

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

In the Matter of
TCI CABLEVISION OF SAN JOSE, INC.
HERITAGE CABLEVISION OF SAN JOSE, INC. d/b/a TCI Cablevision of San Jose
Appeals of Local Rate Orders of the City of San Jose, CA CUID CA0213
CSB-A-0342
CSB-A-0450
CSB-A-0554

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 2001

Released: April 13, 2001

By the Deputy Chief, Cable Services Bureau:

1. TCI Cablevision of San Jose, Inc. ("TCI") has pending before the Commission appeals of local rate orders of the City of San Jose, California, its franchising authority. In a Motion to Withdraw Certain Appeals/Stay Requests and Supplement Pending 1997 Appeal/Stay Request ("Motion"), it moves to withdraw appeals of two of these rate orders without benefit of Commission review and states that it is submitting refund plans in compliance with the terms of these rate orders. These rate orders addressed basic service tier and equipment rates for the 1996-1997 and 1998-1999 rate years. TCI additionally asks for expedited consideration of its stay request concerning the City's 1997 Rate Order addressing its rates for the 1997-1998 rate year. The City does not oppose the Motion's request to terminate two of the pending proceedings, but does oppose the Motion with respect to the stay of the 1997 rate order. We are granting TCI's unopposed request to withdraw two appeals but are denying its request for a stay.

2. The Commission evaluates petitions for stay under well settled principles. To support a stay, a petitioner must demonstrate: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay. The likelihood of success on the merits is an important element in a petitioner's showing. However, the degree to which a probability of success on the merits must be found will vary according to the Commission's assessment of other factors. When confronted with a case in which other elements strongly favor interim relief, the Commission may exercise its discretion to grant a stay.

1 Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958).

2 See Cuomo v. NRC, 772 F.2d 972, 974 (D.C.Cir. 1985); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C.Cir. 1985); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843-44 (D.C.Cir. 1977).

3. TCI argues that the stay is warranted because it will be harmed if it must refund substantial amounts attributable to the City's disallowance of converter insurance costs of \$0.20 per month per converter required by the City's 1997 Rate Order,³ and the City has indicated that noncompliance with the City's rate order could have an adverse impact on the operator's franchise renewal. The Rate Order followed from recommendations of the City's Telecommunications Director and its consultant that this cost be disallowed as TCI had not shown it was unbundled from programming tier rates when initial regulated rates were set, had not justified the cost, and had not shown whether it had applied any offsets for payments made by subscribers for lost or damaged converters. TCI argued in its stay request that the cost was an actual cost that should have been allowed. It belatedly adds in its Motion that it cannot locate any inquiries from the City seeking further support for the claimed cost. It tenders information about the cost of converters in its rate base and shows its formula for determining the cost.⁴ We have weighed TCI's stay request under the elements for a stay set forth above and find that TCI has not established such a likelihood of success on the merits that interlocutory relief is warranted.⁵

4. Accordingly, IT IS ORDERED that the Motion to File Based on Service Date filed by the City of San Jose, California on March 23, 2001 IS GRANTED.

5. IT IS FURTHER ORDERED that the Motion to Withdraw Certain Appeals/Stay Requests and Supplement Pending 1997 Appeal/Stay Request filed by TCI Cablevision of San Jose, Inc. on March 12, 2001 IS GRANTED IN PART and otherwise DENIED.

6. IT IS FURTHERED ORDERED that the Appeal of Local Rate Order and the Request for Stay of Local Rate Order filed by TCI Cablevision of San Jose, Inc. on July 25, 1996 (File No. CSB-A-0342) ARE DISMISSED.

7. IT IS FURTHER ORDERED that the Appeal of Local Rate Order and the Request for Emergency Stay of Local Rate Orders filed by Heritage Cablevision of San Jose, Inc., d/b/a TCI Cablevision of San Jose on June 25, 1998 and July 15, 1998, respectively (File No. CSB-A-0554) ARE DISMISSED.

8. IT IS FURTHER ORDERED that the Request for Emergency Stay of Local Rate Order filed by Heritage Cablevision of San Jose, d/b/a TCI Cablevision of San Jose on August 1, 1997 (File No. CSB-A-0450), as supplemented by the Motion to Withdraw Certain Appeals/Stay Requests and Supplement Pending 1997 Appeal/Stay Request filed by TCI Cablevision of San Jose, Inc. on March 12, 2001 IS DENIED.

³ Resolution No. 67494 (adopted June 24, 1997) ("1997 Rate Order"), *found at* TCI, Appeal of Local Rate Order, Attachment A (July 23, 1997) ("TCI 1997 Appeal").

⁴ There appears to be an error in the information provided for the number or value of lost converters in TCI's lost equipment summary, *found at* TCI Motion, Attachment A.

⁵ We note that TCI was provided with a copy of the consultant's letter to the Telecommunications Director and the Telecommunications Director's Memorandum to the Mayor and City Council. TCI submitted a response arguing that unbundling concerns should not preclude legitimate cost recovery and that its converter insurance cost falls within the category of incidental costs allowed under section 76.923(f), (g) of the Commission's rules, 47 C.F.R. § 76.923(f), (g). *See* TCI 1997 Appeal, Attachment B, Memorandum from P.S. Jacobs to Mayor and City Council (June 9, 1997), p.8; Attachment C, Letter from J.C. Smith (Public Knowledge) to P.S. Jacobs (May 28, 1997), pp. 19, 20; Attachment D, Letter from D.L. Walton (TCI) to P.S. Jacobs (June 18, 1997) at unnumbered pages 1, 3-4, 7-8.

9. 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