

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

In the Matter of)
)
Pegasus Communications, LP d/b/a)
Pegasus Cable Television) File No. CSB-A-0076
)
Appeal of Local Rate Order of the Connecticut)
Department of Public Utility Control)

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2004

Released: February 26, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Pegasus Communications, LP d/b/a Pegasus Cable Television ("Pegasus"), the franchised cable operator serving the communities of Winchester, Goshen, Barkhamsted, Harwinton, New Hartford, and Colebrook in the County of Litchfield, State of Connecticut, appealed local rate orders adopted by the Connecticut Department of Utility Control (the "DPUC") on November 28, 1994.¹ The DPUC rejected Pegasus' proposed basic service tier ("BST") rates as unreasonable based on its review of Pegasus' cost of service rate justifications. The DPUC filed an opposition to the appeal to which Pegasus replied. Pegasus also filed a petition for stay of the DPUC's orders, which was granted.² Subsequently, Pegasus qualified as a small system operator under the Commission's rules ("*Bureau Orders*").³ In this Order, we remand this case to the DPUC with instructions to consider Pegasus' small system status in its review of the BST rates.

II. BACKGROUND

2. Under the Commission's rules, rate orders issued by local franchising authorities may be appealed to the Commission.⁴ In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but will sustain the franchising authority's decision provided there is a reasonable basis for that decision, and will reverse a franchising authority's decision only if the

¹ See DPUC Docket Nos. 93-12-14 and 94-06-24.

² See *Pegasus Communications, LP d/b/a Pegasus Cable Television*, DA 95-567, 10 FCC Rcd 9519 (CSB 1995).

³ See *Pegasus Cable Television, Inc.*, DA 96-318, 11 FCC Rcd 3561 (CSB 1996), *erratum*, DA 96-784, 11 FCC Rcd 18028 (CSB 1996) (concerning the communities of New Hartford, Winchester, Goshen, Barkhamsted, and Harwinton); and *Pegasus Cable Television, Inc.*, DA 96-457, 11 FCC Rcd 4239 (CSB 1996) (concerning the community of Colebrook).

⁴ 47 C.F.R. § 76.944.

franchising authority unreasonably applied the Commission's rules in its local rate order.⁵ If the Commission reverses a franchising authority's decision, it will not substitute its own decision but will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission decision on appeal.⁶

3. An operator seeking to justify its existing rates for the basic services tier, equipment, or installation bears the burden of demonstrating that the rates conform with our rules.⁷ In determining whether the operator's rates conform with our rules, a franchising authority may direct the operator to provide supporting information.⁸ After reviewing an operator's rate forms and any other additional information submitted, the franchising authority may approve the operator's rates or issue a written decision explaining why the operator's rates are not reasonable.⁹ If the franchising authority determines that the operator's rates exceed the maximum permitted rate as determined by the Commission's rules, it may order refunds, provided that it explains why the operator's rate or rates are unreasonable.

4. Cable operators may justify their initial BST rates using either the benchmark methodology established in the *Rate Order* or a cost-of-service showing based on the cable operator's actual cost and revenue data.¹⁰ When a cable operator elects to make a cost-of-service showing, the Commission's rules permit local authorities to prescribe any rate that is justified by the cost showing, including a rate lower than the benchmark or operator's current rate level.¹¹ Cost-of-service showings for rates in effect prior to May 15, 1994 are governed by general cost-of-service principles,¹² and submitted without a Commission-provided rate form. The Commission adopted interim cost-of-service rules effective May 15, 1994 and final cost-of-service rules effective March 9, 1996.¹³ Justifications under both the interim and final cost-of-service rules are submitted on FCC Form 1220. Operators with cases pending under the interim rules when the final cost rules became effective could elect to have their cases decided under the final rules. Cases already decided by a final decision of a franchising authority when the final cost rules became

⁵ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); See also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Third Order on Reconsideration*, 9 FCC Rcd 4316, 4346 (1994) ("*Third Reconsideration*").

⁶ *Rate Order* at 5732.

⁷ 47 C.F.R. § 76.937(a).

⁸ See *Rate Order* at 5718-19; *Third Reconsideration*, 9 FCC Rcd at 4348.

⁹ 47 C.F.R. § 76.936; see *Ultracom of Marple, Inc.*, 10 FCC Rcd 6640, 6641-42 (CSB 1995).

¹⁰ *Rate Order* at 5755 ¶ 187; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 2220, 2223-24 (1996) ("*Final Cost Order*").

¹¹ *Rate Order* at 5800 ¶ 272.

¹² *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 4527, 4532 ¶ 5 (1994) ("*Cost Order*"); *Rate Order* at 5800 n.639.

¹³ *Cost Order*, 9 FCC Rcd 4527 (interim rules); *Final Cost Order*, 11 FCC Rcd 2220 (final rules).

effective are to be reviewed in accordance with the rules in effect when the decision was made.

5. The significant administrative and compliance costs associated with cost-of-service regulation impose heavy burdens on regulators and regulated entities.¹⁴ To offer small cable companies administrative relief from rate regulation, the Commission amended the definition of small cable companies and small cable systems and introduced a simplified form of small system relief in *the Small System Order*.¹⁵ Cable systems serving 15,000 or fewer subscribers, and owned by a company having 400,000 or fewer subscribers, may elect to use the small cable system rate mechanism in lieu of other Commission rate processes.¹⁶

6. The *Small System Order* stated that in order to qualify for the modified form of relief, systems and companies must meet the modified size standards as of either the effective date of that order or on the date thereafter when a request for relief under those revised provisions is filed.¹⁷ Franchising authorities were directed to permit systems to use the small system cost-of-service approach in any proceeding that was pending when the *Small Systems Order* was released, using data that was accurate when the rates were charged. To make the small system cost-of-service showing in a pending case, the system was required to show that it met the new definitions of a small system owned by a small cable company when the *Small Systems Order* was released and when the disputed rates were in effect.¹⁸ Further, in the interest of administrative finality, the *Small System Order* stated that the revised form of regulation would not affect the validity of a final rate decision made by a franchising authority before the release date of that item. If such a decision is appealed to the Commission, the decision is to be reviewed in accordance with the rules in effect at the time the rates were charged and the decision was made.¹⁹

III. DISCUSSION

7. The *Small System Order* provides that certain presumptions and restrictions applicable to standard cost-of-service proceedings and applied in this proceeding shall not apply to cable systems fitting within the small cable system definitions adopted in that order.²⁰ The *Small System Order* gave eligible operators substantial discretion in determining how the rate of return should be calculated and relieved operators of the heavy burden normally imposed on operators seeking rates of return higher than 11.25%. A strong presumption of reasonableness will apply where an operator seeks to establish rates no higher than \$1.24 per channel.

8. The *Bureau Orders*, which granted Pegasus relief pursuant to the *Small System Order*, do not

¹⁴ See *Rate Order*, 8 FCC Rcd at 5755-56.

¹⁵ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995) ("*Small System Order*").

¹⁶ Operators attempting to justify their rates through small system relief must file FCC Form 1230.

¹⁷ See *id.*, 10 FCC Rcd at 7413.

¹⁸ *Id.*, 10 FCC Rcd at 7428 ¶ 74.

¹⁹ See *id.*, 10 FCC Rcd at 7428.

²⁰ *Small System Order*, 10 FCC Rcd at 7422-23.

automatically resolve the issues here. The DPUC orders preceded the *Small System Order*, and we are required by the *Small System Order* to review the DPUC orders in accordance with the rules in effect at the time the rates were charged and the decision was made. Nevertheless, if a local rate order is challenged through an appeal to the Commission, and the Commission remands the case to the franchising authority, the local rate order should no longer be considered a "final rate decision" within the meaning of paragraph 74 of the *Small System Order*, and the operator should be able to avail itself of the relief provided in that order if it otherwise meets the criteria for doing so.²¹ Allowing small cable operators to avail themselves of the relief provided in the *Small System Order* on reconsideration of remanded local rate orders is fully consistent with the Congressional goals referenced in that order.²²

9. Turning to the merits of the DPUC orders, we find the DPUC's treatment of the rate of return issue to be unreasonable. In its appeal, Pegasus asserts that the DPUC was unreasonable in its rate orders by adopting the Commission's presumptive 11.25% rate of return. Our review of the pleadings and exhibits, including portions of the hearing transcripts, results in our concluding that the DPUC should have given further consideration to the rate of return issue. Although Pegasus was late in raising this issue before the DPUC, the DPUC did address the substantive aspects of the rate of return issue in its hearings and orders. When Pegasus offered to submit additional supporting documentation on this issue, the DPUC only allowed Pegasus to provide oral testimony which the DPUC then rejected as anecdotal.²³ We find that Pegasus should have been given the opportunity to provide additional evidence that it required a higher than presumptive rate of return, due to its unique characteristics.

10. Our finding that the DPUC's treatment of the rate of return issue was unreasonable requires remand for further DPUC consideration.²⁴ On remand, we direct the DPUC to provide Pegasus an opportunity to support its BST and regulated equipment rates for the period at issue here by means of FCC Form 1230 and the modified cost-of-service rate regulations adopted in the *Small System Order*. In its review of any Form 1230 filed by Pegasus, the DPUC must adhere to the provisions of the *Small System Order*.²⁵

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the Petition for Review of the local rate orders of the Connecticut Department of Public Utility Control (CSB-A-0076) filed by Pegasus Communications, LP d/b/a Pegasus Cable Television on December 23, 1994, IS GRANTED IN PART as indicated in this

²¹ See, e.g., *Tele-Media Company of Virginia*, DA 00-378, 15 FCC Rcd 4351 (CSB 2000).

²² *Id.*

²³ See *Reply to Opposition*, Exhibit C.

²⁴ In light of the action ordered herein, we have not addressed the merits of the other issues raised by Pegasus in its appeal.

²⁵ See *Small System Order*, 10 FCC Rcd at 7421-23.

Memorandum Opinion and Order, and the Decisions in DPUC Docket Nos. 93-12-14 and 94-06-24 ARE REMANDED for further consideration consistent with this Memorandum Opinion and Order.

12. 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

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