

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

In the Matter of:

Century-TCI California, L.P.

Order Setting Basic Service Rates

Los Angeles, CA (CA0253, CA1194)

File No. \_\_\_\_\_

**OPPOSITION OF THE CITY OF LOS ANGELES, CALIFORNIA  
TO ADELPHIA'S APPEAL OF LOCAL RATE ORDER**

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## SUMMARY

In this rate proceeding, Adelphia has placed the City in a situation of extreme difficulty. This is not an ordinary rate appeal in which a cable operator claims that a local franchising authority has misapplied the Commission's rules. Rather, the petitioner has admitted to criminal fraud; concedes it has not complied with the Commission's rules to certify the data submitted; and has submitted inconsistent data to the City. Moreover, the City has gone to great lengths to give Adelphia opportunities to rectify its filings and submit reliable information. Adelphia declined to do so; it has failed to meet its burden of proof.

Due to the continuing series of public disclosures about Adelphia's management and practices, including the falsification of data provided to other entities, the City asked Adelphia to recertify the accuracy and reliability of the financial data presented in the Rate Filings. Adelphia declined to do so. As a result, the City was unable to rely on Adelphia's data. Accordingly, the City set rates for the four rate-regulated Adelphia franchise areas using the best available information.

The City sought to ensure that Adelphia had every opportunity to show how more accurate regulated rates could be determined. First, the City expressly invited Adelphia to submit revised rate forms once the company was in a position to certify the necessary data. Moreover, to make doubly sure that Adelphia would not be unnecessarily disadvantaged, the City offered an alternative mechanism by which Adelphia could justify its rates, based on evidence of such actual competitive rates. Adelphia took neither approach. Instead, the company filed this appeal.

Adelphia has the burden of justifying its rates pursuant to the Commission's rules. The Commission will sustain the franchising authority's decision if there is a reasonable basis for the

City's action. Thus, Adelphia must show that the City's action was arbitrary or capricious, lacking any rational basis. Adelphia has not done so.

Adelphia misstates the magnitude of the problem the City faced in dealing with the company's fraud. In light of Adelphia's unwillingness to stand behind its Rate Filings, the City was required to set rates in the absence of reliable information. The only solution Adelphia proffers for this problem is indefinite delay. Nowhere does Adelphia ever indicate when it will be prepared to certify the Rate Filings in their entirety.

Adelphia claims the City cannot reject a rate filing altogether and revert to the last previous rate. But Adelphia can only qualify for a rate increase, under the Commission's rules, by making a certified rate filing justifying the increase. Accepting Adelphia's position would reverse the entire Commission rule regarding the burden of proof in a rate proceeding.

In Areas F, G, and H, the City left Adelphia's rates set as they were for the previous year. In Area C, however, the City had evidence from Adelphia that even Adelphia's previous year's rates were too high. Thus, in Area C the City was forced to recalculate a rate based on the meager "best available" information in the Rate Filing.

Adelphia raises only one specific objection to the rates set by the City in Area C. That objection is based on the issue of correct channel counts. Adelphia submitted conflicting information on this point. The City was forced to make a factual determination as to which set of Adelphia data was less unreliable. Adelphia failed to show that the City's determination was unreasonable.

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The City of Los Angeles, by its attorneys, hereby opposes the Appeal of Local Rate Order (“Appeal”) filed by Century-TCI California, L.P., d/b/a Adelphia Communications Corporation (“Adelphia”) on June 26, 2003, with respect to Ordinance No. 175231, Adopting a Rate Regulation Regarding Cable Television Rates for Basic Service and Equipment: Adelphia – Franchise Areas C, F, G, H, Pursuant to 2002 FCC Forms 1240 and 1205 (“Rate Order”), adopted by the City of Los Angeles (“City”) on May 30, 2003, which rate order is incorporated herein by reference.<sup>1</sup>

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<sup>1</sup> Most of the material in Adelphia’s Appeal – pp. 1-11 – is adopted from Adelphia’s Request for Emergency Stay of Local Rate Order (June 9, 2003) in the above-captioned proceeding (“Stay Request”). This Opposition therefore reprises many of the points made in the Opposition of the City of Los Angeles, California to Request for Emergency Stay of Local Rate Order (June 16, 2003) (“Stay Opposition”), although an effort has been made to avoid unnecessary repetition. To ensure that the record is complete, the Stay Opposition is incorporated herein by reference.

## I. INTRODUCTION

In this rate proceeding, Adelphia has placed the City in a situation of extreme difficulty, in which it is impossible for the City to rely on the rate filings Adelphia submitted. The City took a measured and reasonable course to address that situation. By contrast, Adelphia's Appeal does its best to avoid confronting the central issue: how the City should have proceeded in light of Adelphia's failure to provide reliable data.

It must be kept in mind that this is not an ordinary rate appeal in which a cable operator claims that a local franchising authority has misapplied the Commission's rules. Rather, the petitioner has admitted to criminal fraud; concedes it has not complied with the Commission's rules to certify the data submitted; and has submitted inconsistent data to the City. Moreover, the City has gone to great lengths to give Adelphia opportunities to rectify its filings and submit reliable information. Yet Adelphia has declined to do so; it has failed to meet its burden of proof in this rate proceeding. Instead, Adelphia has embarked on what amounts to an argument for indefinite delay in relief to subscribers. The Commission should not countenance that argument.

## II. BACKGROUND

The City of Los Angeles has fourteen distinct franchise territories.<sup>2</sup> Each franchise area is served by one of five separate incumbent cable operators. This proceeding addresses a Rate Order issued by the City to Adelphia, which serves four franchise areas in the City not subject to effective competition, reaching over 200,000 cable subscribers.<sup>3</sup> The Order addresses

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<sup>2</sup> To avoid unnecessary cross-referencing between documents, this section recapitulates the factual background previously laid out in pp. 2-9 of the Stay Opposition.

<sup>3</sup> Adelphia also serves a fifth franchise area, Area L, which has been held to be subject to effective competition. Hence, Adelphia does not submit rate filings for Area L.

Adelphia's 2002 rate filings for Areas C, F, G, and H (the "Rate Filings"). Adelphia filed for new basic service rates for Area C on March 29, 2002, and for the other three areas on June 4, 2002. Adelphia implemented new rates based on the Rate Filings in Areas F, G, and H in 2002.

The City timely reviewed the financial information submitted by Adelphia in the Rate Filings.<sup>4</sup> In the course of its review, the City took notice of a continuing series of public disclosures about Adelphia's management and practices, including the falsification of data provided to other entities. Adelphia Communications Corporation, the franchisee's parent company, filed for bankruptcy protection on or about June 25, 2002.<sup>5</sup> On July 24, 2002, the Securities and Exchange Commission ("SEC") filed charges against Adelphia, members of the Rigas family, and other corporate executives for massive financial fraud – "one of the most extensive financial frauds ever to take place at a public company."<sup>6</sup> On January 10, 2003, Timothy A. Werth, Adelphia's former accounting director, pleaded guilty to securities fraud and conspiracy in connection with Adelphia's financial information.<sup>7</sup> The City was thus forced to conduct its review of Adelphia's Rate Filings under a cloud of increasing uncertainty as to whether the information provided by Adelphia was reliable.

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<sup>4</sup> The City retained the firm of Ashpaugh & Sculco, CPAs, PLC ("A&S"), to assist in the financial review of the rate forms, and the law firm of Miller & Van Eaton, P.L.L.C. ("MVE"), to assist with respect to legal aspects of the rate proceeding.

<sup>5</sup> For convenience, the corporate parent of the franchisee, Adelphia Communications Corp., will be referred to as "Adelphia" in connection with the allegations and admissions discussed here.

<sup>6</sup> Press Release, Securities and Exchange Commission, *SEC Charges Adelphia and Rigas Family with Massive Financial Fraud* (July 24, 2002), available at <http://www.sec.gov/news/press/2002-110.htm>.

<sup>7</sup> See, e.g., *Ex-Adelphia Accountant Pleads Guilty to Fraud*, AP, Jan. 13, 2003, available at <http://www.smartpros.com/x36671.xml>.

The City sought to resolve this uncertainty by asking Adelphia to recertify the accuracy and reliability of the financial data presented in the Rate Filings. On February 27, 2003, the City sent Adelphia a letter requesting that the company's current management attest to the accuracy of the data in the Rate Filings, or, if it could not do so, to give the City an estimated date by which the current management *would* be able to confirm the accuracy of the data on which the City was expected to rely.<sup>8</sup> On March 11, Adelphia responded:

Unfortunately, Adelphia is not in a position to reply to this request in such short order. The new management has simply not had sufficient time to review these filings and the supporting data to make a determination, one way or another. As well, we are unable to predict with any certainty when Adelphia would be in a position to definitively respond to this request.<sup>9</sup>

In other words, not only did Adelphia refuse to certify the Rate Filings; it also disclaimed any knowledge of when in the future it might be able to do so.

Adelphia's refusal in effect negated the company's original signatures on the Rate Filings.<sup>10</sup> Because the company was unwilling to stand behind the information it had submitted during the period of fraudulent behavior, it was clear the City could not rely on that information as it is normally expected to do in reviewing a rate filing. Thus, Adelphia's failure to reaffirm its certification in effect "decertified" the original Rate Filings, leaving the City in the same position as if Adelphia had never signed the filings at all.

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<sup>8</sup> Letter from Thera G. Bradshaw, Assistant General Manager, Information Technology Agency, City of Los Angeles, to Laurence Windsor, Government Affairs Manager, Adelphia (Feb. 27, 2003) (attached to the Appeal as Exhibit B).

<sup>9</sup> Letter from Thomas M. Wilson, Staff Attorney, Adelphia, to Thera Bradshaw, Assistant General Manager, Information Technology Agency, City of Los Angeles (March 11, 2003) (attached to the Appeal as Exhibit C).

<sup>10</sup> The signature block of Form 1240 requires the cable operator to "certify that the statements made in this form are true and correct to the best of my knowledge and belief, and are made in good faith."

At this point it was evident that Adelphia could not be relied upon to provide properly certified information according to the Commission's rules. It was thus necessary for the City to proceed along two tracks simultaneously: (1) to determine what could be concluded from the company's submitted (but unreliable) data, and (2) to determine what other surrogate information might provide the "best available information" under the unique conditions of this review.

Under normal circumstances, the City would have been expected to act on the Area C Rate Filing by March 29, 2003. Adelphia, however, indicated that it would be receptive to petitioning the Commission to extend that deadline through June 1, 2003.<sup>11</sup> In order to give Adelphia a further opportunity to substantiate and defend the soundness of the data in its Rate Filings, the City joined with Adelphia in obtaining that extension of time.<sup>12</sup> The City, however, determined that in order to take the necessary steps to issue a rate order by June 1, it would need to obtain Adelphia's certification of the data filed with the City by April 15, 2003.<sup>13</sup> The City notified Adelphia of this deadline in writing on March 21, making clear that if the company

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<sup>11</sup> Letter from Thomas M. Wilson to Thera Bradshaw of the City, *supra* note 9. This extension made the deadline for Area C approximately the same as those for Areas F, G, and H.

<sup>12</sup> The Commission agreed to that extension in a letter from John B. Norton of the Commission to Marci L. Frischkorn of MVE, dated March 20, 2003, attached to the Appeal at Exhibit D.

<sup>13</sup> The City anticipated the following procedural steps would have to be completed for timely action on a rate order by June 1, 2003: (1) completion of the staff analysis of any newly submitted Adelphia data; (2) approval and recommendation of a Rate Order by the City of Los Angeles Board of Information Technology Commissioners; (3) approval and recommendation of a Rate Order by the City Council Committee for Information, Technology and General Services; (4) approval of the Rate Order by the full City Council. Steps 2, 3, and 4 each required adequate public notice prior to action by the respective entity.

could not certify the data, the City would proceed with a rate order based on the best available information.<sup>14</sup>

Adelphia again failed to certify its Rate Filing information by the April 15 deadline. To date, Adelphia has not certified any of that information. At most, in comments filed on May 22, eight days before the City needed to take final action, Adelphia was only willing to say that it was “prepared to recertify” as to “channel counts and programming costs.”<sup>15</sup> Once again, Adelphia made no suggestion as to when it might be prepared to recertify the complete information contained in the Rate Filings.

