

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

| | | | |
|------------------------------|---|-----------|------------------------------------|
| In the Matter of |) | CUID Nos. | NJ0463 (Hillsborough) |
| |) | | NJ0491 (Lebanon) |
| |) | | NJ0492 (Clinton) |
| RCN Cable of New Jersey, Inc |) | | NJ0493 (Readington) |
| |) | | NJ0494 (Clinton Township) |
| |) | | NJ0495 (Passaic/Longhill Township) |
| |) | | NJ0504 (Branchburg) |
| |) | | NJ0505 (Bernardsville) |
| |) | | NJ0506 (Flemington) |
| |) | | NJ0507 (Raritan) |
| |) | | NJ0509 (Chatham) |
| |) | | NJ0510 (Franklin) |
| |) | | NJ0565 (Mendham Township) |
| |) | | NJ0576 (Montgomery) |
| Application for Review |) | | NJ0586 (West Amwell) |
| |) | | NJ0591 (Franklin) |

ORDER

Adopted: February 22, 2000

Released: February 25, 2000

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application for review ("Application") filed October 4, 1999, by RCN of New Jersey, Inc. ("RCN") of an Order, DA 99-1745 ("Reconsideration Order"),¹ released by the Cable Services Bureau ("Bureau"), denying RCN's petition for reconsideration of a prior Bureau Order, DA 98-2130 ("Bureau Order").² In the Reconsideration Order, the Bureau determined that RCN could not modify its 1997 FCC Form 1240 filing in order to support a modification of its 1998 FCC Form 1240 filing, which was the subject of the Bureau Order. Having considered RCN's application for review, we conclude that the Reconsideration Order should be affirmed. RCN also filed a petition for stay of the Reconsideration Order pending resolution of its Application. Because we resolve RCN's Application herein, we will dismiss RCN's petition for stay as moot.

II. BACKGROUND

2. Under the Communications Act, cable operators that do not face effective competition are subject to regulation of their cable programming services tier ("CPST") rates in effect prior to March 31,

¹ In the Matter of RCN Cable of New Jersey, Inc., Order on Reconsideration (released September 2, 1999).

² In the Matter of RCN Cable Of New Jersey, Inc, 13 FCC Rcd 21788 (1998).

1999.³ Operators may establish their regulated rates using either the benchmark methodology or the cost of service methodology, both of which set a maximum permitted rate ("MPR") that an operator may charge in a local franchise area.⁴ During the relevant time period, the Telecommunications Act of 1996 ("1996 Act")⁵ and our rules implementing the legislation,⁶ required that a complaint against the CPST rate be filed with the Commission only by a local franchising authority ("LFA") that received more than one subscriber complaint.⁷ The filing of a complete and timely complaint triggered an obligation upon the cable operator to file a justification of its CPST rates.⁸ To justify rates for the period beginning May 15, 1994, operators must use the FCC Form 1200 series.⁹ Operators are permitted to make changes to their rates on a quarterly basis using FCC Form 1210.¹⁰ Operators may justify their rates on an annual basis using FCC Form 1240.¹¹

3. In the Thirteenth Reconsideration Order,¹² the Commission adopted an optional rate adjustment methodology that encouraged cable operators to make only annual rate changes to their basic service tiers ("BSTs") and CPSTs. Operators that elect to use the annual methodology adjust their rates once a year to reflect changes in external costs, inflation, and the number of regulated channels that they expect to occur during the 12 months following the rate change.¹³ If actual and projected costs are different during the rate year, a true-up mechanism is available to correct estimated costs with actual cost changes. At the end of the rate year, operators true up their projected changes to correct for differences between actual and projected costs during the rate year.¹⁴ The true-up requires operators to decrease their rates or alternatively, permits them to increase their rates to make adjustments for over or under estimations of these cost changes.

³ Communications Act, Section 623(c), *as amended*, 47 U.S.C. § 543(c) (1996). 47 U.S.C. § 543(c), which establishes the criteria for Commission regulation of the cable programming service tier, does not apply to cable programming services provided after March 31, 1999. *See* 47 U.S.C. § 543(c)(4) (1996).

⁴ *See* 47 C.F.R. § 76.922 (1997).

