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March 5, 1993

Bruce A. Romano  
Deputy Chief  
Policy and Rules Division  
Federal Communications Commission  
2025 M Street N.W. - Room 8010  
Washington, D. C. 20554

Re: MM Docket 92-266/Bill Itemization

Dear Mr. Romano:

This letter is written on behalf of Harron Communications Corporation regarding the Comments of the Massachusetts Community Antenna Commission. For some reason the Comments were not available to our messenger when he made efforts to obtain all of the Comments filed in this docket, and we have only recently seen the Massachusetts Commission's filing. Although late-filed, we respectfully request consideration of the substance of this letter.

The Massachusetts Commission specifically refers to Harron's practice of itemizing on its bills that portion which Harron must pay to the Register of Copyrights under the compulsory license. The amount is calculated by Harron using the requisite formula for determining the percentage of "gross receipts" payable based on the complement of distant broadcast signals carried by each system.

We believe that the 1992 Cable Act specifically authorizes itemization of these payments because they are "an assessment, or charge . . . imposed by [a] governmental authority on the transaction between the operator and the subscriber." Pub.L. No. 102-385, § 14. The fee is "imposed" by Congress and the Copyright Royalty Tribunal. Sections 111(c) and 111(d) of the Copyright Act of 1976, 17 U.S.C. §§ 111(c) and 111(d), give cable operators a compulsory copyright license only when the appropriate payment is made to the Copyright Register. The amount of the payment is calculated as a percentage of the "gross receipts" collected by the cable operator from the subscriber for basic service.

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*Handwritten initials/signature*

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The Massachusetts Commission states that neither the Register of Copyrights nor the Copyright Royalty Tribunal impose the requirement that cable operators pay the fee. Mass. Comments at 26. Actually, it is the United States Congress which has imposed that obligation. The Copyright Royalty Tribunal helps to set the percentage payment.

The Massachusetts Commission also states that the fees "result from the 'transaction' between the programmer or the broadcaster and the operator, not the operator and the subscriber." Id. This also is incorrect. The entire reason for the compulsory license is that there is no "transaction" between the cable operator and the programmer or broadcaster. The only "transaction" regarding the retransmission of broadcast signals is between the cable operator and the subscriber.

The Massachusetts Commission also states that "the liability for copyright payment" is triggered by "the transmission of the signal by the operator." Id. at 26-27. Again, the Massachusetts Commission is incorrect. No liability under the Copyright Act is incurred until the subscriber pays to receive the signal. A compulsory copyright license may be obtained by the cable operator only if the operator pays a semi-annual royalty to the Copyright Register based on the "gross receipts for the basic service of providing secondary transmission of primary broadcast transmitters . . . ." 17 U.S.C § 111(d)(2)(B).

Nor is there any question about how the amount of copyright fees is calculated. The Copyright Act and rules specify the applicable percentages of gross receipts received for providing basic service to a subscriber, based on the character and number of the broadcast signals provided. Similar to franchise fees -- also permitted to be itemized -- copyright fees are easily calculated as a percentage of the subscriber's bill for basic cable service.

The Massachusetts Commission also expresses concern that "operators may use the itemization provision to unjustly manipulate both public opinion regarding the effect of the Act and an operator's negotiations with broadcasters for retransmission consent." Mass. Comments at 27. The Massachusetts Commission then quotes from correspondence in which counsel for Harron noted that the bill itemization language in the 1984 and 1992 Cable Acts applies only to preempt regulatory

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prohibitions against specified matters being itemized. As Harron's counsel stated in the correspondence from which the Massachusetts Commission selectively quotes:

The specific provisions of the 1984 and 1992 Cable Acts refer to practices that are specifically permitted, even in the face of efforts by state or local authorities to restrict them. In the absence of a properly promulgated rule by the Massachusetts Cable Commission prohibiting itemization, Harron is fully within its rights to configure its bills in any way it desires -- and to itemize any cost items it chooses to. The Commission has no such rule, and may not adopt one without initiating formal rulemaking proceedings. The point here is that, unless the Cable Commission properly promulgates some prohibition against Harron's practice, the Cable Act provisions don't come into play.

A copy of the full correspondence between Harron and the Massachusetts Commission on this point is attached.

