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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections of the Cable)
Television Consumer Protection and)
Competition Act of 1992:)
Rate Regulation)

MM Dkt. No. 92-266

Implementation of Sections of the Cable)
Television Consumer Protection and)
Competition Act of 1992:)
Rate Regulation)

MM Dkt. No. 93-215

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

COMCAST CABLEVISION OF
TALLAHASSEE, INC.

Peter H. Feinberg
Peter C. Godwin

Its Attorneys

DOW, LOHNES & ALBERTSON
1255 Twenty-Third Street, N.W.
Suite 500
Washington, D.C. 20037

February 3, 1995

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Competition Act of 1992:)	MM Dkt. No. 93-215
Rate Regulation)	
)	

**OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION OR, IN THE
ALTERNATIVE, FOR CLARIFICATION**

Comcast Cablevision of Tallahassee, Inc. ("Comcast"), by its attorneys, hereby files this Opposition to a Petition for Partial Reconsideration or, In the Alternative, For Clarification (the "Opposition" and the "Petition") filed by the City of Tallahassee, Florida (the "City") concerning the Federal Communications Commission's (the "Commission's") Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Dkt. Nos. 92-266 and 93-215, FCC 94-286 (rel. Nov. 18, 1994) (the "Sixth Recon. Order").

In its Petition, the City fails to provide an adequate basis for Commission reconsideration of the Sixth Recon. Order. The City, rather than addressing the merits of the Commission's Sixth Recon. Order, instead disputes the Cable Service Bureau's (the "Bureau's") treatment of Comcast's à la carte channels in the Bureau's November 18, 1994

Order.^{1/} The City appends a recently filed Application for Review of that Order as its substantive showing that the Commission should reverse the policies it adopted in the Sixth Recon. Order.

Even if the Commission were to consider the arguments presented in the defective Petition, the City provides no basis by which the Commission should reverse its prior conclusions concerning à la carte packages, nor does it demonstrate that the Order needs to be clarified or modified in any respect. The City's Petition, therefore, must be denied.

I. The City's Petition Fails to Address the Merits of the Commission's à La Carte Policy.

The City does not argue against the Commission's new approach to the treatment of packaged service offerings. Rather, it argues that the Bureau improperly interpreted the Commission's Sixth Recon. Order when it reviewed Comcast's à la carte package offered on its Tallahassee, Florida system. However, the Bureau's Order, which merely *interprets* the Commission's Sixth Recon. Order, is not at issue in the Commission's Sixth Recon. Order, and therefore is not a matter properly raised in the City's Petition. The petition for reconsideration should have addressed the substantive legal issues decided by the Commission, not a Bureau decision which interprets the Commission's order.

In its Sixth Recon. Order, the Commission concluded that its former à la carte rules apparently were unclear to the industry and local regulators,^{2/} and that it therefore

1/ Comcast Cablevision, City of Tallahassee: Letter of Inquiry, DA 94-1275 (rel. Nov. 18, 1994) (the "Order").

2/ Sixth Recon. Order at ¶ 42.

should treat *on a case-by-case basis* à la carte packages, going forward, as cable programming service ("CPS") tiers.^{3/} For purposes of previously existing à la carte packages, the Commission stated that though, in some cases, à la carte packages may not be permissible under the prior standards, "in other cases . . . it is not clear how our test should be applied to the package at issue,"^{4/} and that in such cases, it would be fair, "in light of the uncertainty created by our [former à la carte] test, to allow cable operators to treat existing packages as NPTs even though [they] would not qualify under the [new NPT] rules. . . ." Id. (emphasis added).

