

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

**DA 95-1354**

In the Matter of: )  
 )  
CABLE TV OF EAST PROVIDENCE, INC. )  
 )  
Appeal of Local Rate Order of the State of )  
Rhode Island and Providence Plantations, )  
Division of Public Utilities, )  
Cable Television Section )

**ORDER**

**Adopted:** June 14, 1995

**Released:** June 19, 1995

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. On May 4, 1994, Cable TV of East Providence, Inc. ("Cable TV") filed with the Commission an Appeal of the Local Rate Order adopted by the State of Rhode Island and Providence Plantations, Division of Public Utilities, Cable Television Section ("Division").<sup>1</sup> In its local order, the Division established Cable TV's rates for basic cable service, equipment, installations and hourly service charges.<sup>2</sup> The principal issues raised by Cable TV in this appeal are whether the Division properly determined the regulatory status of Cable TV's Sports Offering package and properly categorized its service offerings for purposes of calculating its maximum permitted rates.

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<sup>1</sup> Other filings in this proceeding include an Opposition of the State of Rhode Island and Providence Plantations, Division of Public Utilities, Cable Television Section to the Appeal of Cable TV of East Providence, Inc. filed by the Division on May 20, 1994, and an Erratum to the Appeal filed by Cable TV on June 17, 1994.

<sup>2</sup> See Appeal, Attachment 1, In re: Regulation of the Rates for the Basic Service Tier and Accompanying Equipment of Cable TV of East Providence, Inc., Report and Order, Docket No. 93-C, State of Rhode Island and Providence Plantations, Division of Public Utilities, Cable Television Section (April 4, 1994) ("Local Rate Order").

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.<sup>3</sup> In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.<sup>4</sup> Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.<sup>5</sup> If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.<sup>6</sup> With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."<sup>7</sup>

3. Cable TV attaches to its appeal a copy of the FCC Form 393 which it filed with the Division.<sup>8</sup> The record reflects that Cable TV's service offerings as of September 30, 1992, were as follows: a 46-channel service offering for \$19.70 per month called "Economy Cable;"<sup>9</sup> a 47-channel service offering, consisting of the same 46 channels as on

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<sup>3</sup> 47 C.F.R. § 76.944.

<sup>4</sup> See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4346 (1994) ("*Third Reconsideration Order*").

<sup>5</sup> *Id.*

<sup>6</sup> *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

<sup>7</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (released March 30, 1994) ("*Second Reconsideration Order*").

<sup>8</sup> See Appeal, Attachment 2, FCC Form 393, dated December 3, 1993.

<sup>9</sup> Cable TV did not include the 46-channel Economy Cable offering on the FCC Form 393 which it filed with the Division on December 3, 1993. However, according to the Division, information regarding the 46-channel offering was included in "back-up"

Economy Cable plus American Movie Classics (AMC)<sup>10</sup> for \$19.95 per month called "Basic Cable;"<sup>11</sup> and a Sports Offering package, consisting of SportsChannel and New England Sports Network (NESN) for \$13.95 per month.<sup>12</sup> SportsChannel and NESN could also be purchased individually, for \$13.95 each.<sup>13</sup> Cable TV states in its appeal that on January 1, 1993, it restructured its rates for the Sports Offering package, offering the package for \$15.95 per month, and SportsChannel and NESN individually for \$10.95 and \$8.95 per month, respectively.<sup>14</sup> Cable TV also states in its appeal that these revised rates for the Sports Offering service were in effect on December 3, 1993, the date Cable TV filed its FCC Form 393 with the Division to justify its rates.<sup>15</sup> In addition, the record reflects that at some point after September 30, 1992, Cable TV increased its rate for its 47-channel Basic Cable service to \$21.65 per month.<sup>16</sup> This rate was in effect when Cable TV filed its Form

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documents to Cable TV's FCC Form 393. See Local Rate Order at 4. In addition, in response to the Division's findings in the Local Rate Order, Cable TV attaches to its appeal an alternative Worksheet 2 to FCC Form 393 in which the 46-channel Economy Cable offering is identified as the basic service tier. See paragraph 6, *infra*. Apparently, Cable TV did not actively market the Economy Cable service and few customers received this service. We note that in a letter from the operator to the Division, Cable TV states that it does not consider the 46-channel offering to be its basic service tier for two reasons, first, because it does not actually market this offering other than to include on its rate schedules the option of purchasing the service, and second, because for the time period October 1991 through September 1992, at most only five customers availed themselves of the option to purchase the 46-channel offering. Appeal at Attachment 3.

<sup>10</sup> In the same letter to the Division referred to in footnote 9, *supra*, Cable TV contends that it does not consider AMC to be offered on an a la carte basis. However, the letter also states that the terms of Cable TV's contract with AMC specifically provide that AMC must be made available to Cable TV's customers as a separate channel. Appeal at Attachment 3.

<sup>11</sup> Cable TV's appeal stated that as of September 30, 1992, the monthly charge for its 47-channel "Basic Cable" service was \$21.65. On June 17, 1994, Cable TV filed an erratum correcting the Appeal and indicating that the correct monthly charge as of September 30, 1992 was \$19.95. See Appeal, Attachment 2, FCC Form 393, Worksheet 2.

<sup>12</sup> Appeal at 3 and Attachment 2, FCC Form 393, Worksheet 2; Local Rate Order at 3-4.

<sup>13</sup> Appeal at 3; Local Rate Order at 3.

<sup>14</sup> Appeal at 13.

<sup>15</sup> *Id.*

<sup>16</sup> Appeal at 4 and Attachment 2, FCC Form 393, Worksheet 1; Local Rate Order at 5

393 with the Division.<sup>17</sup> It is not clear from the record what the rate was for the Economy Cable Offering as of the time Cable TV filed its Form 393.

4. In Worksheet 1 of its FCC Form 393, which reflects Cable TV's rates in effect when it became subject to rate regulation by the Division, Cable TV classifies the 47-channel Basic Cable offering as its basic tier (identified as tier 1 on FCC Form 393). Cable TV did not include a cable programming service (CPS) tier on Worksheet 1. In Worksheet 2 of its FCC Form 393, which reflects Cable TV's rates in effect on September 30, 1992, Cable TV also classifies the 47-channel offering as its basic tier and further classifies the 2-channel Sports Offering package as a CPS tier (identified as tier 2 on FCC Form 393).<sup>18</sup> Cable TV explains in its Appeal that it did not include the 2-channel Sports Offering package on Worksheet 1 (as it did on Worksheet 2), because it believed that as of December 3, 1993, the date it filed its Form 393, "the individual channels were then priced in a manner that made them 'realistic alternatives' to the 2-channel combination," and therefore, the channels were unregulated.<sup>19</sup> Cable TV treated its Sports Offering package as a rate-regulated tier of service only for purposes of Worksheet 2, which relates to services as of September 30, 1992, at which time the price for either of the Sports Offering channels was the same as for the package. Based on its calculations, Cable TV arrived at a maximum permitted monthly per channel rate of \$0.46, and a maximum permitted monthly rate of \$21.68 for the 47-channel Basic Cable service which it regarded as its basic service tier.

5. In the Local Rate Order, the Division accepted Cable TV's 47-channel Basic Cable offering as the basic service tier on Worksheets 1 and 2, but found that the 46-channel Economy Cable offering which Cable TV offered in September 1992 should be considered a

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<sup>17</sup> Appeal at Attachment 2, FCC Form 393, Worksheet 1.

<sup>18</sup> Cable TV did not identify the 46-channel Economy Cable offering on either Worksheets 1 or 2 of the FCC Form 393 which it filed with the Division on December 3, 1993.

<sup>19</sup> Appeal at 13 n.7. Cable TV's explanation is framed in terms of the Commission's guidelines for determining whether an a la carte package would be exempt from rate regulation. In the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice." *Rate Order*, 8 FCC Rcd at 5836-37 & n.808. In the *Second Reconsideration Order*, the Commission affirmed its prior view and set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Second Reconsideration Order*, 9 FCC Rcd at 4213-4216.

CPS tier on Worksheet 2. The Division further found that the channels contained in Cable TV's Sports Offering package are not rate-regulated channels and should not have been included in Cable TV's Worksheet 2 calculations. The Division calculated Cable TV's maximum permitted per-channel rate to be \$0.43, and the maximum permitted rate for the basic service tier to be \$20.21. The Division ordered Cable TV to make refunds to subscribers for all payments made in excess of the rates for basic service and equipment and installations set forth in the Local Rate Order for the period September 1, 1993 through April 4, 1994.<sup>20</sup>

6. In its appeal, Cable TV challenges the Division's finding that for purposes of Worksheet 2 the Sports Offering package was not a cable programming service tier and was not to be included in calculating rates for Cable TV's basic service. Cable TV also states in its appeal that it opposes the Division's finding that the 46-channel Economy Cable offering should be counted as a CPS tier. As an aside, Cable TV also argues that if the 46-channel offering were to be considered as Cable TV's basic service tier, then contrary to the Division's findings, the 47-channel tier should not be considered a separate tier of service.

7. The Division responds that, pursuant to authority granted by the Commission, it properly applied the Commission's guidelines on a la carte packages and concluded that the channels in Cable TV's Sports Offering package should be treated as non-rate regulated channels.<sup>21</sup> The Division also argues that it correctly recalculated Cable TV's rates using the 47-channel offering as the basic tier and the 46-channel offering as the cable programming service tier.<sup>22</sup>

## II. DISCUSSION

8. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.<sup>23</sup> Form 393 is divided

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<sup>20</sup> Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

<sup>21</sup> *Rate Order*, 8 FCC Rcd at 5836-5838.

<sup>22</sup> See Opposition to Appeal at 4; but see footnote 35, *infra*.

<sup>23</sup> To the extent that an operator has sought to take advantage of the refund deferral period available under the *Second Reconsideration Order*, the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series. *Second Reconsideration Order*, 9 FCC Rcd at 4183-4185.

into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

9. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.<sup>24</sup> After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September, 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

10. The operator calculates its current aggregate revenues and current per-channel rate level and makes the comparison of this current rate level with the benchmark in Worksheet 1 of Part II of the FCC Form 393. If necessary, the operator calculates its September 30, 1992 aggregate revenues and September 30, 1992 per-channel rate level and makes the comparison of this rate level with the benchmark and any necessary adjustments to that rate level in Worksheet 2 of Part II. Essentially, in both Worksheets 1 and 2, the operator is required to insert the tier charge for each of its regulated service tiers, the number of channels on each such tier, the number of subscribers to each tier and its regulated equipment and installation revenues. The aggregate revenue and per channel rates are derived from these figures.

#### **A. Sports Offering Package**

11. In its appeal, Cable TV objects to the Division's finding that the channels comprising Cable TV's Sports Offering a la carte package are not rate-regulated channels and

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<sup>24</sup> An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

to their exclusion from the Worksheet 2 calculations.<sup>25</sup> Cable TV argues that as of September 30, 1992, the relevant date for including channel count and other data in Worksheet 2, its Sports Offering package did not meet the Commission's two-part test for determining whether an a la carte package should be rate regulated because the package does not provide consumers with a "realistic service choice."<sup>26</sup> In addition, for the same reason, Cable TV asserts that the package fails under the Commission's 15 interpretative guidelines set out in the *Second Reconsideration Order*.<sup>27</sup> Cable TV further contends that the grandfathering provision of the *Second Reconsideration Order*, which states that "[p]ackages of 'a la carte' channels offered prior to April 1, 1993 ... will be accorded nonregulated treatment,"<sup>28</sup> is not applicable here because Cable TV made "major changes" in the rates for the Sports Offering package and the individual channels in January 1993. It argues that the purpose of the grandfathering provision was "to avoid elimination of discounts that were available" on April 1, 1993, and that the rate changes Cable TV made to this package in January 1993 were contrary to this purpose.<sup>29</sup>

12. The Cable TV Sports Offering package at issue was offered to subscribers as early as September 1, 1992, as a two-channel Sports Offering package, consisting of SportsChannel and NESN, for a total price of \$13.95 per month. At that time, Cable TV also offered these channels on an individual basis for \$13.95 per channel per month. On January 1, 1993, Cable TV restructured its rates for the package as follows: SportsChannel was offered at a price of \$10.95; NESN was offered at a price of \$8.95; and both channels were offered together as the Sports Offering package at a price of \$15.95.

13. The Division's decision to treat the Sports Offering package as a nonregulated service offering is based on the fact that neither channel was offered on Cable TV's basic service tier prior to September 1, 1993, the beginning of rate regulation. Instead, both channels had been offered individually or as part of the Sports Offering package as early as September 1, 1992. The Commission's *Second Reconsideration Order* addressed the issue of

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<sup>25</sup> Appeal, Attachment 1. As stated by Cable TV in its Appeal, rate-regulated treatment of an "a la carte package" is "precisely the reverse" of the position which most other cable operators would advocate. Appeal at 16.

<sup>26</sup> Appeal at 9-11; See *Rate Order*, 8 FCC Rcd at 5836-5838.

<sup>27</sup> *Second Reconsideration Order*, 9 FCC Rcd at 4212-4216. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Id.*

<sup>28</sup> *Second Reconsideration Order*, 9 FCC Rcd at 4214, n.263.

<sup>29</sup> Appeal at 13.

the rate-regulatory status of packages of a la carte channels which existed before it adopted its initial rate rules. In the *Second Reconsideration Order*, the Commission "grandfathered" from rate regulation those packages which were available when the *Rate Order* was adopted. The Commission stated that packages of a la carte channels offered prior to April 1, 1993 will be accorded nonregulated treatment.<sup>30</sup> Subsequently, the Commission clarified its rules with respect to a la carte packages existing prior to April 1, 1993, to provide that "a discounted package price offered by a cable system is not unreasonable with respect to any collective offering of channels if the component channels' collective offering also have been continuously available on the system on a per channel basis since April 1, 1993."<sup>31</sup> Given the fact that the Sports Offering package has been available at a discounted package price since April 1, 1993 and the channels have been continuously available on the system on a per channel basis since that date, we believe that the Division properly determined that the channels should not be considered rate-regulated channels for purposes of rate calculations. Therefore, we hereby deny Cable TV's appeal requesting rate-regulated treatment of the channels in its Sports Offering package.<sup>32</sup>

## B. Other Issues

14. Cable TV, in its appeal, also challenges the Division's finding that the 46-channel Economy Cable service offering is a CPS tier. Under the *1992 Cable Act*, our rate rules, and FCC Form 393, regulated service is divided into two categories. The first category is the basic service tier. This tier of service is the lowest level of service which a subscriber may obtain. It includes, at a minimum, the broadcast signals distributed by the operator and any public, educational and government (PEG) access channels that the local franchise authority requires. In addition, the operator has the discretion to carry additional program services on this tier.<sup>33</sup> The second category, cable programming service, includes all video programming offered over a cable system, except that provided on the basic service

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<sup>30</sup> See *Second Reconsideration Order*, 9 FCC Rcd at 4213-4214 and n.263.

<sup>31</sup> 47 C.F.R. § 76.986(b); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, MM Docket No. 92-266, and Fifth Report and Order, MM Docket No. 93-215, 10 FCC Rcd 1226 (1995) ("*Going Forward Order*").

<sup>32</sup> We need not address Cable TV's arguments with respect to the proper application by the Division of the two-part test set forth in the *Rate Order* for determining whether an a la carte package should be rate regulated or the 15 guidelines set forth in the *Second Reconsideration Order* in light of our opinion that the Sports Offering package was not the type of offering that was intended to be rate-regulated.

