

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

In the Matter of)
)
MARCUS CABLE ASSOCIATES, L.L.C.) DA 01-268
d/b/a Charter Communications) File No. CSB-A-0659
) File No. CSB-A-0660
Appeals of the Local Rate Orders of the) File No. CSB-A-0664
City of Burbank, CA, CUID No. CA0178) File No. CSB-A-0665
)
Appeals of the Local Rate Orders of the)
City of Glendale, CA, CUID No. CA0180)

CONSOLIDATED MEMORANDUM OPINION AND ORDER

Adopted: April 23, 2001

Released: April 25, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Before the Commission is a petition for partial reconsideration of the Consolidated Memorandum Opinion and Order in Marcus Cable Associates ("Consolidated Order"),¹ which was filed by the Cities of Burbank, California and Glendale, California ("Cities") and opposed by Marcus Cable Associates, d/b/a Charter Communications ("Charter"), the franchised cable operator serving Burbank and Glendale, California.² Also before the Commission are appeals of local rate orders issued by each of the Cities in response to the Consolidated Order, and requests for emergency stays of these rate orders, filed by Charter and opposed by the Cities.³ Because of the commonality of issues in these matters, we are consolidating them for administrative convenience.

¹ DA 01-268 (Cab. Serv. Bur. rel. Feb. 1, 2001) (File Nos. CSB-A-0659, CSB-A-0660).

² Cities Motion to Reconsider, in Part, Consolidated Memorandum Opinion and Order (Feb. 9, 2001) ("Petition" or "Petition for Reconsideration"); Charter Consent Motion for Extension of Time (Feb. 21, 2001); Charter Opposition to Motion to Reconsideration, in Part, Consolidated Memorandum Opinion and Order (Feb. 28, 2001) ("Charter Opposition").

³ Charter Appeal of Local Rate Order (Mar. 22, 2001) ("Charter Burbank Appeal"); Charter Appeal of Local Rate Order (Mar. 22, 2001) ("Charter Glendale Appeal"); Cities Opposition to Appeals of Local Rate Orders (Apr. 2, 2001); Charter Consolidated Reply to Opposition to Appeals of Local Rate Orders (Apr. 9, 2001); Charter Request for Emergency Stay of Local Rate Order (Apr. 6, 2001) (Burbank); Charter Request for Emergency Stay of Local Rate Order (Apr. 6, 2001) (Glendale). In light of our action on the merits, the stay requests are dismissed as moot.

II. PETITION FOR RECONSIDERATION

2. Charter had appealed local rate orders issued by each of the Cities, arguing that the Cities had improperly reduced Charter's rates for its wire maintenance plan ("WMP") and ordered refunds beyond the refund period permitted by section 76.933(g)(2) of the Commission's rules.⁴ The *Consolidated Order* denied Charter's appeal with respect to the rates for its WMP, but remanded the Cities' refunds orders to the extent they ordered refunds beyond the period established by section 76.933(g)(2). The Cities had argued when opposing the appeals that the refund period in section 76.933(g)(2) is inapplicable because Charter had not filed a Form 1205 for the WMP or provided a rate justification in response to the Cities' request for justification. The *Consolidated Order* found that the Cities were aware of Charter's WMP when reviewing Charter's previous rate form, had requested a rate justification from Charter during that review, but did not pursue the matter further within the period established for ordering refunds on Charter's previous rate filing.

3. The Cities argue on reconsideration that they had exercised regulatory forbearance at the Charter's request but had no opportunity to advise the Commission of this fact as Charter's factual argument was made in its Reply. They seek reconsideration pursuant to section 1.106 of the Commission's rules so that relevant facts not previously presented can be considered.⁵ According to the Cities, they learned of the WMP during discussions in late 1998 relating to the transfer of control of Charter. At that time Charter had asserted the deregulated status of the WMP and asked for regulatory forbearance so that it could seek a clarifying opinion from the Commission regarding the regulatory status of a whole house wiring plan. While Charter's request for Commission clarification was pending, Charter responded to the Cities' status requests by stating its belief that a response would be shortly forthcoming and renewing its request for regulatory forbearance. The Cities argue that Charter should not now benefit from the forbearance it requested.

4. In opposing reconsideration, Charter questions why the Cities would have forbore action on Charter's WMP pending Commission clarification if, as their rate orders found, Charter's plan was not marketed in Burbank and Glendale as the kind of plan described in the clarification request. Charter also questions the assumption in the Cities' petition that the refund period intended by the *Consolidated Order* extends back to the date Charter filed its rate form. It seeks clarification that the refund period should not extend beyond the beginning of the rate period covered by the rate form under review.

5. We are denying reconsideration. The *Consolidated Order* held that the Cities were not reasonable in using their review of Charter's rate form for the rate year starting June 1, 2000 to order refunds for a prior rate period.⁶ As noted in the *Consolidated Order*, the Cities could have timely acted on the WMP for the prior rate period even if Charter was not forthcoming with a justification for the rate. Although the Cities argue on reconsideration that they forbore from timely action during the prior period at Charter's suggestion, this forbearance does not require a different result, for parties cannot unilaterally waive the jurisdictional deadlines in the Commission's rules.⁷ That the Commission might not have acted

⁴ 47 C.F.R. § 76.933(g)(2).

⁵ 47 C.F.R. § 1.106.

⁶ Both the Burbank and the Glendale rate orders refer to Charter's rate forms filed March 1, 2000. See Cities Opposition to Appeals of Local Rate Orders, File Nos. CSB-A-0659, CSB-A-0660, filed Dec. 28, 2000, Exhibits A, B, Findings B.

⁷ See *Falcon Cablevision*, 12 FCC Rcd 4190, 4192 (Cab. Serv. Bur. 1997). Section 76.933(g) of the Commission's Rules, 47 C.F.R. § 76.933(g), provides for tolling the deadlines when a franchising authority is confronted with a
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on Charter's clarification request before the deadline was foreseeable; that Charter's WMP might not have fallen within the scope of the request could have been considered within the time for acting on Charter's rates for the prior rate period. Absent an extension of the deadline for acting from the Commission, which was not sought, or fraudulent conduct on the operator's part, which is not alleged here, the deadlines in section 76.933(g) govern, and the refund period for rates reviewed during the annual review process begins with the effective date of the rates under review. Section 76.933(g)(2), which governs the review process, does not provide for refunds extending back to the previous rate period.⁸

III. APPEALS

6. Each of the Cities adopted a resolution conditionally amending its earlier resolution in response to the *Consolidated Order*. These remand resolutions order Charter to make refunds of amounts collected for the WMP in excess of the prescribed rates subsequent to March 1, 2000 and to prepare a separate accounting of the potential refund liability for the period from September 15, 1998 to February 29, 2000, pending a ruling on the Cities' petition for reconsideration.⁹ Charter argues that the refund periods exceed the period permitted by section 76.933(g) of the Commission's rules in that they extend beyond the effective date of Charters 2000 rates, June 1, 2000. We agree. As stated in paragraph 5, *supra*, and in *Time Warner Communications*,¹⁰ the refund period for rates reviewed during the annual review process begins with the effective date of the rates under review, not the filing date of the rate forms. The operator's previous rates remain in effect during the 90 day period provided by section 76.933(g) for reviewing proposed rates in advance of their effectiveness. Ordering refunds for rates charged during a rate period not before the Cities was not reasonable and requires a remand. On remand, the Cities are to review the refund periods in accordance with this Consolidated Memorandum Opinion and Order.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that Consent Motion for Extension of Time filed by Marcus Cable Associates, L.L.C. d/b/a Charter Communications on February 21, 2001 IS GRANTED.

8. IT IS FURTHER ORDERED that the Motion to Reconsider, in Part, Consolidated Memorandum Opinion and Order filed by the Cities of Burbank and Glendale, California on February 9, 2001 IS DENIED.

9. IT IS FURTHER ORDERED that the Appeal of Local Rate Order filed by Marcus Cable Associates, L.L.C. d/b/a Charter Communications on March 22, 2001 (Burbank, CA, File No. CSB-A-0664) IS GRANTED and Burbank Resolution No. 25,934 IS REMANDED to the City of Burbank, California for further action consistent with this Consolidated Memorandum Opinion and Order.

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facially incomplete rate justification, provided that, to toll the deadline for issuing a decision, the date on which rates can go into effect if no decision is issued, and the period for which refunds are payable, "the franchising authority or its designee must notify the operator of the incomplete filing within 45 days of the date the filing is made."

⁸ *Time Warner Communications*, DA 01-825 ¶ 11 (Cab. Serv. Bur. rel. Apr. 3, 2001).

⁹ Charter Burbank Appeal, Attachment A, Burbank Resolution No. 25,934, p.3; Charter Glendale Appeal, Attachment A, Glendale Resolution No. 01-32, pp.3-4.

¹⁰ DA 01-825 ¶ 11.

10. IT IS FURTHER ORDERED that the Appeal of Local Rate Order filed by Marcus Cable Associates, L.L.C. d/b/a Charter Communications on March 22, 2001 (Glendale, CA, File No. CSB-A-066) IS GRANTED and Glendale Resolution No. 01-32 IS REMANDED to the City of Glendale, California for further action consistent with this Consolidated Memorandum Opinion and Order.

11. IT IS FURTHER ORDERED that the Request for Emergency Stay of Local Rate Order (Burbank) and the Request for Emergency Stay of Local Rate Order (Glendale) filed by Marcus Cable Associates, L. L.C. d/b/a Charter Communications on April 6, 2001 ARE DISMISSED.

12. 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