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November 6, 1995

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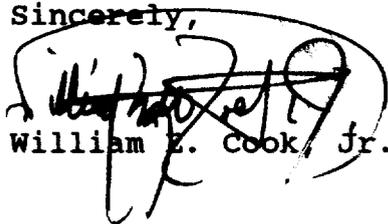
Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Petition for Reconsideration and Clarification by the City of New York and the National Association of Telecommunications Officers and Advisors of the Thirteenth Order on Reconsideration in MM Docket No. 92-266

Dear Mr. Caton:

Please find enclosed the original and eleven (11) copies of the Petition for Reconsideration and Clarification of the City of New York and the National Association of Telecommunications Officers and Advisors in the above-referenced proceeding.

Please contact me if you have any questions regarding this matter.

Sincerely,  
  
William E. Cook, Jr.

Enclosures

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In the Matter of )  
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Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )  
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Rate Regulation )  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

MM Docket No. 92-266

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TO: The Commission

**PETITION FOR  
RECONSIDERATION AND CLARIFICATION  
BY THE CITY OF NEW YORK AND  
THE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

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Counsel for Petitioners

November 6, 1995

### SUMMARY

The Local Governments support the concept of annual rate filings and agree that, in concept, such annual rate filings, among other things, would "limit subscriber confusion and frustration" caused by quarterly rate filings, and would minimize the regulatory burdens on franchising authorities and the FCC caused by multiple rate filings in a single year. Unfortunately, the annual rate review process adopted by the Commission fails to achieve these objectives.

The Local Governments are concerned that a result of the rules for annual rate reviews may be that cable operators will be permitted to charge unreasonable rates. Moreover, the annual review process has the potential to be even more burdensome to local franchising authorities than the quarterly rate proceedings.

The Commission should reconsider and clarify certain rules in the Order to alleviate some of the foregoing concerns. Specifically, the Local Governments request that the Commission:

- require cable operators to update the FCC Form 1240 yearly;
- eliminate the requirement that a franchising authority respond within 15 days to an operator's inquiry regarding a rate proceeding;

- require cable operators to refund overcharges during an adjustment period to subscribers, rather than offsetting such overcharges against future rate increases;
- eliminate the one-year limit on a franchising authority's right to review a rate filing and issue a rate order;
- clarify that the 90-day period to review the FCC Form 1240 does not commence until a cable operator submits a completed form that includes relevant attachments;
- grant a franchising authority 90 days to review an amended rate filing that contains substantial changes from the initial rate filing, and prohibit a cable operator from implementing a proposed rate adjustment prior to the expiration of the review period for the amended form;
- require that a franchising authority pay a cable operator interest at the IRS rate on franchise fee overpayments, rather than at a 11.25% interest rate;
- require a cable operator to submit its proposed annual filing date to a franchising authority 45 days in advance of the proposed filing date; and
- clarify a franchising authority's right to issue a rate order after the initial 60-day review period for new equipment and channel additions.

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MM Docket No. 92-266

TO: The Commission

**PETITION FOR  
RECONSIDERATION AND CLARIFICATION  
BY THE CITY OF NEW YORK AND  
THE NATIONAL ASSOCIATION OF  
TELECOMMUNICATIONS OFFICERS AND ADVISORS**

Pursuant to 47 C.F.R. § 1.429, the City of New York and the National Association of Telecommunications Officers and Advisors (collectively, the "Local Governments") hereby submit this Petition in the above-captioned proceeding. The Local Governments request that the Federal Communications Commission ("FCC" or "Commission") reconsider and clarify certain rules issued as part of the Thirteenth Order on Reconsideration<sup>1</sup> in the above-captioned proceeding.

<sup>1</sup> In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration (MM Docket No. 92-266), FCC 95-397 (released September 22, 1995) ("Order").

I. **BACKGROUND**

The Local Governments support the concept of annual rate filings and agree that, in concept, such an annual rate filing period, among other things, would "limit subscriber confusion and frustration" caused by quarterly rate filings, and would minimize the regulatory burdens on franchising authorities and the FCC caused by multiple rate filings in a single year. See Order at ¶ 59. Unfortunately, the annual rate review process adopted by the Commission fails to achieve these objectives.

As discussed below, the Local Governments are concerned that a result of the rules for rate reviews may be that cable operators will be permitted to charge unreasonable rates. In addition, the FCC Form 1240 appears to be even more complicated and burdensome to review than the FCC Form 1220 (cost-of-service filing) or any other rate form thus far developed by the Commission. Moreover, the procedural rules the Commission has adopted as part of the annual review process have the potential to be even more burdensome to local franchising authorities than the rules that apply to quarterly rate proceedings. Also, the limits on a franchising authority's ability to review the FCC Form 1240 may result in cable operators having the right to

impose unreasonable rates and in cable subscribers losing their right to refunds. Subscribers should not have to pay the price as a result of a franchising authority's inability to navigate the procedural pitfalls the Commission has created as part of the annual review process.

The Commission should reconsider and clarify certain rules in the Order to alleviate some of the foregoing concerns. Specifically, the Local Governments request that the Commission:

- require cable operators to update the FCC Form 1240 yearly;
- eliminate the requirement that a franchising authority respond within 15 days to an operator's inquiry regarding a rate proceeding;
- require cable operators to refund overcharges during an adjustment period to subscribers, rather than offsetting such overcharges against future rate increases;
- eliminate the one-year limit on a franchising authority's right to review a rate filing and issue a rate order;
- clarify that the 90-day period to review the FCC Form 1240 does not commence until a cable operator submits a completed form that includes relevant attachments;
- grant a franchising authority 90 days to review an amended rate filing that contains substantial changes from the initial rate filing, and prohibit a cable operator from implementing a proposed rate adjustment prior to the expiration of the review period for the amended form;

-- require that a franchising authority pay a cable operator interest at the IRS rate on franchise fee overpayments, rather than 11.25% interest;

-- require a cable operator to submit its proposed annual filing date to a franchising authority 45 days in advance of the proposed filing date; and

-- clarify a franchising authority's right to issue a rate order after the initial 60-day review period for new equipment and channel additions.

## II. DISCUSSION

### A. The Commission Should Require Cable Operators that Choose the Annual Rate Adjustment Option to Thereafter File the FCC Form 1240 Yearly

The Commission should make several adjustments to its rules to ensure that: (1) cable subscribers do not pay unreasonable rates or suffer "rate shock" as a result of the yearly review process; and (2) the Commission's goal of eliminating "confusion" among cable subscribers as a result of multiple rate filings is achieved.

First, the FCC Rules should require that cable operators file the FCC Form 1240 annually.<sup>2</sup> A cable operator, of course, would not be required to raise its rates to the maximum permitted level as a result of such filing.

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<sup>2</sup> The Local Governments have set forth proposed amendments to the Commission's rules to accomplish this purpose at Exhibit A.

A cable operator should not be able to wait several years before filing an updated Form 1240, regardless of whether it is overcharging or undercharging subscribers in the interim. Under the rules adopted in the Order, there is no time limit on the number of years that might pass before an operator must "true-up" undercharges between filing periods. As a result, cable subscribers may experience "rate shock" if a cable operator tries to recoup years of undercharges with its next FCC Form 1240 filing.<sup>3</sup> To resolve this concern, cable operators should be required to file the FCC Form 1240 yearly.<sup>4</sup>

Also, to the extent an operator seeks to "true-up" undercharges during a previous adjustment period, the FCC rules permit an operator to recoup such undercharges only during the next annual adjustment year. To ensure that an operator does not continue to recoup such "true-up" after the 12-month recovery

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<sup>3</sup> Moreover, permitting cable operators to indefinitely postpone their "true-up" of "undercharges" may cause an unintended and anticompetitive effect. A cable operator will have an incentive to reserve the implementation of rate increases based on previous "undercharges" in the presence of nascent competition. Once the operator succeeds in eliminating such competition through years of unrealistically low rates, cable subscribers may experience "rate shock" when the operator attempts to recoup years of "undercharges" in a single rate adjustment year.

<sup>4</sup> At a minimum, cable operators should lose any right to recoup undercharges that are more than two years old.

period, or to otherwise charge subscribers unreasonable rates after the adjustment period, the operator should be required to file a new Form 1240 shortly after the close of the 12-month recovery period.<sup>5</sup>

Such annual filing requirement also would reduce the administrative burden of reviewing the form since the Commission and franchising authorities would be able to review data on a yearly basis when it is still fresh and verifiable. Otherwise, if a cable operator is permitted to wait several years between filings, the FCC and local authorities may be in the position of trying to review years of data and to retroactively reconstruct the data to determine what an operator's rates should

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<sup>5</sup> A requirement that a cable operator file annually is important to ensure that cable subscribers obtain any rate decrease to which they are entitled. The rules appear to suggest that an operator must file annually to reflect any decrease in costs. See § 76.922(e)(2)(ii)(B) ("In all events, a system must adjust its rates every twelve months to reflect any net decreases in external costs that have not previously been accounted for in the system's rates"). In reality, however, a cable operator will not be inclined to complete the Form 1240 to determine whether there is a net increase or decrease in external costs unless it seeks a rate increase in the coming year. In fact, a cable operator may conclude that it is not required to complete the form at all, even if to determine whether there is a net decrease in costs, since the draft FCC Form 1240, in contradiction to the rule, suggests that operators may take longer than a year between FCC Form 1240 filings. Therefore, to ensure that consumers are protected, a cable operator should be required to file the FCC Form 1240 each year so that a franchising authority may ensure that subscribers receive the advantage of any net decrease in external costs.

have been in each of the intervening years. Such a process could become an administrative nightmare for both franchising authorities and the Commission.

Second, once a cable operator chooses the annual rate adjustment option, the Commission should not permit the operator to switch back to a quarterly review period at a later date.<sup>6</sup> To reduce subscriber confusion, cable operators should be required to adjust rates on a consistent schedule. Subscribers that have become accustomed to a yearly rate adjustment schedule should not then have to cope with sudden quarterly rate increases at the option of the cable operator.

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<sup>6</sup> The Local Governments suggest that the Commission make the following change to its rules to accomplish this purpose:

§ 76.922 (c)(3). An operator may switch ~~between from~~ the quarterly rate adjustment option contained in paragraph (d) of this section ~~and to~~ the annual rate adjustment option contained in paragraph (e) of this section, provided that:

(i) ~~Whenever~~ whenever an operator switches from the current quarterly system to the annual system, the operator may not file a Form 1240 earlier than 90 days after the operator proposed its last rate adjustment on a Form 1210 ~~and.~~

~~(ii) When an operator changes from the annual system to the quarterly system, the~~ Once an operator has elected to file the FCC Form 1240 pursuant to paragraph (e), the operator may not thereafter return to a quarterly adjustment period using a Form 1210 until a full quarter after it has filed a true up of its annual rate on a Form 1240 for the preceding filing period.

Moreover, by requiring a cable operator to adhere to the yearly review period once chosen, the Commission will eliminate the possibility that a cable operator may "game" the review period options to impose rate increases beyond what would otherwise be permissible under the Commission's rules. Such a prohibition on an operator's ability to switch back and forth between review options would be consistent with the Commission's rule prohibiting cable operators from choosing between the two methodologies used in adjusting rates as a result of channel additions.<sup>7</sup>

**B. The Commission Should Eliminate the Requirement that a Franchising Authority Respond within 15 Days to an Operator's Inquiry Regarding a Rate Proceeding**

The Commission should amend Section 76.933(g) to eliminate the provision that requires that, in order to preserve its right to issue a rate order after the initial review period, a franchising authority notify an operator within 15 days of the operator's "inquiry" as to whether the franchising authority intends to issue a rate order. Such a draconian measure may have the unconscionable consequence of legally permitting a cable

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<sup>7</sup> See 76.922(g)(1) ("Operators must elect between the channel addition rules . . . the first time they adjust rates after December 31, 1994, to reflect a channel addition to a CPST that occurred on or after May 15, 1994, and must use the elected methodology for all rate adjustments through December 31, 1997").

operator to recoup unreasonable rates on a going-forward basis merely because the Commission has imposed an unreasonable time period for a City Council or other governmental body to respond to an operator's "inquiry."<sup>8</sup>

Moreover, the rule as presently drafted is imprecise and problematic, and may encourage needless disputes between cable operators and franchising authorities. The rule, for example, does not even require that an operator's inquiry be in writing, thus potentially leading to disputes between a franchising authority and a cable operator as to whether the franchising authority ever received an "inquiry" from the operator. Also, an operator may make its "inquiry" at a time when it knows the franchising authority cannot respond in a timely manner, such as when the official responsible for responding is on vacation, or during the summer months when many city councils and county commissions may not even be in session.

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<sup>8</sup> Although in many jurisdictions a local official may meet the requirement by simply sending a letter, in many other jurisdictions the local rules may require action by, for example, a city council or other governmental body that meets only monthly or bimonthly. A fifteen day response period would not permit a timely response by such a body, with the result that the cable operator could be entitled to a windfall in the form of unreasonable rates.

The Commission should eliminate the 15-day notice provision. The adverse impact on subscribers -- the payment of unreasonable rates on a going-forward basis if a franchising authority does not respond in 15 days -- far outweighs any benefits to the operator of obtaining a response to its inquiry in a two-week period. There is a better way to achieve the Commission's purpose while ensuring that subscribers do not pay unreasonable rates. The Local Governments recommend that the Commission adopt a rule that presumes that a franchising authority will issue a rate decision after the 90-day period, unless the franchising authority at the end of such period indicates that it will not issue a rate order.<sup>9</sup> Such a rule would be consistent with what happens in practice in many jurisdictions, where franchising authorities have issued rate orders after the initial review period for FCC Forms 393 and 1200 has expired. Moreover, such a rule provides the information a cable operator seeks while ensuring that consumers do not pay unreasonable rates.

**C. Cable Operators Should Refund Overcharges to Subscribers, Rather than Offsetting Such Overcharges Against Future Rate Increases**

The Commission should amend its rules to require that cable operators refund to subscribers any

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<sup>9</sup> The Local Governments have set forth the proposed revision to § 76.933(g) at Exhibit B.

overcharges accrued during an annual adjustment period.<sup>10</sup> Such a rule is necessary to ensure that cable operators are not permitted to overcharge subscribers in perpetuity.

Under the current rule, a cable operator would have an incentive to overestimate its costs since it knows that it would not have to refund overcharges during the adjustment period to subscribers, and that any overcharges would simply offset rate increases during the following adjustment year. For the following adjustment year, the operator also would have an incentive to overestimate its projected costs to take into account overcharges from the previous year. The result could be that cable subscribers would be in a position of always overpaying for cable service without ever recouping the amount of any overcharge. Such a system is particularly unfair to subscribers who terminate service since they will never recoup the amount of any overpayment.

A requirement that a cable operator refund any overpayments would reduce any incentive an operator would have to overestimate its external costs during the forecast year. Moreover, a refund requirement ensures

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<sup>10</sup> The Local Governments have set forth the proposed revision to §§ 76.922(e)(3) and 76.942 at Exhibits C and E.

that subscribers receive the amount of any overpayments for cable service.

In addition, to ensure that cable subscribers receive all refunds to which they are entitled, the Commission should eliminate the rule prohibiting franchising authorities from ordering refunds for longer than a one-year period.<sup>11</sup> Such a rule simply does not work in the context of an annual rate review process of costs projected a year or more ago.

For example, assume that an operator made its first rate increase pursuant to the FCC Form 1240 on February 6, 1996. Assume further that on February 6, 1997 -- the anniversary date of its first increase -- the operator files a new FCC Form 1240 which includes "true up" information demonstrating that it overcharged subscribers during the previous year. Each day after the day the operator files such form, cable subscribers would be losing refund rights because a franchising authority may only order refunds one year back in time.<sup>12</sup> Subscribers would be protected only if a

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<sup>11</sup> The Local Governments have set forth the proposed revision to § 76.942 at Exhibit E.

<sup>12</sup> This problem would be compounded to the extent that cable operators are permitted to wait several years between rate filings. For example, if a cable operator filed its FCC Form 1240 on the third anniversary of the effective date of its initial FCC Form 1240 rate increase, subscribers already would have lost two years of potential refunds by the date of such filing.

franchising authority could review the rate filing and issue a rate order on February 6, 1997 -- which is the same day it received the rate filing.

The Commission should revise its refund rule to correct this unintended consequence of the one-year time limit on a franchising authority's right to order refunds where the operator files pursuant to the annual rate adjustment rule. To ensure that consumers are protected, there should be no time limit on a franchising authority's right to order refunds. Such a rule would be consistent with the rule that applies to the Commission's right to order cable programming service tier refunds. See 47 C.F.R. § 76.961. There is no time limit on the Commission's right to order refunds under that rule.

**D. The Commission Should Eliminate the One-Year Limit On A Franchising Authority's Right to Review a Rate Filing and Issue an Order**

The Commission should eliminate the 12-month limit on a franchising authority's right to issue a rate order.<sup>13</sup> Although franchising authorities in most cases may be able to meet the one year time limit, in certain situations a franchising authority might need additional time to make a rate decision.

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<sup>13</sup> The Local Governments have set forth the proposed revision to § 76.933(g) at Exhibit B.

For example, many franchising authorities are still waiting for the Commission to rule on cable operators' appeals -- many of which have been pending for more than a year<sup>14</sup> -- of their FCC Form 393 and FCC Form 1200 decisions. Since the proper base rate on the FCC Form 1240 will depend on the basic service tier rate established by a franchising authority in a previous rate order, the franchising authority may desire to wait until the FCC issues a decision on the operator's appeal of the previous order before issuing a FCC Form 1240 rate order. If the FCC, for example, reverses a franchising authority's FCC Form 1200 rate decision, then the franchising authority will be able to take the FCC's decision into account and, thus, potentially avoid an additional appeal by the operator of the FCC Form 1240 rate order. On the other hand, if the franchising authority is forced to issue a FCC Form 1240 rate order prior to action by the FCC on the FCC Form 1200 appeal, then the franchising authority may be forced to expend scarce resources in defending against an additional appeal by the operator, and the FCC will be forced to

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<sup>14</sup> Significantly, the Commission does not impose on itself a one year time limit to act on cable programming service tier complaints or to rule on basic service tier rate appeals.

review an additional rate appeal.<sup>15</sup> Such an additional appeal might have been avoided if the franchising authority had the ability to delay issuing the FCC Form 1240 rate order until action by the Commission on the appeal.

**E. The 90-Day Review Period to Review the FCC Form 1240 Should Not Commence Until a Cable Operator Submits a Completed Form that Includes Relevant Attachments**

The Local Governments agree that a franchising authority should be able to toll the FCC Form 1240 review period if a cable operator submits a "facially incomplete" form. However, the Commission should make clear that a form is facially incomplete if it does not include supporting calculations or other documentation in support of the entries on the form.

The Local Governments raise this concern because the draft FCC Form 1240, unlike the FCC Forms 393 and 1200, does not require an operator to submit supporting documentation in support of certain key calculations on the form. It is imperative that such information be

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<sup>15</sup> To preserve its rights, the operator would be forced to appeal the franchising authority's FCC Form 1240 order within 30 days after the release of the text of the order. See 47 C.F.R. § 76.944. The franchising authority would have to file its opposition to the appeal within 15 days after the appeal is filed. Id. The FCC may not have reached a decision on the previous FCC Form 1200 appeal prior to the franchising authority's FCC Form 1240 order, or prior to the close of the pleading cycle for the FCC Form 1240 appeal.

included, otherwise a franchising authority's review would be meaningless since the franchising authority would have no way of verifying the correctness of information entered on the form.

Local Governments urge the Commission to ensure that the FCC Form 1240 requires operators to include attachments in support of key calculations and entries on the form. Moreover, the Commission should amend its rules to clarify that a form is considered facially incomplete if it does not include such attachments.<sup>16</sup> The Commission has made such clarification with regard to the filing of other forms, and there is no reason it should not make a similar clarification in this instance. In its Third Order on Reconsideration, the Commission stated that "[i]n the event a cable operator files a facially incomplete rate justification, viz., fails to complete the form or fails to include supporting information called for by the form, the franchising authority or the Commission may order the cable operator to file supplemental information."<sup>17</sup> A franchising authority similarly should have the right to

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<sup>16</sup> The Local Governments have set forth the proposed revision to § 76.933(g) at Exhibit B.

<sup>17</sup> See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-through Prohibition, Third Order on Reconsideration, 9 FCC Rcd. 4316, 4348, ¶ 88 (1994) (emphasis added).

request supplemental information and toll the review period if a cable operator does not submit such information with the FCC Form 1240.

**F. A Franchising Authority Should Have an Additional 90 Days to Review an Amended Rate Filing Containing Substantial Changes, and a Cable Operator Should Not Be Permitted to Raise its Rates Until the Period for Review of an Amended Filing Expires**

The 30-day review period for reviewing amended FCC Form 1240 filings will be insufficient in many instances. Based on past experience, franchising authorities have found that amended filings by cable operators may entail changes to most, if not all, of the key assumptions included in the original filing and the supporting documents. In such cases, the results of a franchising authority's review of the initial filing is of little or no assistance in reviewing the revised filing. As a result, it may take the franchising authority just as long, if not longer, to review the amended filing as it took to review the initial filing.

For these reasons, the Commission should amend its rules to permit a franchising authority an additional 90 days to review an amended filing that the franchising authority, in its sole discretion, finds contains substantial changes from the initial filing in terms of the entries on the form and/or supporting

documents.<sup>18</sup> Otherwise, a cable operator may take advantage of the Commission's rules to file an insufficient FCC Form 1240 in order to commence the 90-day review period, and wait until the 89th day, or some other unreasonable date, to file a corrected filing which contains the information a franchising authority needs to commence the review of the rate filing. Such an incentive is built into the FCC rules since the Commission's rules appear to permit a cable operator to implement a rate increase after the initial 90-day review period has expired, regardless of whether the time period for review of the amended filing has elapsed. To eliminate such an incentive, the Commission also should amend its rules to clarify that a cable operator's proposed rate increase may not go into effect until the later of the expiration of the initial 90-day time period or the time period to review any amended filing.<sup>19</sup>

**G. A Franchising Authority Should Pay Interest at the IRS Rate on Franchise Fee Refunds**

The Commission should amend its rule entitling cable operators interest at 11.25 percent on franchise

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<sup>18</sup> The Local Governments have set forth the proposed revision to § 76.933(g) at Exhibit B.

<sup>19</sup> The Local Governments have set forth the proposed revision to § 76.933(g) at Exhibit B.

fee refunds owed by the franchising authority.<sup>20</sup> This interest rate -- which is equal to the rate of return permitted cable operators on capital investments -- exceeds the interest rate that cable operators must pay on refunds to subscribers. See § 76.942(e) ("Refunds shall include interest computed at applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments"). There is no equitable reason for requiring franchising authorities to pay a higher interest rate on franchise fee refunds than cable operators pay on rate refunds.

In fact, the Commission should make sure that when interest is paid, the interest rate is the same for both franchising authorities and cable operators to prevent cable operators from profiting on overcharges to subscribers. For instance, a cable operator would have to pay subscribers only the IRS interest rate -- for instance, 9% -- on the amount of any refunds up to the date it implements such refunds. A franchising authority, on the other hand, would have to pay a cable operator a rate of return of 11.25% on the franchise

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<sup>20</sup> The Local Governments have set forth the proposed revision to § 76.942 at Exhibit E. The proposed revision does not affect the right of a franchising authority to choose whether the franchise fee refund is to be returned to the cable operator in one lump sum payment or by offsetting the overcharge against future franchise fee payments.