

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

In the Matter of	)	
	)	
TKR Cable Company	)	
	)	CSB-A-0145
Appeal of Rate Orders of the	)	DA 95-1179
State of New Jersey	)	Hamilton, NJ
Board of Public Utilities	)	Elizabeth, NJ
	)	Wildwood, NJ
	)	Old Bridge, NJ
	)	Ramapo, NJ
	)	Rockland, NJ
	)	Tri-System, NJ
	)	Warwick, NJ

**MEMORANDUM OPINION AND ORDER ON REVIEW**

**Adopted: June 23, 2000**

**Released: June 30, 2000**

By the Commission:

**I. INTRODUCTION**

1. The New Jersey Board of Public Utilities ("Board") filed an Application for Review of the Memorandum Opinion and Order issued by the Cable Services Bureau in *TKR Cable Company*<sup>1</sup> ("Bureau Order"), which granted the operator's consolidated appeal of local rate orders issued by the Board for each of the rate districts listed in the caption above. The operator, TKR Cable Company ("TKR"), filed an opposition, and the Board replied.

**II. BACKGROUND AND DISCUSSION**

2. In each of its rate orders, the Board found that packages of a la carte channels TKR created on August 31, 1993, the eve of rate regulation, were regulated tiers of service. The *Bureau Order* relied on *TKR Cable of Hamilton*<sup>2</sup> and similar orders<sup>3</sup> and found that these packages, which consisted of

<sup>1</sup> DA 95-1179 (released June 1, 1995).

<sup>2</sup> LOI-93-31, 9 FCC Rcd 7325 (Cab. Serv. Bur. 1994). *TKR Cable of Hamilton* reviewed facts for TKR's Hamilton system identical to those in TKR's appeal for the system. In light of prior confusion as to what constituted a permissible a la carte offering and the finding that TKR's a la carte package did not constitute a clear evasion of the Commission's rate rules when created, TKR was not required to reter its service, adjust its rates, or pay refunds for its Hamilton system.

<sup>3</sup> E.g. *Cablevision Industries*, 10 FCC Rcd 618 (Cab. Serv. Bur. 1994) (Long Beach, CA) (5-channel a la carte tier (continued...))

three to five channels each, should not be treated as rate regulated tiers of service. It remanded the rate orders for further Board consideration consistent with this finding. The Board's Application for Review takes issue with this finding. According to the Board, TKR's restructuring of its programming offerings was so blatantly an attempt to evade rate regulation that treating its a la carte tiers on an unregulated basis is inequitable to subscribers. TKR's opposition questions the findings of facts on which the Board based its conclusion, and argues that the Board's conclusion is not consistent with Commission precedent.

3. The Communications Act of 1934, as amended ("Act") directs the Commission to establish regulations designed to ensure the reasonableness of rates for the basic service tier ("BST") for cable systems not facing effective competition.<sup>4</sup> The Act exempts video programming offered on a per channel or per program basis from rate regulation.<sup>5</sup> The Act also requires that the Commission take steps to prevent evasions of rate regulation, including evasions resulting from service retiering.<sup>6</sup> The Commission developed criteria for evaluating collective service offerings of a la carte channels in its Report and Order in MM Docket No. 92-266 ("*Rate Order*"),<sup>7</sup> and gave guidance for applying these criteria in its Second Order on Reconsideration ("*Second Reconsideration Order*").<sup>8</sup> In the Sixth Order on Reconsideration and Fifth Report and Order ("*Going Forward Order*"), the Commission acknowledged that application of the test for determining whether a la carte packages were permissible was unclear.<sup>9</sup> With respect to a la carte packages created between April 1, 1993 and September 30, 1994,

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created by moving channels from another tier was not clearly unreasonable; operator was not required to retier its service, adjust its rates, or make refunds), followed in *Long Beach Acquisition Corp.*, 10 FCC Rcd 3922 (Cab. Serv. Bur. 1995) (Long Beach, CA) (appeal of local rate order granted).

<sup>4</sup> 47 U.S.C. § 543(a)(2), (b)(1). Rates for cable programming services offered through March 31, 1999 were also subject to rate regulation pursuant to Commission criteria for identifying unreasonable rates in individual cases. 47 U.S.C. § 543(c).

<sup>5</sup> 47 U.S.C. § 543(l)(2).

<sup>6</sup> 47 C.F.R. § 543(h).

<sup>7</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5836-37 paras. 327-28:

[W]e will not regulate collective offerings of otherwise exempt per-channel or per-program services so long as two essential conditions are met. First, the price for the combined package must not exceed the sum of the individual charges for each component of service. . . . Second, the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the collective offering.

The second condition is satisfied when the per channel offering presents subscribers with a realistic choice. *Id.* at 5837 n.808.

<sup>8</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4214-16 para. 196 (1994) (15 factors listed as guidance for applying these criteria).

<sup>9</sup> Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd 1226, 1241 para. 45, 1243 para. 51 (1994), *aff'd*, *Adelphia Communications Corp. v. FCC*, 88 F.3d 1250 (D.C. Cir.1996) (Commission treatment of a la carte offerings upheld).

the Commission stated, “[W]e think it is fair, in light of the uncertainty created by our test, to allow cable operators to treat existing packages as [new product tiers] . . . , provided that such packages involve only a small number of migrated channels. We see little reason to require an operator to ‘reverse migrate’ a package that was not clearly ineligible for unregulated treatment under our a la carte policy.”<sup>10</sup> Section 76.986(c)(2) implementing this policy provides that a collective offering of a la carte channels could have been treated as new product tier if “[t]he operator had reasonable grounds to believe the collective offering involving only a small number of migrated channels complied with the Commission’s requirements as of the date it was first offered.”<sup>11</sup>

4. In *TKR Cable of Hamilton*, the Bureau considered several factors before concluding, on balance, that it could not reach a clear answer as to whether TKR understood its restructuring to be impermissible under the criteria announced in the *Rate Order*. In light of the confusion about collective offerings, the Bureau added that it could not say whether it was clear that TKR’s restructuring was not a permissible a la carte offering. The *Bureau Order* found that the facts reviewed in *TKR Cable of Hamilton* were similar to the facts concerning the a la carte offerings in each of TKR’s rate districts addressed in the Board’s rate orders and required consistent treatment. The Board’s Application for Review takes issue with *TKR Cable of Hamilton* and the *Bureau Order* because the a la carte packages failed to offer a greater variety of programming choices, the operator’s pricing methodology made selecting individual channels from the package unrealistic, and the operator avoided rate reductions. However, the Commission found in *Comcast Cablevision* that a package like those offered by TKR was arguably a permissible collective offering when created and would be treated as new product tier under the *Going Forward Order*.<sup>12</sup> Given the ambiguity in the Commission’s rules, *TKR Cable of Hamilton* appropriately treated the matters raised in the Board’s Application for Review as probative rather than conclusive and determined that TKR’s a la carte package was arguably permissive under the rules in effect when it was created and qualified for treatment as new product tier under the *Going Forward Order*.<sup>13</sup> The Bureau’s application of *TKR Cable of Hamilton* and other similar Bureau orders when reviewing the Board’s rate orders was appropriate.<sup>14</sup>

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<sup>10</sup> *Going Forward Order*, 10 FCC Rcd at 1243 para. 51 (footnote omitted). The conclusions were based on evidence obtained in response to letters of inquiry issued to cable operators offering a la carte packages. *Id.* at 1241 para. 45. New product tiers were created as a category of cable programming service tiers (“CPSTs”) in order to give operators incentives to expand capacity and provide new services by allowing operators to price the tiers as they chose. *Id.* at 1234-35.

<sup>11</sup> 47 C.F.R. § 76.986(c)(2).

<sup>12</sup> 11 FCC Rcd 1246, 1249 (1995) (Tallahassee, FL) (4-channel a la carte tier created on September 1, 1993 by moving channels from other tiers; subscribership to individual channels was low).

<sup>13</sup> See *Comcast Cablevision*, 11 FCC Rcd 1248-49. When operators attempted to remove more channels from rate regulation than TKR moved to its a la carte offerings, the Commission and the Bureau found an evasion of rate regulation and ordered corrective action. See *Adelphia Cable Partners, L.P.*, 9 FCC Rcd 7781 (Cab. Serv. Bur. 1994) (South Dade County, FL) (operator’s attempt to remove entire regulated package of 32 channels from rate regulation found to be evasion of rate regulation), *rev. denied* FCC 95-378, 1995 WL 713487 (released Dec. 1, 1995); *Vision Cable Television Co., Inc.* LOI 93-32, 10 FCC Rcd 2207 (Cab. Serv. Bur. 1994) (Fort Lee, NJ) (a la carte packages totaling 8 channels not reasonable).

<sup>14</sup> In resolving issues addressed in letters of inquiry, the Bureau had found that 6-channel a la carte offerings made up of channels previously on the system were not clearly unreasonable in *Nashoba Cable Services*, LOI-93-23, 10 FCC Rcd 994 (1994) (Danvers, MA); *Falcon Cable TV*, LOI-93-50, 10 FCC Rcd 998 (1994) (Port Orchard, WA). The Bureau had found that 4-channel a la carte offerings were not clearly unreasonable in, e.g., *Comcast* (continued...)

5. The Board argues that the Commission does not conduct *de novo* reviews of rate orders issued by franchising authorities and defers to a local authority's decisions if there is a reasonable basis for the decision. While this statement generally reflects the Commission's review of local rate orders, it is incomplete. The Commission's responsibility to establish rate regulations includes the responsibility to ensure the uniform interpretation of these guidelines.<sup>15</sup> With respect to a la carte determinations, the Commission has clarified that it will defer to the local authority's findings of fact if there is a reasonable basis for the local findings, but "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the tier in question."<sup>16</sup> The Board's determination that TKR's a la carte packages are subject to rate regulation is a legal conclusion. The Bureau acted appropriately in reviewing this conclusion in light of Commission and Bureau precedent. Consistency on both the federal and the local levels is desirable and justifies Commission review of a local franchising authority's legal conclusions when properly raised before the Commission.<sup>17</sup>

6. In view of the foregoing considerations, we affirm the *Bureau Order*. We therefore deny the Board's Application for Review.

### III. ORDERING CLAUSES

7. Accordingly, pursuant to 47 C.F.R. § 1.115(g), IT IS ORDERED THAT the Application for Review of Cable Services Bureau Memorandum Opinion and Order filed by the New Jersey Board of Public Utilities on July 3, 1995 IS DENIED.

8. IT IS FURTHER ORDERED THAT the staff of the Cable Services Bureau SHALL SEND copies of this decision to the authorized representatives of the parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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*Cablevision*, LOI 94-11, 10 FCC Rcd 537 (1994) (Sterling Heights, MI); *US Cable*, LOI-93-13, 10 FCC Rcd 533 (1994) (Lake Forest, IL, Lake Bluff, IL); *Warner Cable Communications*, LOI-93-14, 9 FCC Rcd 7777 (1994) (Milwaukee, WI); *Dimension Cable Services*, LOI-93-36, 9 FCC Rcd 7311 (1994) (Oceanside, CA). No refunds or restructurings were ordered in these cases for a la carte offerings.

<sup>15</sup> *Rate Order*, 8 FCC Rcd at 5729-30 para. 147.

<sup>16</sup> *Second Reconsideration Order*, 9 FCC Rcd at 4217 para. 199. Local franchising authorities may make determinations as to whether a collective offering of a la carte channels should be considered a regulated tier, even though a la carte channels are not part of the BST, because the rate rules take into account the total number of channels subject to rate regulation. Determining the status of an a la carte package is necessary to determine the correct permitted rate for the BST. See *Second Reconsideration Order*, 9 FCC Rcd at 4213 n.262.

<sup>17</sup> See *Comcast Cablevision*, 11 FCC Rcd at 1248 para. 14 (Tallahassee, FL); *Falcon Cablevision*, 11 FCC Rcd 10534, 10536-37 (Cab. Serv. Bur. 1996) (channels in 4-channel a la carte package should not be treated as regulated); Request by the County of Clackamas, 10 FCC Rcd 8258 (Cab. Serv. Bur. 1995) (6-channel package may be treated prospectively as new product tier). In *TKR Cable Company of Wildwood*, 10 FCC Rcd 6703 (1995), citing *TKR Cable of Hamilton*, 9 FCC Rcd 7325, the Bureau found that the a la carte package for TKR's Wildwood rate district at issue in this proceeding may be treated as a new product tier and, therefore, dismissed complaints against TKR's CPST.