

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

In the Matter of:)	
)	File No. CSB-A-0529
CABLEVISION VII, INC. d/b/a/)	File No. CSB-A-0311
TCI CABLEVISION OF EASTERN IOWA)	File No. CSB-A-0398
)	File No. CSB-A-0624
Appeals of Local Rate Orders Issued)	
by the City of Fort Madison, Iowa,)	IA0001
Request for Decertification, and)	
Petition for Partial Reconsideration)	
)	

**MEMORANDUM OPINION AND ORDER AND
ORDER ON RECONSIDERATION**

Adopted: January 7, 2000

Released: January 12, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Cablevision VII, Inc., d/b/a TCI of Eastern Iowa ("TCI-EI"), the franchised operator of a cable system serving the City of Fort Madison, Iowa, ("City" or "Fort Madison") has filed a petition for partial reconsideration of the Cable Services Bureau ("Bureau") Memorandum Opinion and Order in *Cablevision VII, Inc.* ("*Remand Order*").¹ TCI-EI has also filed appeals of three local rate orders issued by the City.

2. The *Remand Order* remanded the City's local rate order denying TCI-EI's rate adjustment for the period from June 1, 1996 through May 31, 1997. TCI-EI has sought reconsideration of n.18 of the order, which declined to authorize TCI-EI's rate adjustment and left existing rates in effect pending City action on remand. TCI-EI filed a supplement to its petition for reconsideration on April 21, 1997² and on June 16, 1997 moved to file³ and did file a further supplement.⁴ The City did not file oppositions to these pleadings.

3. On April 21, 1997, TCI-EI filed an appeal of the City's order in response to the *Remand*

¹ DA 97-365 (CSB released Feb. 21, 1997).

² See "Supplement to Petition for Reconsideration" filed April 21, 1997, CSB-A-0311.

³ See "Motion for Leave to File Further Supplement to Petition for Reconsideration" filed June 16, 1997, CSB-A-0311.

⁴ See "Further Supplement to Petition for Reconsideration", filed June 16, 1997, CSB-A-0311.

Order in which the City reconsidered TCI-EI's FCC Form 1240 and again concluded that TCI-EI's rate starting June 1, 1996 was not justified ("1996 Order").⁵ TCI-EI argued that the City's decision did not comply with Commission's rate regulatory rules and the Bureau's *Remand Order*.⁶ The City filed an opposition to TCI-EI's appeal of its 1996 Order⁷ to which TCI-EI replied.⁸ On June 16, 1997, TCI-EI filed a supplement to its appeal ("Appeal Supplement") of the 1996 Order. In the Appeal Supplement, TCI-EI seeks to add the local rate order adopted by the City on March 25, 1997 for rates to be effective from June 1, 1997 through May 31, 1998 ("1997 Order") to its appeal of the 1996 Order.⁹ In addition, TCI-EI filed a stay request.¹⁰ The City did not file oppositions to these additional pleadings.

4. On April 10, 1998, TCI-EI filed an appeal of the local rate order adopted by the City on March 13, 1998, which denied the proposed BST rate increase for the period from June 1, 1998 through May 31, 1999 ("1998 Order").¹¹ TCI-EI also filed a stay request.¹² The City did not file oppositions to these additional pleadings.

5. On April 30, 1999, TCI-EI filed an appeal of the local rate order adopted by the City on March 31, 1999, which denied the proposed BST rate increase for the period June 1, 1999 through May 31, 2000 ("1999 Order").¹³ TCI-EI included a request for decertification with its appeal and also filed a stay request.¹⁴ The City did not file oppositions to these pleadings. In this proceeding, we consolidate review of each of TCI-EI's appeals as well as its petition for reconsideration, motion to file a further supplement to the petition, requests for stay, and request for decertification.

II. BACKGROUND

⁵ Cablevision VII, Inc., Order Regarding Basic Cable Rate Increase from June 1, 1996, to and including May 31, 1997, dated March 21, 1997.

⁶ See "Appeal of Local Rate Order and Request for Emergency Relief" filed April 21, 1997, CSB-A-0398.

⁷ See "Resistance to Appeal of Local Rate Order and Request for Emergency Relief" filed May 5, 1997, CSB-A-0398.

⁸ See "Reply to Resistance to Appeal of Local Rate Order and Request for Emergency Relief" filed May 9, 1997, CSB-A-0398.

⁹ See "Supplement to Appeal of Local Rate Order" filed June 16, 1997, CSB-A-0398.

