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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	MM Docket No. 93-215
	)	
Rate Regulation	)	

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OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
TO CITIES' PETITIONS FOR RECONSIDERATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its Opposition to the Petitions for Reconsideration filed by the National Association of Telecommunications Officers and Advisors ("NATOA") and the West Michigan Communities in the above captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators, cable programmers, and others affiliated with or interested in the cable television industry. NCTA participated in the rulemaking proceeding leading to adoption of the rules under reconsideration.

INTRODUCTION

In its Petition for Reconsideration, NATOA urges that the Commission reverse its decisions (1) to adopt a new "going forward" formula by which rates may be increased where channels are added to the cable programming service tier, and (2) not to prescribe the rates for new product tiers ("NPTs"). The West Michigan Communities' Petition argues that any revenues received by an operator from a programmer should be netted

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against any increases in fees for wholly different channels carried on the same tier, rather than on a channel-by-channel basis as the rules currently allow.

The Commission should deny these petitions. In adopting its new rules, the Commission recognized that "under the 1992 Cable Act, we must reconcile and accomplish the goals of ensuring that cable rates are reasonable, while expanding opportunities for cable programmers to reach viewers."[1] The Commission's rules attempt to balance these competing interests; the Petitioners' proposed modifications to the rules do not. Instead, having already convinced the FCC not to provide operators with incentives to add cable programming services to the basic tier over which they exercise regulatory authority, local franchising authorities such as the Petitioners now seek to have the Commission deprive operators of incentives to add services to other tiers as well. The public interest would not be served by the Petitioners' proposed modifications.

ARGUMENT

I. The Commission Should Not Reduce Incentives to Add Programming to Cable Programming Service Tiers

The Commission's new rules limit the amount that operators may increase rates on account of channels newly added to cable programming service tiers. Rate increases are tightly constrained to a maximum of 20 cents per channel plus the license fee, up to a total cap of $1.50 a month, for two years. In the third year, an operator in essence may only add one additional channel.[2]

NATOA argues that the Commission should scrap these new rules. Its primary argument for doing so is based on the speculative claim that the rules "may result in

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1 Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket Nos. 92-266 and 93-215 (rel. Nov. 18, 1994) at ¶3 (hereinafter "Sixth Order on Reconsideration").

2 47 C.F.R. §76.922(e)(3).

unreasonable rates."[3] NATOA presents no evidence justifying this assertion. Instead, it resorts to claiming that the twenty cent per channel adjustment "may far exceed the actual cost of adding low-cost or no-cost programming."[4]

NATOA's argument is baseless for several reasons. First, the Petition proceeds from the incorrect assumption that the 20 cent per channel adjustment is based on an amount that includes programming costs. But that is not the case. Instead, the per channel adjustment, according to the Commission, is "[w]ithin 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, exclusive of programming costs."[5] Programming costs are separately accounted for -- and are also subject to a cap -- under the new rules.[6] Therefore, while an operator may incur programming costs of less than twenty cents for a given channel, that fails to support NATOA's argument that rates for added channels are too high.

Second, the twenty cent per channel adjustment is not based on cost, but is based on the rates (exclusive of programming costs) that the Commission determined an operator would charge in a competitive environment when a channel is added. The Commission explained its reasons why such rates would be reasonable:

> [T]he particular channel adjustment factors that we incorporate into our rules are based on a comprehensive analysis of the changes in channel offerings and rates operators made during the years prior to regulation,

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3 NATOA Petition at 3.

4 Id. at 4.

5 Sixth Order on Reconsideration at ¶ 73 (emphasis added).

6 NATOA also claims that "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." NATOA Petition at 4. But operators may only recoup the actual cost of programming for each channel added (up to a total cap of $1.50 over two years). NATOA fails to explain how an operator would gain any profit on this straight pass through -- no less "even greater profits" -- by pursuing this strategy.

> adjusted to account for the lack of effective competition. Just as cable systems that are subject to effective competition continue to add channels to CPSTs, our new rule is designed to allow some additions to these tiers by systems subject to regulation. We will permit such channel additions to be reflected in reasonable price increases commensurate with the added value subscribers are receiving.[7]

NATOA presents no reason why relying on competitive systems' rates -- which form the basis for the Commission's benchmark approach -- yields unreasonably high rates in the context of added channels.

