

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

In the Matter of
Comcast Cable of Dallas, Inc.
Order Setting Basic Service,
Equipment and Installation Rates
Dallas TX (TX0762)
File No. CSB-A-0704

ORDER

Adopted: August 31, 2004

Released: September 2, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On February 27, 2004, Comcast Cable of Dallas, Inc. ("Comcast" or the "Company"), filed an appeal of a rate order adopted by the City of Dallas, Texas (the "City of Dallas" or the "City").

2. Comcast's appeal challenges three aspects of the rate order adopted by the City of Dallas on January 28, 2004. These are the Rate Order's treatment of the rates for some of Comcast's converters, its rejection of Comcast's proposed depreciation rate for those converters, and its rejection of the Company's showing of future inflation-based price increases in the cost of certain programming.

1 Appeal of Local Rate Order ("Comcast Appeal"), filed February 27, 2004.
2 Dallas Response Opposing Comcast Appeal of Local Rate Order ("City of Dallas Response"), filed March 15, 2004.
3 Reply to Response Opposing Comcast Appeal of Local Rate Order ("Comcast Reply"), filed March 24, 2004.
4 Ordinance No. 25488 of the City of Dallas TX ("Rate Order"), dated January 28, 2004, which is Attachment A to Comcast Appeal.
5 The City, for its part, points to many alleged errors in the Appeal's form - certain "irrelevant and . . . inflammatory surplusage" at its beginning; its lack of a table of contents, summary, and certification; the font size of its footnotes; and the inadequate attestation of an affidavit attached to it. City of Dallas Response at 1-3. Comcast has added a certification (Reply, Attachment B), has corrected the attestation (Id., Attachment A), and claims that its other errors in form (and its allegedly objectionable language) are not significant enough to cause denial of its Appeal. Comcast Reply at 7-9. We agree with Comcast that its errors in form and language are not fatal to its appeal. The City was correct and helpful to point them out, however, and we direct Comcast to observe our Rules carefully in the future. The City also objects, at page 1 of its Response, that Comcast's Appeal uses material that was not available to the (continued...)

brief, we grant Comcast's appeal against the Rate Order's decision about rates and depreciation for Comcast's converters, but we deny the Company's program-related appeal. Accordingly, we grant Comcast's appeal in part and deny it in part, and we remand the Rate Order for further consideration consistent with this Order.

II. BACKGROUND

3. The Communications Act of 1934, as amended, ("the Act"),⁶ provides that, where effective competition is absent, rates for the BST and associated equipment are subject to regulation by franchising authorities.⁷ Rates for the BST 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.⁸ 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.⁹

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.¹⁰ 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 rational basis for that decision exists.¹¹ 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.

(...continued from previous page)

City in the proceedings below. The City does not specify what material it is objecting to, however, and we do not discern any material in Comcast's presentation that is new, surprising, and prejudicial to the City. Accordingly, we deny the City's objection.

⁶ 47 U.S.C. §§ 151 *et seq.*

⁷ 47 U.S.C. § 543(a)(2).

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

⁹ 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.

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

¹¹ *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.

III. DISCUSSION

A. Comcast's Converters

5. Comcast offers several kinds of converters, two of which may be labeled “Other Than Basic Service Only – Analog” and “All Other Converters.”¹² It appears that the latter category includes both digital and HDTV-capable converters.¹³ Section 623(a)(7)(A) of the Act gives cable operators the option to aggregate the costs of converters into broad categories.¹⁴ Comcast exercised that option in the Form 1205 that it filed with the City and that led to the Rate Order here under review.¹⁵

6. In the proceedings below, Comcast, the City's consultant, and the City each developed a different proposal for Comcast's rates for the above-mentioned converters. It appears that Comcast proposed to charge a relatively high rate for “Other Than Basic Service Only – Analog” converters and a relatively low rate for “All Other Converters.”¹⁶ The City's consultant proposed an identical rate for both kinds of converters.¹⁷ The City, in the Rate Order here under review, ordered a relatively low rate for “Other Than Basic Service Only – Analog” converters and a relatively high rate for “All Other Converters” – the opposite of Comcast's proposal.¹⁸ Comcast appeals from the City's order. Comcast is also concerned that, if we merely grant its appeal, then on remand the City will adopt its consultant's recommendation. Because Comcast opposed that also, it asks that we direct the City, on remand, to approve its proposal and reject the consultant's.¹⁹

7. The Act and Commission decisions²⁰ and regulations²¹ permit a cable operator to aggregate equipment costs. Congress and the Commission have allowed cable operators to aggregate equipment costs in order to promote the development of a broadband, two-way telecommunications infrastructure, to reduce the cost of advanced technology for consumers, to smooth the path for technical innovation in the broadband industry, and to ease the burden of cable rate regulation on operators.²²

¹² Comcast also offers another kind of converter, for “Basic Service Only.” Rate Order, *supra* note 4, at 3.

