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December 7, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street N.W.
Washington, DC 20554

Re: The "Going Forward" Rules for Small System Operators

Dear Chairman Hundt:

On behalf of SCBA's 374 member companies nationwide, I am writing to express the Association's strong disagreement with the Commission's rules in the Sixth Order on Reconsideration in MM Docket Nos. 92-266 and 93-215, FCC 94-286, released November 18, 1994. As with past Commission actions, the "Going Forward" rules create a significant disparity for small systems. Far from providing the much-advertised incentives for adding channels, these rules do nothing of the sort for small systems.

Largely in response to the efforts of CATA and Steve Effros' letter of November 23, there is widespread recognition at the Commission that these rules as applied to small systems are a serious mistake. Commissioner Ness went so far as to say in a speech at the Western Show last week that the FCC "dropped the ball" in these rules when it came to small systems.

What is just as disturbing is that these rules continue the pattern of not just disagreeing with analyses of small system concerns, but ignoring them. This pattern has now apparently become a *policy of conscious disregard* of the impact of your rules on small system operators. It has already required SCBA to undertake expensive litigation against the FCC in the U. S. Court of Appeals. In fact, with reference to the FCC's obligations under the Small Business Act, the Commission's conscious disregard was so egregious that it triggered unprecedented intervention by a sister agency (see letter to you from Jere W. Glover, Chief Counsel for Advocacy, U.S. Small Business Administration, dated July 28, 1994: "Due to the burdens that the [FCC's] regulations impose on small cable operators, the Office of Advocacy is considering the filing of an amicus brief in support of SCBA's intervention in the D.C. Circuit.")

The apparent *policy of conscious disregard* has likewise triggered unprecedented response from Capitol Hill. In a letter dated July 21, 1994, sixteen Senators, fully half the membership of the Senate Small Business Committee, including the new Chairman of the Senate Commerce Committee, urged SBA to intervene against your agency in SCBA's court appeal. Then in a letter to you on September 29, the Congressional Rural Caucus was openly critical of the FCC's treatment of small system operators. The letter urged you and the other commissioners "to ensure that small and rural cable operators are not unduly burdened" by the FCC's rate regulations. In

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an historic high for support, sixty-five members of Congress signed the letter. To our knowledge, this letter from 15% of the House of Representatives remains unanswered..

The interaction between SCBA and the Commission leading up to the Going Forward rules is but the latest example of the apparent *policy of conscious disregard*. The Commission recognized that small systems have a high per subscriber cost for headend equipment because that cost is fixed, regardless of the number of customers served by a headend. The Commission proposed an addition to the rate based on the cost of headend equipment. In October, members of the Cable Services Bureau staff contacted us asking for reaction to the proposed "relief." We were told that the order in the Going Forward rulemaking was to be issued in a matter of days.

We quickly prepared and faxed to the Bureau our analysis. In the analysis, SCBA raised four principal concerns:

1. in order to create parity between small systems and large, the additional cost of headend equipment must be added to the incentives given larger systems (i.e. added to the $.20 per channel) rather than offered in place of it, because larger systems can and will earn incremental margin using the $.20 amount, while small systems with higher costs per subscriber will only be allowed to recover the equipment costs

2. our computations showed that the headend cost "add-on" was typically less than $.20 and that operators of systems with more than 350 subscribers would be foolish to choose the small system option

3. the headend cost recovery should be available to systems with more than 1,000 subscribers because the per subscriber cost remains high for those systems

4. no "subscriber cap" on the headend cost "add-on" was necessary because the calculation was self limiting (i.e., it quickly decreased to less than one cent per subscriber as the number of subscribers per headend increased).

We then reviewed this analysis in detail with the staff in a conference call.

When the Sixth Order On Reconsideration was released, we discovered the Commission had made no changes from its original proposal. In fact, none of the concerns in our analysis were even mentioned, let alone discussed.

As a result, the Going Forward rules enable larger systems to recover their costs and earn additional margin by adding channels to regulated tiers, since headend costs are less than one cent per subscriber for systems with 6,000 or more subscribers. On the other hand, small systems are

either prohibited from recovering their headend costs altogether or can elect to recover them with a profit of 11.25% on the hardware, but lose the $.20 per channel, which enables larger systems to recover all their costs, both hardware and programming, and still maintain a mark-up.

We urge the Commission to reconsider this aspect of the Going Forward rules on its own motion. The staff of some Commissioners has indicated they intend to do that. Other staff members insist, however, that a petition for reconsideration must be filed.

In view of the apparent *policy of conscious disregard* discussed above, we doubt that the Commission will take any action on its own initiative. In any event, the deadline for filing a petition for reconsideration in this matter is December 19. We stand ready to work cooperatively with the Commission between now and then to resolve this obvious problem in the Going Forward rules. But the issues detailed in October and ignored in November must be formally considered by the Commission. The only avenue for assuring such consideration is the filing of a petition.

The Commission already has more than sufficient data, from both CATA and SCBA, to act on its own to correct an obvious problem. However, if the apparent *policy of conscious disregard* continues to apply, then SCBA will be forced, once again, to expend time and money to submit its analysis on December 19.

Sincerely,

David D. Kinley
Chairman

cc: Commissioner James H. Quello
Commissioner Andrew C. Barrett
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Meredith Jones
Blair Levin