

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

In the Matter of:)
)
COX COMMUNICATIONS, INC.,)
d/b/a Dimension Cable Services)
)
Appeal of Local Rate Order)
of City of Chillicothe, Ohio)

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1996

Released: August 27, 1996

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On May 10, 1995, Cox Communications, Inc., d/b/a Dimension Cable Services ("Dimension"), operator of a cable system in the City of Chillicothe, Ohio ("the City"), filed an appeal of a local rate order issued by the City on April 10, 1995. The City's rate order reviewed Dimension's rates in effect after July 14, 1994. Dimension's appeal argues that the rate order is invalid, on the grounds that the City lacks authority to regulate Dimension's rates, that the order determined erroneously that Dimension's a la carte package of channels is a regulated tier, and that the order improperly disallowed a charge assessed on cable programming service tier subscribers having additional outlets.¹ The City filed an opposition to the appeal on May 2, 1995, and Dimension filed a reply on June 19, 1995.²

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.³ 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 there is

¹Dimension filed a petition for a stay pending review on May 10, 1995. Because we are resolving the appeal on its merits, the petition for stay is rendered moot.

²Dimension's reply was accompanied by a motion to accept late-filed pleading, stating that the reply could not be filed by its original due date of June 8, 1995, because the City had not served Dimension with a copy of the opposition prior to that date. Dimension was granted an extension until June 19, 1995 to file a reply.

³See 47 C.F.R. § 76.944.

a reasonable basis for that decision.⁴ 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 its local rate order.⁵ 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.⁶ With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."⁷

DISCUSSION

A. The City's Authority to Regulate Cable System Rates

3. Dimension claims that the City lacks authority to regulate cable system rates, because the City failed to adopt cable rate regulations within 120 days from the effective date of certification pursuant to Commission regulations.⁸ We reject this claim. The City submitted a Form 328 for certification to the Commission on September 7, 1993, and in the absence of any contrary notification to the City pursuant to Section 76.910(e), the City's certification became effective thirty days later on October 7, 1993.⁹ The City adopted cable rate regulations on May 23, 1994.¹⁰ On June 7, 1994, the City notified Dimension that it was subject to cable rate regulation by the City. The City received a Form 393, dated August 11, 1994 and Forms 1200, 1205 and 1215, dated August 14, 1994 from Dimension in response to that notification. The City issued a rate order on April 10, 1995. Dimension did not challenge the City's authority to

⁴See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 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: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) ("*Third Recon. Order*").

⁵*Id.*

⁶*Id.*

⁷See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket 92-266, 9 FCC Rcd 4119, 4217 (1994).

⁸"A franchising authority must be certified by the Commission in order to regulate the basic tier and associated equipment of a cable system within its jurisdiction." See 47 C.F.R. § 910(a).

⁹47 C.F.R. § 76.910(e).

¹⁰See Dimension appeal, Exhibit 5, City of Chillicothe Ordinance No. 37-94.

regulate its basic tier or equipment rates by means of a petition for reconsideration nor request a stay of rate regulation pursuant to Section 76.911(a)(2) and (c)(2), nor did it seek revocation of the City's certification pursuant to Section 76.914(c),¹¹ at any time prior to the filing of this appeal.

4. We do not agree that the City's failure to adopt regulations within 120 days of the effective date of certification invalidated the City's authority to regulate basic tier and equipment rates, as suggested by Dimension. Section 623(a)(4) of the Communications Act, as amended, provides that a franchise authority's certification shall be effective 30 days after being filed with the Commission, unless the Commission make findings (a) that regulations adopted by the franchise authority are not consistent with regulations prescribed under Section 623(b); (b) that the franchise authority does not have authority to adopt or the personnel to administer such regulations; or (c) that an opportunity to consider the views of interested parties is not provided by the regulations or procedures adopted by such authority.¹² The Commission has made no such findings with respect to the certification at issue in this matter. Moreover, neither Dimension nor any other party filed either a petition for reconsideration or a petition for revocation of the City's certification pursuant to our rules.¹³

5. The Commission stated in the *Rate Order* in this connection, "The franchise authority must notify the cable operator that it has been certified and has adopted appropriate regulations before it can begin regulating rates and, if necessary, ordering refunds."¹⁴ Section 76.910(e) of our rules provides franchise authorities with 120 days following the effective date of certification in which to adopt regulations consistent with this Commission's regulations governing the basic tier and providing opportunity for consideration of views of interested parties.¹⁵ However, the mere lapse of 120 days without rules being adopted cannot be deemed by itself to be determinative, under Section 623(a)(4), that the franchise authority is unable or unwilling to adopt rules consistent with our regulations, and that its otherwise valid certification should therefore be revoked. Furthermore, while we acknowledge that the City failed to adopt rules within the prescribed period, we find that City's adoption of procedures to regulate rates cured any procedural defects that may have existed due to its tardiness in adopting those procedures. We find that any such tardiness by the City was, on these facts, harmless error.

