

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

In the Matter of
CENCOM CABLE TELEVISION
Appeals of Local Rate Orders of
City of Temple City, CA (CUID CA0871)
City of Walnut, CA (CUID CA0899)
File No. CSB-A-0273
File No. CSB-A-0242

MEMORANDUM OPINION AND ORDER

Adopted: June 18, 2001

Released: June 21, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Cencom Cable Television ("Cencom") has appealed local rate orders issued by the Cities of Temple City and Walnut, California, where it operates franchised cable television systems. Each of the Cities denied certain equipment costs claimed by Cencom and denied recovery of revenues Cencom claimed it lost while the Cities reviewed Cencom's proposed basic service tier ("BST") rate increases. The Cities also ordered refunds. The Cities oppose the appeals. Based on the record as a whole, we grant Cencom's appeal with respect to the disallowed equipment costs and deny its appeal with respect to the allegedly lost revenues.

II. BACKGROUND

2. The Communications Act provides that, where effective competition is absent, cable rates for the basic service tier ("BST") are subject to regulation by franchising authorities. Rates for the BST should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates. Rates for regulated equipment and installation services on the customer's premises, the equipment basket, must be based on the operator's actual costs. Operators adjust BST rates periodically for changes in inflation, the number of regulated channels, and

1 Cencom Cable Television, Appeal of Local Rate Order ("Temple City Appeal"), Exhibit 1, City of Temple City Local Resolutions No. 95-3449, 95-3450 (Sept. 14, 1995); Cencom Cable Television, Appeal of Local Rate Order ("Walnut Appeal"), Exhibit A, City of Walnut Local Resolutions No. 4030, 4031 (Jul. 28, 1995).

2 47 U.S.C. § 543(a)(2).

3 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

4 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923(a)(2).

external costs, including changes in the cost of programming.<sup>5</sup> Operators using the quarterly rate adjustment method file as often as quarterly on FCC Form 1210. Operators using the annual rate adjustment method file on FCC Form 1240. Operators adjust regulated cable equipment and installation rates with FCC Form 1205.

3. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.<sup>6</sup> In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as a reasonable basis for that decision exists.<sup>7</sup> The Commission will reverse a franchising authority's rate decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules. 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.

### III. DISCUSSION

#### A. Basic Service Tier Rates

4. After Cencom filed FCC Forms 1210 to justify BST rate increases and Forms 1205 to justify equipment rate increases, each of the Cities issued tolling orders pursuant to section 76.933 of the Commission's rules. These orders extended the Cities' period for reviewing the proposed rate increases and delayed Cencom's implementation of the increases. When the review periods expired, Cencom put its new rates into effect and added to the rates proposed in its Forms 1210 the value of the revenue lost during the tolling periods, amortized over the remaining period covered by the rate forms.<sup>8</sup> Cencom included in this amount the value of BST and equipment rate increases and the franchise fees on these amounts it had not collected during the tolling period.<sup>9</sup> Both Cities ordered refunds of these add-ons because Cencom had no basis for imposing retroactive charges based on rates not permitted or recoverable during the tolling period.<sup>10</sup> Cencom challenges these refund orders. It argues that the delayed implementation of its rate increases is a cost of complying with a franchise requirement and should be passed on to subscribers as an external cost. The Cities disagree.

5. We find the Cities were reasonable in disallowing these add-ons. Section 76.933 of the Commission's rules provides for advance review of an operator's proposed rate increase. For operators using the quarterly rate adjustment method, section 76.933 allows the franchising authority 30 days to

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<sup>5</sup> 47 C.F.R. § 76.922(d), (e), (f).

<sup>6</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

<sup>7</sup> *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, 5731-32 (1993) ("*Rate Order*"), Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) ("*Third Reconsideration Order*").

<sup>8</sup> Temple City Appeal at 2; Cencom Walnut Appeal at 3.

<sup>9</sup> Temple City Appeal, Exhibit 1, Memorandum to City Council from City Manager (Aug. 15, 1995), p.3 ("Temple City Memorandum to City Council"); Walnut Opposition, attaching Memorandum to City Council from Shelly Wishner, Supervisor, Public Relations and Cable Operations (Jun. 28, 1995), p.3 ("Walnut Memorandum to City Council").

<sup>10</sup> Temple City Resolution No. 95-3449, § 1; Walnut Resolution No. 4030, § 1.

complete its review before the rates may take effect.<sup>11</sup> Section 6.933 also provides that a franchising authority needing additional time may extend the review period for an additional 90 days by issuing a written tolling order.<sup>12</sup> If the franchising authority does not approve the proposed rates during this tolling period, the operator must wait until the end of the tolling period to put its new rates into effect. A rate increase becomes effective and can be recovered in subscriber rates only after proper subscriber notice and after it has been approved by the franchising authority or the review period for such approval has lapsed.<sup>13</sup> Although Cencom argues that the revenues lost during this tolling period are costs of complying with franchise requirements and should be recovered as external costs, the delay in recovering costs shown on its rate forms is due to generally applicable rate regulations delaying the effectiveness of new rates pending franchising authority review, not to requirements in the franchise. Only increases specifically required in franchise documents should be accorded external cost treatment as franchise costs.<sup>14</sup> The revenues Cencom claims it has lost are, therefore, not recoverable as external costs.<sup>15</sup> Cencom's add on to the rate computed on its Form 1210 is an impermissible attempt to recover for rate adjustments before they were permitted and implemented.<sup>16</sup>

6. Cencom asks that we grant a waiver if we find against it on the merits. The Commission adopted the procedures in section 76.933 in an attempt to balance the desire of cable operators for expedition in the rate approval process with franchising authorities' need for a sufficient time to review rate proposals.<sup>17</sup> The passage of time involved in giving franchising authorities an opportunity to review rate increases in advance of implementation affects all operators in the same manner. Cencom has offered no showing as to why its situation warrants special treatment. We will not grant a waiver.

## B. Equipment Rates

7. The Cities reduced Cencom's rates for converters and remotes. Following their consultant's recommendation that certain expenses related to this equipment were incorrectly included in Cencom's capitol cost calculations,<sup>18</sup> the Cities eliminated "costs of shipping and handling, inventory,

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<sup>11</sup> 47 C.F.R. § 76.933(a).

<sup>12</sup> 47 C.F.R. § 76.933(a), (b). *See Rate Order*, 8 FCC Rcd at 5710 (two-step procedure is intended to give franchising authorities sufficient time to review proposed rates before they can go into effect).

<sup>13</sup> *See Rate Order*, 8 FCC Rcd at 5711 ¶ 121; *TCI Cablevision of Washington, Inc.*, 13 FCC Rcd 17879, 17881 ¶ 7 (Cab. Serv. Bur. 1998) (operator could not claim refund offsets for rates it had not implemented).

<sup>14</sup> *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 438 ¶ 123 (1995) ("*Thirteenth Reconsideration Order*").

<sup>15</sup> *See id.* at 413 ¶ 56 (operators' inability to recover costs incurred as a result of delays in the rate review process under the quarterly rate adjustment method was a consideration in Commission's adoption of alternative annual rate adjustment methodology). *See also* 47 C.F.R. § 76.925 listing costs includable as franchise cost requirements.

<sup>16</sup> *Second fx Letter* cited by Cencom does not require a different result. There the Commission allowed operators to implement programming changes during the transition period to new rate regulations without a penalty when the changes had been planned before the rule changes were announced. Operators could include the associated programming costs as external costs in their subsequent Form 1210, which would have been subject to review under the procedures applicable here for BST programming changes. *See The Disney Channel*, 9 FCC Rcd 7759 (1994).

<sup>17</sup> *Rate Order*, 8 FCC Rcd at 5710.

<sup>18</sup> Temple City Resolution No. 95-3450 § 1; Walnut Resolution No. 4031 § 1.

taxes, converter preparation, etc.” from Cencom’s capital costs for leased customer equipment shown on Form 1205, Schedule C.<sup>19</sup> Cencom argues that these costs are properly included in Form 1205 equipment costs. The Cities disagree.

8. The Commission rule defining the “equipment basket” states that the basket shall include all “direct and indirect material and labor costs of providing, leasing, installing, repairing, and servicing customer equipment.”<sup>20</sup> Material and labor costs included in the equipment basket must be recoverable by the operator.<sup>21</sup> The costs of installing and retrieving converters, the costs of managing the converter inventory, and the material costs of converters are clearly related to providing and installing equipment, and are properly classified as part of the equipment basket. These costs are recovered as capital costs of service installation and maintenance of equipment and plant (Schedule A), annual operating expenses for service installation and maintenance of plant (Schedule B),<sup>22</sup> or capital costs of leased customer equipment (Schedule C), depending on the type of cost involved. Regardless of the appropriate schedule for a cost, however, the operator must be permitted to recover its costs through Form 1205.

