

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

In the Matter of)	
)	
Comcast Cablevision of Detroit, Inc.)	
)	CSB-A-0615
Appeal of Local Rate Order of the)	
City of Detroit, Michigan)	
CUID MI1039)	

MEMORANDUM OPINION AND ORDER

Adopted: December 5, 2000

Released: December 7, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Comcast Cablevision of Detroit, Inc. (“Comcast”) has filed an appeal of the local rate order approved by the City of Detroit (“City”), its franchising authority, on January 29, 1999.¹ The rate order reduced basic service tier (“BST”) and equipment and installation rates and required refunds.² The City opposed the appeal and submitted an addendum/clarification to its opposition, and Comcast replied. Comcast also filed a petition for stay, which the City opposed.³ The appeal is granted in part and denied in part, and the local rate order is remanded to the City for further consideration.

II. BACKGROUND

2. Under the Commission’s rules, rate orders issued by local franchising authorities may be appealed to the Commission.⁴ In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but will sustain the franchising authority’s decision provided there is a reasonable basis for that decision, and will reverse a franchising authority’s decision only if the franchising authority

¹ Appeal of Comcast Cablevision of Detroit, Inc. from a Rate Order of the City of Detroit, Michigan, filed March 15, 1999 (“Comcast Appeal”); Opposition to Appeal of Local Rate Order, filed by the City Apr. 30, 1999 (“City Opposition”); Addendum/Clarification to Opposition to Appeal of Local Rate Order, filed May 4, 1999; Reply of Comcast Cablevision of Detroit, Inc. to Opposition by the City of Detroit, Michigan, filed May 12, 1999 (“Comcast Reply”). On June 3, 1999, Comcast submitted a videotape of the City’s January 29, 1999 Rate Hearing to be associated with its Reply.

² Comcast Appeal, Exhibit 1, Resolution and Rate Order Regarding Basic Service and Equipment and Other Charges of Comcast Cablevision of Detroit, approved Jan. 29, 1999 (“Local Rate Order”). The Local Rate Order can also be found at City Opposition, Exhibit A.

³ In light of the disposition on the merits, the petition for stay is being dismissed as moot.

⁴ 47 C.F.R. § 76.944.

unreasonably applied the Commission's rules in its local rate order.⁵ If the Commission reverses a franchising authority's decision, it will not substitute its own decision but will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission decision on appeal.⁶

3. An operator seeking to justify its existing or proposed rates for the basic service tier or for equipment and installation bears the burden of demonstrating that the rates conform with our rules.⁷ A franchising authority may direct the operator to provide supporting information⁸ and should permit the cable operator an opportunity to cure defects in its filing or file supplemental information considered necessary by the franchising authority.⁹ An operator failing to comply with a reasonable data request in a timely fashion or failing to provide complete information in good faith does so at the risk of being found in default and having a rate prescribed on the basis of the best information available to the franchising authority. If after reviewing an operator's rate forms and any other additional information submitted, the franchising authority determines that the operator's rates exceed the maximum permitted rate as determined by the Commission's rules, it may prescribe a rate different from the proposed rate or order refunds, provided that, after having given the operator an opportunity to participate, it affirmatively demonstrates in its written decision why the operator's rate or rates are unreasonable and any prescribed rate is reasonable.¹⁰

III. DISCUSSION

4. The City reviewed Comcast's proposed BST rates filed on its FCC Form 1240 and the equipment and installation rates filed on FCC Form 1205 with the assistance of a consultant and adopted the findings and recommendations in the Consultant's Report as its own.¹¹ It approved the rates recommended in the Consultant's Report and ordered rate reductions and refunds to the extent Comcast's rates exceeded the approved rates.¹² Comcast argues that the treatment of its BST rate in the Consultant's Report was unreasonable because: (1) a shared channel was deleted from the BST channel lineup in violation of the Commission's preponderance of use policy and the deletion was not properly reflected in the rate calculation; (2) three months were eliminated from Comcast's true-up period in violation of the *Waiver Order* procedure for handling the transition to the annual rate adjustment method; and (3) the inflation data used in the operator's rate form was improperly refreshed. Comcast also claims that the

⁵ 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*"); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4346 (1994) ("*Third Order on Reconsideration*").

⁶ *Rate Order*, 8 FCC Rcd at 5732.

⁷ 47 C.F.R. § 76.937(a).

⁸ See *Rate Order*, 8 FCC Rcd at 5718-19; *Third Order on Reconsideration*, 9 FCC Rcd at 4344.

⁹ *Id.* at 4347-48.

¹⁰ 47 C.F.R. § 76.936; see *Falcon Telecable*, 11 FCC Rcd 9849, 9853 para. 10 (Cab. Serv. Bur. 1996); *Ultracom of Marple, Inc.*, 10 FCC Rcd 6640, 6641-42 (Cab. Serv. Bur. 1995).

¹¹ Local Rate Order at 2. The Consultant's Report can be found at Comcast Appeal, Exhibit 5, Review of Comcast's 1998 1240 and 1205 Filed with the City of Detroit (January 4, 1998), and City Opposition, Exhibit E.

¹² Local Rate Order at 3.

treatment of its equipment and installation rates in the Consultant's Report was unreasonable because: (1) depreciation expense was recalculated with annualized rather than actual data and converter losses were eliminated from the recovery; (2) the number of labor hours used to compute the hourly service charge was adjusted in a way that denies Comcast full recovery of its equipment and installation expenses; and (3) the operator's rate of return was reduced below the level the operator had previously recovered. Comcast also argues that it should be able to offset equipment overcharges against BST undercharges if refunds for equipment rates are required.