Finally, the Massachusetts Commission argues that cable operators should not be permitted to do what the statute plainly permits -- itemize items as separate charges. Mass. Comments at 28. The Massachusetts Commission states that allowing operators to show franchise fees as separate charges will "reduce the gross revenue on which the franchise fee is based." Id. But that is not at all the case. Franchise documents generally set forth the manner by which franchise fees are calculated, and obviously the cable operator could not alter those requirements by setting out some different amount on its bills. Nor is setting forth the correct amount of a franchise fee on a bill the difficult task that the Massachusetts Commission implies. The example given by the Massachusetts Commission in a footnote calculates the franchise fee as a percentage of the other items in the bill. 1/

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1/ The Massachusetts Commission uses the following example:

[Footnote continued]

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All the operator must do to correctly calculate the fee is to be sure it is a percentage of the total bill. 2/

As noted in our letter to the Massachusetts Commission, copyright fees may vary among different franchise areas. By itemizing those fees, a cable operator can keep the price for basic service consistent throughout the system, yet still have subscribers in different franchise areas pay their rightful share of copyright obligations. We respectfully request the Commission to make clear that:

1. In the absence of a properly promulgated prohibition against itemization, cable operators are not restricted in what matters they may itemize; and

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1/ [Footnote continued]

cable service	\$20.00
5% franchise fee	<u>1.00</u>
amount due	\$21.00

As the Massachusetts Commission correctly points out, this example understates the franchise fee.

2/ To correctly set out the franchise fee, the operator should calculate it as a percentage of the total bill:

cable service	\$20.00
5% franchise fee	<u>1.05</u>
amount due	\$21.05

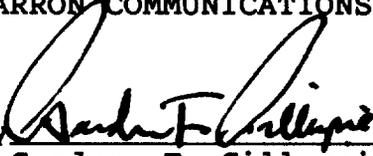
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2. Even in the face of such a limitation on itemization, cable operators may itemize compulsory copyright payments.

Respectfully submitted,

HARRON COMMUNICATIONS CORP.

By   
Gardner F. Gillespie

HOGAN & HARTSON  
555 13th Street N.W.  
Washington, D. C. 20004

Its Attorneys

cc: Hon. Donna M. Searcy  
Hon. John M. Urban

0599/3048o



JOHN M. URBAN  
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION  
COMMUNITY ANTENNA TELEVISION COMMISSION  
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100 CAMBRIDGE STREET, BOSTON 02142

(617) 551-6000

September 22, 1992

Terry Hicks, General Manager  
Harron Cablevision of Massachusetts  
333 Weymouth Street  
Rockland, MA 02370

Re: Itemization of Copyright Costs

Dear Terry:

I am writing in response to Harron's latest rate increase notice. Specifically, I have concerns relating to the itemization of copyright costs. While various members of my staff have had conversations with you and your staff and counsel, I am concerned about this matter and felt it warranted my personal attention.

As you know, the Cable Communications and Policy Act of 1984 (the "1984 Act") entitles cable operators to designate as a separate item on a subscriber's bill that amount of the bill which is attributable to the franchise fee. 47 U.S.C. §542(f). The definition of the term "franchise fee" specifically excludes copyright fees. 47 U.S.C. §542(g)(3)(E). The 1984 Act was amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"). The 1992 Act amends the 1984 Act in relevant part by allowing a cable operator to identify on a subscriber's bill "consistent with the regulations prescribed by the Commission . . . the amount of any fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §14 (1992) (emphasis added).

The 1992 Act makes clear that any such amount may be itemized on a subscriber's bill but only in a manner which is consistent with FCC regulations. Because the FCC has not yet issued its regulations on this matter, I do not believe you are entitled to itemize this amount at the present time.

In addition, I do not believe that copyright fees are imposed by a "governmental authority" as that term is used in the 1992 Act. It

Mr. Terry Hicks, General Manager  
December 22, 1992  
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It is true that copyright fees for the compulsory license are collected by the Register of Copyrights (the "Register") and distributed by the Copyright Royalty Tribunal (the "CRT"). However, the Register and the CRT are merely administrative clearinghouses for these payments; it is not the Register or the CRT which imposes the requirement that an operator pay copyright fees.

From our review of this matter, it appears that copyright charges are not amounts the liability for which arises from the transaction between the operator and the subscriber. Copyright fees result from the "transaction" between the programmer or the broadcaster and the operator, not the operator and the subscriber. It is not the subscriber's reception of the signal but the transmission of the signal by the operator which triggers the liability for copyright payment.

I believe the language in the 1992 Act was intended to allow operators to itemize amounts such as entertainment taxes and the like, not to allow an operator to randomly select components of its operating expenses to line item on a subscriber's bill.

If Harron insists on including this itemization on its subscribers' bills at this time, the Commission will have to make a determination as to how its can most effectively monitor the accuracy of these charges to subscribers. I believe itemization of copyright costs is a practice you may want to reconsider and you should know that we will review this issue again once the FCC has completed its rulemaking in connection with this matter.

If you should have any questions regarding this matter, please feel free to contact me.

Terry Truly,  
John N. Urban,  
Commissioner

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January 8, 1993

Sally Williamson, Esq.  
General Counsel  
Community Antenna Television Commission  
Leverett Saltonstall Building-20th Floor  
Room 2003  
100 Cambridge Street  
Boston, MA 02202

Re: Harron Communications

Dear Ms. Williamson:

Terry Hicks of Harron Cablevision of Massachusetts has shared with me a copy of Commissioner John M. Urban's letter dated December 22, 1992, regarding itemization of copyright costs. In view of our telephone discussions about the issues, and because my comments are primarily directed to legal issues, I thought I should address this response to you.

I would ask that you and Commissioner Urban consider the following:

1. The specific provisions of the 1984 and 1992 Cable Acts refer to practices that are specifically permitted, even in the face of efforts by state or local authorities to restrict them. In the absence of a properly promulgated rule by the Massachusetts Cable Commission prohibiting itemization, Harron is fully within its rights to configure its bills in any way it desires -- and to itemize any cost items it chooses to. The Commission has no such rule, and may not adopt one without initiating formal rulemaking proceedings. The point here is that, unless the Cable Commission properly promulgates some prohibition against Harron's practice, the Cable Act provisions don't come into play.

Sally Williamson, Esq.

January 8, 1993

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2. I believe that copyright payments do represent an "assessment, or charge . . . imposed by [a] governmental authority on the transaction between the operator and the subscriber," in the words of the 1992 Cable Act. The copyright fees are imposed by Congress and the Copyright Royalty Tribunal. Sections 111(c) and 111(d) of the Copyright Act of 1976, 17 U.S.C. §§ 111(c) and 111(d), give cable operators a compulsory copyright license only when the appropriate payment is made to the Copyright Office. Moreover, the amount of the payment is a percentage of the "gross receipts" collected by the cable operator from the subscriber. Thus, the copyright fee is "imposed by [a] governmental authority on the transactions between the operator and the subscriber." Accordingly, it is explicitly permitted to be itemized under the 1992 Cable Act. After this provision of the 1992 Cable Act becomes effective on April 3, 1992, Harron may itemize its copyright fees, even in the face of a conflicting rule of the Massachusetts Cable Commission.
3. Commissioner Urban references the FCC's proceedings under the 1992 Cable Act. The FCC released the text of its rulemaking on rate regulation on Christmas Eve and has not proposed to address the issue specifically raised by Commissioner Urban. But the FCC has proposed to require that a rate structure be uniform within a system under Section 623(a) of the 1992 Cable Act. We believe that the FCC should -- and will -- require cable systems to have the same basic and tiered rate structures throughout a system, but will permit variations, by bill itemization, for franchise fees, PEG expenses, and other governmental charges like copyright fees. Similar to franchise fees and PEG expenses, copyright fees may vary among different franchise areas of a system. It would be unfair not to permit subscribers' bills to vary between franchise areas based on significant differences in these charges. Moreover, not to allow the charges to be itemized would confuse franchising authorities and subscribers. By itemizing these costs, all subscribers within the same system will see the same charges for basic and tiered service, yet will

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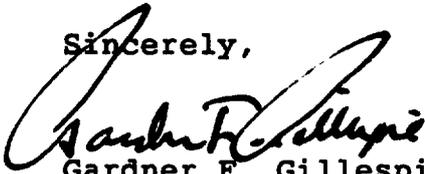
Sally Williamson, Esq.  
January 8, 1993  
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then pay their rightful share of the franchise fees, PEG costs, and copyright fees reflected in the particular franchise area.

4. Harron has carefully calculated its copyright fees for each of its franchise areas, based on the applicable percentage of "gross receipts" called for under Copyright Office regulations. I am certain that Harron accountants would be happy to discuss with a representative of the Commission how those determinations are reached.

Please let me know if you have any further questions regarding this matter.

Sincerely,



Gardner F. Gillespie

GFG:dj  
cc: Terry Hicks

0225G



JOHN M. URBAN  
Commissioner

THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION  
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February 16, 1993

Gardner F. Gillespie, Esq.  
Hogan & Hartson  
Columbia Square  
555 Thirteenth Street NW  
Washington, DC 20004-1109

Re: Harron Communications

Dear Gardner:

I have received your letter dated January 8, 1993. We disagree with your interpretation of the Cable Communications and Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992. We do not believe that either of these laws permits the itemization of Harron's copyright costs.

At this time, we are awaiting the release of the FCC's rulemaking in connection with rate regulation. Once we see what the FCC's rules are regarding this type of itemization, we will decide how to proceed in this matter.

In the meantime, as the Commissioner mentioned in his previous letter to you, if Harron insists on including this itemization on its subscribers' bills at this time, the Commission will have to make a determination as to how it can most effectively monitor the accuracy of these charges.

If you have any questions regarding the Commission's interpretation of law or if you wish to discuss this matter further, please call me.

Sincerely,

*Sally E. Williamson*  
Sally E. Williamson  
General Counsel