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Before The
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Washington, D.C. 20554

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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

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COMMENTS REGARDING PETITIONS FOR RECONSIDERATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Opposition to the Petition for Reconsideration filed by the City of New York and the National Association of Telecommunications Officers and Advisors ("NATOA") in the above-captioned proceeding. NATOA opposes the Commission's decision in its Fourth Order on Reconsideration¹ to allow cable operators to pass-through to subscribers, without prior approval, increases in rates caused by increases in franchise fees. NATOA also urges the Commission to deny cable operators the right to recover from their subscribers -- especially their basic subscribers -- new governmental fees imposed on the cable industry that squarely warrant external cost treatment under the Commission's rate rules.

¹ Fourth Order on Reconsideration, MM Docket No. 92-266, FCC 94-254 (rel. Oct. 5, 1994) (hereinafter "Fourth Order").

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NATOA's reconsideration proposals are wholly unwarranted, and its Petition should be denied. Local authorities should not be given carte blanche to delay and ultimately to deny recovery of cable operators' legitimate cost increases through the guise of extended review of those costs. Consumers are adequately protected against any unlawful rate increases by the refund mechanism. Indeed, for that reason, the Commission should allow operators to pass-through all external cost increases upon thirty days' notice, as proposed in the Petition for Reconsideration filed by TKR Cable Company.²

A. The Commission Should Not Modify Its Treatment of Franchise Fees

In its Fourth Order on Reconsideration in the above-captioned proceeding, the Commission allowed cable operators to adjust their rates to reflect increases in franchise fees, upon 30 days' notice, without prior regulatory approval. The Commission explained that "these fees are generally set by the franchising authority itself. Thus, the fees are set by a governmental entity which is aware of and sensitive to the fees' impact upon consumers. Since it is the franchising authority which has set the franchise fee, prior regulatory review appears less necessary from a consumer protection standpoint than it is for other categories of external costs."³

NATOA urges that the Commission reconsider this decision so that cable operators could not implement a rate increase to recover increased

² Petition for Reconsideration and Request for Expedited Action, MM Docket No. 92-266, filed October 19, 1994 ("TKR Petition").

³ Fourth Order on Reconsideration at para. 3.

franchise fees without prior franchising authority approval. NATOA's reasons in support of this delaying tactic are entirely unpersuasive.

For example, NATOA claims that "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."⁴ This is hardly the case. Under the Commission's rules, cable operators must provide franchising authorities (and subscribers) with 30 days advance notice prior to increasing rates to account for increased franchise fees and with documentation supporting the increase. Thirty days should be more than sufficient time for franchising authorities to review the proposed rate increase (e.g., from a 3% to 5% franchise fee), which should be a relatively simple matter in all but the most unusual cases. But even in those cases where the increase is a "much contested issue", as NATOA baldly posits,⁵ franchising authorities retain the ability to order refunds. Consumers are adequately protected against any undue rate increases should a franchising authority upon review determine that franchise fees have been calculated incorrectly.⁶

The approach that NATOA advocates, in contrast, would allow franchising authorities to prevent the legitimate pass-through of those costs by issuing a tolling order (for up to 90 days) prior to expiration of the 30 day

⁴ NATOA Petition at 4.

⁵ Id. at 3.

⁶ NATOA also complains that the right to order refunds fails to protect consumers. Id. at 4.5. Given NATOA's suggestion that "[c]able operators may pay less than the full amount required under franchise agreements as franchise fees" (NATOA Petition at 3 n.4, emphasis added), refunds on account of operators passing through excessive franchise fees seems unlikely.

notice period. There is no reason to subject operators to this delay. After all, franchising authorities have imposed these increases and operators will presumably be liable for franchise fees during the entire period that its rate increase has been held up while rate review proceeds. No cause exists for allowing franchising authorities to deny operators the ability to collect those fees during an extended review period.

B. The Commission Should Extend Its Pass-Through Treatment To All External Costs, Upon Thirty Days' Notice

NATOA also argues that "there is no convincing reason to treat franchise fee increases differently than any other proposed rate increase for purposes of regulatory review."⁷ We agree, but for that reason we support the Petition filed by TKR Cable Company urging the Commission to extend the pass-through treatment of franchise fees to all external costs. TKR's Petition details the unfairness inherent in the Commission's procedural rules that have been used by some local franchising authorities to automatically enter tolling orders -- for no good reason -- when rate increase requests are received reflecting increases in costs other than for franchise or regulatory fees.

The Commission, in initially adopting its external cost pass-throughs, conceived of them as "automatic."⁸ As the initial Rate Order described, "Because such exogenous costs are presumed reasonable, review of these adjustments should not create an undue delay for the operator, and the

⁷ Id. at 5.

⁸ See TKR Petition at 4.

franchising authority must pass on them within 30 days.⁹ Section 76.933 of the Commission's rules, however, fails to reflect this expedited review procedure. As a result, franchising authorities can prevent legitimate rate increases from going into effect merely by issuing a 90-day tolling order (in proceedings other than cost-of-service) prior to the expiration of the 30 day review period.

