

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

In the Matter of:)
)
Century Bay Area Cable Corp.) CSB-A- 0552
)
Appeal of Local Rate Order of the City of)
Fairfield, California (CUID No. CA0459))

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2000

Released: March 24, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Century Bay Area Cable Corp. ("Century") has appealed a local rate order adopted on May 19, 1998 by the City of Fairfield, California. The City of Fairfield filed an opposition to the appeal, and Century filed a reply.

II. BACKGROUND

2. An operator proposing an increase in basic service tier ("BST"), equipment or installation rates bears the burden of demonstrating that the proposed increase conforms with our rules.¹ In determining whether the operator's proposed increase conforms with our rules, a franchising authority may direct the operator to provide supporting information.² After reviewing an operator's rate forms and any other additional information submitted, the franchising authority may approve the operator's requested rate increase or issue a written decision explaining why the operator's rate is not reasonable.³ If the franchising authority determines that the operator's proposed rate exceeds the maximum permitted rate as determined by the Commission's rules, it may prescribe a rate different from the proposed rate provided that it explains why the operator's rate is unreasonable and the prescribed rate is reasonable.

3. Cable operators may justify adjustments to their rates on an annual basis using FCC Form 1240 to reflect reasonably certain and quantifiable changes in external costs, inflation, and the number of regulated channels that are projected for the twelve months following the rate change.⁴ Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.⁵ If actual and

¹47 C.F.R. § 76.937(a).

²Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation etc., 8 FCC Rcd 5631, 5718-19 (1993) ("Rate Order").

³47 C.F.R. § 76.936; see *Ultracom of Marple Inc.*, 10 FCC Rcd 6640, 6641-42 (CSB 1995).

⁴See 47 C.F.R. Section 76.960; see also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation, Thirteenth Order on Reconsideration, ("Thirteenth Reconsideration Order")*, 11 FCC Rcd 388, 391 (1995).

⁵*Id* at 392.

projected costs are different during the rate year, a "true-up" mechanism is available to correct estimated costs with actual cost changes.⁶

III. DISCUSSION AND ANALYSIS

4. One issue presented by this appeal concerns whether a \$100,000 payment made to the City in 1997 to support PEG Access claimed on Century's Form 1240 was properly disallowed by the City, or whether this cost item may be claimed by Century as a franchise related external cost. The other issue concerns Century's allegation that the City's disallowance exceeded the PEG Access payment and thereby also improperly disallowed pass through of a retroactive franchise fee payment made pursuant to *City of Dallas v. FCC*, 118 F.3d 935 (5th Cir., 1997) and *Franchise Fee "Pass Through" and Dallas v. FCC*, 13 FCC Rcd 4566 (CSB 1998). The City's disallowance of these cost items provided the bases for reductions in the BST rate proposed in the Form 1240.

5. The City found that Century's obligation to make the payment stems from the May 18, 1992 franchise agreement, which predates the initial date of cable rate regulation. The City cites *Falcon Cablevision (County of San Luis, Obispo)*, 11 FCC Rcd 9840 (CSB 1996), which applied these limitations to plant relocation costs, as the grounds for the disallowance of Century's PEG Access payment. Century asserts in response that the payment was set for five years after the franchise agreement and was made in 1997. Century argues that the cost of implementing this obligation could not have been incurred prior to the date of initial regulation and for that reason its payment falls outside the limitations of Section 76.922(4). Century disagrees with the treatment of franchise related costs in *Falcon Cablevision* and argues that the City's disallowance is inconsistent with principles underlying the Commission's benchmark regulations. Century further contends the Commission has stated that franchise costs eligible for pass through treatment "include both new requirements that the franchising authority imposes and increases in the cost of complying with existing requirements."⁷

6. In its *Thirteenth Reconsideration Order* the Commission reviewed its prior determinations regarding the treatment to be accorded franchise-imposed cable operator costs as external costs within the overall context of its benchmark regulation of cable rates. In this context, the Commission stated that cable operators "should be permitted to include increases in franchise costs that the operator would not have incurred in the absence of the franchise agreement."⁸ The Commission further stated, "Such increases include both new requirements that the franchising authority imposes and increases in the cost of complying with existing requirements."⁹ After noting several examples of the kinds of services that may be imposed by franchise agreements, the Commission further observed, "We believe that such external costs should be afforded external costs treatment because we believe that operators would not provide such services in the absence of a franchising requirement. Because such costs are largely beyond the control of the cable operator, we believe they should be passed on to subscribers without a cost-of-service showing."¹⁰ Thus the Commission clearly intended for PEG Access payments to be accorded external cost treatment, provided the payment is consistent with Sections 76.922(f) and 76.925 of the Commission's rules.¹¹ *TCI of Richardson, Inc.*¹² clarifies that new PEG