This failure by Adelphia presented the City with unprecedented difficulties. The Commission’s rate forms require a cable operator to certify the truth and correctness of all the information submitted, so that the reviewing community can rely on that information. Given the admissions and allegations of fraud made with respect to Adelphia’s financial information, and the refusal of the current management to stand behind the data originally filed, it was impossible for the City to rely on the submitted information. Yet the only solution offered by Adelphia was to continue delaying action on these uncertified rates until some unspecified future date at which time Adelphia might be able to attest to reliable information.<sup>16</sup> The City, however, could not

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<sup>14</sup> Letter from Liza M. Lowery, Chief Information Officer, Information Technology Agency, City of Los Angeles, to Thomas M. Wilson, Staff Attorney, Adelphia (March 21, 2003) (attached to this Opposition as Exhibit C).

<sup>15</sup> Letter from Andrew Elson, Vice President of Regulatory Accounting and Compliance, to Thera Bradshaw, Assistant General Manager, Information Technology Agency, City of Los Angeles 2-3 (May 22, 2003) (attached to the Appeal as Exhibit J) (providing comments on the proposed Rate Order).

<sup>16</sup> In fact, Adelphia informed the City in April that it would indefinitely delay the submission of its *next* rate filings. Letter from Terry Sergi, Rate Regulation Supervisor, to the City’s Information Technology Agency, dated April 7, 2003, attached to this Opposition as Exhibit D. This action by Adelphia cast further doubt on whether Adelphia would fully certify

stand idly by for an indefinite period. Failure to act by June 1 would preclude subscriber rate refunds for improper rates, and Adelphia's maximum permitted rates as filed the previous year would become effective.<sup>17</sup> In other words, Adelphia's subscribers would be overcharged into the indefinite future, and relief from past overcharges would be lost.

Accordingly, the City sought to set rates relying on the best information available, as the Commission's rules provide, and as the City had indicated to Adelphia on March 21.<sup>18</sup> Given the wholesale unreliability of the information filed by Adelphia, this was no easy task. In the end, the City concluded that for Areas F, G, and H, the best way to approximate reasonable rates was to deny Adelphia's proposed increase and leave rates where they were at the end of the preceding rate year. This was not wholly satisfactory. In particular, the City is aware that the 2001 rate filings may also have incorporated faulty data: Adelphia has refused to certify its pre-2002 filings as well. The City has not been able to determine how far back in Adelphia's history the data may be contaminated by fraud. But because the company had effectively left the City without a rate filing that could be used to support an increase, the next best alternative in applying the Commission's rules was to go back to the rates previously in effect. Those rates had been chosen by Adelphia, and thus were presumptively compensatory. Absent reliable evidence supporting different rates, those rates provided the best available rates going forward.<sup>19</sup>

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its 2002 Rate Filings within any reasonable time frame. The City is currently reviewing what steps it should take with respect to Adelphia's ongoing failure to file for 2003 in accordance with the Commission's rules.

<sup>17</sup> 47 C.F.R. § 76.933(g)(2).

<sup>18</sup> 47 C.F.R. § 76.937(d). *See, e.g., Century New Mexico Cable Corporation: Appeal of Local Rate Order (Silver City, New Mexico)*, DA 95-1134, Memorandum Opinion and Order at ¶¶ 5, 8 (Cable Serv. Bureau May 23, 1995).

<sup>19</sup> *See* Rate Order at §§ 2(b)-(j).

The situation in Area C, however, was different. There, the information in Adelphia's 2002 Rate Filing, once it had been analyzed and corrected by the City's financial consultant, appeared to produce a basic service tier rate much *lower* than even the previous year's rate. Thus, even if one assumed the information provided by Adelphia was basically accurate, a rate reduction would have been required. Hence, for Area C, adopting the previous year's rate appeared to set the rate far too high. It would not have been appropriate for the City to leave such an unreasonable rate in place: the purpose of the Commission's rules, as directed by Congress, is to "ensure that the rates for the basic service tier are reasonable."<sup>20</sup> Thus, in order to implement the Commission's rules as the Commission must have intended them to operate, the City accepted the figure recalculated by the City's financial consultant from Adelphia's data as the regulated Area C rate.<sup>21</sup> The City reached each of these conclusions subject to the possibility that further information might later allow for a better determination of what rates were reasonable according to the Commission's rules, carefully reserving its rights in that respect.<sup>22</sup>

In setting Adelphia's basic rates under these extraordinary and trying circumstances, the City sought to ensure that Adelphia had every opportunity to show how more accurate regulated rates could be determined. First, the City expressly invited Adelphia to submit revised rate forms once the company was in a position to certify the necessary data. The City stated that as soon as Adelphia could certify its data, the City would review the resulting filings pursuant to applicable law.<sup>23</sup> Moreover, in order to make doubly sure that Adelphia would not be

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<sup>20</sup> 47 U.S.C. § 543(b)(1).

<sup>21</sup> See Rate Order at § 2(g).

<sup>22</sup> See Rate Order at § 3(p).

<sup>23</sup> See Rate Order at §§ 2(g), 3(c).

unnecessarily disadvantaged by the Rate Order, the City offered an alternative mechanism by which Adelphia could justify its rates. The purpose of the Commission's rules is to set rates at a level approximating those that would be charged in a competitive marketplace. The City could therefore look to the rates Adelphia sets in areas where it is subject to *actual* wireline competition in the Los Angeles area.<sup>24</sup> The Rate Order thus invited Adelphia to submit evidence of such actual competitive rates as a rationale for setting the Area C, F, G, and H rates if it wished to avoid the results the City had otherwise arrived at in the Rate Order based on the best available information.<sup>25</sup>

Had Adelphia been seriously moving toward a full recertification of the Rate Filings, it could have taken advantage of the City's offer and filed revised and certified forms. Instead, Adelphia submitted no new information and did not certify the data already provided. Nor did the company submit actual competitive rates as an alternative. Instead, Adelphia first moved for a stay of the City's order, then filed its Appeal, in an attempt to avoid complying with the City's Rate Order, further delaying relief to subscribers.

### III. STANDARD OF REVIEW

Adelphia has the burden of justifying its rates pursuant to the Commission's rules.

A cable operator has the burden of proving that its existing or proposed rates for basic service and associated equipment comply with 47 USC §543, §§76.922 and 76.923.<sup>26</sup>

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<sup>24</sup> See, e.g., Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, and the Miami Valley Cable Council, In the Matter of Revisions to Cable Television Rate Regulations, MB Docket No. 02-144 *et al.*, filed Nov. 4, 2002, at 20-23.

<sup>25</sup> See Rate Order at § 3(b).

<sup>26</sup> 47 C.F.R. § 76.937(a).

When a cable operator fails to demonstrate the reasonableness of its rates, a community may use the best information available to determine a reasonable rate:

A franchising authority or the Commission may find a cable operator that does not demonstrate the reasonableness of its rates in default and, using the best information available, enter an order finding the cable operator's rates unreasonable and mandating appropriate relief, as specified in §§ 76.940, 76.941, and 76.942.<sup>27</sup>

In ruling on a rate appeal, the Commission does not conduct a *de novo* review, but instead will sustain the franchising authority's decision if there is a reasonable basis for the City's action.<sup>28</sup> "[T]he Commission will defer to the judgment of the local franchising authority provided that there is a rational basis for the decision."<sup>29</sup> The Commission reverses a franchising authority's decision only when it finds that the franchising authority acted unreasonably under the Commission's rules in rendering the rate order.<sup>30</sup> The Commission has pointed out:

Congress generally allocated to franchising authorities responsibility for reviewing basic service rates under the Act. While we have set out the general rules for regulation, we have not attempted, nor could we address, every detail of the rate regulation process. A certain amount of latitude has been left to franchising authorities. As we stated in the *Rate Order*, we will not review decisions of franchising authorities *de novo*, but rather will sustain their decisions as long as there is a reasonable basis for those decisions. *Id.* at 5731. This standard of review will apply as well with respect to franchising authority

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<sup>27</sup> 47 C.F.R. § 76.937(d).

<sup>28</sup> See, e.g., *Falcon Cable Systems, Petition for Review of Local Rate Order (Florence, OR)*, DA 98-360, Memorandum Opinion and Order, 13 FCC Rcd. 4425, 4426 (Cable Serv. Bureau February 25, 1998).

<sup>29</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, 5731-32, FCC 93-177, ¶ 149 (May 3, 1993). See also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket 92-266, *Third Order on Reconsideration*, 9 FCC Rcd. 4316, 4346, FCC 94-40, ¶ 81 (March 30, 1994); Public Notice 42927, Questions and Answers on Cable Television Rate Regulation at A18 (May 6, 1994); *Silver City* at ¶ 5.

<sup>30</sup> See *Falcon Cable Systems, op. cit.*

interpretations of any ambiguities in evaluating the responses or information provided on the FCC Form 393 (and/or FCC Forms 1200/1205) or in a cost-of-service showing.<sup>31</sup>

This deferential standard of review applies particularly to factual issues, such as whether a cable operator has provided sufficient reliable information to carry its burden of proof. In this respect, the Commission acts as a court of appeal, deferring to the judgment of the franchising authority as the finder of fact.<sup>32</sup>

These Commission precedents, taken together, mean that the City's actions must be given deference, and the City's action may be overturned only if it was arbitrary or capricious, lacking any rational basis.<sup>33</sup>

#### IV. **ARGUMENT**

##### **A. The City Was Not Required To Accept Data Adelpia Could Not Confirm To Justify A Rate Increase.**

##### **1. Adelpia Created A Situation In Which the City Could Not Rely Upon the Rate Filings.**

As noted above, under the Commission's rules a rate filing must be certified by the cable operator.<sup>34</sup> Adelpia has failed to certify its filings, because after admissions of financial fraud,

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<sup>31</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, Third Order on Reconsideration, 9 FCC Rcd. 4316 at ¶ 81 (1994). *See also* Public Notice 42927, Questions and Answers on Cable Television Rate Regulation at A18 (May 6, 1994); *Silver City* at ¶ 8.

<sup>32</sup> *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, Third Report and Order, 8 FCC Rcd. 8444 at ¶ 20 & n.28 (1993); *In re Century Cable Corp., Appeal of Local Rate Order of the Town of Silver City, New Mexico*, 10 FCC Rcd. 9403, 9403-04 at ¶ 5 (May 23, 1995) ("*Silver City*").

<sup>33</sup> *See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, FCC 93-177, 8 FCC Rcd. 5631, ¶ 149 (1993).

Adelphia refused to restate its certification. Therefore, the City could not accept the Rate Filings at face value, but had to arrive at a reasonable rate in the complete absence of reliable data from Adelphia.

If Adelphia had maintained its books and records in accord with proper accounting practices, as the Commission's rules require,<sup>35</sup> the company, the City, and the Commission would not be in this position today. Indeed, Adelphia's position in the Appeal – that the Commission should punish the City for not giving Adelphia more time for the company to straighten out its data – implicitly admits that Adelphia now finds its own filed information unreliable. If Adelphia had been prepared to recertify its data when the City asked it to, much of the trouble in this proceeding could have been avoided. Thus, what is at stake in this proceeding is not just the protection of consumers from Adelphia's market power; it is the integrity of the Commission's own rules. Under these circumstances, there is no reason for the Commission to extend special protection to Adelphia by allowing it to continue collecting rates that it has failed to justify in accordance with Commission rules.

