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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition)
Act of 1992)

Rate Regulation)

MM Docket No. 92-266

To: The Commission

PETITION OF UNITED VIDEO FOR RECONSIDERATION

United Video respectfully submits this Petition for Reconsideration in the above captioned proceeding and urges the Commission to reconsider several provisions in the regulations adopted in the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266 (Rel. March 30, 1994) ("Report and Order") governing how cable operators may pass through external costs associated with the addition of program services. United Video believes that modifications to the Commission's rules are necessary to ensure that cable operators will not be deterred from adding new program services, thereby providing consumers access to the broadest range possible of diverse programming at reasonable rates.

Introduction

United Video is aware of the complexity of the cable regulations and commends the Commission for its hard work. We appreciate the Commission's well-intentioned attempts to address the concerns of cable programmers by permitting cable operators to mark-up programming costs and adjust rates based

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on the addition of channels. Although a step in the right direction, we believe these regulatory incentives do not go far enough to promote the addition of new program services.

In evaluating whether to add program services, operators must weigh the benefit of a 7.5% mark-up on program costs and a per channel adjustment in rates with the cost of delays of up to six (6) months or longer before permitted program costs can be recovered since pass throughs are limited to the quarter following when costs are incurred. The delay could be even longer should the local franchising authority toll rate adjustment requests for the maximum time allowed under the regulations. Furthermore, an operator whose rates previously have not been challenged risks prompting a challenge and a possible reduction in rates when recovery of the costs associated with adding new services is sought.

United Video believes that these regulatory barriers, when considered together, create such significant disincentives for operators that program services simply will not be added to regulated tiers. If not modified, the regulations will deny consumers access to new program services. Accordingly, our comments are directed at improving the Commission's regulatory framework and ensuring that operators are provided with sufficient incentives to provide new program services to consumers.

Timing Delays

The Commission's going forward regulations represent a fundamental change in the way cable operators, consumers and programmers have traditionally planned for the addition of new program services. In the past, the addition of new program services was timed with a rate adjustment. This approach served several purposes: 1) It insured that the consumer realized immediate value from a rate adjustment; 2) It insured that only those subscribers

paying for the new program service were the ones receiving the new program service, and 3) It permitted coordination of expenses with revenues. There is no indication that the practice of timing the addition of new program services with rate adjustments was objectionable to consumers.

By contrast, the Commission's going-forward regulations prohibit a cable operator from passing through increases in programming costs associated with the addition of new program services until, at the earliest, the quarter following when the program expense is incurred. Consequently, it will not be possible for cable operators to coordinate the addition of new services with rate adjustments. Instead, consumers will be billed for the new program service months after the new service is launched. Similarly, if a program service is ultimately dropped, consumers will be forced to pay for that service beyond the time when it is actually available. New cable subscribers will be further penalized, as those who add cable between the time the service is dropped and the corresponding decrease in rates will be paying for a service they never received.

Thus, the biggest problem with the going-forward scheme is that cable operators must launch a new service and incur significant expenses with no certainty as to when those expenses may be recovered. Depending on how the Commission's rules are interpreted and the tier to which a service is added, the delays in passing through permitted costs could be quite substantial.

Moreover, the regulations as currently drafted give local franchise authorities up to 120 days in which to approve rate adjustments on the basic tier (30 days plus 90 additional days) and 180 days if the system elects cost-of-service (30 days plus 150 additional days). It is highly unlikely that cable operators will add program services to the tier of service regulated by the local franchising authority since the subsequent quarter delay combined with the franchise

authority's tolling order could prolong recovery of legitimate program costs for a substantially longer period of time.

Such potentially significant delays coupled with an insufficient mark-up will result in the virtual halt of new program service launches to regulated tiers of service. Again, the consumer will bear the burden of these unintended consequences. It is critical that the Commission make provisions for the coincidental launch of new services and their associated rate increases.

Incurred vs. Paid Programming Costs

The Commission's regulations are unclear as to when cable operators may consider external costs as incurred for the purpose of passing through program cost increases. The negative effect of the quarterly filing requirement will be magnified should the Commission determine that program costs cannot be passed through until they are paid.

If the regulations are interpreted so as to permit that an expense is incurred once there is an accompanying legal obligation, the gap between increases in expenses and recovery of those expenses will be minimized but not eliminated. The subsequent quarter filing requirement still will prevent cable operators from timing permitted pass throughs to coincide with the addition of new program services.

For example, if an operator launches a new service on June 1, the earliest date that the increased costs could be reflected under the rules is July 1, the beginning of the subsequent quarter. Even assuming that a rate adjustment could be passed through the same day, the operator's revenue will be behind expenses by one month. In reality, the delays are likely to be much longer as a result of the Commission's notice requirements and local franchising authority's ability to toll decisions for up to four (4) additional months.

On the other hand, if the regulations are interpreted to require that an expense is not incurred until paid, the consequences are significant. First, it will force cable operators to make multiple rate adjustments for superstations. As a practical matter, all of the program costs associated with the launch of a superstation will not be paid for at the same time. The statutory copyright payments are generally paid well after the transmission fees. Thus, an operator adding a superstation may be forced to file separate Form 1210's for each permitted external cost based on when it was paid, make separate subscriber notifications informing consumers of each rate adjustment, and implement separate rate increases for each permitted program cost.

Second, an interpretation that incurred means paid would further extend the delays in recovering legitimate program costs, particularly when cable operators are billed for program services in arrears. If the Commission decides that program fees must be paid before they may be passed through, cable operators will be prohibited from passing through program fees that they are legally liable to pay and which have been accruing on their books. The result is that subscribers may receive a rate adjustment for a new program service many months after the service was first introduced. Under this definition of incurred the Commission may be forcing all programmers to bill monthly in advance a billing arrangement which is currently used by very few programmers.

The programming industry does not operate under uniform billing system: billing can occur monthly, quarterly, semi-annually or annually. Similarly, there is no standard in the industry as to how cable operators submit payment to programmers: in advance or in arrears. Programmers may be forced to adjust their billing practices accordingly; this adjustment will not be cost-free. Ultimately, subscribers could foot part of the bill as the programming industry restructures to conform to the going-forward regulations.

Copyright Fees under Going Forward Regulations

The distinction between program costs that are incurred as opposed to paid has particular significance for program services subject to statutory copyright payments, such as distant broadcast signals or superstations. Again, depending on how the term incurred is interpreted by the Commission, cable operators adding these services may be forced to wait for as long as one year before recovering the legitimate program costs associated with carriage of superstations.

As the Commission has correctly noted in the Report and Order (at ¶180) copyright fees are a legitimate program cost. Despite this clarification the regulations fall short of ensuring that cable operators can recover this expense in a timely manner because program costs for distant broadcast signals differ from other program costs in several significant respects.

First, there are two program costs associated with carriage of distant broadcast signals: a per subscriber transmission fee paid to companies such as United Video and a statutory copyright payment paid to the Copyright Office. Second, for the purpose of calculating copyright fees, the calendar year is divided into two copyright periods lasting six months each. Under the statute, copyright fees are divided into two periods. The first copyright period runs from January 1 through June 30, with payments due between July 1 and August 29. The second copyright period extends from July 1 to December 31, with payments due between January 1 and March 1. Consequently, unlike licensing fees or other program costs for non-superstation programming, cable operators and programmers cannot time the payment of statutory copyright fees so as to minimize the effect of the Commission's quarterly filing requirements.

Finally, the cable operator's liability for copyright extends for the entire six-month copyright period, despite when the distant broadcast signal is added. This

means that a cable operator who adds a distant broadcast signal at the end of a copyright period must pay copyright for the preceding six months even though they may have carried the superstation for only one month. As a result, a cable operator cannot time the addition of distant broadcast signals to coincide with the end of a calendar quarter in order to receive more advantageous treatment since to do so would result in copyright liability for the previous six month period.

Because copyright fees are payable only on a semi-annual basis; cannot be pre-paid; and may not be negotiated, program services are subject to statutory copyright at a distinct disadvantage under the Commission's rules.

The combined effect of requiring operators to wait until statutory copyright payments are actually paid and the subsequent quarterly filing requirement will prevent an operator from passing through copyright fees for up to seven (7) to nine (9) months. This would be the case even though under copyright law a cable operator "incurs" statutory copyright liability on the day a distant broadcast signal is added.

By contrast, an operator can begin recovering the program costs associated with adding a program service not subject to statutory copyright payments much sooner. Indeed, an operator adding a non-broadcast channel at the end of a quarter can initiate the process to recover program costs within days.

United Video recognizes that the Commission's rules will require all cable operators to make major adjustments to accommodate the new regulatory scheme, our concern is that for statutory copyright payments the adjustment is likely to be so great that operators will not add superstations even though consumer demand for superstations is greater than for other program services. The inability of cable operators to control the timing, amount or terms of copyright payments, and the fact that copyright fees can be a substantial program cost for

many cable systems will act as a significant deterrent to those systems in adding distant broadcast signals.

The 7.5% Mark-up and Per Channel Adjustment

The Commission's going forward regulations include two provisions designed to encourage cable operators to add additional channels to their existing service tiers (Report and Order at ¶¶ 246-247.) The first incentive permits cable operators to take a 7.5% mark up on its program service fees. The second incentive permits operators to adjust their rates by a set amount for each channel added based on the number of channels activated on the system. In theory these two provisions give cable operators incentive to add program services. In reality, they do not. Indeed, when balanced with the tremendous cost of adding new program services: the time lag for recovering legitimate program expenses, potentially longer delays in the case of local franchising authority approval, and the risk of a challenge to the operator's entire rate structure, the benefit of the incentives does not provide the cable operator much encouragement.

The current mark-up of 7.5% does not provide enough incentive for operators to add new program services. United Video's estimates of a typical system's costs incurred when launching a new program service indicate an operator would not fully recover launch-related expenditures for several years at the 7.5% mark up rate. Even with the per channel adjustment to rates, the mark up is inadequate. For most systems the .01¢ to .02¢ adjustment is insufficient to offset the costs of adding new programming.

United Video urges the Commission to examine this issue more closely and to establish a mark up rate and per channel adjustment which will encourage operators to add new program services.

Challenges to Existing Rates

Under the current regulations, a cable operator whose rates have not been challenged is discouraged from adding a new service and taking the permitted pass-throughs. Even though the deadline for rate complaints expired February 28, 1994, the regulations in effect extend that deadline indefinitely since any service changes (in rates or channel offerings) trigger a 45 day window for complaints. These complaints are not limited to the difference between the old rate and the new rate, but can extend to the cable operator's entire rate structure.

For example, there are cable operators whose rates have not been challenged thus far. Should any of these operators decide to offer new programming services and adjust rates to cover the costs accordingly, subscribers will be given the opportunity to complain about the new rate under the Commission's regulations. Furthermore, the subscriber may also complain about the operator's entire rate structure, despite the fact that such challenges to the operator's rates were to have been filed before February 28, 1994.

While subscribers should be given the opportunity to challenge the appropriateness of the new rate and the cable operator should be required to provide the necessary justification for the adjustment, permitting challenges to the underlying rate will deter the addition of new program services. Cable operators given the choice between adding a new program service and facing a rate challenge will undoubtedly opt to preserve the status quo and forgo the addition of new program services altogether.

Conclusion

The Commission's going forward regulations need further refinement in order to achieve the Commission's goal of providing cable operators with sufficient incentives to add additional program services to existing tiers of services. Although permitting operators to mark-up programming fees and adjust rates for

additional channels could be effective incentives, at the present time they are not sufficient to overcome the other disadvantages cable operators face when adding new program services. United Video urges the Commission to view the rate regulations, particularly the going-forward scheme, in its totality to ensure that cable operators have sufficient incentive to add new program services to regulated tiers of service.

Additionally, the Commission's rules must be modified so that they do not inadvertently discriminate against some types of program services. As they stand now, the going forward rules discourage cable operators from adding program services subject to statutory copyright fees, such as superstations. For the reasons outlined previously, the current regulatory scheme will not work for the additions of superstations. United Video requests that the Commission reconsider those aspects of the regulations we have highlighted which discourage the addition of superstations and develop regulations that will promote the addition of all program services to regulated tiers of cable service.

Respectfully submitted,

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