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November 21, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY HAND

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

Re: Petition for Reconsideration of Fourth Order
on Reconsideration in MM Docket No. 92-266

Dear Mr. Caton:

Please find enclosed, on behalf of the City of New York and the National Association of Telecommunications Officers and Advisors, an original and eleven (11) copies of the Petition for Reconsideration of the Fourth Order on Reconsideration in MM Docket No. 92-266.

Thank you for your attention to this matter. Please call the undersigned if you have any questions.

Sincerely,

William E. Cook, Jr.

William E. Cook, Jr.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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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 FOR RECONSIDERATION BY
THE CITY OF NEW YORK AND
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

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Counsel for Petitioners

November 21, 1994

Before the
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TO: The Commission

**PETITION FOR RECONSIDERATION BY
THE CITY OF NEW YORK AND
THE NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

Pursuant to 47 C.F.R. § 1.429, the National Association of Telecommunications Officers and Advisors and the City of New York (collectively, the "Local Governments") hereby submit this Petition in the above-captioned proceeding.

The Local Governments request that the Federal Communications Commission ("FCC" or "Commission") reconsider the rules issued as part of the Fourth Order on Reconsideration¹ in the above-captioned proceeding.

¹ In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Fourth Order on Reconsideration (MM Docket No. 92-266), FCC 94-254 (released October 5, 1994) ("Fourth Order").

Specifically, the Local Governments request that the Commission: (a) not permit cable operators to pass through increases in franchise fees for the basic cable service tier without receiving prior franchising authority or Commission approval; and (b) not permit cable operators to pass through the cost of Commission regulatory fees, or, in the alternative, require that such external costs be allocated fairly among all services provided by a cable operator.²

DISCUSSION

I. The Commission Should Not Permit Cable Operators to Pass Through Alleged Increases in Franchise Fees Without Prior Approval

The Commission should reconsider its rule permitting cable operators to adjust capped rates to reflect increases in franchise fees for the basic service tier without prior regulatory approval. See 47 C.F.R. § 76.933(e); Fourth Order at 3-5. The Commission adopted its rule based on the mistaken assumption that "[s]ince it is the franchising authority which has set the franchise fee, prior regulatory review appears less necessary from a consumer protection standpoint than it

² The Commission reached its actions on reconsideration on its own motion. See Fourth Order at ¶ 1 n.1. Thus, the Local Governments did not have a prior opportunity to raise the issues addressed in this Petition.

is for other categories of external costs." Fourth Order at 3. Nothing could be further from the truth.

Although franchising authorities determine the amount of franchise fees, the amount on a subscriber's bill that a cable operator actually attributes to franchise fees is a much contested issue, as evident from even a cursory review of rate appeals filed at the Commission.³ Moreover, the Local Governments have pending before the Commission a Petition for Reconsideration and Clarification that requests that the Commission clarify its bill itemization and "fee plus" rules so that cable operators cannot exploit such rules to misrepresent the amount in franchise fees reported on subscribers' bills and in advertisements.⁴ Cable

³ See, e.g., Paragon Cable Manhattan v. The Department of Information Technology and Telecommunications for the City of New York, New York, FCC CUID No. NY0104 (filed Oct. 31, 1994); Time Warner Cable of New York City v. The Department of Information Technology and Telecommunications for the City of New York, New York, FCC CUID No. NY0234 (filed Sept. 30, 1994).

⁴ See Petition for Reconsideration and Clarification filed by NATOA, et.al. in MM Dkt. No. 92-266 (filed May 16, 1994). NATOA asked the Commission to clarify its bill itemization rule, 47 C.F.R. § 76.985, and its "fee plus" advertisement rule, 47 C.F.R. § 76.946. NATOA opposed statements in the Third Order On Reconsideration that suggested that cable operators may pay less than the full amount required under franchise agreements as franchise fees. See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 FCC Rcd. 4316, 4368, ¶ 143 n.99 (1994).

operators have itemized on subscribers' bills, or have included in cable service rates, amounts for franchise fees that bear no relation to the franchise fee amount required under franchise agreements.

For example, the calculation of franchise fees may involve more than just calculating a percentage of a cable operator's gross revenues. Section 622(g) of the Cable Act, 47 U.S.C. § 542(g), identifies certain other costs, including, for example, certain on-going support for public, educational and governmental ("PEG") access facilities, as franchise fees. The amounts attributable to such costs are far from clear in many jurisdictions; franchising authorities and cable operators often dispute the amount in franchise fees that is attributable to such costs.

The Commission has exacerbated disagreements between cable operators and franchising authorities over this issue with its new rule. The Commission has made it possible for cable operators to exploit disagreements with franchising authorities over franchise fees by simply passing through alleged increases in such fees without prior regulatory review.

Although a franchising authority retains the right to order refunds if the authority determines that an operator unlawfully passed through rate increases under the guise of franchise fees, cable subscribers

should not have to suffer from the operator's unlawful behavior -- in the form of higher rates -- until the franchising authority issues a rate order requiring refunds and a rate reduction. Moreover, given that a cable operator has the option of refunding overpayments to a class of subscribers rather than to actual subscribers, cable subscribers who paid the franchise fee overpayment and who disconnected cable service before a refund was ordered, may not actually receive a refund.

There is no convincing reason to treat franchise fee increases differently than any other proposed rate increase for purposes of regulatory review. In fact, contrary to the Commission's conclusion, from a "consumer protection standpoint," all rate increases should be treated the same. See Fourth Order at 3. It is just as imperative that franchising authorities have the ability to review the reasonableness of alleged increases in franchise fees, as it is for them to review any other rate increase. To a subscriber, there is no difference between an overcharge by an operator for basic cable service and an overcharge by an operator for franchise fees. The result is the same, an overpayment by the subscriber for cable service.

The Commission should not create artificial distinctions between unreasonable charges by cable

operators for cable service and unreasonable charges by cable operators for franchise fees by treating them differently for regulatory purposes. The Commission, therefore, should repeal 47 C.F.R. § 76.933(e).

II. Basic Subscribers Should Not Bear the Cost of the Commission's Regulatory Fees

The Commission should reconsider its rule permitting cable operators to assign the cost of the Commission's regulatory fees directly to the basic cable service tier as an external cost. See 47 C.F.R. §§ 76.922(d)(3)(iv)(F), 76.924(f)(5), and 76.933(e) & (f); Fourth Order at 7-8. Such a regressive regulatory scheme unfairly burdens basic-only subscribers, who are often elderly, low-income and "captive"⁵ subscribers. Such regulatory fees, compounded by other recent rate increases permitted by the Commission, will make basic cable service unaffordable for many such subscribers.

The Commission's regulatory fee rule is unfair since it requires basic-only subscribers to pay the same regulatory fee as subscribers that receive basic and other services, such as cable programming service tiers,

⁵ "Captive" subscribers are those subscribers who subscribe to basic service because they cannot otherwise receive over-the-air local broadcast stations due to signal interference caused by mountains, tall buildings or other sources. Such subscribers, who already must bear the cost of basic service in order to receive over-the-air broadcast signals, should not bear unfairly the cost of the Commission's regulatory fees.

optional equipment, and premium services. The regulatory fee may appear particularly unfair to basic subscribers since such subscribers are aware that, in most cases, it is the local franchising authority, not the Commission, that regulates a cable operator's basic cable rates and, thus, incurs the expenses of such regulation. The Commission, on the other hand, is responsible for regulating the rates for the cable programming service tier, which basic-only subscribers do not receive.

Not only is the Commission's regressive regulatory fee rule unfair, it is inconsistent with Section 623(b)(1) of the Cable Act, 47 U.S.C. § 543(b)(1), which obligates the Commission to ensure that subscribers pay "reasonable" rates for the basic service tier. By requiring basic-only subscribers to pay a disproportionate share of the cable regulatory fees, the Commission is requiring them to pay an unreasonable rate for basic cable service.

Moreover, neither 47 U.S.C. § 159 nor the Commission's regulatory fee rules require the Commission to impose the fee on a per subscriber basis. Section 159 simply requires a fee at a rate of \$370 per 1,000 subscribers. It does not require the Commission to directly impose such fee as an external cost on each basic subscriber. In addition, the Local Governments do

not disagree that the Commission's definition of "subscriber," 47 C.F.R. § 76.5, is useful for determining the total number of cable subscribers to a cable system since the amount in regulatory fees is assessed under 47 U.S.C. § 156 at \$370 per 1,000 subscribers. See Petition at 6-7. But there is no convincing argument that just because fees are assessed on a per subscriber basis, such fees should be passed through to subscribers on a per subscriber basis, regardless of the number of cable services to which an individual subscriber subscribes.

The simplest and fairest solution would be to not permit a cable operator to pass through regulatory fees as an external cost. The Commission already has concluded that the \$220 regulatory fee for the Cable Television Antenna Relay Service ("CARS") license should not be treated as an external cost since such fees "should not represent significant amounts to most operators." Fourth Order at 7 n.35. Similarly, the Commission should not treat the Commission's cable television regulatory fees as an external cost since a charge of \$370 per 1,000 subscribers is not a significant amount.

To the extent the Commission continues to permit its regulatory fee to be treated as an external cost, such a cost should be allocated fairly. As with any

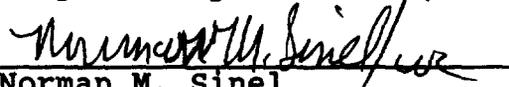
other tax, fee or assessment, those subscribers receiving more services should bear more of the burden. Hence, the Commission's regulatory fee should be allocated across the various services provided by cable operators, rather than allotted entirely to the basic service tier.

For the foregoing reasons, the Commission should repeal 47 C.F.R. §§ 76.922(d)(3)(iv)(F), 76.924(f)(5), and 76.933(e) & (f). In the alternative, the Commission should amend its rules to require a cable operator to allocate regulatory fee costs proportionally among its various cable service offerings.

CONCLUSION

For the reasons stated above, the Local Governments urge the Commission to reconsider its cable rate regulations regarding the pass-through of franchise fees and the Commission's regulatory fees.

Respectfully Submitted,


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