The City suggests that the Commission should modify paragraph 51 of its Sixth Recon. Order such that good faith restructuring of services, such as Comcast's, be deemed a rate evasion. Petition at 2-3. But even a generous reading of the City's Petition does not provide adequate support to warrant reconsideration of this policy. The Commission's Sixth Recon. Order properly found that cable operators that restructured services should not be penalized for attempting to comply in good faith with the Commission's unclear à la carte regulations. Sixth Recon. Order at ¶ 51. Once the Commission determined that an operator should not be penalized for restructuring its services, and that it would be "fair, in light of the uncertainty created by [its] test, to allow cable operators to treat existing packages as NPTs," it would be unreasonable and arbitrary to require operators to count these channels as regulated services in recomputing cable rates under Forms 393 and 1200 as advocated by the City. In effect, the City is requesting that

^{3/} Id. at ¶ 46.

^{4/} Id. at ¶ 51.

the Commission disavow or "clarify" what logically follows from its order: that if these channels are considered channels in an NPT, they cannot not be included as regulated channels. Whether or not the Bureau properly has interpreted the Commission's policy and regulation as implemented in the Sixth Recon. Order (an issue properly for the Commission to determine in a separate proceeding), there is no reason for the Commission to reconsider or clarify its own order. Moreover, the City has provided no reasons why the Commission should do otherwise, other than its dismay at how the Bureau interpreted the Commission's Sixth Recon. Order.

The City's Petition simply provides no basis for suggesting that the Commission's approach in classifying à la carte packages is improper and deserving of reconsideration or clarification. The City asserts only that the Bureau *will* interpret the Sixth Recon. Order to allow operators to charge improperly high rates and engage in improper retying. Petition at 2. However, this assertion has proven false, and the Commission's Sixth Recon. Order does not lend itself to such interpretation. The Bureau already has interpreted the Commission's Sixth Recon. Order in several cases to disallow certain restructurings.

The Bureau has issued numerous letters of inquiry on à la carte packages and reviewed the facts of each case. Based on those facts and the Commission's Sixth Recon. Order, the Bureau has disallowed the à la carte packages of several cable operators^{5/} and has afforded NPT treatment to the à la carte packages of other operators, such as Comcast.

^{5/} See, e.g., C-TEC Cable Systems, DA 94-1622 (rel. Dec. 30, 1994); Century Southwest Cable TV, DA 94-1553 (rel. Dec. 22, 1994).

The City's assertion that the Bureau *will* interpret the Sixth Order in a particular manner, therefore, has been disproved, and in any event, should be addressed on a case-by-case basis.

II. The City's Application for Review Provides No Basis for Either Reversing the Bureau's Decision in the Comcast LOI-93-2 or Reconsidering the Commission's Sixth Recon. Order.

As discussed above, the Commission should reject outright the City's Petition for failure to address the substantive issue of whether the action which the Commission took in its Sixth Recon. Order is improper. Moreover, the Commission already is considering the City's Application for Review and Comcast's Opposition to that Application in a separate proceeding. See Comcast's Opposition to Application for Review (Jan. 3, 1995) ("Opposition"), attached hereto and incorporated by reference herein.

Nevertheless, as Comcast noted in the attached Opposition, the Bureau's action was proper. The Bureau did not impermissibly waive the Commission's rules, but rather applied the Commission's Sixth Recon. Order and the new NPT rules to reclassify Comcast's à la carte package as an NPT. Moreover, Comcast demonstrated in the LOI proceeding that was the basis for the Bureau's Order that, under the rules that the Commission had adopted, Comcast's à la carte package was *bona fide*. Finally, Comcast demonstrated that the Commission's regulations and policies do not require Comcast to issue refunds. Comcast's restructuring was not done in bad faith, comported with the criteria enunciated in the

Commission's previous orders,^{6/} and, because the channels that comprise the à la carte package will qualify as an NPT, do not result in refund liability to subscribers.

The Commission's à la carte rules as established in the Sixth Recon. Order were intended to permit cable operators to offer à la carte services in packages and to provide subscribers with greater choice. Cable operators relied on the Commission's initial rules to restructure service offerings as of September 1, 1993. The Commission's Sixth Recon. Order recognized that those rules were vague and created uncertainty in the industry, and that though some restructurings may be suspect, not all restructurings can be considered evasive due to the indefinite nature of the à la carte rules.

