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

In the Matter of :	)	
	)	
Warner Cable Communications of Cincinnati	)	CSB-A-0164
	)	
Appeal of Local Rate Order of	)	
City of Cincinnati, Ohio	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 10, 2004 **Released: March 12, 2004**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. In this *Order,* we address the Petition for Reconsideration filed by Warner Cable Communications of Cincinnati ("Warner") of the Memorandum Opinion and Order adopted by the Cable Services Bureau involving an appeal of a local rate order issued by the City of Cincinnati, Ohio.[1] The City filed a Response, to which Warner filed a Reply. Warner seeks reconsideration of the Bureau's *MO&O*, specifically objecting to the Bureau's treatment of the monthly community service fee. For the reasons discussed below, we deny Warner's petition.

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.[3] Under the Commission's rules, rate orders issued by local franchising authorities may be appealed to the Commission. In ruling on an appeal of a local rate order, the Commission 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 franchising authority unreasonably applied the Commission's rules in its local rate order.[4] 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

[1] *Warner Cable Communications of Cincinnati, Inc*., 10 FCC Rcd 12267, DA 95-998 (CSB 1995)(the "*MO&O").*

[2] 47 U.S.C.§ 543(a)(2).

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

[4] *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).

Commission decision on appeal.[5]

III. DISCUSSION

3. Warner seeks reconsideration of the *MO&O* because the decision suggests that under some circumstances, the separately-itemized community service fee *may not* be included in the reported basic service tier rate on the FCC's rate regulation form.[6] To remove any uncertainty, Warner states that the Bureau should clarify its decision.[7] Warner explains that the *MO&O* includes the following statement:

> *"*As we pointed out in *Warner I*, the community service fee, depending on the outcome of the parties' franchise agreement and modification dispute, *may* be included in the per-channel rates calculated in Worksheets 1 and 2 on Warner's Form 393."[8]

Warner states that the *MO&O* inaccurately characterizes the Bureau's prior decision in *Warner I*.[9] Warner indicates that in the *MO&O* the Bureau should have stated that the community service fee *shall* be included in the per channel rates in Form 393, as it had done in *Warner I*.[10] Moreover, Warner states that the *MO&O* appears to be inconsistent with the Bureau's prior decision in *SBC Media Ventures, Inc.*[11]

4. Warner asserts that in *SBC Media Ventures*, *Inc.* the company wished to continue its pre-rate regulation practice of separately itemizing its public, educational and governmental ("PEG") fee on its customer's bill and to have it treated as an external cost.[12] It points out that the Bureau agreed with the franchising authority's objection to external cost treatment of the PEG fee, but the Bureau also concluded that the amount of the fee had to be included in the reported basic service tier charge on FCC Form 393 for purposes of calculating the benchmark rate.[13] Similarly in *Warner I*, Warner states that the Bureau sustained the City's position that the community service fee should not be afforded fully external treatment, but the Bureau also said that "except in the case of franchise fees, the operator should include these external costs [*i.e.* the community service fee] in its initial rate calculations on FCC Form 393."[14] The Bureau continued, "PEG access fees and external costs other than franchise fees should be included in the per-channel rates calculated in Worksheets 1 and 2 of a cable operators FCC Form 393".[15] Warner interprets the Bureau's decision as meaning that the amount of the community service fee must be included as part of the basic "tier charge" reported on FCC Form 393.[16]

5. Warner states that the appropriate treatment of the community service fee became an

[5] *Rate Order* at 5732.

[6] Warner Reply at 4 (emphasis added).

[7] *Id.*

[8] *MO&O,* 10 FCC Rcd at 12269.

[9] Warner Petition at 2. *See Warner Cable Communications of Cincinnati* ("*Warner I")*, 10 FCC Rcd 6015, DA 95-550 (CSB 1995)(emphasis added).

[10] Warner Petition at 2 (emphasis added).

[11] 9 FCC Rcd 7175 (CSB 1994).

[12] Warner Petition at 9. *See SBC Media Ventures,* 9 FCC Rcd at 7180.

[13] *Id.* Warner Reply at 5, n.10.

[14] Warner Petition at 4. *See Warner I,* 10 FCC Rcd at 6017.

[15] Warner Petition at 9-10. *See Warner I*, 10 FCC Rcd at 6017.

[16] Warner Petition at 4-5.

issue because of Warner's billing practice in which it separately itemized the community service fee and the basic cable service fee.[17] The City contends that Warner may report only the basic cable service fee component of the tier charge and not the entire basic tier charge, which is the sum of the basic cable service fee and the community service fee.[18] Warner argues that since its subscribers paid a basic tier charge of both the community service fee and the basic service fee, and since the Bureau has ruled that the community service fee is not a "franchise fee" that may be afforded wholly external treatment (*i.e.* a separate charge item added to the maximum permitted basic tier charge on the customer's bill), the only remaining alternative is that the community service fee must be added to the basic service fee when reporting the monthly basic tier charge on the Commission's rate regulation forms, just as it must be included in the maximum permitted rate that is charged the customer, and cannot under the Bureau's decisions, be a separate bill item like a franchise fee.[19]

6. In its Response, the City states that Warner seeks to have the Commission interfere in the City's administration of its franchise agreement and ratify Warner's pass-through of an unlawful surcharge properly terminated by the City.[20] In addition, it asserts that Warner's characterization of the contractual surcharge as a "billing practice" and "two part monthly basic cable tier charge for all cable customers" is disingenuous at best. The City argues that Warner's petition should be denied and Warner should not be permitted to include unlawful amounts in either its Form 393 or Form 1200.[21]

7. In its Reply, Warner asserts that the City's response does not address the legal issue posed by the Petition--whether the amount of the community service fee collected should be reported as part of the basic service tier charge and instead the City persists in arguing the merits of whether Warner was ever entitled to impose a community service fee, and whether the PEG access support and capital costs the fee was designed to recoup have, in fact, been recouped.[22] Warner states that the issue is whether the City's action is consistent with FCC regulations, a question that implicates those regulations and the FCC's instruction for its forms.[23]

8. As was explained in *Warner I,* the expenses charged by Warner appear to be costs associated with providing PEG access channels and an institutional network for the City. Warner argued in *Warner I* that this community service fee should be considered a part of its franchise fee which, as an external cost, would allow Warner to continue to charge subscribers for the fee as a separate item on their bills.[24] As an external cost, Warner added and itemized the fee on subscribers' bills in the same manner as its franchise fees.[25] Alternatively, Warner argued that if the Commission found that its community service fee cannot be treated as an external cost, then Warner must be allowed to treat the fee as an internal cost in calculating its per-channel rates (on FCC Form 393).[26] In *Warner I,* the Bureau concluded that franchise fees are accorded external costs treatment and that all other "external" costs must be

[17] *Id.* at 2.

[18] *Id.* at 3.

[19] *Id.* at 10.

[20] Response at 1.

[21] Response at 3, 5.

[22] Warner Reply at 1-2.

[23] *Id.* at 3.

[24] *Warner I,* 10 FCC Rcd at 6017.

[25] *Id.*

[26] *Id.*

internalized in an operator's initial rate calculations.[27] The Act specifically excludes from the definition of franchise fees "payments … made by the cable operator … for, or in support of, the use of, PEG access facilities.[28] The community service fee at issue is in the nature of a payment made in support of PEG access facilities. It is not a franchise fee, and the distinction is evident on Warner's subscriber bills, where it separately itemizes the franchise and "community service fee."

9. We also stated in *Warner I* that the operator should include PEG access costs in its initial rate calculations on FCC Form 393.[29] *Warner I* also noted that Warner may not bill the costs separately as it was doing.[30]

10. Warner seeks clarification of the Bureau's statement in the *MO&O* that the community service fee, depending on the outcome of the parties' franchise agreement and modification dispute, *may* be included in the per-channel rate calculated on Warner's Form 393. The use of the word "may" was intended to reflect the existence of the dispute between the City and Warner over whether Warner's charging subscribers a community service fee was permitted under the franchise agreement.[31] Absent that dispute, the Bureau would have stated that which it had stated previously; that is, PEG access fees, and this community service fee in particular, should be included in the per-channel rate calculations in Warner's Form 393.

11. Accordingly, **IT IS ORDERED** that Warner's Petition for Reconsideration **IS GRANTED.**

12. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.[32]

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton
Deputy Chief, Policy Division
Media Bureau

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 6017-18 n.25. As the Bureau stated in *Warner I,* resolution of that dispute is essentially a contract dispute and is appropriately addressed by the state and local courts, and not by the Commission.

[32] 47 C.F.R. § 0.283.