NATOA's alternative argument for reversing the new rules is equally untenable. By allowing operators to adjust their rates for CPS tiers when channels are added, NATOA claims, the "[C]ommission could force many subscribers to pay for programming services they do not want and did not request."[8]

But the Commission, unlike NATOA, understands that in order to promote the growth of new program services, "under current industry practices, new programming typically must be offered in packages or bundles if it is to obtain sufficiently high subscription rates to be commercially successful."[9] The Commission's formula -- while it sharply limits the number of channels that can be added -- at least provides an opportunity for some new channels to gain an audience by obtaining carriage on widely-penetrated existing tiers. NATOA's proposal to repeal the revised going forward rules would close the door to the growth of new programming services.[10] Its Petition should be denied.

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7 Sixth Order on Reconsideration at ¶ 68.

8 NATOA Petition at 3.

9 Sixth Order on Reconsideration at ¶3.

10 NATOA made virtually the identical argument to the Commission in support of its plea not to allow operators to add services to the basic tier:

> NATOA also argued against permitting programming additions to [basic service tiers] on the ground that to do so would force BST-only subscribers -- "who include many low-income and elderly subscribers

II. The Commission Should Reject NATOA's Call for Regulating New Product Tier Rates

NATOA's Petition also attacks the Commission's so-called "New Product Tier" rules. Under those rules, the Commission does not prescribe the per channel rates at which NPTs may be offered. However, the rules impose numerous stringent conditions that operators must meet in order to be eligible to qualify for NPT treatment.[11]

NATOA takes issue with the Commission's rules insofar as they do not dictate rates for NPTs, and urges the Commission to regulate the rates for NPTs in some unspecified manner.[12] But NATOA presents no evidence demonstrating that NPTs are or will be priced unreasonably. There is no reason to credit NATOA's bald supposition that operators will charge noncompetitive rates for services offered on these new tiers.

The Commission explained why NPT rates should be presumed reasonable: "[c]onsumers retain the option to subscribe to [basic service tiers] and/or [cable programming service tiers] regulated under the benchmark formula or pursuant to cost-of-service standards and therefore will not choose an NPT if the price is unreasonable."[13] The Commission properly assumes that an operator will not price unreasonably new tiers

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> and captive subscribers who could not otherwise receive over-the-air broadcast stations" -- to pay for programming they did not want.

Sixth Order on Reconsideration at ¶62.

NATOA succeeded in convincing the Commission not to allow operators to add channels to the basic tier under the new formula. NATOA's interest now is the same as before -- to use the Commission's rate rules to erect roadblocks to operators adding services to tiers under the Commission's jurisdiction.

11 47 C.F.R. § 76.987.

12 NATOA Petition at 10.

13 Sixth Order on Reconsideration at ¶ 25. See also id. at ¶ 36.

for which it is attempting to gain viewership.[14] And the availability of existing tiers of established services at regulated rates will act as a constraint on those prices.

NCTA and others advocated a different approach to the treatment of packages of new services. Nonetheless, the NPT rules do provide some operators with at least a modicum of flexibility to add new services to their systems and to experiment with pricing flexibility and service offerings. Given the constraints on an operator's ability to add more than a limited number of channels to existing cable programming service tiers, the NPT rules also provide some additional programmers with a potential avenue to gain entry to a cable system that otherwise would be restricted to adding essentially seven program services over three years.[15]

III. The Commission Should Reject The West Michigan Communities' Offset Proposal

The West Michigan Communities argue that the Commission erred by amending Section 76.922(d)(3)(x) to make clear that programming cost increases must be adjusted "to reflect any revenues received by the operator from the programmer. Such adjustments shall apply on a channel-by-channel basis."[16] Their Petition claims that the Cable Act contemplates a "tier-based" adjustment, which would "give[ ] operators an incentive to add diverse programming and increase subscriber choice," while the current channel-by-channel approach "creates a preference for the addition of no cost or pay for

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14 See id. at ¶24 ("[M]arket forces will ensure that operators will charge rates for NPTs that are low enough to attract new viewers").

