

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

In the Matter of)	
)	
Century Enterprise Cable Corporation)	CSB-A-0721
Order Setting Basic Service,)	CSB-A-0722
Equipment and Installation Rates)	
Enterprise AL (AL0025))	

ORDER

Adopted: September 2, 2005

Released: September 7, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. On September 2, 2004, Century Enterprise Cable Corporation (“Adelphia”), filed an appeal (the “Appeal”) of a rate order (the “Rate Order”) adopted by the City of Enterprise, Alabama (the “City”), on August 3 and 4, 2004.¹ The Rate Order was the City’s first regulation of the Basic Service Tier (“BST”) of Adelphia’s cable service,² and ordered refunds for subscribers to the BST.³

2. On September 13, Adelphia raised a related issue regarding refund liability in a pleading which it characterized as an appeal and which we will accept as a Supplemental Filing in this proceeding.⁴ The Supplemental Filing was directed at a letter from the City’s City Attorney (the “Letter”),⁵ which addressed Adelphia’s upcoming refunds pursuant to the Rate Order. Adelphia’s filings ask us to find, respectively, that (a) the City lacks authority over Adelphia’s charges for digital additional outlets⁶ and (b) for purposes of calculating refunds, Adelphia may offset its overcharges for the BST with its undercharges

¹ Appeal of Local Rate Order, filed by Adelphia on Sept. 2, 2004. The Rate Order is Resolution 07-20-04-C, adopted and passed by the City Council on August 3, 2004, and approved by the Mayor on August 4, 2004. It is Attachment A to the Appeal.

² Appeal of Local Rate Order or Petition for Declaratory Ruling (“Supplemental Filing”), filed by Adelphia on Sept. 13, 2004, at 2.

³ Rate Order, *supra* note 1, ¶¶ 4-8 *passim*.

⁴ See *supra* note 2.

⁵ The Letter (Letter from R. Rainer Cotter, III, Esq., Marsh, Cotter & Tindol, LLP, outside counsel for the City, to Mr. Chris Melcher, Adelphia, dated Aug. 31, 2004) is Attachment D to the Supplemental Filing.

⁶ Appeal at 1.

for all equipment through which the BST is delivered.⁷ On September 27, 2004, the City filed a single Opposition to both Adelphia's pleadings.⁸

3. On March 29, 2005, Adelphia filed a Reply,⁹ and also a Motion¹⁰ that the Reply be accepted despite its lateness. In the Motion, Adelphia states that, apparently due to erroneous delivery, it did not receive a copy of the City's Opposition until March 25.¹¹ Although it is the policy of the Commission that motions for extensions of time shall not be routinely granted,¹² we find that Adelphia has shown good cause for an extension in this case. Adelphia was unaware of the Opposition through no fault of its own.¹³ When it learned that the Opposition had been filed, it obtained a copy and filed its Reply four business days later, which is less time than our rules allow under normal conditions.¹⁴ The City has not objected to grant of the Motion. Accordingly, we grant Adelphia's Motion and accept its late-filed Reply.

II. BACKGROUND

4. The Communications Act of 1934, as amended,¹⁵ provides that, where effective competition is absent, rates for the BST and associated equipment are subject to regulation by franchising authorities.¹⁶ Rates for the BST and equipment should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates.¹⁷ If the cable operator fails to meet its burden of proof, has improperly calculated its rates, or is unresponsive to requests for relevant information, the franchising authority may use the "best information available" to review the operator's proposed rates and, if appropriate, adjust them and order refunds.¹⁸

5. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.¹⁹ In ruling on appeals of local rate orders, the Commission will not conduct a *de novo*

⁷ Supplemental Filing at 2, 4.

⁸ Opposition to Appeal of Local Rate Order or Petition for Declaratory Ruling ("Opposition") at 1 ("the City has therefore consolidated its response into this one Opposition.").

⁹ Reply to Opposition to Appeal of Local Rate Order or Petition for Declaratory Ruling ("Reply"), filed by Adelphia on March 29, 2005.

¹⁰ Motion for Leave to Submit Late-Filed Reply to Opposition to Appeal of Local Rate Order or Petition for Declaratory Ruling ("Motion"), filed by Adelphia on March 29, 2005.

¹¹ Motion *passim*.

¹² 47 C.F.R. § 1.46(a).

¹³ Motion at 1.

¹⁴ 47 C.F.R. § 76.944(b).

¹⁵ 47 U.S.C. §§ 151 *et seq.*

¹⁶ 47 U.S.C. § 543(a)(2).

¹⁷ 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

¹⁸ 47 C.F.R. § 76.937(d); *Falcon Classic Cable*, 15 FCC Rcd 5717, 5720 (2000) ¶ 10; *Western Reserve Cablevision, Inc.*, 14 FCC Rcd 13391, 13398 (1999) ¶ 12.

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

review, but instead will sustain the franchising authority's decision as long as a rational basis for that decision exists.²⁰ 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. 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.

III. DISCUSSION

A. Charges for Digital Additional Outlets

6. Adelphia charges \$3 for digital additional outlets.²¹ In the Rate Order, the City ordered that Adelphia lower that charge to three cents.²²

7. Adelphia's digital additional outlet charge is not a charge for equipment. Adelphia describes the charge as not a charge to recover the cost of equipment, but "fundamentally a service authorization fee,"²³ a charge "for the delivery of programming,"²⁴ and "for digital service."²⁵ Adelphia's current bills call it a "Digital Additional Outlet Service Charge"²⁶ and its 2003-04 rate card refers to it as an "Additional Outlet[] . . . Service Fee."²⁷ The City gives us no grounds to doubt the accuracy of Adelphia's descriptions.

8. Two decisions issued while the litigation before the City was unfolding, our *Dallas Reconsideration* and *Irving Orders*,²⁸ clarified local franchise authorities' power over digital additional outlet charges. In our *Irving Order*, we noted that Comcast, the cable operator there,

assesses a digital additional outlet charge only against subscribers to its digital cable service. . . . Through these outlets subscribers receive BST and other programming transmitted in analog and digital format. But it is only Comcast subscribers who

²⁰ *Harron Commun. Corp.*, 15 FCC Rcd 7901 (2000) ¶ 2; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act*, 8 FCC Rcd 5631 (1993), 9 FCC Rcd 4316, 4346 (1994) ¶ 81.

²¹ Appeal at 2; Supplemental Filing, Attachment C (Letter from Chris J. Melcher, Vice President, Law & Public Policy, Adelphia to Mr. Rainer Cotter, III, City Attorney, Marsh, Cotter & Tindol, LLP, dated Aug. 17, 2004), attached bill dated Aug. 7, 2004; Letter, *supra* note 5, at 1.

²² Rate Order, *supra* note 1, at ¶ 3.

²³ Appeal at 2.

²⁴ *Id.*

²⁵ Reply at 2.

²⁶ Supplemental Filing, Attachment C, *supra* note 21, attached bill dated Aug. 7, 2004.

²⁷ Opposition, Attachment A (Adelphia 2003-04 Rate Card).

²⁸ *Comcast Cablevision of Dallas, Inc.* ("Dallas Reconsideration"), 19 FCC Rcd 22687, 22688-89 ¶¶ 3-7, *reconsidering* 19 FCC Rcd 10628, 10634-36 (2004) ¶¶ 15-17; *Comcast Cable of Indiana/Michigan/Texas, Inc.* ("Irving Order"), 19 FCC Rcd 16344, 16348-49 (2004) ¶ 13.

subscribe to Comcast's digital tier (and who want additional outlets) who pay the digital additional outlet charge.²⁹

We reasoned that

[t]he digital tier of cable service . . . is best analogized to the [Cable Services Programming Tier or “CPST”] and to premium programming, over which franchising authorities do not have rate-setting authority. An additional outlet charge assessed only against CPST subscribers, though they also subscribe to the BST, is not subject to franchising authority jurisdiction. During the period when CPST rates were subject to oversight by the Commission, such a charge had to be based on the cost of the CPST programming. Of course, now that the CPST is unregulated, a CPST additional outlet charge is itself unregulated.³⁰

We concluded that

[a]n additional outlet charge imposed on subscribers to other unregulated programming, such as premium programming, though subscribers receiving premium programming also subscribe to the BST, is not subject to franchising authority jurisdiction. Similarly, an additional outlet charge assessed only against digital tier subscribers, though they also subscribe to the BST, is not subject to franchising authority jurisdiction.³¹

The City has presented no circumstances that distinguish this case from the *Dallas Reconsideration* and *Irving* cases. Thus, in this case, where Adelphia charges specifically for additional outlets used by subscribers to the digital tier, that charge is beyond the regulatory authority of the City. Accordingly, we grant Adelphia's Appeal from the Rate Order's assertion of authority over charges for digital additional outlets.

B. Refunds

9. The City's Rate Order found that Adelphia had overcharged for the BST and had, implicitly, undercharged for equipment and installation.³² The Rate Order required that Adelphia make refunds to its BST subscribers and also provided that “[t]he refund amounts described above shall be reduced by the difference between the amount that Adelphia collected for installations and equipment *associated with the*

²⁹ *Irving Order*, 19 FCC Rcd at 16348 ¶ 11; *see also Dallas Reconsideration*, 19 FCC Rcd at 22688 ¶ 3.

³⁰ *Irving Order* at 16349 ¶ 13 (footnote omitted); *see also Dallas Reconsideration*, 19 FCC Rcd at 22689 ¶ 6.

³¹ *Id.*

³² Rate Order, *supra* note 1, ¶¶ 4-6, 9 (noting that the City has not prescribed equipment and installation rates but may do so in the future). This balancing of BST rates on the one hand and equipment and installation rates on the other hand occurs often when a franchising authority first asserts authority over cable service rates. *See, e.g. Sammons Communications, Inc.*, 19 FCC Rcd 12849, 12852 (2004) ¶ 12; *TCI Cablevision of Ohio*, 13 FCC Rcd 733, 737 (1998) ¶ 12; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation: Buy-Through Prohibition*, 9 FCC Rcd 4316, 4353 (1994) ¶ 104.

BST and the amount that Adelphia would have collected had Adelphia charged its proposed equipment and installation rates”³³ (italics added).

10. Our policy is to allow refunds for overcharges for BST service to be reduced or offset by undercharges for equipment and installations when a franchising authority first sets BST rates under the Cable Television Consumer Protection and Competition Act of 1992,³⁴ but not afterwards.³⁵ The Rate Order here under review, although issued long after the beginning of BST regulation in most communities, was the City’s first regulation of Adelphia’s BST. Accordingly, in this case the kind of offset provided for in the City’s Rate Order was proper.

11. Shortly after the Rate Order, Adelphia submitted a refund plan to the City.³⁶ Two weeks later, the City, in the Letter, disapproved the plan by prohibiting Adelphia from reducing its BST refunds by “undercharges for digital converters and the converters’ remote control devices.”³⁷ The City asserted that “[t]hese converters and remote control devices are not related to the BST. They are used to receive the digital cable programming services tier (‘CPST’).”³⁸ In the same letter, the City further avowed its authority over Adelphia’s charges for digital additional outlets and required that overcharges for them be refunded.³⁹

12. Our decisions make clear that, for regulatory purposes, equipment is associated with the BST if it delivers the BST to a subscriber, even if the equipment also delivers a ‘higher’ tier of cable service to the subscriber.⁴⁰ Adelphia’s digital converters and remotes are such equipment and therefore are associated with the BST for purposes of calculating Adelphia’s refunds. Accordingly, we agree with Adelphia that, for purposes of calculating refunds pursuant to the Rate Order, it may offset its overcharges for the BST with its undercharges for all equipment through which the BST is delivered, including

³³ Rate Order, *supra* note 1, ¶ 6.

³⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. §§ 521 *et seq.*

³⁵ *Sammons Commun., Inc.*, 19 FCC Rcd 12849, 12852 (2004) ¶ 12; *Comcast Cablevision of Detroit, Inc.*, 15 FCC Rcd 24022, 24032 (2000) ¶ 29; *Media General Cable of Fairfax County, Inc.*, 12 FCC Rcd 17424, 1731-32 (1997) ¶¶ 22-23.

³⁶ Supplemental Filing, Attachment C, *supra* note 21.

³⁷ Letter, *supra* note 5, at 1.

³⁸ *Id.*

³⁹ *Id.* The Letter, at *id.*, refers to “additional outlets” and the Opposition (at 2) speaks of “converter box[es]” and “remote control device[s].” We presume that the former reference is to *digital* additional outlets, because Adelphia does not charge for analog additional outlets. Supplemental Filing, Attachment C, *supra* note 21, at 2. More broadly, we understand that the dispute the parties wish us to resolve concerns only matters associated with the digital tier.

⁴⁰ *See Revisions to Cable Television Rate Regulation*, 17 FCC Rcd 11550, 11567 (2002) ¶ 45 (“As a practical matter, because there is a statutory requirement that all subscribers receive basic tier service, virtually all equipment used for the receipt of video service has been regarded as associated with the basic tier of service.”); *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5806-07 (1993) ¶ 283.

equipment associated with the digital tier of Adelphia's cable service; provided, however, that the aforementioned undercharges do not include its charges for digital additional outlets.⁴¹

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Appeal filed by Century Enterprise Cable Corporation in CSB-A-0721 and CSB-A-0722 **IS GRANTED** to the extent indicated above and **IS REMANDED** for further consideration consistent with this Order.

14. This action is taken pursuant to authority delegated by Section 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

⁴¹ In so ruling, we are granting in part and denying in part the City's request that we instruct it "either to include the entire \$6.50 bundled equipment fee in the refund calculation or exclude the entire fee." Opposition at 5. The \$6.50 fee in question is for a bundle that is stated on Adelphia's 2003-04 Rate Card and consists of "Additional Outlets (Digital Receiver, Remote Control and Service Fee)." Opposition, Attachment A.