

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

In the Matter of
HERITAGE CABLEVISION OF CALIFORNIA,
INC. d/b/a TCI CABLEVISION OF SAN JOSE,
Petitioner,
v.
CITY OF SAN JOSE, SAN JOSE, CALIFORNIA
State of California.
Respondent.
Appeal of Local Rate Order
File Nos.
CSB-A-0637

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2003

Released: January 17, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Heritage Cablevision of San Jose, Inc., d/b/a TCI Cablevision of San Jose ("TCI"), the franchised cable operator serving the community of San Jose, California, has appealed a local rate order adopted by the City of San Jose ("San Jose") on June 29, 1999 ("Rate Order"),<sup>1</sup> requiring TCI to reduce the maximum permitted basic service tier ("BST") rate that was scheduled to take effect on June 1, 1999, and to refund any excessive rates and charges paid. San Jose opposes the appeal. Based upon our review of the record, we deny TCI's appeal of San Jose's local rate order.

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.<sup>2</sup> 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.<sup>3</sup>

<sup>1</sup> Resolution No. 69036.

<sup>2</sup> 47 U.S.C. § 543(a)(2).

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

3. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.<sup>4</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>5</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

4. On March 2, 1999, TCI filed with San Jose its FCC Form 1240,<sup>6</sup> by which it calculated its proposed BST rate for a non-rebuilt system, which included a "residual" for adding a channel to the BST from the CPST. TCI's proposed rates would become effective on June 1, 1999, if San Jose did not take action within the 90-day review period established by our rules.<sup>7</sup> San Jose's consultant reviewed TCI's Form 1240 and prepared a report recommending that San Jose reduce TCI's maximum permitted BST rate for adding a "residual" credit for the addition of a channel to the BST. The consultant also recommended that San Jose order refunds for any excessive rates and charges. San Jose adopted its rate order on June 29, 1999, directing TCI to reduce its BST rate and make refunds as recommended by the consultant.

5. TCI filed a local rate appeal with the Commission on July 29, 1999, alleging that San Jose erred in reducing TCI's maximum permitted BST rate by failing to account for the "residual" credit for channel movement pursuant to section 76.922(g)(5) of the Commission's rules. TCI argues that it is entitled to a "residual" credit under section 76.922(g) and that the Commission never intended for the sunset provision in 76.922(g)(8) to apply beyond subsections (g)(3) and (g)(7). San Jose argues that all of section 76.922(g) expired on January 1, 1998 and section 76.922(g)(5) is therefore not applicable.<sup>8</sup>

6. Subsequent to the filing of TCI's appeal, the Commission issued *Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order* ("NPRM/Order")<sup>9</sup> in light of the confusion resulting from the sunset language in section 76.922(g)(8) and the intent expressed in the *Going Forward Order*.<sup>10</sup> The Commission subsequently issued a limited reconsideration ("*Reconsideration Order*") of the *NPRM/Order* that contained an explanation of the issues surrounding section 76.922(g) of the Commission's rate regulations and included guidance on the appropriate

---

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

<sup>5</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>6</sup> San Jose is certified by the Commission to regulate basic cable television rates.

<sup>7</sup> See 47 C.F.R. § 76.933(g)(2).

<sup>8</sup> See 47 C.F.R. § 76.922(g).

<sup>9</sup> MB Docket No. 02-144, FCC 02-177 (released June 19, 2002).

<sup>10</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation* ("*Going Forward Order*"), 10 FCC Rcd 1226, 1260 (1994).

regulatory response to channel changes.<sup>11</sup> The Commission stated:

In light of the confusion created by section 76.922(g)(8) of the Commission's rules and the intent expressed in the *Going Forward Order* that there be some mechanism for dealing with channel changes if the incentives in paragraph (g) were not renewed, we clarify how channel changes should be handled pending action on this notice of proposed rulemaking.<sup>12</sup>

Because the Commission has not put in place another mechanism for dealing with channel changes, it continues to apply the provisions of section 76.922(g) as outlined in the *Reconsideration Order* pending action on the NPRM/Order.

7. According to the record as submitted, TCI removed the Weather Channel from the CPST tier in June 1998. TCI filed its Form 1240 on March 2, 1999, which proposed a new BST that included a "residual" credit for the addition of the Weather Channel to the BST. TCI argues that it is entitled to a "residual" credit for a channel movement from the CPST tier to the BST consistent with section 76.922(g)(5) of the Commission's rules for rate regulation. We disagree. When a channel is shifted between a BST and CPST, "it shall be treated as if it was dropped from one tier and the residual and programming cost associated with the shifted channel shall be shifted to the other tier."<sup>13</sup> TCI's movement of the Weather Channel is not consistent with a channel shift because the initial deletion of the Weather Channel from the CPST occurred in June 1998. The addition of the Weather Channel to the BST did not occur until June 1999, one year later. The *Going Forward Order* contemplates a simultaneous deletion and substitution by the operator. The year separation between the deletion of the channel from the CPST and its subsequent addition to the BST is not a shift from the CPST to the BST as contemplated by section 76.922(g)(5), and therefore would not come under the provision of section 76.922(g)(5). The addition of the Weather Channel to the BST in June 1999 is to be treated as a channel addition and TCI is entitled to a per channel adjustment factor under section 76.922(g)(2), but TCI is not entitled to any residual credit for the addition of the Weather Channel to the BST.<sup>14</sup> Accordingly, we deny TCI's appeal.

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the Appeal of Local Rate Order filed by Heritage Cablevision of San Jose, Inc., d/b/a TCI Cablevision of San Jose on July 29, 1999, **IS DENIED** and the local rate order of the City of San Jose **IS REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

---

<sup>11</sup> *In the Matter of Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order ("Reconsideration Order")*, FCC 02-228 (August 14, 2002), ¶ 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Going Forward Order*, 10 FCC Rcd 1226, 1256 (1994).

<sup>14</sup> *Id.* at 1249.

9. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.  
47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton  
Deputy Chief, Policy Division  
Media Bureau