15 Section 76.987(g) of the rules already imposes filing requirements on operators with respect to NPTs. There is, therefore, no reason to adopt NATOA's suggestion to impose more burdens on operators and the Commission by requiring yet another survey of rates. See NATOA Petition at 12-13.

16 47 C.F.R. § 76.922(d)(3)(x).

carriage programming."[17] West Michigan's Petition, however, rests on a fundamental misunderstanding of the Commission's rules and their purpose.

First, contrary to West Michigan's assertion, the Commission's rules have never required a tier based offset.[18] Rather, the FCC clarified nearly nine months ago that its offset rule applied on a channel by channel basis.[19]

Second, while West Michigan Communities advocate using the offset rules to provide cable operators with disincentives to add certain types of program services that the cities apparently disfavor -- such as "no cost or pay for carriage" programming[20] -- the rationale behind the offset requirement is quite different. As the Cable Bureau explained,

> This requirement is designed to protect subscribers by assuring that external programming costs paid by subscribers are based on the net costs experienced by the operator and fully reflect any rebates or other compensation received by the operator from the programmer.
>
> We believe that the purposes of the rule will be fully achieved if offset requirements are applied on a channel-by-channel basis. Under a channel-by-channel offset, any rebates or payments in consideration of carriage from a programmer will be applied to payments from the operator to that programmer, but will not offset payments to other programmers. This will assure that only the net costs of obtaining programming are passed through to subscribers. At the same time where, as in the case of QVC's home shopping services, payments are only made from the programmer to the operator, or, where the payments from the programmer exceed payments from the operator, the operator may receive the benefit of the payment without decreasing or increasing charges to subscribers. Thus, this approach

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17 West Michigan Communities Petition at 2.

18 The relevant rule originally read as follows: "Adjustments to permitted per-channel changes on account of increases in costs of programming shall be further adjusted to reflect any revenues received by the operator from the programmer." 47 C.F.R. §76.922(d)(2)(vii) (1993) (emphasis added).

19 See, e.g., Letter to QVC Network, Inc. (Cable Bureau, rel. May 9, 1994); Letter to the Home Shopping Network (Cable Bureau, rel. May 9, 1994).

20 West Michigan Communities Petition at 2.

> will fairly balance the interests of programmers, subscribers and operators. It will also facilitate the provision and promotion of useful home shopping services to the public.[21]

Contrary to West Michigan Communities' Petition's assumptions, then, the offset rule was designed to prevent an operator and programmer from artificially inflating the amount attributable to programming cost increases where certain other consideration flowed from that particular programmer to the operator. It was not intended to punish operators for adding no-cost services or for providing subscribers with "useful home shopping services".[22]

Third, West Michigan Communities claim that a tier-based adjustment is "sound policy" because it will presumably give operators an incentive to add "programming with acquisition costs."[23] The Commission, however, has properly recognized that its rules should "[m]ake no judgment about the relative value to subscribers of high or low cost channels."[24] Moreover, adoption of the rule change advocated in their Petition would not necessarily provide the incentive that West Michigan Communities suppose. That is, an operator may have a disincentive to offer programming with acquisition costs on the same tier as pay for carriage programming. Otherwise, sales commissions paid by the "pay for carriage" channel would eat into the amount of increased programming costs for the "acquisition cost" channel that an operator could recover.

In sum, the channel-by-channel offset requirement fairly balances the interests of subscribers, programmers, and operators. It should not be modified to apply on a tier basis.

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21 Letter to QVC Network, Inc. (Cable Bureau, rel. May 9, 1994) (footnote omitted).

22 Id.

23 West Michigan Communities Petition at 4.

24 Sixth Order on Reconsideration at ¶82.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petitions for Reconsideration filed by NATOA and the West Michigan Communities.

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CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that on this 3RD day of February, 1995, copies of the foregoing **"Opposition of the National Cable Television Association, Inc. to Cities' Petitions for Reconsideration"** were delivered by first-class, postage pre-paid mail to the following:

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