

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

In the Matter of)
)
MARCUS CABLE ASSOCIATES, L.L.C.)
d/b/a Charter Communications)
)
Appeal of Local Rate Order of the) File No. CSB-A-0659
City of Burbank, CA, CUID No. CA0178)
)
)
Appeal of Local Rate Order of the) File No. CSB-A-0660
City of Glendale, CA, CUID No. CA0180)

CONSOLIDATED MEMORANDUM OPINION AND ORDER

Adopted: January 30, 2001

Released: February 1, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Marcus Cable Associates, L.L.C., d/b/a Charter Communications ("Charter"), the franchised cable operator serving Burbank and Glendale, California has appealed the local rate orders issued by the City of Burbank, California and the City of Glendale, California (respectively "Burbank" and "Glendale," collectively "Cities"), each on November 14, 2000. These rate orders are Burbank Resolution No. 25,864 and Glendale Resolution No. 00-208. Both local rate orders reduced the rate for the operator's wire maintenance plan and ordered refunds. The Cities have opposed the request and Charter has replied. Charter has additionally requested stays of the rate orders, which the Cities have opposed. Because the petitioner and the issues are the same in each of these appeals, we consolidate them for administrative convenience. We deny the appeals with respect to the wire maintenance plans and grant them with respect to the refund orders.

1 Charter Burbank pleadings: Appeal of Local Rate Order (Dec. 14, 2000) ("Burbank Appeal"); Motion to file Supplement to Appeal of Local Rate Order (Dec. 20, 2000); Supplement to Appeal of Local Rate Order (Dec. 20, 2000); Request for Emergency Stay of Local Rate Order (Dec. 22, 2000). Charter Glendale pleadings: Appeal of Local Rate Order (Dec. 14, 2000) ("Glendale Appeal"); Motion to file Supplement to Appeal of Local Rate Order (Dec. 20, 2000); Supplement to Appeal of Local Rate Order (Dec. 20, 2000); Request for Emergency Stay of Local Rate Order (Dec. 22, 2000). Consolidated pleadings: Cities Opposition to Appeals of Local Rate Orders (Dec. 28, 2000) ("Cities Opposition"); Cities Opposition to Request for Emergency Stay of Local Rate Orders (Jan. 5, 2001); Charter Consolidated Reply to Oppositions to Appeals of Local Rate Orders (Jan. 12, 2001).

2 Burbank Resolution No. 25,864 can be found at Charter Burbank Appeal, Attachment A. Glendale Resolution No. 00-208 can be found at Charter Glendale Appeal, Attachment A.

3 In light of our action on the appeals, we are dismissing the requests for stay as moot.

4 47 U.S.C. § 154(j).

A. Wire Maintenance Plans

2. The Commission has repeatedly held that rates for cable wire maintenance plans are subject to local rate local franchising authority review and regulation.⁵ We have rejected arguments regarding the availability of competitive alternatives where the operator has not shown how competitive pressures will insure compliance with the statutory standard that prices be based on operators' actual costs.⁶ In response to a request for declaratory ruling from Charter, we found that a "whole house" plan is not subject to rate regulation when it is comparable to local exchange carrier maintenance plans that will exert competitive pressure on the "whole house" plan.⁷ We noted that consumers will continue to have the option of a cost-based hourly service charge rate for cable wire maintenance.

3. Charter offers an optional wire maintenance plan in both Burbank and Glendale, which it claims is a "whole house" plan encompassing inside wire maintenance for all home communications lines, including telephone and satellite as well as cable television, and is competitive with the unregulated inside wire maintenance offerings of the ILEC, Pacific Bell. Finding that the whole house scope of the plan was not established, the Cities treated the plan as a cable-only plan, prescribed a lower rate, and ordered refunds beyond the refund period permitted in section 76.933(g)(2) of the Commission's rules for operators using the annual rate adjustment. Charter argues that this narrow view of its plan was not reasonable but, even if reasonable, that the refund period is in violation of section 76.933(g)(2).