The Commission therefore ruled that cable operators should not be penalized and instead should be permitted to offer former à la carte services as NPTs. The Commission's answer was an equitable solution to the problem. Comcast's restructuring was

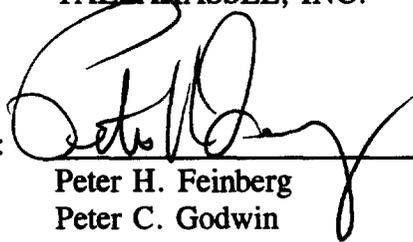
^{6/} See Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5651, 5836-38 (1993); Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulations, Second Order on Reconsideration, Fourth Report and Order, and Fifth Further Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4210-18 (1994).

proper in light of the Commission's Sixth Recon. Order and the Bureau did not err in reaching that holding. For the foregoing reasons, the Commission should dismiss the City's Petition.

Respectfully submitted,

COMCAST CABLEVISION OF
TALLAHASSEE, INC.

By:



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Its Attorneys

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February 3, 1995

CERTIFICATE OF SERVICE

I, Cynthia R. Porter, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 3rd day of February 1995, I caused to be delivered the foregoing Opposition to Petition for Partial Reconsideration or, in the Alternative, for Clarification by hand delivery to:

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Cynthia R. Porter

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**Before the
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Washington, D.C. 20554**

In the Matter of)
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COMCAST CABLEVISION OF TALLAHASSEE, INC.)
City of Tallahassee)
)
Letter of Inquiry)
)
)

LOI-93-2

DA 94-1275

OPPOSITION TO APPLICATION FOR REVIEW

**COMCAST CABLEVISION OF
TALLAHASSEE, INC.**

**Peter H. Feinberg
Peter C. Godwin**

Its Attorneys

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1255 Twenty-Third Street, N.W.
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January 3, 1995

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

In the Matter of)	
)	
COMCAST CABLEVISION OF TALLAHASSEE, INC.)	LOI-93-2
City of Tallahassee)	
)	DA 94-1275
Letter of Inquiry)	

OPPOSITION TO APPLICATION FOR REVIEW

Comcast Cablevision of Tallahassee, Inc. ("Comcast" or the "Company"), by its attorneys, hereby files this Opposition to an Application for Review (the "Application") filed by the City of Tallahassee (the "City") concerning the *Memorandum Opinion and Order*, DA 94-1275 (rel. Nov. 18, 1994) ("*Order*") issued by the Cable Services Bureau (the "Bureau").

The City argues in its Application that the Bureau improperly classified Comcast's New Product Tier (the "NPT") as a *bona fide* NPT by waiving the Federal Communications Commission's (the "Commission") NPT rules, and that the Bureau should have ordered refunds for charges to subscribers for Comcast's former *à la carte* package. The Application should be denied because the City has failed to demonstrate that the Bureau's *Order* is inconsistent with the Commission's regulations and with its policies as adopted in the *Sixth Order on Reconsideration*.^{1/}

^{1/} 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*, MM Dkt. Nos. 92-266 and 93-215, FCC 94-286 (rel. Nov. 18, 1994) ("*Sixth Recon. Order*").

STATEMENT OF FACTS

On September 1, 1993, Comcast offered its subscribers in the City of Tallahassee a four channel *à la carte* package of services (known as "Value Pak") which could be purchased individually or as a package. The City filed with the Commission a letter dated September 16, 1993 alleging that Comcast's *à la carte* package violated the Commission's rules. In response, the Commission issued a Letter of Inquiry^{2/} which requested that Comcast provide information regarding its services and rates. Comcast's response to this inquiry explained that the services were *bona fide à la carte* services offered to subscribers pursuant to the Commission's regulations.^{3/}

The Bureau issued an *Order* on November 18, 1994 holding that it could not find that Comcast's *à la carte* package offering violated the Commission's regulations. In its *Order*, the Bureau held that the Value Pak services would be considered an unregulated NPT going forward. The City filed its Application for Review of this *Order* on December 19, 1994 requesting that the Commission review and reverse the Bureau's *Order* for failure to comply with the Commission's regulations and orders.

I. The Bureau Did Not Waive the Commission's Rules.

It is clear that the Bureau correctly, and in accordance with the *Sixth Order on Reconsideration*, determined that Comcast's *à la carte* offering was a *bona fide* NPT. The City argues that the Bureau should not have deemed Comcast's Value Pak services a NPT

^{2/} Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Patrick Keating, General Manager, Comcast Cablevision of Tallahassee, Inc., LOI-93-2 (Nov. 17, 1993) ("LOI") (Exhibit A).

^{3/} Exhibit B, Response at 5-10.

under the Commission's *Sixth Recon. Order*, and that to do so constituted an improper waiver of the Commission's regulations. Application at 8. The City also incorrectly argues that the Bureau's decision violates the Administrative Procedure Act. Application at 10. The Bureau's *Order* conforms to the provisions of the Commission's *Sixth Recon. Order* in all respects and does not constitute a waiver as applied to Comcast's Value Pak offering.

The Commission stated that, with regard to *à la carte* packages such as Comcast's, "it is not clear how the [*à la carte*] test should be applied. . . ." *Sixth Recon. Order* at ¶ 51. Therefore, the Commission indicated that "[i]n those cases, we think it is fair, in light of the uncertainty created by our test, to allow cable operators to *treat existing packages as NPTs. . . .*" *Id.* (emphasis added). The Commission created this subset classification of NPTs simultaneously with its NPT policies and rules. The Bureau's *Order*, therefore, plainly does not constitute a waiver, but rather constitutes a substantive application of the Commission's holding in its *Sixth Recon. Order*, that permits operators to treat certain classes of *à la carte* packages "as NPTs *even though [they] would not qualify* under the rules we establish today. . . ." *Id.* (emphasis added).

The Bureau's action is authorized by Section 76.986(c) of the Commission's rules. That rule provides that a collective offering may be treated as an NPT if the offering "involved only a small number of channels or BSTs or CPSTs, and the operator had reasonable grounds to believe the collection offering complied with the Commission's requirements as of the date it was first offered." 47 C.F.R. § 76.986(c). It is also confirmed by Question No. 4 of the Commission's Q&A released on December 29, 1994, which states that a qualifying *à la carte* package automatically becomes an NPT on

January 1, 1995. Second, Comcast continued to provide the components of the package on a stand-alone basis. That so few subscribers elected to take individual components of the package was testament to Comcast's extremely low (*i.e.*, benchmark) pricing. In light of the Commission's policy as expressed in the *Sixth Recon. Order* and the Commission's codification of that policy, if the City wished to dispute the underlying legal conclusions in the Bureau's *Order*, the proper remedy would be to seek review of the *Sixth Recon. Order* and Section 76.986(c), not challenge the instant *Order*.

II. The City's Claim That The Alleged Marketplace Failure of Comcast's Value Pak Demonstrates That Comcast Evaded Regulation is Flawed.

The City's argument that "[t]he resounding indifference of Tallahassee subscribers to COMCAST's alleged à la carte option demonstrates that COMCAST's [Value Pak] was not a bona fide offering" is unconvincing,^{4/} and in no manner demonstrates that Comcast's service offering constituted a rate evasion.

The Commission's test to determine that a package of services is a *bona fide à la carte* package as enunciated in the *Sixth Recon. Order* does not make marketplace acceptance a *dispositive* test of whether a package of services is a legitimate *à la carte* package. As the Bureau recognizes in its *Order*, it "will not find an actual evasion occurred . . . if Comcast's action complied with our *à la carte* policy that was in effect at the time of its restructuring."

^{4/} Application at 4.

Order at ¶ 16 (emphasis added). Comcast did comply with the FCC's regulations which were in effect when it restructured its services.^{5/}

Under the Commission's original two-part standard (only *one part of which* implicates marketplace considerations),^{6/} the Bureau properly held that it could not find that Comcast's Value Pak was not a *bona fide à la carte* package. *Order* at ¶ 19. First, it is undisputed that Comcast priced the services such that the package price did not exceed the sum of the charges for the individual services. And, although the Bureau concluded that the low level of subscribers that chose not to subscribe to the service "tend[ed] to show, in this instance, that the per-channel offering does not constitute a realistic service offering,"^{7/} the Bureau's determination that Comcast did not evade rate regulation was based in part on the fact that the test itself was not clear, and that the test *did not specify* what percentage of subscribers would have to refuse the package to indicate that the offering is not a "realistic service offering." *Id.*

^{5/} As the D.C. Circuit has stated:

Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties *after the new standard has been proclaimed as in effect.*

Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C. Cir. 1977) (emphasis added), *cert. denied sub nom. Town of Norwood, Mass. v. Boston Edison Co.*, 434 U.S. 956 (1977).

^{6/} The two-part test set forth in the Commission's *Initial Rate Order* required: (1) that the price of the combined package not exceed the sum of the individual charges for the services, and (2) that the package constitute a realistic service offering. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5630, 5836-37 and n.808 (1993) ("*Initial Rate Order*").

^{7/} *Order* at ¶ 19.

Moreover, as Comcast noted in its LOI response, rates for the Value Pak package were set at levels commensurate with benchmark rates — subscribers were permitted to select any combination of the services, and indeed, some subscribers elected not to purchase the Value Pak services at all or in their entirety. Response at 5-6; *see also Order* at ¶ 19. Comcast priced the Value Pak services so that "no subscriber is paying more than they would under the Commission's benchmarks for these services. . . ." Response at 6. On its face, therefore, Comcast's Value Pak services could not have constituted a rate evasion because Comcast was receiving at most the same revenue from these services as it would have received had the restructuring not occurred.^{8/}

III. The Bureau Was Not Required to Give Weight to the City's Rate Findings.

The City argues that Comcast failed to meet any requisite burden of proof that its rates are reasonable, and that the Bureau must defer to the City's rate findings. Application at 6. The City is plainly wrong. The Commission clearly stated in its *Second Recon. Order*^{9/} that cities may make *initial determinations*, but that the Commission may make the ultimate determination on the status of an *à la carte* package.^{10/}

^{8/} The City is also wrong when it asserts that initially the equipment charge of \$1.04 to receive the Value Pak services evaded rate regulation. The converter charge was imposed solely as a result of the new rules requiring charges for converters (unbundling). Comcast eliminated this charge once it became aware that 35 subscribers who did not wish to receive the entire package were charged the fee. It is *not significant*, as the City asserts, that the "initial communication to subscribers" listed this converter charge. Application at 5. What is significant is that the charge was not deemed improper *and* that Comcast waived the charge, in any case.

^{9/} 9 FCC Rcd 4216-18.

^{10/} *See also* Question 17 of the Commission's Questions and Answers (Apr. 26, 1994).

Comcast met its burden of proof that its rates were reasonable in its response to the LOI, based on the manner in which Comcast priced its a la carte package.^{11/} The City implies that Comcast failed to demonstrate that its Value Pak services were *bona fide à la carte* services.^{12/} But the Bureau correctly concluded in its evaluation of Comcast's LOI response that Comcast's package offering did not constitute a rate evasion:

Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*, we still would not reach a clear answer to the question of what constitutes a realistic service offering. . . . Comcast's four-channel tier . . . did not constitute a clear evasion of our rate rules.^{13/}

Under the 15-part test, no one factor was dispositive, and Comcast's package met a large number of the 15 tests. The Bureau's *Order* provides a reasoned analysis of the elements of this case, and properly concludes that Comcast's justification of its Value Pak services in its LOI response, coupled with the Commission's indefinite two-part test, do not lead to the definitive conclusion that Comcast's Value Pak was improper.