There is nothing "automatic" about allowing pass-throughs only many months after the costs have been incurred. And operators have no means to recover the lost revenues occasioned by this delay -- since operators may recover external costs only on a prospective basis.¹⁰

The potential for mischief that tolling causes is obvious. In fact, as TKR explains, local authorities have routinely tolled implementation of rate increases without any cause. As a result, little, if any, review of Form 1210's occurs during the initial 30 day filing period since there is no incentive for franchising authorities to act promptly.¹¹

The Commission has narrowly circumscribed the cost increases that may be passed through to subscribers. It "presumes reasonable" such costs. It requires that such costs be incurred before a rate increase may take effect. And its rules provide local authorities the opportunity to require refunds if cost increases have been improperly calculated. Under these circumstances,

⁹ Report and Order, MM Docket No. 92-266, at ¶133 (May 3, 1993) (citations omitted, emphasis supplied) (hereinafter "Rate Order").

¹⁰ TKR Petition at 7.

¹¹ See Letter to Gregory J. Vogt from Mark J. Palchick, Counsel for TKR Cable Company (Oct. 19, 1994) at 3 ("TKR has been advised that the franchising authority has automatically, unilaterally and unconditionally tolled all cable operator rate submissions beyond this otherwise 30-day effective date.")

it is entirely appropriate to adopt a procedure for all external cost increases that allows operators to pass these increases through upon 30 days' notice to subscribers and franchising authorities.¹²

**C. The Commission Should Maintain its
Treatment of Regulatory Fee Pass-Throughs**

The Fourth Report and Order also allowed cable operators to pass-through the annual 37 cent per subscriber regulatory fees that were newly-imposed on the industry by the federal government. The rules also provide that these costs must be entirely assigned to basic subscribers.

NATOA objects to both of these provisions. It argues that the Commission has adopted a "regressive regulatory scheme" that "unfairly burdens basic-only subscribers",¹³ because they do not subscribe to all the services that the Commission regulates. It therefore urges that the Commission not permit operators to pass-through regulatory fees or, alternatively, that it require an allocation of those fees among all services an operator provides.

NATOA's argument is baseless. With respect to its allocation proposal, the regulatory fee established by Congress is not based on an individual subscriber's particular level of consumption of services. Instead, the law requires payment on a per-subscriber basis. All subscribers must receive the

¹² We also agree with TKR that the Commission's rules should be amended to allow operators to recover the cumulative amount of all external costs previously incurred but not passed through. Providing this relief will minimize the need to modify rates on a frequent basis -- an inevitable result of the current rules -- to ensure that costs are fully recovered.

¹³ NATOA Petition at 6.

basic tier.¹⁴ Thus, an operator must pay the fee regardless of whether any particular subscriber benefits from the particular regulatory undertaking.¹⁵

With respect to whether such fees should be passed through at all, NATOA is correct in observing that the law "does not require the Commission to directly impose such fee as an external cost on each basic subscriber."¹⁶ But the law's failure to specifically address this issue says nothing about whether such a pass-through is appropriate. One rationale for treating certain costs as external and permitting their pass-through was that they were beyond the operator's control.¹⁷ Plainly, the government-imposed regulatory fee, just like locally-imposed franchise fees and cable-specific taxes, meets this criterion. As the Fourth Order on Reconsideration correctly concluded,¹⁸ pass-through of these regulatory fee costs is wholly consistent with the Commission's treatment of other types of costs.

¹⁴ See 47 U.S.C. §623(b)(7).

¹⁵ It is equally absurd to argue, as NATOA does, that the regulatory fee is "particularly unfair" to basic subscribers since 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." NATOA Petition at 7. Who regulates a particular service is separate from the question of the cost to the FCC of its regulation. NATOA, of course, ignores the fact that the Commission established the rules that local authorities are implementing. It also ignores the Commission's role in devising rules that relate solely to issues concerning the basic tier, such as broadcast signal carriage, and PEG access channels. Requiring that the relative use of Commission resources relating to discrete tiers of cable service be measured and reflected in the pass-through of the 37 cent regulatory fee would be a pointless and wasteful exercise. But that is the logical extension of NATOA's proposal.

¹⁶ NATOA at 7.

¹⁷ See Rate Order at ¶133.

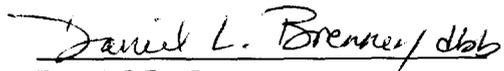
¹⁸ Fourth Order on Reconsideration at ¶11.

The Commission has already adopted the "simplest and fairest solution. . . ." ¹⁹ It should continue to allow regulatory fees to be treated as external costs directly assigned to the basic service tier.

CONCLUSION

For the foregoing reasons, the Commission should deny NATOA's Petition for Reconsideration, and adopt the rule modifications proposed by TKR Cable Company.

Respectfully submitted,



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¹⁹ NATOA at 8.

CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that on this 15th day of December, 1994, copies of the foregoing "Comments Regarding Petitions For Reconsideration" were delivered by first-class, postage pre-paid mail to the following parties:

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