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

In the Matter of

COLONY	Chelmsford, MA
CABLEVISION OF	Dartmouth, MA
SOUTHEASTERN	Fall River, MA
MASSACHUSETTS, INC.	Lowell, MA
AND	New Bedford, MA
LOWELL CABLE	Tewksbury, MA
TELEVISION, INC.	

Appeals of Local Rate Orders of the Massachusetts Community Antenna Television Commission

Requests for Stay of Local Rate Orders of the Massachusetts Community Antenna Television Commission

CONSOLIDATED ORDER

Adopted: December 22, 1994; Released: December 22, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc., wholly-owned subsidiaries of Colony Communications, Inc. (collectively "Colony"), filed on June 22, 1994 six appeals of local rate orders adopted May 20, 1994 by the Massachusetts Community Antenna Television Commission ("CATC") for the communities of Chelmsford, MA.; Dartmouth, MA.; Fall River, MA.; Lowell, MA.; New Bedford, MA.; and Tewksbury, MA. ("Communities").[1] On June 22, 1994, Colony also filed six Requests for Stays of the CATC's local rate orders.[2] The six appeals filed by Colony of the local rate orders for the Communities are identical in all material respects. In the interest of administrative efficiency, the Commission has decided that each of the proceedings is sufficiently related to one another to justify the resolution of all six of the appeals in this Consolidated Order.

2. In its local rate orders, the CATC established regulated rates for Colony's basic cable service, associated equipment and installation charges,[3] pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[4]

3. Colony challenges those portions of the CATC's local rate orders which (a) disallow portions of Colony's claimed direct and indirect labor costs of providing, installing and maintaining customer equipment; (b) order refunds for all installation and equipment charges since September 1, 1993 in excess of the rates the CATC found to be reasonable; and (c) prohibit Colony from identifying a cable programming service tier with the single word "Basic."

II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.[5] In ruling on an appeal of a local rate order, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.[6] Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering a local rate order.[7] If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead it will remand the issue to the franchising authority with instructions for its resolution.[8] The three issues under consideration in the instant appeal are discussed in the ensuing section of the Order.

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[1] On June 30, 1994, the CATC filed a Motion for Extension of Time, in which it sought an extension until August 1, 1994 for the submission of its Opposition to Colony's Appeals. The Commission granted the CATC's Motion on July 5, 1994. The CATC then filed a Consolidated Opposition to Colony's Appeals ("Opposition") on July 29, 1994. Colony filed a Consolidated Reply to the CATC's Opposition on August 11, 1994.

[2] The CATC filed a consolidated Opposition to Colony's Requests for Stay on July 1, 1994. As discussed in paragraph 16, *infra*, these Requests for Stay are dismissed as moot in light of the decision on the merits herein.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[4] As part of the rate review process, Colony submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") for each of the Communities to the CATC. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. *See Report and Order and Further Notice of Proposed Rulemaking* in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (rel. May 3, 1993) (*"Rate Order"*).

[5] 47 C.F.R. §76.944.

[6] *Rate Order* at ¶ 149; *Third Order on Reconsideration* in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (rel. March 30, 1994) (*"Third Order on Reconsideration"*). As part of its appeal, Colony has alleged that the CATC has failed to demonstrate that Colony's rates were unreasonable. Pursuant to §76.937 of the Commission's rules, cable operators bear the burden of proving that their existing or proposed rates for basic service and associated equipment are in compliance with the Commission's regulations. Therefore, Colony's assertion that the CATC failed to demonstrate that Colony's rates were unreasonable is an erroneous statement of who bears the burden of proof.

[7] *Id.*

[8] *Id.*

III. DISCUSSION

A. Equipment Basket

5. The first issue raised by Colony involves the correct calculation of equipment costs to be included in Colony's FCC Form 393. FCC Form 393 is the official form used by cable operators to justify that their regulated rates for programming, equipment and installations comply with the Commission's rules. FCC Form 393 is divided into three separate, but interrelated, parts. In Part II, the operator calculates its permitted programming rates, while in Part III, the operator calculates its permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the time period under review.

6. The operator's maximum permitted rates are derived by completing Parts II and III of FCC Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation, or as of September 30, 1992 if the operator's current per channel rate exceeds its benchmark per channel rate. After calculating actual aggregate revenues, the operator converts those revenues to a per channel rate, and then compares the per channel figures to the applicable benchmark rate. If the per channel rate exceeds the benchmark rate, the operator must reduce the per channel rate to the benchmark rate or by 10%, whichever reduction amount is less. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of FCC Form 393.

7. Colony claims that the CATC's local rate orders unjustifiably exclude portions of Colony's direct and indirect labor costs of providing, installing and maintaining customer equipment by disallowing (a) the costs associated with the time spent by Colony employees on the telephone responding to subscribers' inquiries about equipment and diagnosing equipment trouble reports: and (b) the labor costs associated with the time spent by Colony employees on the administrative tasks of handling and processing subscriber complaints regarding equipment and service.

8. At a prehearing conference, the CATC requested that Colony provide detailed information regarding the components of its converter and remote repair hours on Steps C and D of FCC Form 393. After reviewing the information that Colony submitted in response to its request, the CATC allowed Colony to include the time spent by Colony employees on "initial maintenance" of customer equipment, as well as "service call" time in those situations in which a Colony technician must remove equipment from a subscriber's home. The CATC excluded that time spent by Colony employees (a) talking to customers on the telephone; and (b) handling administrative tasks related to the maintenance of customer equipment. The CATC then removed the salary and benefit costs associated with the excluded hours. The CATC maintains that it acted reasonably in disallowing the costs in question because the corresponding time spent by Colony employees on the telephone with subscribers, and on the processing and handling of subscribers' equipment and installation inquiries, did not directly affect the performance of subscriber equipment or prolong its life.[9] The CATC concluded that the removed hours were "general administrative time that is not includable [in Colony's Equipment Basket] under the FCC's regulations."[10]

9. Colony asserts that these excluded costs result in an unwarranted reduction in its monthly rates for remotes and converters, as well as a lowered percentage of annual maintenance and installation costs attributable to customer equipment and installation, which produces an artificially depressed Hourly Service Charge ("HSC"). The HSC, in turn, affects Colony's installation charge and its charges for changing service tiers or equipment. It is Colony's position that the CATC's total disallowance of its equipment costs arising from time spent on the telephone with subscribers, and on the processing and handling of subscribers' equipment and installation inquiries, is presumptively unreasonable. Alternatively, Colony argues that the excluded activities performed by Colony employees do directly affect the use of subscriber equipment, and the costs at issue are specifically related to the maintenance and repair of remotes and converters. Thus, Colony asks that the Commission reverse the CATC's local rate orders and remand them to the CATC with instructions to allow Colony to include the disputed costs in its Equipment Basket.

10. Under the Commission's rules, Equipment Basket costs are limited to the direct and indirect material and labor costs of providing, leasing, installing, repairing and servicing customer equipment.[11] The Equipment Basket does not include general administrative overhead.[12] By its own admission, the CATC interpreted this provision of the Commission's rules "narrowly."[13] Unfortunately, the CATC's interpretation was too narrow. Generally, the Commission prefers to leave regulation of the basic service tier to the sound discretion of certified local franchising authorities.[14] However, in this instance, the CATC has excluded certain costs from Colony's Equipment Basket that are legitimate indirect labor costs related to the maintenance and repair of remotes and converters. The CATC included only those costs related to activities performed by Colony employees that directly affected the performance of subscriber equipment or prolonged its life.[15] However, the Commission's regulations are clear that direct and indirect labor costs of providing, leasing, installing, repairing and servicing customer equipment may be included in an operator's Equipment Basket. Accordingly, we remand this portion of the local rate orders to the CATC with instructions to allow Colony to include in its Equipment Basket those direct and indirect labor costs that relate to the provision, leasing, installation, repair, or service of customer equipment. For example, all of the labor costs of a telephone operator should not be included in Colony's Equipment Basket just because a portion of the operator's duties in-

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[9] Colony notes, however, that because the CATC articulated this standard for the first time in its Opposition, Colony was denied the opportunity to meaningfully address this issue.

[10] *See* Local Rate Orders, at p. 11.

[11] 47 C.F.R. §76.923(c).

[12] *Id.*

[13] *See* Opposition, at p. 8.

[14] *See TCI Cablevision of St. Louis, Inc.*, DA 94-424 (rel. April 29, 1994).

[15] *See* paragraph 8, *supra*.

volve answering equipment complaint calls from subscribers. However, Colony should be allowed to incorporate in its Equipment Basket that portion of a telephone operator's time that is spent responding to such calls. It remains within the discretion of the CATC to determine which of Colony's previously excluded costs are includable in its Equipment Basket under the Commission's regulations and which of Colony's previously excluded costs should continue to be excluded because they do not bear even an indirect relation to the provision, leasing, installation, repair, or service of customer equipment.

B. Refund Order

11. Colony also claims that the CATC violated the Commission's rules by ordering Colony to refund equipment and installation overcharges without providing Colony with notice and an opportunity to comment prior to the issuance of the refund order. Colony states that while the CATC solicited information from Colony on several occasions, the CATC declined to inform Colony of the possibility that it would issue a refund order or the basis and size of such a refund order. Colony asks that the refund order be reversed and remanded to the CATC. The CATC contends that Colony was afforded reasonable notice and an opportunity to comment on the possibility of a refund order, including at least two face-to-face meetings with the CATC's staff.

12. Under the Commission's rules, a franchising authority must give a cable operator notice and an opportunity to comment before ordering the operator to refund previously paid rates to subscribers.[16] By the very nature of the rate review conducted by the CATC, Colony had effective notice that a refund order might be issued by the CATC. Although Colony claims that the CATC did not inform it of the possibility of a refund order, or the basis and size of such a refund order, the record indicates that, in addition to any informal contacts which might have taken place between Colony and the CATC, representatives of the CATC and Colony met on at least two occasions prior to the release of the CATC's local rate orders.[17] Representatives of Colony and the CATC attended both a prehearing conference at the CATC's offices in Boston on January 28, 1994 and the ensuing public hearing on March 7, 1994.[18] Colony, through its participation in the local regulatory process, had sufficient notice and opportunity to inquire about and comment on the likelihood and scope of such a refund order. Therefore, we find that Colony was afforded adequate notice and opportunity to comment by the CATC.

C. Identification of Cable Programming Service Tier

13. Colony has changed the name of its basic service tier, which was formerly known as "Basic," to "Lifeline." In addition, Colony has changed the name of its cable programming service tier, which was formerly known as "Basic Plus," to "Basic." In its local rate orders, the CATC prohibited Colony from continuing to use the word "Basic" by itself to identify what is in fact a cable programming service tier. Colony claims that this prohibition unreasonably dictates the nomenclature that it must use to denote its two tiers of regulated service. Colony further contends that the CATC's prohibition of using the word "Basic" to identify a cable programming service tier violates its First Amendment rights by unduly restricting its ability to engage in protected commercial speech. The CATC states that while the use of the word "Basic" in combination with additional words such as "Expanded" or "Plus" is not objectionable, Colony's practice of using the single word "Basic" to identify a cable programming service tier is a violation of the CATC's customer service rules requiring (a) that cable operators fully disclose all of their programming services and rates to each of their subscribers;[19] and (b) that cable bills contain clear, concise and understandable language.[20]

14. Under the Commission's rules, appeals of local franchising authorities' ratemaking decisions that do not turn on whether a franchising authority has acted consistently with the 1992 Cable Act, or the Commission's rules regarding rate regulation, "may be heard in state or local courts."[21] This portion of Colony's appeal does not depend upon whether the CATC has acted in conformity with the 1992 Cable Act or the Commission's rules since the CATC relied upon its own customer service rules in rendering its decision to prohibit Colony from using the word "Basic" to identify a cable programming service tier. Because the issues presented in this portion of Colony's appeal involve state, rather than federal, customer service regulations, this portion of Colony's appeal should be taken up in a state or local forum of appropriate jurisdiction, rather than with the Commission.[22] This portion of Colony's appeal is therefore denied.

IV. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED, that the Appeals filed by Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc. are REMANDED IN PART and DENIED IN PART.

16. IT IS FURTHER ORDERED that, in light of the resolution of their Appeals, the six Requests for Stay filed by Colony Cablevision of Southeastern Massachusetts, Inc. and Lowell Cable Television, Inc. ARE DISMISSED as moot.

17. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[16] 47 C.F.R. §76.942(a).
[17] *See* Local Rate Orders, at p. 2-3.
[18] *Id.*
[19] *See* 207 CMR §10.02(1).
[20] *See* 207 CMR §10.04(1).
[21] 47 C.F.R. §76.944(a).
[22] As a consequence of our ruling here, we need not address Colony's First Amendment claim.