<sup>33</sup> *Rate Order*, 8 FCC Rcd at 5637.

tier or on a per-channel or per-program basis.<sup>34</sup> The FCC Form 393 contemplates that each channel must be considered part of only one service tier, either the basic tier or CPS tier.<sup>35</sup> As part of calculating maximum permitted rates, FCC Form 393 requires the operator to list the number of channels included in each tier of regulated programming service. Further, the derivation of maximum permitted rates involves the use of a benchmark formula, one of the variables of which is number of regulated channels offered by the operator. The instructions for completing the form state that "a 'channel' is a unit of cable service identified and selected by a channel number or similar designation."

15. The lowest level of service that a customer can purchase on Cable TV's East Providence system is the 46-channel Economy Cable service. Despite the fact that apparently few subscribers avail themselves of the Economy Cable offering, the parties should have considered this offering Cable TV's basic service tier for purposes of rate regulation. Cable TV's Economy Cable service is identical to its Basic Cable service, except that the Basic Cable service includes AMC and costs \$.25 more. Because, with the exception of AMC, the channels comprising Economy Cable and Basic Cable are the same, and because, at the very least, each cable customer must subscribe to the 46-channel service, the 47-channel Basic Cable service should not be considered as a separate tier. The fact that AMC is offered as part of the Basic Cable service does not make Basic Cable a separate tier. In substance as well as under the terms of Cable TV's contract with AMC,<sup>36</sup> AMC is offered on a per-channel basis. It is, therefore, unregulated. Cable TV's East Providence customers can choose to take the Economy Cable offering only or they can receive the channels offered on Economy Cable plus AMC. Simply calling the combination of offerings "Basic Cable" does not create a separate tier of service for rate-regulation purposes.

16. Based on the foregoing, we find that the 46-channel Economy Cable offering should be treated as Cable TV's basic service tier and that AMC is an unregulated a la carte channel. Further we find the Basic Cable offering is not a separate tier of service. These findings should be applied in the FCC Form 393 calculations for Cable TV's basic rates.<sup>37</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> Thus, the Division's characterization of the 46- and 47-channel offerings as distinct tiers of service was incorrect.

<sup>36</sup> *See Appeal, Attachment 3 at 4 and 6.*

<sup>37</sup> As an aside, it appears that Cable TV has made little or no attempt to market its Economy Cable offering and that very few customers subscribe to that service, perhaps because they are not aware of its existence. *See Appeal, Attachment 3 at 4.* Our customer service standards, which cable franchising authorities enforce, include requirements under which operators must describe their products, services, prices, and options in writing to subscribers at least once a year. *See 47 C.F.R. § 76.309(c)(3).* Those descriptions must be accurate or the requirement would serve no purpose. In addition, states often have other

Accordingly, we are remanding this issue to the Division so that it can enter an order consistent with our findings herein.

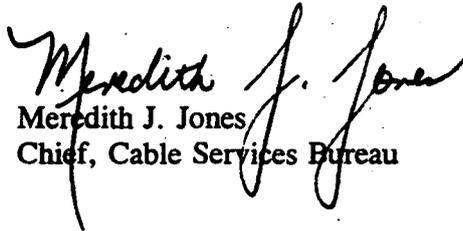
### III. ORDERING CLAUSE

17. Accordingly, **IT IS ORDERED** that Cable TV's appeal of the Local Rate Order, with respect to the issue of the regulatory status of Cable TV's Sports Offering package, is **DENIED**.

18. **IT IS FURTHER ORDERED** that this matter **IS REMANDED** to the local franchising authority for further proceedings consistent with this opinion.

19. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

#### FEDERAL COMMUNICATIONS COMMISSION

  
Meredith J. Jones  
Chief, Cable Services Bureau

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consumer protection provisions regarding completeness and accuracy in marketing. The Division may wish to consider whether Cable TV's descriptions of its rates and services comply with any applicable requirements it has authority to enforce or consider referring the matter to any other agency which might have jurisdiction.