

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

In the Matter of:)	
)	
Clear-Vu Cable, Inc.)	CSB-A-0085
)	
Appeal of Local Rate Order of)	
the City of Summerville, Georgia)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 2004

Released: July 12, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Clear-Vu Cable, Inc. (“Clear-Vu”), has filed an appeal of the local rate order adopted by the City of Summerville, Georgia (the “City” or “Summerville”) on May 10, 1995.¹ Clear-Vu seeks review of the rate order which prescribes a cable television basic service rate and orders Clear-Vu to issue refunds to its subscribers. For the reasons set forth herein, the appeal is granted in part and denied in part, and part of the rate order is remanded to the City for further consideration.

II. BACKGROUND

2. The Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”) gave the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of cable systems that did not face effective competition, as defined by the 1992 Cable Act. Specifically, the 1992 Cable Act provided that, with respect to cable systems that are not subject to effective competition, local franchising authorities may regulate the rates for the BST and equipment pursuant to guidelines established by the Commission, and the Commission would regulate the rates for the cable programming service tier (“CPST”).²

3. The 1992 Cable Act requires operators to fully “unbundle” equipment and installation costs from programming costs.³ The Commission’s regulations implement Congress’ directive by requiring

¹ Clear-Vu also filed a request that the Commission stay the City’s rate order. In light of our decision herein, the stay is deemed moot.

² 47 U.S.C. § 543(a)(2). The 1996 Act, P.L. 104-104, 110 Stat. 56 (1996), repealed the Commission’s regulatory authority over CPST rates effective March 31, 1999.

³ 47 U.S.C. § 543(b)(3).

operators to establish an “equipment basket.”⁴ Section 76.923(c) of the Commission’s regulations provides that equipment basket costs shall include “the direct and indirect material and labor of providing, leasing, installing, repairing, and servicing customer equipment.” In the order adopting this regulation, the Commission further explained that “[t]he basket will include an allocation of all those system joint and company costs that service installation, leasing and equipment repair share with other activities, excluding general system overhead.”⁵ When completed correctly, Part III of FCC Form 393 unbundles equipment costs from programming costs.⁶

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.⁷ 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 a reasonable basis for that decision exists.⁸ The Commission will reverse a franchising authority's rate decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules.⁹ 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.¹⁰

5. An operator seeking to justify its existing or proposed rates for the basic service tier or for equipment and installation bears the burden of demonstrating that the rates conform with our rules.¹¹ A franchising authority may direct the operator to provide supporting information and should permit the cable operator an opportunity to cure defects in its filing or file supplemental information considered necessary by the franchising authority.¹² If after reviewing an operator’s rate forms and any additional information submitted, the franchising authority determines that the operator’s rates exceed the maximum permitted rate (“MPR”), it may prescribe a rate different from the proposed rate or order refunds, provided that, after having given the operator an opportunity to participate, it affirmatively demonstrates in its written decision why the operator’s rate or rates are unreasonable and any prescribed rate is reasonable.¹³ If the local

⁴ 47 U.S.C. § 76.923(b).

⁵ See *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5815 (1993). See also *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1190 (1993).

⁶ Operators attempting to justify their prices for the period prior to May 15, 1994 were required to complete FCC Form 393, and after May 15, 1994 were required to complete FCC Form 1200.

⁷ See 47 C.F.R. § 76.944; 47 U.S.C. § 543(b)(5)(B).

⁸ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5731-32 (1993) (“*Rate Order*”); 9 FCC Rcd 4316, 4346 (1994) (“*Third Reconsideration Order*”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 C.F.R. § 76.937(a).

¹² See *Third Reconsideration Order*, 9 FCC Rcd at 4347-48.

¹³ 47 C.F.R. § 76.936; see *Falcon Telecable*, 15 FCC Rcd 52, 54 (CSB 1999); *Ultracom of Marple, Inc.*, 10 FCC Rcd 6640, 6641-42 (CSB 1995); *TCI-TKR of Northern Kentucky Inc.*, 11 FCC Rcd 17353, 17365 (CSB 1996).

franchising authority does not dispute the basis for the figures presented in a cable operator's filings or has not discovered any mathematical errors in the form, the franchising authority should approve the operator's MPR as calculated in the form.¹⁴

III. DISCUSSION

6. **Adjusting Line 104 to Match Line 301 of FCC Form 393.** Clear-Vu asserts that on its FCC Form 393¹⁵ the City improperly adjusted Clear-Vu's line 104 equipment revenue entry to match the entry for equipment costs on Line 301.¹⁶ By making this adjustment, Clear-Vu states that the City ignored the rationale that required operators to report all revenue attributable to equipment and installation for the prior fiscal year, and completely ignored the specific methodology that the Commission expected and required operators to follow when restructuring their rates in anticipation of regulation on September 1, 1993.¹⁷ Clear-Vu states that instructions to FCC Form 393 required cable operators to calculate pre-regulatory, unbundled equipment revenue per month for Line 104, that Clear-Vu charged additional outlet fees prior to regulation, and that it included such fees in Line 104.¹⁸ Clear-Vu explains that by including additional outlet fees in the Line 104 calculation, these pre-regulatory fees are considered equipment fees and to derive the maximum permitted service rates additional outlet revenues are then unbundled from the total service charge.¹⁹ In addition, Clear-Vu indicates that once having been unbundled, regulated equipment costs in Line 301 no longer include additional outlet costs, and therefore if a cable operator received revenues from additional outlets prior to regulation, properly completing the FCC Form 393 will require Line 104 to differ by approximately the amount of revenues received from additional outlets.²⁰ Clear-Vu argues that this discrepancy should be recognized by the Commission as a "special circumstance" in which the two figures from Lines 104 and 301 are permitted to differ.²¹ It asserts that compelling special circumstances exist to make it fundamentally inequitable to subject an operator to refund liability when it restructured its rates in accordance with the Commission's instructions.²² Further, Clear-Vu argues that the Commission has determined that cable operators would not be required to change their rates when current rates are accurately justified by analysis using old data provided that the data was accurate at the time.²³ According to Clear-Vu, operators that charged for

¹⁴ See *A-R Cable Services-ME Inc.*, 10 FCC Rcd 1783, 1784 (CSB 1995).

¹⁵ On March 14, 1995 Clear-Vu submitted FCC Form 393 to the City of Summerville.

¹⁶ Appeal Petition at ii and 3. Line 104 reflects an operator's average monthly equipment and installation revenue. Line 301 reflects the costs an operator incurs in an average month for monthly equipment and installations.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.* at 5.

²¹ *Id.* at 5-6.

²² *Id.* at 6.

²³ *Id.* at 6, citing Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition, *Third Order on Reconsideration*, 9 FCC Rcd 4316 (1994) (*Third Reconsideration Order*).

additional outlets must be permitted to include these revenues in establishing their benchmark rates because it is consistent with and required by the benchmark scheme established by the Commission and the instructions to Line 104.²⁴

7. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994. Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum 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 charges during the period of review.

8. Clear-Vu correctly points out that the instructions pertaining to Line 104 of FCC Form 393 specifically state that revenue earned over the last fiscal year, including revenue from additional outlet fees, should be used to determine an operator's monthly equipment revenue entry on Line 104.²⁵ However, in the November 10, 1993 Public Notice, we discussed the issue of the relationship between Lines 104 and 301 on FCC Form 393:

The instructions for completing Worksheet I Line 104 of FCC Form 393 specify that equipment revenues for the year preceding September 1, 1993 shall be used in computation of the current rate per channel which is to be compared to the benchmark. Revenues for the previous years may not be sufficiently representative where the operator has already unbundled and instituted cost-based pricing in accordance with our requirements. This answer clarifies that in completing Line 104 operators must use equipment revenues that will be representative of the equipment rates that were in effect as of the initial date of regulation. Where available, actual revenues should be used. Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations, we would anticipate that in most cases, absent special circumstances, operators will enter on Line 104 the same, or nearly the same, number as on Line 301. Line 301 is the anticipated revenues based on equipment rates derived in accordance with FCC rate regulations.²⁶

9. Clear-Vu's assertion that its inclusion of additional outlet revenue in Line 104 amounts to a special circumstance which permits a discrepancy between its entries on Lines 104 and 301 is not convincing because the November 10, 1993 Public Notice seeks to ensure that operators did not include such revenues in Line 104.²⁷ In completing Line 104, Clear-Vu must use equipment revenues that are representative of equipment rates in effect on the initial date of regulation.²⁸ Clear-Vu's additional outlet revenues generated from non-cost-based rates established prior to the initial date of regulation were not

²⁴ *Id.* at 8.

²⁵ *See* FCC Form 393 at 10.

²⁶ *See* November 10, 1993 Public Notice.

²⁷ *See Intermedia Partners, on Behalf of Kauai Cablevision, L.P., v. State of Hawaii Department of Commerce and Consumer Affairs, Cable Television Division*, 10 FCC Rcd 8722 (CSB 1995).

²⁸ *Id.* at 8724.

representative of its rates in effect on the initial date of regulation.²⁹ Because Clear-Vu's Line 104 entry included non-cost-based additional outlet revenue, it was not representative of its equipment rates in effect as of the initial date of regulation, as is required by the Commission's November 10, 1993 Public Notice.³⁰ Therefore, the City acted reasonably in equating Clear-Vu's entry on Line 104 with its entry on Line 301.³¹ Accordingly, we deny this portion of Clear-Vu's appeal.

10. **Offsetting Basic Tier Overcharges Against Equipment and CPS Tier Undercharges.** Clear-Vu states that the City determined that Clear-Vu's basic service tier ("BST") charges were too high and the City is requesting a BST rate reduction for 12 channels from \$9.79 to \$8.90.³² However, Clear-Vu notes that the City is not allowing an offset for CPST rates that are less than the maximum permitted rate.³³ Clear-Vu also states that Summerville determined that Clear-Vu's equipment and install charges were lower than would have been permitted.³⁴ It asserts that although the City ordered Clear-Vu to refund the excessive charges for basic service, it does not intend to allow Clear-Vu to reduce the amount of the refund by the amount that Clear-Vu was undercharging for basic equipment and the CPST.³⁵ Clear-Vu states that an upward adjustment of these rates would have the effect of eliminating any refund liability that Clear-Vu might owe for BST rates and that the Commission did not intend that franchising authorities be permitted to engage in this type of gaming.³⁶ Moreover, Clear-Vu argues that the City's approach contravenes the Commission's established policy that a cable operator subject to a refund order for overcharges for the BST may offset any such refund liability by the amount the operator was undercharging for equipment used to receive basic service.³⁷ Clear-Vu states that in calculating refund liability, any overcharges for the BST may be offset by any undercharges for equipment, so that subscribers are no worse off—and no better off—than had they been charged reasonable rates for program service and actual cost for equipment.³⁸

11. Clear-Vu is correct on offsets between the BST and equipment and incorrect with respect to offsets involving the CPST. In calculating an operator's refund liability for initial rates established through FCC Form 393, offsets between BST programming and equipment overcharges and undercharges

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Clear-Vu's rates are not accurately justified because Clear-Vu's entry, which relied upon pre-regulatory 1992 data, is not representative of its rates in effect as of its initial date of regulation, as required by the Commission. Accordingly, Clear-Vu is not entitled to rely upon the exception in the *Third Reconsideration Order* which permits operators to rely upon old data if its current rates are accurately justified using the old data and that data was accurate at the time. *See Third Reconsideration Order*, 9 FCC Rcd at 4349-50.

³² *Id.* at 11.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 12.

³⁷ *Id.*

³⁸ *Id.* at 15.

on the same tier are allowed.³⁹ Offsets are allowed in this context for initial rates because the formulas establish a direct relationship between equipment rates and programming rates.⁴⁰ Therefore with regard to the overcharge in the BST rate and the undercharging for equipment, the City should offset or reduce the BST refunds it had ordered. We remand this issue to the City so that it can reconsider its ruling in a manner consistent with this finding.

12. The Commission addressed the issue of inter-tier offsets in *Cencom Cable Income Partners* (“*Cencom*”),⁴¹ subsequent to the filing of this appeal. In *Cencom*, the Commission explained why it does not allow such offsets. If both BST and CPST rates were within the Commission’s jurisdiction, the Commission stated that it might have considered inter-tier offsets when ordering refunds for overcharges on CPST where less than the maximum permitted rate has been charged on the BST.⁴² However, the Communications Act set up a dual regulatory structure for cable services during the period at issue here, giving local franchising authorities jurisdiction to regulate BST and associated equipment rates, and until April 1999, giving the Commission jurisdiction to regulate CPST rates upon the filing of a valid complaint.⁴³ While the Commission prescribed standards and procedures for local rate regulation,⁴⁴ and is authorized to consider appeals from local rate orders,⁴⁵ the Commission generally is not otherwise involved in local rate regulation and is not in a position to evaluate offsets between tiers as a matter of routine. Absent an appeal, the Commission may be uninformed about local matters potentially affecting BST rates. The Commission’s past authority over CPST rates was not coordinated with local rate review processes.⁴⁶ In short, allowing inter-tier offsets would have created practical problems in determining the correct BST rates for offset purposes, further burdening the administrative

³⁹ See *TCI Cablevision of Ohio, Inc.*, 13 FCC Rcd 733, 735 (CSB 1998); *Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948 (1997); *Falcon Cablevision*, 13 FCC Rcd 16847 (CSB 1998).

⁴⁰ *Id.*

⁴¹ See *Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948, 7957 (1997).

⁴² *Id.*

⁴³ Communications Act § 623, 47 U.S.C. § 543.

⁴⁴ Communications Act § 623(b)(1), (3), 47 U.S.C. § 543(b)(1), (3); 47 C.F.R. §§ 76.922, 76.923.

⁴⁵ Communications Act § 623 (b)(5)(B), 47 U.S.C. § 543(b)(5)(B); 47 C.F. R. § 76.944.

⁴⁶ See *Cencom*, 12 FCC Rcd 7948, 7958.

processes of cable rate regulation.⁴⁷ Clear-Vu's appeal with respect to inter-tier programming offsets is denied.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Appeal of Clear-Vu Cable, Inc. from a Rate Order of the City of Summerville, Georgia **IS GRANTED IN PART AND DENIED IN PART** to the extent indicated herein.

14. **IT IS FURTHER ORDERED** that the Request for Emergency Stay filed by Clear-Vu Cable, Inc. **IS DISMISSED**.

15. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules. 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton
Deputy Chief, Policy Division
Media Bureau

⁴⁷ *Id.*