4. According to Charter, its wire maintenance plan has been offered since April 1997 and should not be subject to cable rate regulation. The Cities treated the plan as subject to rate regulation because the written information presenting the plan to subscribers referred only to cable wiring. They made findings to this effect in their local rate orders, and added that there was no evidence that Charter intended the plan to cover more services or had informed subscribers about any broader coverage.⁸ Although acknowledging that Charter gave them a copy of its request for declaratory ruling, which explained the whole house plan, they argue that the plan offered in their communities should be reviewed from the viewpoint of what subscribers understood about the plan, not from a description of a "new competitive service" the operator "would like to offer" in a 1999 declaratory ruling petition to the Commission.⁹ According to the Cities, subscribers would not have known from the operator's informational sheet that they could seek more than cable wiring service under the plan. Charter concedes it could have done a better job of marketing and explaining its whole house plan, but claims it has performed non-cable wire service under the plan since its inception and that the overwhelming majority of subscribers to the plan subscribed in connection with oral communications.¹⁰

5. Our role in reviewing resolving an appeal of a local rate order is to determine whether there was a reasonable basis for the franchising authority's determination, not to substitute our own

⁵ *Eg., TCI of Southeast Mississippi*, 13 FCC Rcd 11080 (Cab. Serv. Bur. 1998).

⁶ *Id.* at 11087.

⁷ *Request for Clarification of Rate Regulatory Rules, Inside Wire Maintenance*, DA 01-154 (released Jan. 22, 2001).

⁸ Burbank Resolution at 1; Glendale Resolution at 1.

⁹ Opposition at 8, quoting from Letter of Paul Glist to Nancy Stevenson (Jan. 15, 1999), p.1.

¹⁰ Charter Consolidated Reply at 3-4.

decision.¹¹ We will defer to a franchising authority's findings of fact if there is a reasonable basis for the findings.¹² The record shows that the Cities sought information, documentation, and a rate justification for the wire maintenance plan offered subscribers.¹³ They received a description prepared by Charter's predecessor which, as the Cities state, referred only to cable wire inside the home, and the Burbank Assistant City Attorney was advised that this was the only brochure made available to customers.¹⁴ In response to the Cities' concern that the plan was not presented to subscribers as a whole house plan, Charter states in its reply to us that "the overwhelming majority of customers that subscribe to the plan have done so in connection with oral communications with service technicians and customer service representatives,"¹⁵ but without verification or any description of what its employees were directed to communicate about the plan. Charter also states that work has been done on other wiring, but supports this with a single work order issued after the Cities issued their rate orders.¹⁶ Charter provides an affidavit attesting to the truth and accuracy of information in both appeals,¹⁷ which state, "The system offers an optional 'whole house' wire maintenance plan and has done so since April of 1997," and adds ambiguously, "The 'whole house' option has been in effect since the plan was offered."¹⁸

6. While it is possible that some subscribers to the wire maintenance plan understood it to cover non-cable wiring, the cable operator bears the burden of justifying its rates to the Cities in the first instance.¹⁹ The Cities' findings in their rate orders, that there was no evidence at the time of the rate orders that subscribers to the plan were informed that the plan covered services other than the repair of cable television wire inside subscriber homes, are supported by the record. We agree with the Cities that the plan should have been reviewed from the subscribers' perspective for, as the Cities point out, customers not affirmatively told that the plan covers inside house telephone facilities are not likely to make many claims against the plan for telephone repairs.²⁰ What is described to the Cities and the Commission as a low-price competitive option for the maintenance of telephone facilities becomes a high-priced option if plan subscribers unaware of the scope of Charter's plan also purchase the local exchange carrier's plan or pay on an as needed, ad hoc basis for telephone line repairs. The Cities' conclusions that the price for the

¹¹ *Implementation of Sections of the Cable Television Consumer Protection Act of 1992, Rate Regulation*, Report and Order, 8 FCC Rcd 5631, 5731 (1993); Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) ("Third Order on Reconsideration").

¹² *TCI Cablevision of Ohio*, 13 FCC Rcd 11,954, 11,957 para. 7.

¹³ See Charter Burbank and Glendale Appeals, Attachments B; Cities Opposition, Affidavit of Sheri D. Ungar, Assistant City Attorney, City of Burbank ("Ungar Affidavit").

¹⁴ Cities Opposition, Ungar Affidavit & Attachment.

¹⁵ Charter Consolidated Reply at 3-4.

¹⁶ *Id.* at Exhibit 1.

¹⁷ Charter's appeals simply state that it currently offers a whole house plan for all home communications lines. Charter Burbank and Glendale Appeals at 2

¹⁸ *Id.* Affidavit of Tom Schaeffer in Support of Appeal of Local Rate Order.

¹⁹ 47 C.F.R. § 76.937(a).

²⁰ Joint Opposition at 7 n.8.

wiring plan in this case was subject to regulation during the period under review is reasonable, and Charter's appeals of these conclusions are denied.²¹

B. Refund Orders

7. We agree with Charter, however, that the scope of the Cities' refund orders is not reasonable. Section 76.933(g)(2) of the Commission's rules provides that, if a proposed rate goes into effect before the franchising authority issues its rate order, the franchising authority will have 12 months from the date the operator filed for the rate adjustment to issue its rate order. In the event that the franchising authority does not act within this 12-month period, it may not at a later date order a refund or a prospective rate reduction with respect to the filing.²² Although Charter submitted rate forms dated March 1, 2000 and put its rates into effect thereafter, both local rate orders ordered refunds going back to September 15, 1998.²³ The Cities disagree that section 76.933(g)(2) is applicable because Charter never filed a Form 1205 for the wire maintenance plan or provided justification for the rate in response to the Cities' request for a justification.²⁴ Thus, they argue, they can work backwards to September 15, 1998 as provided in the rate orders or, in a worst case scenario, to the twelve-month period concluding with the adoption of their rate orders as provided in section 76.942(b) of the Commission's rules.²⁵ Charter argues in reply that the refund period should not exceed the period provided for in section 76.933(g)(2), because the Cities were made aware of the plan at least as far back as Charter's 1999 Form 1205 and took no action on the 1999 rate form.²⁶

8. The record shows that the Cities were aware of Charter's wire maintenance plan and requested a justification of the plan in the context of their reviews of Charter's 1999 Form 1205.²⁷ When Charter failed to respond substantively, instead advising the Cities that it considered the plan to be an unregulated service,²⁸ the Cities had a remedy. If they disagreed with Charter, they could have found the operator to be in default and prescribed a rate on the basis of the best information available at the time, as long as their authority was exercised in a reasonable manner.²⁹ The Cities did not pursue the matter further within the period established for ordering refunds on Charter's 1999 rate filing. Using their review of Charter's 2000 rate form to order refunds for earlier periods was not reasonable under these circumstances.

²¹ Our action on these appeals does not preclude Charter from offering unregulated whole house plans in these communities that are clearly marketed as whole house plans.

²² 47 C.F.R. § 76.933(g)(2).

²³ Burbank Resolution at 1, 3; Glendale Resolution at 1,3.

²⁴ Cities Opposition at 10.

²⁵ *Id.*, citing 47 C.F.R. § 76.942(b).

²⁶ Charter Consolidated Reply at 6-7, and Exhibits 2, Letter from Christina R. Sansone, Glendale Assistant City Attorney, and Sherri D. Ungar, Burbank Assistant City Attorney, to Denise Jones, Charter (May 26, 1999), and 3, Letters from Jones to Sansone (June 11, 1999) and Jones to Ungar (June 11, 1999).

²⁷ *Id.* Exhibit 2.

²⁸ *Id.* Exhibit 3.

²⁹ 47 C.F.R. § 76.937(d); *Third Order on Reconsideration*, 9 FCC Rcd at 4347-48.

The Cities' refund orders are being remanded to the extent they order refunds beyond the period established by section 76.933(g)(2) for Charter's 2000 Forms 1205.

II. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the Appeal of Local Rate Order filed December 14, 2000 by Marcus Cable Associates, L.L.C. d/b/a Charter Communications (File No. CSB-A-0659) IS GRANTED IN PART and otherwise denied, and Resolution No. 25,864 of the Council of the City of Burbank, California IS REMANDED for further action consistent with this Memorandum Opinion and Order.

10. IT IS FURTHER ORDERED that the Appeal of Local Rate Order filed December 14, 2000 by Marcus Cable Associates, L.L.C. d/b/a Charter Communications (File No. CSB-A-0660) IS GRANTED IN PART and otherwise denied, and Resolution No. 00-208 of the Council of the City of Glendale, California IS REMANDED for further action consistent with this 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 December 22, 2000 ARE DISMISSED.

12. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement to Appeal of Local Rate Order (Burbank) and the Motion for Leave to File Supplement to Appeal of Local Rate Order (Glendale) filed December 20, 2000 by Marcus Cable Associates, L.L.C. d/b/a Charter Communications IS GRANTED.

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

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau