the leased access channel on the BST or on a CPST that qualifies as a genuine outlet. To ease technical burdens on operators, the Commission proposes to permit operators to place leased access programming that it must scramble or trap out with other programming that is also scrambled or trapped out. The Commission also proposes to allow operators to consider these technical concerns when deciding whether to place leased access programming on either the BST or a CPST that qualifies as a genuine outlet. The Commission seeks comment on these tentative conclusions.

V. Obligation to Open New Channels and Bump Existing Non-Leased Access Services

42. Although cable operators that have not fulfilled their statutory leased access set-aside requirement are generally required to accommodate requests for leased access time, the Commission recognizes that there may be circumstances in which substantially greater harm to the subscribers, the operator, and the non-leased access programmer may result if the leased access request is accommodated than would result for the leased access programmer if the leased access request is not accommodated. The Commission seeks comment on whether, when a specific time slot requested by a part-time leased access programmer is already leased, an operator should be required to open up another leased access channel, if the operator can otherwise reasonably accommodate the leased access request in a comparable time slot. The Commission believes that the possible disruption of existing programming or the preclusion of future programming in order to accommodate only a few hours of leased access demand, where adequate and comparable capacity is available on an existing leased access channel, will not advance the goal of assuring that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems. However, the Commission solicits comment on whether it is sufficient to require a ''reasonable accommodation in a comparable time slot'' or whether the standard should be further defined. The Commission also seeks comment on whether the operator should be required to remove an existing full-channel programmer if the leased access programmer agrees to a minimum time increment. The Commission tentatively concludes that the guarantee of a minimum time increment of eight hours within a 24-hour period would be a reasonable pre-condition for requiring an operator to open up an additional channel for leased access.

VI. Selection of Programmers

43. The Commission has not specifically addressed the manner in which lessees are to be selected for placement on leased access channels. The Commission tentatively concludes that a first-come, first-served approach is preferable so long as available leased access channel capacity is sufficient to accommodate incoming leased access requests. However, if an operator's available leased access channel capacity is insufficient to accommodate all pending leased access requests, the Commission seeks comment on whether operators should be allowed to accept leased access programmers on a basis other than first-come, first-served. The Commission believes that allowing cable operators limited ability to make content-neutral selections from among leased access programmers may be appropriate in order to enable them to avoid certain situations that might ''adversely affect the operation, financial condition, or market development of the cable system.''

44. For example, operators may wish to give priority to leased access programmers that request a full-time lease over a programmer seeking to lease only part-time, thus minimizing the disruption to the subscriber, as well as easing the administrative burdens on the operator. The Commission is not suggesting that an operator would be allowed to completely refuse part-time requests for leased access, but is asking whether, when the operator cannot accommodate all leased access requests within its set-aside requirement, the operator should be allowed to select a full-time applicant over a part-time applicant. At the same time, the Commission is concerned that allowing a preference for full-time programmers may not further the statutory goal of promoting the widest possible diversity of programming sources, since encouraging part-time use could result in a wider variety of programmers. To that end, the Commission seeks comment on whether certain circumstances favor shifting the preference to the competing part-time applicant, for example if the part-time applicant is a not-for-profit entity.

Alternatively, instead of allowing a preference for the last available leased access channel, the Commission seeks comment on whether it should require one or two leased access channels to be used exclusively for part-time use. The Commission further seeks comment on whether it should allow operators to base their selections on any content-neutral criteria other than the full-time/part-time distinction.

VII. Minority and Educational Programmers

45. Section 612(i) of the Communications Act permits a cable operator to place programming from a qualified minority or educational programming source on up to 33% of the cable system's designated leased access channels. The Commission seeks comment on whether the requirements for tier and channel placement, as proposed above, should apply to minority and educational programming that is carried as a substitute for leased access programming. Specifically, should operators be required to carry minority and educational programming on the BST or a CPST that qualifies as a genuine outlet, if they are claiming it as a substitute for leased access? There is no explicit language in the statute or legislative history stipulating that minority and educational programming should be received by most subscribers. However, Section 612(i)(1) provides that ''a cable operator required by this section to designate channel capacity for commercial use may use *any such channel capacity*'' for minority and educational programming (emphasis added), suggesting that Congress envisioned that the same channels that would have been used for leased access should be used for any substituted minority and educational programming. Moreover, to allow a less stringent standard for minority and educational programming would seem to defeat the use of such programming as a substitute for leased access. Therefore, the Commission tentatively concludes that minority and educational programming should not qualify as a replacement for leased access programming unless it is carried on the BST or a CPST that qualifies as a genuine outlet. As with leased access, the operator could choose on which qualifying tier to carry the programming.

VIII. Procedures for Resolution of Disputes

46. In order to streamline the Commission's complaint process, the Commission proposes to stipulate that a leased access programmer may not file a complaint alleging that an operator's maximum rate was calculated incorrectly unless an independent certified public accountant has first reviewed the operator's calculations and made an independent determination of the maximum rate. If the operator and leased access programmer cannot agree on a mutually acceptable accountant, the operator may select any independent certified public accountant. The review must be conducted within 60 days of the leased access programmer's request to the operator for a review. The operator would be expected to provide the accountant with all information necessary to support its rate calculation, including an explanation of how the rate was calculated. The findings of the accountant would be certified in a final report and provided to both parties. The Commission seeks comment on whether, in the absence of any evidence to the contrary, the Commission should consider a determination by the accountant that the operator's rate exceeds the permissible rate to constitute clear and convincing evidence that the rate is unreasonable.

47. The Commission tentatively concludes that, in order to provide notice to other potential leased access programmers, the accountant's final report should be filed in the cable system's local public file. The Commission seeks comment on this proposal. Alternatively, the Commission seeks comment on whether operators should be required to provide the report upon request to potential leased access programmers. The Commission seeks comment on what type of information should be contained in the accountant's final report and what type of information would be proprietary and thus kept confidential. The Commission also seeks comment on how the accountant's expenses should be paid. For example, should the parties share the expenses equally or should the full amount be paid by the party that the accountant's report proved was incorrect?

48. In light of the streamlining proposed above, the Commission does not believe that it is necessary for the Commission to set a time limit within which complaints will be decided by the Commission. Each leased access complaint proceeding differs in complexity and requires varying amounts of Commission time and resources. In addition, the Commission believes that shortening the operator's response period would be unfair to the operator.

IX. Resale of Leased Access Time

49. The Commission seeks comment on whether the Commission should permit leased access time to be resold by the lessee. Leased access programmers are of course entitled to sell time to advertisers. The question here is whether the Commission should allow persons unaffiliated with the operator to lease time from the operator and then sell it as programming time to other unaffiliated persons for a profit. The Commission seeks comment on the advisability of allowing the resale of leased access time. If the Commission were to prohibit resale, the Commission asks whether an exception should apply for not-for-profit leased access programmers.

X. Initial Regulatory Flexibility Act Analysis

50. Pursuant to Section 603 of the Regulatory Flexibility Act, the Commission has prepared the following initial regulatory flexibility analysis (''IRFA'') of the expected impact of these proposed policies and rules on small entities. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall send a copy of the Further Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96–354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981).

51. Reason for Action. Section 612 of the Communications Act of 1934, as amended, 47 U.S.C. § 532, requires the Commission to prescribe rules and regulations regarding commercial use of channel capacity for unaffiliated persons. The Commission is using this Further Notice to seek comment on various issues concerning implementation of this statute.

52. Objectives. To propose rules which implement Section 612 of the Communications Act of 1934, as amended, 47 U.S.C. § 532, and further its goals of promoting competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems.

53. Legal Basis. Action as proposed for this rulemaking is contained in

Sections 1, 4(i), 4(j) and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j) and 532.

54. Description, Potential Impact and Number of Small Entities Affected. The Commission anticipates a possible impact on small entities, as defined in Section 601(3) of the Regulatory Flexibility Act, including cable operators and leased access programmers, but the Commission does not currently have information pertaining to the extent of such impact or the number of small entities that may be affected.

55. Reporting, Recordkeeping and Other Compliance Requirements. Action as proposed in this rulemaking may impose new reporting requirements on cable operators.

56. Federal Rules which Overlap, Duplicate or Conflict with these Rules. None.

57. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objectives. The Further Notice solicits comments on alternatives.

XI. Ex Parte

58. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in Commission's rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

XII. Comment Dates

59. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before May 15, 1996 and reply comments on or before May 31, 1996. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original plus six copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, NW., Washington DC 20554.

60. Written comments by the public on the proposed and/or modified information collections are due on or before May 15, 1996. Written comments must be submitted by OMB on the proposed and/or modified information collections on or before 60 days after publication of the Order and Further Notice in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20054, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725–17th Street, NW., Washington, DC 20503 or via the Internet to fain__t@al.eop.gov.

61. Accordingly, pursuant to Sections 4(i), 4(j) and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 532, comment is sought regarding such proposals, discussion, and statement of issues.

Paperwork Reduction Act

62. This Further Notice contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (''OMB'') to comment on the information collections contained in this Further Notice, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104–13. Public and agency comments are due at the same time as other comments on this Further Notice; OMB notification of action is due 60 days from date of publication of this Further Notice in the Federal Register. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0568.

Title: Section 76.970 Commercial leased access rates; 76.971 Commercial leased access terms and conditions.

Type of Review: Revision of existing collection.

Respondents: Business and other for profit.

Number of Respondents: 6,270 cable systems.

Estimated Time Per Response: 1 hour per respondent for recordkeeping and sending the leased access schedule and other information to prospective leased access programmers. 1 hour per respondent to implement 76.971 third party disclosure requirements. 12 hours per respondent for completing the proposed ''cost schedule'', instead of the existing ''maximum rate schedule''. If the proposed ''cost schedule'' is not adopted by the Commission, the burden for completing the ''maximum rate schedule'' is 4 hours per respondent.

Total Annual Burden: 87,780 hours. If the proposed ''cost schedule'' is not adopted, the Commission will further adjust the burden for this collection from 12 hours per respondent in completing the ''cost schedule'' to 4 hours per respondent to continue to use the existing ''maximum rate schedule''. This would result in an adjustment reduction of 50,160 hours ($6,270 \times 8$ hours), leaving a total burden of $87,780 - 50,160 = 37,620$ hours.

Estimated costs per respondent: We estimate the postage and stationery costs incurred by cable operators for record keeping activities and for sending out leased access information to prospective programmers, as required, to be roughly $4.00 per respondent. We therefore report a total annual cost of $25,000 for all respondents.

Needs and Uses: The information collected is used by the prospective leased access programmers and the Commission to verify rate calculations for leased access channels. The Commission's leased access requirements were designed to promote diversity of programming sources and competition in programming delivery as required by Section 612 of the Communications Act, and serve to eliminate uncertainty in negotiations for leased commercial access.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 96–9195 Filed 4–12–96; 8:45 am]

BILLING CODE 6712–01–P