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October 19, 1994

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Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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OCT 19 1994

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

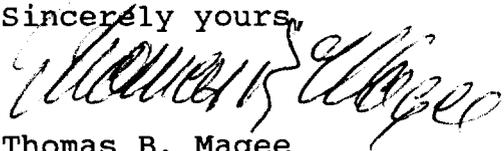
RE: MM Docket No. 92-266
Petition for Reconsideration and
Request for Expedited Action

Dear Mr. Caton:

Attached please find an original and eleven copies of the above-referenced pleading of TKR Cable Company.

Please contact the undersigned counsel if you have any questions regarding this submission.

Sincerely yours,


Thomas B. Magee
Attorney for
TKR Cable Company

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Before the
Federal Communications Commission
Washington, D.C. 20554

RECEIVED ORIGINAL

OCT 19 1994

In the Matter of)	FEDERAL COMMUNICATIONS COMMISSION
)	OFFICE OF SECRETARY
)	
Implementation of Sections of)	
the Cable Television Consumer)	MM Docket No. 92-266
Protection and Competition Act)	
of 1992: Rate Regulation)	
)	DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION
AND REQUEST FOR EXPEDITED ACTION

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October 19, 1994

SUMMARY OF ARGUMENT

TKR respectfully requests the Commission on reconsideration to provide: (i) that local franchising authorities may not toll the effectiveness of external cost pass-throughs, allowing operators to charge higher rates, subject to refund, to recover external cost increases, at any time after 30 days written notice; and (ii) that operators may recover the cumulative amount of all external costs previously incurred but not passed-through in a manner similar to the prorated recovery allowed for FCC regulatory fees. In addition, TKR respectfully requests the Commission to rule on its Petition in an expedited manner, by November 1, 1994.

Pursuant to the current pass-through methodology for external costs, TKR, like other cable operators, must wait as many as nine months before it may begin to collect external costs. Such recovery is permitted only on a prospective basis, so that cable operators will be unable to recoup external cost increases which are incurred during that nine month period.

TKR's reconsideration requests provide a fair and efficient solution to this problem of external cost recovery. They provide operators the ability to recover

external costs while providing safeguards to ensure subscribers are not harmed.

The Rate Order envisioned expedited, automatic pass-throughs of external costs. TKR has been advised, however, that local franchising authorities with authority over its systems intend to automatically toll the effectiveness of external cost pass-throughs. Such tolling frustrates the expedited, automatic nature of the Commission's pass-through provisions.

Expedited review of external costs is consistent with FCC regulatory goals and with Congressional intent. In addition, the balance of equities clearly favors the revisions proposed by TKR of the external cost pass-through provisions. Granting these changes would not substantially harm cable customers, while cable operators would be relieved of significant financial stress.

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**Before the
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In the Matter of)	
Implementation of Sections of)	
the Cable Television Consumer)	
Protection and Competition Act)	MM Docket No. 92-266
of 1992: Rate Regulation)	
)	

**PETITION FOR RECONSIDERATION
AND REQUEST FOR EXPEDITED ACTION**

Pursuant to Section 1.429 of the Rules of Practice and Procedure of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 1.429 (1993), TKR Cable Company ("TKR") hereby files this Petition for Expedited Reconsideration of the "Fourth Order on Reconsideration" released October 5, 1994 in the above-captioned proceeding ("Fourth Reconsideration"). In support of its Petition, TKR states as follows:

I. REQUEST FOR RECONSIDERATION.

TKR respectfully requests the Commission to find: (i) that local franchising authorities may not toll the effectiveness of rate increases due to any external costs, allowing operators to charge higher rates, subject to refund, to recover external cost increases, at any time after 30 days written notice;¹ and (ii) that operators may

¹See 47 C.F.R. §§ 76.945(c), 76.958, and 76.964(b).

recover the cumulative amount of all external costs previously incurred but not passed-through in a manner similar to the prorated recovery allowed for FCC regulatory fees.

II. REQUEST FOR EXPEDITED ACTION.

TKR will be charged higher external costs effective December 1, 1994 as a result of increases in programming fees. To pass-through these costs when they are incurred, TKR must notify customers 30 days in advance of the increase, by November 1, 1994. Thus, TKR respectfully requests a ruling by the Commission on TKR's Petition by November 1, 1994.

III. BACKGROUND.

A. Treatment of External Costs Prior to the Fourth Order on Reconsideration.

The Commission's price cap regulations permit cable operators to pass-through increases in external costs by filing FCC Form 1210. 47 C.F.R. § 76.922(d). Cable operators must "use a calendar year quarter when adjusting rates under the price cap requirements." 47 C.F.R. § 76.922(d)(1). Regarding external costs, the regulations provide: "Permitted charges for a tier may be adjusted up to quarterly to reflect changes in external costs experienced by the cable system." 47 C.F.R. § 76.922(d)(3)(i). All changes during a period must be

"tallied up": "Any rate increase made to reflect an increase in external costs must also fully account for all other changes in external costs, inflation and the number of channels on regulated tiers that occurred during the same period." 47 C.F.R. § 76.922(d)(3)(iii).

Local franchising authorities must rule on proposed rate increases, or issue a tolling order, within 30 days from the date submitted. If not, the proposed rates become effective by the end of that 30 day period, at the latest. 47 C.F.R. § 76.933(a). The regulation is unclear whether proposed rates or existing rates are in effect during this 30-day period. The tolling period available to a franchising authority is 90 days, or 150 days for cost of service filings. 47 C.F.R. § 76.933(b). Likewise, it is unclear whether existing or proposed rates are effective during this tolling period. See 47 C.F.R. § 76.933(c).

The tolling of rate increases was justified in the Rate Order as in some cases necessary to give franchising authorities time to decide "complex" cases. "Complex" cases are those "where it cannot be determined, based on the material submitted, whether the operator's rates are reasonable."²

²Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, "Report and Order and Further Notice of Proposed Rulemaking," MM Docket 92-266, at ¶ 121, 8 FCC Rcd 5631, 5710 (Released May 3, 1993) ("Rate Order").

Importantly, external cost pass-throughs are not considered by the Commission to be "complex" cases. In contrast to "complex" cases, the Commission labelled external costs as "automatic adjustment" items, and indicated that franchising authority review of external costs should result in little delay for the operator. Little delay was expected for "automatic" adjustments because, as declared by the Commission, external cost pass-throughs are presumed reasonable. With this presumption, the Commission provided for expedited review of external costs: "Because such exogenous costs are presumed reasonable, review of these adjustments should not create an undue delay for the operator, and the franchising authority must pass on them within 30 days."³

The simple, expedited method by which franchising authorities should review external costs was explained as follows: "Review of automatic adjustments by franchising authorities should be limited in scope. Such review should consist of ensuring that the item in question qualifies as an 'automatic adjustment' under our rules and that the amount of the automatic adjustment is correct."⁴

To emphasize further the expedited nature of external cost review, the Commission declared that a separate, expedited review of external costs must be made

³Rate Order at ¶ 133, 8 FCC Rcd at 5720 (footnotes omitted).

⁴Id. at n.354.

where rate increases are based both on external costs and on other factors. If not acted on within 30 days, the automatic adjustment portion goes into effect automatically:

In addition, even if a proposed increase exceeds the presumptively reasonable level, we will require franchising authorities to act on the portion of the increase that qualifies as an automatic adjustment within 30 days. If the franchising authority does not act upon a request for such an adjustment within 30 days, it will go into effect automatically.⁵

B. Fourth Order on Reconsideration.

In the Fourth Order on Reconsideration, the Commission amended Section 76.933 of the regulations, regarding franchising authority review of basic rates, to provide specifically that regulatory fees and franchise fees may be placed into effect without prior regulatory approval, upon 30 days notice, subject to refund. 47 C.F.R. § 76.933(e). After stating a general rule that operators must have regulatory approval before placing rate increases into effect, the Commission carved specific exceptions for franchising fees and regulatory fees.⁶

Additionally, the Fourth Reconsideration established a methodology for the recovery of FCC regulatory fees. Under this methodology, an operator's yearly regulatory fee payment is recovered by implementing a

⁵Id. at n.355.

⁶Fourth Reconsideration at ¶¶ 2, 3, 13.

surcharge on each subscriber, which surcharge is prorated for recovery over a twelve month period. Annual payment of FCC regulatory fees is made either in August or September. Under the Commission's new recovery methodology, operators may recover these fees during the twelve-month period beginning in October.

IV. LIKE OTHER CABLE OPERATORS, TKR IS SERIOUSLY HARMED BY THE CURRENT PASS-THROUGH METHODOLOGY FOR EXTERNAL COSTS.

TKR has been advised that local franchising authorities with authority over its systems do not intend to act on TKR's requested external cost pass-throughs within 30 days of the date they receive TKR's Form 1210s, but rather they intend to automatically toll the effectiveness of rate increases whenever a Form 1210 is filed.

If the Commission permits local franchising authorities to toll for ninety days the effective date of a proposed pass-through of external costs, TKR must wait as many as nine months before it may recover external costs through the "automatic adjustment" mechanism. During those nine months, TKR will be forced to pay increased external costs such as those to programmers, for instance, and have no opportunity later to recover those increased payments.

TKR calculates that pass-throughs of external cost increases effective January 1, 1995 may not begin until August 29, 1995. If the price charged TKR by a cable

programmer increases effective January 1, 1995,⁷ TKR may not file its Form 1210 for recovery of those costs until the end of that calendar year quarter, or April 1, 1995. With 30 days to pass on the matter, the local franchising authority does not have to act until May 1, 1995. If 90 days of tolling is permitted, the franchising authority may reach its decision (if it reaches one at all) as late as July 30, 1995. Only then is TKR in a position accurately to provide subscribers the 30 days notice required for rate changes. Thus, TKR's rates reflecting the January 1, 1994 increase in programming costs may not become effective before 30 days after July 30, or August 29, 1995. Considering the amount of time necessary for preparation and issuance of customer communication, it could be as late as September 30, 1995. After these nine months, the current rules permit TKR to recover its external cost increases on a prospective basis only.

V. **TKR'S RECONSIDERATION REQUESTS PROVIDE THE SOLUTION TO THE EXTERNAL COST PASS-THROUGH PROBLEM, AND ARE JUSTIFIED BY COMMISSION AND CONGRESSIONAL PRONOUNCEMENTS AND BY THE BALANCE OF EQUITIES.**

A. **TKR's Reconsideration Requests Provide a Fair and Efficient Method to Enable Operators to Recover External Costs, While Providing Safeguards for Subscribers.**

The three reconsideration requests which are the subject of this Petition, taken together, provide a simple,

⁷TKR fully expects several such increases.

equitable means by which operators may recover external costs they have incurred, while insuring that these costs are properly passed-through.

First, TKR's Petition requests that any Form 1210 filed for "automatic" external costs, such as programming fees, be effective 30 days after filing the Form 1210. Granting this request shortens by 120 days the period during which TKR is denied external cost pass-through. Without such tolling, TKR could file its Form 1210 with the franchising authority on April 1, 1995, and on the same date notify subscribers of the rate change. Thus, TKR's rates could become effective as early as May 1, 1995, four months after the January 1, 1995 date TKR begins paying these increased costs.⁸ Although the rates would be "effective" 30 days after submitting a Form 1210, the operator would still be subject to refunds if the franchise authority subsequently discovered an error in the Form 1210. This review procedure would be similar to that used for review of franchise fee pass-throughs.

Second, TKR's Petition requests that operators be allowed to recover the cumulative amount of all external costs previously incurred but not passed-through in a manner similar to the prorated recovery allowed for FCC regulatory fees. Using this mechanism, operators are guaranteed

⁸Sufficient time necessary for preparation and issuance of customer communication may extend this date to June 1, 1995.

recovery of all external costs. Franchising authorities would still be entitled to review these pass-throughs and order refunds if they are inappropriate. However, this procedure would allow operators to aggregate increases and thereby reduce the number of rate increases. The advantage to the franchising authority from an administrative point of view is that operators likely will file far fewer Form 1210s, leading in turn to a significant reduction in customer confusion. With recovery of previously incurred external costs, operators' motivations for quarterly filings are lessened considerably. As a result, an operator could wait one year before raising rates. Waiting one year, the operator could tally up all external cost increases and decreases incurred during that year and file its Form 1210 with the franchising authority, providing easily verifiable justifications for its pass-throughs. The prorated pass-through amounts would become effective upon thirty days notice, and franchising authorities may elect to extend, if necessary, the time during which they may review rates and order refunds.