¹³ Comcast Appeal at 2-4.

¹⁴ 47 U.S.C. § 543(a)(7)(A) (“The Commission shall allow cable operators . . . to aggregate . . . their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category.”).

¹⁵ Comcast Appeal at 3. FCC Form 1205 is the Commission form that cable operators use to calculate permitted rates for equipment and installation

¹⁶ Rate Order, *supra* note 4, at 2 (fourth “WHEREAS” clause); Comcast Appeal, Attachment C (Memorandum from C2 Consulting Services, Inc., to Mr. Nick Fehrenbach, City of Dallas, dated April 29, 2003) at 2.

¹⁷ Attachment F (Memorandum from Ms. Connie Cannady, C2 Consulting Services, Inc., to Mr. Nick Fehrenbach, City of Dallas, dated November 16, 2003) at 2.

¹⁸ Rate Order, *supra* note 4, at 3.

¹⁹ Comcast Appeal at 3. *See generally id.* at 2-7.

²⁰ *Comcast Cablevision of Dallas, Inc.*, DA 04-1703 at ¶ 19 (released June 14, 2004), available at 2004 WL 1322925; *Implementation of Section 309(j) of the Telecommunications Act of 1996: Aggregation of Equipment Costs by Cable Operators*, 11 FCC Rcd 6778, 6782 (1996) ¶ 8, 11 FCC Rcd 15097, 15100 (1996) ¶ 9.

²¹ 47 C.F.R. § 76.923(c)(1).

²² *Implementation of Section 301(j) of the Telecommunications Act of 1996: Aggregation of Equipment Costs by Cable Operators*, 11 FCC Rcd 6778, 6778-79 (1996) ¶ 2.

Comcast's proposed pricing is likely to advance these goals. Specifically, aggregating the costs of different kinds of converters enables the charging of relatively low rates for digital and HDTV-capable converters, which promotes their deployment and subscription to them.

8. A franchising authority should give discretion to a cable operator's choice of rate structure and rate levels,²³ especially where a cable operator's rates will likely serve specific Congressional goals. In the recent decision of *Comcast Cablevision of Dallas*, we held that a cable operator was under no obligation to charge the same rate for different types of converters whose costs it had aggregated.²⁴ We re-affirm that holding and we further find that Comcast in this case was not obliged to establish a particular relationship between the rates for its different kinds of aggregated converters. Nothing indicates that any of Comcast's converter rates exceeds its Maximum Permitted Rate.²⁵ Accordingly, we grant Comcast's appeal of the Rate Order on this issue.

9. The proposal of the City's rate consultant is not part of the Rate Order that Comcast appealed and is therefore not before us. Nevertheless, we suggest that in proceedings on remand the City review our Order in *Comcast Cablevision of Dallas*, in which we disapproved a rate structure that appears very similar, if not identical, to the one that the City's consultant proposed in the proceedings below.²⁶

10. Lastly, the City complains that Comcast's proposed rates for the above-mentioned converters are unlawful because the notice that Comcast published in the local newspaper failed to disclose that those rates were based on aggregated costs.²⁷ The City points us to no regulation, of its own or of this Commission, requiring such a detailed disclosure; nor was the matter addressed in the Rate Order.²⁸ The City's complaint is without merit.

B. Comcast's Depreciation Schedule

11. In its Form 1205, Comcast proposed to depreciate its converters over three years.²⁹ The Rate Order, in effect, lengthened the period to five years.³⁰ It did this, apparently, on the recommendation

²³ See *TCI of Pennsylvania, Inc.*, 13 FCC Rcd 5119, 5121 (1998) ¶ 9; *Paragon Cable*, 10 FCC Rcd 3963, 3964 (1995) ¶ 7.

²⁴ *Comcast Cablevision of Dallas, Inc.*, *supra* note 20, at ¶ 19 (reversing franchising authority decision requiring cable operator to charge the same rate for aggregated converters of different capabilities).

²⁵ Comcast Appeal at 4-5.

²⁶ *Comcast Cablevision of Dallas, Inc.*, *supra* note 20, at ¶ 19.

²⁷ City of Dallas Response at 5-6; Exhibit A (Declaration of Nikolaus K.L. Fehrenbach, City of Dallas, dated March 12, 2004) at ¶ 5; Exhibit B (copy of Comcast's public notice published in the Dallas Morning News, October 31, 2003).

²⁸ The City's Rate Order does not find fault with Comcast's public notice. It appears that the public notice's undermining effect on Comcast's proposed rate structure did not occur to the City until its counsel was preparing its Response. Post-hoc salvage operations by counsel on appeal generally cannot remedy a flawed rate order. See *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1058-59 (D.C. Cir. 2003); *AT&T Corp. v. FCC*, 236 F.3d 729, 734-35 (D.C. Cir. 2001).

²⁹ Comcast Appeal at 8.

³⁰ Rate Order, *supra* note 4, at 2 (fifth "WHEREAS" clause); Comcast Appeal, Attachment C, *supra* note 16, at 10.

of its consultant, who had attempted unsuccessfully to obtain data from Comcast about its plans for depreciation rates and about the depreciation rates of Comcast's predecessor, AT&T Broadband.³¹

12. Form 1205 requires operators to use "financial data from the company's general ledger and subsidiary records maintained in accordance with generally accepted accounting principles" ("GAAP").³² GAAP does not prescribe useful lives for specific assets, but instead provides guidelines for determining useful life.³³ The City does not claim either that the depreciation period Comcast used in its Form 1205 is not taken from its general records or that those records are not in accordance with GAAP.

13. The City's consultant faulted Comcast for not producing data about the depreciation periods and plans of two particular companies – Comcast before it acquired the Dallas cable system, and AT&T Broadband, that system's previous owner, in past years. That data, however, was irrelevant to the issue before the City.³⁴ The issue before the City was whether the cable operator used a depreciation period that was from its books, was in accordance with GAAP, and reasonably approximated industry standards.³⁵ Comcast's proposed depreciation period for converters satisfied those standards and the City erred in rejecting it. Accordingly, we grant Comcast's appeal on this issue.

C. Projected Increases in the Cost of Programming

14. One ground on which Comcast sought higher rates for its BST was that its existing agreements with certain programmers ("the agreements") called for inflation adjustments during the projected period.³⁶ On this and other subjects related to programming, Comcast and the City corresponded and negotiated for approximately seven months, during which Comcast was less than

³¹ The City's Rate Order refers with evident favor to its consultant's "evaluation of the Form Filings with the City," which was filed with the City on December 12, 2003. Rate Order, *supra* note 4, at 1 (fifth "WHEREAS" clause). The evaluation appears not to have been attached to the Rate Order, and is not attached to any pleading herein. We assume that the rationale for the Rate Order's decision on this issue is stated in Attachment C to Comcast's Appeal (*supra* note 16), which the City cites favorably. City of Dallas Response at 6.

³² Form 1205 Instructions at 3, "General Instructions."

³³ See *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation & Adoption of a Uniform Accounting System for Provision of Regulated Cable Service*, 11 FCC Rcd 2220, 2259 (1996) ¶ 93.

³⁴ The case relied on by the City at page 6 of its Response, *Comcast Cablevision of Detroit, Inc.*, 16 FCC Rcd 13287, 13288 & n.6 (2001) ¶ 3 is inapposite. In that case, the Commission's statements concerned evidence that was relevant.

³⁵ *TCI of Pennsylvania, Inc.*, Order DA 04-1496 at ¶¶ 33-34 (released May 26, 2004), available at 2004 WL 11561509; *TCI of Pennsylvania, Inc.*, 19 FCC Rcd 312, 323 (2004) ¶¶ 37-38; *Media General Cable of Fredericksburg*, 10 FCC Rcd 9390 (1995) ¶ 5a, *reconsideration granted on other grounds*, 13 FCC Rcd 11103 (1998), 14 FCC Rcd 21295 (1999); *Tele-Media Co. of Western Connecticut*, 11 FCC Rcd 3161, 3164 (1996) ¶ 13, *reconsideration dismissed*, 13 FCC Rcd 17756 (1998).