Adelphia persists in misstating the magnitude of the problem the City faced in dealing with the company's fraud. The Appeal's favorite euphemism for the situation is "management transition." Adelphia likes to link this sanitized phrase with the notion that the City's attempt to cope with an uncertified filing was an attempt to "exploit" the unfortunate company's misfortune. Thus, Adelphia claims that the City "*chose . . . to embark on a regulatory scheme designed to exploit Adelphia's management transition.*" The City "*saw an opportunity to exploit the difficult transition in which Adelphia's new management finds itself.*" (By changing

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<sup>34</sup> See note 10 *supra*.

<sup>35</sup> See, e.g., 47 C.F.R. § 76.924(b).

management, Adelphia has evidently absolved itself of all responsibility for the predicament in which it placed itself and the City.) Predatory franchising authorities may “*exploit Adelphia’s transitional status and unreasonably impede Adelphia’s business transition.*”<sup>36</sup> The Commission is asked to believe that Adelphia, which committed fraud, is valiantly coping with minor business difficulties, while the City, which was handed the task of setting rates in the complete absence of reliable information, is gratuitously exploiting the situation. This topsy-turvy rhetoric is designed solely to obscure the fundamental fact in this proceeding: Adelphia’s fraud called into question the accuracy of the Rate Filings.

In light of Adelphia’s unwillingness to stand behind its Rate Filings, the City was required to set rates in the absence of reliable information. The Commission’s normal rate processes do not contemplate such a situation, because the Commission’s rate forms require a cable operator to certify the accuracy of the information submitted. By refusing to certify its Rate Filings – as a direct result of the company’s fraud “problem” – Adelphia forced the City to apply the Commission’s rate principles in a factual vacuum.

Adelphia has never rectified this basic problem. Adelphia now claims that it “expressly committed” to providing “a recertification of the Company’s underlying cost data.”<sup>37</sup> Presumably Adelphia is referring to its partial, last-minute offer in its May 22 comments to recertify two sets of facts, without any specified date as to when this might be done.<sup>38</sup> If so, this

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<sup>36</sup> Appeal at 7, 15, 16 (emphases added).

<sup>37</sup> Appeal at 2.

<sup>38</sup> See note 15 *supra*.

In the Appeal at 4-5, Adelphia claims to have provided “hundreds of programming cost invoices” on May 16 as a response to the City’s information requests. In fact the material

“commitment” was vague, incomplete, and untimely. Adelphia observes that its offer of certification on two specific points (a certification which still has not been provided as of the date of this filing) did not *preclude* certification of the rest of the necessary data.<sup>39</sup> But Adelphia has neither certified the Rate Filings as a whole, nor even indicated when it would be prepared to do so: not before the issuance of the Rate Order, not in the Stay Request, and not in the Appeal. The City is still waiting for Adelphia’s recertification.

Adelphia’s protests in the face of these undeniable facts are feeble. The Appeal claims the City “never explained its expectations regarding the nature and scope of the requested recertification.”<sup>40</sup> This contention is not true. The City sought just what the Commission’s rate forms already required of Adelphia: to certify that *all* the statements in the Rate Filings are true and correct, and made in good faith.<sup>41</sup> This was clear in the City’s February, 2003, written request:

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submitted appears to constitute about ninety invoices, relating to only some of the channels for which the City had required cost support, and covering only part of the relevant time period.

<sup>39</sup> Appeal at 13-14.

<sup>40</sup> Appeal at 3.

<sup>41</sup> *See* n.10 *supra*. In the Appeal, Adelphia continues to try to hide the fact that it will not certify the full set of data on which the City is expected to rule. Thus, we are told that “the Company already has *shared* [but not certified] a summary report on customer counts”; and seeks to divert attention from its refusal to certify the full data set by claiming that this and the FCC’s inflation figures “are clearly the key variables” in the Rate Filings. Appeal at 14. In fact, the numbers of subscribers included by Adelphia in this summary failed to match the number already identified in Adelphia’s summary document for programming. For example, for Area H, Adelphia’s programming cost summary showed for March 2001 13,982 “Basic” subscribers, 43,056 “Std Sat” subscribers, and 18 “Exp Sat” subscribers – a total of 57,056 – along with 808 “EBU” subscribers. The “summary report on customer counts” showed 55,543 “Basic” subscribers and 745 “EBU – PR (Residential Bulk)”, totaling 56,288. The number of subscribers in the filed Form 1240 was 56,153 on Line B1 and 55,212 on Line B2. Neither of these numbers has been supported by Adelphia to date. Thus, again, the City had to make a factual determination to make sense out of the conflicting information submitted by Adelphia.

Therefore, ITA is requesting that Adelphia's current management: 1) attest that data contained in the 2002 forms 1240 and 1205, or relied upon in completing the forms is accurate; and 2) attest that data contained in the forms 1240 and 1205 or relied upon in completing the forms filed during the preceding two years is accurate.<sup>42</sup>

This passage – from a document Adelphia itself attached to its filing – also shows the falsity of Adelphia's protest in the Appeal that “[a]lthough the City criticizes Adelphia for refusing to certify to its pre-2002 rate filings, *id.* at 7, the City never even requested such certification.”<sup>43</sup> The forms for “the preceding two years,” of course, were pre-2002. Adelphia's continuing willingness to play fast and loose with the facts in this way, even in a formal pleading to the Commission, is hardly calculated to inspire confidence in the data on which the company expects the City to rely in setting rates.

## **2. Adelphia's Proposed Solution To Its Fraud Problem Amounts To An Argument For Indefinite Delay.**

What does Adelphia expect the City to do about the need to rule on the Rate Filings when Adelphia cannot confirm them? The company's preferred solution is: delay. Adelphia apparently believes the City is not only permitted, but required, to suspend action on the Rate Filings indefinitely until Adelphia chooses to correct or confirm them. Such delay, however, benefits Adelphia and harms subscribers, because Adelphia has *already put into effect* the unapproved, and now effectively unsupported, rates in the Rate Filings.