⁶*Id.*

⁷*Citing Thirteenth Reconsideration Order*, 11 FCC Rcd 388, 441 (1995). Century also points to Section 76.922(f)(1)(iii) of the rules as expressly recognizing mandatory PEG Access costs as an external cost. *See* 47 C.F.R. § 76.922(f)(1)(iii).

⁸*Id* at 441.

⁹*Id.*

¹⁰*Id.*

Access payments or increases in payments experienced after rate regulation are recoverable as external costs regardless of the effective date of the franchise imposing the requirement.

7. In ruling on an appeal of a local rate order, we will sustain the franchising authority's decision provided there is a reasonable basis for that decision. We will reverse a franchising authority's decision only if the franchising authority unreasonably applied the Commission's rules in its local rate order.¹³ If the Commission reverses a franchising authority's decision, it will not substitute its own decision but will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission decision on appeal. Denying external cost treatment to a PEG Access payment solely on the basis of the date of the franchise without considering whether the franchise requirement involves new or increased payments after rate regulation is unreasonable. We will remand this matter to the City for further consideration.

8. Turning to the alleged improper disallowance of pass through of retroactive franchise fee payments made pursuant to *City of Dallas*, the City argues only that Century may not raise this issue for the first time in an appeal to the Commission. The City asserts that, although an opportunity was provided for review of its proposed rate order, Century never presented any information which explained that the franchise payments were included within the amount shown of Line 707 of Worksheet 7 as payment for PEG Access costs, as Century now claims.¹⁴ Century asserts that it put the City on notice about the franchise fee payments by its letter dated February 5, 1998 to the City's Special Counsel.¹⁵ Century further asserts that the City also ignored a hand written note included with the filing that referred to the franchise fees and specified particular dollar figures.

9. It is significant that the City does not dispute that the franchise fees qualify under *City of Dallas* for pass through treatment. While Century may not have made its case for pass through as clearly as the City may have desired, it nonetheless called the matter to the City's attention through its February 5, 1998 letter to the City's Special Counsel and by means of notes included with its rate filing. In this context, procedural requirements should not be so inflexible as to override a cable operator's right to pass through treatment of franchise fee payments, a substantive issue fully addressed in *City of Dallas* and *Franchise Fee "Pass Through" and Dallas v. FCC*. The public interest will not be served by denying Century the rate relief to which it is entitled under *City of Dallas* and *Franchise Fee "Pass Through" and Dallas v. FCC*.¹⁶ The City's rate is also being remanded for further consideration of the franchise fee pass through.

¹¹There is no basis in this record that supports the notion that Century would have made a \$100,000 payment to the City absent the requirements of the franchise agreement.

¹² 13 FCC Rcd 21690, 21703-04 (CSB 1998), *reconsidered on other grounds*, 14 FCC Rcd 11,700 (CSB 1999).

¹³*See Rate Order*, 8 FCC Rcd at 5731. *See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Third Order on Reconsideration*, 9 FCC Rcd 4316, 4346 (1994).

¹⁴The City notes that the instructions specifically indicate that Worksheet 7 should not include franchise fees.

¹⁵Century appeal, Attachment C.

¹⁶Continental Cablevision of Ohio, Inc., Mentor, OH, 12 FCC Rcd 21337, 343 (CSB 1997).

IV. ORDERING CLAUSES

10. For the foregoing reasons, **IT IS HEREBY ORDERED**, pursuant to authority delegated under Section 0.321 of the Commission's rules, that the captioned appeal of local rate order adopted on May 19, 1998 by the City of Fairfield, California, (CSB-A-0552) **IS GRANTED**, and the rate order **IS REMANDED** to the City for further consideration consistent with this Memorandum Opinion and Order.

11. **IT IS FURTHER ORDERED** that the City shall not enforce matters remanded for further consideration herein pending further action by the City on these matters.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau