

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

In the Matter of)	
)	
Comcast Cable Communications, Inc.,)	CSR-6165-R
)	
Petition for Declaratory Ruling)	
)	CUID No. PA0357
Petition for Revocation of Certification)	
)	
Request for Expedited Consideration)	

DECLARATORY RULING

Adopted: December 29, 2003

Released: January 6, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On April 25, 2003, Comcast Cable Communications, Inc. (“Comcast”), filed a Petition for Declaratory Ruling and Petition for Revocation of Certification (the “Petition”), directed at Middletown Township, Pennsylvania (the “Township”). Simultaneously, Comcast filed a Request for Expedited Consideration of Petition for Declaratory Ruling and Petition for Revocation of Certification. On June 4, 2003, the Township filed Comments of Middletown Township (the “Comments”), to which Comcast filed a Reply to Comments of Middletown Township (the “Reply”) on June 18. On July 2, 2003, Comcast filed a Supplement to Petition for Declaratory Ruling (the “Supplement”).¹

2. By issuing this Declaratory Ruling promptly after the close of the pleading cycle, we grant Comcast’s Request for Expedited Consideration. For the reasons stated below, we grant the Petition for Declaratory Ruling and we deny the Petition for Revocation of Certification. Also, we deny the Township’s First and Second Motions to Strike.

¹ On October 28, 2003, the Township filed a Motion to Strike directed at Comcast’s Supplement. On November 13, 2003, Comcast filed an Opposition to Motion to Strike, to which the Township filed a Reply to Opposition and a second Motion to Strike on November 19, 2003. The latter filing drew an Opposition, filed by Comcast on December 3, 2003.

II. BACKGROUND

3. Strictly speaking, this case is a request for a declaratory ruling and not an appeal of a rate order by a franchising authority. Nevertheless, it concerns two such orders, and therefore a statement of general principles is in order. The Communications Act provides that, where effective competition is absent, rates for basic cable service and associated equipment are subject to regulation by franchising authorities.² Rates for service and equipment should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates.³ If the cable operator fails to meet its burden of proof, has improperly calculated its rates, or is unresponsive to requests for relevant information, the franchising authority may use the “best information available” to review the operator’s proposed rates and, if appropriate, adjust them and order refunds.⁴

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.⁵ 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.⁶ 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. Facts

5. The present dispute concerns two rate orders that the Township adopted, in 2002 and 2003, regarding the rates for the Basic Service Tier (“BST”) of Comcast’s cable service in Middletown. Before the first of those decisions, the rate that Comcast and its predecessor had actually charged its BST subscribers (the “actual rate”) had not changed since January 2000.⁷ That actual rate was \$11.66.⁸

6. On March 1, 2002, Comcast filed a Form 1240 (the “2002 Form 1240”) to establish BST rates for the 12-month period beginning June 1, 2002.⁹ The 2002 Form 1240 stated a Maximum

² 47 U.S.C. § 543(a)(2).

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

⁴ 47 C.F.R. § 76.937(d); *Falcon Classic Cable*, 15 FCC Rcd 5717, 5720 (2000) ¶ 10; *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13398 (1999) ¶ 12.

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

⁶ *Harron Commun. Corp.*, 15 FCC Rcd 7901 (2000) ¶ 2; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act*, 8 FCC Rcd 5631 (1993), 9 FCC Rcd 4316, 4346 (1994) ¶ 81.

⁷ Township’s first Motion to Strike, Exh. 2 (2002 Form 1240 Cover Letter); Reply at 3 n.3.

⁸ Petition at 2, n.1 & text accompanying n.3.

⁹ *Appeal of Comcast Cable Commun., Inc., From a Rate Order of the Township of Middletown, Pennsylvania Board of Supervisors*, CUID PA0357, Exh. 2 (filed June 13, 2002), *decided*, *Comcast Cable Commun., Inc.*, 18 FCC Rcd 4540 (2003).

Permitted Rate (“MPR”) of \$13.10, but left blank Line I10 on the Form, which was for “Operator Selected Rate [“OSR”] For Projected Period.”¹⁰ Comcast’s cover letter to its 2002 Form 1240 stated:

“Currently, Comcast does not plan to implement any changes in its regulated basic . . . rates when these filings become effective on June 1, 2002. Although these may not be our actual rate change plans, we want to preserve our rights for the coming year under the current rules.”¹¹

7. On May 14, 2002, the Township adopted an Opinion and Order concerning the 2002 Form 1240 (the “May 2002 Order”).¹² The Township’s May 2002 Order disapproved of Comcast’s treatment of inflation and lowered the MPR to \$12.77.¹³ We later overturned the Township’s May 2002 Order in this respect,¹⁴ and Comcast’s MPR was re-established at \$13.10.¹⁵ More important to the present dispute, however, the Township’s May 2002 Order addressed the BST rate that Comcast could charge in the future. The May 2002 Order stated that Comcast “has indicated to the Township that it will continue to charge subscribers \$11.70 for Basic service,” perhaps overlooking that Comcast’s actual rate was \$11.66.¹⁶ The Township “ordered . . . that an operator selected [rate] of \$11.70 is approved for the projected period from June 1, 2002 through May 31, 2003.”¹⁷

8. On or about January 27, 2003, Comcast notified the Township and its subscribers that it would increase its actual rate to \$12.65 on March 1 of that year.¹⁸ Comcast effected that increase. Also on or about March 1, 2003, Comcast filed a Form 1240 (the “2003 Form 1240”) to establish BST rates for the 12-month period beginning June 1, 2003.¹⁹ The 2003 Form 1240 stated an MPR of \$13.95.²⁰ Comcast’s cover letter to its 2003 Form 1240 contained almost the same tentative and cautionary words as the previous year’s,²¹ and again Comcast’s Form 1240 left blank the line for the OSR.²²

9. On March 6, 2003, the Township advised Comcast that it could not lawfully raise its actual rate until after June 1, 2003 – the end of the 90-day review period for its 2003 Form 1240.²³ Over

¹⁰ *Id.* at 4.

¹¹ Township’s first Motion to Strike, Exh. 2 (2002 Form 1240 Cover Letter).

¹² Comments, Exh. 1.

¹³ *Id.*, ¶ 7 at 2.

¹⁴ *Comcast Cable Commun., Inc.*, 18 FCC Rcd 4540 (2003).

¹⁵ Supplement, Exhibit 1 (June 2003 Order) at ¶¶ 3, 9.

¹⁶ May 2002 Order, *supra* note 12, at ¶ 3.

¹⁷ *Id.* at ¶ 7 (capitalization omitted).

¹⁸ Comments at 4 & Exh. 2.

¹⁹ Township’s first Motion to Strike, Exh. 3 (Comcast’s March 2003 Form 1240 and cover letter).

²⁰ *Id.*, 2003 Form 1240 at 4.

²¹ *Id.*, Cover Letter at 1.

²² *Id.*, 2003 Form 1240 at 4.

²³ Petition, Exh. 2 at 1.

the next several weeks, Comcast and the Township corresponded.²⁴ Comcast proposed that they consult with the Commission's Media Bureau for an informal resolution of their disagreement.²⁵ The Township demanded refunds and mentioned the possibility of fines and imprisonment if Comcast persisted with the \$12.65 actual rate for Basic Service.²⁶ Later, on or about April 11, 2003, the Township served information requests on Comcast, one of which stated: "The Operator's Selected Rate for the Projected Period was not set forth in line item I10. Please provide this Rate."²⁷ Comcast responded on May 1, 2003, that

"The information requested is not relevant to the FCC Form 1240 preparation or the information contained in the form used to determine the Maximum Permitted Rate because currently Comcast does not plan to implement changes in its regulated basic rates when this filing becomes effective on June 1, 2003.

....

"Thus the FCC Form 1240 submitted on March 1, 2003 was not intended to serve as notice for any price adjustments for the basic service tier."²⁸

10. On June 3, 2003, the Township adopted an Opinion and Order (the "June 2003 Order") regarding Comcast's 2003 Form 1240. The June 2003 Order approved Comcast's MPR of \$13.95.²⁹ The June 2003 Order also noted that Comcast

"has not indicated in its Application to the Township what rate it will charge subscribers for Basic service.

....

"The Operator failed to include an Operator Selected Rate in its FCC Form 1240. The best available information concerning the actual rate which the Operator intends to charge for Basic Service is the rate of \$12.65 as described in a special notice sent by the operator to its subscribers in January, 2003."³⁰

Accordingly, the June 2003 Order set Comcast's OSR at \$12.65 for the period from June 1, 2003, through May 31, 2004.³¹ This would keep Comcast's actual rate at \$12.65 until 15 months after Comcast first began charging it.