¹⁰ See "Request for Emergency Stay" filed June 16, 1997, CSB-A-0398. In light of our action herein, the stay request is dismissed as moot.

¹¹ See "Appeal of Local Rate Order and Request for Expedited Treatment" filed April 10, 1998, CSB-A-0529.

¹² See "Request for Emergency Stay of Rate Order" filed May 12, 1998, CSB-A-0529. In light of our action herein, the stay request is dismissed as moot.

¹³ See "Appeal of Local Rate Order and Request for Decertification" filed April 30, 1999, CSB-A-0624.

¹⁴ See "Request for Emergency Stay of Local Rate Order" filed on May 5, 1999, CSB-A-0624. In light of our action herein, the stay request is dismissed as moot.

6. Under the Commission's rules, rate orders issued by local franchising authorities may be appealed to the Commission.¹⁵ 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.¹⁶ 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.¹⁷

7. An operator that wants to increase its BST rate has the burden of demonstrating that the increase is in conformance with the Commission's rules.¹⁸ The local franchising authority is then to review the reasonableness of the operator's rates on the basis of regulations adopted by the Commission.¹⁹ In determining whether an operator's proposed increases are in conformance with the Commission's rules, a franchising authority may direct the operator to provide supporting information.²⁰ After reviewing an operator's rate forms, and any other additional information submitted, the franchising authority may either approve the operator's requested rate increase or issue a written decision explaining why the operator's rate increase is unreasonable.²¹

8. The Commission's rules allow periodic BST rate adjustments for inflation, changes in external costs,²² and change in the number of regulated channels using either the quarterly or annual adjustment method.²³ They permit operators undertaking significant network upgrades to recover the net costs of the added capital investment allocated to the BST through an increase in the BST rate.²⁴ The rules also

¹⁵47 C.F.R. § 76.944.

¹⁶See *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*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5731 (1993) ("Rate Order"); *Third Order on Reconsideration*, MM Docket No. 92-266, (FCC Rcd 4316, 4346 (1994).

¹⁷Rate Order at 5732.

¹⁸47 C.F.R. § 76.937(a).

¹⁹See Communications Act of 1934, as amended, Section 623(b)(1), 47 U.S.C. § 543(b)(1).

²⁰Rate Order at 5718.

²¹See *Century Cable of Southern California*, 11 FCC Rcd 501 (CSB, 1995); *TCI of Iowa, Inc.*, 13 FCC Rcd 12020, 12022 (CSB, 1998).

²²External costs include the following: state and local taxes applicable to the provision of cable television service; franchise fees; costs of complying with franchise requirements; retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; other programming costs; and Commission cable system regulatory fees pursuant to 47 U.S.C. § 159, 47 C.F.R. § 76.922(f).

²³47 C.F.R. § 76.922(d), (e).

²⁴47 C.F.R. § 76.922(j).

provide for periodic adjustments to equipment and installation rates based on the operator's actual costs.²⁵ The rules do not provide any other basis for rate decisions. If the franchising authority does not dispute the bases for the figures presented in the cable operator's rate forms and has not discovered any mathematical errors in the forms, it should approve the operator's rates as derived from the forms. A cable operator must be allowed to charge up to the maximum permitted rates derived from its rate forms. The franchising authority may not arbitrarily deny a justified rate increase in an effort to address non-rate matters.²⁶ Instead, non-rate matters should be addressed pursuant to the Commission's rules on technical standards or customer service obligations, the franchising authority's own cable regulations, or the local franchise agreement.

III. DISCUSSION

9. The basis for each of TCI-EI's appeals is the City's failure to issue rate orders which meet the standards set by the Commission for a written decision.²⁷ The Commission's *Rate Order* requires that "a franchising authority issue a written decision to the public and give public notice of such decision whenever it disapproves, in whole or in part, either initial rates for the basic service tier and accompanying equipment, or a request for an increase in those rates, or approves a proposed rate over the objections of interested parties."²⁸ In the local rate orders before us, the City finds that TCI-EI's proposed rate adjustments are "unreasonable, in excess of inflation and constitute a windfall to TCI-EI."²⁹ The Commission has stated that local franchising authorities must affirmatively demonstrate why operators' proposed rates are unreasonable.³⁰

10. In the *Remand Order*, the Bureau found that the record did not indicate that Fort Madison affirmatively demonstrated why TCI-EI's proposed rate was unreasonable.³¹ Based upon the record here, it appears that Fort Madison's subsequent decisions fail to meet the standards set by the Commission. As stated above, Fort Madison concludes in each of the Orders that TCI-EI's proposed rate adjustments are unreasonable, in excess of inflation,³² and constitutes a windfall to TCI-EI. Fort Madison, however, does not

²⁵47 C.F.R. § 76.923.

²⁶See *TCI of Southeast Mississippi*, 10 FCC Rcd 8728, 8730 (CSB, 1995); *reconsideration denied on other grounds*, 13 FCC Rcd 11080 (CSB, 1998); *TCI Cablevision of Texas, Inc.*, 13 FCC Rcd 6656, 6658 (CSB, 1998); *Century Cable of Southern California*, 11 FCC Rcd at 501-502.

²⁷See April 30, 1999 Appeal of Local Rate Order and Request for Decertification at p. 1; April 10, 1998 Appeal of Local Rate Order and Request for Expedited Treatment at 2; and April 21, 1997 Appeal of Local Rate Order and Request for Emergency Relief at 2.

²⁸8 FCC Rcd at 5715.

²⁹See 1996 Order at p.3; 1998 Order at p.3; and 1999 Order at p.2.

³⁰*Remand Order* at 3.

³¹*Id.*

³²The Commission's initial rate rules provided that changes in external costs must be measured against inflation and adjusted for the corrected inflation rate. See *Rate Order*, 8 FCC Rcd at 5792 para. 257. The Commission subsequently decided that the inflation adjustment should be separated from the external cost adjustment in the rate calculation. Effective May 15, 1994, changes in external costs have no longer been compared to inflation. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on*

make any findings that dispute the figures in the rate forms or point to mathematical errors in those forms. It appears that Fort Madison objects to the magnitude of the rate increase but "the magnitude of a rate increase alone is not determinative of its reasonableness."³³ Because Fort Madison's decisions to deny TCI-EI's proposed rate increases are not based on the Commission's rate regulations, the denials of TCI-EI's BST rate adjustments are not reasonable. For this reason we will grant TCI-EI's appeals. Further, we will remand the case to provide Fort Madison with an opportunity to review its rate decisions in light of this Order.³⁴ We direct Fort Madison to base its review on FCC rate rules and rate forms.

11. In its Appeal Supplement, TCI-EI seeks consolidated consideration of the 1997 Order with the 1996 Order. TCI-EI has not appealed the 1997 Order, however. We find that TCI-EI failed to show good cause for failing to comply with Section 76.944 of the Commission's rules, which governs appeals of rate decisions by local franchising authorities.³⁵ Section 76.944 provides thirty days within which to file an appeal of a local rate order. The local rate order complained of was adopted by the City on March 25, 1997; therefore, TCI-EI should have submitted an appeal of that order within thirty days of the release of the text of the order. The Appeal Supplement, which was filed on June 16, 1997, simply states that, "[a]fter the Appeal was filed, TCI-EI became aware of an additional rate order . . ." and "the responsible staff at TCI did not become aware of the Additional Order until quite recently."³⁶ The Appeal Supplement does not allege that the City failed to provide due process pursuant to Section 76.910(b)(2) of the Commission's rules³⁷ or to provide public notice of its action³⁸ or show why, with the exercise of ordinary diligence, the 1997 Order could not have been timely appealed. Accordingly, we conclude that there is no basis shown in the Appeal Supplement for authorizing the pleading and addressing the 1997 Order on the merits.

12. We turn next to TCI-EI's petition for reconsideration requesting review of note 18 of the *Remand Order*, which declined to authorize TCI-EI's rate adjustment and left existing rates in effect pending

Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4202-03 paras. 174-75, 4252 para. 277 (1994) ("*Second Order*"). An operator seeking to adjust capped rates must remove external costs from the total charge for the tier and adjust the tier residual for inflation. The external costs are adjusted without regard to inflation. Because the residual that is adjusted for inflation does not include external costs, there is no possibility of double recovery of external cost increases. This produces the same rates as the requirements initially adopted with the *Rate Order*, but is simpler to apply. The inflation and external cost adjustments are computed using the Commission's rate forms. See, e.g., FCC Form 1240, Module D: Calculating the Base Rate, Module I: New Maximum Permitted Rate (July 1996).

³³See *TCI of Pennsylvania, Inc.*, 13 FCC Rcd 5119, 5120-5121 (CSB, 1998) and *Marcus Cable Partners, L.L.C.*, (DA 99-1399 (CSB rel. July 19, 1999)

³⁴We are remanding TCI-EI's appeals to Fort Madison in order to permit it to comply with our rules governing written decisions by a local franchising authority. See n. 34, *supra*. Any refund liability determined by this review shall be determined pursuant to 47 C.F.R. § 76.942.

³⁵47 C.F.R. § 76.944.

³⁶Appeal Supplement at 1 and n.1.

³⁷See 47 C.F.R. § 76.910(b)(2)

³⁸See 47 C.F.R. § 76.936(b).

City action on remand. It appears from the record that TCI-EI's rate adjustment remained in effect pending the City's review on remand, thus mooting its petition and April 21, 1997 supplement.³⁹ In the June 16, 1997 motion to file and the further supplement to its petition for reconsideration TCI-EI asked for consideration of the 1997 Order as "inextricably linked to the instant [reconsideration] proceeding."⁴⁰ The alleged linkage is the City's failure in the 1997 Order to properly exercise its rate regulation authority pursuant to the Commission's rules. Thus, TCI-EI argues that the 1997 Order should not be given legal effect and urges the Commission to seriously consider decertifying the City.⁴¹ We will deny the motion and dismiss the supplement. TCI-EI does not state how review of this local rate order not addressed in the *Remand Order* should affect reconsideration of the *Remand Order*. 47 C.F.R. § 76.944 provided a procedure for seeking review of the 1997 Order, and TCI-EI is not precluded by the *Remand Order* from raising issues of the City's certification in an appropriate proceeding, as it later did.

13. TCI-EI has asked the Commission to revoke the City's certification to regulate BST rates because of what it views as a pattern of rate orders that reject rate adjustments without any legitimate reason for doing so.⁴² We will deny this request. It is Commission policy under Section 76.914 of the Commission's rules⁴³ to provide a local franchising authority with an opportunity to cure any defect which could result in revocation of certification with the expectation that the local franchising authority will so do. We will provide Fort Madison with an opportunity to comply with the Commission's rules on written decisions. If future local rate orders are not based on matters cognizable under the Commission's rate rules, we may revisit this determination.⁴⁴

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the appeals filed by Cablevision VII, Inc. d/b/a TCI Cablevision of Eastern Iowa on April 21, 1997, April 10, 1998, and May 30, 1999, **ARE GRANTED** and the issues of the accompanying rate adjustments **ARE REMANDED** to the City of Fort Madison, Iowa for proceedings consistent with the terms of this Order.

15. **IT IS FURTHER ORDERED** that TCI-EI's June 16, 1999 supplement to Appeal of Local Rate Order adopted by the City of Fort Madison, Iowa on March 25, 1997 **IS DISMISSED**.

³⁹ In its supplement, TCI-EI argued that the City's allegedly unjustified action in the 1996 Order supports the need for the requested relief. In its petition, TCI-EI also expressed concern that the City might take action against the operator for implementing the rate adjustment, but acknowledged that the City had taken no such action as of the filing.

⁴⁰ Motion to File at 1; Further Supplement at 1.

⁴¹ Further Supplement at 2-3.

⁴² April 30, 1999 Appeal at 4-5.

⁴³ 47 C.F.R. § 76.914.

⁴⁴ See 47 C.F.R. § 76.913(a), which provides that, upon revocation of a franchising authority's certification, the Commission will regulate rates for cable services and associated equipment of a cable system not subject to effective competition. Such regulation will continue until the franchising authority has obtained recertification. A remedy that TCI-EI requests in its appeals, that its rates be deemed approved without further regulatory review (e.g., April 21, 1997 Appeal at 4), is not provided for under the Commission's rules.

16. **IT IS FURTHER ORDERED** that the petition for reconsideration filed by TCI-EI **IS DENIED**; that TCI-EI's June 16, 1997 Motion for Leave to File Further Supplement to Petition for Reconsideration **IS DENIED**; and TCI-EI's June 16, 1997 Further Supplement to petition for Reconsideration **IS DISMISSED**.

17. **IT IS FURTHER ORDERED** that the April 30, 1999 request for decertification of the City of Fort Madison, Iowa **IS DENIED**.

18. **IT IS FURTHER ORDERED** that TCI-EI's requests for emergency stay of the City's filed June 16, 1997, May 12, 1998, and May 5, 1999 **ARE DISMISSED**.

19. **IT IS FURTHER ORDERED** that the City of Fort Madison, Iowa shall not enforce matters remanded for further consideration pending further action by the City on those matters.

20. 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