¹¹See 47 C.F.R. § 76.911(a)(2) and (c)(2), and §76.914(c).

¹²47 U.S.C. § 543(a)(4).

¹³See 47 C.F.R. §§ 76.911 and 76.914.

¹⁴See *Rate Order*, 8 FCC Rcd 5631, 5693 (¶ 87). The Commission also made it clear that if a challenge to a certification presented under Section 76.911 or Section 76.914 on other than effective competition grounds were upheld, opportunity would be provided to the franchise authority to modify or otherwise cure any defects in its certification. *Id.* at 5696 (¶ 93).

¹⁵47 C.F.R. § 76.910(e).

6. We further hold that Dimension is estopped from challenging the authority of the City to regulate its basic tier and equipment rates. We believe it would be patently unfair to permit Dimension to submit itself to the City for review of its cable rates, without raising any objections to the City's authority to regulate those rates, and then, upon issuance by the City of a decision deemed unfavorable in some respects, to raise objections to the City's authority to regulate for the first time in an appeal to this Commission.

B. A La Carte Package

7. Effective August 31, 1993, Dimension introduced an a la carte package consisting of four channels, which could be purchased individually for \$1.10 each or as a discounted package for \$2.20. The a la carte package was created by restructuring a twelve-channel Basic tier and a twenty-two-channel Preferred Dimension tier offering into an eighteen-channel Basic tier, a twelve-channel Dimension tier, and a four-channel Preferred Dimension Package offering. Dimension asserts that the City, for purposes of setting Basic tier rates, improperly treated the collective offering of the four a la carte channels as a regulated tier. Dimension argues that this a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourages cable operators to unbundle programming services from regulated tiers and to offer them on a per-channel basis.¹⁶ Dimension further argues that the a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.¹⁷

8. In its opposition the City argues that the Commission's regulations in effect at the time the a la carte package was created indicate that these channels should be treated as a rate-regulated tier. The City asserts that such treatment is required because the a la carte channels could not be purchased separately until after Dimension installed traps permitting separate ordering in February 1995. Dimension states that the inability to block basic-only subscribers who do not order the a la carte package or the individual channels from receiving those services was remedied when the required traps were installed commencing in February 1995 and completed shortly thereafter, before the City issued its rate order on April 10, 1995.

9. The facts presented in this appeal resemble the facts presented in several of our letter of inquiry decisions in which a la carte packages were deemed to be a "new product tier" and should not be treated as a rate-regulated tier for purposes of calculating a cable system's

¹⁶Appeal at 4-5.

¹⁷See *Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 1164, 1184-85 (1993).

basic rates.¹⁸ For example, the a la carte package at issue in the *Comcast of Mt. Clemens* order consisted of a four-channel package, made up of channels formerly available on its basic tier and on its two cable programming service tiers, and which was offered as part of a restructuring of the operator's channel line up. In that case, after considering the restructuring put into effect there under the various tests set forth in the Commission's *Rate Order*, in the *Second Reconsideration Order*, and in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order*,¹⁹ we still were unable to find that the a la carte package at issue clearly was not a permissible non-rate regulated offering under our rules. We further concluded that, in light of prior confusion over what constituted a permissible non-rate-regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers and return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue there could be treated as a new product tier under the *Going Forward Order*.

10. However, in *Washington Court House*, we decided an appeal of a rate order issued by a local franchising authority in which all of the operator's subscribers received all of the channels of a package at no additional cost as a result of the operator's inability to obtain the necessary blocking equipment.²⁰ In that case, we explained that our rules required that the operator offer the channels in the package on an individual basis as well as a collective basis in order to be categorized as an unregulated a la carte package.²¹ We ruled that the package in question was not a true a la carte package because it did not meet the threshold requirement that channels be offered on a per-channel basis.²² In the case before us now, unlike in *Washington Court House*, the package in question became a true a la carte package upon completion by

¹⁸See, for example, *Comcast Cablevision (Mt. Clemens, Michigan)*, 10 FCC Rcd 103 (Cab. Serv. Bur. 1994) ("*Comcast of Mt. Clemens*"). See also *Paragon Cable (Irving, TX)*, 9 FCC Rcd 7333 (Cab. Serv. Bur. 1994) ("*Paragon, Irving TX*"), and *Century Cable TV (Huntington, WV)*, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994).

¹⁹See MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 1226 (1994) ("*Going Forward Order*"). New product tiers are cable programming services that, subject to certain conditions, are not rate-regulated. *Going Forward Order*, 10 FCC Rcd at 1233-39. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

²⁰See In the Matter of *Chillicothe Cablevision, Inc., d/b/a/ Dimension Cable Services (Washington Court House, Ohio) Order*, DA 95-479 (Cab. Serv. Bur., Rel. March 14, 1995) at ¶ 10 ("*Washington Court House*").

²¹*Washington Court House* at ¶ 11.

²²*Id.*

Dimension of the installation of traps, which then permitted an offering of the channels in the package individually on an unregulated basis.

11. On the record before us, we find that the City's rate order is unreasonable to the extent that, in setting basic tier rates and ordering refunds, it fails to take into account completion by Dimension of the installation of traps permitting subscribers to order the a la carte channels separately. To that extent we find that the City's determination that Dimension's a la carte package is a regulated tier is inconsistent with the action taken in our a la carte letter of inquiry orders, and in particular in our order in *Comcast of Mt. Clemens*.²³ We further find that Dimension's a la carte package, once the traps were installed, should not have been treated as a standard rate-regulated tier of service, and that the channels comprising it should be treated as non-rate-regulated for purposes of rate justification. Accordingly, we are remanding this issue to the City for the entry of an order (a) that does not treat Dimension's a la carte package of four channels as regulated services from and after completion of installation of traps permitting subscribers to order individual a la carte channels separately and (b) that establishes basic rates and requires refunds consistent with such treatment of the a la carte channels and with this order.

C. Charge for Additional Outlets for Cable Programming Service

12. The City disallowed a \$2.32 per month charge imposed by Dimension for each additional outlet provided to cable programming service tier ("CPST") subscribers with multiple outlets and ordered refunds of those charges, on the grounds that the charge was unreasonable because Dimension had not provided an adequate explanation or any cost support for the charge. Dimension contends that the additional outlet charge is subject to regulation only by the Commission pursuant to CPST rate complaint procedures.²⁴ In its appeal Dimension asserts that the Cable Services Bureau has previously found additional outlet rates to be CPST rates, in instances where such additional outlet rates were imposed only in connection with programming carried on the CPST, over which the Commission, not the City, has jurisdiction.

13. Dimension is correct that the City has no jurisdiction over an additional outlet charge that is imposed only in connection with programming carried on the CPS tier.²⁵ We note further that Dimension was required, by commitments made by Cox Communications, Inc and its subsidiaries in the *Cox Resolution Order*²⁶ to eliminate charges for regulated additional outlets

²³See n. 19, above.

²⁴See 47 C.F.R. § 76.950.

²⁵See Community Cablevision Company, d/b/a Dimension Cable Services (Irvine, California), DA 95-456 (Cab. Serv. Bur., March 10, 1995), for example. Rates for cable programming services are subject to regulation only by the Commission. See 47 U.S.C. § 543(a)(2)(A) & (B).

²⁶See In the Matter of Cox Communications, Inc. and Times Mirror Cable Television, Inc., 11 FCC Rcd 1972 (FCC 95-483, Released December 1, 1995) ("*Cox Resolution Order*"). Neither Dimension nor the City submitted any comment on the impact of the *Cox Resolution Order* on our resolution of this proceeding.

as of the January 1996 billing cycle or the first billing cycle beginning sixty days after the effective date of that Order, whichever occurred later. Also, the additional outlet charges collected by Dimension on its Chillicothe, Ohio system were incorporated within the overall rate settlement arrangements approved in the *Cox Resolution Order*. The record before us provides no specific information regarding whether the additional outlet rate in question here applies only to CPS tier subscribers. However, the City has not contested Dimension's assertion that the additional outlet charge applies only to CPS tier subscribers.²⁷ Further, the *Cox Resolution Order* treated the additional outlet charge as a CPS tier charge. Accordingly, we set aside that portion of the City's order disallowing the additional outlet charge and requiring any refund of moneys collected by Dimension pursuant to additional outlet charges.

ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that Dimension's appeal of the local order of the City of Chillicothe, Ohio **IS GRANTED** to the extent indicated herein and is otherwise **DENIED**, and the cause **IS REMANDED** to the City for further proceedings consistent with this Order.

15. **IT IS FURTHER ORDERED** that the petition for stay **IS DISMISSED** as moot.

16. 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

²⁷Appeal at 4.