9. In the cases before us, the Cities disallowed the disputed costs, stating these are overhead costs that do not belong on Schedule C for the capital costs of leased equipment. Section 76.923(f) and (g) of the Commission’s rules provides that capital costs of leased equipment “shall consist of the average annual unit purchase cost of [the category of equipment] leased, including acquisition price and incidental costs such as sales tax, financing and storage up to the time it is provided to the customer.”<sup>23</sup> The costs of delivering the equipment to the operator, taxes on the equipment, at least some of the inventory itself,<sup>24</sup> insurance on the equipment before it is placed in service, and costs of placing the equipment in service are costs incidental to acquiring the equipment and placing it in service and should be included on Schedule C.<sup>25</sup> To the extent the disallowed costs fall into this “incidental costs” category, the Cities were

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<sup>19</sup> Temple City Opposition, attaching Temple City Memorandum to City Council, Exhibit A, City of Temple City Review of FCC Form 1200 Additional Information Submitted by Charter Communications, Inc. (formerly Crown Cable) (June 22, 1995), at ¶ 9; Walnut Opposition, attaching Walnut Memorandum to City Council, at ¶ 10.

<sup>20</sup> 47 C.F.R. § 76.923(c).

<sup>21</sup> See Communications Act § 632(b)(3), 47 U.S.C. § 543(b)(3) (equipment rates are to be based on actual cost); See generally *Rate Order*, 8 FCC Rcd at 5814-18.

<sup>22</sup> FCC Form 1205 Instructions for Determining Costs of Regulated Cable Equipment and Installation (May 1994) (“Form 1205 Instructions”), at 11, provide that operating expenses, including salary and benefits, supplies, utilities, other taxes and any other applicable expenses except interest expense should be included on Schedule B.

<sup>23</sup> 47 C.F.R. § 76.923(f), (g). Unusual maintenance for a particular type of equipment may also be capitalized on Schedule C rather than expensed on Schedule B and averaged over all equipment types. *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, 1200(1993).

<sup>24</sup> See FCC Form 1205 Instructions at 12, line D (“The gross book value includes the cost of a reasonable number of spare customer equipment units that the operator keeps on-hand as replacements for broken equipment.”). See also *Continental Cablevision of Western New England, Inc.*, DA 95-210, 10 FCC Rcd 3220, 3222 (Cab. Serv. Bur. 1995) (inventory included in calculation of the rate for units in service).

<sup>25</sup> Costs of recovering converters from subscribers and placing them back in inventory or back in service would not be includable on Schedule C. *TCI of Seattle, Inc.*, 13 FCC Rcd 5103, 5107 ¶ 9 (Cab. Serv. Bur. 1998).

unreasonable in disallowing them on Schedule C.<sup>26</sup> Furthermore, even if some of the disallowed costs were not incidental costs as contemplated by section 76.923(f) and (g), nothing in the record suggests these do not include costs belonging in the operator's equipment basket and recoverable as part of the operator's actual equipment and installation costs. The record does not disclose whether the Cities' recalculation of Cencom's equipment costs included any of these costs on other schedules on Form 1205 after the costs were removed from Schedule C, although the amount of decrease in the prescribed rates suggests that no recovery was allowed. For these reasons, we cannot find that the Cities acted reasonably in disallowing the disputed equipment costs. We are remanding these cases for further consideration of Cencom's disallowed equipment costs consistent with this Memorandum Opinion and Order.

#### IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Appeal of Local Rate Order filed September 14, 1995 by Cencom Cable Television (File No. CSB-A-0273) IS GRANTED IN PART and DENIED IN PART and Resolution No. 95-3450 of the City of Temple City IS REMANDED to the City of Temple City, California for further consideration consistent with this Memorandum Opinion and Order.

11. IT IS FURTHER ORDERED that the Appeal of Local Rate Order filed July 28, 1995 by Cencom Cable Television (File No. CSB-A-0242) IS GRANTED IN PART and DENIED IN PART and Resolution No. 4031 of the City of Walnut IS REMANDED to the City of Walnut, California for further consideration consistent with this Memorandum Opinion and Order.

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  
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<sup>26</sup> On the other hand, as provided in 47 C.F.R. § 76.923(c), the equipment basket "shall not include general administrative overhead including marketing expenses."