A. Programming Rates

1. Channel Count

5. Although Comcast's BST rate computed on its 1998 Form 1240 was before the City, the Consultant's Report focused on the channel count in Comcast's earlier 1997 Form 1240. According to the Consultant's Report, Comcast erroneously included its premium PASS channel in the regulated channel count on its 1997 Form 1240.¹³ The consultant deleted the channel on the 1997 form and brought the revision forward. According to Comcast, the channel was a shared channel that should be counted as a basic service channel under the Commission's preponderance of use policy.¹⁴ Even if the channel did not qualify as a regulated channel, Comcast argues, the consultant's methodology for carrying the correction forward failed to follow the instructions for the rate form.¹⁵

6. A comparison of the operator's 1997 and 1998 forms with the revised forms prepared by the City's consultant shows that the consultant deleted one channel during the true-up period on the 1997 Form 1240 and carried that deletion through the rest of the true-up period and projected period on the 1997 form, although not for the intervening "gap" or second true-up period on that same form.¹⁶ The comparison also shows that the consultant accepted Comcast's channel count for both the true-up and projected periods shown on Comcast's 1998 Form 1240. The value of the deleted channel was reflected in the entry on Line I3 of the consultant's revised 1997 form and in a lower MPR on Line I9 than Comcast had claimed. The reduced MPR was brought forward to Line A1 on the 1998 form and used as the starting point for computing the base rate on Module D, but the companion entry on Line I3 was not brought forward to Line D5 of Module D as required by the Form 1240 instructions. Form 1240 works by first stripping away past rate adjustments to arrive at a base rate and then adjusting the base rate to calculate both the new true-up period and projected period rates.¹⁷ If a prior adjustment is added back to the base rate in the true-up process without first being removed from the base rate, as appears to have been the case in the consultant's revised 1998 rate form, the effect is to make the adjustment twice, and the resulting MPR is inaccurate.

¹³ Consultant's Report at 2.

¹⁴ FCC Form 1240 Instructions at 7. *Accord*, Public Notice 43303, Questions and Answers on Cable Television Rate Regulation, 75 RR2d 346-47, Answer to Q1 (released June 1, 1994). The instructions to FCC Form 1240 provide that a channel used to carry a regulated service more than half the time should be considered a regulated channel.

¹⁵ Comcast Appeal at 8-9.

¹⁶ The forms prepared by Comcast can be found at Comcast Appeal, Exhibit 2 and Exhibit 3, Attachment A. The revised forms can be found at Consultant's Report, Exhibit C and Exhibit I. For channel counts, *see* Worksheet 2. Although the Consultant's Report reduced the number of channels in the projected period on the 1997 form, it accepted Comcast's channel count for this same period in the true up on the 1998 form.

¹⁷ Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services at 4 (July 1996) ("FCC Form 1240 Instructions").

7. The City's claimed support for this action was the documentation Comcast provided with its 1998 form, the 1998 channel line-up and rate card and channel line-ups for the true-up period on the 1998 form.¹⁸ Comcast responded to the Consultant's Report with a description of how the channel was used during 1997 and with lists of channels and associated program costs showing a shared PASS/PASS BASIC channel for the months of the true-up and projected periods covered by the 1997 form, which it had submitted in 1997.¹⁹ This was not addressed in the City's local rate order. The City argues generally that the Consultant's Report is correct based on information available when it was prepared,²⁰ but the Consultant's Report mailed to Comcast on January 7, 1999 is the first notice in the record of concern about Comcast's count of regulated channels on the earlier rate form. Comcast submitted its rebuttal information to the Detroit Cable Communications Commission ("DCCC") for its January 14, 1999 meeting held to discuss the report and the DCCC's recommendations for the City Council's January 29, 1999 hearing on Comcast's rates.²¹ In addition to failing to address Comcast's supporting information, neither the City's local rate order nor the Consultant's Report explains how the documentation for the 1998 rate form supports the adjustment made to the channel count during the 1997 form's true-up period, explains the Consultant's Report's seemingly inconsistent treatment of the channel count over different periods and forms,²² or explains why any inaccurate channel count continuing through the projected period on the 1997 Form 1240 could not be addressed through a subsequent true-up on Form 1240. The City's treatment of the PASS channel does not satisfy the reasonableness standard and is remanded.

2. True-Up Period

8. Operators using Form 1240 may adjust rates once per year to reflect reasonably certain and quantifiable changes in external costs, inflation, and the number of regulated channels that are projected for the 12 months following the rate change.²³ If actual and projected costs are different during the rate year, operators use a true-up mechanism to correct estimated costs for actual costs. The instructions to Form 1240 provide that an operator cannot perform a true-up on the same period twice and must have actual data available to verify the rate adjustments claimed for the true-up period.²⁴ Because operators file Form 1240 with the franchising authority at least 90 days before implementing the rate, there will be a gap between the end of the true-up period and the beginning of the next projected period for which actual data will not be available and a true-up cannot ordinarily be performed. This gap created a problem for operators making the transition from the quarterly rate adjustment methodology on Form 1210 to the Form 1240 annual adjustment methodology. The Bureau's *Waiver Order* addressed this problem by providing a one-time exception to the actual cost data requirement.²⁵

¹⁸ City Opposition at 13-14, and Exhibits F and G.

¹⁹ See Comcast Appeal, Exhibit 6, letter from Booth (Comcast) to Stanton (DCCC) (Jan. 14, 1999) at 2 and attachments to Attachment D (letter from Kenna (Comcast) to Stanton (Apr. 8, 1997)).

²⁰ City Opposition at 12.

²¹ See Comcast Appeal, Exhibit 4, Letter from Stanton to Booth and Nathan (Comcast) (Jan. 7, 1999).

²² The true-up on the 1998 Form 1240 overlapped the projected period on the 1997 Form 1240.

²³ 47 C.F.R. § 76.922(e)(3).

²⁴ FCC Form 1240 Instructions at 4.

²⁵ *Annual Rate Adjustment System: Request for Waiver FCC Form 1240*, DA 96-1084 Corrected, 11 FCC Rcd 16297 (Cab. Serv. Bur. 1996) ("*Waiver Order*"), extending *Annual Rate Adjustment System for Cable Service Rates: Request for Waiver of Requirements Contained in the Thirteenth Order on Reconsideration*, 11 FCC Rcd 10235 (Cab. Serv. Bur. 1996), to all cable operators.

9. The Consultant's Report eliminated three months of Comcast's true-up period for what it characterized as an overlap of those months with the true-up period selected in the operator's 1997 Form 1240. It adjusted Comcast's rate form accordingly. Comcast argues that its true-up calculation was consistent with the *Waiver Order*. We agree. Pursuant to the *Waiver Order*, an operator's initial Form 1240 may include an estimated true-up period based on projected changes in costs, inflation, channels and subscriber information attributed to the period between the last date for which historical cost data is available and the effective date of the new rates. These projections are to be accompanied by a separate calculation and explanation of the basis for the projected costs in accordance with guidelines set forth in Appendix A to the *Waiver Order*.²⁶ Operators put actual and estimated costs into separate true-up periods on the rate form. Appendix A provides that operators shall use Form 1240 Module F for the actual true-up period and Module G for the estimated true-up period. In Module H, Lines H1 through H4 are used to calculate the total amount by which subscribers were overcharged or undercharged during the actual true-up period and lines H5 through H8 to calculate the estimated overcharge or undercharge. Comcast followed these instructions in claiming two true-up periods on its 1997 Form 1240, one for actual costs since its last form filed under the quarterly adjustment methodology, and one for the estimated costs occurring between filing its first Form 1240 and implementing its adjusted rate.

10. When an operator files its second Form 1240, it performs a true-up on the estimated true-up period from the first filing based on costs actually incurred for that period. *Waiver Order* Appendix A provides the method for doing this.²⁷ First, the operator removes the Inflation Segment for the estimated true-up period (line G5) in the first filing from the Base Rate (line D8) of the second filing. Then, the operator corrects Module H in the second filing to eliminate the amount already claimed for the estimated period in the first filing from line H13. It does so by subtracting the sum of lines H7 and H8 from the first filing (the estimated true-up period adjustment eligible for interest, and the interest on that amount) from the total true-up adjustment on line H13 of the second filing. Comcast followed these instructions in completing its 1998 Form 1240 and correctly included the months covered by the estimated true-up period from its 1997 form in its 1998 true up calculation.²⁸ The City was not reasonable in rejecting the methodology approved in the *Waiver Order* and in disallowing three months of Comcast's true-up period. The City's argument that Comcast insufficiently explained the source of the number used for the current inflation segment on its 1998 Form 1240 line D7 also does not support its decision. Comcast's response²⁹ to the City's information request³⁰ explained where the information was found in the 1997 Form 1240 and sufficiently identified the source. The City's treatment of the true-up calculation must be remanded.

²⁶ *Waiver Order*, 11 FCC Rcd at 16303-04.

²⁷ *Id.* at 1604-05.

²⁸ The total true-up adjustment on line H13 of the 1997 Form 1240 included the actual and estimated true ups Comcast could have recovered through its rate. Line H14 shows that Comcast did not claim any of this true up in the new rate. Instead, the total adjustment from line H13 is entered as the remaining true-up adjustment on line H15 of the 1997 form. When Comcast carried this remaining adjustment over to line H12 of the 1998 Form 1240, the number entered for the previous remaining true-up adjustment on line H12 was reduced by the sum of lines H7 and H8 on the 1997 form. This removed the estimated true up claimed in the 1997 filing from the true up computed on the 1998 form. Line H12 is added to other adjustments shown in Module H to compute the total adjustment on line H13.

²⁹ City Opposition, Exhibit C, Letter from Kenna to Stanton (May 6, 1998), at 1, response 2.f).

³⁰ City Opposition, Exhibit B, Letter from Stanton to Kenna (Apr. 6, 1998), at 3, request 2.f).

3. Inflation Factors

11. An operators using Form 1240 trues up the inflation information on the rate form by using the quarterly inflation figures published by the Commission.³¹ If the true-up on Worksheet 1 includes months for which the Commission has not released an inflation figure, the operator must use the figure for the most recent quarter for which a figure is available. The operator then computes an average inflation factor for the true-up period, which is used in calculating the inflation factor and the maximum permitted rate for the true-up period.³² The inflation factor most recently released by the Commission is also used to compute the current inflation factor for the projected period.³³ 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.³⁴ However, if a rate is unreasonable on its face or has to be adjusted for reasons other than the availability of a more current inflation figure, the franchising authority may recalculate the maximum permitted basic service tier rate using the most accurate inflation information for the period at issue that is available at the time of its review.