The City further suggests, without any authority, that the Bureau is bound by a "presumption of correctness to the franchising authority's determination" that Comcast's basic service rates were unreasonable. Application at 7. The Bureau is not bound by the

11/ In fact, given the benchmark scheme that the Commission adopted, Comcast was required to assign a value to the per channel charge for basic service which conformed to the Commission's benchmark formula. Comcast could not, for example, have lowered the rate for each channel of basic service and raised the rate on the programming service tier because of the Commission's tier neutrality scheme.

12/ Application at 6.

13/ *Order* at ¶¶ 19, 23. The City quotes the Bureau's *Order* out of context. The quoted text actually states that the facts "tend[] to show . . . that the per-channel offering does not constitute a realistic service offering." *Order* at ¶ 19 (emphasis added). The *Order* does not conclude that the Value Pak was not *bona fide à la carte* package.

City's notion of a "presumption of correctness," especially when the Commission specifically reserved the right to review franchising authority determinations of whether certain *à la carte* services are *bona fide*.^{14/}

The Commission initiated its LOI long before the City issued its first rate order on March 9, 1994, pursuant to the City's own request for clarification of whether Comcast's service offerings complied with Commission regulations. In effect, the City's request constituted a request for a declaratory ruling, which vested the Commission with the sole jurisdiction over *à la carte* determinations.^{15/} Moreover, even if the City had reached a preliminary decision without requesting Commission review of the *à la carte* package, the Commission still is obligated to consider independently the Value Pak offering on its merits in connection with its review of the LOI. The Commission has not granted sole jurisdiction to local franchising authorities to make decisions which bind the Commission, especially where, as here, the *à la carte* services at issue would be classified as either unregulated or CPS tier services, both of which are beyond local jurisdiction.

The Bureau interpreted the Commission's regulations and made a decision on the merits, and in doing so has held that Comcast has met any requisite burden of proof. The local authority is bound by this determination.

14/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119, 4217-18 (1994) ("*Second Recon. Order*").

15/ In its *Second Order on Reconsideration*, the Commission stated that local authorities may seek clarification of whether *à la carte* packages are *bona fide*, thereby granting the Commission sole jurisdiction over that aspect of the basic rate review process. *Second*

IV. The City Misinterprets the Commission's Regulations and Policies In Arguing That Comcast Is Subject to Refund Liability.

The City states that Comcast should be subject to refund liability for basic service overcharges. Application at 7. This conclusion is premised on the *faulty* assumption that Comcast's restructuring was invalid, and that the Bureau "found that their deregulation was not consistent with the public interest. . . ." Application at 8. But in fact, the Bureau *explicitly* found that Comcast's Value Pak was *not* inconsistent with the applicable regulations: "[W]e *cannot* say that it was clear to Comcast that its restructuring was not a permissible a la carte package." Order at ¶¶ 20, 21 (emphasis added). Having made this factual determination, the Bureau applied the Commission's policy as expressed in the *Sixth Recon. Order* and found that "Comcast's four-channel tier . . . *did not constitute a clear evasion of our rate rules.*" Order at ¶ 21 (emphasis added).

The Bureau further found that it did "not think that it would be equitable to subject Comcast to refund liability." Order at ¶ 22. In fact, this truly was the most equitable result because Comcast offered the Value Pak service to subscribers who were *already* receiving the service at rates *no higher* than before the introduction of Value Pak. If Comcast were required to issue refunds, it would, in effect, be forced to offer those services free of charge. In any case, the City fails to provide any justification whatsoever as to why Comcast should be subject to refund liability given the finding by the Commission that offerings such as Comcast should be treated as NPTs.

The City also claims that the establishment of the *à la carte* package "improperly allowed COMCAST to charge substantially more per month for basic service that [sic] would have otherwise been possible." Application at 7. However, it is not significant that the per

channel charge for basic tier services was more costly than if Comcast had not created the *à la carte* package. Under the Commission's regulations, Comcast had the *right* to eliminate channels from a regulated tier and thereby increase the per channel rates. In any case, the Bureau's decision to treat Value Pak as an NPT has the same effect on the basic rate as if the Bureau had permitted Comcast to retain the package's *à la carte* status, and the Commission's *Sixth Recon. Order*, as demonstrated in this Opposition, directly supports the Bureau's determination that the services should not be subject to regulation. Therefore, the City's Application, which asserts that Comcast should be subject to refund liability, should be denied.