Extending this mechanism to cover all external costs makes perfect sense from a regulatory perspective: (i) subscribers are fully protected by refund orders; (ii) franchising authorities have more than adequate time to review these pass-throughs; and (iii) operators are guaranteed fair recovery of their external costs.

B. The Rate Order Envisioned Expedited Review of External Cost Pass-Throughs.

The Rate Order itself indicates an intent to disallow tolling orders on external cost pass-through filings. Instead, the Commission envisioned an "automatic adjustment" mechanism, under which cable operators must "notify" local franchising authorities 30 days in advance, and franchising authorities must "pass" on external costs within those 30 days.⁹

The Rate Order treats external cost filings very differently from other cable operator rate filings. First, although the burden rests on cable operators to prove the reasonableness of all other rate filings, the Commission declared a presumption that the operator's external costs are reasonable.¹⁰ Accordingly, operators should not need to prove the reasonableness of external cost pass-throughs. Second, and similarly, the Commission expressly limited the scope of franchising authority review of these costs. Unlike other costs, review of "automatic adjustment" items is limited to whether the cost qualifies as an automatic adjustment, and to whether the cost is reported accurately.¹¹ Third, the Commission clearly provided for separate, expedited review of external costs in situations

⁹Rate Order at ¶ 133, 8 FCC Rcd at 5720.

¹⁰Rate Order at ¶ 133, 8 FCC Rcd at 5720 (footnotes omitted).

¹¹Id. at n.354.

where both external costs and other factors have been used to justify a rate increase.¹² Thus, if a cable operator opts to justify increased rates through a Form 1220 cost of service filing, and concurrently files to pass-through external cost increases with a Form 1210, the franchising authority must sever the external cost portion of the rate increase for expedited review, and render a decision within 30 days. Finally, the Commission distinguished external cost pass-throughs from "complex" cases which justify imposing a tolling period for rate increases.¹³

C. **Expedited Review of External Costs is Consistent with FCC Regulatory Goals and with Congressional Intent.**

Expedited review of external costs is consistent with regulatory goals established for the going forward rules. The Commission expressed concern that its going-forward methodology not "unfairly restrict" the ability of operators to recover their costs: "[A]djustments to recover costs attributable to inflation and other factors beyond an operator's control will assure that the cap does not unfairly restrict cable operators' ability to recover costs."¹⁴

¹²Id. at n.355.

¹³Compare id. at ¶ 121, 8 FCC Rcd at 5710, with id. at ¶ 133, 8 FCC Rcd at 5720 and n.354.

¹⁴Rate Order, 8 FCC Rcd at 5776, ¶ 227.

Several articulated benefits of the price cap and external cost mechanisms would be frustrated by permitting external cost pass-through filings to be tolled and by disallowing these increased rates to become effective upon thirty days notice. Benefits envisioned for the price cap mechanism include: (i) reductions in costs; (ii) increased efficiency; and (iii) an opportunity for efficient operators to increase profits.¹⁵ Benefits envisioned for external cost pass-throughs include: (i) greater availability of broadcast stations; and (ii) greater availability of additional programming.¹⁶ These goals are impeded if TKR's Petition is not granted. First, denying recovery of increased programming costs, taxes, and other external costs has the obvious effect of increasing, not reducing, operator costs. Second, the effect of delaying the effectiveness of external cost rate increases is to deny, not provide, cable operators certain opportunities to increase profits through added efficiencies. Instead of increasing profits, many added efficiencies would be necessary simply to compensate cable operators for the external cost recovery disallowed by such delay. This constitutes a penalty on cable operators, puts their financial integrity at risk, and obviously is not the method by which the Commission sought increased efficiencies. Finally, if cable operators are denied

¹⁵Id.

¹⁶Id., 8 FCC Rcd at 5785, 5787, ¶¶ 246, 251.

recovery of significant amounts of increased programming costs and retransmission consent fees, they quite clearly are less likely to carry such programming.

Not insignificantly, denying recovery of several months' worth of external costs runs contrary to express goals of Congress to "encourage the growth and development of cable systems" and "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."¹⁷ As discussed, delay in the pass-throughs of external cost increases denies cable operators the recovery of programming costs, retransmission consent fees, and other external costs and thereby discourages cable operators from furnishing a wide diversity of information sources to the public. Further, the financial strain of this bar to cost recovery has the obvious effect of discouraging the growth and development of TKR's cable systems.

D. The Balance of Equities Favors Granting TKR's Petition.

Granting TKR's Petition will avoid for TKR and for other cable operators the unjustified, unrecoverable financial loss described above. Since TKR is barred from filing a suit for damages against local franchising

¹⁷Communications Act of 1934, as amended, Section 601(2), (4), 47 U.S.C. 521(2), (4).

authorities,¹⁸ TKR may not later recover such lost external costs no matter how arbitrary and capricious the franchising authority's decisionmaking. Denying the recovery of external cost increases deprives TKR of its property without compensation, and the extent of the loss to TKR implicates takings considerations under the Fifth and Fourteenth Amendments. Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

In contrast with the financial stress placed on cable operators, cable customers will not be substantially harmed if TKR's Petition is granted. First of all, as the Commission has recognized, external costs are easily verified so that franchising authorities should have no trouble making rulings on them within 30 days.¹⁹ Second, it is unsound from a business perspective for cable operators to attempt the pass-through of illegitimate external costs which later will require a refund.

A third reason customers will not be substantially harmed is because such rates will be effective subject to refund. Courts passing on this issue consistently have held

¹⁸See 47 U.S.C. § 555a.

¹⁹Rate Order at ¶ 133, n.354, 8 FCC Rcd at 5720.

that ratepayers suffer no irreparable harm if regulators permit rate increases to become effective subject to refund:

[P]etitioner in this case will suffer no irreparable injury Although petitioner became liable to pay intervenor's new rates after the five-month suspension period ended, its excess payments will be refunded, with interest, if the new rates are not proven to be just and reasonable. And if the Commission ultimately determines that intervenor's new rates are just and reasonable, then petitioner will have been denied no right to which it is entitled.

Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 240-41 (D.C. Cir.) (footnote omitted), cert. denied, 449 U.S. 1061 (1980). Other decisions reach the same conclusion.²⁰

Moreover, permitting TKR's customers to pay preexisting, lower rates while TKR is forced to absorb external cost increases grants TKR's customers an undeserved benefit. In addressing this issue, the Papago court stated:

We do not deny that petitioner would profit if we were to order rejection of the rate filing at this point. . . . However, the purpose of the Commission's authority to reject a rate filing is not to confer this type of undeserved benefit upon intervenor's wholesale customers, but to facilitate the orderly processes of the Commission.

628 F.2d at 241 (emphasis in original).

²⁰See, e.g., Philadelphia Gas Works v. FERC, No. 92-1393, 1993 WL 78805, at *1 (D.C. Cir. March 11, 1993) (per curiam) ("The resulting rate increase does not inflict irreparable injury because it is subject to refund."); Transcontinental Gas Pipe Line Corp. v. FERC, 866 F.2d 477, 481 (D.C. Cir. 1989) (There is no irreparable injury because "[i]f Transco prevails before the Commission on the cost allocation issue, the amount paid into escrow will be refunded (with interest)."); Mid-Tex Elec. Co-op., Inc. v. FERC, 822 F.2d 1123, 1134 (D.C. Cir. 1987).

The reasonableness of prohibiting this "undeserved benefit" is underscored by the fact that while subscribers will be unjustifiably benefitting from reduced rates, cable operators such as TKR will be expending increased amounts for programming expenses, retransmission consent fees, local franchising fees, and other external costs which they are completely unable to recover. This harm was recognized and addressed by Papago, which noted that: "The decision to suspend rate filings may inflict a large and irreparable economic loss on the carrier." Id. at 243.

VI. CONCLUSION.

Wherefore, TKR respectfully requests the Commission on reconsideration to provide: (i) that local franchising authorities may not toll the effectiveness of external cost pass-throughs, allowing operators to charge higher rates, subject to refund, to recover external cost increases, at any time after 30 days written notice; and (ii) that operators may recover the cumulative amount of all external costs previously incurred but not passed-through in a manner similar to the prorated recovery allowed for FCC regulatory fees. In addition, TKR

respectfully requests the Commission to rule on its Petition
in an expedited manner, by November 1, 1994.

Respectfully submitted,

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