Original

RECEIVED
FEB 1 3 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Implementation of Sections of the | ) | MM Docket No. 92-266 |
| Cable Television Consumer | ) | |
| Protection and Competition Act | ) | |
| of 1992 | ) | |

# REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its reply comments with respect to the Seventh Notice of Proposed Rulemaking issued in the above-captioned proceeding.

In our initial comments in this proceeding, NCTA urged the Commission not to adopt its proposal to eliminate the 7.5 percent markup on programming cost increases. Our comments emphasized that contrary to the assumption underlying the Notice, the recently-allowed 20 cent per channel adjustment for newly-added channels did not obviate the need for providing a markup on programming cost increases for services already carried on the system. Instead, such a markup is appropriate to provide operators a continued incentive to support existing programming services carried on regulated tiers.

The comments filed by others in this proceeding demonstrate near universal agreement that the markup should be retained, if not increased. Comments submitted by a wide range of programmers explain that elimination of the markup will harm existing program services by limiting their ability to invest in new original programming.[1]

This effect would be felt by both low and high cost programmers. As Viacom points out, programmers who "relied on the traditional economic model -- providing service for no or minimal license fees at the outset, and then expanding their original programming at ever-increasing expense with the expectancy of reasonable license fee growth -- would be unfairly penalized.... Again, the viewing public would pay the ultimate penalty in loss of programming quality."[2] Higher cost services would also face difficulties under this proposal. ESPN's comments reveal that "this markup is especially critical to cable programmers, such as ESPN, who acquire and produce high cost programming and, thus, have higher than average subscriber fees. The margin that these higher cost cable networks offer operators above the permitted per channel benchmark rate is relatively small and must cover all other capital and operating costs. Eliminating the 7.5 percent markup for increases in programming costs of higher cost networks will cut further into this already slim margin."[3]

Moreover, programmers also note that elimination of the markup will unfairly skew decisionmaking by operators. As Discovery explains, "if adopted, the proposal would leave operators with a substantially enhanced incentive to increase programming investment by adding channels and no incentive to increase programming investment in channels carried prior to May 15, 1994."[4]

---

1 See, e.g., Comments of A&E Television Networks at 1 (filed Jan. 13, 1995)("a markup on external costs is necessary to maintain the value of cable operators' investments over time and to encourage investment in new original programming.")

2 Comments of Viacom at 6.

3 Letter from Edwin M. Durso to Honorable Reed Hundt at 2 (dated Jan. 11, 1995). See also Comments of Affiliated Regional Communications, Ltd. at 10 (filed Jan. 13, 1995) ("Regional programming services, particularly sports networks programmed by ARC, will be harmed disproportionately by elimination of the 7.5 percent margin on cost increases for existing and new programming services.")

4 Comments of Discovery Communications, Inc. at 5 (filed Jan. 13, 1995).

Eliminating the markup will "pose a threat to [the] continued quality" of these services.[5]

The cable operators filing in this proceeding also make clear that eliminating the markup will diminish incentives to support improved programming on existing networks. As Comcast, Cox and Jones Intercable observe,

> The new going forward formula provides improved incentives for adding new programming services, but it does not in any way increase incentives to invest in enhancements to existing programming. Moreover, eliminating the markup will stifle the growth and development of existing programming by removing from cable operators any significant incentives to pay for such improved programming.[6]

In short, the overwhelming record evidence in this proceeding demonstrates that eliminating a markup on programming cost increases will unfairly disadvantage programmers already carried on regulated tiers by taking away incentives for cable operators to invest in their programming.[7]

The Chair of the Sacramento Metropolitan Cable Television Commission ("Sacramento") was the lone dissenter filing in this proceeding. But Sacramento's comments fail to provide support for the FCC's proposed action -- or, for that matter, to even address the markup issue at all. Instead, Sacramento bemoans the fact that cable rates may be adjusted to take into account increases in any external costs, including increased programming fees. It therefore urges that the FCC "implement an annual upper limit for the increases. Or, delay the 'Going Forward' rules until it has examined the effects of the rate relief already in-place."[8]

---

5 Id. See also Comments of Lifetime Television at 4 ("While new services would indeed be "going forward", existing services would instead be 'going backward'.")

6 Comments of Comcast Cable Communications, Inc., Cox Communications, Inc. and Jones Intercable, Inc. at 4 (filed Jan. 13, 1995) (emphasis in original).

7 See also Comments of United Video at 6 (filed Jan. 13, 1995) ("[c]onsumers will benefit to the extent that the 7.5% collectively provides some revenue and incentive for cable operators to offer the widest possible range of programming and make system improvements.")

8 Comments By the Chair of the Sacramento Metropolitan Cable Television Commission at 1 (filed Jan. 13, 1995).

Sacramento's pleading is a woefully out-of-time petition for reconsideration of the Commission's rules regarding external cost pass throughs. As such, it must be dismissed without consideration since it was filed beyond the statutory 30-day period for this filing.[9] Rules adopted nearly two years ago established the "price cap" regime under which programming cost increases are treated as external and passed through to subscribers.[10] The Commission reaffirmed its conclusion in August 1993.[11] Sacramento presents no reason to reopen the fundamental underpinnings of the "price cap"/external cost rules here.

To the extent Sacramento complains about the new "going forward" rules, its concerns similarly are not properly raised in this proceeding. In any event, the Commission has already determined that programming cost increases on channels added under the new going forward rules are not subject to the 7.5 percent markup. Operators are subject to a strict cap through the end of 1996 on the amount that a subscriber's monthly bill may increase on account of newly added channels -- including programming cost increases.

---

9 See 47 U.S.C. § 405.

10 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 8 FCC Rcd 3631, 5787-88 (1993).

11 First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, MM Docket No. 92-266 (rel Aug. 27, 1993).

## CONCLUSION

For the reasons stated herein, and in our initial comments in this proceeding, the Commission should not repeal its 7.5 percent markup on increased programming costs.

Respectfully submitted,

Daniel L. Brenner/dlb

Daniel L. Brenner
Neal M. Goldberg
Diane B. Burstein
1724 Massachusetts Avenue, NW
Washington, D.C. 20036
(202)775-3364

Counsel for the National Cable Television Association, Inc.

February 13, 1995