

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

DA 95-742

In the Matter of	)	Darien, CT
	)	Easton, CT
CABLEVISION OF CONNECTICUT,	)	Greenwich, CT
LIMITED PARTNERSHIP	)	New Canaan, CT
	)	Norwalk, CT
	)	Redding, CT
Appeal of Local Rate Order of the	)	Stamford, CT
Connecticut Department of	)	Weston, CT
Public Utility Control	)	Westport, CT
	)	Wilton, CT
Request for Stay)	
of Local Rate Order of the)	
Connecticut Department of)	
Public Utility Control)	

ORDER

Adopted: April 4, 1995;

Released: April 7, 1995

By the Chief, Cable Services Bureau:

I. Introduction

1. On October 31, 1994, Cablevision of Connecticut, Limited Partnership ("Cablevision"), filed a Petition for Review ("Appeal") of a local rate order of the Connecticut Department of Public Utility Control ("DPUC"), dated August 17, 1994, and served on Cablevision on August 23, 1994, for the communities of Darien, Easton, Greenwich, New Canaan, Norwalk, Redding, Stamford, Weston, Westport, and Wilton.¹ On October 31, 1994, Cablevision also filed a Request for Stay of the local rate order.²

¹ The DPUC filed an Opposition to Cablevision's Appeal ("Opposition") on November 21, 1994. Cablevision filed a Reply ("Reply") to the DPUC's Opposition on November 30, 1994.

² In light of the ruling on Cablevision's Appeal herein, Cablevision's Request for Stay is rendered moot and is dismissed.

2. In the local rate order, the DPUC established regulated rates for Cablevision's basic cable service and associated equipment, pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").³ The DPUC also ordered Cablevision to issue refunds or credits to subscribers for those charges collected between September 1, 1993 and July 14, 1994, which were in excess of Cablevision's maximum permitted rates.

3. In its Appeal, Cablevision challenges only that portion of the local rate order in which the DPUC reduced Cablevision's benchmark per channel rate on Line 121 of FCC Form 393 from \$0.510, which Cablevision derived by interpolation from the Commission's benchmark tables, to \$0.508, which the DPUC calculated using the Commission's benchmark formula.⁴ This change resulted in a reduction of Cablevision's maximum permitted rate for basic service from \$10.32 per month to \$10.28 per month. Cablevision contends that it is entitled to use either the benchmark tables or the benchmark formula to calculate its benchmark per channel rate, and that the DPUC erred when it did not allow Cablevision to interpolate its per channel rate from the benchmark tables contained in FCC Form 393. Accordingly, Cablevision requests that the Local Rate Order be modified (1) to allow Cablevision to use the value of \$0.510 as its benchmark per channel rate on Line 121 of FCC Form 393; and (2) to set its maximum permitted rate for basic service at \$10.32 per month.

4. In its opposition, the DPUC submits that Cablevision's Appeal should be considered untimely filed since it was not filed with the Commission within thirty (30) days of the release of the local rate order.⁵ In reply, Cablevision asserts that the DPUC's argument is without merit, since any delays in the filing of Cablevision's Appeal were wholly the result of the DPUC's conduct. Alternatively, Cablevision requests that the Commission waive its rules and accept as timely filed those pleadings which Cablevision has submitted in

³ Under the Cable Television Consumer Protection and Competition Act of 1992, and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment, and installations. 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).

⁴ As part of the rate review process, Cablevision submitted an FCC Form 393 ("Determination of Maximum Initial Permitted Rates for Regulated Cable Programming Services and Equipment") to the DPUC on November 15, 1993. Local franchising authorities review the information contained in the FCC Form 393, or its successor forms, in order to determine cable operators' maximum permitted rates for basic service, associated equipment, and installations under the Commission's rate regulations. See Report and Order and Further Notice of Proposed Rulemaking in MM Docket 92-266, 8 FCC Rcd 5631, 5770 (1993) ("*Rate Order*").

⁵ See 47 C.F.R. §76.944(b).

the instant proceeding.

II. Standard of Review

5. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.⁶ In ruling on an appeal of a local rate order, 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.⁷ 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 a local rate order.⁸ 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.⁹

III. Discussion

6. The parties' dispute as to whether Cablevision's Appeal was timely filed with the Commission arises from the fact that the DPUC issued a draft decision on July 27, 1994, which contained a transpositional error regarding the benchmark per-channel rate which the DPUC intended to use to calculate Cablevision's maximum permitted rate for the basic service tier.¹⁰ The DPUC's draft decision stated that the DPUC ". . . determined that the FCC benchmark is \$0.510 rather than \$0.508 filed by the Company."¹¹ It appears that the two numbers in the sentence had been inadvertently transposed. Although it did not acknowledge that it had inadvertently transposed the two benchmark figures in the draft decision, the DPUC corrected its error in the local rate order, which was served on Cablevision on August 23, 1994, and in which it stated that it had ". . . determined that the FCC benchmark is \$0.508 . . . rather than \$0.510 filed by the Company."¹²

⁶ 47 C.F.R. §76.944.

⁷ *Rate Order*, 8 FCC Rcd at 5731; Third Order on Reconsideration in MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994).

⁸ *Id.*

⁹ *Id.*

¹⁰ See Draft decision at 9.

¹¹ *Id.*

¹² Local rate order at 11.

7. On August 30, 1994, Cablevision submitted a refund plan to the DPUC.¹³ In a cover letter accompanying its refund plan, Cablevision raised the issue of the divergent benchmark figures in the draft decision and the local rate order. Cablevision informed the DPUC that it believed the lower benchmark figure in the local rate order to be a transpositional error, and therefore, Cablevision intended to calculate its refund liability based upon the higher benchmark figure contained in the draft decision. Cablevision also stated in its pleadings that it advised the DPUC's Docket Coordinator of the situation in order to ensure that the DPUC "was fully apprised of the issues raised by this apparent transpositional error."¹⁴ The DPUC did not respond to Cablevision until October 5, 1994, at which time it issued a written response to Cablevision's refund plan. As part of this response, the DPUC noted that the draft decision, and not the local rate order, had incorrectly transposed the DPUC's and Cablevision's benchmark figures. Cablevision thus contends that the time for filing an appeal of the local rate order did not begin to run until October 5, 1994, for it was not until this time that Cablevision had a basis for believing that the local rate order was "unfair or contrary to the 1992 Cable Act." The DPUC contends, however, that Cablevision is merely attempting to "bootstrap its late appeal by reference to the Department's October 5, 1994 letter which was issued in response to the filing of Cablevision's refund plan."¹⁵

8. Although there was unquestionably a discrepancy between the benchmark figures cited by the DPUC in its draft decision and its local rate order, Cablevision should have filed an appeal of the DPUC's local rate order with the Commission within the required thirty-day period. Where a discrepancy exists between a franchising authority's draft decision and its local rate order, an operator must assume that the local rate order is correct until it is proven otherwise. A local rate order carries with it the force of law, unlike a draft decision, which may simply be designed to give interested parties an opportunity to review and comment upon the franchising authority's proposed rate order, as then drafted. In addition, the fact that the DPUC had mistakenly transposed Cablevision's and the DPUC's benchmark figures in the draft decision was plain on its face. Cablevision should have realized that the draft decision did not cite the correct benchmark figure which Cablevision had submitted on its FCC Form 393. Furthermore, in Attachment A to the local rate order, the DPUC set forth the calculations, using the FCC benchmark formula, which it used to determine Cablevision's benchmark per-channel rate for its basic service tier. This calculation clearly resulted in a benchmark per-channel rate of \$0.508, not the \$0.510 figure which Cablevision claims the DPUC intended to use. Accordingly, a careful reading of the draft decision and the local rate order should have put Cablevision on notice that the DPUC

¹³ In its local rate order, the DPUC ordered Cablevision to refund to subscribers any equipment and installation overcharges applicable to the period of time between September 1, 1993 and July 14, 1994.

¹⁴ Reply at 3.

¹⁵ Opposition at 3.

had transposed the benchmark figures in the draft decision, not in the local rate order.

9. The Commission permits an operator to file a late pleading, including appeals from local rate orders under the 1992 Cable Act, only upon a showing of good cause.¹⁶ In order to establish good cause, Cablevision must demonstrate that something beyond its control which could not have been foreseen, and for which no corrective action could have been taken, prevented it from meeting the deadline.¹⁷ Cablevision has not established the necessary good cause under the Commission's standard. Cablevision could have filed an appeal of the DPUC's local rate order within the Commission's thirty-day deadline, but failed to do so.¹⁸

10. Under the Commission's rules, any participant in a ratemaking proceeding at the franchising authority level may file an appeal of the franchising authority's rate decision with the Commission within 30 days of the release of the text of the franchising authority's decision.¹⁹ In the instant proceeding, Cablevision filed its Appeal with the Commission 39 days after the deadline for the submission of its Appeal. The time for the filing of Cablevision's Appeal began to run on August 23, 1995, the release date of the local rate order, not on October 5, 1994, as Cablevision asserts. The issue which Cablevision is appealing arises in the local rate order, not in the DPUC's October 5, 1994 letter. Cablevision's Appeal was not timely filed under our rules. In an alternative argument, Cablevision requests that we waive our rules and accept its pleadings in the instant case as timely-filed. The DPUC did not file an opposition to this request. The Commission may, upon petition from an interested party, waive any provision of its rules relating to cable

¹⁶ See *In the Matter of Meredith/New Heritage Strategic Partners, L.P.*, 9 FCC Rcd 6841 (1994) ("*Meredith/New Heritage*").

¹⁷ See *Meredith/New Heritage*, 9 FCC Rcd at 6843.

¹⁸ In fact, as it points out in its pleadings, Cablevision could have easily consolidated its Appeal in this instance with its appeal in the communities of Bridgeport, Ct., et al. See, *Cablevision Systems of Southern Connecticut*, DA 95-58 (Cab. Serv. Bur., released January 19, 1995) ("*Cablevision of Southern Connecticut*"). The Bridgeport appeal was also from an August 23, 1994 local rate order of the DPUC, and it presented the same single substantive issue as is presented in the instant case, *i.e.*, whether the DPUC could properly substitute its calculation of Cablevision's benchmark per-channel rate, using the FCC benchmark formula, for Cablevision's calculation of its benchmark per-channel rate, which it derived by interpolation from the benchmark tables attached to FCC Form 393. In *Cablevision of Southern Connecticut*, the Bureau determined that it was Cablevision's option as to which methodology it employed to calculate its benchmark per-channel rate.

¹⁹ 47 C.F.R. § 76.944(b).

television systems.²⁰ However, as noted in paragraph 9 above, Cablevision has not established the requisite good cause for the late filing of its Appeal. We, therefore, deny Cablevision's request for a waiver of our rules.

IV. Ordering Clauses

11. Accordingly, **IT IS ORDERED** that the Appeal filed by Cablevision of Connecticut, Limited Partnership is **DISMISSED**.

12. **IT IS FURTHER ORDERED** that the request for a waiver of Section 76.944(b) of the Commission's rules filed by Cablevision of Connecticut, Limited Partnership is **DENIED**.

13. **IT IS FURTHER ORDERED** that, in light of the dismissal of its Appeal, the Request for Stay filed by Cablevision of Connecticut, Limited Partnership is **DISMISSED** as moot.

14. 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.

FEDERAL COMMUNICATIONS COMMISSION


Meredith J. Jones
Chief, Cable Services Bureau

²⁰ 47 C.F.R. §76.7(a)(1).