

DA 95-710

ORDER

Released: April 4, 1995

I. INTRODUCTION

¹ Cablevision filed a Petition for Stay Pending Review on September 16, 1994. Because we are resolving this dispute on the merits presented in this Petition, the petition for stay has been rendered moot. Other filings in this proceeding include an Opposition to the Petition for Stay Pending Review filed by the State on September 26, 1994; an Opposition to the Petition for Review of Rate Order filed by the State on October 3, 1994; and a Reply to Opposition to Petition for Stay filed by Cablevision on October 11, 1994.

equipment, installations and hourly service charges.² As part of this decision setting the basic tier rates, the BPU found Cablevision's collective or package offering of certain individually offered ("a la carte") channels to be a regulated tier of service, and, therefore, included those channels as regulated channels for purposes of the local order. The BPU ordered Cablevision to make refunds to subscribers for all overcharges in excess of the maximum permitted rates set forth in the local order for the period September 1, 1993 through the date Cablevision revises its rates in accordance with that order.³

2. In its Petition, Cablevision argues that the BPU's decision to treat the a la carte package as a regulated tier of service is contrary to the objectives of the 1992 Cable Act and the Commission's a la carte rules. Cablevision also argues that the BPU's order is inconsistent with Commission rules it claims permit cable operators to offset refund liabilities against undercharges of other maximum permitted rates.⁴ Cablevision asserts that the BPU order directing that refunds be made for basic service overcharges fails to reduce that refund liability by the difference between the rates charged for the a la carte channels and the maximum permitted rates Cablevision could have charged for those channels as regulated channels.⁵

3. The BPU responds that it properly applied the Commission's guidelines on a la carte packages and concluded that Cablevision's package should be treated as a regulated tier. In addition, the BPU responds that Commission rules do not require a local franchising authority to offset refund liability for the basic tier by undercharged amounts on the cable programming service tier.

4. Under our rules, rate orders made by local franchising authorities may be

² See Petition, Exhibit A, *Order Setting Initial Rates*, Docket No. CR93090368 (State of New Jersey Board of Public Utilities, August 17, 1994).

³ Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") Pub. L. No. 102-385, 106 Stat. 1460 (1992), Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

⁴ Petition at 4. In support of this argument, Cablevision cites Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, Third Order on Reconsideration, MM Docket No. 92-266 and 92-262, 9 FCC Rcd 4316, 4351 (1994) ("*Third Reconsideration Order*").

⁵ As of September 1, 1993, Riverview charged its subscribers \$0.35 for each of the individual a la carte channels or \$0.42 for the 3-channel a la carte package. In comparison, the BPU's order held that inclusion of the three a la carte channels as regulated services would result in a monthly maximum permitted per channel rate of \$0.5914. Petition, Exhibit B at 3 and Exhibit A, *Order Setting Initial Rates* at 2.

appealed to the Commission.⁶ In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.⁷ Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.⁸ If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.⁹ With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."¹⁰

II. DISCUSSION

5. Cablevision objects to the provision of the local order in which the BPU finds that Cablevision's a la carte package (consisting of TBS, Turner Network Television and the Madison Square Garden Network) should be considered a regulated tier.¹¹ Cablevision argues that its a la carte package complies with the provisions of the 1992 Cable Act which it contends encourages cable operators to unbundle programming services from regulated tiers in order to promote subscriber choice.¹² Cablevision further argues that its a la carte package fully complied with Commission rules for unregulated treatment existing at the time

⁶ 47 C.F.R. § 76.944.

⁷ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); and *Third Reconsideration Order*, 9 FCC Rcd at 4346.

⁸ *Id.*

⁹ *Rate Order*, 8 FCC Rcd at 5732; *Third Reconsideration Order*, 9 FCC Rcd at 4346.

¹⁰ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration and Fourth Report and Order, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) ("*Second Reconsideration Order*").

¹¹ Petition, Exhibit A at 6.

¹² See Petition at 3 & Exhibit B at 10.

the package was created,¹³ and that the regulatory status of the package should not have been determined on the basis of rules "subsequently adopted and retroactively applied."¹⁴

6. The Cablevision a la carte services at issue were first offered to subscribers at the beginning of rate regulation, on or about September 1, 1993, when Cablevision restructured the service offerings on its Riverview system. Cablevision's restructuring involved moving three channels (one from its basic tier and two from its cable programming service tier) and offering the channels on an individual basis and also as a package that Cablevision alleges is not subject to rate regulation.

7. The facts presented in this appeal closely resemble the facts presented in several of our recently issued letter of inquiry orders on a la carte packages. In particular, in *Cablevision of Central Florida*, LOI 93-26, DA 94-1356 (Cab. Serv. Bur., released Dec. 2, 1994) and *Cablevision of Raleigh*, Hillsborough, NC, LOI 94-6, DA 94-1432 (Cab. Serv. Bur., released Dec. 12, 1994), we resolved the regulatory status of la carte packages comprised of three channels taken from regulated tiers (the basic tier and/or cable programming service tiers), where the operator continued to offer a substantial cable programming service tier after restructuring. In these cases, we found we could not say that it was clear that the a la carte packages at issue were not permissible non-rate regulated offerings under our rules. We further concluded that in light of the prior confusion over what constituted a permissible non-rate regulated a la carte offering, it would be inequitable to subject the operators to refund liability or to require the operators to restructure their tiers so as to return the channels offered in the a la carte packages to regulated tiers. Instead, we found that the a la carte packages at issue may be treated as new product tiers under the Commission's *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration*, MM Docket No. 92-266, and *Fifth Report and Order*, MM Docket No. 93-215, 10 FCC Rcd 1226 (1995) ("*Going Forward Order*").¹⁵

¹³ Petition at 3. See *Rate Order*, 8 FCC at 5836-5838; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: First Order on Reconsideration*, MM Docket 92-266, 9 FCC Rcd 1164, 1184 (released August 27, 1993) ("*First Reconsideration Order*").

¹⁴ Petition at 3; See e.g. *Second Reconsideration Order*, 9 FCC Rcd at 4212-4216. In the *Second Reconsideration Order*, the Commission set out 15 guidelines "that local authorities and the Commission should consider in assessing in an individual case whether an 'a la carte' package enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at 4214.

¹⁵ New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd 1233-38. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la

8. We find that the BPU's determination that Cablevision's a la carte package is a regulated tier is inconsistent with the action taken in the letter of inquiry orders, and in particular, the cases previously cited. We further find that, in accordance with these cases, Cablevision's a la carte package should not be treated as a rate regulated tier of service. Since we conclude that Cablevision's a la carte package is not a regulated tier of service, we also conclude that it is not necessary to address the issue of offsetting refunds in light of the fact that the undercharges referred to by Cablevision would only exist if the a la carte package were subject to rate regulation, which is not the case. We are remanding the issue of the treatment of the a la carte package to the BPU so that it can enter an order consistent with our findings in the letter of inquiry orders.¹⁶

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the appeal of the local order, with respect to the issue of the regulatory status of Cablevision's a la carte package, is **REMANDED** to the BPU for resolution in accordance with the terms of this Order.

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

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993 and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

¹⁶ We need not address Cablevision's argument with respect to the "retroactive" application by the BPU of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Cablevision's Petition on the a la carte issue and remand this case to the BPU.