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**ARNOLD & PORTER**

1200 NEW HAMPSHIRE AVENUE, N.W.  
WASHINGTON, D.C. 20036-6885

(202) 872-6700  
CABLE: "ARFOPO"  
FACSIMILE: (202) 872-6720  
TELEX: 89-2733

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

January 5, 1995

**BY HAND**

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

Re: Petition for Reconsideration by NATOA  
Regarding the Sixth Order on  
Reconsideration, Fifth Report and Order,  
and Seventh Notice of Proposed Rulemaking  
in MM Docket Nos. 92-266 and 93-215

Dear Mr. Caton:

Enclosed for filing, on behalf of the National Association of Telecommunications Officers and Advisors ("NATOA"), please find an original and eleven (11) copies of NATOA's Petition for Reconsideration regarding the Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking in MM Docket Nos. 92-266 and 93-215 (FCC 94-286, released Nov. 18, 1994).

Thank you for your attention to this matter. Please call the undersigned at 202/872-3738 if you have any questions with respect to this filing.

Sincerely,



Carl A. Fornaris

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )  
 )  
Rate Regulation )  
 )

MM Docket Nos. 92-266 ✓  
& 93-215

TO: The Commission

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

Norman M. Sinel  
William E. Cook, Jr.  
Carl A. Fornaris

ARNOLD & PORTER  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036-6885  
(202) 872-6700

Counsel for Petitioner

January 5, 1995

## SUMMARY

The National Association of Telecommunications Officers and Advisors ("NATOA") requests the Commission to repeal the revised channel addition rules and reverse its decision that the rates for new product tiers ("NPTs") are not subject to regulation. These rules are not in the public interest and may result in unreasonable rates. For example, by permitting cable operators to adjust their cable programming services rates under the revised channel addition rules by as much as 20 cents per channel per month, exclusive of license fees, for up to six channels, subscribers could well end up paying unreasonable rates for the addition of low-cost and no-cost channels. Moreover, the NPT rules violate the 1992 Cable Act because the rules entirely remove the rates for NPTs -- which consist exclusively of cable programming services -- from regulation.

To the extent the Commission decides to retain the rules, NATOA urges the Commission to modify the rules to ensure that consumers do not pay unreasonable rates for new cable programming services and NPTs.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket Nos. 92-266 & 93-215
Rate Regulation	)	

TO: The Commission

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

Pursuant to 47 C.F.R. § 1.429, the National Association of Telecommunications Officers and Advisors ("NATOA") hereby submits this Petition for Reconsideration ("Petition") in the above-captioned proceedings.

NATOA requests that the Federal Communications Commission ("FCC" or "Commission") reconsider certain rules issued as part of the Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking<sup>1</sup> (the "Sixth Order") in

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<sup>1</sup> In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking (MM Dkt. Nos. 92-266 & 93-215), FCC 94-286

[Footnote continued on next page]

the above-captioned proceedings. Specifically, NATOA requests the Commission to repeal the revised channel addition rules and reverse its decision not to regulate the rates for new product tiers ("NPTs"). To the extent the Commission decides to retain those rules, NATOA urges the Commission to modify the rules to ensure that consumers do not pay unreasonable rates for new cable programming services or NPTs.

#### DISCUSSION

**I. The Commission Should Reconsider the Revised Channel Addition and New Product Tier Rules Because They Are Contrary to the 1992 Cable Act and the Public Interest**

The Sixth Order's revised channel addition and NPT rules represented a dramatic shift in the Commission's current cable rate regulation rules. The NPT and channel addition rules simply restore to cable operators monopolistic pricing power and lost cash flow from mostly modest rate reductions. The rules also erase the benefits of the rate refunds and lower rates many cable subscribers were beginning to enjoy under the Commission's FCC Form 393 and FCC Form 1200 series rate processes. As explained below, both sets of rules are contrary to the public interest, and the NPT rules run

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[Footnote continued from previous page]  
(released Nov. 18, 1994), 59 Fed. Reg. 62,614 (published Dec. 6, 1994).

counter to the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

Accordingly, the revised channel addition rules should be repealed and the Commission should reverse its decision not to regulate the rates for NPTs.

**A. The Revised Channel Addition Rules**

The revised channel addition rules may result in unreasonable rates. By permitting cable operators to adjust their cable programming services rates under the new rules by as much as 20 cents per channel per month, exclusive of license fees, for up to six new channels added to cable programming services tiers ("CPTs") on or after May 15, 1994, the Commission could force many subscribers to pay for programming services they do not want and did not request. Their only option is to discontinue their subscription to a CPT and, in certain franchise areas, pay a significant downgrade charge -- which may be as high as or higher than the monthly rate for the CPT -- if they wish to continue to receive the basic service tier.

Moreover, subscribers could well end up paying unreasonable rates for channels that are not priced according to their true cost. The Commission's conclusion that "[t]wenty cents falls within the historical range of 15-22 cents by which operators in a competitive environment would adjust rates for the

addition of a new programming channel", Sixth Order, FCC 94-286, at 27, ¶ 73, will enable operators to price low-cost or no-cost programming services at the maximum price they are entitled to charge under the revised channel rules. For example, cable operators are already adding home shopping, barker and other low-cost channels. Under the new rules, operators can automatically impose the 20 cents per channel charge for any of those services -- a rate that may far exceed the actual cost of adding such low-cost or no-cost programming. Cable operators may be able to achieve even greater profits to the extent they are able to take advantage of the 30 cents license fee reserve.

