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

In the Matter of	)	
	)	
Comcast of Dallas, L.P.	)	
Order Setting Basic Equipment and Installation Rates	)	CSB-A-0719
Dallas TX (TX0726)	)	

ORDER

Adopted: March 14, 2005 **Released: March 16, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On July 23, 2004, Comcast of Dallas, Inc. ("Comcast" or the "Company"), filed an appeal[1] of a Rate Order adopted by the City of Dallas, Texas (the "City"), on June 23, 2004.[2] The City filed a Response on August 9, 2004,[3] to which Comcast filed a Reply on August 19, 2004.[4]

2. Comcast's Appeal concerns two specific rulings in the Rate Order. These are the Rate Order's rejection of Comcast's charge for digital additional outlets and its rejection of the Company's attempt to add certain costs to the rate base of its equipment and installation rates. In brief, we find that the City erred in the first ruling, but did not err in the second. Accordingly, we grant the Appeal in part and dismiss it in part and remand it to the City for further consideration consistent with this Order.

[1] Appeal of Local Rate Order ("Appeal"), filed July 23, 2004.

[2] What we refer to as the "Rate Order" is Ordinance No. 25657, adopted by the City of Dallas, Texas, on June 23, 2004. The Rate Order is Attachment A to the Appeal. The Rate Order refers favorably to, attaches as exhibits, and adopts the reasoning and conclusions of two reports by a consultant that the City retained to review Comcast's proposed rates. Appeal, Attachment A at 1, 5 § 1. These are Attachment B to the Appeal (Letter from C2 Consulting Services, Inc., to Mr. Nick Fehrenbach, Manager of Regulatory Affairs, City of Dallas, dated May 27, 2004) and Attachment C to the Appeal (Letter from C2 Consulting Services, Inc., to Mr. Nick Fehrenbach, dated May 20, 2004).

[3] Dallas' Response Opposing Comcast's Appeal of Local Rate Order ("Response"), filed August 9, 2004.

[4] Reply to Response Opposing Comcast's Appeal of Local Rate Order ("Reply"), filed August 19, 2004.

II. BACKGROUND

3. The Communications Act of 1934, as amended ("the Act"),[5] provides that, where effective competition is absent, rates for the Basic Service Tier ("BST") and associated equipment are subject to regulation by franchising authorities.[6] 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.[7] 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.[8]

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.[9] 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.[10] 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. DISCUSSION

A. Charge for "Digital Additional Outlet"

5. Comcast provides digital additional outlets 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.[11] The City regulates charges for the BST and associated equipment,[12] but has no authority over other programming and equipment (including that related to digital service).

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[5] 47 U.S.C. §§ 151 *et seq.*

[6] 47 U.S.C. § 543(a)(2).

[7] 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

[8] 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.

[9] 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

[10] *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.

[11] *Comcast Cable of Indiana/Michigan/Texas, Inc.* ("*Irving Order*"), 19 FCC Rcd 16344 (2004) ¶ 11; *Comcast Cablevision of Dallas* ("*Dallas Order*"), 19 FCC Rcd 10628, 10634 (2004) ¶ 15, *on reconsideration*, Order on Reconsideration DA 04-3618 ("*Dallas Reconsideration*"), released Nov. 18, 2004, available at 2004 WL 2624623.

[12] 47 U.S.C. § 543(a)(2). Concerning rates for outlets in particular, see 47 C.F.R. § 76.923(a).

6. In the Rate Order, the City found Comcast's proposed charge for digital additional outlets unreasonable and prescribed a charge of zero for them.[13] Comcast appeals, taking the position that the City has no authority over charges for its digital additional outlets.[14]

7. The City bases its authority over Comcast's digital additional outlets from our decision in *Comcast Cablevision of Dallas, Inc.* ("*Dallas Order*").[15] We clarified that decision on reconsideration[16] and in our recent Order concerning Irving, Texas (the "*Irving Order*").[17] In our *Dallas Reconsideration* and our *Irving Order*, we analogized the digital tier of cable service to the Cable Services Programming Tier ("CPST") and premium programming, over which franchising authorities do not have rate-setting authority. An additional outlet charge assessed only against subscribers who receive the CPST or premium programming, though they 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 specifically for additional outlets used by subscribers to the digital tier, that charge is beyond the regulatory authority of the City.[18]

