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

In the Matter of:	)
InterMedia Partners d/b/a	)
Robin Media Group, Inc.	)
Petition to Appeal	)
Franchising Authority's	)
Ordinance Regulating Basic Cable	)
Rates in Murfreesboro, TN	)

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1996 **Released: August 13, 1996**

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On March 27, 1995, InterMedia Partners d/b/a the Robin Group, Inc. ("InterMedia") filed with the Commission an appeal of the local order adopted by the City of Murfreesboro, Tennessee ("the City").[1] The rate order established rates for InterMedia's basic service tier and ordered corresponding refunds dating back to December 1, 1993.[2]

2. InterMedia elected to use the cost of service approach in order to justify its rates for the period beginning May 15, 1994, and accordingly filed an FCC Form 1220 Cost of Service

[1]On March 27, 1995, InterMedia also filed a request for stay of the local rate order. The Bureau granted InterMedia's request on May 22, 1995. *See* InterMedia, (Murfreesboro, TN), 11 FCC Rcd 978 (Cab. Serv. Bur. 1995). As a result of our ruling on the merits of InterMedia's appeal herein, the Commission's stay of the City's local rate order is vacated. Other pleadings filed in the matter include an opposition filed by the City on March 30, 1995 and a reply filed by InterMedia on April 17, 1995. InterMedia also filed a May 20, 1996 Supplemental Appeal and Election to Apply the Modified Cost of Service Rules, the [Final Cost Rules] in which Intermedia raised substantive issues regarding the City's recalculation of the operator's intangible assets. As we are remanding InterMedia's appeal on procedural grounds, we need not address the issues raised in this pleading.

[2]Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchise authorities may regulate rates for basic cable service and associated equipment. *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).

Filing.[3] In its review of InterMedia's cost of service analysis, the City disallowed the inclusion of $40 million in intangible assets in the Company's ratebase. As a result of this disallowance, in its February 13, 1995 order, the City reduced InterMedia's basic service tier rate from $10.04 to $5.83. InterMedia sets forth a number of procedural and substantive arguments regarding the City's ratemaking process and its February 13, 1995 decision.

3. InterMedia raises three procedural challenges regarding the City's ratemaking process. First, InterMedia contends that the City failed to provide the operator proper notice that the February 13, 1995 meeting was to be a formal ratemaking hearing. The City placed a "public notice" in the local newspaper listing the date and time of the meeting and did not provide the operator an indication that the meeting would be an adversarial proceeding or that the City would adopt a rate order at the meeting. Second, InterMedia further alleges that, at the February 13, 1995 meeting, the City ignored evidence that the operator presented in response to the City's preliminary order regarding the cost of service submission.[4] Third, InterMedia alleges that the City's February 13, 1995 rate order merely prescribes the basic service tier rate without providing any supporting documentation or calculations for the underlying decision.

4. InterMedia also raises three substantive challenges regarding the City's decision. First, InterMedia alleges that the City improperly ordered the operator to issue refunds retroactive to December 1993. Second, InterMedia contends that the City erred in disallowing the inclusion of intangible assets. InterMedia contends that it presented sufficient evidence to rebut the presumption against the inclusion of intangible assets in an operator's rate base.[5] Third, InterMedia alleges that the City's disallowance would result in a "taking" in violation of the Fifth Amendment and would constitute retroactive rulemaking since InterMedia would be precluded from recouping investments made before the 1992 Cable Act was enacted.

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[3]The City and InterMedia disagree over the time period covered by the Form 1220 submission. The City alleges that InterMedia's filing was intended to cover both the period September 1, 1993 through May 14, 1994 and the period May 14, 1994 onward. However, InterMedia alleges that the Form 1200 series filing was intended only to cover the period May 14, 1994 onward. *See infra* ¶ ¶ 8-9.

[4]On August 15, 1995, InterMedia filed FCC Forms 1220, 1200, 1205, and 1215 to justify its rates for the period beginning July 15, 1994. The City reviewed the 1220 series filing and issued a preliminary order on December 12, 1994 rejecting the operator's intangible assets related to organizational costs and franchise acquisition costs for failure to provide supporting information. The preliminary order also allowed InterMedia two months to justify the inclusion of the intangibles in the ratebase. *See* Opposition, Appendix A, City Exhibit 9, Docket No. 94-09. On February 8, 1995, InterMedia conducted a "rate workshop" for the City to discuss the operator's position regarding the intangibles and provided documentation in support of their inclusion. On February 13, 1995, the City issued a final order reducing InterMedia's basic rate of $10.04 to $5.83 retroactive to November 11, 1993 and requiring InterMedia to issue refunds retroactive to December 1, 1993.

[5]InterMedia provided the City *inter alia* an appraisal of intangible assets of the company performed by Kane Reece Association, Inc.; a statement from Barakat & Chamberlin regarding the specific intangible assets at issue in the cost of service showing before the City; and a copy of an explanatory letter from the company's legal counsel concerning the company's cost of service showing and the claimed intangible assets.

STANDARD OF REVIEW

5. In ruling on appeals of local rate orders, the Commission does not conduct a *de novo* review, but instead will sustain the local authority's order as long as there is a reasonable basis for its decision.[6] The Commission will therefore reverse a local authority's decision only if it is determined that the local authority acted unreasonably in applying the Commission's rules in rendering its local rate order.[7] If the Commission reverses a local authority's decision, it will not substitute its own decision but will instead remand the issue to the local authority with instructions to resolve the case consistent with the Commission's decision on appeal.[8]

BACKGROUND

6. On May 3, 1993, the Commission released its *Rate Order* establishing rules to implement the cable television rate regulation provisions of the 1992 Cable Act. In the *Rate Order*, the Commission determined that a benchmark and price cap approach should serve as the primary method for regulating basic service and CPS rates. The Commission also concluded that because the benchmark methodology might not produce fully compensatory rates in all cases, it was appropriate to permit operators, as an alternative, to justify rates based on costs, using individual cost of service showings.[9] The cost of service approach was intended to be used only if an operator believed that the maximum rate permitted under the benchmark formula would not enable the operator to recover costs reasonably incurred in providing rate-regulated cable services. Under traditional cost of service regulation, rates are set at a level to provide a company with recovery of its costs and a reasonable opportunity to earn a fair return on its invested capital.[10]

7. The Commission found, however, that the record before it at the time of the adoption of the *Rate Order* did not provide sufficient information on which to develop detailed

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[6]Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 ("*Third Reconsideration Order*").

[7]*Id.*

[8]*Id.*

[9]*Rate Order*, 8 FCC Rcd at 5794-95; *see also*, 47 C.F.R. Section 76.922.

[10]Under the traditional cost of service formulation, a company's revenue requirement is equal to the reasonable expenses of providing service and a fair return on investment: $R = E + (V - d) r$, where R is the revenue requirement; E is expenses including operating expenses, maintenance expenses, depreciation and taxes; V is the value of the rate base including plant in service and working capital; d is accumulated depreciation; and r is the rate of return, consisting of a weighted average of long term debt, preferred stock, and common stock. *See* Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation, MM Docket No. 93-215, Notice of Proposed Rulemaking, FCC 93-353, 58 Fed. Reg. 40762, 40765, n.18. (1993) ("*Notice*").

cost of service rules for the cable industry.[11] Therefore, on July 16, 1993, the Commission issued a Notice of Proposed Rulemaking which proposed requirements to govern cost of service showings submitted by cable operators seeking to justify rates higher than those determined under the benchmark approach.[12] The Commission indicated in the *Notice* that the proposed requirements would apply only to those cost of service showings submitted after the effective date of the rules.[13] InterMedia's FCC Form 1220 cost of service filing under review in this proceeding was submitted during that post-adoption time period, and the operator alleges that the filing was intended to cover only the period after May 14, 1994.[14] However, despite issuing an order approving InterMedia's rates as justified by its Form 393 for the period September 1, 1993 through May 14, 1994, the City analyzed the Form 1220 utilizing the rules the Commission adopted in the *Notice*, and ordered refunds dating back to December 1993.[15]

DISCUSSION

8. As a preliminary matter, the parties do not agree on the time period covered by InterMedia's Form 1220 cost of service filing. The City contends that the Form 1220 filing was intended to support both the operator's rates from September 1, 1993 to May 14, 1994 and its rates from May 14, 1994 onward. In support of its contention, the City cites InterMedia's cover letter to the filing which stated that "the Form 1200 [was] intended to support InterMedia's rates from September 1, 1993 through May 14, 1994 and InterMedia's rates from May 14, 1994 onward."[16] In response, InterMedia states that the City approved its FCC Form 393 in support of its pre-May 14 rates and has not issued an order re-opening the Form 393 proceedings.[17] InterMedia explains that it incorrectly stated that the Form 1200 series was intended to cover both time periods. The operator further notes that upon reviewing the cover letter, the City Attorney

[11] *Rate Order*, 8 FCC Rcd at 5798-99.

[12] *Notice*, 58 Fed. Reg. at 40762.

[13] *Id.* at 40763. The Commission also indicated in the *Notice*, as it did in the *Rate Order*, that general cost of service principles would apply to cost of service filings submitted prior to the adoption of specific rules. *Id.* at 40763; *Rate Order*, 8 FCC Rcd at 5798-99, 5854, n.859.

[14] *See supra* n.3.

[15] *See* Opposition, Appendix A, at 37. In February 1994, the Commission adopted an order setting forth specific regulatory requirements to govern cost of service filings to justify rates above levels determined under its benchmark requirements. The new rules apply to rates charged or to be charged after May 15, 1994. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 93-215, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527 (1994) ("*Cost Order*").

[16] *See* Opposition, Appendix A, Exhibit 13B.

[17] *See* Reply at 31, *citing* Appeal, Attachment 6 (FCC Form 393 Rate Order).

discovered the error and notified InterMedia.[18] Consequently, in a subsequent letter to the City, InterMedia clarified that the 1220 filing was intended to support only those rates for the period May 14, 1994 onward.[19]

9. In determining the time period covered by InterMedia's Form 1220, we find decisive the fact that the City previously issued an order ruling on InterMedia's rates for the period September 1, 1993 through May 14, 1994, as justified by InterMedia's Form 393. As the City has not indicated that it dissolved its Form 393 order and re-opened the Form 393 proceedings, we must conclude that InterMedia's Form 1220 covered only the period beginning on May 14, 1994. Accordingly, the City erred by ordering InterMedia to issue refunds dating back to December 1993. Instead, the City should have ordered refunds, if any were applicable, for the period beginning July 14, 1994.[20] We remand this issue to the City for resolution in accordance with this Memorandum Opinion and Order.

10. InterMedia alleges that the City failed to provide the operator proper notice of the February 13 meeting because the City provided only a general notice published in the local newspaper stating the date, time, and location of the regular meeting. InterMedia further alleges that the City failed to provide the operator proper notice of the nature of the meeting because the City did not give the operator notice that the meeting would be an adversarial proceeding or that the local authority would adopt a rate order at the meeting.[21] InterMedia contends that it

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[18] *See* Reply at Attachment C.

[19] *See* Reply, Attachment D, (September 26, 1994 letter to the City).

[20] Under the Commission's revised benchmark regulations adopted on February 22, 1994, regulated cable systems were required to set their rates at a level equal to their September 30, 1992 rates minus a revised competitive differential of 17 percent. In order to comply with the new rules, cable operators were required to collect necessary rate-setting information, complete FCC Form 1200 to determine their new permitted rates, and give 30 days notice of any rate changes to their subscribers and to franchising authorities. Systems that were not in compliance with the new rules by May 15, 1994 were subject to refund liability for the period May 15, 1994 through July 14, 1994. Recognizing that many systems would have difficulty complying with the new regulatory scheme by May 15, 1994, the Commission gave operators the option of deferring refund liability for an additional 60 days after May 15, 1994 or until July 14, 1994. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4119, 4184-86 (1994) ("*Second Reconsideration Order*"). *See also* 47 C.F.R. §§ 76.922(b)(6)(ii) and 76.964. InterMedia took advantage of this refund deferral period. Thus, its refund liability period under the Form 393 ran from September 1, 1993 though July 14, 1994, and its refund liability period under the Form 1220 began July 15, 1994. Otherwise, if InterMedia had *not* taken advantage of the refund deferral period, its refund liability period under the Form 393 would have run from September 1, 1993 through May 15, 1994 and its refund liability period under the Form 1220 would have begun May 15, 1994.

[21] InterMedia further claims that the City never formally served the operator in person or via mail. The operator claims that it first received notice of the February 13 meeting the Friday before the meeting. The City disputes this contention and argues that it sent InterMedia a fax notifying it of the February 13 meeting and published a February 5, 1995 public notice of the hearing in the local paper. Opposition at Appendix A, InterMedia Exhibit 1 (February 5 Notice of Publication). As InterMedia was able to appear at the meeting, we will regard this issue as moot.

believed that the City would adhere to the informal rate review process that the local authority used during its review of the operator's Form 393 and during its initial review of the Form 1220 series. The operator did not have its legal counsel or necessary witnesses in attendance at the February 13 meeting. The City does not address specifically the allegedly deficient public notice. Rather, the City merely asserts that the company "should know that the proper way to present evidence is by witnesses at the rate hearing before the City's Cable TV Commission."[22] In support of this assertion, the City states that its Cable TV Commission is subject to the "Tennessee Open Meetings" law which prevents more than one member of the Cable TV Commission from talking or meeting with representatives of InterMedia except at an open, advertised, public meeting.[23]

11. The Commission affords local franchising authorities considerable latitude to decide whether and when to conduct formal or informal hearings on an operator's rate submissions, as long as the local authorities provides interested parties with notice and a meaningful opportunity to participate.[24] In this proceeding, the first issue is whether the City provided InterMedia sufficient notice of the February 13 meeting. In describing what constitutes adequate notice, the Supreme Court has held:

> The notice must be of such a nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.[25]

In the present case, the public notice for the meeting merely stated: "The Murfreesboro Cable Television Commission will hold a Public Meeting on InterMedia a.k.a. 1st Cablevision d/b/a/ Mid Tennessee Cablevision's filing of FCC 1200 series cable service rate justification at the February 13, 1995 Regular Meeting."[26] The notice did not described the February 13 meeting as an adversarial proceeding nor did it explain that the City would adopt a rate order at the meeting.[27] Moreover, there appears no history to convey any expectation regarding what was

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[22]Opposition at 11.

[23]*Id.* at 11. *See also, id.* at Attachment B, "Tennessee Open Meetings Law," TCA § 8-44-101-107.

[24]*See Rate Order*, 8 FCC Rcd at 5716; *see also Third Reconsideration Order*, 9 FCC Rcd at 4340.

[25]*Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306, 319 (1950) (internal citations omitted).

[26]Opposition, Appendix A, City Exhibit 1.

[27]Additionally, nothing in the City's cable rate regulations indicated that the February 13 meeting would be in the nature of a formal rate hearing. The local franchising authority's cable rate regulations regarding public meetings merely require "the City Council to hold at least one public [meeting] at which interested parties may express their views and record objections." *See* Opposition, Appendix A, City Exhibit 7 at 3-4. The franchising authority's regulations regarding the submission and review of cost of service showings also do not indicate that a formal rate hearing will take place. Instead, the regulations merely state that "the City Council will review a cost

to take place at the Public Meeting. The City did not provide InterMedia with any notice that it would need to present witnesses or evidence at the February 13, 1995 meeting. Accordingly, we find that the notice was insufficient.

12. The second and related issue is whether the City provided InterMedia a meaningful opportunity to participate in the February 13, 1995 meeting. InterMedia contends that the City erroneously restricted the record of the February 13 meeting to the transcript and evidence admitted at the February 13 meeting, and excluded from the record the evidence which the Company provided to the City during a February 8, 1995 "workshop" regarding the company's cost of service showing.[28] The City acknowledges that prior to the meeting, on February 8, 1995, InterMedia conducted a "rate workshop" for City officials and provided information regarding the intangible assets in question. However, the City contends that InterMedia had a reasonable opportunity to present this information as sworn testimony during the February 13 meeting and elected not to do so. The City claims that it excluded the rate workshop evidence from the hearing because InterMedia failed to present it at the February 13 meeting as sworn testimony. The City alleges that InterMedia is trying to subvert the local franchising authority's rate review process by providing testimony in its appeal that was not subject to cross examination at the local level.[29]

13. In its December 12, 1994 preliminary order, the City requested additional information regarding InterMedia's intangible assets by February 12, 1995. InterMedia provided the supplemental information regarding the intangibles during a February 8, 1995 rate workshop with City officials. If a franchising authority elects to toll the deadline for review of a cable operator's rate filing, as the City did here, the solicitation and collection of additional information during the review period will be at the franchising authority's discretion.[30] Where the franchising

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of service showing pursuant to FCC standards for a cost of service review." *Id.* Finally, the City's past practice also did not indicate that it would conduct a formal rate hearing. During its initial review of the company's 1220 series filing and the review of the company's Form 393, the City used an informal rate review process.

[28]On February 8, 1994, InterMedia met with the City to discuss in detail the issue of intangibles assets and to provide the City documentation regarding these assets. Representing InterMedia at the meeting were InterMedia's Director of Regulatory Affairs Barbara Wood; Craig Eichelman, InterMedia's Tennessee Director of Franchising; and Judd Ostrom, InterMedia's rate consultant from Barakat & Chamberlin, Inc. Representing the City at the meeting were City Cable Commission Chairman Barry Smotherman; Cable TV Coordinator Darryl Anderson; City Accountant Melissa Wright, CPA; City Consultant Joel Jobe, CPA; City Attorney Thomas Reed, Esq.; and City Recorder Jim Penner. *See* Reply at 6. *See also* Opposition, Appendix A at 9.

[29]As part of its appeal petition, InterMedia provided a synopsis of the February 8 rate workshop and copies of the supporting documentation that were distributed to workshop participants. The City did not allow InterMedia to present this information at the February 13 meeting because they contend that it was not subject to cross examination. *See* Appeal at Exhibit 4.

[30]On August 15, 1995, InterMedia filed FCC Forms 1220, 1200, 1205, and 1215 to justify its rates for the period beginning July 15, 1994. On September 12, 1994, the City issued a tolling order extending the review period an additional 150 days. *Rate Order* at 5709 (". . . To toll the effective date of the proposed rates, the franchising

authority solicits additional information as it did in this case, the local authority should accept for review any amended or supplemental filings to the original FCC Form 1220 if an operator submits the new information within a reasonable period of time and presents an adequate explanation for the submission.[31]

14. It is inconsistent for the City, after requesting the supplemental information, to exclude that very information from the record of the February 13 meeting on the basis that the InterMedia personnel responsible for the production of the workshop information were not available at the February 13 meeting to be sworn as witnesses or cross-examined, particularly since the City failed to give InterMedia adequate notice that the operator would be required to produce those personnel at the February 13 meeting. By failing to accept the evidence and information provided at the February 8, 1995 meeting into the record, we find that the City did not provide InterMedia with a meaningful opportunity to participate in the merits decided at the February 13, 1995 Regular Meeting.

15. As a result of the deficient notice and the lack of a meaningful opportunity to participate, InterMedia was prejudiced. InterMedia did not have its legal counsel or necessary witnesses in attendance and was not able to reintroduce the evidence which had previously been provided to the City during its February 8th informal review of the cost of service showing. Accordingly, we remand this issue to the City for further consideration.[32] Upon remand, InterMedia is entitled to sufficient notice of the time and nature of all meetings and/or formal hearings to review InterMedia's Form 1220 and a meaningful opportunity to participate in such meetings and/or formal hearings.

16. The third procedural issue involves the City's alleged failure to provide supporting documentation or calculations for its rate order. InterMedia alleges that the City's rate order merely prescribes the basic service tier rate without providing any supporting documentation or calculations for the underlying decision. In response, the City asserts that InterMedia was notified as early as December 12, 1994, that the issue in contention was the operator's intangible assets.[33] The City further asserts that at the February 13, 1995 meeting it provided InterMedia

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authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. During these 90 or 150-day periods, the franchising authority *can* solicit additional information from the cable operator, if necessary, and consider the views of interested parties." (emphasis added))

[31]*See* 47 C.F.R. § 76.933(b) and *Rate Order* 5709, n.311. *See also Continental Cablevision of Michigan*, (Westland, MI), 10 FCC Rcd 8836 (Cab. Serv. Bur. 1995).

[32]Because we are remanding the appeal based on the City's failure to give InterMedia sufficient notice of the nature of the February 13 meeting and the City's failure to consider evidence presented in response to the City's preliminary order, we need not reach InterMedia's substantive challenges to the local authority's decision.

[33]Opposition at 24.

an explanation of the reason for the reduction in its rates and how the City recalculated its rates and that such an explanation is included in the meeting's transcripts.[34]

17. Nothing in our rules requires a local franchising authority to provide cable operators with reports and calculations that it may have relied upon in rendering its rate decision. Our rules do require that the franchising authority's decision be publicly available and provide a sufficient basis for its decision to allow an operator and other interested parties to know why the rate was disapproved so that the operator can evaluate the decision and determine whether to appeal the local authority's decision. Here, the local authority's written decision is in two parts consisting of: (1) a one-page document entitled "order" dictating the maximum permitted rates that the operator is required to charge for basic service and equipment and (2) the transcript from the local authority's February 13, 1995 meeting explaining the City's basis for finding InterMedia's rates unreasonable and the City's reasoning for finding that its prescribed rates are reasonable. However, the "order" indicating the maximum permitted rates does not reference the second document containing the transcript. We are unable to discern any attempt by the City to inform the public that transcripts containing the City's justification for its rate reduction were available. Yet, based upon the detailed, issue-specific appeal petition filed by the operator, it is obvious that InterMedia knew the City's basis for the rejection of its rates, most likely from the transcripts. Accordingly, we find that the City's failure to inform the operator of the availability of the transcript harmless error. Thus, we deny InterMedia's appeal with respect to this issue.

ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the appeal petition filed by InterMedia Partners d/b/a Robin Media Group, regarding the City of Murfreesboro's failure to provide InterMedia proper notice of the nature of the February 13, 1995 meeting **IS REMANDED** to the local authority for further consideration in accordance with the terms of this order.

19. **IT IS FURTHER ORDERED** that the appeal petition filed by InterMedia Partners d/b/a Robin Media Group, regarding the City of Murfreesboro's failure to provide Intermedia a meaningful opportunity to participate in the February 13, 1995 meeting **IS REMANDED** to the local authority for further consideration in accordance with the terms of this order.

20. **IT IS FURTHER ORDERED** that the appeal petition filed by InterMedia Partners d/b/a Robin Media Group, regarding the City of Murfreesboro's failure to provide Intermedia with a basis for its underlying decision **IS DENIED.**

21. **IT IS FURTHER ORDERED** that our stay of the local rate order, which was granted pending the resolution of this appeal, is hereby **VACATED.**

[34]Opposition at 24, *citing,* Hearing Transcripts at 54-58.

22. 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 (1995).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau