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Before the
Copyright Royalty Tribunal
Washington, D.C.

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In the Matter of

Compulsory License for Secondary Transmissions by Cable Systems; Royalty Adjustment Proceeding.

REPLY COMMENTS OF THE
NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby submits its response to the Joint Comments of Copyright Owners which were submitted on May 19, 1980.

The May 19 filing was to be a submission of economic and other studies to be used in the proceeding according to the Copyright Royalty Tribunal's Notice of January 1, 1980. 45 Fed. Reg. 63. This is what NCTA submitted on May 19. The Copyright Owners, however, have instead chosen to advance their theory of how the Tribunal should accomplish its 1980 rate adjustment task. This pleading is wholly unresponsive to the Tribunal's Notice insofar as it goes beyond the offering of data to be relied on in the hearing. As such, it is a premature and conclusionary exercise.[1/] Moreover, as shown

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1/ NCTA will advance its case during the hearing and in the post-hearing findings of fact and conclusions of law mandated by the Administrative Procedure Act. 5 § U.S.C. § 557(c). See also 17 U.S.C. § 803(a).

below, the Copyright Owners' proposal for an adjustment formulation is patently beyond the Tribunal's authority under Section 801(b)(2)(A) and (D) of the Copyright Act. In addition, the data which was submitted is frequently confusing and largely irrelevant.

The Copyright Owners' Adjustment Proposal Is Illegal and Illogical

The heart of the Copyright Owners' adjustment proposal is a scheme whereby a cable system's 1976 basic service charge would be multiplied by a factor representing aggregate inflation since 1976 and then applied to the royalty rates set out in Section 111(d)(2). This inflation multiplier would be adjusted for each semi-annual accounting period.

As NCTA carefully pointed out in its May 1, 1980, pleading on the legal parameters of this proceeding, Section 801(b)(2) empowers the Tribunal "to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions ..." (Emphasis supplied.) The Tribunal's discretion is thus explicitly limited by the specific provisions of the two subsections, (A) and (D), of Section 801(b)(2), which are pertinent to the instant proceeding. Subsection (A) states that [t]he [DSE] rates established by section 111(d)(2)(B) may be adjusted..."

(Emphasis supplied.) Nowhere does it say that anything other than the actual royalty rates can be adjusted. This is confirmed by the legislative history. See House Report No. 94-1476, p. 175. Likewise, Subsection (D) directs the Tribunal to adjust "[t]he gross receipts limitations established by section 111(d)(2)(C) and (D)..." (Emphasis supplied.) See also House Report, supra, p. 177.[2/] Thus the Copyright Owners' entire proposal is unacceptable as a threshhold matter since it clearly contravenes the quite specific statutory "provisions" under which this proceeding must be conducted.

Furthermore, the concept of a semi-annual inflation adjustment also runs contrary to the statute. Section 804(a) specifically provides that an adjustment proceeding shall be held in 1980 and thereafter at five year intervals upon petition. The Copyright Owners complain that an adjustment every five years means that they are never even with inflation. This shortfall argument is simply not cognizable under the Act. An adjustment every five years is all that the Act provides. This factor works both ways. In the event of deflation or other circumstances favoring the cable industry,

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2/ The Copyright Owners have erroneously assumed that their adjustment proposal would apply to all cable systems. However, cable systems with gross revenues of $160,000 or less per six months pay copyright fees purely on a gross revenue basis, thus the Copyright Owners' proposal could not even work for these systems. Therefore, the adjustment under Subsection (D) must proceed under a different basis in any event.

no downward rate adjustment could occur until an adjustment year either. Moreover, a pure inflation adjustment factor every six months, as suggested by the Copyright Owners, would eliminate the discretionary "extenuating factor" aspect of the Tribunal's adjustment proceeding provided for in Section 801(b)(2)(A). Either of these reasons suffices to make this suggestion untenable.

Assuming arguendo that the Copyright Owners' proposal was somehow legally permissible, it should be rejected by the Tribunal in any event on practical grounds. In the first place, it is purely an inflation adjustment, thus it admits of no possibility for "extenuating" factors to reduce the full measure of an inflation-mandated adjustment. Clearly there are many extenuating factors which logically and equitably would mitigate a full pass-through of inflation such as regulatory restraints. Secondly, contrary to the Copyright Owners' assertions, this methodology does not "exactly" maintain the "real constant dollar level of the royalty fee per subscriber." There are other factors which affect that figure besides inflation. Since the royalty fee of Section 111(d)(2)(B) is based on a per DSE payment, changes in the average DSE level per subscriber affect the royalty fee as well. Likewise, cable systems moving from the lower per subscriber fee category (less than $160,000 in revenues on a semi-annual basis) to a per DSE payment basis also affect the

average per subscriber royalty fee. NCTA's data submitted in its May 19 pleading provides clear evidence of the results of these factors during the 1976-1980 time period. The Copyright Owners' single factor approach necessarily, and erroneously, would over- or under- compensate and thus not "maintain" the per subscriber royalty fee in place as of the October, 1976, date of enactment.

Data Submitted by Copyright Owners

The data which the Copyright Owners did supply is often confusing and is mostly irrelevant.

The amount of inflation since October, 1976 is clearly a critical figure. As NCTA pointed out in its May 1st pleading, this figure will serve as the outer boundary for the rate adjustment calculation. The key issue is the proper measure for inflation. NCTA's data submission contains information on this matter. The Copyright Owners assume that the CPI is the correct measure of inflation, but they then go on to use two different starting and concluding dates for measuring the period for which inflation is the determinant. Thus, even assuming that the CPI is the correct measuring device, the Copyright Owners supply inflation figures ranging from 27.5% between December 31, 1976, and December 31, 1979, to 38.4% from

October, 1976, through March, 1980. It is clear from the statute that October, 1976 is the correct starting date since Section 801(b)(2)(A) refers to "the date of enactment of this Act." The concluding date for the measurement is not clear cut. Section 804 and the supporting legislative history refer only to an adjustment proceeding taking place in 1980. The Tribunal used April 1, 1980 as its date for the measurement of certain data in the questionnaire sent to all cable systems in April, 1980. However, since the critical measurement under Section 801(b)(2)(A) of the statute is "the royalty fee per subscriber", NCTA will show through its data that this figure can be most easily calculated by using the information on the most current set of completed Copyright Forms. This means that for the Subsection (A) adjustment, December 31, 1979 would be the logical concluding date. Any date would work for the Subsection (D) adjustment but administrative efficiency would seem to dictate choice of consistent dates. In the long run, it makes little difference to the Copyright Owners since the concluding date for the 1980 adjustment will simply mark the beginning date for any adjustment which may take place in 1985.

Examples of confusing data include the subscriber figures provided in Table 1 of the Copyright Owners' submission. All of the annual subscriber figures in that table are apparently as of December 31 of each year. However, this is not true for the 1975 figure which is as of January 1 of that year; the 1975

year end subscriber count was actually 10,800,000. Indeed, this is the figure which Congress used in estimating the copyright payments which cable systems would make under the bill as of the date of enactment. See House Report, supra, page 91. Tables 3 and 4 and the ensuing discussion are confusing since they mix FCC and Paul Kagan data together. It may well be that data on basic cable rates will not be as significant as the Copyright Owners appear to believe except insofar as this data is a component of the "royalty fee per subscriber" calculation. The issue under Subsection (A) is whether and to what extent the "royalty fee per subscriber" in constant dollars has changed since October, 1976. The relevant data for this determination encompasses far more than just subscriber rates. Basic service charge data is wholly crucial only to the Subsection (D) adjustment for smaller systems which pay their copyright fees on a straight percentage of revenues basis. The data presented in Tables 5 and 6 of the Copyright Owners' submission therefore seems largely irrelevant. A more careful breakdown of basic service charge changes by system size would be relevant to the Subsection (D) adjustment. In this regard see Table 3 of Exhibit 2 to NCTA's May 19 data submission.

The Copyright Owners' citation of NCTA's Hart study is likewise irrelevant. This study asked people who were not cable subscribers what they thought they would pay for a

service which the interviewers described to them. It is not a market study. It does not purport to measure what people would pay if actually confronted with a salesman asking for a binding commitment, nor what present subscribers would pay. Furthermore, this elasticity assertion does not explain other causes for whatever gap may exist between the rate of inflation and basic cable charges. There are many reasons for the alleged lag including the factor of regulatory restraint. In any event, if the data adduced during this proceeding demonstrates that the "royalty fee per subscriber" has not decreased since October, 1976, the fact that cable systems have not increased their basic service rates to the full level of inflation becomes totally beside the point.

On page 10 of their pleading the Copyright Owners make the puzzling assertion that any royalty rate adjustment would not compensate for changes occurring between October, 1976, and December 31, 1976. It is unclear why this should be the case. The data submitted by NCTA and the data requested by the Tribunal in its questionnaire attempts to measure the relevant facts from October, 1976.

The Copyright Owners raise the issue of "tiered" service packages and the offering of some "free" service as part of a tiered cable system. No suggestion is made as to how to deal with this alleged problem. In the first place, this scenario is simply not applicable to the present proceeding. The

Tribunal is now evaluating developments in the industry from October, 1976 until the beginning of 1980. At most a handful of such tiered systems are in operation today out of the almost 3,700 cable systems making copyright royalty payments. The Copyright Owners are raising an issue which may be relevant in 1985 should a significant number of systems then be using tiering. In 1985 the Tribunal can consider what, if any, weight to give this market development. Moreover, it can be argued that the Copyright Owners are not injured by some systems charging lower rates for the basic service. The rates are based on an industry average and the Copyright Owners will therefore always receive their full measure of copyright fees consistent with the statutory directive to maintain the same overall per subscriber fee level. Indeed, if any effect is to be noted here, it is that cable is generating more basic service revenues through the provision of originated programming. Thus, this entire argument is a red herring submitted in an attempt to obfuscate and broaden this proceeding.

Finally, the Copyright Owners conclude without proof that the cable industry is under no regulatory restraint in setting its basic service rates. This is allegedly obvious because cable revenues and profits have continued to increase from year to year as submitted in the attachments to the Copyright Owners' pleading. The size of the industry's revenues and

profits are totally irrelevant to the question of whether basic service rates are subject to any regulatory restraint. Gross revenues have increased because of subscriber growth, rate increases and the advent of ancillary revenues from such services as pay cable. The profits on these revenues bear no relationship to whether or not basic cable rates have been held down by regulatory authorities. Furthermore, the entire subject of pay cable revenues is wholly irrelevant since they play no part in the copyright royalty scheme for the retransmission of broadcast signals. It should also be noted that the product exhibited on pay cable is purchased in the marketplace and a high percentage of the purchase price flows directly into the coffers of many of the major copyright holders.

The issue of regulatory restraint is important and obviously relevant to this proceeding. NCTA will present evidence during the oral phase of this proceeding that there has indeed been significant regulatory restraint. The "trend toward deregulation" cited by the Copyright Owners will be shown to be a very small matter at this time. The 350 or so deregulated communities cited by the Copyright Owners represent only about 3% of all of the communities with cable television. Furthermore, the existence of a nearby regulated community serves as a real deterrent to rate increases in deregulated communities beyond those prevailing in the area. A deregulated community can become a regulated community again very quickly.

Conclusion

The data presented by the Copyright Owners in their May 19 submission is sketchy and largely unhelpful to the resolution of this proceeding. Furthermore, they have used this opportunity to put forward an adjustment proposal which misreads the Tribunal's limited statutory power. This proposal cannot be seriously considered since it is flatly illegal under the statute. The Copyright Owners proposal should therefore be summarily rejected and the proceeding should be conducted within the legal parameters of Section 801(b)(2)(A) and (D) as spelled out in NCTA's May 1st statement on jurisdictional and legal issues.

Respectfully submitted,

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June 2, 1980

CERTIFICATE OF SERVICE

I, Karen McCabe, a secretary in the firm of Fleischman & Walsh, P.C., do hereby certify that I have caused to be mailed, postage prepaid, this 2nd day of June, 1980, copies of the foregoing "Reply Comments" to the following:

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