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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

National Cable Television Association

Daniel L. Brenner
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October 21, 1994

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Ms. Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

Re: Going Forward, MM Dkt. 92-266

Dear Ms. Jones:

We understand that the Commission is considering the possibility of allowing cable operators to add new networks to regulated tiers on an "incubation" basis. Under this arrangement, the operator would place a network new to the operator's system on a regulated tier for some period of time during which subscribers would have the opportunity to sample the programming offered by the network. After some period of time, the operator would be free to migrate the incubated network to an a la carte or other status, thereby freeing up a channel slot on the regulated tier for other services and permitting individuals who wish to continue to purchase the incubated service to do so.

One of the issues that has arisen in establishing an incubation policy is the allowable term for incubation after which an operator would no longer be free to migrate the channel without the channel losing its "incubated" status. (This question is in distinction to the situation where a network has long been on a regulated tier and is migrated off by the operator to an a la carte channel.)

We believe that the Commission should not establish a precise number of years before an operator must migrate an incubated network or the network loses its incubated status. Each programming network will develop its own audience in its own distinctive way. Some networks, containing programming elements that are well known and established to audiences will likely generate audiences much more quickly than more niche-type programming services that will have to find their audience. Furthermore, those networks that receive wide-scale carriage early (for example, networks that may be added pursuant to a retransmission consent agreement between operators and programmers) may have a different pattern of audience development than a network without a large initial audience. We believe that it would make more sense to allow the incubation policy to proceed through negotiations between programmers and operators to assure that marketplace forces rather than government fiat determine the appropriate length of the incubation period.

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Nevertheless, the Commission may wish to establish an incubation period. We have spoken with a number of our programming companies to determine the typical length of new network carriage contracts in the industry. While there is no set standard length, a five-year program contract is not atypical of the industry. Therefore, should the Commission determine that establishing an incubation time limit is necessary to protect the public interest, we would suggest five years as a reasonable time limit after which a network could not migrate from the regulated tier without being treated as other than an "incubated" service.

In terms of establishing a limit, matching the allowable incubation period with the network contract carriage limit makes considerable sense. The length of a carriage contract, as established by industry practice, reflects the judgment by both the operator and programmer as to an appropriate period during which the operator can measure the desirability of a particular service for its intended audience. It also permits the program network to have an opportunity to renegotiate the terms under which it will be carried, in the event that the operator wishes to continue to carry the network at the end of the contract period. To establish a shorter time limit for either party would establish an artificial limitation, imposed by government regulation, on the normal workings of the programming contract market. It might discourage an operator to even consider a network for incubation if it believed that it could not make a "stay or go" decision within the time limit. This would eliminate a carriage option for some networks and distort, by government policy, a result that might otherwise obtain.

Moreover, to the extent that consumers are affected by any migration of an incubated network, it is difficult to imagine a situation where at least some consumers would not be upset by migration even after a few weeks whereas other viewers, who may never sample the service or have no interest in it, would never even notice the change. This variation in consumer reaction to migration (along with the fact that the migrated channel will in all probability be replaced by another service, which might well appeal to a yet unserved part of the operator's market) makes reliance on consumer expectations an unreliable basis on which to determine the proper incubation period.

Therefore, we suggest that a typical program contract term, such as the five-year period, would be an appropriate limit if any limit is to be set at all.

Sincerely,



Daniel L. Brenner

DLB:tkb

cc: William F. Caton, Secretary