

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

In the Matter of	)	
	)	
Time Warner Cable	)	
	)	CSB-A-0691
Appeals of Local Rate Orders of	)	CSB-A-0706
Durham County, NC	)	
CUID Nos. NC0343, NC0650	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 3, 2004**

**Released: August 5, 2004**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Time Warner Cable (“TWC”), the franchised cable operator in Durham County, North Carolina, has appealed two local rate orders of the Board of County Commissioners of Durham County, North Carolina (the “County”) directing TWC to rescind January 1, 2003 and January 1, 2004 basic service tier (“BST”) and equipment and installation rate adjustments. The rate orders were adopted May 12, 2003 (“2003 Rate Order”) and February 9, 2004 (“2004 Rate Order”), respectively. TWC asks the Commission to consolidate these proceedings, vacate these rate orders, rescind the County’s certification to regulate rates, and assess costs against the County, including attorneys’ fees. The County has opposed TWC’s appeals, and TWC has replied. Because the parties are identical and the issues similar, we are consolidating these proceedings in the interest of administrative efficiency. For the reasons set forth herein, we conclude that the rate orders are not reasonable exercises of the County’s authority to regulate rates and remand the rate orders for further proceedings. We deny TWC’s requests for decertification and costs.

**II. BACKGROUND**

2. Rate orders issued by a franchising authority may be appealed to the Commission.<sup>1</sup> In ruling on appeals, the Commission will not conduct a de novo review, but instead will sustain the franchising authority’s decision as long as there is a reasonable basis for that decision.<sup>2</sup> The Commission will reverse a franchising authority’s decision only if it determines that the franchising authority acted

<sup>1</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944(b).

<sup>2</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5731 ¶ 149 (1993); 9 FCC Rcd 4316, 4346 ¶ 81 (1994).

unreasonably in applying the Commission's rules.<sup>3</sup> 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.<sup>4</sup>

### III. DISCUSSION

3. In its 2003 Rate Order, the County addressed BST and equipment rates for two parts of the county identified as separate community units. Asserting responsibility to ensure that "cable rate levels are equivalent to rates that would be charged in the presence of effective competition,"<sup>5</sup> the County ordered that TWC's maximum permitted BST rate and network upgrade add-on rate for each community unit are "unreasonable" and that "Time Warner may charge a combined 'selected' BST rate below the last approved maximum permitted rate, but not above it."<sup>6</sup> The County found that TWC may base its installation rates on its regional hourly service charge rate, but not above it, and ordered that TWC's equipment, installation, and hourly service charge rates "are unreasonable and are not equivalent to rates that would be charged in the presence of true effective competition."<sup>7</sup>

4. Before the County acted, its consultant reviewed TWC's rate calculations on FCC Form 1240, the rate form for computing annual BST rate adjustments.<sup>8</sup> The consultant stated that TWC's selected BST rates for the two community units fell below the maximum permitted rates, including the network upgrade add-on computed on FCC Form 1235.<sup>9</sup> The consultant also stated that the amount of the network upgrade add-on was equal to the add-on rate previously approved.<sup>10</sup> The consultant nevertheless advised that the rates were unreasonable and should be rejected because, on a per-channel basis, they were not equivalent to rates for other TWC systems facing effective competition in five Texas and Ohio communities.<sup>11</sup> Comparing TWC's installation rates to the rates in four of these communities and stating that regional FCC Form 1205 filings are preferable to filings based on company-wide aggregated data, the consultant advised that TWC's Durham County installation rates were unreasonable.<sup>12</sup> FCC Form 1205 is

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Durham County, NC, Review of FCC 1240 Annual Rate Adjustment Request, FCC 1235 Abbreviated Cost of Service Rate Request, and FCC 1205 Equipment and Installation Rate Request filed by Time Warner Cable, at 1 (May 12, 2003), TWC 2003 Appeal, Ex. A.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

<sup>8</sup> Action Audits, LLC, Time Warner Cable Service Rate Report, at 1, 9-11 (Apr. 25, 2003), TWC 2003 Appeal, Ex. B.

<sup>9</sup> *Id.* at 1.

<sup>10</sup> *Id.* at 11-12. The network upgrade add-on is not recomputed or re-approved each year that it is available to the cable operator.

<sup>11</sup> *Id.* at 3, 14-15, 17. The rates of effective competition systems were based on "anecdotal evidence" drawn from contacts with TWC customer service representatives in April 2003. *Id.* at 14, 15 n.4.

<sup>12</sup> *Id.* at 14, 16, 17.

used for computing equipment and installation rates and, pursuant to the Communications Act, may be completed based on costs aggregated at the franchise, system, regional, or company level.<sup>13</sup>

5. In its 2004 Rate Order, the County again ordered TWC to charge combined BST and network upgrade add-on rates “below its last approved maximum permitted rate, but not above it,”<sup>14</sup> and found that TWC may base its installation rates on a regional hourly service charge rate, but not above it.<sup>15</sup> The County relied on a report and recommendation from its consultant.<sup>16</sup> The County’s consultant compared TWC’s 2004 Durham County rates to the same 2003 Texas- and Ohio-community per channel and installation rates used in the 2003 Consulting Report and again advised the County to reject TWC’s rates as unreasonable because they do not reflect effective competition.<sup>17</sup> The consultant also stated that TWC’s combined selected BST and add-on rates for each community unit were less than the maximum permitted combined BST and network upgrade add-on rates for the community units.<sup>18</sup>

6. TWC challenges the County’s 2003 and 2004 Rate Orders as inconsistent with the Commission’s rules and precedent, arguing that franchising authorities may not base rate decisions on matters extrinsic to the Commission’s rate rules and forms. We agree.

7. The Communications Act is clear that, in the absence of effective competition,<sup>19</sup> a franchising authority may regulate rates “only to the extent provided” in section 623 of the Act.<sup>20</sup> Section 623 preserves franchising authority to regulate BST and associated equipment rates only if the franchising authority regulates rates “in accordance with the regulations prescribed by the Commission.”<sup>21</sup> Although the County argues that its approach is consistent with the statutory intent to model regulated rates on the rates charged in systems subject to effective competition,<sup>22</sup> the Commission has exclusive authority to prescribe the ratemaking methodology for meeting statutory criteria.<sup>23</sup> The County’s regulatory authority over BST and associated equipment rates is limited to applying the rate regulations prescribed by the Commission, including any “formulas or other mechanisms” adopted by the Commission through its rate forms.<sup>24</sup> If, after reviewing the operator’s rate forms and any supporting information, the County

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<sup>13</sup> See 47 U.S.C. § 543(a)(7)(A); 47 C.F.R. § 76.923(c)(1), (3).

<sup>14</sup> Durham County, NC, Review of FCC Form 1240 Annual Rate Adjustment Request, FCC Form 1235 Abbreviated Cost of Service Rate Request, and FCC 1205 Equipment and Installation Rate Request filed by Time Warner Cable, at 2-3 (Feb. 9, 2004), TWC 2004 Appeal, Ex. A.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> Action Audits, LLC, Durham County, NC-0343 and NC-0650, Review of Time Warner Cable FCC1240 and FCC1205 2004 Rate Filings, at 9-11, 20 (Dec. 31, 2003), TWC 2004 Appeal, Ex. A.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> TWC has also sought a determination that it is subject to effective competition in Durham County. Time Warner Cable, Petition for Special Relief, CSR 5940-E (filed July 1, 2002). That petition is pending.

<sup>20</sup> 47 U.S.C. § 543(a)(1).

<sup>21</sup> *Id.* § 543(a)(2)(A), (3).

<sup>22</sup> County 2003 Opposition at 11-12; County 2004 Opposition at 5.

<sup>23</sup> *Id.* § 543(b)(1)-(2).

<sup>24</sup> *Id.* § 543(a)(2)(a), (3), (b)(2)(B).

determines that the operator's proposed rates exceed the maximum permitted rates as determined by the Commission's rules, it may prescribe rates different from the proposed rates, provided that it explains in writing why the operator's rate is unreasonable and the prescribed rate is reasonable under the Commission's rules.<sup>25</sup> If the County does not dispute the bases for the figures in the operator's rate forms and has not discovered any mathematical errors in the forms, it should approve the operator's rates as derived from the forms. The magnitude of a rate increase is not determinative,<sup>26</sup> and the County may not require the cable operator to charge less than the maximum permitted rates derived from the rate forms. The County's denial of the proposed rates based on considerations other than the Commission's rules and rate forms, including rates charged in other communities, is outside its regulatory authority and is not reasonable.<sup>27</sup>

8. Because the County did not act reasonably in its 2003 and 2004 rate orders denying TWC's proposed BST and installation rates for Durham County, we are remanding the County's 2003 and 2004 rate orders for further action consistent with the Commission's rules and rate forms and this decision. We remind the County that it may not enforce rate order provisions found to be unreasonable by the Commission. We are confident that, with the guidance in this decision, the County will follow the Commission's rules and rate forms,<sup>28</sup> so we are denying TWC's requests for extraordinary relief and will not revoke the County's certification to regulate BST and associated equipment rates or impose sanctions on the County.

#### IV. CONCLUSION

9. Accordingly, IT IS ORDERED that Time Warner Cable's Appeal of Local Rate Order filed June 11, 2003 IS GRANTED, its Petition to Revoke Certification and Request for Assessment of Costs IS DENIED, and the May 12, 2003 Rate Order of the Durham Board of County Commissioners IS REMANDED for further consideration consistent with this Memorandum Opinion and Order.

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<sup>25</sup> E.g., *TCI Cablevision of California, Inc.*, 14 FCC Rcd 7897 (Cab. Serv. Bur. 1999) (Pacifica, CA); *Paragon Communications*, 13 FCC Rcd 19557 (Cab. Serv. Bur. 1998) (Palestine, TX).

<sup>26</sup> See *Time Warner Cable*, 18 FCC Rcd 738, 743 ¶ 10 (Med. Bur. 2003) (Smithfield, NC). Even if the magnitude of a rate increase causes the franchising authority to examine it carefully, the franchising authority may not reject a rate increase because of its magnitude if the proposed rate is otherwise at or below the maximum permitted rate determined from the Commission's rate rules and forms. See *TCI of Richardson, Inc.*, 14 FCC Rcd 11700, 11709 ¶ 23 (Cab. Serv. Bur. 1999).

<sup>27</sup> See *Westmarc Cable Holding, Inc.*, 14 FCC Rcd 2110 at ¶ 5 (Cab. Serv. Bur. 1999) (denying a proposed rate increase on the basis that there should be rate comparability with other communities is not adequate). See also *supra* n.25. If the County believes that the Commission's rules and rate forms no longer provide for rates consistent with the statutory standards, it may seek a change in those rules and rate forms, but it may not unilaterally impose its own rate-making approach. See generally *Revisions to Cable Television Rate Regulations*, 17 FCC Rcd 11550 (2002) (MB Docket No. 02-144), a Notice of Proposed Rulemaking seeking comment on revisions to the Commission's current rate rules.

<sup>28</sup> To be certified to regulate rates, the County had to certify that it would adopt and administer regulations with respect to BST rates that are consistent with the regulations prescribed by the Commission for regulation of the BST. See 47 U.S.C. § 543(a)(3)(A); 47 C.F.R. § 76.910(b)(1).

10. IT IS FURTHER ORDERED that Time Warner Cable's Appeal of Local Rate Order filed March 8, 2004 IS GRANTED, its Petition to Revoke Certification and Request for Assessment of Costs IS DENIED, and the February 9, 2004 Rate Order of the Durham Board of County Commissioners IS REMANDED for further consideration consistent with this Memorandum Opinion and Order.

11. 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  
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