³⁶ Comcast Appeal at 10; Comcast Reply at 6. By "projected period," we mean the period, usually in the near future, based on which rates for cable service are set.

forthcoming.³⁷ Ultimately, Comcast did provide the City with copies of the agreements.³⁸ In some of them, however, Comcast deleted clauses that may be relevant to inflation adjustments.³⁹ In its Rate Order, the City denied Comcast's request for higher rates based on the agreements' inflation adjustments.⁴⁰

15. Our rules place on Comcast the burden of proof that its BST rates are lawful.⁴¹ Our rules also clearly entitle the franchising authority to see information that is material and relevant, even if it is proprietary.⁴² The precise inflation factors in the agreements were both material and relevant. Comcast should have been more forthcoming with the agreements and should have made it possible for the City to know more about the inflation factors and their effects on rates during the projected period. Comcast argues that showing the City parts of two of the agreements should have satisfied the City's curiosity.⁴³ It fails to make a convincing showing for all of the agreements, however. In sum, Comcast has not sustained its burden of proof that the City's information requests were immaterial or burdensome, or that the City had no rational basis to find that Comcast's showing of inflation adjustments in programming costs during the projected period was inadequate. Accordingly, we deny Comcast's appeal on this issue.

³⁷ The correspondence and negotiations continued until about one month before the City's consultant apparently filed its final recommendation (*see supra* note 17) with the City. *See* Comcast Appeal, Attachment B (Letter from C2 Consulting Services, Inc., to Mr. Nick Fehrenbach, City of Dallas, dated April 24, 2003) at 4-5; Attachment E (Letter from C2 Consulting Services, Inc., to Mr. Nick Fehrenbach, City of Dallas, dated November 6, 2003), at 4-5; Attachment H. The latter Attachment consists of approximately 65 pages of correspondence of various dates, the material pages of which are Letter from Mr. Nick Fehrenbach, City of Dallas, to Mr. Dick Kirby, AT&T Broadband, dated March 11, 2003, first attached page; Letter from Ms. Robbin Pepper, Comcast, to Mr. Nick Fehrenbach, dated March 25, 2003, second attached page; Letter from Ms. Pepper to Ms. Constance T. Cannady, C2 Consulting Services, Inc., dated April 24, 2003, first attached page; Letter from Ms. Pepper to Ms. Cannady, dated June 17, 2003, first attached page; Letter from Ms. Pepper to Ms. Cannady, dated September 30, 2003, first attached page; Letter from Mr. Fehrenbach to Ms. Pepper, dated August 5, 2003, first attached page. *See also* City of Dallas Response, Exhibit C (Declaration of Nikolaus K.L. Fehrenbach, City of Dallas, dated March 12, 2004) *passim*; Exhibit D (Letters from Mr. Fehrenbach to Ms. Pepper, dated July 10 & August 5, 2003).

³⁸ Appeal, Attachment I (Declaration of Robbin Pepper, dated Feb. 27, 2004) at ¶ 3. The City supplied copies of the agreements along with its Response.

³⁹ Comcast Appeal, Attachment E, *supra* note 37, at 5; City of Dallas Response, Exhibit C, *supra* note 37, at ¶¶ 10, 12 ("Although some of the agreements . . . do include inflation adjustments, the City is unable to determine the amount of the adjustment or the amount due under the agreement due to the incomplete information."), 14. Even in its Reply herein, Comcast stated that it "certainly is not waiving its confidentiality claims with respect to that information." Comcast Reply at 6.

⁴⁰ Rate Order, *supra* note 4, at 2 (second WHEREAS clause); Comcast Appeal, Attachment E, *supra* note 37, at 5.

⁴¹ 47 C.F.R. § 76.937(a).

⁴² 47 C.F.R. § 76.938.

⁴³ Comcast Reply at 6-7, referencing two of the agreements, copies of which the City supplied along with its Response.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the Appeal filed by Comcast Cable of Dallas, Inc., in CSB-A-0704, **IS GRANTED IN PART AND DENIED IN PART** and is remanded for further consideration consistent with this Order.

17. 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
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