

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

In the Matter of	)	
	)	
Comcast Cablevision of Dallas, Inc.	)	
Order Setting Basic Equipment and Installation Rates	)	CSB-A-0698
Farmers Branch TX (TX0624)	)	
	)	
Comcast of California/Colorado/Illinois/Indiana/Texas, Inc.	)	
Order Setting Basic Service, Equipment and Installation Rates	)	CSB-A-0699
Allen TX (TX0642)	)	
	)	
Comcast of California/Colorado/Illinois/Indiana/Texas, Inc.	)	
Order Setting Basic Equipment and Installation Rates	)	CSB-A-0700
McKinney TX (TX0641)	)	
	)	
Comcast of California/Colorado/Illinois/Indiana/Texas, Inc.	)	
Order Setting Basic Service, Equipment and Installation Rates	)	CSB-A-0701
Flower Mound TX (TX0840)	)	
	)	
Comcast of Texas II, Inc.	)	
Order Setting Basic Service, Equipment and Installation Rates	)	CSB-A-0705
Colleyville, TX (TX0712)	)	
	)	
Comcast of Texas II, Inc.	)	
Order Setting Basic Service, Equipment and Installation Rates	)	CSB-A-0707
DeSoto, TX (TX0652)	)	
	)	
Comcast of Illinois/Texas, Inc.	)	
Order Setting Basic Service, Equipment and Installation Rates	)	CSB-A-0708
Grapevine, TX (TX0775)	)	

Comcast of Texas II, Inc. )  
 Order Setting Basic Service, Equipment and ) CSB-A-0710  
 Installation Rates )  
 Bedford, TX (TX0648) )

### ORDER ON RECONSIDERATION

**Adopted: November 18, 2004**

**Released: November 18, 2004**

By the Deputy Chief, Policy Division, Media Bureau:

#### I. INTRODUCTION

1. Comcast Cable Communications, LLC (“Comcast”), has filed a Petition for Partial Reconsideration and Clarification (“Petition”) of a Media Bureau Order<sup>1</sup> that granted in part and dismissed in part appeals by Comcast of rate orders issued by eight cities in Texas (the “Cities”).<sup>2</sup> Six of the Cities filed responses<sup>3</sup> and Comcast filed a Reply.<sup>4</sup> In brief, we grant the clarification that Comcast requests, holding that the Cities lack authority over charges imposed on Comcast’s digital service subscribers for digital additional outlets. We deny the reconsideration that Comcast requests and we hold that the Cities had a rational basis to deny Comcast higher rates based on increased costs of programming.

<sup>1</sup> *Comcast Cablevision of Dallas*, 19 FCC Rcd 10628 (2004). The Petition for Partial Reconsideration & Clarification (“Petition”) herein was filed on July 14, 2004, by Comcast Cable Communications, LLC, on behalf of its affiliates and subsidiaries that are named in the style of this Order on Reconsideration. For simplicity, we will refer to these companies as “Comcast.”

<sup>2</sup> The cities are Allen, Bedford, Colleyville, DeSoto, Farmers Branch, Flower Mound, Grapevine, and McKinney.

<sup>3</sup> City Response to Comcast’s Petition for Partial Reconsideration & Clarification (“Allen & DeSoto Response”), filed by the Cities of Allen and DeSoto on July 30, 2004; City Response to Comcast Cablevision of Dallas, Inc.’s Petition for Partial Reconsideration & Clarification (“Three City Response”), filed by the Cities of Bedford, Farmers Branch, and Grapevine on July 30, 2004; City Response to Comcast Cablevision of Dallas, Inc.’s Petition for Partial Reconsideration & Clarification (“McKinney Response”), filed by the City of McKinney on August 4, 2004. Although the Cities of Colleyville and Flower Mound did not respond to Comcast’s Petition, we will apply the points made in the foregoing pleadings to their cases.

<sup>4</sup> Reply of Comcast Cable Communications, LLC to Responses to Comcast’s Petition for Partial Reconsideration & Clarification (“Reply”), filed on August 19, 2004.