Cable subscribers already are beginning to complain about the impact of the Commission's new rules on cable rates. As of January 1, 1995, for example, the operator in the City of Saint Louis, Missouri began charging CPT subscribers an additional \$1.38 per month to receive the following channels: (1) TV!, a channel featuring, among other things, samples of cable programming services already available over the cable system; (2) the Learning Channel; (3) the Food Channel; (4) America's Talking; and (5) Cable Health.<sup>2</sup> As of

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<sup>2</sup> While adding these channels which CPT subscribers are now forced to buy, the operator eliminated two pay-per-view channels which gave subscribers flexibility in determining which services to receive.

January 3, 1995 -- the first business day after the rules went into effect -- the City of St. Louis Communications Division already had received approximately 25 telephone calls from subscribers complaining about the rate increase.<sup>3</sup>

Furthermore, the FCC rules would only temporarily constrain a cable operator's right to pass through unreasonable rate increases. The Commission has stated that "[l]icense fees incurred in the third year the Operator's Cap is in effect may be passed through to subscribers as external costs without counting against either the License Fee Reserve or the Operator's Cap." Sixth Order, FCC 94-286, at 29-30, ¶ 80 (footnote omitted). Such a rule simply encourages operators and programmers to negotiate artificially low license fees during the three-year period covered by the FCC's rules and substantially higher license fees after the three year period since operators will be able to recoup such increased fees as an external cost.

**B. The New Product Tier Rules**

In the Sixth Order, the Commission permitted cable operators to create NPTs, which the Commission

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<sup>3</sup> According to the City of St. Louis Communications Division, the majority of those complaints came from retired and low- or fixed-income subscribers.

stated are cable programming service tiers.<sup>4</sup> Despite this finding, the Commission in the Sixth Order decided not to regulate the rates for NPTs; instead, the Commission permitted operators "to price NPTs as they choose" since the NPT rules purportedly will ensure that rates for NPTs will not be unreasonable. Id. at 13, ¶ 33.<sup>5</sup>

The NPT rules violate the 1992 Cable Act because the rules entirely remove the rates for NPTs -- which consist exclusively of cable programming services -- from rate regulation. Section 623(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 543(c), provides that, for cable systems not subject to effective competition, the Commission shall ensure that the rates for cable programming services are not unreasonable. Although the Commission has established

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<sup>4</sup> Sixth Order, FCC 94-286, at 10, ¶ 23 ("NPTs are, by definition, 'cable programming services' under the 1992 Cable Act, because NPTs are composed of video programming provided over cable systems that are not carried on the [basic service tier] and are offered in a package rather than exclusively on a per channel or per program basis.") (footnote omitted).

<sup>5</sup> In addition, contrary to the Commission's conclusion that "a la carte" packages are regulated CPTs, Sixth Order, FCC 94-286, at 16, ¶ 46, the Sixth Order allows certain "a la carte" packages (which the FCC in recent rate regulation orders has suggested may have been created as an attempt to evade rate regulation) to be treated as NPTs and, thus, not subject to regulation. Id. at 18, ¶ 51. In effect, the Sixth Order confers a benefit upon those operators who may have created "a la carte" tiers in order to evade rate regulation.

conditions that operators must meet before establishing NPTs, such conditions do not ensure that the rates charged by operators that meet the conditions are in fact reasonable as required by Section 623(c). Because the Commission cannot abdicate its statutory responsibility to regulate the rates for cable programming services, the Commission should reconsider its NPT rules.

Furthermore, the Commission's justifications in support of its conclusion that the NPT rules will ensure that NPT rates remain reasonable are flawed. In the Sixth Order, the Commission articulated its belief that the rates charged for NPTs will not be unreasonable because:

- (1) all subscribers will continue to be able to purchase services on the basic and cable programming services tiers at reasonable rates;
- (2) the basic and cable programming services tiers will be comparable to NPT services;
- (3) operators that offer NPTs will preserve the "fundamental nature" of their basic and cable programming services tier offerings; and
- (4) because NPTs are likely to be composed of new programming services, operators will not have an established audience and, thus, operators will

charge low NPT rates to attract viewers.

Sixth Order, FCC 94-286, at 10, ¶ 24. These justifications are flawed. With respect to the first and fourth justifications, the fact that all subscribers can still receive basic service and cable programming services at reasonable rates under the current rate regulation rules has absolutely no relevance to the rates that operators will charge for NPTs. The Commission has presented no empirical evidence that the rates cable operators charge for basic and cable programming service tiers will influence the rates charged for NPTs. The Commission, for instance, has not presented any evidence that rates for "a la carte" tiers and premium services have been reduced as a result of basic and cable programming service tiers being subject to regulation. In addition, the Commission has not presented any convincing proof that operators subject to regulation of their basic and cable programming service tiers will charge reasonable rates when they price their unregulated NPTs. Further, although some cable operators might charge a competitive rate when an NPT is first offered in order to attract subscribers, there is nothing under the Commission's rules to prevent cable operators from then raising the rates for NPTs to unreasonable levels once they have obtained the desired number of subscribers.

