

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

In the Matter of)	
)	
Sammons Communications, Inc.)	
)	
v.)	File No. CSB-A-0195
)	
Appeal of Local Rate Order of City of Benbrook,)	
Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: July 8, 2004

Released: July 12, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Sammons Communications, Inc. ("Sammons"), the franchised cable operator serving the City of Benbrook, Texas has appealed a local rate order adopted by the City on May 18, 1995 approving Sammons' proposed basic service tier ("BST") rate, hourly service charge and related equipment costs, but requiring Sammons to issue refunds to customers for all installation and equipment charges from September 1993 through July 1994.¹ The City filed an opposition to which Sammons replied. Sammons also requested a stay of the City's order, which is rendered moot by this order and is dismissed. Based upon our review of the record, we grant Sammons' appeal of the City's local rate order.

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.² 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.³

3. 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* 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

¹ Identified locally as Resolution No. 95-06.

² 47 U.S.C. § 543(a)(2).

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

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

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 ("Rate Order")*, 8 FCC Rcd 5631, 5731-32 (1993); *Third Order on Reconsideration ("Third Reconsideration Order")*, 9 FCC Rcd 4316, 4346 (1994).

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 February 15, 1994 the City notified Sammons of its intention to regulate BST rates.⁶ On March 18, 1994, Sammons filed FCC Form 393, which is the form that operators use to justify their regulated rates for programming, equipment and installation charges during the period September 1, 1993 to May 14, 1994.⁷ The City reviewed Sammons' Form 393 and approved Sammons' proposed BST rate of \$10.35, but reduced Sammons' hourly service charge and related equipment costs and ordering Sammons to issue a refund for excess installation and equipment charges assessed during the period of September 1993 through July 1994.⁸ Sammons filed its local appeal on June 19, 1995.

III. POSITION OF THE PARTIES

5. Sammons argues that the City's order is unreasonable and inconsistent with Commission rules because it would cause Sammons to issue refunds in excess of its maximum liability. Sammons argues that the City erred by: 1) improperly replacing Sammons' Form 393 Line 104 equipment revenue estimate with the City's equipment cost estimate without demonstrating that Sammons' estimate was unreasonable; and 2) failing to provide Sammons with the Form 393 as revised by the City so that Sammons could be certain of the calculations and methods used to derive the revised equipment figure as well as other alleged errors.⁹

6. The City submitted an opposition making the following points: 1) Sammons has the burden of proving that its rates comply with Commission regulations and it has not carried its burden; 2) any misinformation in the City's calculation is attributable to Sammons withholding requested information or delaying the transfer of the information; 3) Sammons has not cited any specific violation of section 76.922 or 76.933¹⁰ by the City; and 4) Sammons has overcharged customers and the City's refund order should be upheld.

IV. DISCUSSION

Offset

7. Sammons argues that the City's order would cause it to issue refunds that exceed its maximum liability because the order requires Sammons to adopt rates for equipment and installation significantly below those calculated by Sammons and disregards the inverse relationship between the BST and equipment rates.¹¹ Sammons asserts that Worksheet 3 of FCC Form 393 requires that any lowering of the equipment and installation rates causes an increase in the base service rate due to the requirement that operators calculate a Base Rate per Channel using Worksheets 1 and 2, which includes both programming service rates and rates for equipment and installation, and operators are then required to unbundle the equipment and installation rates from the Base Rate per Channel, and that calculation

⁶ Appeal at 3.

⁷ *Id.*, Exhibit C.

⁸ Resolution No. 95-06.

⁹ *Id.* at 5.

¹⁰ 47 C.F.R. § 76.922; 47 C.F.R. § 76.933.

¹¹ Appeal at 5-6.

produces the Base Service Rate per Channel.¹² If a lower charge for equipment is deducted from the Base Rate per Channel, the Base Service Rate will increase.¹³ To support its position, Sammons cites the Commission's decision in *TCI Cablevision of St. Louis*.¹⁴

8. According to Sammons, refund liability is calculated by comparing the sum of the actual unbundled program service and equipment rates with the sum of the permitted unbundled program service and equipment rates.¹⁵ Sammons asserts that the City calculated refund liability by comparing only equipment rates, rather than looking at the aggregate of equipment and programming rates in determining refund liability.¹⁶ Sammons argues that the City cannot approve a base service rate, while also prescribing a lower equipment and installation rate and ordering corresponding refunds.¹⁷ We agree.

9. Form 393 was used to calculate permitted rates from September 1, 1993 to May 14, 1994.¹⁸ The benchmark comparisons in Form 393 are based on an operator's combined charges for programming and equipment and installation. Only after benchmark comparisons have been made are equipment and installation costs unbundled in the calculation and the maximum permitted per channel charge determined. As the amount of an operator's costs allocated to equipment and installation increases, the amount allocated to the BST decreases. Conversely, as the amount of costs allocated to equipment and installations decreases, the amount allocated to the BST increases in both benchmark and cost-of-service computations. These costs are reflected in the rates.¹⁹

10. An operator may choose to charge less than the permitted BST rate, and that rate would be reasonable, but doing so does not reduce the maximum rate it is permitted to charge.²⁰ The *Third Reconsideration Order* provides that an operator's aggregated actual BST rates and equipment and installation rates at the time its rates became subject to regulation should be compared to the system's aggregate new permitted rates in order to determine whether refunds are owed.²¹ Under section 76.942, the operator has refund liability for rates previously paid by subscribers only to the extent that those rates exceed the aggregate maximum permitted rates for equipment and BST and are not otherwise justified by a cost of service showing. Stated differently, an operator has no refund liability if its excessive equipment charges are offset by its less-than-permitted BST rate.

11. After setting the various maximum rates that an operator is permitted to charge on a prospective basis, a local franchising authority ("LFA") should then determine if the operator is liable

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ 9 FCC Rcd 2141 (1994).

¹⁵ *Id.* at 7.

¹⁶ Sammons Communications, Inc., 9 FCC Rcd 2518 (1994); TCI Cablevision of St. Louis, Inc., 9 FCC Rcd 2141 (1994).

¹⁷ *Id.*

¹⁸ For a detailed explanation of the refund offset process at the commencement of rate regulation, see *Media General Cable of Fairfax County, Inc.*, 12 FCC Rcd 17424, 17430 (1997).

¹⁹ Both benchmark and cost-of-service systems use the same forms for computing equipment and installation costs, FCC Form 393 Part III until May 15, 1994 and Form 1205 thereafter. These costs are then used in determining the correct BST rates in Form 393 Part II for benchmark systems until May 15, 1994 and Form 1200 Module D or Module E thereafter.

²⁰ A-R Cable Services-ME, Inc., 10 FCC Rcd 1783, 1784, n.10 (1995).

²¹ Third Reconsideration Order, 9 FCC Rcd at 4353

for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.²² If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the LFA may order the operator to refund the difference to subscribers.²³ If the operator's aggregate revenues computed from its actual rates do not exceed its permitted rates, the operator will not be required to issue any refunds for that period under review.

12. As Sammons notes in its appeal, the City did not dispute its maximum permitted benchmark rate for the BST as calculated in Form 393, which was \$10.35.²⁴ Thus, allowing an offset within the BST avoids penalizing operators unfamiliar with regulation that, in anticipation of regulation, made a good faith effort to adjust their rates accurately.²⁵ Subscribers are not harmed if they have not paid rates in excess of aggregated initial permitted charges.²⁶ This is consistent with our decision in *TCI Cablevision of St. Louis*, where we held that the City's approval of TCI's proposed rates for the BST while reducing its permitted rates for lease remote and converters, without allowing TCI an offsetting increase in the tier charge for the BST would have the effect of requiring TCI to refund amounts back to subscribers in excess of maximum levels permitted under our rate regulations.²⁷ Significantly, this offset of BST and equipment charges is permitted only for the initial charges an operator established at the advent of cable rate regulation.²⁸ The rates at issue in this appeal are Sammons' initial charges and are thus subject to an offset. We grant Sammons appeal with respect to the offset of equipment and BST rates in determining Sammons' refund liability.

Form 393 Revision

13. Sammons argues that the City's order has failed to explain and justify its rate adjustments with evidence.²⁹ For instance, the City's consultant prepared a report detailing its analysis of Sammons' Form 393, including the Line 104 estimate. Line 104 is equipment revenues. Sammons states that the City never provided it with the consultant's revised Form 393 or the basis behind it so that Sammons could respond.³⁰ Thus, Sammons could not determine the calculations and methods used to arrive at the City's prescribed numbers.³¹ Sammons further alleges that the consultant's report is

²² See 47 C.F.R. § 76.942.

²³ See Third Reconsideration Order, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

²⁴ *Id.* at 2.

²⁵ Media General Cable of Fairfax County, Inc., 12 FCC Rcd 17,424, 17431 (1997); TCI Cablevision of Ohio, Inc., 13 FCC Rcd 733 (1998).

²⁶ *Id.*

²⁷ 9 FCC Rcd at 2142; See also Sammons Communications, Inc., 9 FCC Rcd 3659 (1994); Paragon Cable, 9 FCC Rcd 4091 (1994); Media General Cable of Fairfax County, Inc., 12 FCC Rcd 17,424, 17431 (1997); TCI Cablevision of Ohio, Inc., 13 FCC Rcd 733 (1998).

²⁸ Comcast Cablevision of Detroit, 15 FCC Rcd 24022, 24032 (2000), *citing* TCI Cablevision of Ohio, Inc.); Media General Cable of Fairfax, 12 FCC Rcd at 17432.

²⁹ Appeal at 10.

³⁰ *Id.* at 2-3, fn.3

³¹ *Id.* at 2.

“fraught with an overwhelming number of mathematical errors, simple mistakes and flawed logic.”³²

14. As Sammons notes in its appeal, if the City alleges that the operator has failed to justify its rates, then the City is required to explain and justify its rate adjustment. Section 76.936 of our rules requires that a franchising authority issue a written decision in a rate case.³³ Our case law has also required that the written decision affirmatively support any ruling that a cable operator’s proposed rate is unreasonable.³⁴ This protects the cable operator’s right to due process and gives it a basis to re-file its rate or appeal the decision to the Commission.³⁵ We have repeatedly remanded franchising authorities’ decisions that summarily or vaguely reject a cable operator’s proposed rates.³⁶ Where a franchising authority has a report prepared by a consultant whom it has retained, we have required the franchising authority’s decision to do more than simply refer to the consultant’s report.³⁷

15. We find that the rate order issued by the City contained less than the minimum written rationale or explanation our rules and case law require. The order simply states that the City has adopted the recommended rates of the consultant “as presented in Appendix A,” but it does not attach the consultant’s report nor does it incorporate it by reference.

16. To satisfy the standard that a rate order affirmatively support any ruling that a cable operator’s proposed rate is unreasonable and/or that a prescribed rate is reasonable, the order should meet one of two criteria.³⁸ The first is that each ruling in the order to which a participant has objected must, within the order’s four corners, contain a written explanation sufficient to support a finding by the Commission on appeal that a rational basis for the ruling exists.³⁹ The second is that an external document, such as a consultant’s report, that contains such an explanation be incorporated by reference in and attached to the rate order.⁴⁰ It would be helpful, but may not be necessary, for the rate order to refer to the passages in any attachments that support its decisions. By these criteria, the rate order issued by the City is deficient. We remand the City’s rate order on this issue.

V. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the Appeal of Local Rate Order filed by Sammons Communication, Inc. **IS GRANTED** and **IS REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

³² *Id.* at 7.

³³ 47 C.F.R. § 76.936.

³⁴ *See, e.g.*, TCI of Pennsylvania, Inc., 18 FCC Rcd 7058, 7062-63 (2003) ¶ 20 & cases cited therein; Marcus Cable Partners, L.L.C., 15 FCC Rcd 8794, 8798 (2000) ¶ 11 & cases cited therein.

³⁵ *See* Comcast Cablevision of Dallas, Inc. et al., DA 04-1703 (2004) ¶10.

³⁶ *See* authorities cited *supra* note 36.

³⁷ *See, e.g.*, Comcast Cablevision of Dallas, Inc., et al., DA 04-1703 ¶ 10.

³⁸ *Id.*, ¶ 12.

³⁹ *Id.* & cases cited therein.

⁴⁰ *Id.*

18. **IT IS FURTHER ORDERED** that Sammons Communication, Inc.'s request for a Stay of the City's Local Rate Order **IS DISMISSED**.

19. 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

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