## II. BACKGROUND

2. The Communications Act of 1934, as amended (“the Act”), provides that, where effective competition is absent, rates for the Basic Service Tier (“BST”) of cable service and associated equipment are subject to regulation by franchising authorities.<sup>5</sup> 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.<sup>6</sup> Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.<sup>7</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 rational basis for that decision exists.<sup>8</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. CHARGE FOR “DIGITAL ADDITIONAL OUTLET”

3. A digital additional outlet is equipment that Comcast supplies only to subscribers to its digital cable service who desire additional outlets for that service. Through those outlets, subscribers receive both the BST and other programming. Only Comcast subscribers who subscribe to its digital tier and who want additional outlets pay the additional outlet charge.<sup>9</sup>

4. The Cities regulate rates for the BST and associated equipment,<sup>10</sup> but have no authority over other programming and equipment. In the rate orders that our Order reviewed, the Cities found Comcast's proposed charges for digital additional outlets unreasonable and prescribed charges of zero for them. Comcast appealed, taking the position that the Cities have no authority over digital additional outlets.<sup>11</sup>

5. In the part of the Order of which Comcast seeks clarification, we held that the Cities had authority over Comcast's digital additional outlets unless it could show that its proposed charge for those outlets reflected the costs of its non-BST programming.<sup>12</sup> Comcast seeks clarification of that part of the

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<sup>5</sup> 47 U.S.C. § 543(a)(2).

<sup>6</sup> 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

<sup>7</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

<sup>8</sup> *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.

<sup>9</sup> *Comcast Cable of Indiana/Michigan/Texas, Inc* (“*Irving Order*”), Order DA 04-2615 at ¶ 11 (rel. Aug. 24, 2004), available at 2004 WL 1883980; *Dallas Order*, 19 FCC Rcd at 10634, ¶ 15.

<sup>10</sup> 47 U.S.C. § 543(a)(2). Concerning rates for outlets in particular, see 47 C.F.R. § 76.923(a, h).

<sup>11</sup> *Dallas Order*, 19 FCC Rcd at 10634, ¶ 15.

<sup>12</sup> *Id.* at 10635, ¶ 17.

Order. Specifically, Comcast asks that we hold that it need not show franchising authorities that charges for digital additional outlets are supported by programming costs.<sup>13</sup>

6. In a recent rate order concerning Irving, Texas (the “*Irving Order*”), we reconsidered and clarified the Order’s treatment of digital additional outlets.<sup>14</sup> In that order, we analogized the digital tier of cable service to the Cable Services Programming Tier (“CPST”) and premium programming. In the *Irving Order*, we stated:

The Act and our rules give franchising authorities authority over the BST and equipment used to serve BST customers. Thus, if a cable operator charges a rate for additional outlets used by customers who subscribe to the BST, then the operator's certified franchising authority has jurisdiction over the rate for those outlets. The digital tier of cable service, however, is best analogized to the CPST and to premium programming, over which franchising authorities do not have rate-setting authority. An additional outlet charge assessed only against CPST subscribers, though they also subscribe to the BST, is not subject to franchising authority jurisdiction. During the period when CPST rates were subject to oversight by the Commission, such a charge had to be based on the cost of the CPST programming. Of course, now that the CPST is unregulated, a CPST additional outlet charge is itself unregulated. An additional outlet charge imposed on subscribers to other unregulated programming, such as premium programming, though subscribers receiving premium programming also subscribe to the BST, is not subject to franchising authority jurisdiction. Similarly, an additional outlet charge assessed only against digital tier subscribers, though they also subscribe to the BST, is not subject to franchising authority jurisdiction. Thus, in this case, where Comcast charges a rate specifically for additional outlets used by subscribers to the digital tier, that rate is beyond the regulatory authority of the City of Irving. The rate need not be based on the operator's digital programming costs, as suggested in our *Dallas* decision, but it could be. . . . We conclude that this result best conforms to the statutory scheme for rate regulation, our precedent, and the policy of relating our authority over equipment pricing to authority over the related programming.<sup>15</sup>

7. This analysis applies to the Cities’ authority over digital additional outlets. Comcast’s and the Cities’ submissions on this issue in the Petition and the responses to it<sup>16</sup> confirm, and do not weaken, our belief that our *Irving Order* reached the right result. Accordingly, to the extent that the Order’s analysis of digital additional outlets differs from that of the *Irving Order*, we grant Comcast’s Petition for clarification.