⁵ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁶ *See* Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 (1996).

⁷ *See* Communications Act, Section 623(c), *as amended*, 47 U.S.C. Section 543(c) (1996).

⁸ *See* Section 76.956 of the Commission's Rules, 47 C.F.R. §76.956.

⁹ *See* Section 76.922 of the Commission's Rules, 47 C.F.R. §76.922.

¹⁰ *Id.*

¹¹ *Id.*

¹² Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation FCC 95-397, 11 FCC Rcd 388 (1996).

¹³ This 12 month period is called the Projected Period.

¹⁴ The period of time for which estimated costs are compared with actual costs is called the True-Up Period.

III. BUREAU ACTION

4. Prior to the release of the Bureau Order, the Commission released for comment an Order, FCC 98-132 (“Proposed Resolution Order”),¹⁵ resolving complaints filed against RCN which were pending as of January 31, 1998. The Proposed Resolution Order included a review of RCN’s FCC Form 1240 for the Projected Period February 1, 1997 through January 31, 1998 (“1997 1240”) and, based on that review, found that RCN had justified a maximum permitted rate (“MPR”) of \$10.95 and an actual CPST rate of \$10.93 through January 31, 1998. On the 1997 1240, RCN claimed a True-Up Period from April 1, 1996 through August 31, 1996. This means that the projected costs and actual costs, including any allowances for external cost increases and inflation increases were compared for the period that included the months of July and August 1996, on the 1997 1240. Subsequently, on March 31, 1999, the Commission issued an Order, FCC 99-63 (“Final Resolution Order”),¹⁶ which finally adopted the proposed resolution previously released for comment, and resolved complaints against RCN which were pending as of January 31, 1998.

5. Meanwhile, on October 26, 1998, the Bureau Order was released resolving complaints filed against RCN’s April 26, 1998 CPST rate increase from \$10.93 to \$11.90. The Bureau Order included a review of RCN’s FCC Form 1240 for the Projected Period February 1, 1998 through January 31, 1999 (“1998 1240”), which updated the 1997 1240. On the 1998 1240, RCN claimed a True-Up Period from September 1, 1996 through July 31, 1997. RCN also claimed additional inflation on Line C1 (Unclaimed Inflation: Operator Switching From 1210 to 1240) of the 1998 1240. The Instructions for Line C1 state that “[I]f this is **not** your first Form 1240, enter a “1” here and in Line C2 and skip to Line C3.”¹⁷ Because RCN was not a first time FCC Form 1240 filer, the Bureau adjusted Line C1 to 1.00 rather than the 1.0037 claimed by RCN.

6. On November 25, 1998, RCN filed a petition for reconsideration (“Petition”), as well as a request for stay of the Bureau Order. In its Petition, RCN argued that it should have been allowed to recover unclaimed inflation for the months of July and August 1996 in its 1998 1240. RCN argued that it had incorrectly included its claim on Line C1 of its 1998 1240 but that it was nevertheless entitled to claim inflation for July and August 1996. In the Reconsideration Order, the Bureau denied RCN’s Petition because RCN had already recovered inflation for July and August 1996 in the 1997 1240. The Bureau stated that Operator’s claim to inflation for the months of July and August 1996 should have been included in the 1997 1240 because Operator’s 1997 1240 True-Up Period included those two months.¹⁸ The Bureau further noted that the Commission’s approval of RCN’s MPR and actual rate in both the Proposed and Final Resolution Orders was based on a review of RCN’s 1997 1240, including inflation for the months of July and August 1996. The Bureau did not accept RCN’s claim that it did not intend, contrary to the FCC Form 1240 Instructions, to include the inflation adjustment for that period of time in its 1997 1240.¹⁹ The Bureau

¹⁵ In the Matter of C-TEC Corporation, FCC 98-132, 13 FCC Rcd 13673 (1998). C-TEC is the predecessor in interest to RCN.

¹⁶ In the Matter of C-TEC Cable Systems, FCC 99-63, 14 FCC Rcd 5437 (1999).

¹⁷ FCC Form 1240 Instructions at p.13.

¹⁸ Reconsideration Order at ¶ 4.

¹⁹ *Id.* at ¶ 5.

stated, "We cannot now go back and review a filing which has been resolved to determine if operator [RCN] could have claimed additional inflation in that filing."²⁰ The Bureau also stated that it could not ordinarily allow an operator to amend its FCC Form filings on appeal with information that should have been submitted in the original certification.

IV. APPLICATION FOR REVIEW

7. In its Application, RCN argues that it is entitled to recover inflation for the months of July and August 1996 because it did not previously recover inflation for that period of time. RCN claims that in its 1997 FCC Form 1240, it claimed external costs increases for the period April 1, 1996 through August 31, 1996 and inflation increases for the period July 1, 1995 through June 30, 1996. RCN also claims that its request for this recovery was simply mischaracterized in its 1998 1240 and should be converted to a different line, allowing RCN to recover this inflation. RCN also argues that the Bureau has treated it unfairly by not accepting its amended 1998 1240 because the Bureau has accepted amended filings on appeal on other occasions.²¹ We reject RCN's request for the reasons set forth below.

8. RCN indicated on its 1997 1240 that its True-Up period covered April 1, 1996 through August 31, 1996. By designating this period of time as its True-Up Period, RCN represented that it was claiming any external costs and inflation adjustments for that period in the 1997 1240. In its Application, RCN now says that was incorrect and it meant to claim something different. However, in determining that RCN's proposed MPR of \$10.95 and actual CPST rate of \$10.93 were reasonable through January 31, 1998, the Bureau relied on RCN's designation of its True-Up Period in its 1997 1240 as including July and August 1996. Thus, the Commission's final approval of RCN's MPR was based on a review of RCN's 1997 1240 as submitted. Moreover, the Commission resolved the complaints filed against RCN which were pending as of January 31, 1998, based on the MPR as approved. Thus, contrary to RCN's characterization that its request is merely for a correction of a minor error on its 1998 1240, RCN is actually seeking to correct its 1997 1240, then carry that correction through to its 1998 1240. Contrary to RCN's claim that the Bureau acted arbitrarily in rejecting RCN's amended 1998 1240, the Bureau rejected RCN's amended 1998 1240 because it included inflation that was already claimed in the 1997 1240.²²

9. Because RCN's claim to an inflation adjustment for the months of July and August 1996 was included in the True-Up Period of its 1997 1240, RCN is not entitled to claim an inflation adjustment for that same period in its 1998 1240. In order to determine whether RCN made a mistake in its 1997 1240, the Commission would have to reopen and reevaluate its determination regarding the MPR which formed the basis of the Proposed and Final Resolution Orders. The period of time for appeal of those orders has long

²⁰ *Id.* at ¶ 4.

²¹ Application at p. 5. In support of its proposition, RCN cites *In the Matter of Comcast Cablevision of Paducah, Inc.*, DA 97-2144, 13 FCC Rcd 7891 (1997) ("*Comcast*"), in which the Bureau stated "We accept Operator's FCC Form 1240 in lieu of its previous filings and make the following adjustments."

²² The *Comcast* decision cited by RCN is distinguishable from the instant matter because, in *Comcast*, the Bureau allowed the operator to file an amended FCC Form 1240 in order to claim adjustments to its CPST rate that the operator was entitled to claim whereas RCN is asking the Bureau to allow RCN to file an amended FCC Form 1240 in order to claim an adjustment RCN is not entitled to claim.

passed and the parties to the resolution are entitled to rely on the finality of those orders.²³ Moreover, to allow RCN to recover inflation for July and August 1996 without reviewing the 1997 1240 could amount to allowing RCN a double recovery for those months.

V. CONCLUSION AND ORDERING CLAUSE

10. For the reasons discussed above, we conclude that RCN's application for review should be denied.

11. Accordingly, IT IS ORDERED, pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review of RCN of New Jersey, Inc. seeking reversal of In the Matter of RCN Cable of New Jersey, Inc., DA 99-1745 (released September 2, 1999), IS DENIED and the referenced Petition for Stay IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

²³ See 47 C.F.R. §1.106(f), which allows 30 days to file a petition for reconsideration. The Proposed Resolution Order was released on July 15, 1998 and the Final Resolution Order was released on March 31, 1999.