12. The Consultant's Report found that Comcast used an inflation rate of 1.43% for the last month of its true-up period but that the subsequently published Commission inflation factor for that month, January 1998, was 1.14%.³⁵ The consultant adjusted the inflation factor on Line C3 of Form 1240 for the true-up period and made a comparable adjustment on Line C5 for the current FCC inflation factor. Comcast argues on appeal that the inflation rates it used were justified and valid when the programming rates were set and should not have been adjusted using information released five months after it submitted its 1998 Form 1240.³⁶ Comcast dated its rate form on February 1, 1998 for the period beginning May 1, 1998,³⁷ and the updated inflation information was not released by the Commission until June 30, 1998.³⁸ The City argues its action was permitted because Comcast's rate had to be recalculated due to problems regarding the PASS channel and the true-up period.³⁹

13. In light of our remand of the PASS channel and true-up issues, we are also remanding the City's adjustment of the inflation factor. The City should accept the inflation factor available when Comcast's rate form was submitted unless, after the further review, the City determines that the rate Comcast proposed should be adjusted.

³¹ Form 1240 Instructions at 13, 24-25.

³² *Id.* at 14, 17, 24-25.

³³ *Id.* at 14, 22.

³⁴ *Time Warner Cable*, 14 FCC Rcd 14038, 14038 (Cab. Serv. Bur. 1999), *aff'g* 13 FCC Rcd 10310 (Cab. Serv. Bur. 1998); *TCI Cablevision of Ohio, Inc.*, 13 FCC Rcd 10339, 10341 (Cab. Serv. Bur. 1998).

³⁵ Consultant's Report at 2.

³⁶ Comcast Appeal at 12-15.

³⁷ Comcast Appeal, Exhibit 2, FCC Form 1240, pp. 1, 4.

³⁸ See Public Notice, First Quarter 1998 Inflation Adjustment Figure for Cable Operators Using FCC Form 1240 Now Available, DA 98-1292 (released June 30, 1998).

³⁹ City Opposition at 15-16.

B. Equipment and Installation Rates

1. Depreciation Data Used

14. Comcast submitted its equipment rates on February 1, 1998, using data from its fiscal year closing on December 31, 1996 rather than its more recent fiscal year closing December 31, 1997. According to Comcast, data from the 1997 fiscal year was not yet available when it signed and submitted its rates.⁴⁰ To compensate for the lack of 1997 numbers, the City's consultant "annualized depreciation expense based on assets as of December 31, 1996."⁴¹ According to the Consultant's Report, this use of annualized depreciation expense accounts for the major difference between the recalculation and Comcast's form.⁴² Comcast challenges this recalculation, arguing that only actual historical costs can be used to compute equipment costs for the upcoming year.⁴³ The City defends its consultant's methodology as reasonable, because the annualized expense was based on the actual expenses for 1996.⁴⁴

15. Operators electing the annual adjustment methodology must file Form 1205 when they file Form 1240 for proposed BST rates.⁴⁵ Because the filing may not coincide with an operator's fiscal year, operators can choose to use data from either the "last," or "most recent" fiscal year or, alternatively, from "the 12 months preceding the filing."⁴⁶ The Form 1205 Instructions provide that operators making their annual filing must reflect "the most recent fiscal year"⁴⁷ and use financial data from the company's general ledger and subsidiary records maintained in accordance with generally accepted accounting principles from the fiscal year indicated on the cover sheet.⁴⁸ This past cost requirement follows from the Communications Act requirement that equipment and installation rates be based on actual cost and is consistent with the intent of Congress that operators be able to recover their costs for leasing equipment and installing service from the rates charged for those activities.⁴⁹ Thus, the rate form generally requires historical costs rather than historically-based projected costs, even though there may be a time lag between the time the costs are incurred and the time they are reflected in rates.⁵⁰

⁴⁰ Comcast Reply at 15 n.52. Comcast states that this lag is consistent with past rate filings. Its 1997 rate filing used data from its 1995 fiscal year.

⁴¹ Consultant's Report at 2-3.

⁴² *Id.*

⁴³ Comcast Appeal at 18-20.

⁴⁴ City Opposition at 16-17.

⁴⁵ 47 C.F.R. § 76.923(n)(3); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Thirteenth Order on Reconsideration*, 11 FCC Rcd 388, 423-24 (1995).

⁴⁶ *Id.* at 424 para. 88.

⁴⁷ Form 1205 Instructions for Determining Costs of Regulated Cable Equipment and Installation at 6, Question 2 (June 1996) ("FCC Form 1205 Instructions").

⁴⁸ FCC Form 1205 Instructions at 3.

⁴⁹ Communications Act § 623(b)(3), 47 U.S.C. § 543(b)(3); see *Rate Order*, 8 FCC Rcd at 5810 para. 287, 5814-15 para. 294.

⁵⁰ *Third Order on Reconsideration*, 9 FCC Rcd at 4372 para. 157. The Form 1205 Instructions at 3-4 require operators to complete the form using financial data from the company's general ledger and subsidiary records, and provides for estimates only to the extent that operators have not previously maintained accounts in a manner consistent with the Commission's rules and do not have fully developed cost data.

16. We find that Comcast's use of the most recently available fiscal year data, the data from its 1996 fiscal year, is consistent with the Commission's requirements that the operator reflect its most recent fiscal year in the rate calculations and that equipment and installation rates be based on actual cost. The filing date for the Form 1205 in this case was dictated by the filing of the Form 1240. In light of the short time between the close of the operator's 1997 fiscal year and the filing date, Comcast's claim that fiscal year 1997 data was not yet available was not unreasonable on its face, and there is no allegation on the record that Comcast lacked diligence in pursuing the availability of this data.⁵¹ Although there is a lag between incurring the depreciation expense and recovering it through rates, the depreciation expense from the 1997 fiscal year should be recovered in the operator's next rate form. On the other hand, the rates prescribed from the methodology in the Consultant's Report are based on cost projections. Although these projections are derived from Comcast's past depreciation expense, they are still projections that cannot be trued up on future Forms 1205. If the City consistently applies this methodology to future rate filings, future rate prescriptions will continue to reflect projections rather than actual depreciation expense. The City's use of historically-based projected costs in lieu of actual costs to prescribe equipment rates was not reasonable and is remanded.

2. Converter Loss Adjustment

17. Comcast also alleges that the City's consultant erred in disallowing the costs in Comcast's converter loss adjustment account. The Consultant's Report disallowed an expense item for converter losses in 1996 because Comcast failed to show that these costs were incurred in 1996 or were expenses that should appropriately be recovered in equipment rates.⁵² The City explains that the only supporting information Comcast provided before the consultant prepared his report was a one-line ledger page showing the claimed amount.⁵³ In the City's view, it reasonably rejected the figure in the absence of adequate support. Comcast disagrees that the City's action was reasonable, arguing that it calculated rates the same way it had calculated rates in the past without objection from the City, and had provided additional information after learning of the consultant's concern from the Consultant's Report.⁵⁴

18. The Commission's *First Order on Reconsideration* clarified that lost equipment is recoverable through depreciation rates.⁵⁵ There the Commission assumed that depreciation rates would take into account a normal loss of converters, and retirement of lost items would adjust the net plant balance, but added that an operator experiencing an unusual number of lost items not provided for in depreciation rates may make a reasonable adjustment to recover the cost. An operator including unusual losses in the depreciation expense reported on Schedule C should note and document the unusual losses so that the franchising authority can assess the reasonableness of lost converter adjustments.⁵⁶ The practice Comcast

⁵¹ Operators not using the annual filing methodology must file equipment rate adjustments within 60 days of the end of the fiscal year. 47 C.F.R. § 76.923(n)(2). Presumably this is a sufficient time for closing the books and preparing the rate form.

⁵² Consultant's Report at 3.

⁵³ City Opposition at 17-18.

⁵⁴ Comcast Appeal at 17, 20 & n.51; Comcast Reply at 2 n.2.

⁵⁵ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, 9 FCC Rcd 1164, 1199-1200 para. 66 (1993) ("*First Order on Reconsideration*").

⁵⁶ *Id.* at n.97. Where recovery would not cause unusual rate spikes, the Commission expects the adjustment to be made by including the losses in the depreciation expense reported on Schedule C, Column H. Where an unusual

(continued...)

describes for addressing lost converters differs somewhat from the treatment the Commission assumed most operators would follow. Rather than leaving the value of the lost equipment in the book value of assets recovered on Schedule C and continuing to earn a rate of return on the lost assets, which the *First Order on Reconsideration* permits, Comcast removes the gross book value (acquisition cost) of all lost converters from the gross book account and recovers the remaining depreciation by including the net book value as a depreciation expense in a lost converter sub-account.

19. The City has not questioned Comcast's methodology, but has challenged the adequacy of the operator's support for its lost converter claim.⁵⁷ The record before us shows that the City issued a request for information on April 6, 1998 asking Comcast to provide "Support for the 'Current Provision for Depreciation' for each category of equipment indicating the date/period represented and providing sufficient documentation such that the calculation can be recreated including detail of assets by vintage year showing gross book value and accumulated depreciation as of the December 31, 1996."⁵⁸ Comcast provided depreciation schedules by vintage year and noted, "Included in the current provision for depreciation on addressable converters is \$295,988 of converter loss expense incurred in 1996."⁵⁹ Documentation of this amount was not provided at that time, although it should have been under the *First Order on Reconsideration*.⁶⁰ In response to an oral request from the City's consultant, on December 29, 1998, Comcast documented the amount with a facsimile copy of the general ledger page showing the year-end converter loss expense as of December 31, 1996.⁶¹ This documentation was comparable to the support for the amount of losses given to the City the previous year⁶² and to the accumulated year-end information requested and provided for other accounts.⁶³ If the City wanted more detailed documentation of converter losses, it could have specified the additional support it felt it needed, and Comcast could have been found in default if it failed to respond to a reasonable request for information.⁶⁴ However, where an operator has provided the information required by the rate form and the Commission's instructions, and has not been asked for additional support, it should not be found in default for failing to provide additional support. An operator should have an opportunity to respond to a franchising authority's concerns.⁶⁵ On this record, we cannot find that Comcast had that opportunity. Nothing in the record shows that the consultant or the City gave Comcast reason to understand that supporting information was expected for the Consultant's Report

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rate spike would occur, the Commission expects the recovery to be made by deferring the loss for ratemaking purposes and amortizing the amount over a long enough period to smooth out the rate effect, such as the average remaining life for the equipment in question. *Id.*

⁵⁷ City Opposition at 17-18.

⁵⁸ City Opposition, Exhibit B, Request for Information at 5-6.

⁵⁹ Comcast Appeal, Exhibit 3, Letter from Kenna to Stanton (May 8, 1998) at 4.

⁶⁰ *First Order on Reconsideration*, 9 FCC Rcd at 1200 n.97.

⁶¹ City Opposition, Exhibit H, General Ledger Period: Dec. 96 To Dec. 96, Exhibit D, Declaration of Garth T. Ashpaugh at 2; Comcast Reply at 16.

⁶² See Comcast Appeal, Exhibit 6, Attachment C, G/L Auditor page 5170. Page 5170 showed a running total for two months.

⁶³ See Comcast Appeal, Exhibit 3, Attachment D, General Ledger entries for December 1996.

⁶⁴ See *Third Order on Reconsideration*, 9 FCC Rcd at 4347-48.

⁶⁵ See *Rate Order*, 8 FCC Rcd at 5723-24 para. 139 and n.367; *Telerama, Inc.*, 11 FCC Rcd 17369, 17375 para. 12 (Cab. Serv. Bur. 1996); *TCI TKR of Houston*, 10 FCC Rcd 8063, 8063 para. 3 (Cab. Serv. Bur. 1995).

beyond the accumulated year end information provided in Comcast's December 29, 1998 facsimile, or that Comcast had a reasonable opportunity to have additional information considered in response to the Consultant's Report.⁶⁶ For this reason, we cannot find that the City was reasonable when rejecting Comcast's converter losses as insufficiently supported,⁶⁷ and are remanding this matter for further consideration.

3. Labor Hour Adjustments

20. A cable operator recovers its costs of installing and maintaining equipment on the customer's premises through the hourly service charge ("HSC"), which is computed by dividing the operator's annual capital costs and operating expenses for installation and maintenance by the total number of person hours spent on these activities over the past year.⁶⁸ The capital costs in the formula are those shown on Schedule A of Form 1205. The expenses are those shown on Schedule B of the form. Recoverable expenses include the salaries and benefits of employees performing HSC-related activities and other costs, such as the costs of sending equipment out for repair and the costs of HSC-related work performed on a contract basis.⁶⁹ The total costs and expenses are adjusted to reflect the percentage relating to the equipment maintenance and customer installations related to receiving basic tier services. How the operator counts labor hours determines how much cost and expense are attributed to an hour of service.

21. Neither the Commission's rules nor the Form 1205 instructions specify a particular method for counting labor hours as long as the operator uses the same method for counting hours in calculating the HSC that it uses in setting rates for installations, maintenance, and equipment leases. The primary concern is to ensure that the operator's equipment basket costs are fully recovered on a consistent basis.⁷⁰ The Form 1205 instructions require operators only to explain how they derived the figures they report.⁷¹ Using installation services as an example, some operators may use so-called billable hours, counting only the time the installer is actually at a subscriber's premises. Others may include so-called non-billable hours, including the time spent driving to and from the premises, while others may take a different approach by counting an installer's total paid time and dividing by the number of installations performed. Some operators may include supervisory time. If the operator sends equipment out for repair or uses

⁶⁶ Comcast Appeal, Exhibit 7, contains additional information in support of Comcast's converter losses. Whether or when this information might have been presented to the City is unclear from the record.

⁶⁷ The City is additionally concerned that Comcast may be receiving an impermissible double recovery on converter losses if it applies a converter deposit to a defaulting subscriber's outstanding bills and fails to offset its loss calculation by the amount of the deposit. City Opposition at 18. Whether converter losses were offset by unrefunded deposits was not addressed below and cannot be considered here.

⁶⁸ FCC Form 1205 Instructions at 14. Installation charges can either be standard charges based on the HSC times the average time for the particular type of activity or can be set using the actual number of hours times the HSC. *Id.* at 16. An operator's lease charges are computed by multiplying the HSC by the number of hours spent maintaining and servicing the type of equipment to which a charge applies, plus the annual capital costs for that equipment, and allocating this total amount over the number of equipment units in service and the 12 months of the rate year. *Id.* at 19.

⁶⁹ FCC Form 1205 Instructions at 11. Other expense categories on Schedule B include supplies, utilities, and other taxes.

⁷⁰ See *TCI TKR of Houston, Inc.*, 11 FCC Rcd 20929, 20935 para. 13 (Cab. Serv. Bur. 1996); *Falcon Cablevision v. City of Thousand Oaks*, 10 FCC Rcd 9424, 9425 para. 8 (Cab. Serv. Bur. 1995).

⁷¹ FCC Form 1205 Instructions at 15, Line 6.

contract labor for installations and maintenance and includes the expense on Schedule B, an appropriate adjustment to the total labor hours reported on Form 1205 must be made so that “equivalent labor hours” can be added to the total company labor hours.⁷² These “equivalent labor hours” should then be treated like other labor hours. The primary concern in reviewing an operator’s calculations should be to ensure that the operator’s overall equipment basket costs are fully recovered on a consistent basis, not how the operator delineated its labor hours. Use of any of these methods consistently should result in proper cost recovery. Regardless of the method used, the resulting rates should recover the HSC portion of the expenses on Schedule B. Counting only “billable” hours in the example above would result in fewer labor hours at a higher rate per hour than counting “nonbillable” hours, but both methods should recover the same total expenses overall.

22. According to Comcast, it has historically calculated the HSC using only the specific hours dedicated to HSC-related activities; *i.e.*, to leasing, installing and equipment repair services.⁷³ It determined that an employee’s average productive work year, excluding paid leave and non-productive time,⁷⁴ was 1,295 hours. Because it used both in-house and contract labor for various HSC-related tasks, it converted its contract labor costs into equivalent labor hours by dividing the expense associated with an activity by the hourly rate for in-house employees performing that activity. It further converted these equivalent hours into equivalent employees by dividing the equivalent labor hours by 1,850 annual hours for converter repair and 2,080 hours for contract installations.⁷⁵ Comcast then treated in-house and equivalent employees doing HSC-related work alike by applying the same productivity adjustment to each to calculate the labor hours used on Form 1205. Thus, it multiplied each employee and equivalent employee by 1,295 hours.⁷⁶

23. The Consultant’s Report eliminated Comcast’s productivity factor as unsupported and showed recalculated labor hours for the converter repair activity based on 1,850 annual hours per employee, the number of hours in the work year excluding paid leave, for both in-house and equivalent employees.⁷⁷ It showed recalculated hours for contractor labor hour equivalents based on 2,080 annual hours.⁷⁸ The consultant also faulted Comcast for imputing the same productive hours to equivalent employees performing contract installations that it imputed to in-house employees. Comcast argues that these adjustments inflated its hours and prevented it from recovering the actual costs of providing maintenance and installation services to subscribers.

24. We disagree with Comcast that the consultant should have accepted its productivity

⁷² FCC Form 1205 Instructions at 14-15, Note 1.

⁷³ Comcast Appeal at 25.

⁷⁴ Its definition of nonproductive time included training, downtime, shift changes, breaks and other administrative functions. Comcast Appeal, Exhibit 3, Letter from Kenna to Stanton (May 6, 1998) at 5-6.

⁷⁵ *Id.* at 6-7.

⁷⁶ Comcast Appeal, Exhibit 2, Attachment A, FCC Form 1205 Supplemental Information at 1.

⁷⁷ Consultant’s Report, Appendix E, Calculation of Estimated Total Hours Related to the Hourly Service Charge. Although these hours are described as “In-house Hours” on Appendix E, Line 9, the hours include hours for “Converter Repair Equivalents” as well as “Converter Repairmen.” *Id.* See Comcast Appeal, Exhibit 3, Letter from Kenna to Stanton at 5 (showing in-house converter repair personnel and converter repair equivalents).

⁷⁸ It is not clear from the record why both Comcast and the consultant used a different number of annual hours for determining the number of equivalent equipment repair employees than it used for determining contract installation employees. See Comcast Appeal, Exhibit 3 at 5; Consultant’s Report, Appendix E.

adjustment. The City's April 6, 1998 information request asked for substantiation for this adjustment.⁷⁹ We find nothing responsive in the record. When requested supporting documentation has not been provided, the franchising authority is not required to accept the operator's figures.⁸⁰ However, if the franchising authority adjusts the operator's method for determining labor hours, the adjustment must be consistently applied throughout the review of the operator's rate form and provide for recovering the operator's HSC-related costs and expenses. Although the consultant adjusted the hours used to compute both the HSC and the converter and remote control unit lease charges, the record does not reflect that the hours used to compute standard installation and maintenance rates were reviewed and handled consistently. This raises a question as to whether the City's revised HSC allows Comcast to recover its equipment basket costs and, therefore, requires a remand.⁸¹

4. Rate of Return

25. Comcast complains that the City has rejected without notice or explanation its 13% rate of return, which it claims was approved in a cost-of-service proceeding when the system's initial rates were set and has been used consistently since the system unbundled equipment costs from tier rates. The City disputes that the operator's claimed rate of return was previously approved, arguing that it never "affirmatively" approved that rate of return and that the current rate of return was unexplained.

26. We have no basis in this record for determining how the City handled Comcast's rate of return at the onset of rate regulation and later. Even if the City previously accepted a 13% return, however, circumstances change over time, and a return that was appropriate several years ago may not continue to be justified today.⁸² In the case before us, the record shows that the City asked Comcast to provide "Support for the 'Rate of Return' of 13.00% noting the FCC suggested rate of 11.25%," and received in response a brief statement of management's view about the company's business risks.⁸³ The consultant recomputed Comcast's costs on the revised Form 1205, using 11.25% as the rate of return on Schedule A, Line F. This revised form was attached to the Consultant's Report,⁸⁴ but the 11.25% rate of return was not discussed in the text of the report.

27. Comcast argues that its rate of return should be accepted if it falls within a range of reasonableness limited on the upper end by the maximum possible rate of return after a return is grossed up for state and federal income taxes. We disagree with this view. The FCC Form 1205 instructions presume that 11.25% is a reasonable rate of return but allow an operator to show special circumstances justifying a higher rate.⁸⁵ The Commission determined in its *Cost Order* that this overall uniform rate of return is

⁷⁹ City Opposition, Exhibit B, Request for Information at 7.

⁸⁰ *Third Order on Reconsideration*, 9 FCC Rcd at 4347, 4348.

⁸¹ See *Falcon Cablevision*, 11 FCC Rcd 10534, 10540 para. 13 (Cab. Serv. Bur. 1996); *Ventura County Cablevision v. City of Thousand Oaks*, 10 FCC Rcd 13394, 13400 para. 12 (Cab. Serv. Bur. 1995).

⁸² See generally *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13397 para. 10 (Cab. Serv. Bur. 1999). Changes over time in costs associated with previously unbundled rate elements do not require a reopening of the unbundling calculation used to establish initial regulated rates. Comcast's argument to the contrary does not provide a reason for accepting its 13% rate of return indefinitely.

⁸³ See City Opposition, Exhibit B, Request for Information at 5; Comcast Appeal, Exhibit 3, Letter from Kenna to Stanton (May 6, 1998) at 3.

⁸⁴ See Consultant's Report, Appendix D.

⁸⁵ FCC Form 1205 Instructions at 8.

sufficient to enable cable companies to earn a reasonable return on their investment while protecting subscribers from excessive rates,⁸⁶ and it retained the presumptive 11.25% return in the *Final Cost Order* cited by Comcast.⁸⁷ If this return fails to provide adequate compensation for a cable operator's genuine capital costs, the operator must show the exceptional facts and circumstances that make the cost of capital for regulated cable services exceed the prescribed rate of return and that those facts and circumstances will persist.⁸⁸ Although Comcast correctly states that the Commission proposed an alternative approach for determining the rate of return in the *Final Cost Order*,⁸⁹ it has not adopted the proposed change or replaced the uniform return with a range of presumptively reasonable rates of return. Furthermore, although an operator can gross up its rate of return on Form 1205 using normalized rates for federal and state income taxes, the starting point for the calculation is the rate of return at issue here from Line F of the form, and any adjustment to the rate of return is dictated by the formula on the form.⁹⁰ Because the formula provides for an adjustment to reflect interest deductibility and certain other adjustments, it does not result in a higher rate of return in every case and apparently did not for Comcast on its Form 1205.⁹¹

28. Comcast bears the burden of proving that its proposed rates are justified. If it seeks to recover a rate of return in excess of the presumptive return specified by the Commission, it "bear[s] a heavy burden" under the *Cost Order* and the *Final Cost Order* and should attach its justification to its Form 1205.⁹² Its conclusory statement about management's assessment of the risks of operating in an urban environment does not address this burden and, therefore, does not trigger an affirmative obligation on the City's part to establish the reasonableness of applying the Commission's presumptive return. That the City used the Commission's presumptive return was shown on the revised Form 1205 attached to the Consultant's Report. Comcast's appeal of the rate of return used in the City's local rate order is denied.

5. Offsets

29. In the event it prevails on BST but not all equipment issues, Comcast asks that the City be directed to offset any purported equipment overcharges with actual program service undercharges.⁹³ The City disagrees, arguing that such offsets are limited to the one-time unbundling of equipment and programming rates through FCC Forms 393 and 1200. We agree with the City. As pointed out in *TCI Cablevision of Ohio, Inc.*,⁹⁴ the Commission provided for refund offsets when operators unbundled equipment costs from regulated rates and set their base rates using FCC Forms 393 or 1200, because the

⁸⁶ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 4527, 4615-16 (1994) ("*Cost Order*").

⁸⁷ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 2220, 2255-56 para. 81 (1996) ("*Final Cost Order*").

⁸⁸ *Id.*; *Cost Order* at 4616 n.327.

⁸⁹ *Final Cost Order* at 2256, 2299-2311.

⁹⁰ FCC Form 1205 Instructions at 8-9.

⁹¹ See Comcast Appeal, Exhibit 2A, Form 1205 at 2, Schedule A, Line H.

⁹² *Cost Order*, 9 FCC Rcd at 4616 n.327; FCC Form 1205 Instructions at 8.

⁹³ Comcast Appeal at 30-33.

⁹⁴ 13 FCC Rcd 733, 737 para. 11 (Cab. Serv. Bur. 1998).

unbundling formulas established a direct relationship between equipment rates and programming rates at that time. With Form 1200, the successor to Form 393, an operator computed rates by first aggregating its revenues from all regulated sources to determine its total regulated revenue per subscriber. It then unbundled equipment costs by subtracting its monthly equipment costs per subscriber. The resulting monthly programming tier revenue per subscriber was used to set unbundled programming tier rates. Equipment rates were set based on the unbundled equipment costs. Because of the reciprocal relationship between program and equipment rates in this unbundling calculation, higher equipment costs resulted in lower programming rates, and lower equipment costs resulted in higher programming rates. This reciprocal relationship does not extend beyond the initial unbundling. The Commission has not recognized offsets beyond this initial period,⁹⁵ and Comcast has not established good cause for equitable relief.

IV. ORDERING CLAUSES

30. ACCORDINGLY, IT IS ORDERED that the Appeal of Comcast Cablevision of Detroit, Inc. from a Rate Order of the City of Detroit, Michigan filed March 15, 1999 IS GRANTED IN PART and DENIED IN PART as provided above and the Resolution and Rate Order of the City of Detroit approved January 29, 1999 IS REMANDED for further consideration consistent with this Memorandum Opinion and Order.

31. IT IS FURTHER ORDERED that the Petition for Stay of Local Rate Order filed by Comcast Cablevision of Detroit on March 23, 1999 IS DISMISSED as moot.

32. This action is taken pursuant to authority delegated by section 0.321 the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

⁹⁵ See *id.*; *Media General Cable of Fairfax County, Inc.*, 12 FCC Rcd 17424, 17431 para. 20 (Cab. Serv. Bur 1997) (refund liability for initial regulated rates within the franchising authority's jurisdiction should be determined from aggregated actual and permitted BST and equipment rates), *application for review pending*. See also section 629 of the Communications Act, 47 U.S.C. § 549, which provides that multichannel video programming distributors shall not be prohibited from offering converter boxes and other equipment used by consumers to access multichannel video programming services, if the system operator's charges are separately stated and not subsidized by charges for any such services. This statutory provision is implemented by 47 C.F.R. § 76.1206, which incorporates the standards of 47 C.F.R. § 76.923.