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

In the Matter of)
)
Implementation of Sections of)
the Cable Act of 1992)

MM Docket Nos. 92-264, 92-265, 92-266

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Rate Regulation
Horizontal and Vertical Ownership Limits
Development of Competition and Diversity
of Video Programming Distribution and Carriage

**OPPOSITION TO PETITION TO UPDATE CABLE TELEVISION
REGULATIONS AND FREEZE EXISTING CABLE TELEVISION RATES**

A&E Television Networks ("Network"), which operates two programming services -- A&E and The History Channel ("History") -- opposes the request by the Consumers Union ("CU") and the Consumer Federation of America ("CFA") to freeze cable rates and revise rate-related rules in a shotgun-style approach that would penalize the entire programming and cable industries. The Petition to Update Cable Television Regulations and Freeze Existing Cable Television Rates (the "Petition") cites the bare fact that cable rates have increased as the basis for its claim that rates are unreasonable. 1/ The Petition fails to examine the reasons for rate increases in individual cases, such as increases in programming costs, increases in number of channels offered on a system or capital investment in system improvements. In fact,

1/ See Petition at 7-8.

the Petition attacks cable rate increases with uniform ferocity, even in cases where increases have been approved by the Commission as part of social contracts. 2/

A&E is an *unaffiliated* programmer. A&E is not owned by or affiliated with any cable operator. A&E delivers critically acclaimed entertainment programming featuring the original series **BIOGRAPHY®**, mysteries and specials to more than **66 million** households. Over 80 percent of A&E's prime time schedule consists of original productions. A&E is among the most popular and most honored cable services, having won more CableAce awards than any other basic cable network. A&E launched a new cable network, The History Channel, approximately two years ago. The History Channel features historical documentaries, movies and mini-series. Launch of The History Channel was delayed because of the Commission's original rate regulations, which did not permit cable operators to profit from -- or even recover the costs associated with -- adding new channels.

Both A&E and History have endured the evolution of rate regulation -- from an inflexible, formula-based methodology that discouraged operators from adding any new channels to a more flexible approach which provides modest incentives to add a limited number of channels and permits operators to pass through license fee costs so that channels may be added to accommodate subscriber taste rather than federal regulation. The trend toward flexibility also features social contracts for resolution of rate complaints, which recognize the benefit to subscribers of flexibility in pricing. For example, the social contracts permit above-benchmark prices in exchange for

2/ *Id.* at 7.

commitments to rebuild systems to increase capacity for additional programming. Petitioners urge the abolition of pass-throughs and mark-ups as incentives to add programming, disregarding the Commission's findings that such measures were required when it adopted the Going Forward rules. 3/

Not only has the Commission recently embraced flexibility in rate regulation, Congress has established March 31, 1999 as the date on which regulation of cable programming services tier rates will sunset altogether. 4/ In addition, Congress provided that only the very largest cable operators would continue to be subject to rate regulation on cable programming service tiers during the period until sunset of the regulations. 5/ This is not the legislative or regulatory landscape favoring a crack-down on cable rates.

The Petition paints a portrait of rampant, excessive rate increases by cable operators, ignoring key findings made by the FCC in its 1996 Report on Competition in the Video Marketplace. 6/ Specifically, the *1996 Competition Report* finds that license fees paid by cable system operators to non-premium cable network programmers increased by 19 percent from 1994 to 1995 and premium channel license fees rose by 2.1 percent. *Id.* at 4370. Citing anecdotal evidence, the Commission's

3/ *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, Rate Regulation*, 10 FCC Rcd 1226 (1994) (¶ 78) (the "Going Forward Order").

4/ Telecommunications Act of 1996, 47 U.S.C. § 543(c)(4).

5/ 47 U.S.C. § 543(m).

6/ *Annual Assessment of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358 (1997) (the "1996 Competition Report").

1996 Report on Cable Industry Prices indicates that rate increases in 1996 may have been attributable to: (1) general inflation; (2) the addition of new channels; (3) increases in the cost of programming already carried on the system; and (4) system upgrades. 7/ The Commission indicated that it will adjust survey questionnaires in the future to solicit information on these important variables. *Id.*

Even with rate increases attributable to these external pressures, the Commission found in its *1996 Competition Report* that the objectives of the 1992 Act had been realized, with the differential between competitive and non-competitive systems having shrunk considerably. 8/ These projections made in the *1996 Competition Report* appear to have been substantiated by evidence gathered in connection with the soon-to-be-released 1997 Competition Report. In a recent report to Congress, Chairman Hundt addressed reports that some cable rates were increasing faster than the rate of inflation. 9/ Chairman Hundt reported that Preliminary 1997 *Price Survey* results indicate that "the bulk of the increase in cable rates in the past year can be attributed to the following four factors: general inflation; the addition of new channels; increases in costs of programming already on the system; and system upgrades (including upgrades required for conversions to digital service)." *Id.* at 22. Given these preliminary conclusions, and Chairman Hundt's pledge that a more

7/ *Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 12 FCC Rcd 3239, 3245-46 (1997) (the "1996 Price Survey").

8/ *Id.* at 3252.

9/ Statement of Reed E. Hundt, Chairman, Federal Communications Commission, *The State of Competition in the Cable Television Industry*, before the Committee on the Judiciary, U.S. House of Representatives, September 24, 1997, at 21.

thorough analysis of the Price Survey data is under way, *id.* at 21, the mere fact that cable rates have increased, without a more substantive review, does not warrant the extreme form of relief sought by Petitioners.

Substantial increases in license fees for programming have been creating headlines in the trade press. For example when TCI increased rates in June, 1997, it reported that increases were driven primarily by programming cost increases. ^{10/} According to TCI, FCC rules would have permitted an increase up to 35% more than the amount of TCI's announced hikes. *Id.* Another example of cost increases pressuring cable rates is provided by TBS conversion from a broadcast station to a cable network. As part of the conversion, it has been reported that TBS will begin charging \$0.26 per subscriber. ^{11/} Prices of cable sports networks also has skyrocketed, ^{12/} which should not be surprising in view of the staggering salaries that are paid to professional athletes. ^{13/} Thus, professional sports salaries drive up rates for cable sports networks, which, in turn, drive up cable rates. This simple example demonstrates the fallacy of the Petitioners' proposal -- cable rates cannot be regulated

^{10/} TCI to raise rates in June; MSO will recoup some cost increases, eat others, *Broadcasting & Cable*, vol. 127, no. 11 (March 17, 1997), p. 16.

^{11/} MSOs face boost in TBS conversion rate; cost to operators of basic channel TBS is doubling, *Broadcasting & Cable*, vol. 127, No. 33 (Aug. 11, 1997), p.38.

^{12/} See "Who's Winning With Sports Programming? Miron Says Rising Athletes Salaries Hurt Ops," CABLEFAX, Vol. 8, Issue 113 (Sept. 11, 1997).

^{13/} See "Sosa Deal May Be So-So in Future; Other Owners, Players Dictate Salary 'Market,'" *The Chicago Tribune*, (July 1, 1997)("In 1987, only six players made \$2 million or more . . . fast forward to 1997 and there are 197 players earning \$2 million or more . . .").

in a vacuum. To do so could force cable systems to select program services based on cost rather than consumer demand, and likewise, cable networks would be forced to avoid expensive programming in favor of inexpensive programming, without regard to quality or consumer preference. The Commission has been there before, and it was a serious mistake. 14/

The Petition presents no evidence that cable rates are unreasonable. Instead, it relies solely on the fact that rate increases have occurred as the justification for its drastic proposal that the Commission impose a rate freeze. See Petition at 5-8. Allegations that the cited increases are unreasonable are unsupported, and the reasons for the increases are not provided in the Petition. The Petition also ignores procedures in place right now at the Commission to ensure the reasonableness of rates. Specifically, there are extensive regulations in place governing the rates that may be charged by cable operators who do not face competition; and monitoring rates and competition in the video marketplace:

- Franchising authorities may regulate basic rates and equipment and, based on subscriber complaints, may ask the FCC to review the reasonableness of CPST rate increases.
- The FCC conducts annual surveys of competition in the multichannel video marketplace to evaluate both competition and pricing issues. In the *1996 Competition Report*, the Commission considered comments on every single one of the issues raised in the Petition, ultimately concluding that rules changes were not necessary. 15/

14/ See *Going Forward Order* at ¶ 59.

15/ Petitioners did not submit comments or reply comments in that proceeding, nor do they offer any explanation for their demand that the Commission consider these issues outside the 1997 Competition Report proceeding, which is ongoing.

- The FCC conducts annual surveys of pricing in the multichannel video marketplace. Again, Petitioners ignore the findings made in the *1996 Price Report*, in which the Commission concludes that “the intent of the 1992 Cable Act’s rate regulation, to simulate the effects of a competitive marketplace, was met.” *Id.* at ¶ 30.
- The FCC enters into social contracts with cable operators to resolve rate complaints in a manner that will most benefit subscribers. See, e.g., *Continental Cablevision*, FCC 95-335 (Aug. 3, 1995) (¶ 81) (goals achieved by social contract included: “reasonable, stable rates for existing services”, “pricing flexibility to upgrade [the] system in cost effective ways in order to provide customers with increased programming choices and improved quality of service”, and “reduce the regulatory burdens associated with rate regulation”).

The Petition fails to acknowledge the Commission’s significant efforts that went into formulating and reformulating rate regulations to implement a regulatory structure that would not penalize programmers. When it adopted the Going Forward rules, the Commission sought to create “appropriate incentives for adding new channels [to serve] the statutory goal of ‘promot[ing] the availability to the public of a diversity of views and information.’” ^{16/} When it adopted the *Going Forward Order*, the Commission rejected the contention by the CFA that former rules provided sufficient incentives to add channels, *id.* at ¶ 58, finding instead that the “new rules will benefit consumers by assuring that operators will have incentives to add new services.” *Id.* at ¶ 64.

The measures recommended in the Petition -- a blanket rate freeze and, ultimately, elimination of any incentives to add new programming to cable systems --

^{16/} *Going Forward Order* at ¶ 8.

would stifle innovation in programming. 17/ The Commission has taken steps to remedy former rules that discouraged operators from adding services. It must not now undo reforms and return to the regime where programmers promising to enhance the diversity of programming available to viewers, such as The History Channel, were forced to delay launch of new services because of regulatory impediments. 18/ The Petition ignores the fact that other federal agencies have reviewed the mergers that the Petitioner now claims are monopolistic and disagreed with Petitioner's conclusions. 19/

CONCLUSION

Petitioners have failed to submit any evidence to support their extreme position that cable rates should be frozen immediately, with no opportunity for operators to increase prices, even to recover direct costs. The rate freeze proposal, and the permanent proposal by Petitioners which would effectively penalize operators that add new programming to their systems, must be rejected by the Commission. Congress and the Commission have recently favored more relaxed rate regulation in recognition of increased competition to cable and the benefits of flexibility in permitting operators to upgrade systems and improve programming options. Petitioners should

17/ In the context of the closed captioning proceeding, the Commission recently affirmed its commitment to "fostering diversity in video programming" by adopting special rules to exempt new programming services from captioning requirements. *Closed Captioning and Video Description of Programming*, FCC 97-279 (Aug. 22, 1997), ¶ 154.

18/ Nickolas Davatzes, "Quality Cable at Risk," *The Washington Post* (April 27, 1994).

19/ See, e.g., *1996 Competition Report* at n.370.

not be permitted to upset these reasoned policy decisions by filing a pleading with unsupported allegations of unreasonable rates

In view of the foregoing, A&E and History respectfully request denial of the Petition in the captioned proceeding.

Respectfully submitted,

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Dated: October 30, 1997

CERTIFICATE OF SERVICE

I, Peggy E. Gelinas, a secretary at the law firm of Hogan & Hartson L.L.P., hereby declare that the foregoing Opposition to Petition to Update Cable Television Regulations and Freeze Existing Cable Television Rates was sent on this 30th day of October, 1997, by first class mail, postage pre-paid, to the following:

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