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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of)	
)	
Implementation of Sections of the)	MM Docket 92-266
Cable Television Consumer Protection)	
and Competition Act of 1992:)	
)	
Rate Regulation)	

CONTINENTAL CABLEVISION'S PETITION FOR RECONSIDERATION
OF SIXTH ORDER

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CONTINENTAL CABLEVISION'S PETITION FOR RECONSIDERATION

Continental Cablevision, Inc. respectfully requests the Commission to reconsider its limitations on the creation of viable New Product Tiers (NPTs), adopted in the Sixth Order on Reconsideration in this Docket, 59 Fed.Reg. 62614 (Dec. 6, 1994). The Sixth Order permits only those operators who moved a small number of channels from regulated service to à la carte service between September 1, 1993 and September 30, 1994 to treat such channels as deregulated NPTs. Other operators are forbidden to move even a small number of channels from regulated service to NPTs, creating two classes of cable operators and significant problems for which Continental respectfully requests prompt correction by the Commission. Continental takes no issue with the Commission's forgiveness of refund liability due to the uncertainties of the Commission's rulings during the pre-reregulation period regarding à la carte packages. However, Continental's petition seeks equal treatment for all operators to create comparable NPTs on a going forward basis.

I. The Commission's Effort to Put À La Carte Behind It Has Created Serious Competitive Imbalance

The Commission's effort to do justice for cable operators who launched à la carte packages does more than distinguish between those who sought recourse in ambiguous rules and those who awaited clarification. The Commission's transformation of à la carte packages into New Product Tiers (NPTs) has introduced a serious competitive disequilibrium into the capital markets and the programming marketplace.

A. Forgiving Refunds of À La Carte Revenues Is Understandable, Despite Evidence of Evasion

The Commission's Sixth Order on Reconsideration, and companion rulings on à la carte Letters of Inquiry (see Attachment A), make plain the Commission's view of à la carte packages. The Commission believes that those who removed channels from regulated BBT and CPS tiers and placed them into à la carte packages on September 1, 1993 had no intention or purpose other than evading rate reductions prescribed by the 1992 Act. In a series of rulings, the Commission states that such packages were introduced "on the eve of regulation;" that the à la carte option did "not constitute a realistic service offering;" that customers were "automatically subscribed" to the package; and that the package had "no sufficient justification ... other than to avoid rate regulation."¹ Citing confusion in application of the rules, the

¹ E.g., Century Cable TV, DA 94-1314 (Nov. 25, 1994).

Commission has forgiven rate refunds in almost every case where the à la carte package consisted of 5 or fewer channels. That is understandable, given the uncertainties of that transition period from deregulation to regulation.

B. Converting Selected À La Carte Packages Into NPTs
Creates Significant Price Differences In Otherwise Identical
Systems, and Artificial Distinctions In the Markets for Equity,
Debt and System Swaps

More difficult to understand, however, is the Commission's decision to convert à la carte packages into price deregulated NPTs only for selected cable operators while forbidding all other from creating comparable packages.² The only justification for allowing channels previously carried on BBT or CPS to be converted into NPTs for some operators but not others is that there would be "confusion and transaction costs" if these services were to be regulated as CPS tiers. This "confusion and transaction costs" is nowhere to be found in the record, referred to in the Sixth Order, quantified anywhere, or distinguished from similarly perplexing issues on which the Commission has not been so forgiving. From Continental's perspective, this summary justification masks a more fundamental problem. Because neither NPT nor grandfathering of à la carte packages was ever put out for public comment, the Commission is most likely unaware of the serious competitive disequilibrium which its new rules create by forbidding other operators from bolstering NPTs with a small number of foundation services.

Consider two systems with only two vacant channels. Both systems are identical

² Only where operators migrated 8 or more channels from BBT and CPS tiers to à la carte packages has the Commission found such offerings to be invalid.

in every way, and started from the same price point, except that System A moved 4 popular CPS channels, TNT, WTBS, Family Channel, and a regional Sports Service, into an à la carte package September 1, 1993, and they remain subscribed to by more than 99% of customers. System A priced the four channels so that there was no reduction in the \$20 price charged for BBT, CPS, and ALC after September 1, 1993. System B did not move the four services to ALC, and instead took a rate reduction of \$1.40 on program services (with equipment price reductions cutting rates still further). As a result, for identical services the Systems now charge these prices:

Level of Service	System A	System B
<i>Basic</i>	\$7.10*	\$7.00
<i>CPS Tier</i>	\$11.50*	\$11.60
<i>À la carte package</i>	\$1.40	NA
<i>Total Program Service</i>	\$20.00	\$18.60

*Reducing the number of regulated channels increases the BBT rate and lowers the CPS rate under the benchmark rules.

In a stroke, the Commission has provided System A with 7% greater revenue and 14% greater cash flow (assuming a 50% operating margin),³ and the unrestricted ability to raise it still more. This has significant consequences.

- **Access to Equity.** An investor trying to decide whether to invest \$100 into System A or System B has had the decision made for him or her. System A can provide a considerably better return on investment than can System B.

³ Cash flow is operating revenues minus operating expenses and taxes, before depreciation, amortization and other non-cash charges.

- **Access to Debt.** Commercial banks typically set debt-to-cash-flow ratios in determining how much they will lend to a cable operator and the rate of interest they will charge. A 6:1 debt-to-cash-flow ratio is considered reasonable. In our example, the owner of System A will have a \$16.80 per subscriber annual cash flow advantage over System B and a \$100 per subscriber advantage in borrowing power.
- **System Swaps.** If the owners of System A and System B were to swap their systems in order to rationalize the geographic area each serves, System A is now more valuable because system swaps are often based on equivalent cash flows.

Thus, the Commission has provided Owner A with artificially cheaper access to capital, and an advantage in the acquisition market. The Commission's Milwaukee, Wisconsin decision (LOI-93 14) illustrates the financial impact. Among the 83,000 subscribers in Milwaukee alone, the operator avoided over \$1.5 million in rate reductions from September 1993 through November 1994 and will continue to benefit by \$100,000 month (\$1.20/sub/mo) in additional revenue. Time Warner confirmed to Broadcasting & Cable that the "FCC's seal of approval" on Time Warner's à la carte packaging is worth \$40 million to \$50 million in annual revenue to Time Warner. Broadcasting & Cable, November 28, 1994, page 15. Equity markets value Time Warner at about nine times cash flow, so that the Commission has added \$360-\$450 million to Time Warner's equity value. In addition, Time Warner can now borrow \$240-\$300 million more in the debt market than an operator who did not create à la carte packages on the eve of rate regulation.

Multiply this phenomenon by the number of subscribers served by MSO's who offered à la carte packages. According to FCC releases so far (see Attachment A), à la carte has been approved for use by Century, Cablevision Industries, Falcon, Multivision, Paragon, Scripps Howard, Time Warner, TKR, US Cable, and Comcast.⁴ These MSO's alone serve over 16 million subscribers and represent 25% of the cable industry. The Commission has introduced a major competitive disequilibrium into both the capital and acquisition marketplaces by creating two classes of cable operators. Ironically, most of those who created à la carte packages on the eve of rate regulation will benefit not only by rate reductions avoided in September 1993 but also by having a foundation for future NPT's that other operators such as Continental are denied. Continental takes no issue with the Commission's forgiveness of refund liability, due to the uncertainties of the Commission's rulings during the pre-reregulation period regarding à la carte packages. However, Continental's petition seeks equal treatment for all operators to create comparable NPT's on a going forward basis.

II. The Going Forward Rules Do Not Correct the Competitive Imbalance Caused by Converting Selected À La Carte Packages Into Deregulated NPTs

A. NPT Launched on À La Carte Systems Have Established Foundation Audiences; All Other Systems Must Market New Services Without A Foundation Audience

Unfortunately, the rest of the going forward rules do not right this imbalance. The Commission has assumed that new channels may be launched in virtually deregulated NPTs, and

⁴ As shown by Attachment A, Comcast apparently initially priced its à la carte package at benchmark rates.

revenues made up there. But there is a huge difference in the real world of channel locked systems in need of rebuilds. In the example, Systems A and B both have 2 channels held in reserve, but there is a major difference in the potential use of these available channels. System A has had TNT, WTBS, Family Channel, and a regional Sports Service grandfathered into NPT as foundation services, to which 99% of its customers subscribe. System B cannot, under any circumstances, move these same services to NPT. The newly launched services will be offered as unknowns into the market, with no powerful neighbor to draw viewership to them. System A can add two new channels to its package of four well established services. System B has to market two services by themselves. It is highly unlikely that System B will be able to achieve the high penetration levels which System A is enjoying due to the grandfathering of its à la carte package. Nor will "cloning" foundation services from regulated tiers make the difference. If the foundation channels are already part of regulated service, it is the new channels which must attract viewers to the NPT. Moreover, cable operators have historically struggled under consumer criticism of overly complex programming options; cable operators will be reluctant to exacerbate consumer confusion with "cloned" channels. Thus, System B will not be able to overcome its cash flow disadvantage

B. Foundation Channels Attract Viewers to New Programming
Just As Major Department Stores Attract Traffic To
Boutiques In A Mall

The lack of foundation services for System B's NPT creates a dramatic difference in actual practice. New networks usually strive mightily to be placed on the dominant CPS tier. During the launches of now well established foundation cable networks, programmers would try

to be placed in proximity to channels with high viewership, particularly in the 2-13 VHF band. Indeed, the importance of having a foundation channel to increase traffic past a new channel is as important to programmers as the presence of a major department store is essential for the survival of a boutique shop in a mall. This is the reason that programmers usually resist being moved to stand alone à la carte channels. This is also the reason that the FCC insures that new broadcast channels are placed in the basic service tier, and why they are given a choice of channel position under the 1992 Act.

III. The Commission Should Permit All Cable Operators to Move A Small Number of Channels From BBT/CPS to NPT

A. There Are No Differences Between "À La Carte" and Other MSO's Sufficient to Justify Such Dissimilar Treatment And Competitive Imbalances

In view of the public benefits associated with allowing a small number of foundation services on NPT, Continental believes that there is no difference between System A and System B sufficient to justify such dissimilar treatment and results. For System A, the Commission has already determined that 4 channels are de minimis, and that their movement did not change the fundamental nature of the remaining CPS tier(s). For System A, the Commission assumes that the competitive force of the regulated CPS option--minus the four channels--is sufficient to keep the price of the NPT in check. For System A, movement of the four channels to NPT is transparent, nondisruptive, and preserves continuity of service. The only difference between System A and System B is that System A nominally offered customers the chance to buy the four channels à la carte, on terms the FCC itself has found to be neither credible nor popular. Fewer than 1% of subscribers took up that unlikely offer, and the offer may now be

discontinued under Commission rules.

The only way for the Commission to restore equilibrium to the market is to extend the same flexibility to System B. As with System A, allowing System B to move 4 channels from BBT or CPS is de minimis, and will not change the fundamental nature of the remaining CPS tier(s). As with System A, the competitive force of a regulated System B CPS option--minus the four channels--is sufficient to keep the price of NPT in check. As with System A, allowing System B to re-tier four services into a NPT or convert an existing 4 channel CPS into an NPT will be transparent, nondisruptive, and will preserve continuity of service. (Indeed, many of Continental's systems already offer multiple CPS options, including four-channel packages of cable networks which could readily be transformed into NPTs.) The only difference is that System B will not need to go through the exercise of offering channels à la carte on terms which all now recognize to be unrealistic and dispensable.

B. The Competitive Force of Regulated BBT/CPS
Will Continue to Constrain NPT Prices

The only reason which Continental can fathom for any reluctance to level the field in this manner is visceral fear that System B's rates will increase more than the \$1.50 over the next two years permitted by the Commission's Going Forward Rules. But that fear of increase is inconsistent with the premises and operation of the Commission's own rules:

- The Commission has already determined that the regulated CPS tiers remaining on the à la carte Systems A of the world are sufficiently robust to check the prices of NPTs.

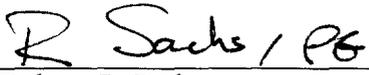
The same must be true for the System B's of the world.

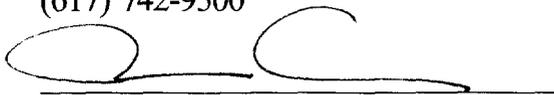
- Moreover, if a small number of channels were migrated from regulated CPS tiers, the Commission rules assure that the price of those tiers would decline for subscribers who chose not to take the NPT.

CONCLUSION

For these reasons, Continental respectfully requests that the Commission reconsider and revise its rules to permit all operators to move a *de minimus* number of channels from BSTs or CPSTs to NPT. The proposed specific rule change is shown in Attachment B.

Respectfully submitted,

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January 5, 1995

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Attachment A

DIGEST OF À LA CARTE DECISIONS

Prepared by Cole, Raywid & Braverman 1/5/95

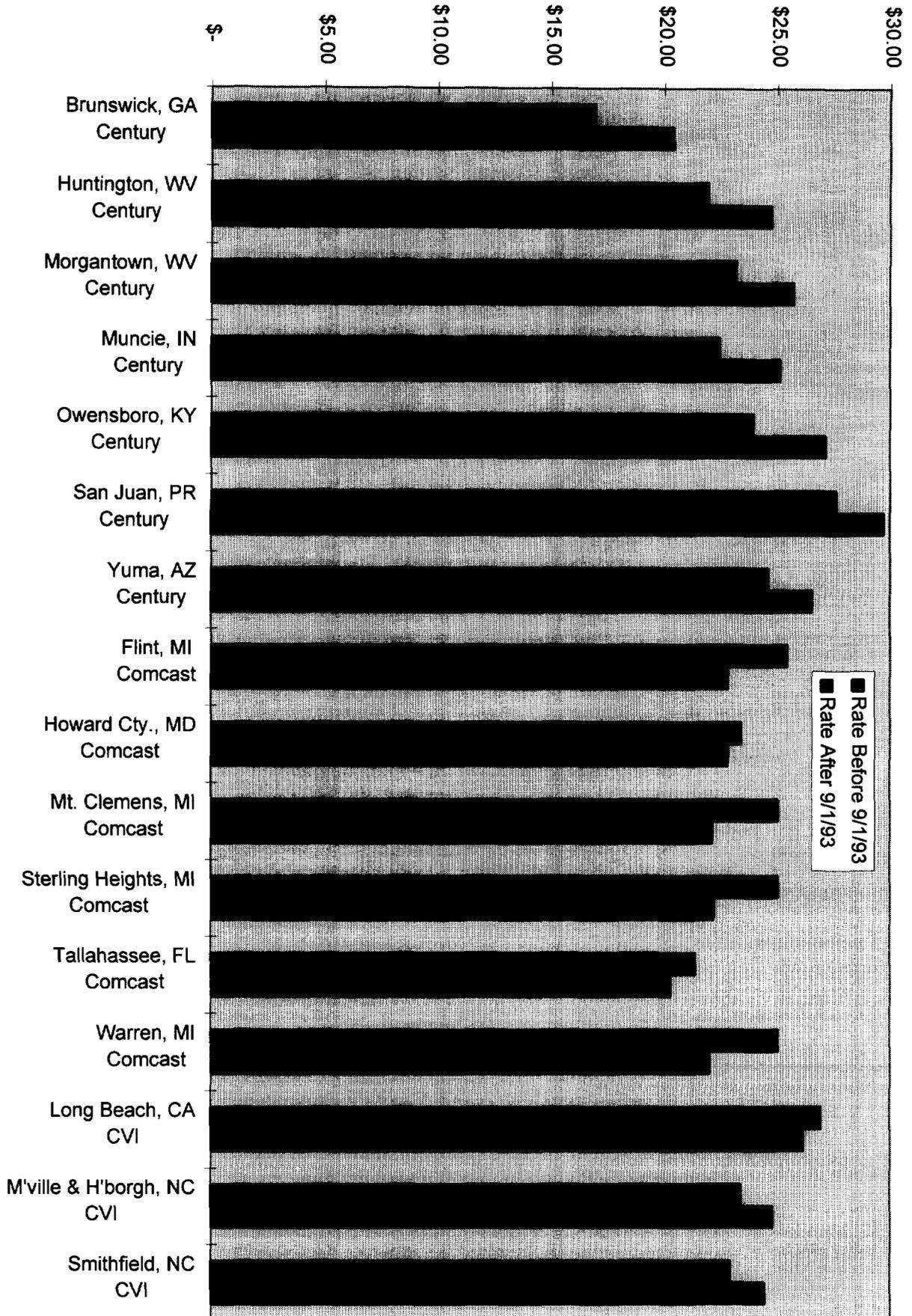
MSO	Franchise	Subs.	Penetration of A La Carte Package	% Subs to Single Channel A La Carte	No. Reg. Chs Before 9/1/93	No. Reg. Chs After 9/1/93	No. Chs. A La Carte	Rate Before 9/1/93	A La Carte Rate After 9/1/93	Rate After 9/1/93	Amt. of Inc. (\$/sub/mo)	Case No.
Adelphia	South Dade Cty, FL	50,983	99.6%	<2%	50	18	32	\$ 23.95	\$ 12.75	\$ 24.75	\$ 6.98	LOI-93-42
Cablevision	Boston, MA	119,112	99.9%	<1%	64	52	12	\$ 27.95	\$ 8.64	\$ 27.95	-	LOI-93-12
Cablevision	Lincoln, NE	8,673	91.2%	8.8%	49	39	11	\$ 28.10	\$ 4.95	\$ 25.21	\$ (0.89)	LOI-93-47
Century	Beverly Hills & Los Angeles, CA	9,066	96.0%	<4%	55	43	12	\$ 26.15	\$ 6.30	\$ 34.39	\$ 6.24	LOI-93-17
Century	Brunswick, GA	21,928	90.4%	9.6%	55	49	6	\$ 16.95	\$ 3.00	\$ 20.41	\$ 3.46	LOI-93-44 LOI-94-4
Century	Huntington, WV	20,191	98.0%	<2%	33	30	3	\$ 21.95	\$ 3.00	\$ 24.75	\$ 2.80	LOI-93-49
Century	Morgantown, WV	7,649	93.8%	6.2%	31	28	3	\$ 23.20	\$ 2.25	\$ 25.75	\$ 2.55	LOI-93-34
Century	Muncie, IN	25,870	77.0%	23%	34	30	4	\$ 22.45	\$ 4.50	\$ 25.14	\$ 2.69	LOI-93-18
Century	Owensboro, KY	20,445	98.0%	<2%	39	36	3	\$ 23.95	\$ 4.50	\$ 27.15	\$ 3.20	LOI-93-45
Century	San Juan, PR	94,293	99.8%	<2%	47	44	3	\$ 27.60	\$ 1.55	\$ 29.72	\$ 2.12	LOI-93-38
Century	Yuma, AZ	22,683	99.0%	<1%	31	28	3	\$ 24.60	\$ 1.50	\$ 26.56	\$ 1.96	LOI-93-39
Colony	Hialeah, FL		91.0%	0%	44	41	6	\$ 26.85	\$ 4.95	\$ 24.20	\$ (2.65)	LOI-93-43
			99.0%	<1%			4		\$ 0.97			
Comcast	Flint, MI	3,432	100.0%	0%	39	43	4	\$ 25.45	\$ 0.49	\$ 22.84	\$ (2.61)	LOI-93-35
Comcast	Howard Cty., MD		99.9%	0.1%	36	38	4	\$ 23.40	\$ 0.57	\$ 22.83	\$ (0.57)	LOI-93-3
Comcast	Mt. Clemens, MI	3,900	99.7%	0.3%	41	43	4	\$ 25.05	\$ 0.48	\$ 22.15	\$ (2.90)	LOI-93-19
Comcast	Sterling Heights, MI	27,873	100.0%	0%	41	44	4	\$ 25.05	\$ 0.49	\$ 22.20	\$ (2.85)	LOI-94-11
Comcast	Tallahassee, FL	43,494	98.5%	1.5%	33	29	4	\$ 21.40	\$ 0.65	\$ 20.30	\$ (1.10)	LOI-93-2
Comcast	Warren, MI		100.0%	0%	41	43	4	\$ 25.05	\$ 0.49	\$ 22.02	\$ (3.03)	LOI-93-33
C-TEC	McBain, MI	168	100.0%	0%	23	13	10	\$ 21.95	\$ 5.95	\$ 21.95	\$ -	LOI-93-1
	Zeeland Ch., MI	763	99.8%	<2%	33	18	17	\$ 21.95	\$ 8.95	\$ 21.95	\$ -	
					32	16	16	\$ 21.95	\$ 8.95	\$ 21.95	\$ -	
CVI	Long Beach, CA	63,267	99.0%	<1%	52	48	5	\$ 26.95	\$ 4.55	\$ 26.15	\$ (0.80)	LOI-93-40
CVI	Morrisville & Hillsborough, NC	481	99.0%	<1%	33	32	3	\$ 23.40	\$ 3.00	\$ 24.80	\$ 1.40	LOI-94-10
CVI	Smithfield, NC	1,896	98.0%	<2%	33	32	3	\$ 22.95	\$ 3.00	\$ 24.45	\$ 1.50	LOI-94-9

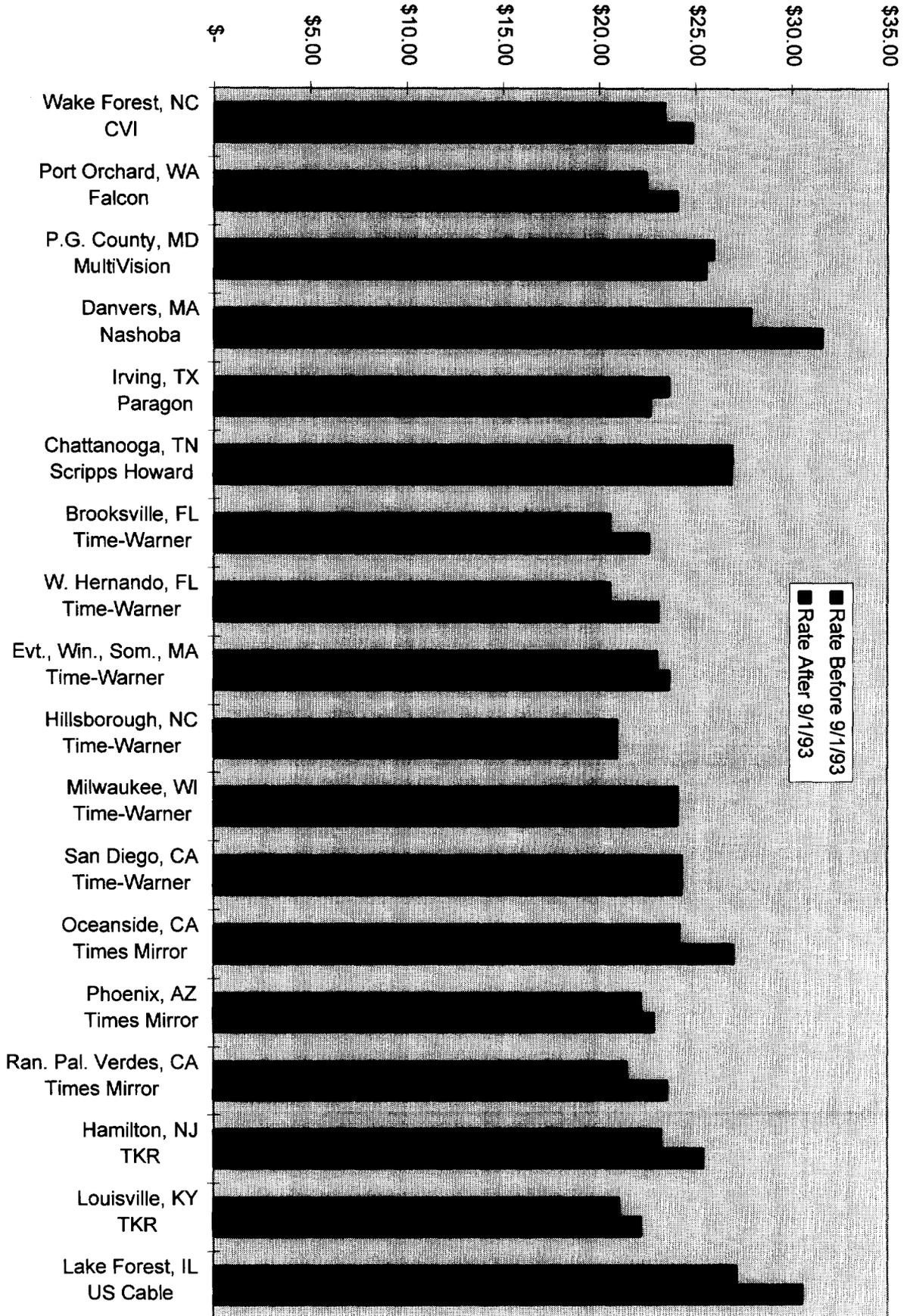
Shaded items have been disallowed

Prepared by Cole, Raywid & Braverman 1/5/95

CVI	Wake Forest, NC	1,803	99.7%	0.3%	33	32	3	\$ 23.40	\$ 3.00	\$ 24.85	\$ 1.45	LOI-94-7
Falcon	Port Orchard, WA	24,530	99.8%	<.2%	35	29	6	\$ 22.45	\$ 5.25	\$ 24.07	\$ 1.62	LOI-93-50
Falcon	Southern Shores, NC	1,283	100.0%	0%	35	29	10	\$ 22.41	\$ 5.25	\$ 21.79	\$ (0.82)	LOI-94-2
MultiVision	Prince George's Cty, MD	39,577	99.0%	<1%	60	58	5	\$ 25.95	\$ 3.61	\$ 25.56	\$ (0.39)	LOI-93-15
Nashoba	Danvers, MA	3,383	86.8%	13.2%	48	51	5	\$ 27.90	\$ 4.95	\$ 31.60	\$ 3.70	LOI-93-23
					49	51	6	\$ 35.90	\$ 12.95	\$ 39.60	\$ 3.70	
NashCharters	Binghamton, NY	90,801	99.8%	<.2%	40	27	5	\$ 28.75	\$ 0.75	\$ 24.94	\$ (1.91)	LOI-93-48
							3		\$ 2.80			
							5		\$ 2.50			
Paragon	Irving, TX	31,429	99.8%	<.2%	47	48	2	\$ 23.63	\$ 1.50	\$ 22.67	\$ (0.96)	LOI-93-25
Scripps Howard	Chattanooga, TN	2,682	97.0%	<3%	43	42	6	\$ 26.93	\$ 3.95	\$ 26.90	\$ (0.03)	LOI-93-51
Time-Warner	Brooksville, FL	3,269	99.6%	<.4%	33	30	3	\$ 20.58	\$ 2.97	\$ 22.59	\$ 2.01	LOI-93-26
	W. Hernando, FL	21,761	99.7%	<.3%	32	29	3	\$ 20.58	\$ 2.97	\$ 23.11	\$ 2.53	LOI-93-26
Time-Warner	Everett, Winthrop Somerville, MA	34,549	100.0%	0%	47	44	3	\$ 23.03	\$ 1.00	\$ 23.65	\$ 0.62	LOI-93-16
Time-Warner	Hillsborough, NC	176	92.6%	7.4%	31	30	3	\$ 20.95	\$ 2.17	\$ 20.95	\$ -	LOI-94-6
Time-Warner	Milwaukee, WI	90,281	95.0%	5%	51	47	4	\$ 24.10	\$ 2.20	\$ 24.10	\$ -	LOI-93-14
Time-Warner	San Diego, CA	154,900	97.6%	2.4%	39	38	4	\$ 24.32	\$ 1.50	\$ 24.32	\$ -	LOI-93-41
Times Mirror	Oceanside, CA	38,824	99.8%	<.2%	41	39	4	\$ 24.20	\$ 2.95	\$ 27.00	\$ 2.80	LOI-93-36
Times Mirror	Phoenix, AZ	174,924	99.9%	<.1%	37	33	4	\$ 22.20	\$ 2.46	\$ 22.88	\$ 0.68	LOI-93-30
Times Mirror	Rancho Palos Verdes, CA	11,741	99.8%	<.2%	43	39	4	\$ 21.45	\$ 1.50	\$ 23.55	\$ 2.10	LOI-93-37
TKR	Hamilton, NJ	26,160	99.9%	<.1%	44	40	4	\$ 23.25	\$ 3.25	\$ 25.44	\$ 2.19	LOI-93-31
TKR	Louisville, KY	62,368	99.9%	<.1%	36	32	4	\$ 21.05	\$ 1.85	\$ 22.20	\$ 1.15	LOI-93-46
US Cable	Lake Forest, IL	4,729	98.7%	1.3%	50	51	4	\$ 27.15	\$ 1.60	\$ 30.57	\$ 3.42	LOI-93-13
Vision Cable	Charlotte & Mecklenburg, NC		99.0%	1%	47	49	4	\$ 24.00	\$ 1.27	\$ 24.73	\$ 0.73	LOI-93-24
			92.0%	8%			4		\$ 3.50			
Vision Cable	Fort Lee, NJ		96.4%	1.6%	41	34	4	\$ 25.60	\$ 2.00	\$ 26.81	\$ 1.21	LOI-93-32
			92.0%	8%			5		\$ 4.00			

Shaded items have been disallowed





Attachment B

RULE CHANGES REQUESTED BY CONTINENTAL CABLEVISION'S PETITION FOR RECONSIDERATION OF SIXTH ORDER

Section 76.986 "À la carte" Offerings ***

(c) A collective offering of per channel offerings may be treated as a New Product Tier if

(i) the collective offering meets the conditions set forth in Section 76.987, or

(ii) the collective offering was created between April 1, 1993 and September 30, 1994, involved only a small number of channels on BSTs or CPSTs, 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, or

(iii) the collective offering involves only a small number of channels on BSTs or CPSTs.

Section 76.987 New Product Tiers

(b) In order to be eligible to offer NPTs, cable operators must meet the following conditions:

(1) Operators offering NPTs are prohibited from making fundamental changes to what they offer on their BSTs and CPSTs offerings on September 30, 1994. Operators may drop channels or move channels between BSTs and/or CPSTs or to an à la carte offering so long as the aggregation of such changes do not constitute a fundamental change in their BST or CPSTs.

(b)(2) Operators may on a one-time basis move a small number of channels from BSTs or CPSTs to NPT. All other channels offered on a BST or CPST on September 30, 1994 may not be dropped to NPT until ~~Operators may not drop channels that were offered on their BSTs or CPSTs on September 30, 1994 and move them to NPTs unless they wait~~ at least two years from the date the channels were dropped from the BSTs or CPSTs. Time shifted versions, slightly altered versions or renamed versions of channels offered on BSTs and CPSTs on September 30, 1994 shall not be exempt from this restriction.