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

In the Matter of	)	
	)	
Century Southwest Cable Television	)	
	)	
Appeals of Local Rate Orders of the City of Beverly Hills, California (CUID No. CA0457)	)	File Nos.
	)	
	)	CSB-A-0587 & CSB-A-0639

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2003 **Released: February 21, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Century Southwest Cable Television ("Century") the franchised cable operator serving the City of Beverly Hills, California has appealed two local rate orders adopted by the City of Beverly Hills ("City") on July 21, 1998[1] and July 20, 1999[2], respectively, that rejected Century's FCC Form 1240 proposed basic service tier ("BST") rates as unreasonable because they sought to "pass through" several franchise-related costs, that the City concluded, pre-dated the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[3] and thus, were not eligible to be passed through to subscribers through a rate increase. We consolidate these appeals because the legal arguments presented by the parties are identical and the interests of administrative efficiency will be advanced thereby. The City opposes the appeal. Based upon our review of the record, we grant in part and deny in part Century's appeal.

II. BACKGROUND

2. The Communications Act provides that, where effective competition is absent, cable rates for the BST are subject to regulation by franchising authorities.[4] 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.[5]

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[1] Resolution No. 98-R-9922.

[2] Resolution No. 99-R-10185.

[3] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5718-19, 5731-32 (1993) ("Rate Order"); *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4346 (1994) ("*Third Reconsideration Order*").

[4] 47 U.S.C. § 543(a)(2).

[5] 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.[6] 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.[7] 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.

4. On April 30, 1998, Century filed with the City its FCC Forms 1205 and 1240. The Form 1240 proposed an increase of .69 cents per month for the BST. The increase was sought for: (1) a $20,000 payment to the City for the purchase of cable television equipment; (2) an $18,500 reimbursement to the City for audit costs; and (3) $3,950.50 in "forced relocate" costs.[8]

5. The City held a public hearing on July 21, 1998 and adopted Resolution No. 98-R-9922. The City approved the Form 1205. The City rejected the Form 1240 proposed BST increase of .69 cents and reduced it by .13 cents, which resulted in a new rate of $26.72 rather than the requested rate of $26.85. Century filed its appeal of the City's rate order on August 20, 1988.[9] Century is challenging the City's reduction of its proposed Form 1240 BST rate.

6. One year later, on April 30, 1999, Century filed with the City its FCC Forms 1205 and 1240. The Form 1240 proposed an increase of $2.72 cents per month for the BST. The justification for the increase included the same costs submitted and rejected in the prior year: (1) the purchase of cable television equipment; (2) the reimbursement to the City for audit costs; and (3) "forced relocate" costs. In addition, the Form 1240 also included $216,918.99 in new "forced relocate costs."

7. The City held a public hearing on July 20, 1999 and adopted Resolution No. 99-R-10185. The City approved the Form 1205. But the City rejected the Form 1240 proposed BST increase of $2.72 and reduced it by $1.10, which resulted in a new rate of $28.47 rather than the requested rate of $29.57. Century filed its appeal of the City's rate order on August 19, 1999.[10] Century is challenging the City's Form 1240 BST rate.

8. The parties agree that Century incurred the costs at issue. The parties also agree that such costs were required by the franchise agreement between Century and the City. Century, however, claimed the costs at issue as "external costs" and attempted to pass-through these costs to subscribers through an increase in the BST rate. The City rejected these items as "external costs" subject to a right of pass-through because, although they were required by the franchise agreement, the agreement was entered into before the 1992 Cable Act. Thus, the City concluded that they were pre-1992 Cable Act obligations and therefore not entitled to be passed on to subscribers as external costs.

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[6] 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

[7] *Rate Order*, 8 FCC Rcd 5631 (1993); *Third Reconsideration Order*, 9 FCC Rcd 4316, 4346 (1994).

[8] "Forced relocate" costs involve the relocation of Century's underground facilities.

[9] CSB-A-0587.

[10] CSB-A-0639.

III. DISCUSSION

9. Century argues that the fact that its franchise agreement pre-dates the 1992 Cable Act should not preclude it from passing through subsequent cost increases. Both parties rely on the treatment of external costs as that subject is addressed in the *Thirteenth Order on Reconsideration*, which states:

> operators should be permitted to include increases in franchise requirement costs that the operator would not have incurred in the absence of the franchise requirement. Such increases include both new requirements that the franchising authority imposes and increases in the cost of complying with existing requirements.[11]

10. Century claims that the costs at issue are increases in costs incurred subsequent to the effective date of the 1992 Cable Act and are therefore eligible to be passed through to subscribers. To buttress its argument, Century argues that under our decision in *TCI of Richardson, Inc*,[12] payments arising under a franchise agreement which pre-dated rate regulation, but which are not incurred until after regulation, should not be considered part of the operator's original base rate, and the operator should be permitted to pass through such costs to subscribers as external costs.

11. In Opposition, the City acknowledges that costs eligible for pass-through treatment include new requirements that the franchising authority imposes and increases in the cost of complying with existing requirements. The City, however, rejects Century's claim that the disputed costs are new costs or increases to existing costs. The City also rejects Century's interpretation of *Richardson*. The City argues that Century misreads *Richardson* and places undue reliance upon when costs are incurred. The City further argues that *Richardson* correctly holds that the cable operator is only entitled to recover the marginal increase in its annual obligation and not the base payment.

12. In *Richardson,* we held that the operator could recover its "incremental increase" of $25,000 in ongoing community access fund payments, which were required by a franchise agreement entered into before rate regulation. In *Richardson*, the operator had paid $100,000 a year for the prior four years but the amount was scheduled to increase by $25,000 in the fifth year with additional amounts in the years to follow. The operator sought recovery of the $25,000 increase, but not the original "base" payment of $100,000. We concluded that the operator's costs were an "incremental increase" under the *Thirteenth Order on Reconsideration* and granted its appeal. We also stated that we would not "extend external cost treatment to all possible circumstances" and we identified franchise-required costs that could be passed through to subscribers in 47 C.F.R. § 76.925(a).[13]

13. Our rules provide that operators may adjust their rates to reflect changes in external costs.[14] Our rules also define external costs as consisting of seven categories,[15] including the "costs of complying with franchise requirements." The "costs of franchise requirements" are defined more

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[11] Appeal at 2; citing *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (1995), Thirteenth Order on Reconsideration*, FCC 95-397, MM Docket No. 92-266, *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation* 11 FCC Rcd 388, 441 (1995) ("*Thirteenth Order on Reconsideration*").

[12] *TCI of Richardson, Inc.*, 13 FCC Rcd. 21,690 (1998) ("*Richardson*").

[13] 13 FCC Rcd. at 21,702.

[14] 47 C.F.R. § 76.922(e)(3).

[15] 47 C.F.R. § 76.922(f).

specifically in section 76.925(a)[16] as follows:

> (1) Costs of providing PEG access channels;
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> (2) Costs of PEG access programming;
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> (3) Costs of technical and customer service standards to the extent that they exceed federal standards;
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> (4) Costs of institutional networks and the provision of video services, voice transmissions and data transmissions to or from governmental institutions and educational institutions, including private schools, to the extent such services are required by the franchise agreement; and
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> (5) When the operator is not already in the process of upgrading the system, costs of removing cable from utility poles and placing the same cable underground.

The question, then, is whether the costs at issue qualify as "new" costs or "increases" in costs of complying with franchise requirements as those requirements are defined in our regulations.

14. The first contested cost is a $20,000 payment made to the City on July 25, 1996 for the purchase of cable television equipment in lieu of undergoing and paying for a performance review in the seventh year of the franchise agreement. Century alleges that this cost was not identified as a franchise obligation until July 2, 1996, which is several years after the initiation of rate regulation. In 1996, the parties mutually agreed to replace the franchise agreement requirement that Century conduct periodic "Performance Evaluation Sessions," which provided for a total assessment of no greater than $20,000, with a payment by Century of $20,000 for the purchase of cable television equipment. Century states that it did not know how much the Performance Evaluation Sessions would have cost because none was ever conducted. Century thus argues that the City has no basis for assuming that this cost was built into its 1992 rate base.

15. In opposition, the City argues that the franchise agreement, which was adopted on June 16, 1987, required Century to contribute up to $20,000 for a performance review in the fourth,[17] seventh and twelfth years of the agreement. The City argues that the original payment obligation was part of the 1987 agreement and was not a new or increased cost. According to the City, in 1996 Century voluntarily agreed to apply $20,000 to the purchase of cable equipment "in lieu of contributing monies to and undergoing a performance review." The City argues that, but for the performance review requirement in the 1987 franchise agreement, it never would have received the $20,000 worth of cable equipment. Finally, the City argues that the 1996 $20,000 cable equipment purchase was not an increase in franchise costs but was equal to the maximum financial exposure required under the franchise agreement.

16. The parties agree that their 1987 franchise agreement required Century to pay the costs of up to $20,000 a year for a performance review. However, it was never required to do so. In 1996, by mutual agreement of the parties, Century agreed to pay the City $20,000 for the purchase of cable

[16] 47 C.F.R. § 76.925(a); *Thirteenth Order on Reconsideration* 11 FCC Rcd 388 (1995) at ¶ 132; 47 C.F.R. §§ 76.922(f) and 76.925(a).

[17] The fourth year review was crossed through in hand writing in the copy of the franchise agreement submitted by Century, and the word "change" with a downward arrow was placed next to it. It is unclear what the reference means, although it appears no performance review was conducted in that year.

equipment in lieu the performance review. As a result, the performance review obligation terminated and a new obligation was created. The performance review liability was uncertain at best. The performance review obligation only provided that the cost of a review would not exceed $20,000, but a review could also have been substantially less than that amount. It is reasonable to conclude that Century did not build any such cost into its 1992 rate base. Then, in 1996, the parties substituted that obligation with a commitment from Century to pay $20,000 for cable television equipment. This substitution was without any understanding of the parties that Century would not treat the payment as an external cost. It is in fact a new cost. Century is entitled to treat it as an external cost under 47 C.F.R. § 76.925.

17. The second contested costs are audit fees. Century alleges that even though the 1987 franchise agreement required it to pay the cost of such audits, it did not know prior to the effective date of the 1992 Cable Act whether audits would actually be conducted, and if so, the costs of such audits. Therefore, Century alleges that the cost of the audits could not have been part of Century's 1992 base rate. In Opposition, the City alleges that the audit obligation was required by the 1987 franchise agreement, that Century was therefore aware that it would incur audit costs, and that the audit payments are not "a new cost or an increased cost."

18. The parties agree that the 1987 franchise agreement required Century to pay the City the costs of audit fees. Century bears the burden of proving the reasonableness of all of its proposed regulated rates.[18] The record fails to indicate whether Century had made payments prior to 1996. Century states in its appeal only that the "City has no basis to assume that the costs of the City's recent audit were somehow encompassed in the Company's 1992 rate base."[19] If the obligation to pay was uncertain because Century was uncertain that audits would be conducted in any given year, the 1996 audit fee payment could be construed as a "new" cost. But we have no way of knowing the history of the subject, based on the record before us. We cannot conclude that the audit expenses Century incurred were new or increased costs. Similarly, we cannot conclude that the City was unreasonable in ruling that the audit fees at issue are ineligible for external cost treatment under 47 C.F.R. § 76.925.

19. The third category of contested costs is $3,950.50 in "forced relocate" expenses. Century alleges that although it did indeed commit itself to pay forced relocate costs, it did not know the "precise costs" it would incur a decade later. Century argues that the payments at issue here were not made prior to rate regulation, nor were they included in Century's 1992 rate base, and that they are new incremental costs.[20]

20. The parties agree that the 1987 franchise agreement required Century to undertake "forced relocates" as part of the franchise agreement. However, we have previously stated that a franchise requirement does not automatically make an obligation eligible for an external cost treatment.[21] In *Falcon Cablevision*,[22] we held that the obligation of a cable operator to relocate cable plant was not an external cost but an integral part of providing services under the cable franchise agreement, and thus not eligible for pass-through as an external cost. Section 76.925(a)(5) provides an exception to this rule in that "forced relocates" are eligible for treatment as external costs only when the operator is not already in the process of upgrading the system, and only when the costs involved are those incurred from removing

[18] *In the Matter of Sammons Communications, Inc.*, 10 FCC Rcd 5089 (1995).

[19] Appeal at 3.

[20] Century reply at 3 in CSB-A-0587.

[21] *Thirteenth Order on Reconsideration*, 11 FCC Rcd. at 442; *First Reconsideration*, 9 FCC Rcd. at 1168.

[22] *In the Matter of Falcon Cablevision*, 11 FCC Rcd. 9840 (rel. August 21, 1996).

cable from utility poles and placing the same cable underground. Century's franchise agreement with the City required it to "locate all of its facilities underground, at its expense."[23] Therefore, Century's relocate costs are not eligible for external cost treatment under Section 76.925(a)(5) because the relocations were not from pole to underground. Century's were relocations from one location underground to another location underground.[24] Nor does the record reflect that the costs were not related to an upgrading of the system. The City's determination that these costs are not recoverable is not an unreasonable application of Commission rules.

21. The fourth and final contested costs are $216,918.99 in new "forced relocate costs."[25] Century states that the City's Order does not appear to address these costs, but it assumes that they are covered by the City's decision to deny "forced relocate costs." The City's Opposition does not address this issue. Unless these new "forced relocate costs" are somehow different than the relocation costs discussed above or otherwise can be shown to fall within the section 76.925(a)(5) definition of external costs, they are not eligible for external cost treatment. Based on the record submitted, we are unable to make that determination.

IV. ORDERING CLAUSES

22. Accordingly, **IT IS ORDERED** that the Appeals of Local Rate Orders filed by Century Southwest Cable Television on July 21, 1998 and July 20, 1999, **ARE GRANTED IN PART AND DENIED IN PART** and the local rate orders of the City of Beverly Hills, California **ARE REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

23. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.[26]

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton
Deputy Chief, Policy Division
Media Bureau

[23] Resolution No. 98-R-9922 at 3.

[24] Opposition at 4.

[25] The "new forced relocate costs" are only in appeal CSB-A-0639.

[26] 47 C.F.R. § 0.283.