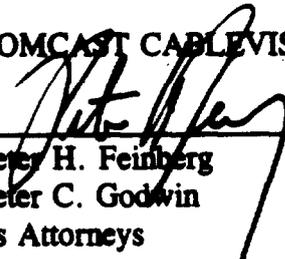
CONCLUSION

The City's Application for Review incorrectly contends that the Bureau abused its authority in deeming Comcast's Value Pak services an NPT. The Bureau's *Order* is in strict conformity with the Commission's *Sixth Recon. Order*, which established the rules for NPTs and acknowledged that the *à la carte* regulations in place did not clearly deem certain *à la carte* packages, such as those offered by Comcast, to be impermissible.

Respectfully submitted,

COMCAST CABLEVISION OF TALLAHASSEE, INC.

By: _____


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Its Attorneys

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January 3, 1995

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20544

November 17, 1993

IN REPLY REFER TO:

Mr. Patrick Keating
Manager
Comcast Cablevision Inc.
3760 Hartsfield Road
Tallahassee, Florida 32303

File Number LOI-93-2

Dear Mr. Keating:

This is a letter of inquiry concerning rate and service changes implemented by Comcast Cablevision Inc. (Comcast) for regulated cable services offered in the City of Tallahassee, Florida. A letter from the Tallahassee Cable Administrator dated September 16, 1993, and supporting materials, raise questions concerning possible violations by Comcast of FCC requirements governing the provision of cable television service under the Cable Act of 1992. A copy of this letter and supporting materials are attached.

Under the Commission's freeze on regulated cable service revenues, the average monthly subscriber bill for services provided by cable operators subject to regulation may not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993 until November 15, 1993, or if the basic service tier has not become subject to regulation, until February 15, 1993. 47 C.F.R. 76.1090(a) and (c). The average monthly subscriber bill is required to be calculated in accordance with Section 76.1090(b) of the Commission's rules, 47 C.F.R. Section 76.1090(b).

Tallahassee in its letter states that it believes that the new rates and services violate the FCC freeze. In order to permit an assessment by this office of compliance with the freeze, Comcast is required to complete the attached "Rate Freeze Computation" form. Further, Comcast is required to submit its rate cards for rates, channel line-ups and services in effect on April 5, 1993 and for all other rates, channel line-ups and services in effect subsequently.

Under the Cable Act, video programming offered on a per channel or per program basis is unregulated. See 47 U.S.C. Section 543(1)(2). In Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, 8 FCC Rcd 5631 (1993) ("Rate Order"), the Commission determined that it would not regulate the collective offerings of otherwise nonregulated per channel or per

program services as long as: (1) the price of the combined package does not exceed the sum of the individual charges for each component service; and (2) the operator continues to provide the component parts of the package to subscribers separately in addition to the collective offering. Rate Order, paras. 327-328. The Commission also determined that the second condition is satisfied only when the per channel offering provides consumers with a realistic service choice. Rate Order, para. 328.

The rate card attached to the Tallahassee letter indicates that Comcast now offers a package of a la carte channels which it calls "Value Pak". In order for the Commission to review this matter, Comcast is required to provide the following information: (1) a list of all channels currently being offered on an a la carte basis, the price for each channel, the date on which each channel was first offered a la carte, whether each channel was previously offered as part of a tier of channels and, if so, the tier on which it was previously offered; (2) the terms and conditions of any collective offering of a la carte channels available to customers, including the channels which comprise the package and the rate for the package, and the date on which the package was first made available; (3) the amount of any other charges in addition to the per channel or package charge (both one-time and recurring) required to subscribe to, and receive, the a la carte channels and any package of a la carte channels, including charges to receive the channels or packages on additional outlets and for switching from an a la carte package to individual channels comprising the package or for switching from individual channels to an a la carte package; (4) a description and the charge for any additional equipment required to receive the a la carte channels or any a la carte package; and (5) the number of subscribers receiving each package of a la carte channels and the number of subscribers receiving each of the a la carte channels other than through subscription to the entire package as of the date you reply to this letter. Comcast is also required to demonstrate that any package of a la carte channels it offers meets the Commission's requirements specified in the Rate Order for a permissible unregulated package of a la carte channels. In particular, Comcast is required to explain why the offering of the a la carte channels is a realistic service offering in comparison to the package under the prices and any other terms and conditions applicable respectively to the package and a la carte offering.

On another issue, Section 3 of the Cable Act (28 U.S.C. Section 543(f)) and Section 76.901 of the Commission's Rules, 47 C.F.R. Section 76.901, prohibit negative option billing, i.e. a cable operator may not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name.

The Tallahassee letter alleges that Comcast has offered its CableGuard service through negative option billing. In order for the Commission to review this issue, C-LEC is required to provide

full details concerning this service and a description of how customers have been subscribed, and are currently being subscribed, to the CableGuard service, including a statement as to whether customers who have been subscribed to this service (i) received prior notice of the service and (ii) were asked if they wanted to receive the service. With respect to (ii), if the customers were asked, how were they asked and how were they directed to indicate their response? Comcast is also required to demonstrate that its subscription of any customers to the CableGuard service does not violate the prohibition against negative option billing.

Tallahassee also expresses concern about a separate new charge for service repairs and the notice that was provided with respect to the rate and service changes. Comcast is required to provide full details concerning the service repair charge, including whether this is a new charge and, if so, whether there was a reduction in any other charge when this new charge was established. Further, Comcast is required to provide complete details about the notice it provided of the new rate and service changes, including copies of notices provided, so that this office can review compliance with the Commission's notice rules.

The Cable Act of 1992 authorizes the Commission to establish rules to prevent evasions of rate regulation. See 47 U.S.C. Section 543(h). The Rate Order defines a prohibited evasion, inter alia, as any practice which avoids the rate regulation provisions of the Cable Act or our rules contrary to the intent of the Act or its underlying policies. Rate Order, para. 451. Your responses to this letter will be reviewed in light of these provisions.

Comcast is required to provide the foregoing information within thirty days of the date of this letter, and to serve a copy on the Tallahassee Cable Administrator. Please refer to the above file number in responding. If you have any questions, you may contact Steve Weingarten at (202) 416-0846.

Sincerely,


Roy Stewart
Chief, Mass Media Bureau

CC: City of Tallahassee Cable Administrator



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DEC 17 1993

December 15, 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
Washington, DC 20554

Re: Your File No. LOI-93-2

Dear Mr. Stewart:

I am responding to your letter dated November 17, 1993 requesting a response to certain questions raised with the Commission by the City of Tallahassee. Specifically, the Commission requested that Comcast demonstrate its compliance with the Commission's regulations in four areas. I believe that the information that we are providing in response to your request demonstrates that the Tallahassee system's rates conform to the Commission's regulations and the policies established in the Rate Order.

1. Compliance with the Rate Freeze.

I have enclosed a rate card and channel lineup effective as of September 1, 1993 as well as one effective as of January 1, 1993. The latter covers the period beginning April 5, 1993 referred to in your letter. I am also enclosing the Rate Freeze Computation form which accompanied your letter. The form confirms that the average monthly subscriber bill for regulated cable services has not increased. According to the form the average monthly subscriber bill has decreased by \$3.01 per month.

2. Charges for Repair Service.

The City questions why Comcast's September 1, 1993 rate card contains "a separate new charge for service repairs which used to be included as part of basic service." The City is, of course, referring to the hourly service charge which the system was required to compute in accordance with Section 76.923 of the Commission's rules. The Tallahassee system's hourly service charge is \$25.66 per hour.

The City correctly notes that prior to September 1, 1993, service calls were included in basic and programming service rates.