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

In the matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation	)	MM Docket No. 92-266
Implementation of Sections of the Cable Television Consumer Protection and Competititon Act of 1992: Rate Regulation	)	MM Docket No. 93-215

PETITION FOR PARTIAL RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR CLARIFICATION

The City of Tallahassee, Florida, petitions for reconsideration, or, in the alternative, for clarification, of so much of the Sixth Order on Reconsideration, etc. (FCC 94-286) as the Cable Bureau relied on in its à la carte order (DA 94-1275, released November 18, 1994) as a basis for (i) denying full refunds of COMCAST's past overcharges to cable subscribers and (ii) rewarding COMCAST's past violations as to negative options and à la carte packages by waiving the Commission's rules as to new product tiers on a going-forward basis.

The reasons for partial reconsideration of the Sixth Order, etc., are as set forth in the City's application for review of DA 94-1275, in file no. LOI-93-2, filed December 19, 1984. A copy of that application is attached and is incorporated by reference

herein as if set forth in full. The Bureau's error in DA 94-1275, resulted in turn in a computational diminution of the full refunds due cable subscribers in the Bureau's subsequent rate order, DA 94-1480 (released December 13, 1994). Unless the Commission's order is clarified or reconsidered, it is also possible that the Bureau will interpret the order to allow operators to (1) charge higher rates than would be otherwise authorized under the Form 1200 going forward (by counting the channels as unregulated for purposes of determining Form 1200 rates that will serve as the base rates for going forward and price cap adjustments, even though this will result in permanantly excessive rates for the future); and (2) will allow operators who retiered and placed products in "à la carte" tiers to charge effectively unregulated rates for that à la carte programming, even though subscribers were automatically provided those services and even though the tiers were part of the service packages which gave operators market power in the first place.

Conclusion

WHEREFORE, the Commission should modify paragraph 51 of the Sixth Order, etc., to eliminate any implication that a cable operator's flagrant evasion of rate regulation by retiering existing cable programming as a package on a bogus à la carte tier should computationally diminish refunds to subscribers for past overcharges or (ii) that the cable operator's past evasion

and present non-compliance with the "Going Forward" rules should be grandfathered.

Contrary to paragraph 51, no reverse migration or disruptive retiering is required to correct the evasion. The cable programming channels in the ersatz à la carte package need only be counted as regulated channels for purposes of setting rates and for calculating refunds.

Alternatively, the Commission should clarify the Sixth Order, etc., to make it clear that the Sixth Order does not support the result reached by the Bureau in DA 94-1275 and DA 94-1480.

Respectfully submitted,

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January 5, 1995

Attachment

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	)	

To the Commission:

APPLICATION FOR REVIEW

Summary

The Commission should review and reverse the Cable Bureau's order as one of thirty such à la carte orders released since mid-November. The à la carte issue goes to the very integrity of the commission's regulation of cable programming service rates. In the order below, DA 94-1275, released November 18, 1994, the Bureau whitewashed the cable operator's flagrant evasion of rate regulation by retiering existing cable programming as a package on a bogus à la carte tier.

In failing to recognize that the retiering was fatally infected from the outset, the Bureau erred substantively and procedurally. Its error below resulted in (i) unjustly denying through computational diminution the full refunds due subscribers for overcharges, and (ii) rewarding COMCAST's past violation by

waiving without request, notice, or justification the unlawfully instituted evasion of rate regulation on a going-forward basis.

The Bureau erred in not recognizing that the resounding failure in the marketplace of COMCAST's à la carte option conclusively demonstrated that COMCAST had simply evaded rate regulation by the retiering. Apparently, less than 0.1 percent of COMCAST's subscribers ordered single à la carte channels. The Bureau did find that COMCAST's migration of four existing cable programming services to an unregulated tier on September 1, 1993, (1) had "no sufficient justification ... other than to avoid rate regulation" and (2) did not provide subscribers with a realistic service choice under the Commission's two-part test in its Rate Order released May 3, 1993 (Order, ¶¶ 15, 19). It erred in excusing COMCAST's violation of the Commission's rules by saying it wasn't clear ex post facto that COMCAST's package was not permissible under the fifteen-factors listed in the Second Reconsideration Order, which did not become effective until May 15, 1994. The resort to ex post facto exculpation is logically inconsistent with the Bureau's twice recognizing that it "must evaluate its à la carte package under the rules that were in effect when it restructured." (Order, ¶ 16 & n.19)

The Bureau ignored the fact that consumer choice was not enhanced by the migration of channels theretofore available on regulated tiers to an unregulated tier. No new cable programming was offered as a result, and -- as the market demonstrated -- the

theoretical à la carte option satisfied neither a public need nor demand in practice.

There is no question that the retiering was in violation of the 1993 Rate Order when instituted. Under the "when instituted" test, that should have disposed of the matter. But the Bureau went on, and in the process overlooked two salient points. The Going-Forward order establishes that such à la carte packaging is unlawful now and that under the statute, à la carte tiers were not entitled to deregulated status. As to the period intervening (between September 1, 1993, and May 15, 1994), the Bureau erred in failing to impose on COMCAST the burden of proof that it fell within the rationale of exemption from regulation. Any ambiguity (Order, ¶ 20) should have been resolved against the party seeking to come within the exemption, and the Bureau failed to give any weight to the reasonable finding of the franchising authority in its rate regulation proceeding that the operator's package of purportedly à la carte channels was part of basic service subject to regulation.

COMCAST's actions resulted in basic rate overcharges that should be refunded to COMCAST's subscribers. The Bureau's action was apparently motivated by a concern that, to solve the problem created by COMCAST's action, it would be necessary to order COMCAST to re-tier its services. That was not the case. All that was required to prevent a windfall to COMCAST was to count

the à la carte channels as regulated channels for purposes of setting rates and for establishing refunds.

The Bureau erred in allowing COMCAST to continue to charge high rates and benefit from it retiering on a grandfathered basis, thereby waiving without request, notice, or justification the contrary public interest findings and legal conclusions adopted in the Going Forward order (FCC 94-286), released November 18, 1994.

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	)	

To the Commission:

APPLICATION FOR REVIEW

The City of Tallahassee, complainant in the above-captioned matter, hereby seeks review of the Bureau order (DA 94-1275), released November 18, 1994, a copy of which is appended hereto.

The Bureau's order deals with the regulation of à la carte channels. The order is one of a series of such orders numbering thirty to date, only one of which granted relief.[1] The à la carte issue goes to the very integrity of the Commission's

1/ On November 18, 1994: South Dade County, Fla., DA 94-1277; Tallahassee, Fla., DA 94-1275; Milwaukee, Wisc., DA 94-1276. On November 25, 1994: Huntington, W.Va., DA 94-1314; Oceanside, Calif., DA 94-1310; Phoenix, Ariz., DA 94-1311; Rancho Palos Verde, Calif., DA 94-1309; Irving, Tex., DA 94-1315; Hamilton, N.J., DA 94-1312; Louisville, Ky., DA 94-1313. On December 2, 1994: Central Florida, DA 94-1356; Morgantown, W.Va., DA 94-1358; Muncie, Ind., DA-1354; Ownesboro, Ky., DA 94-1361; Yuma, Ariz., DA-1360; Flint, Mich., DA 94-1359; Mt. Clements, Mich., DA 94-1355; Warren, Mich., DA 94-1357; PG County, Md., DA 94-1352; San Diego, Calif., DA 94-1378; Everett, Mass., DA 94-1353. On December 12, 1994: San Juan, P.R., DA 94-1425; Long Beach, Calif., DA 94-1424; Morrisville, No. Car., DA 94-1429; Hillsborough, No. Car., DA 94-1432; Smithfield, No. Car., DA 94-1428; Brunswick, Ga., DA 94-1426; Howard County, Md., DA 94-1423; Sterling Heights, Mich., DA 94-1430; Lake Forest, Ill., DA 94-1431.

regulation of cable programming service rates. As such, the order raises significant issues of general importance within the meaning of Section 1.115(b)(2).

In the order below the Bureau whitewashed the cable operator's flagrant evasion of the rate regulation in its retiering existing cable programming as a package on a bogus à la carte tier. The Bureau found that retiering the channels and then treating them as unregulated channels for purposes of setting rates was in violation of the rules when instituted on September 1, 1993, yet denied reparations for past overcharges and waived the violation going-forward on the basis of a supposed intervening ambiguity created by the Second Reconsideration Order, which became effective some eight months after retiering. The order errs in failing to adhere to the Commission's rules placing the burden of proof in rate matters on the operator (§ 76.937), in withholding rate refunds from subscribers as though these refunds were punishment of the operator for past rules violations based on mens rea instead of as reparations for excess rates flagrantly charged the cable subscribers, and in waiving without notice on a going-forward basis the substantive rules adopted by the Commission in its concurrently released going-forward order in Docket Nos. 92-266 and 93-215 (FCC 94-286).

Course of the Proceedings Below

On September 15, 1993, the City filed a letter, a Form 329, and supporting documentation with the Bureau alleging violations

of Commission rules governing the provision of cable service by its local operator, COMCAST. In response thereto the Chief of the Mass Media Bureau issued a letter of inquiry to COMCAST on November 17, 1993. COMCAST responded by letter of December 15, 1993. On June 24, 1994, the City furnished additional information to the Commission derived from the files in the co-pending rate order appeals by COMCAST.

On November 18, 1994, the Bureau issued an order purporting to dispose of the à la carte issues raised in the November 17, 1993, letter of inquiry. The remaining issues were not dealt with in the November 17th order, Order ¶ 1 n.2, but were decided in the Bureau's subsequent order (DA 94-1480), released December 13, 1994, which granted limited refunds for the period September 1, 1993, through May 14, 1994.

The Bureau held essentially that (i) it could not determine that COMCAST's transfer, on the eve of rate regulation, of four channels from the basic and cable programming tiers to a separate, non-regulated à la carte tier would thwart rate regulation of cable programming service, (ii) it would not order retiering in accordance with the going-forward rules released concurrently by the Commission in FCC 94-286 but instead would "grandfather" COMCAST's violation of the new rules, and (iii) it would not order refund of past overcharges.

I. THE MARKETPLACE FAILURE OF ITS À LA CARTE OPTION DEMONSTRATES THAT COMCAST EVADED RATE REGULATION BY RETIERING.

The resounding indifference of Tallahassee subscribers to COMCAST's alleged à la carte option demonstrates that COMCAST's offering of the four channels à la carte was not a bona fide offering in the marketplace but, rather, was only an evasion of the Commission's rules in violation of Section 76.937 of the Commission's Rules and Section 623(h) of the 1992 Cable Act. It had no other purpose or effect (Order, ¶ 15). The retiering of the four old programming channels brought no new services to subscribers, and the optional repackaging as à la carte services satisfied no public need or demand in fact.

The historical facts are undisputed. In anticipation of rate regulation commencing September 1, 1993, COMCAST on September 1st broke out four programming services that had previously been included in its "standard service" (cable programming service) tier. COMCAST claimed that the newly created, "Value Pak" service was offered on an à la carte basis -- and therefore was not subject to rate regulation -- because subscribers could buy the programming services individually.

In fact, purchase of the individual channels by subscribers was not a commercially realistic option. The package price for Value Pak was 65¢ per month. The rates of the channels individually were 33¢ per month for three and 49¢ per month for the

fourth. Thus, the purchase of any two channels would cost *more* than the purchase of the package of *four* channels.

In addition, the circumstances of the offering of Value Pak on September 1st made the individual purchase of Value Pak channels an unrealistic choice for subscribers. On September 1st the Value Pak package was automatically provided to all existing standard tier subscribers, unless they affirmatively opted out of the service.[2] At the time Value Pak was initially offered, COMCAST announced that individual channel election carried with it a $ 1.04 per month set-top converter charge. Thus, a single Value Pak channel would have resulted in a monthly charge of $ 1.37 or $ 1.53, compared with 65¢ per month for the Value Pak package. The significant point is that the initial communication to subscribers offering them the negative option showed that it would cost more to receive one programming service than to received the entire Value Pak. As a consequence only thirty-five of the system's 43,494 basic tier subscribers opted out. Even after COMCAST deleted the $ 1.04 converter charge, only 652 subscribers, or 1.5 percent, had elected not to receive Value Pak. The Bureau did not find that any subscribers beyond the initial thirty-five subscribers -- less than 0.1 percent -- ever elected to subscribe to a single channel from the Value Pak package on an à la carte basis. The marketplace had spoken:

2/ The offer clearly violated Section 623(f) (Negative Option Billing Prohibited) of the Cable Act, 47 U.S.C. § 543(f), and Section 76.981 of the Commission's Rules, 47 C.F.R. § 76.981, designed to preserve subscriber options.

COMCAST's à la carte offering was not a realistic option. Under the Commission's then-extent rules, that meant he offering had to be treated as a regulated tier and counted for purposes of getting rates, whether or not one assumed the action was an "evasion."

II. THE BUREAU ERRED IN ASSIGNING THE BURDEN OF PROOF OF EVASION, AND IT FAILED TO GIVE APPROPRIATE WEIGHT TO THE RATE FINDINGS OF THE LOCAL FRANCHISING AUTHORITY.

The Bureau's determination that it could not find evasion after May 15, 1994 (Order, ¶ 20) misconceived the issue before it and thus is irrelevant.

First, the Bureau overlooked the fact that the burden of proof is on the operator to show that its rates are reasonable (§76.937 [Burden of Proof]). An operator's rates for cable programming service are not reasonable, if part of the cable programming service has been evasively transferred to a non-regulated tier. Nor can the Commission counter once the failure to count as channels for purpose of setting rates channels that remain subject to regulation. The burden is on the operator to demonstrate that (1) its supposed à la carte tier qualifies for deregulation, and (2) the transfer was legitimated by a valid à la carte offering in the fist place. Here, there was no bona fide à la carte offering, and COMCAST has obviously failed to persuade the Bureau on that point (Order, ¶ 19 ["does not constitute a realistic service offering"]).

Second, the Bureau has failed to give the presumption of correctness to the franchising authority's determination that COMCAST's rates for basic service were unreasonable. Necessarily embodied in the City's ultimate conclusion of unreasonableness is the underlying finding that the four channels alleged by COMCAST to be à la carte channels are in fact part of the cable programming service tier. This error is not cured by the Commission's rate order (DA 94-1480) released December 13, 1994, because the later order accepts the erroneous determination in the instant order (DA 94-1275) that Value Pak, though a cable programming tier, is not to be so regulated.

Whether the Bureau was prepared to make an affirmative finding of evasion or not, COMCAST had clearly failed to carry its burden of proof under Section 76.937 of the Rules that its rates based on the retiering were reasonable. What's more the Bureau failed to give the required weight to the local franchising authority's finding that COMCAST's rates were unreasonable as a result thereof.

III. COMCAST's EVASIVE RETIERING RESULTED IN OVERCHARGES THAT SHOULD BE REFUNDED TO COMCAST's SUBSCRIBERS.

Given the way the FCC rate formulae work, wherein rates are tied to the total number of regulated channels, the establishment of the à la carte tier improperly allowed COMCAST to charge substantially more per month for basic service that would have otherwise been possible. In addition, retiering removed four programming channels from rate regulation entirely by negative

option, without the offsetting benefit of giving subscribers a realistic choice of taking these channels à la carte.

There is no justification for deregulating these channels. The Bureau found that their deregulation was not consistent with the public interest as defined in the 1993 Rate Order (Order, ¶ 19) when COMCAST retiered in September, 1993, and their deregulation is not consistent with the public interest, as most recently defined in the Going Forward order (Order, ¶ 21). Whether the creation of à la carte tiers became momentarily consistent with the public interest in the interim period between the effective date of the Second Reconsideration Order (May 14, 1994), and the Going Forward order is irrelevant, since the test to be applied -- as the Bureau itself twice recognized in paragraph 16 of the order below -- was the date of the retiering.

IV. THE COMMISSION ERRED IN WAIVING PROSPECTIVE RATE REGULATION OF A CABLE PROGRAMMING TIER WITHOUT NOTICE.

COMCAST's Value Pak package does not qualify as a new product tier (NPT) under the Commission's "going forward" order (FCC 94-286), released concurrently. It was arbitrary for the Bureau, in effect, consider it a NPT when it does not meet the criteria of the rule. This is, in effect, a waiver of the rule. COMCAST did not ask for such a waiver, the City had no opportunity to oppose any such request, and the Bureau had no basis for granting such a waiver on this record. The result is to allow COMCAST to place channels that clearly provide it market

power on a tier that the FCC does not intend to regulate. The rationale for non-regulation of NPT's is at odds with an order that assures an NPT need not be regulated because it will have to compete with an existing tier of regulated and established services. Moreover, in recent orders, the Bureau seems to be readings its LOI decisions to require it to count à la carte channels as unregulated for purposes of establishing rates that will apply on a going forward basis. Even if one assumed that the Commission could retroactively limit operator refund obligations, it has no authority to interpret its rule to allow operators to continue to gain all the financial benefits that accrue from counting à la carte channels as an unregulated tier. The Commission has an affirmative statutory obligation to prevent evasions and to ensure rates are reasonable. As it is well aware, by creating à la carte tiers, operators avoided taking the 10 and 17 percent reductions the FCC found necessary to carry out its statutory mandate; the FCC therefore cannot simply endorse a system that locks in this evasion on a going forward basis.

Paragraph 51 of the Going-Forward order, which deals with grandfathering, does not justify the Bureau's action here. Paragraph 51 purports to grandfather packages of "à la carte" channels against reverse migration, but only where the "package ... was not clearly ineligible for unregulated treatment under our à la carte policy." The COMCAST package was demonstrably unlawful at the date it was instituted, the Bureau so found, and

COMCAST has failed to demonstrate that it became legal thereafter.

The going-forward rule is an avowed change of substantive policy "contrary to our prior decisions...". Sixth Order (FCC 94-286), ¶¶ 7, 46 (released Nov. 18, 1994).

As such, the waiver violates the Administrative Procedure Act.

Conclusion

For the foregoing reasons, the Commission should review the Bureau's order below and hold that COMCAST's retiering did not deregulate its à la carte tier from September 1, 1993, forward. It should order the resulting overcharges refunded to COMCAST's subscribers, and set rates accordingly.

Respectfully submitted,

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Attorneys for
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December 19, 1994

Attachment

Certificate of Service

I hereby certify that I have caused to be delivered by mail this day a copy of the foregoing Petition for Partial Reconsideration or, in the Alternative, for Clarification to:

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