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<sup>13</sup> Petition at 2, 5.

<sup>14</sup> *Irving Order*, *supra* note 9, at ¶ 13.

<sup>15</sup> *Id.* (footnotes omitted).

<sup>16</sup> Petition at 3-5; Allen & DeSoto Response at 3-4; Three City Response at 2-3; McKinney Response at 1-3; Reply at 2-3. The Responses, in the last pages just cited, allege certain questionable conduct by Comcast, but do not claim that it violates the Act or any Commission rule. Accordingly, we do not discuss that conduct.

#### IV. PROJECTED PROGRAMMING COST INCREASES

8. In its filings with five of the Cities (Allen, Colleyville, Flower Mound, Grapevine, and McKinney), Comcast sought higher rates for the BST based on increased costs it alleged it would incur in the future for programming on several channels.<sup>17</sup> None of the five Cities allowed Comcast to recover those costs.<sup>18</sup> Comcast appealed those disallowances,<sup>19</sup> and our Order affirmed them.<sup>20</sup> Now, Comcast seeks reconsideration of that part of our Order.<sup>21</sup> It claims that the Order misunderstood its presentation of evidence to recover the increased costs in question and misinterpreted the evidence.<sup>22</sup> After careful reconsideration, we stand by our Order's affirmation of the Cities' disallowances.

9. In brief, the five Cities concluded on the merits that Comcast had failed to sustain its burden of proof<sup>23</sup> that it would incur the increased costs it alleged. In its appeal, Comcast argued that it provided each City with copies of the agreements it had executed with programmers and under which the cost of the programming they provided to Comcast would rise.<sup>24</sup> In the part of Order of which Comcast seeks reconsideration, we found that the five Cities' had a rational basis for their decisions.<sup>25</sup>

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<sup>17</sup> See, e.g., Appeal of Local Rate Order ("Allen Appeal") by Comcast of California/Colorado/Illinois/Indiana/Texas, Inc., at 14, filed on Jan. 8, 2004; City of Allen's Response to Comcast Cablevision of California/Colorado/Illinois/Indiana/Texas, Inc.'s Appeal of Local Rate Order ("Allen Response"), filed on Jan. 26, 2004, Exhibit I (Letter from Robbin Pepper, Manager of Rates & Regulatory Compliance, West Division, Comcast Cable Commun., Inc., to Constance T. Cannady, President, C2 Consulting Services, Inc., dated April 23, 2003), Attachment at 2 (City request for information about programming costs, referencing "Attachment 4 to the filing [presumably of Form 1240] and . . . Worksheet 7"); City of Colleyville's Opposition Pleading to Comcast Cablevision of California/Colorado/Illinois/Indiana/Texas, Inc.'s Appeal of Local Rate Order, filed on April 5, 2004, Exhibit C (Letter from Ms. Pepper to Ms. Cannady, dated July 8, 2003) at 3-4; Appeal of Local Rate Order ("Flower Mound Appeal") by Comcast of California/ Colorado/Illinois/Indiana/Texas, Inc., at 14, filed on Feb. 4, 2004, Exhibit A (Town of Flower Mound, Texas, Ordinance No. 01-04), Exhibit D (Letter from C2 Consulting Services, Inc., to Mr. Steve Williams, Director of Budget & Research, Town of Flower Mound, dated Nov. 7, 2004) at 3-4; *id.*, Attachment (Comcast's Flower Mound Form 1240, Worksheet 7, concerning its asserted future programming costs) at 7-8; Appeal of Local Rate Order ("Grapevine Appeal") by Comcast of Illinois/Texas, Inc., at 14-15, filed on March 18, 2004; Appeal of Local Rate Order ("McKinney Appeal") by Comcast of California/Colorado/Illinois/Indiana/Texas, Inc., at 14-15, filed on Jan. 14, 2004.

<sup>18</sup> Allen Appeal, *supra* note 17, at 14; Appeal of Local Rate Order ("Colleyville Appeal") by Comcast of Texas II, Inc., at 14-15, filed on March 4, 2004; Town of Flower Mound's Opposition Pleading to Comcast Cablevision of California/Colorado/Illinois/Indiana/Texas, Inc.'s Appeal of Local Rate Order ("Flower Mound Opposition"), filed on Feb. 18, 2004, Exhibit A (Town of Flower Mound, Texas, Ordinance No. 01-04, §2.1 at 2); Grapevine Appeal, *supra* note 17, at 14; McKinney Appeal, *supra* note 17, at 14.

<sup>19</sup> Allen Appeal, *supra* note 17, at 14-15; Colleyville Appeal, *supra* note 18, at 14-15; Flower Mound Appeal, *supra* note 17, at 14; Grapevine Appeal, *supra* note 17, at 14-15; McKinney Appeal, *supra* note 17, at 14-15.

<sup>20</sup> *Dallas Order*, 19 FCC Rcd at 10639, ¶ 26.

<sup>21</sup> Petition at 5-7; Reply at 4-5.

<sup>22</sup> See, e.g., Petition at 6-7.

<sup>23</sup> Comcast had the burden of proof that its proposed rates were lawful. 47 C.F.R. § 76.937(a).

<sup>24</sup> Allen Appeal, *supra* note 17, Exhibit H (Declaration of Ms. Pepper at ¶ 3, dated Jan. 8, 2004); Colleyville Appeal, *supra* note 18, Attachment I (Declaration of Ms. Pepper at ¶ 3, dated March 4, 2004); Flower Mound Appeal, *supra* note 17, Attachment G (Declaration of Ms. Pepper at ¶ 3, dated Feb. 4, 2004); Grapevine Appeal, *supra* note 17, (continued...)

10. The issue before us on reconsideration is whether the Cities had a rational basis for concluding that Comcast failed to sustain its burden of proof. Each City sought information from Comcast to test the company's claim of higher programming costs. How Comcast responded differs slightly in each case, but each one follows a common pattern.<sup>26</sup> Comcast had filed its Form 1240,<sup>27</sup> claiming that the company would incur increased costs for programming in the future. Shortly thereafter, each City (through a consultant) requested supporting information,<sup>28</sup> including "actual invoices/correspondence/notification, which supports the amount directly, or indirectly assigned as well as programming costs by channel."<sup>29</sup> Comcast, instead of providing the information requested, gave the Cities "an internally generated schedule with nothing more than numbers that added to the information included in [Comcast's Form 1240]. The information included a breakdown by channel, but no contractual supporting documentation."<sup>30</sup> In correspondence with at least some of the Cities, Comcast noted that the information the Cities asked for was proprietary. There were negotiations about confidentiality agreements<sup>31</sup> and, ultimately, Comcast gave copies of the programming agreements to the

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Attachment J (Declaration of Ms. Pepper at ¶ 3, dated March 18, 2004); McKinney Appeal, *supra* note 17, Attachment H (Declaration of Ms. Pepper at ¶ 3, dated Jan. 14, 2004).

<sup>25</sup> *Dallas Order*, 19 FCC Rcd at 10639, ¶ 26.

<sup>26</sup> The various filings by each side on the issue of Comcast's claim for increased future programming costs are almost identical, both in the proceedings that led to our previous Order and in the present proceedings. The attachments to all the pleadings show a similar pattern of conduct by each City. Accordingly, we do not understand or rely on Comcast's statement at page 4 of its Reply that "[t]he programming cost issue raised below directly affected only two of the Cities (Grapevine and Allen)."

<sup>27</sup> A cable operator completes the Commission's Form 1240 and, based on it, the operator's franchising authority sets the prices for the cable operator's BST.

<sup>28</sup> Each City was entitled to see material and relevant information, even if it is proprietary. *See* 47 C.F.R. § 76.938.

<sup>29</sup> *See, e.g.*, City of Allen Reply to Response to Appeal of Local Rate Order ("Allen Reply"), filed on Feb. 3, 2004, Attachment I (Letter from Ms. Cannady to Ms. Pepper, dated April 3, 2004), Attachment at 1; Colleyville Appeal, *supra* note 18, Attachment B (Letter from Ms. Pepper to Ms. Cannady, dated July 8, 2003) at 3-4; Flower Mound Opposition, *supra* note 18, Exhibit I (Letter from Ms. Pepper to Ms. Cannady, dated June 2, 2003), Attachment at 3; Grapevine Appeal, *supra* note 17, Attachment I (Letter from Ms. Cannady to Ms. Pepper, dated April 1, 2003), Attachment at 1; Reply to Opposition to Appeal of Local Rate Order by City of McKinney, filed on Feb. 6, 2004, Attachment I (Letter from Ms. Cannady to Ms. Pepper, dated April 3, 2003), Attachment at 1.

<sup>30</sup> Allen Appeal, *supra* note 17, Exhibit F (Letter from Ms. Cannady to Debra Wallace, Assistant Finance Director, City of McKinney, & Shelli Seimer, Assistant to the City Manager, City of Allen, dated May 5, 2003) at 4; Allen Reply, Attachment I, *supra* note 29, Attachment at 2 ("we are providing programming cost information by individual service"); Colleyville Appeal, *supra* note 18, Attachment E (Letter from C2 Consulting Services, Inc., to Cindy Martin, City of Colleyville, dated Nov. 7, 2004) at 4; Flower Mound Appeal, *supra* note 17, Attachment E (Letter from C2 Consulting Services, Inc., to Steve Williams, Director of Budget & Research, Town of Flower Mound, dated Nov. 7, 2003) at 4; Grapevine Appeal, *supra* note 17, Attachment E (Letter from C2 Consulting Services, Inc., to Melisa Leal, City of Grapevine, dated May 1, 2003) at 3, Attachment I (Letter from Ms. Pepper to Ms. Cannady, dated April 16, 2003), Attachment at 2-3.

<sup>31</sup> Allen Appeal, *supra* note 17, Attachment C (Letter from Ms. Pepper to Shelli Seimer, Assistant to the City Manager, City of Allen, dated May 20, 2004) at 21; Allen Response, Exhibit I, *supra* note 17, Attachment at 2; Colleyville Appeal, Attachment E, *supra* note 30, at 4; Grapevine Appeal, Attachment G (Letter from Ms. Pepper to Melise [sic] Leal, Assistant to the City Manager, City of Grapevine, dated May 20, 2004) at 21; McKinney Appeal, Attachment C (Letter from Ms. Pepper to Debra Wallace, Assistant Finance Director, City of McKinney, dated May 20, 2003) at 20-21.

Cities' consultant.<sup>32</sup> By that time, approximately six months had passed since the Cities' requests for information and the Cities' consultant stated that "Comcast still did not provide 2003 and 2004 supporting documentation for three of the four channels" involved.<sup>33</sup>

11. It also appears that, on the copies of some of the programming agreements that Comcast ultimately produced, words that were significant to the future cost of the programming were deleted.<sup>34</sup> Further, it appears that the Cities were unable to conclude from the agreements that whatever higher costs Comcast would actually incur in the future matched Comcast's estimates of higher costs. It may be, and Comcast does not deny, that some or all of the agreements left unclear how their provisions for higher costs added up to the costs of programming that Comcast had claimed on its Form 1240s.<sup>35</sup> One agreement, for example, provided simply for an adjustment in what Comcast would pay for programming based on increases in a future consumer price index.<sup>36</sup> The Cities were entitled to question how each provision added up to the dollar amount that Comcast was claiming on its Form 1240. In our opinion, when Comcast failed after many months to answer that question, the Cities could reasonably conclude that Comcast had not justified its claim of increased programming costs. Comcast argues repeatedly that it showed the programming agreements to the Cities,<sup>37</sup> but the interpretation of those agreements was crucial to Comcast's case, and Comcast did not make that clear to the Cities.

12. The Cities' case would be stronger if they had supplied affidavits supporting the claims and analysis made in their pleadings, but their claims are supported by the documents produced by Comcast and are not challenged by Comcast. Comcast's briefing in this reconsideration has made clear some matters that were left unclear in its earlier, sparse submissions. But, as in the recent case of *TCI of Pennsylvania, Inc.*,<sup>38</sup> the fact remains in each case that the cable operator failed to provide information that the franchising authority requested and reasonably believed was necessary for its evaluation of the

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<sup>32</sup> See authorities cited *supra* note [Pepper Declarations]; Flower Mound Opposition, Exhibit J (Letter from Ms. Pepper to Ms. Cannady, dated Sept. 30, 2004), Attachment.

<sup>33</sup> Allen Appeal, *supra* note 17, Exhibit G (Letter from Ms. Cannady to Jennifer Jung, City of McKinney, & Shelli Siemer [sic], City of Allen, dated Nov. 10, 2003), at 1; Colleyville Appeal, Attachment E, *supra* note 30, at 4; Flower Mound Appeal, Attachment E (Letter from C2 Consulting Services, Inc., to Mr. Steve Williams, Director of Budget & Research, Town of Flower Mound, dated Nov. 7, 2004) at 4; Grapevine Appeal, Attachment F (Letter from Ms. Cannady to Jennifer Hibbs, City of Grapevine, dated Nov. 10, 2003) at 1.

<sup>34</sup> Allen & DeSoto Response at 4 ("the Cities' consultant informed the Cities that there were large portions of information redacted from the documents"); Three City Response at 4 (same); McKinney Response at 3 (same).

<sup>35</sup> See, e.g., City of McKinney's Opposition Pleading to Comcast Cablevision of California/Colorado/Illinois/Indiana/Texas, Inc.'s Appeal of Local Rate Order at 10, filed on January 26, 2004. See also Reply, Attachment A (programming agreement providing for Comcast to be charged adjusted fees based on an increase in a certain consumer price index).

<sup>36</sup> Reply, Attachment A. See also *id* at 5 (the five Cities' consultant's "real concern was not regarding the *bona fide* status of Comcast's contractual obligation, but how that obligation should be calculated. . . . [C]ertain contracts expressed the obligation in terms of a general inflationary index (rather than quantifying a precise annual fee adjustment)").

<sup>37</sup> Petition at 6-7; Reply at 4-5.

<sup>38</sup> *TCI of Pennsylvania, Inc.*, 19 FCC Rcd 9454, 9458 (2004) ¶ 14 (denying rate increase when cable operator failed to provide information that the franchising authority requested and reasonably believed was necessary for its evaluation of the operator's case).

cable operator's case. Comcast has not shown that the Cities acted without a rational basis and, accordingly, we deny Comcast's Petition for partial reconsideration.

## V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Petition for Partial Reconsideration and Clarification filed by Comcast Cablevision of Dallas, Inc., in CSB-A-0698, by Comcast of California/Colorado/Illinois/Indiana/Texas, Inc., in CSB-A-0699, CSB-A-0700, and CSB-A-0701, by Comcast of Texas II, Inc., in CSB-A-0705, CSB-A-0707, and CSB-A-0710, and by Comcast of Illinois/Texas, Inc., in CAB-A-0708, **IS GRANTED IN PART AND DENIED IN PART** and **IS REMANDED** for further consideration consistent with this Order.

14. 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