

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

In the Matter of)	
)	
TIME WARNER COMMUNICATIONS)	
)	CSB-A-0661
Appeal of Local Rate Order of)	
Public Cable Television Authority)	
Concerning the Communities of)	
Fountain Valley, CA CUID CA0752)	
Huntington Beach, CA CUID CA0751)	
Stanton, CA CUID CA0932)	
Westminster, CA CUID CA0750)	

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2001

Released: April 3, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Time Warner Communications ("TWC"), the franchised cable operator serving the cities of Fountain Valley, Huntington Beach, Stanton, and Westminster, California, filed an appeal of the local rate order issued by the Public Cable Television Authority ("PCTA") on February 20, 2001.¹ This order asserted jurisdiction over TWC's charge for its Service Protection Plan ("SPP"), reduced the rate, and ordered refunds.² PCTA filed an opposition to this appeal, and TWC replied. TWC additionally requested an emergency stay of the rate order, which PCTA opposed.³

II. SCOPE OF REVIEW

2. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.⁴ In ruling on appeals of local rate orders, the Commission will not conduct a *de novo*

¹ TWC, Appeal of Local Rate Order (Mar. 2, 2001) ("TWC Appeal"); PCTA, Opposition to Appeal of Local Rate Order; Opposition to Emergency Petition for Stay of Enforcement Pending Appeal of Local Rate Order (Mar 13, 2001) ("PCTA Opposition"); TWC, Reply to Opposition to Appeal of Local Rate Order (Mar. 19, 2001) ("TWC Reply").

² TWC Appeal, Exhibit A, A Rate Order of Board of Directors of the Public Cable Television Authority Finding a Regulated Cable Rate of AOL Time Warner Cable ("TWC") to be Unreasonable, Prescribing a Reasonable Rate and Ordering Refunds to Subscribers (adopted Feb. 20, 2001) ("PCTA Rate Order").

³ Emergency Petition for Stay of Enforcement Pending Appeal of Local Rate Order (Mar. 2, 2001). In light of our action on the merits, this stay request is dismissed as moot.

⁴ 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

review, but instead will sustain the franchising authority's decision as long as a reasonable basis for that decision exists.⁵ 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. Service Protection Plan

3. TWC offers a Service Protection Plan for \$1.00 per month that it claims is distinguished from a traditional regulated wire maintenance plan and, therefore, not subject to local rate regulation. TWC describes the SPP as including features beyond simple repair of cable inside wiring; namely, repair of internal and external cable lines accidentally cut as a result of dog chews, gardening, or construction on the customer's property; fine tuning reception devices such as televisions or VCRs; assisting the subscriber by trouble-shooting problems; free service upgrades (hooking up an additional outlet or upgrading to a premium service); and providing free replacement batteries for TWC-provided remote controls.⁶

4. PCTA found in its February 20, 2001 rate order that the SPP was not justified on TWC's Form 1205 or in any substantive response to PCTA requests for supporting data, does not cover telephone wiring, and is not competitive with any service offered by an incumbent local exchange carrier.⁷ Relying on actual service call data from another cable system as the best information available and TWC's maximum permitted hourly service charge ("HSC") for one hour of service at the HSC, PCTA determined that annual service calls for inside wiring are for only 1.99% of the total number of cable subscribers and, accordingly, ordered TWC to reduce its SPP rate to \$0.07.⁸

5. TWC claims its SPP is not subject to regulation because it is comprised of a variety of elements, including some that are available competitively from other sources.⁹ This inclusion of competitively available elements allegedly distinguishes the SPP from cable inside wire maintenance plans that are subject to local rate regulation. Further, according to the TWC, as a matter of good public policy, cable operators should be encouraged to make available optional service plans that include a wide range of products and services. PCTA disagrees, arguing that wire maintenance plans have been consistently treated as regulated services by the Commission's rules and decisions and that TWC's public policy argument is inconsistent with these rules and decisions.¹⁰ PCTA disagrees that TWC's bundling of a clearly regulated

⁵ *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 para. 149 (1993) ("*Rate Order*"), Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 para. 81 (1994) ("*Third Reconsideration Order*").

⁶ TWC Appeal, Exhibit C, Nov. 9, 2000 Letter from Kristy Hennessey (TWC) to Mary Morales (PCTA), and Exhibit E, Jan. 2, 2001 Letter from Hennessey to Morales.

⁷ PCTA Rate Order at 1, 2, 3.

⁸ *Id.* at 2.

⁹ TWC Appeal at 4-5.

¹⁰ PCTA Opposition at 3-6.

commodity with non-regulated cable commodities of dubious value is reason to deregulate the whole package. In reply, TWC continues to argue that public policy considerations support its appeal.¹¹

6. We find PCTA's treatment of TWC's package to be reasonable. In addressing cable wire maintenance plans, the Commission has repeatedly held that the rates are subject to local franchising authority rate review and regulation and has 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.¹² Simply bundling wire maintenance with additional outlet installation, other repair activities that would normally be subject to rate regulation if obtained from the cable operator, or including programming tier upgrades for which there would otherwise be a regulated charge, does not address this burden for the package as a whole or for any of its parts, and no other showing was tendered in this case. Nor do we find that the competitive availability of equipment tuning and replacement batteries requires a different result. Absent a showing of competitive pressures on the rate for the package as a whole,¹³ which TWC has not made, the inclusion of some services that may be available from other sources does not, by itself, insulate the package from rate regulation.

7. When reviewing an optional wire maintenance plan in *Southeast Mississippi*, we were concerned that the task of comparing the costs and benefits over time associated with purchasing a wire maintenance plan for a flat monthly fee, verses relying on the regulated hourly service charge if and when maintenance or repair is needed, is a "difficult, if not amorphous, task" for the subscriber and, accordingly, found that the two types of maintenance offered by the cable operator were not comparable and would not exert competitive pressures upon one another.¹⁴ The difficulty in evaluating the price for the maintenance plan addressed in *Southeast Mississippi* is compounded with TWC's SPP where multiple activities are bundled in the plan. Comparing the costs and benefits of a service plan verses paying an hourly service charge to the operator or paying a third party's charges is no less difficult for a subscriber when the activity is equipment tuning, adding an outlet, or ordering a premium service than when it is wire maintenance or repair. In contrast, the "whole house" wire maintenance situation addressed in *Clarification* and relied on by TWC was shown not to raise this concern. There the operator included cable wire maintenance in a package of similar but unregulated services for non-cable wiring and established that its plan was in direct competition with monthly maintenance plans offered by the local exchange carrier and that its price was less than the price charged by the competing local exchange carrier for only part of the package. Under those circumstances, the cable part of the package was not subject to rate regulation.¹⁵ The problems associated with evaluating any competitive offering in *Southeast Mississippi* and in this case were not present in *Clarification*.

B. Prescribed Rate

8. Assuming that the elements of the SPP are subject to rate regulation, TWC faults PCTA for ignoring costs of some of the products included in its SPP when setting an unreasonably low rate for the

¹¹ TWC Reply at 2-3.

¹² E.g., *TCI of Southeast Mississippi*, 13 FCC Rcd 11080 (Cab. Serv. Bur. 1998) ("*Southeast Mississippi*").

¹³ See *Request for Clarification of Rate Regulatory Rules Inside Wire Maintenance*, CSR-5424, DA 01-154 paras. 7-9 (Cab. Serv. Bur. released Jan. 22, 2001) ("*Clarification*").

¹⁴ *Southeast Mississippi*, at 11085-86 para. 17.

¹⁵ *Clarification* at para. 9.

SPP.¹⁶ TWC argues that the PCTA order must be remanded so that the rate prescribed by PCTA can take into account all of the costs associated with the plan. Section 76.937 of the Commission's rules places the burden of justifying rates on the cable operator.¹⁷ An operator that does not attempt to demonstrate the reasonableness of its rates or respond to reasonable requests for supportive information from the franchising authority has not met its burden and can be subject to an order mandating appropriate relief. This relief can include ordering a prospective rate reduction and a refund based on the best information available at the time.¹⁸

9. In this case, the PCTA twice sought service call information in order to evaluate the SPP,¹⁹ and TWC twice declined to provide the information.²⁰ Lacking information from TWC, the PCTA used actual service call data acquired from a neighboring operator to determine the percent of total cable subscribers receiving service calls for inside home wiring. This percent was applied to TWC's subscriber base to determine the number of TWC subscribers that likely required a service call of one hour at the hourly service charge. Although the data relied on was only for service calls associated with inside home wiring, TWC does not suggest that other information was available to the PCTA for prescribing a rate or that the PCTA should have prescribed a rate based on pure speculation. Under the circumstances here, the information available to the PCTA provided a reasonable basis for its decision.

C. Refund Period

10. Finally, the PCTA order requires TWC to provide a refund plan and to provide refunds with interest for any amounts collected since October 1, 2000 in excess of the prescribed rate.²¹ TWC argues that the PCTA erred in ordering refunds dating back farther than January 1, 2001, the effective date of rates implemented pursuant to the Form 1205 it filed on or about October 1, 2000.²² In opposition, the PCTA argues it can work backward to the filing date of the company's most recent rate form when the form does not purport to justify the SPP rate and the operator has refused to provide the requested justification for the rate.²³

11. When an operator uses the annual rate adjustment method for justifying its rates, the procedures in section 76.933(g) govern the review process.²⁴ An operator files its proposed rates with the franchising authority no later than 90 days before the effective date of the proposed rates. If the franchising

¹⁶ TWC Appeal at 5; Reply at 3-4.

¹⁷ 47 C.F.R. § 76.937(a).

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

¹⁹ Appeal Exhibit D, January 2, 2001 letter from Mary Morales (PCTA) to Kristy Hennessey (TWC), and Exhibit F, January 11, 2001 letter from Morales to Hennessey.

²⁰ Appeal Exhibit E, January 2, 2001 letter from Hennessey to Morales, and Exhibit G, February 2, 2001 letter from Gary R. Matz (TWC) to Morales.

²¹ PCTA Rate Order at 3.

²² TWC Appeal at 6.

²³ PCTA Opposition at 7.

²⁴ 47 C.F.R. § 76.933(g).

authority does not act within this 90 day period, the operator can put its new rates in effect, but the franchising authority will have 12 months from the date the operator filed for the rate adjustment to issue its rate order. If the franchising authority concludes that the operator has submitted a facially incomplete application, however, the franchising authority's deadline for issuing a decision, the date on which rates may go into effect if no decision is issued, and the period for which refunds are payable will be tolled while the franchising authority is waiting for the missing information, provided that the franchising authority has notified the operator of the incomplete filing within 45 days of the date the filing is made. Absent fraudulent conduct on the operator's part, which is not alleged here,²⁵ these procedures govern and the refund period for rates reviewed during the annual review process begins with the effective date of the rates under review.²⁶ Ordering refunds for rates charged during a rate period not before the PCTA was not reasonable and requires a remand.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the Appeal of Local Rate Order filed by Time Warner Communications on March 2, 2001 IS GRANTED IN PART and otherwise DENIED and the PCTA Rate Order adopted February 20, 2001 IS REMANDED to the Public Cable Television Authority for further consideration consistent with this Memorandum Opinion and Order.

13. IT IS FURTHER ORDERED that the Emergency Petition for Stay of Enforcement Pending Appeal of Local Rate Order IS DISMISSED.

14. 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

²⁵ The report from PCTA's consultant advises, "As has been noted in the past, the Time Warner rate card indicates a \$1.00 per month charge for a 'Service Protection Plan.'" TWC Reply, Appendix A, Telecommunications Management Corp., Review of FCC Forms 1205 & 1240 Submitted by Time Warner Communications to the Public Cable Television Authority (Oct. 26, 2000), p.3. The PCTA could have pursued this charge as part of its review of TWC's prior rate filing. See *Marcus Cable Associates, L.L.C.*, DA 01-268 (Cab. Serv. Bur. released Feb. 1, 2001), *petition for partial reconsideration pending*.

²⁶ See 47 C.F.R. § 76.933(g)(2). TWC states that the rate year began January 1, 2001. TWC Appeal at 2.