

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)	DA 95-559
)	
TCI CABLEVISION OF)	
OHIO, INC.)	
)	
Appeal of Local)	
Rate Order of City of)	
Newton Falls, Ohio)	

ORDER

Adopted: March 20, 1995

Released: March 22, 1995

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On May 18, 1994, TCI Cablevision of Ohio, Inc. ("TCI"), filed an Appeal of Local Cable Rate Order, adopted on April 11, 1994 by its local franchising authority, the City of Newton Falls, Ohio ("the City"). The City opposes TCI's appeal.¹ The Rate Order established a new regulated rate schedule for TCI's basic service tier rates and associated equipment.² Specifically, the City's Rate Order requires TCI to implement certain rate reductions and to issue refunds to subscribers for overcharges levied for the time period from September 1, 1993 to no later than July 14, 1994.

2. In its review of TCI's Form 393, the City adopted TCI's maximum permitted rate for its basic service tier, but ordered TCI to keep its rates for equipment and installation at the current levels, rather than at the higher, maximum permitted levels.³ TCI argues that

¹ The City filed its opposition on June 1, 1994 to which TCI filed a reply on June 3, 1994.

² Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. See Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b) (1992).

³ The City reduced TCI's current rate of \$10.04 for its basic service tier was to the maximum permitted rate of \$9.86. On the Cover Sheet (Part I) of its Form 393, TCI's actual rates for all regulated equipment and installations are below the maximum permitted

because of this misapplication of the Commission's rate regulations, the City has improperly reduced TCI's regulated revenues by setting its rates for equipment and installation below the levels permitted under the benchmark regime and has imposed a refund liability that is greater than the level allowed under our rules.⁴ TCI argues that it should be permitted to offset its refund liability for its basic service tier rate with its undercharges for equipment and installation rates.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.⁵ 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 there is a reasonable basis for that decision.⁶ Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.⁷ 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.⁸

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installation were reasonable

the charge for changing tiers is the same for both rates. The City set TCI's rates for equipment and installations at the lower, actual rate rather than the higher, maximum permitted rate.

⁴ The City amended its rate order to enable TCI to charge equipment and installation rates up to the maximum permitted rates identified on TCI's Form 393. The amended rate order still does not allow TCI to offset basic service overcharges with equipment and installation undercharges.

⁵ See 47 C.F.R. § 76.944 (1993).

⁶ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) ("*Third Recon. Order*").

⁷ *Id.*

⁸ *Id.*

during the time period from September 1, 1993 until May 14, 1994.⁹ 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 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 charged during the period of review.

5. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial date of regulation ("current rate") or as of September 30, 1992.¹⁰ After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate is below the applicable benchmark rate, then the operator's rate is deemed reasonable, but it must remain at its current level. If its current per-channel rate exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate to the applicable benchmark rate. If its September 30, 1992 per-channel rate is above the benchmark rate, it must reduce this rate to the benchmark rate or by 10%, whichever reduction is less. The adjusted rate will be its maximum permitted rate for programming. Maximum permitted rates for equipment and installation are based on actual cost and are calculated in Part III of the Form 393. Equipment rates are derived from capital and maintenance costs per unit of equipment. Installation rates are derived from the calculation of a hourly service charge and application of that charge to different types of installations. Under our regulations, the maximum permitted rates are deemed to be reasonable, as required by the 1992 Cable Act.¹¹ Requiring cable operators to set all or some of their rates for programming, equipment or installation below their maximum permitted levels would force them to charge rates at levels below those specifically allowed

⁹ To the extent that an operator has sought to take advantage of the refund deferral period available under Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

¹⁰ An operator must calculate its rate in effect on September 30, 1992, only if its current rate is above the benchmark rate. If an operator's current rate is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

¹¹ See Communications Act, § 623(b). 47 U.S.C. § 543(b) (1992).

under our rules.¹²

6. If a franchising authority does not dispute the bases for the figures presented in a cable operator's Form 393 or has not discovered any mathematical errors in the form, the franchising authority should then approve the operator's maximum permitted rates, as derived by the form. A franchising authority should not require the operator to set a particular rate for programming, equipment or installation at any rate less than its maximum permitted rate, even if its current or actual rate is below its maximum permitted rate. Instead, the franchising authority should allow the operator to charge up to its maximum permitted rates, as derived by Form 393.¹³ In this proceeding, unless the City disputes either the validity of the figures used in TCI's Form 393 or the accuracy of the calculations in the form, the City should allow TCI to charge its maximum permitted rates, as derived by the Form 393.

7. After setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.¹⁴ If an operator's aggregate revenues computed from its actual rates exceeded its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.¹⁵ If the operator's aggregate revenues computed from its permitted rates exceeded its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

8. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when

¹² If a franchising authority required an operator to set its rates for equipment and installation below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installation at levels below actual cost.

¹³ An operator is not required, however, to raise its rates to the maximum permitted level. An operator may voluntarily choose to charge less than the maximum permitted rate.

¹⁴ See 47 C.F.R. § 76.942 (1993).

¹⁵ See *Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s).").

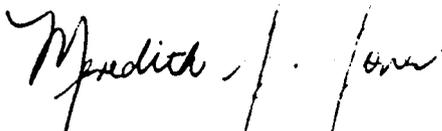
calculating an operator's refund liability.¹⁶ For instance, in this case, the City may not order TCI to set its equipment and installation rates below maximum permitted levels. Further, the City must offset or reduce any refunds it may order by the difference between the actual equipment and installation rates that TCI charged and the maximum permitted rates that it could have charged during the applicable period of review.¹⁷ According to TCI, the City has directed TCI to charge less than its maximum permitted levels for certain components of its regulated service and to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can reconsider its ruling in a manner consistent with our findings.¹⁸

III. ORDERING CLAUSE

9. Accordingly, **IT IS ORDERED** that TCI's appeal of the City of Newton Falls' local Rate Order **IS REMANDED** to the local franchising authority for resolution in accordance with the terms of this Order.

10. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION


Meredith J. Jones
Chief, Cable Services Bureau

¹⁶ See *Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

¹⁷ See *Third Recon. Order*, 9 FCC Rcd at 4353.

¹⁸ See *TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY)*, DA 94-1479 (Cable Services Bureau, released December 14, 1994).