8. Comcast's and the Cities' submissions in this appeal support the conclusion that our *Dallas Reconsideration* and *Irving Order* reached the right result.[19] In the present appeal, the City makes several points not made in previous appeals about this issue. They concern, however, Comcast's digital outlet charge, not the digital *additional* outlet charge that is the focus of Comcast's Appeal.[20] The City's points are thus immaterial here. There are, therefore, no circumstances that would make the reasoning of our *Dallas Reconsideration* and *Irving Order* inapplicable here. Accordingly, we grant Comcast's Appeal from the Rate Order's prescription of a zero charge for digital additional outlets.

[13] Appeal, Attachment A, *supra* note 2, at 4, 5.

[14] Appeal at 2-5.

[15] Appeal, Attachment C, *supra* note 2, at 6; Response at 2-3, citing *Dallas Order,* 19 FCC Rcd 10628, 10635-36 ¶ 17, *supra* note 11.

[16] *Dallas Reconsideration*, *supra* note 11, at ¶¶ 6-7.

[17] *Irving Order,*19 FCC at 16348-49 ¶ 13.

[18] See authorities cited *supra* notes 11 (*Dallas Reconsideration*), 17.

[19] Comcast's Appeal at 3-5 is an almost *verbatim* copy of its argument on the same issue in the *Dallas Reconsideration. See* Petition for Partial Reconsideration & Clarification at 3-5, CSB-A-0698 *et seq.* (filed July 14, 2004). In turn, the City, when it addresses the digital additional outlet charge, relies almost entirely on our now-reconsidered *Dallas Order, supra* note 11.

[20] *Compare* Response at 2-3 *with* Reply at 2-3.

B. Unbundling

9. According to the City's consultant, the Form 1205 that Comcast filed with the City[21] stated, for the first time, certain costs for utilities, property taxes and insurance, and proposed to recover them in its Hourly Service Charge.[22] The City's consultant recommended that the City not allow Comcast to recover those costs because they had not been "unbundled."[23] The City, in the Rate Order, followed the consultant's recommendation.[24]

10. Unbundling describes something that cable operators were required to do when current cable rate regulation began in the mid-1990s. It consisted of a cable operator removing the costs of its equipment and installation from its other costs.[25] This resulted in the cable operator having two "baskets" of costs, one for equipment and installation and the other for basic cable service. The costs in each basket were paid by charges for, respectively, equipment and installation and BST. If, after some years, the cable operator proposes to remove a cost related to equipment and installation from "the BST basket" and to move it to "the equipment and installation basket," that might result in a better alignment of costs and charges. However, if the cable operator had already recovered that cost, albeit in the 'wrong' basket and kind of charge, the movement would also result in the cable operator recovering the same cost twice. This would be an impermissible result.[26]

11. The parties' first disagreement on this issue is purely factual. The City found, and re-asserts here, that Comcast had not shown that it is not attempting the kind of double recovery described in the preceding paragraph.[27] Comcast claims that, on the contrary, it made such a showing to the City's consultant.[28] In the present appeal, neither party has produced evidence supporting its claim other than the foregoing generalized claims. Comcast, for example, might have supplied us with copies of its financial records showing that it had previously unbundled the costs in question here, and that therefore the City's contrary conclusion was without rational basis. Comcast did not do so, however. The Company has the burden of proof on appeal[29] and, accordingly, we resolve this disagreement in the City's favor.

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[21] Form 1205 is the Commission form that cable operators use to calculate permitted rates for equipment and installation.

[22] Appeal, Attachment C, *supra* note 2, at 3-4.

[23] *Id.*

[24] Appeal, Attachment A, *supra* note 2, at 2.

[25] 47 U.S.C. § 543(b)(3) (requiring that rates for installation and equipment be set "on the basis of actual cost"); 47 C.F.R. § 76.923(b) ("A cable operator shall establish rates for remote control units, converter boxes, other customer equipment, installation, and additional connections separate from rates for basic tier service.").

[26] *Jones Commun. of Georgia/South Carolina, Inc*., 19 FCC Rcd 14814, 14816 (2004) ¶¶ 9-10 ("If an operator shifts existing costs from the BST to the equipment basket after the initial unbundling but without adjusting the BST rate, the operator may be recovering the cost twice, once through the BST rate and again through the equipment basket."); *TCI Cablevision of Oregon, Inc*., 14 FCC Rcd 17685, 17686-87 (1999) ¶¶ 5-6, *vacated as moot*, 16 FCC Rcd 13285 (2001).

[27] Appeal, Attachment A, *supra* note 2, at 2; & Response at 3-4.

[28] Appeal at 6, citing Attachment D (Letter from Craig A. Schmid, Senior Director of Regulatory Affairs for the Atlantic Division, Comcast Cable Commun., Inc., to Mr. Nick Fehrenbach, dated June 14, 2004) at 5.

[29] *See* ¶ 4 *supra*.

12. Comcast also argues that it is unjust for the City to require it to show that it did something (unbundling) more than ten years ago. Material persons and records may not be available today, especially for a cable system that Comcast acquired only in recent years.[30] The injustice, Comcast says, is especially great when the City has not raised the issue in the past. We find this appeal to the passage of time, in this case, unconvincing. Comcast has long been aware of the details of our regulation of BST rates, including unbundling. It is not unreasonable to expect Comcast to have preserved records that would satisfy a franchising authority that double recovery will not occur, or to require that cable systems Comcast acquired have such records.

13. Finally, Comcast argues that to require it to show that it unbundled equipment costs in a specific cable system is inconsistent with Congress authorizing a cable operator to file an aggregated Form 1205 for all its cable systems.[31] We rejected this argument in *TCI Cablevision of Oregon, Inc.,* and we re-affirm that decision's analysis here:

> "We disagree that considering whether a cost was previously unbundled is at odds with the cost aggregation policy reflected in 47 U.S.C. § 543(a)(7)(A) and implemented by the Commission in 47 C.F.R. § 76.923(c)(1). . . . Nothing in the statute or the Commission's rules . . . suggests that cost aggregation is permitted so that operators can recover the same costs through both programming and equipment rates. . . . Changing accounting practices when changing to company-wide cost aggregation necessarily involves some burden, but this does not relieve an operator of . . . the requirement in the statute and the Commission's rules that rates be based on the company's actual cost experience . . . ."[32]

14. The result we reach here concerning Comcast's attempted unbundling is not contrary to our ruling in *Comcast of Texas, LLC*.[33] There, we remand a franchising authority's decision that disallowed higher equipment and installation charges that were related to unbundling. In that case, the cable operator had, in fact, unbundled in the past.[34] In this case, however, Comcast did not convince the City that it had unbundled, and has not convinced us that the City was without rational basis in doubting that Comcast had unbundled.[35] We also noted in *Comcast of Texas, LLC*, that the unbundling there had occurred in 1996 and was first protested by the City only in 2004.[36] In this case, however, the City did not sleep on its rights, but objected to new costs that had been delineated for the first time. In these respects, the City's disallowance in this case has support that the franchising authority's in *Comcast of Texas, LLC*, lacked. Accordingly, we deny Comcast's appeal on this issue.

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[30] Appeal at 5-9; Reply at 4-5.

[31] Appeal at 6-8 & Reply at 3 (citing 47 U.S.C. § 543(a)(7)), 47 U.S.C. § 76.923(c)).

[32] *TCI Cablevision of Oregon, Inc*., 14 FCC Rcd at 17687-88 ¶¶ 7-8, *vacated as moot*, 16 FCC Rcd 13285 (2001).

[33] *Comcast of Texas, LLC*, Order DA 05-678 ¶¶ 5-8 (rel. Mar. 16, 2005).

[34] *Id.,* ¶ 5.

[35] See *supra* ¶ 11.

[36] *Comcast of Texas, supra* note 33, ¶¶ 5-6.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the Appeal filed by Comcast Cable of Dallas, Inc., in CSB-A-0719, **IS GRANTED IN PART AND DISMISSED IN PART** and **IS REMANDED** for further consideration consistent with this Order.

16. 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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