

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision
City of Tallahassee, Florida

LOI-93-2

Letter of Inquiry
Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1995;

Released: August 15, 1995

By the Commission; Commissioner Barrett concurring
and issuing a statement:

I. INTRODUCTION

1. In this Order, we deny the Application for Review ("Application") of the City of Tallahassee, Florida ("the City"), filed on December 19, 1994. In its Application, the City seeks Commission review of the Memorandum Opinion and Order of the Cable Services Bureau ("Bureau") released on November 18, 1994,¹ holding that the Value Pak a la carte package offered by Comcast Cablevision ("Comcast") as it existed on November 17, 1993, may be treated as a new product tier under the Commission's *Going Forward Order*.² Comcast opposes the City's Application for Review.

II. BACKGROUND

2. The Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public,

educational, and governmental channels.³ The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.⁴ Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.⁵ The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.⁶ The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates. However, rates for program offerings on a per channel or per program basis may not be regulated under the 1992 Cable Act.⁷

3. The 1992 Cable Act also requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."⁸ In addition, the 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.⁹ In its *Rate Order* adopted April 1, 1993, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."¹⁰ Consequently, the Commission is required to scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

4. In the *Rate Order*, the Commission determined that packages of channels which were also offered individually (so-called "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.¹¹ The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a "realistic service choice."¹² On reconsideration, the Commission retained the two-part test contained in the *Rate Order* and set out 15 interpretive guidelines to enable

¹ Comcast Cablevision, City of Tallahassee, Florida, 9 FCC Rcd 7773 (Cab. Serv. Bur., 1994) ("*Comcast LOI Order*").

² Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd 1226 (1994) ("*Going Forward Order*").

³ Communications Act of 1934 § 623(b)(7)(A)(ii-iii), 47 U.S.C. § 543(b)(7)(A)(ii-iii) (1992). See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 8 FCC Rcd 5631 at ¶¶ 157-161 (1993) ("*Rate Order*") (franchising authorities may require operators to carry PEG channels on tiers other than basic).

⁴ Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1). The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system

were subject to effective competition." *Id.*

⁵ Communications Act of 1934 § 623(1)(2), 47 U.S.C. § 543(1)(2).

⁶ Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). The Commission evaluates whether an operator's rates are unreasonable pursuant to a complaint filed about a cable programming service tier.

⁷ Communications Act of 1934 § 623(1)(2), 47 U.S.C. § 543(1)(2).

⁸ Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

⁹ See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992). This provision in the Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation. See S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

¹⁰ *Rate Order* ¶ 451.

¹¹ *Id.* at ¶¶ 327-328.

¹² *Id.* at ¶¶ 327-328 & n.808.

operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings."¹³ In the *Going Forward Order*, the Commission reconsidered its rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act.¹⁴ However, the Commission determined that packages meeting specified criteria may be treated as New Product Tiers ("NPTs").¹⁵

III. THE BUREAU'S ORDER

5. The Bureau issued a Letter of Inquiry ("LOI") to Comcast on November 17, 1993.¹⁶ The LOI asked Comcast to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion of rate regulation in the offering of packages of a la carte channels (*i.e.* packages of channels also offered on a per channel basis) which allegedly are not rate regulated. Comcast responded to the LOI on December 15, 1993.

6. Comcast's response showed that before September 1, 1993, its services included a 13 channel basic tier, called Limited Service, for \$7.95 per month and a 20 channel cable programming service tier, called Satellite Service, for \$13.45 per month. Both tiers of service could be purchased together as a package, called Preferred Basic Service, for \$21.40 per month. On the effective date of our cable rate regulations, September 1, 1993, Comcast restructured its service offerings. Comcast's restructured service offerings included a 12 channel basic tier, called Limited Basic, for \$8.13 per month and a 17 channel cable programming service tier, called Standard Service, for \$11.52 per month. Comcast also began offering four channels on an individual basis. The four channels were WTBS, The Family Channel, The Nashville Network and TNT. WTBS was originally in Comcast's Limited Service tier and TNT, The Family Channel and The Nashville Network were originally in Comcast's Satellite Service tier.

7. Comcast stated that WTBS, The Family Channel and The Nashville Network each could be purchased individually for \$0.33 per month and TNT could be purchased individually for \$0.49 per month. All four channels could be purchased as a package, called Value Pak, for \$0.65 per month. The same four channels purchased individually cost subscribers \$1.48 per month. If a subscriber purchased

Limited Basic, Standard Service and Value Pak, this was called Preferred Service and cost \$20.30 per month. Comcast's response indicated that as of October 31, 1993, only 652 of its 43,494 subscribers,¹⁷ or 1.5%, elected not to receive Value Pak.

8. Based on these facts, the Bureau first examined whether Comcast's restructuring of its offerings had the effect of evading regulation for the channels that Congress intended to be rate regulated. The Bureau found that the restructuring may have had the effect of avoiding rate regulation based on the fact that Comcast had removed channels from otherwise rate regulated tiers to create a new package of channels, along with other factors present in the case.¹⁸

9. The Bureau then examined whether the offering met the Commission's requirements for a permissible collective offering of a la carte channels that were in effect when the offering was created.¹⁹ The Bureau found that, in this case, Comcast's a la carte package complied with the first condition requiring that the price for the combined package not exceed the sum of the individual charges for each component service, but the fact that only 1.5% of Comcast's subscribers chose not to purchase the a la carte package tended to show that the separate parts of the package did not constitute a "realistic service offering." However, the Bureau concluded that, in light of the Commission's rules, it could not say that it was clear to Comcast that its restructuring was not a permissible a la carte package.²⁰

10. In its *Comcast LOI Order*, the Bureau noted that the *Going Forward Order* recognized that the a la carte rules adopted in the *Rate Order* and clarified in the *Second Reconsideration Order*, as applied to many fact patterns, did not provide a clear test for determining whether an a la carte package was permissible.²¹ The Bureau stated that it could not say that it was clear that Comcast's Value Pak was not a permissible a la carte package. As a result, the Bureau said it would not be equitable to subject Comcast to refund liability.²² The Bureau determined that Comcast may treat the package as a new product tier under the Commission's *Going Forward Order*, even though the channels that composed the package were removed from rate regulated tiers.²³

¹³ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 at ¶ 195 (1994) ("*Second Reconsideration Order*").

¹⁴ 10 FCC Rcd 1226 at ¶ 46.

¹⁵ *Id.* at ¶ 51. See also 47 C.F.R. §76.986(c) (affording NPT treatment to packages created between April 1, 1993, and September 30, 1994, which involved only a small number of channels that were moved from the basic or cable programming service tiers and the operator had reasonable grounds to believe the offering complied with the Commission's requirements as of the date it was first offered).

¹⁶ Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Patrick Keating, General Manager, Comcast Cablevision of Tallahassee, Florida, LOI-93-2 (November 17, 1993).

¹⁷ According to Comcast's response, it had 43,494 subscribers as of October 31, 1993.

¹⁸ *Comcast LOI Order* at ¶ ¶ 15-16. The additional factors noted by the Bureau included the facts that Comcast offered the

package on the eve of regulation and it automatically subscribed its customers to the offerings that previously had been part of its basic and cable programming service tiers. *Id.*

¹⁹ The Bureau noted that if the offering met the requirements for a permissible collective offering, Comcast would not have evaded our rate regulations. *Comcast LOI Order* at ¶ 16.

²⁰ *Comcast LOI Order* at ¶ ¶ 19-21.

²¹ *Id.* In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order*'s two prong test, the Commission hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation. See *Going Forward Order* ¶ 40.

²² *Comcast LOI Order* at ¶ 22.

²³ *Comcast LOI Order* at ¶ 23. Under the going forward rules, new product tiers generally cannot be composed of channels removed from current basic or cable service programming tiers. See *Going Forward Order* at ¶ 27. The Bureau distinguished the result in this case from the result it reached in *Adelphia Cable Partners, L.P. South Dade County, Florida*, 9 FCC Rcd 7781 (Cab. Serv. Bur., 1994) ("*Adelphia*"), in which a cable operator

IV. THE CITY'S APPLICATION FOR REVIEW

11. The City makes four arguments in favor of reversing the Bureau's *Comcast LOI Order*. First, it claims that by treating Comcast's collective offering as a new product tier, the Bureau waived the new product tier requirements set forth in the *Going Forward Order* without providing an opportunity for notice and comment.²⁴ Second, the City argues that the Bureau should have interpreted the "marketplace failure" of Comcast's individual offerings as conclusive evidence that the individual channels contained in the package were not realistic service options, but, rather, were options which were created to evade rate regulation.²⁵ Third, the City claims that the Bureau should have deferred to the City's finding that Comcast's Value Pak was not a legitimate a la carte package, and the Bureau should have required Comcast to demonstrate the reasonableness of its rates.²⁶ Finally, the City argues that Comcast should be subject to refund liability as a result of overcharges for its collective offering.²⁷ The City requests that the Commission overturn the Bureau's decision and order that Comcast's Value Pak, and the channels comprising it, be deemed subject to regulation as of September 1, 1993, and to order refunds accordingly.²⁸

V. DISCUSSION

12. On the basis of the analysis set forth above,²⁹ we believe it was reasonable for the Bureau to permit Comcast to treat the package as a new product tier. This is consistent with the Commission's conclusions concerning a la carte packages in the *Going Forward Order*, which was released the same day as the *Comcast LOI Order*. In the *Going Forward Order*, the Commission determined that a la carte packages are subject to regulation as cable programming service tiers. However, the Commission also stated:

"In [some] cases [where it was not clear whether packages were permissible under the rules in existence at the time], we think it is fair, in light of the uncertainty created by our test, to allow cable operators to treat existing packages as NPTs even though it would not qualify under the rules we establish today, provided that such packages involve only a small number of migrated channels."³⁰

Furthermore, the revised rules provide for treatment as a new product tier if the collective offering was created between April 1, 1993 and September 30, 1994, involved

only a small number of channels on basic service tiers or cable programming service tiers, and the operator had reasonable grounds to believe the collective offering complied with the Commission's requirements as of the date it was first offered.³¹ Here, Comcast's package satisfies the new product tier criteria since it was created during the relevant time period, involved only four channels, and it cannot be said that it was clear that Comcast's Value Pak was not a permissible package. Contrary to the City's assertion, rather than granting a waiver of the Commission's rules, the Bureau's action in this case was clearly contemplated by the rules and policies announced in the *Going Forward Order*.

13. Likewise, we are not persuaded by the City's argument that the Bureau should have considered the low number of subscribers to the individual channels in Comcast's collective offering as conclusive evidence that the individual channels were not realistic service options. The Bureau did consider the subscribership to individual channels and stated that this, together with other factors, tends to show that the per channel offering does not constitute a realistic service choice.³² However, even though it found that Comcast's package may not have satisfied the Commission's requirements for a permissible a la carte offering, the Bureau determined that its test had been unclear.³³ Given the ambiguity in our rules, it was appropriate for the Bureau to treat the evidence of subscribership as probative, but not conclusive.

14. The City asserts that in its *Comcast LOI Order*, the Bureau should have deferred to the City's determination that Comcast's Value Pak was not a legitimate a la carte package. We disagree. With respect to appeals of local rate determinations made by franchising authorities 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."³⁴ The Bureau's decision in this case was based on a matter of law -- rather than fact -- and, therefore, the City would not be entitled to deference with respect to its legal conclusion on the regulatory status of the a la carte package in question. Moreover, deference on the a la carte issue would defeat the Commission's interest in ensuring that its regulations are implemented consistently on both the federal and state levels.

began offering all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In *Adelphia*, the operator removed from regulation an entire service tier consisting of 32 channels. While the Bureau acknowledged that the rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, it did not believe that the a la carte rules were unclear as applied to the fact pattern in *Adelphia*. The Bureau, therefore, found that Adelphia's a la carte package must be treated as a rate regulated cable programming service tier and that the channels composing it must be counted as rate regulated channels for purposes of rate justification as of September 1, 1993.

²⁴ Application at 8-10.

²⁵ *Id.* at 4-6.

²⁶ *Id.* at 6-7.

²⁷ *Id.* at 7-8.

²⁸ *Id.* at 10-11.

²⁹ See *supra*, ¶ 8-10.

³⁰ *Going Forward Order* at ¶ 51. See also 47 C.F.R. §76.986(c) (permitting new product tier treatment if package meets conditions of new product tier or "operator had reasonable grounds to believe the collective offering involving only a small number of migrated channels complied with the Commission's requirements as of the date it was first offered").

³¹ See *id.*; 47 C.F.R. § 76.986(c).

³² See paragraph 9, *supra*; *Comcast LOI Order* at ¶ 19.

³³ See paragraph 10, *supra*; *Comcast LOI Order* at ¶ 21.

³⁴ *Second Reconsideration Order*, 9 FCC Rcd 4119 at 4217.

15. The City's arguments that the Bureau failed to require Comcast to demonstrate the reasonableness of its rates and that Comcast should be subject to refund liability are also without merit. Because we have found that Comcast's Value Pak a la carte package was arguably a permissible collective offering under our rules as they existed when the package was created, and because the package may be treated as a new product tier under our current rules, there is no basis on this record to review Comcast's rates nor to order refunds pursuant to Sections 76.945 and 76.942 of the Commission's rules. Instead, the Bureau has determined that Comcast's Value Pak offering is in compliance with our rules for new product tiers as announced in the *Going Forward Order*.³⁵

16. In view of the foregoing considerations, we affirm the Cable Service Bureau's determinations in the *Comcast LOI Order* and we find that reconsideration of the Cable Services Bureau's *Comcast LOI Order* is not justified. We therefore deny the City's Application for Review.

VI. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the City's Application for Review IS DENIED.

18. IT IS FURTHER ORDERED that the staff of the Cable Services Bureau shall send copies of this decision to the authorized representatives of the parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

³⁵ See *Comcast LOI Order* at ¶ 23 and 47 C.F.R. § 76.986(c).