With respect to the second justification, there is no basis in the record for the Commission to conclude that basic service and cable programming service will be comparable to NPT service. NPTs -- at the time the Sixth Order was adopted -- had never been offered. Thus, the Commission should not speculate that programming services offered on NPTs will be comparable to those services offered on the basic and cable programming services tiers. Instead, the Commission must ensure that NPTs are offered at a reasonable rate. The Commission cannot rely on the assumption that there is some concept of internal competition within the cable system that will ensure reasonable rates.

With respect to the third justification, the requirement that operators must preserve the "fundamental nature" of their basic and cable programming services tiers as a condition to offering NPTs will not ensure reasonable rates for NPTs. As the Commission learned with regard to its former "a la carte" rules,<sup>6</sup> cable operators may exploit such a subjective, case-by-case standard to remove as many services as they can over time from regulated tiers to NPTs in an effort to evade rate regulation.

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<sup>6</sup> See Sixth Order, FCC 94-86, at 16, ¶ 45 (noting that "a la carte" rules were not capable of precise application).

In sum, there simply is no statutory or factual basis for the FCC's decision not to regulate NPT rates, and the NPT rules are not in the public interest. The rules violate the 1992 Cable Act. Moreover, the Commission has presented no convincing rationale for its conclusion that the rates charged for NPTs will be constrained by the rates charged for basic service tiers and cable programming services tiers. The Commission should not expose subscribers to the risk that they may pay unreasonable rates for NPTs based on the Commission's speculation about the effectiveness of its NPT rules on NPT rates. Therefore, NATOA urges the Commission to reconsider the NPT rules and regulate the rates for NPTs.

II. **To the Extent the Commission Retains the Revised Channel Addition Rules and the New Product Tier Rules, The Commission Needs To Amend Those Rules To Add More Protections for Subscribers**

1. **The Revised Channel Addition Rules**

The Commission should add more subscriber protections to the revised channel addition rules. For example, the Commission should consider limiting the ability of cable operators to take advantage of the significant rate increases permitted by the revised channel addition rules when they offer low-cost channels (e.g., home shopping channels).

Moreover, the Commission should reconsider its decision in the Sixth Order to wait three years to determine if there is any need to continue to provide incentives to increase the number of cable programming service channels. Sixth Order, FCC 94-286, at 35, ¶ 98. This three-year "wait-and-see" period is much too long for the Commission to reassess the efficacy of the revised channel addition rules. Also, the focus of any review should determine not only whether operators have incentives to add new programming, but also should determine whether the rules are resulting in unreasonable rates for cable service. Subscribers who are paying unreasonable rates simply should not have to wait three years for rate relief. Therefore, to the extent the Commission retains its revised channel addition rules, the Commission should review the efficacy of those rules and the impact of such rules on the reasonableness of cable rates one year after the effective date of the rules -- i.e., December 31, 1995.

In addition, the Commission's rules do not clarify whether channels added pursuant to its revised channel addition rules must be counted as regulatable channels for purposes of computing the benchmark rate on the FCC 1200 series forms. The Commission should clarify that such channels should be counted as regulatable channels for purposes of calculating

benchmark rates pursuant to these forms, given that the total number of regulatable channels on a cable system impacts the rate for the basic tier and those CPTs on which an operator may not have added channels pursuant to the channel addition rules.

## 2. The New Product Tier Rules

To the extent the Commission retains its NPT rules, the Commission should amend the NPT rules to add more protections for subscribers.

In particular, the Commission should review the efficacy of the NPT rules within one year after January 1, 1995, the effective date of the NPT rules, to ensure that NPTs are not unreasonably priced.<sup>7</sup> For example, the Commission should review the rules to determine whether the rates cable operators actually charged for NPTs are lower than or equal to the amount cable operators could have charged if such tiers were subject to rate regulation. The Commission might make this determination by developing a rate survey to compare the rates for NPTs and tiers subject to regulation. If the NPT rates are higher than those that would have been permitted if such rates were regulated, the Commission must regulate the rates for NPTs -- as required by

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<sup>7</sup> See Sixth Order, FCC 94-286, at 10, ¶ 23 ("We . . . have a duty under the 1992 Cable Act to ensure that NPTs are not unreasonably priced.") (footnote omitted).

Section 623(c) of the 1992 Cable Act -- to ensure that subscribers do not pay unreasonable rates for NPTs.

**CONCLUSION**

For the reasons stated above, NATOA urges the Commission to reconsider the revised channel addition and NPT rules adopted in the Sixth Order.

Respectfully Submitted,

  
Norman M. Sinel  
William E. Cook, Jr.  
Carl A. Fornaris

ARNOLD & PORTER  
1200 New Hampshire Ave., N.W.  
Washington, D.C. 20036-6885  
(202) 872-6700

Counsel for Petitioner

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