As noted above, the City had already agreed to one extension for Area C, giving Adelphia additional time to get its house in order. Yet Adelphia still offered no date certain by which it would certify the Rate Filings as a whole. The City reasonably concluded that there was

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<sup>42</sup> Letter from Thera G. Bradshaw, Assistant General Manager, Information Technology Agency, City of Los Angeles, to Laurence Windsor, Government Affairs Manager, Adelphia, at 2 (Feb. 27, 2003) (attached to the Appeal as Exhibit B).

no reason to think that additional time would help. Thus Adelphia's demand for further delay amounts to a claim that the City is *obliged* to extend the Commission's time period *indefinitely* – while subscribers continue to be overcharged.

Adelphia's constant refrain in its Appeal is the need for inaction. Adelphia "repeatedly volunteered that the City could continue its review during an additional extension period." The Appeal states that when Adelphia filed comments on the draft Rate Order, the company "renew[ed] its offer to extend the review period," and argued that "declining the extension offer would be unfair and unreasonable." Adelphia claims that the Commission's one-year rule can be ignored because "[t]he City had already accepted a short extension for Area C, and Adelphia had clearly offered an additional extension for all four franchise areas." The City "easily could have extended the review period for any variety of timeframes."<sup>44</sup>

It is significant that nowhere in these numerous offers of delay does Adelphia ever indicate when it expects the extensions to end – when it will be prepared to certify the Rate Filings in their entirety. The Appeal protests the City's characterization of the company's position as asking for *indefinite* delay.<sup>45</sup> But the simple fact is that Adelphia has steadfastly declined to say when it would be prepared to stand behind (and, if necessary, correct) its Rate Filings. Indeed, the Appeal promotes the notion that the City should have continued to extend the review period "as long as material progress was being made."<sup>46</sup> That is about as indefinite as a time frame could be.

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<sup>43</sup> Appeal at 14 n.32.

<sup>44</sup> Appeal at 2, 5, 6, 12, 13, .

<sup>45</sup> Appeal at 13.

<sup>46</sup> Appeal at 13.

Adelphia nowhere acknowledges that even one extension of the review period (much less more) is extraordinary, an exception to what the Commission set as the normal rule. The City was not *required* to extend the normal one-year review period – and delay relief to subscribers – still further. Rather, the City acted reasonably in establishing new rates based on the best available information. Moreover, the City placed control of the schedule in Adelphia’s own hands by setting up a procedure by which Adelphia could apply for reconsideration of its rates whenever the company was in fact prepared to certify the set of rate data upon which the City was expected to rely. Adelphia still has not taken advantage of the City’s offer, which would have made this Appeal unnecessary. If Adelphia had really wished to fix its Rate Filings, the company would have seized that opportunity. The fact that Adelphia chose to burden the Commission with this appeal, rather than concentrate its efforts on verifying its rate data and returning to the City with a certified rate filing, shows that Adelphia is seeking delay, not reasonable rates.

Adelphia complains that it was deprived of an “opportunity to substantiate” its Rate Filings.<sup>47</sup> The record shows, however, that the City did give Adelphia several such opportunities, both before issuing the Rate Order and afterwards (in expressly allowing Adelphia to resubmit the Rate Filings with certified data). Adelphia failed to take advantage of these opportunities, and instead chose to burden the Commission with this appeal. That is telling evidence that Adelphia has no intention of providing a full certification of its Rate Filing at any foreseeable date – and that the company’s goal is *indefinite* delay.<sup>48</sup>

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<sup>47</sup> Appeal at 6.

<sup>48</sup> Adelphia acknowledges in the Appeal at 7 n.16 that the City has provided this option, but makes no claim that it is willing to take advantage of the City’s offer. On the other hand,

**B. The City Acted Reasonably In Setting Rates In the Absence Of Any Viable Justification Of A Rate Increase.**

**1. Adelphia's Appeal Challenges the Commission's Principle of the Burden of Proof.**

Adelphia devotes a great deal of argument to the notion that the City cannot reject a rate filing altogether and revert to the last previous rate. For example, Adelphia claims to be outraged by “a flat rejection of the Company’s last rate increase.”<sup>49</sup> This claim, however, goes to the whole basis of the Commission’s rules about justifying a rate increase. Adelphia can only qualify for a rate increase, under the Commission’s rules, by making a certified rate filing justifying the increase. Until it does so, Adelphia cannot increase its rate: it is limited by its rate ceiling previously in effect.

Accepting Adelphia’s position would reverse the entire Commission rule about the burden of proof in a rate proceeding.<sup>50</sup> That rule is not arbitrary. The cable operator *must* have the burden, because only the cable operator has the data necessary to determine the correct rates under the Commission’s rate formulae. But if a company can in effect disavow its entire filing – as Adelphia has done – and then demand that the City devise a substitute rate, this would allow Adelphia to cast that burden entirely on the City: to require the City to come up with data *Adelphia itself could not confirm* to justify a new rate. In other words, Adelphia claims the City must do Adelphia’s job of setting rates and must consider various factors to establish a rate different from the rate previously in effect.<sup>51</sup> But the Commission’s rules do not place that

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Adelphia may hope by filing this Appeal to keep the issue in suspense for an indefinitely long time. *See* Stay Opposition at 12.

<sup>49</sup> Appeal at 11.

<sup>50</sup> 47 C.F.R. § 76.937.

<sup>51</sup> *See* Appeal at 11-12.

burden on the City. The City can reject the rate filing in its entirety as wholly inadequate and unreliable.

This principle plays an important role in preventing abuses of the Commission's process by cable operators. Adelphia must have the burden of producing reliable information to justify any increase. The option of rejecting a wholly uncertified rate filing is thus essential to the functioning of the Commission's rules.

## **2. The City Reasonably Set Adelphia's Rates.**

Because the company bears the burden of proof, a wholly inadequate rate filing can be rejected *in toto*. Thus, the Commission itself has denied a rate increase where no rate form was available to support the increase.<sup>52</sup> That is Adelphia's situation in Los Angeles. Adelphia's Rate Filing was revealed as fundamentally flawed when the company failed to recertify the accuracy of the data. This is the same thing as submitting no form at all. More recently, the Commission has stated: "Insufficient or incomplete cable operator responses may result in our finding that the rate increase is unreasonable."<sup>53</sup>

Since it is possible to find a rate increase, as a whole, unreasonable on the basis of insufficient or incomplete responses to data requests, it is *a fortiori* proper to find a rate increase unreasonable on the basis of an entire filing which is insufficient and invalid. For this reason,

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<sup>52</sup> See, e.g., *Falcon Community Cable, L.P.: Complaint Regarding Cable Programming Service Tier Rate Increase*, DA 96-1082, Order, 11 FCC Rcd. 8027, ¶9 (Cable Serv. Bureau July 5, 1996) modified by Order on Reconsideration, 16 FCC Rcd. 20,253, ¶4 (2001).

<sup>53</sup> *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order*, FCC 99-57, 14 FCC Rcd 5296, ¶48 (1999).

leaving Adelphia's rates set as they were for the previous year in Areas F, G, and H, since Adelphia has failed to justify an increase, is consistent with the Commission's rules.<sup>54</sup>

The City faced a different situation, however, in Area C, where it had evidence from Adelphia that even Adelphia's previous year's rates were too high. As noted above, the City was unable to ensure that the previous year's rates were reliable. Adelphia's admitted fraud extends several years back. In Areas F, G, and H, the previous rates seemed the "lesser of evils" in terms of the best available information. In Area C, however, the information in the Rate Filing indicated that the 2002 rates should have been *lower* than the previous year's rates. For such a result to emerge from a filing designed to justify higher rates – even a filing of dubious reliability – cast additional doubt, in Area C's case, on the reasonableness of the previous year's rates. Thus, in Area C the City was forced to recalculate a rate, even on the meager "best available" information – once again as the lesser of evils. In these peculiar circumstances, the City concluded that the suspect Rate Filing information, as adjusted, was nonetheless the best available.

It is important to keep in mind, once again, that this proceeding is entirely unlike the typical case in which the cable operator has certified the information submitted, and a city can rely on *most* of that information while making specific corrections. The Commission decisions that Adelphia cites in its Appeal assume that sort of normal process.<sup>55</sup> Here, however, Adelphia's whole data set is unreliable: the company has not yet certified *any* of the information

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<sup>54</sup> Adelphia makes a further claim, without citation or explanation, that the City is "of course" precluded from setting a rate below the previous maximum permitted rate. It is unclear what this means, or what basis Adelphia has to make the assertion. Appeal at 11. The Appeal does not amplify, but merely repeats, the language of the Stay Request on this point. Stay Request at 13.

<sup>55</sup> See Appeal at 8, 11 n.24.

in the Rate Filings. Thus the City is not in a position to make what might normally be relatively minor corrections to a basically sound filing. The City was forced to take a different approach, as described in the Rate Order and above – while ensuring that Adelphia’s interests were sufficiently protected by providing that as soon as Adelphia was ready to certify its Rate Filings, the City would review those filings pursuant to applicable law. The City’s conclusion, in these extraordinary circumstances, represents a factual determination, with respect to which the Commission should “defer to the judgment of the local franchising authority.”<sup>56</sup>

**C. Adelphia Has Failed To Show That the City’s Determination of the Factual Issue of Channel Counts Was Not Reasonable.**

Adelphia raises only one specific objection to the rates set by the City in Area C. That objection is based on the issue of correct channel counts. Here, however, Adelphia fails to show that the City’s factual determination was in any way unreasonable.

The Commission’s rate regulation rules use the channel count for the basic tier service as a basic datum for the rate calculations. This should be a simple and unambiguous fact. In practice, cable operators often claim ambiguity because this one factor is so significant to the ultimate rate. And a cable operator’s internal records are often inconsistent on this basic fact. Thus, when Adelphia puts forward new backup information to support its channel count claims (as in the May 16 information appended to the Appeal as “Exhibit E-Response”), the company fails to mention that these new documents are inconsistent with those already filed with the company’s forms, which the City’s financial consultant took into account in analyzing the rate calculations. For example, “Exhibit IV” to the Form 1240 filing for Area C shows 37 channels as of 07/01/02; but it reaches this total by counting “C-SPAN” (on channels 77 and 95) and “C-SPAN2” (on channels 78 and 96) each twice. Counting them only once apiece yields the

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<sup>56</sup> See note 29 *supra* and accompanying text.

channel count arrived at by the City's financial consultant – 35 channels. Similarly, Area F's exhibit shows 51 channels as of 09/01/02, and Area G's shows 52, the same figures used by the City's financial consultant. For Area H, Adelphia's Form 1240 exhibit shows 50 channels at 09/01/02, but arrives at that result by counting Fox Sports West 2 twice (on channels 33 and 67).<sup>57</sup> Thus, when Adelphia put forward its new figures in May 2002, it was contradicting its own earlier filings. Given the conflicting factual information provided by Adelphia, it was the responsibility of the City, as the finder of fact, to determine the actual situation to which the Commission's rules were to be applied. Taking into account all the available materials and information, the City concluded, as finder of fact, that the channel counts arrived at by the City's financial consultant were correct. If the Commission were to reverse that finding, it would be improperly superseding the City's role as the finder of fact. Moreover, Adelphia has submitted no evidence to show that the City erred in its resolution of the factual confusion created by Adelphia.

Adelphia's Appeal claims that Adelphia "demonstrated" in its May 22 Comments that the channel counts used in the City's recalculation of Area C rates were erroneous.<sup>58</sup> Apparently Adelphia believes that its uncertified May 22 characterization of the channel counts as "actual" means the City must accept the May 22 letter as correct. The Appeal adds nothing to the record on this factual issue: it merely asserts, without proof, that the counts put forward on May 22 by Adelphia were the ones "actually included" on the basic tier and reflected "accurate data."<sup>59</sup> On the contrary, the City's financial consultant, A&S, reviewed the May 22 and May 16 information

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<sup>57</sup> See Exhibit F to this Opposition.

<sup>58</sup> Appeal at 6, 8-9.

<sup>59</sup> Appeal at 4, 9.

submitted by Adelphia to determine whether this late-filed information warranted any changes in the rate calculations made in support of the draft Rate Order. The A&S analysis was embodied in a letter from Garth T. Ashpaugh of A&S to Frederick E. Ellrod III of MVE dated May 29, 2003, attached to this Opposition as Exhibit E. Mr. Ashpaugh pointed out:

First, the cost support [submitted by Adelphia in May 2003] conflicts with other information provided by Adelphia and information developed by A&S in our original review and analysis of the 2002 filings. For example, the cost support identifies channels on the Basic Tier that are not included in other sources of channel line-up information. The cost support also appears to identify several digital channels on the Basic Tier. In addition, the costs per channel shown in this support are materially different from the programming costs Adelphia included with the filing. For example, the filing shows the 4th quarter 2002 per subscriber cost per channel of: “Hallmark” to be \$0.0800 whereas the May 16 response indicates the cost is \$0.0053; “The Weather Channel” to be \$0.1036 as compared to \$0.0748; and, “USA” at \$0.4350 when the invoice cost purports to be \$0.3450.

As explained in our original report, we reviewed Adelphia’s costs and then changed these costs to amounts known by A&S to be reasonable and customary. Based on the new information provided by Adelphia, we conclude that the data we relied upon is the best available information for setting rates. Nonetheless, for purposes of this letter, we updated our costs in our original report to reflect the costs provided by Adelphia in the May 16 package, insofar as that can be done given the internal inconsistencies in the Adelphia data. Since A&S was using different costs than filed by Adelphia, contrary to the suggestions in Mr. Elson’s letter, updating our analysis had only a very small impact on our determined Maximum Permitted Rate – only about \$0.01. There continue to be discrepancies in the cost and channel line-up information and we see no reason to change our original report.<sup>60</sup>

Adelphia’s May 22 assertion as to which set of data was correct is not determinative. Under normal circumstances, even the certified information submitted by a cable operator in its rate filing is subject to correction, and a franchising authority may require support for such information. Here, where the basic information was uncertified, Adelphia had even less claim to

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<sup>60</sup> Although this passage was cited in the City’s Stay Opposition, Adelphia’s Appeal at 9 persists in claiming that “the City neither explored nor rebutted Adelphia’s channel count correction.” It is unclear why Adelphia would repeat a statement from the Stay Request that had already been shown to be false.

argue that the City had to accept its assertions at face value. In dealing with the conflicting information provided by the cable operator itself, the City was forced to make factual determinations as to which set of information was more reliable. Here, the City concluded that the original calculations by the City's financial consultant represented the best available information in terms of factual reliability.

Adelphia appears to believe that the failure to refer specifically to Adelphia's filed comments in the City's Rate Order is a defect in the Rate Order.<sup>61</sup> As indicated above, however, the City's financial experts did in fact review Adelphia's comments and recommended against any changes in the Rate Order based on the late, uncertified submission. The City appropriately concluded that no significant changes needed to be made. The mere omission of a specific reference to the late-filed comments in the Rate Order does not call into question the validity or reasonableness of the Rate Order.<sup>62</sup>

**D. Adelphia Has Failed To Show That the Commission's Rules Required A Different Result.**

In a situation as unusual as the one Adelphia has created, it is worth repeating the standard of review that applies to this Appeal: "[T]he Commission will defer to the judgment of the local franchising authority provided that there is a rational basis for the decision."<sup>63</sup> To prevail, Adelphia would need to show that the Commission's rules provide clear direction showing how a community is to deal with Adelphia's extraordinary situation and the company's

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<sup>61</sup> See Appeal at 5, 8 (claiming that "the City chose the politically attractive, but legally unacceptable, solution of simply ignoring the Comments").

<sup>62</sup> Adelphia makes one-sentence references to two other objections in a footnote, Appeal at 9 n.20, as it did in the Stay Request at 11 n.22. It does not appear that these side remarks require detailed refutation here. If the Commission wishes to have such additional issues briefed, the City will be happy to provide a detailed discussion.

refusal to provide reliable filings. Adelpia would then need to show that the Rate Order is inconsistent with such clear guidance from the Commission. Adelpia cannot do so. Instead, Adelpia is reduced to empty rhetoric about the City's alleged intentions and pleas for leniency due to the company's bankruptcy.<sup>64</sup> Such window dressing does not alter the reasonableness of the City's response to the situation created by Adelpia here.

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<sup>63</sup> *See* n.29 *supra*.

<sup>64</sup> Appeal at 15-16. As noted in the Stay Opposition, Adelpia's bankruptcy status is not a reason for leniency in this regulatory proceeding. While the Commission and the City should not discriminate against a company in bankruptcy, neither should a company in bankruptcy receive more favorable treatment than other companies subjected to the same regulatory regime. *See* Stay Opposition at 13-14.

V. **CONCLUSION**

For the reasons indicated above, in light of the extraordinary circumstances surrounding Adelphia's failure to certify the Rate Filings, the Commission should reject the Appeal.

Respectfully submitted,

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Counsel for the City of Los Angeles, CA

July 11, 2003

Certificate of Service

I hereby certify that I have caused to be mailed this 11th day of July, 2003, copies of the foregoing Opposition of the City of Los Angeles, California, to Adelpia's Appeal of Local Rate Order, by first-class mail, postage prepaid, or as otherwise indicated, to the following persons:

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Washington, DC 20554

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**Marci L. Frischkorn**

Washington, D.C.  
July 11, 2003

**EXHIBIT A**

**Declaration of Patrick Collins**

**EXHIBIT B**

**Declaration of Garth T. Ashpaugh**

**EXHIBIT C**

**Letter from Liza M. Lowery of the City to Thomas M. Wilson of Adelphia  
Dated March 21, 2003**

**EXHIBIT D**

**Letter from Terry Sergi to the City's Information Technology Agency  
Dated April 7, 2003**

**EXHIBIT E**

**Letter from Garth T. Ashpaugh of A&S to Frederick E. Ellrod III of MVE  
Dated May 29, 2003**

**EXHIBIT F**

**Channel Count Data From Adelphia's Form 1240 Filings**