²⁴ Petition, Exhs. 3-5. The Township may have believed that the increase in Comcast's actual rate was related to the 2003 Form 1240.

²⁵ Petition, Exhibit 5.

²⁶ Petition, Exh. 4 at 2-3.

²⁷ Township's first Motion to Strike, Exh. 5 at 1.

²⁸ *Id.* at 1 (quotations from and citations to Commission decisions omitted).

²⁹ June 2003 Order, *supra* note 15, at ¶¶ 6, 9.

³⁰ *Id.* at ¶¶ 4, 7.

³¹ *Id.* at ¶ 9.

B. Analysis

11. Appropriateness of a Declaratory Ruling. The Bureau may issue a declaratory ruling at any time to terminate a controversy or remove uncertainty.³² The Bureau has wide discretion to determine whether a declaratory ruling is appropriate.³³ Here, we find that it is. Comcast and the Township have a dispute that is real, well defined, and ripe for resolution. The dispute concerns a course of conduct -- cable operators not specifying OSRs on their Forms 1240 and franchising authorities reacting differently -- that is occurring elsewhere in the industry.³⁴ By issuing this ruling to resolve this dispute between Comcast and the Township, we may give useful guidance to other cable operators and franchising authorities about how to jointly set BST rates with a minimum of time, cost, and misunderstanding.

12. The Township argues that this proceeding, although styled by Comcast as a request for a declaratory ruling, is really an untimely appeal of the Township's May 2002 Order.³⁵ The Township notes that Comcast previously brought the May 2002 Order before us in an earlier appeal³⁶ without challenging the Township's specification of an OSR that was plain on the face of the May 2002 Order.³⁷ The present dispute between Comcast and the Township, however, did not arise until Comcast first announced that it intended to raise its actual rate above the OSR that the Township had set in its May 2002 Order. Comcast made that announcement on January 27, 2003, by which time the pleading cycle on its appeal had been over for months.³⁸ Comcast might have attempted to re-open the record in its appeal and add the present dispute to it, but it was not unreasonable for Comcast to have begun this separate, later proceeding. Therefore, the Petition is not an untimely rate appeal and we find that the Petition is procedurally proper.

13. Nor do we find it a fatal flaw that Comcast, by its Supplement, added its 2003 Form 1240 to a case that originally concerned only its 2002 Form 1240. Although two Form 1240s and the Township's reaction to each are somewhat different, they have enough in common to make evaluating them in one proceeding efficient and prudent. Accordingly, the Township's first Motion to Strike is denied.

14. The Merits. The recent case of *Frontiervision Operating Partners*³⁹ concerned cable operators who, like Comcast here, left blank Line I10 for their OSRs on their Form 1240s, justified MPRs higher than their actual rates, and later sought to raise their actual rates up to their MPRs.⁴⁰ We ruled that each Form 1240 in *Frontiervision*, lacking all the information required on it, could be treated as "facially

³² 47 C.F.R. §§ 1.2, 76.7; 5 U.S.C. § 554(e). See also 47 USC § 154(i), (j).

³³ *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), cert denied, 414 U.S. 914 (1973).

³⁴ *Frontiervision Operating Partners*, Order DA 03-3127, rel. Oct. 10, 2003, available at 2003 WL 22318718.

³⁵ Township's first Motion to Strike at 3-4, 6.

³⁶ See *supra* note 34.

³⁷ Township's first Motion to Strike at 4.

³⁸ See *supra* note 9.

³⁹ See *supra* note 34.

⁴⁰ *Frontiervision Operating Partners*, *supra* note 34, at ¶¶ 6-9.

incomplete”⁴¹ and that each franchising authority was entitled to demand that the cable operator fill in Line I10 and declare an OSR. Under our Rules, incomplete rate forms toll the review process if the franchising authority is unable to proceed with its review.⁴² Neither authority involved in *Frontiervision*, however, declared the filed Form 1240 facially incomplete, directed that the cable operator complete it by filling in Line I10, or tolled review of the Form pending its completion. Nor did either authority in *Frontiervision* take any formal action on the Form 1240 that had been filed with it.⁴³ We ruled that, on the facts of that case, the cable operator was permitted to raise its actual BST rate after the end of the standard 90-day review period, so long as that rate did not exceed the MPR and was the first change in that actual rate in a year or longer.

15. In this case, the franchising authority (the Township) did more than the authorities in *Frontiervision*. It took formal action on both Forms 1240 filed with it and prescribed an OSR in each one. When the facially incomplete 2003 Form 1240 was filed with it, the Township formally inquired of Comcast what its OSR would be. The Township did not, however, declare either of Comcast’s Forms 1240 facially incomplete, direct Comcast to complete them by filling in Line I10 and declaring an OSR, or toll review of the Form pending its completion. When it instead served information requests on Comcast, the Township permitted Comcast to merely repeat the kind of tentative and cautionary words it had given the Township earlier. The Township’s conduct, while undoubtedly in good faith, failed to extract any commitment to an OSR from Comcast. The Township erred by then prescribing an actual rate when it could have, by requiring that Line I10 be filled in, forced Comcast to commit to an OSR and prescribed that rate. (It is contradictory for the Township to label a rate that it selected an “Operator Selected” rate.)

16. The analysis in *Frontiervision* addresses and answers the claims made by the Township about our Rules.⁴⁴ In that case, the franchising authorities argued that several of our Rules allow actual rates to change only at the end of the 90-day review period -- with a few exceptions, none of which applied to the facts of that case.⁴⁵ We disagreed, stating that “[n]one of those rules states explicitly what the [franchising authorities] read into them, that actual rate changes may occur only at the end of the 90-day review period. None of them explicitly forbids actual rate changes at other times.”⁴⁶ Additionally, in this case, the Township cites another exception, to the same alleged effect as the franchising authority in *Frontiervision* argued.⁴⁷ We find our *Frontiervision* analysis applicable here, too, and find nothing in the Township’s arguments to change that analysis.

17. Here, as in *Frontiervision*, the equities favor the cable operator. The Township cannot, any more than the franchise authorities in *Frontiervision*, claim that its cable operator violated the legitimate expectations of BST subscribers for stable and reasonable rates. Comcast’s present actual rate is below its present MPR, and even below the MPR that it justified in 2002. Our rules generally protect

⁴¹ *Frontiervision Operating Partners*, *supra* note 34, at ¶ 15, citing *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd 7379, 7381 (2000) ¶ 8 and *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 388, 427 (1995) ¶ 95.

⁴² 47 C.F.R. § 76.933(g).

⁴³ *Frontiervision Operating Partners*, *supra* note 34, at ¶¶ 14-15.

⁴⁴ *Compare Frontiervision Operating Partners*, *supra* note 34, at ¶¶ 10-13, with Comments at 7-10.

⁴⁵ 47 C.F.R. §§ 76.922(e)(1), (2)(i), (ii)(A), (iii)(A-C), o.

⁴⁶ *Frontiervision Operating Partners*, *supra* note 34, at ¶ 11.

⁴⁷ Comments at 7-8, citing 47 C.F.R. § 76.933(g)(5).

subscribers from rate increases more than once a year,⁴⁸ and Comcast's rate increase of March 1, 2003, was its first in more than three years. And, to paraphrase *Frontiervision*, for us to uphold the Township's May 2002 and 2003 Orders would allow franchising authorities, when a cable operator does not specify an OSR, to freeze BST rates for a year. Cable operators, if they faced that risk, might specify an OSR higher than they would otherwise charge. We do not wish to encourage such increases. Rather, we want to give free rein to any operator's inclination to restrain a rate increase that our rules allow.⁴⁹

18. The Township attempts to distinguish our decision in *Frontiervision* on grounds already noted -- that it, unlike the franchising authorities in *Frontiervision*, issued timely rate orders and set an OSR in each one.⁵⁰ These differences, however, are not significant to the analysis set forth above and do not overcome the Township's failure to find the 2002 and 2003 Forms 1240 facially incomplete, to demand that Comcast fill in Line I10 and declare an OSR, and to toll its review process until Comcast did so. Generally, we favor the expeditious and simple setting of BST rates,⁵¹ which can best be accomplished by both cable operators and franchising authorities adhering to the Form 1240 requirements.

19. Accordingly, we grant the Petition to the extent of ruling that, under the Communications Act and the Commission's Rules, (1) the Township's May 2002 Order and its June 2003 Order were erroneous to the extent that they prescribed OSRs for Comcast, (2) Comcast's increase of its actual rate for the BST to \$12.65, effected March 1, 2003, was lawful, and (3) no contrary or punitive action by the Township, including fines and imprisonment, would be lawful.

20. Continued Certification of the Township. Comcast characterizes the Township's conduct as "totally unsupported by even the most generous interpretation of its position"⁵² and requests that we revoke the Township's certification to set its BST rates.⁵³ Section 76.914(a)(1) of our Rules provides for such relief, "[a]fter the franchising authority has been given a reasonable opportunity to comment and cure any minor nonconformance, it is determined that state and local laws and regulations are in substantial and material conflict with the Commission's regulations governing cable rates."⁵⁴ The Township's actions do not begin to rise to the level of "substantial and material conflict" with our applicable rules. It is Comcast that filed the incomplete Forms 1240. The Township merely attempted to address Comcast's omissions. We have upheld Comcast's claims against the Township's May 2002 and June 2003 Orders, and we expect the Township to correct the Orders on which Comcast bases its

⁴⁸ See *Frontiervision Operating Partners*, *supra* note 34, at ¶¶ 11-12. See also 47 C.F.R. § 76.922(e).

⁴⁹ *Frontiervision Operating Partners*, *supra* note 34, at ¶ 16.

⁵⁰ Township's first Motion to Strike at 6 n.2; Reply to the Opposition to the Township's first Motion to Strike at 4.

⁵¹ 47 U.S.C. § 543(b)(2)(A) (In prescribing regulations for BST rate-setting, the Commission "shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission"), (5)(B) (such regulations shall include "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations"); *Adelphia Commun. Corp.*, 18 FCC Rcd 14622, 14625 (2003) ¶14 ("We favor expeditious resolution of disputes about rates"); *C-Tec Cable Systems*, 14 FCC Rcd 5437, 5443 (1999) ¶17 ("the Resolution effectively achieves the objectives of the 1992 Cable Act by ensuring the expeditious resolution of all pending rate complaints").

⁵² Petition at 13.

⁵³ *Id.* at 12-14.

⁵⁴ 47 C.F.R. § 76.914(a)(1).

revocation claims in this proceeding.⁵⁵ Accordingly, we deny Comcast's Petition insofar as it asks that we revoke the Township's certification to regulate rates.

21. Procedural Matters. The Township points to several alleged procedural missteps by Comcast. Specifically, it claims that Comcast's Supplement contained new matters and did not explicitly show extraordinary circumstances,⁵⁶ and that Comcast's Opposition to the Township's first Motion to Strike was filed late.⁵⁷ Comcast disputes the Township's claims and alleges procedural missteps (lateness and lack of verification) in the Township's first Motion to Strike.⁵⁸ We find that, whatever the possible procedural flaws in these filings, they have added substance to the record in this case and enable us to make a more informed declaratory ruling that will better guide cable operators and franchising authorities in preparing and reviewing Forms 1240. Accordingly, based on the particular circumstances of this case, we deny Comcast's Motions to Strike.

IV. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that the Request for Expedited Consideration filed by Comcast Cable Communications, Inc., in CSR-6165R, **IS GRANTED**.

23. **IT IS FURTHER ORDERED** that the Request for Declaratory Ruling filed by Comcast Cable Communications, Inc., in CSR-6165R, **IS GRANTED**.

24. **IT IS FURTHER ORDERED** that the Petition for Revocation of Certification filed by Comcast Cable Communications, Inc., in CSR-6165R, **IS DENIED**.

25. **IT IS FURTHER ORDERED** that the Motion to Strike filed by Middletown Township, Pennsylvania and directed at the Supplement to Petition for Declaratory Ruling filed by Comcast Cable Communications, Inc., **IS DENIED**.

26. **IT IS FURTHER ORDERED** that the Motion to Strike Comcast Opposition filed by Middletown Township, Pennsylvania and directed at the Opposition filed by Comcast Cable Communications, Inc., on November 13, 2003, **IS DENIED**.

27. This action is taken pursuant to authority delegated by Section 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

⁵⁵ 47 C.F.R. § 76.914(a)(2). See generally *Joppa Associates, L.P.*, 10 FCC Rcd 13103 (1995).

⁵⁶ Township's first Motion to Strike at 2-3, citing 47 C.F.R. § 76.7(c)(1), (d).

⁵⁷ Township's second Motion to Strike *passim*.

⁵⁸ Opposition to the Township's first Motion to Strike *passim*.