

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

In the Matter of)	
)	
TIME WARNER CABLE)	
)	File No. CSB-A-0502
Appeal of Local Rate Order Issued by)	CUID NC0028
the City of Raleigh, North Carolina)	

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 2000

Released: January 25, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Time Warner Cable (“Time Warner”), a franchised cable operator serving the City of Raleigh, North Carolina (“City”), has filed an appeal from a local rate order issued by the City for the rate period beginning January 1, 1998 (“1998 rate”).¹ The City’s rate order reduced Time Warner’s maximum permitted rate for the basic service tier (“BST”) calculated on FCC Form 1240. The City did not file a responsive pleading.

II. BACKGROUND

2. Under the Commission’s rules, rate orders issued by local franchising authorities may be appealed to the Commission.² In ruling on an appeal of a local rate order, 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.³ 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. 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.⁴

3. An operator proposing an increase in the BST or equipment or installation rates bears the

¹ Review of FCC 1240 Annual Basic Service Tier Rate Adjustment Request filed by Time Warner Cable for the City of Raleigh, NC-0028, dated Dec. 18, 1997, found at Time Warner Appeal Exh. A (“local rate order”).

² 47 C.F.R. 76.944.

³ See 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 5631, 5731 (1993) (“*Rate Order*”); Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) (“*Third Order on Reconsideration*”).

⁴ *Rate Order* at 5732.

burden of demonstrating that the proposed increase conforms with our rules.⁵ In determining whether the operator's proposed increase conforms with our rules, a franchising authority may direct the operator to provide supporting information.⁶ After reviewing an operator's rate forms and any other additional information submitted, the franchising authority may approve the operator's requested rate increase or issue a written decision explaining why the operator's rate is not reasonable.⁷ If the franchising authority determines that the operator's proposed rate exceeds the maximum permitted rate as determined by the Commission's rules, it may prescribe a rate different from the proposed rate, provided that it explains why the operator's rate is unreasonable and the prescribed rate is reasonable.

4. An operator using the annual rate adjustment method on FCC Form 1240 projects its costs for the 12 month period starting from the date the operator implements its new rates and, in the next year, trues up those projections against actual costs.⁸ It then must adjust its rate downward to compensate for any over-estimations of its cost changes and may adjust its rate upward to compensate for any under-estimations. Because operators file their proposed rates at least 90 days in advance of the intended implementation, and the true-up must be based on actual costs, the true-up period will not fully coincide with the period covered by the previous year's projections.⁹

III. DISCUSSION

5. According to Time Warner, the City made two changes to Time Warner's 1998 rate calculation, which resulted in a downward adjustment of Time Warner's proposed MPR. First, where the Form 1240 for 1998 calls for the past permitted rate, the City staff used a lower maximum permitted rate ("MPR") for Time Warner's 1997 rate than it had previously approved.¹⁰ Second, the City used inflation data not released until after Time Warner had submitted its rate form to the City.¹¹ Time Warner argues that the City erred when changing the previously-approved MPR because no appeal of the order approving the 1997 rate was filed and the rate had become final. Because no other errors were alleged by the City, Time Warner argues that the City should not have refreshed the inflation data in Time Warner's Form 1240.

⁵ 47 C.F.R. § 76.937(a).

⁶ See *Rate Order*, 8 FCC Rcd at 5718-19.

⁷ 47 C.F.R. § 76.936; see *Ultracom of Marple, Inc.*, 10 FCC Rcd 6640-6641-42 (Cab. Serv. Bur. 1995).

⁸ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 420-21 para. 79 (1995) ("*Thirteenth Order on Reconsideration*").

⁹ *Id.* at 420 n.151; see Instructions for FCC Form 1240, Annual Updating of Maximum Permitted Rates for Regulated Cable Services at 3-4 (July 1996).

¹⁰ Time Warner Appeal at 2.

¹¹ Time Warner Appeal at 3-4.

6. The City's local rate order found that Time Warner did not base its true-up or projected costs on the most current inflation data available at the time of the City's action and that "Time Warner Cable proposed maximum permitted Basic Service Tier rate charge of \$8.80, cannot be supported by presently known inflation data."¹² The City ordered Time Warner to "revise its Form 1240 for the 1997 by applying the inflation values published by the FCC for each of the four (4) quarters in 1997."¹³ The rate order also found that "Time Warner had by in large substantiated the other adjustments to its Basic Service Tier rate based on past and estimated cost elements."¹⁴ The City approved a maximum permitted rate of \$8.63 for 1998. This rate comes from Table A, Cable Service Rate Adjustments Effective January 1, 1998, of the Staff Report prepared by the City's Information Access Staff.¹⁵ Table A shows operator selected and "Max Rate[s]" for 1996 through 1998. The BST "1997 Max Rate" in Table A is \$8.50 rather than the \$8.68 approved in the City's local rate order adopted December 11, 1996.¹⁶

7. From the record, it appears that the Staff recalculated Time Warner's permitted rate brought forward from 1997 to reflect inflation information made available after that rate was approved and after Time Warner filed its Form 1240 for its 1998 rate. The Commission allows operators projecting their rates to adjust for inflation for the coming year using past inflation data,¹⁷ and Time Warner's 1997 rate would have included an inflation projection based on past inflation data. Because this projection may not exactly reflect inflation actually experienced, the Commission provides a true-up mechanism for correcting inexact estimations.¹⁸ In calculating its 1998 rate on FCC Form 1240, Time Warner should have reflected the true-up inflation for the appropriate true-up period in its rate. Form 1240 Worksheet 1 – True-Up Period Inflation is used to calculate the average inflation factor for the true-up period. This information from Worksheet 1 is entered on Module C, the module showing inflation information, and carried forward into the calculation of the maximum permitted rate for the true-up period on Modules E

¹² Local rate order, second page.

¹³ Local rate order, third page.

¹⁴ Local rate order, second page.

¹⁵ Time Warner Cable City of Raleigh, NC-0028, FCC 1240 Review for 1998, Report at 1 (Dec. 16, 1997) ("Staff Report").

¹⁶ Compare Staff Report at 1 with Review of FCC 1240 Annual Basic Service Tier Adjustment Request filed by Time Warner Cable for the City of Raleigh, NC-0028, dated Dec. 11, 1996, second page ("1997 local rate order"), found at Time Warner Exh. C. According to Table A, \$8.50 is also the operator selected rate for 1997. Table A also shows the CPST rates for 1996-1998, including the 1997 Max Rate for the CPST. Footnote 1 to Table A explains that this is the CPST rate ordered by the Bureau in DA 97-1532, an order that was subject to further Bureau review when the Staff Report was written. See *Time Warner Cable* (Raleigh, NC), 12 FCC Rcd 23530 (Cab. Serv. Bur. 1997), reconsideration granted in part and order vacated, 13 FCC Rcd 16795 (Cab. Serv. Bur. 1998) (reconsideration granted only with respect to treatment of CPST revenues collected pursuant to the Social Contract). The Staff Report does not appear to apply the Bureau's CPST order to the BST rate, a concern expressed in Time Warner's local rate appeal at 2. The Staff Report at 6 states that Staff recalculated Time Warner's 1998 CPST rate on the basis of the 1997 maximum permitted CPST rate found by the Bureau. Time Warner does not raise issues regarding CPST rates, which are outside the City's jurisdiction. See 47 U.S.C. § 543(a)(2)(b).

¹⁷ *Thirteenth Order on Reconsideration*, 11 FCC Rcd at 418 para. 71.

¹⁸ *Id.* at 420 para. 79.

and F. The true-up maximum permitted rate from Module E and F is then carried forward onto Module H, which determines any overcharge or undercharge from the true-up period. This information is then reflected in the new maximum permitted rate calculated on Module I. Because the inflation adjustment for the true-up period is calculated on the current Form 1240 for the BST rate implemented in 1998, the City should not recalculate the 1997 maximum permitted rate outside the form for the 1998 rate to correct it for subsequently available inflation information.¹⁹

8. An operator completing the true-up portion of Form 1240 is to use inflation figure published by the Commission for each month of the true-up period. If the true-up period includes months for which the Commission has not released an inflation figure, the operator is to use the figure for the most recent quarter for which an inflation figure is available.²⁰ The operator calculates the current inflation factor used for the projected period using the quarterly inflation factor most recently released by the Commission.²¹ Time Warner correctly states that a franchising authority should not find a rate unreasonable solely because more current inflation data has become available by the time the franchising authority reviews a cable operator's rate submission.²² Since a cable operator must give its franchising authority 90 days notice before implementing rate adjustments, allowing franchising authorities to refresh a cable operator's inflation calculation with new quarterly inflation data released during the review period would result in adjustment for most, if not all, BST rate changes. This could delay otherwise permissible rate changes or require changes in already-implemented rates, causing needless confusion to subscribers and increased administrative costs for the cable operator. On the other hand, if a rate is unreasonable on its face or has to be adjusted for reasons other than availability of a more current inflation figure, e.g., because the operator failed to provide correct information in its rate justification or failed to complete its rate justification form correctly, the franchising authority may recalculate the maximum permitted BST rate using the most accurate inflation information available at the time of its review for the period at issue.

9. Time Warner contends that the franchising authority unreasonably adjusted its rate using new inflation information that only became available after Time Warner filed its rate form.²³ If Time Warner correctly prepared its rate form, as it argues, this would end the matter. However, the Staff Report raises a question as to whether this is the case. Time Warner submitted its Form 1240 on September 29, 1997 to justify the rate it planned to put into effect beginning January 1, 1998.²⁴ The Staff Report states that the

¹⁹ See Instructions for FCC Form 1240 at 13-25 (July 1996).

²⁰ Instructions for FCC Form 1240 at 24.

²¹ *Id.* at 14.

²² See *Cencom Cable Income Partners*, 12 FCC Rcd 7948, 7952-57, *aff'd* 12 FCC Rcd 22295 (1997); see also *Third Reconsideration*, 9 FCC Rcd at 4349 ("When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates."); *TCI Cablevision of Eastern Iowa*, 13 FCC Rcd 3080, 3085-86 paras. 13-15, *reconsideration denied*, 13 FCC Rcd 11146 (Cab. Serv. Bur. 1998); *Continental Cablevision, Inc. of Michigan*, 10 FCC Rcd 8836, 8838 (Cab. Serv. Bur. 1995). Cf. 47 C.F.R. § 76.933(g)(1), which limits an operator's right to amend its Form 1240 during the review period to situations where there is "a material change in the operator's circumstances during the 90-day review period and the change affects the operator's rate change filing."

²³ The Staff Report at 5 acknowledges that Time Warner did not have the inflation data used by the Staff when completing its Form 1240 for 1998.

²⁴ Staff Report at 1; Appeal at 1.

“true-up period covers the 12 months of 1997, from January 1 to December 31,”²⁵ which includes a period of more than three months after Time Warner prepared its rate forms. The true-up period should indicate real, not projected, cost data.²⁶ Because the operator must file Form 1240 at least 90 days before an increase takes effect, the period for the true-up will not coincide with the previous year’s projection. Information about the actual costs incurred between the filing and the planned implementation date for the new rate belongs in the next true-up. While we are not reviewing the rate form or making findings about the form here, we are not required to disregard questions arising from the face of the operator’s documentation that could have an impact on the issue raised in its appeal.²⁷

10. We are remanding the local rate order addressed herein for action consistent with this Memorandum Opinion and Order.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the Petition for Review of Local Rate Order filed by Time Warner Cable on February 13, 1998 **IS GRANTED** to the extent indicated herein and the local rate order **IS REMANDED** to the City of Raleigh, North Carolina for action consistent with this Memorandum Opinion and Order.

12. **IT IS FURTHER ORDERED** that the City of Raleigh, North Carolina shall not enforce matters remanded for further consideration pending further action by the City on those matters.

13. This action is taken pursuant to authority delegated by section 0.321 of the Commission’s rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁵ Staff Report at 4.

²⁶ *Thirteenth Order on Reconsideration*, 11 FCC Rcd at 420.

²⁷ *See Time Warner Cable* (Chatham County, NC), DA 99-1757, 1999 WL 680418 (released Sept. 2, 1999 Cab. Serv. Bur.), *denying reconsideration of* 13 FCC Rcd 10310 (Cab. Serv. Bur. 1998).