

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

In the Matter of )  
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TCI-TKR of Northern Kentucky, Inc )  
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d/b/a TKR Cable of Northern Kentucky )  
 )  
Appeals of Local Rate Orders )

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 10, 1996**

**Released: December 13, 1996**

By the Chief, Cable Services Bureau:

**I. INTRODUCTION.**

1. By this Order, we consolidate two proceedings and rule on the merits in each.<sup>1</sup> In deciding this appeal, the Bureau has reviewed all the pleadings filed in each of the proceedings. We have determined that the two proceedings are sufficiently similar and related to one another to justify the joint resolution of all the issues raised by each of the concerned parties in one consolidated proceeding.

2. On July 28, 1995, TCI-TKR of Northern Kentucky, Inc. ("TKR") filed an appeal of three local rate orders adopted on June 28, 1995, by its franchising authority, the Kenton/Boone Counties Cable Television Board ("Board").<sup>2</sup> The Board's three rate orders cover four different rate submissions filed by TKR. Resolution 95-006 addresses TKR's Forms 1200 and 1210 filed on July 1, 1994. Resolution 95-004 addresses TKR's Form 1205, also filed on July 1, 1994. Resolution 95-005 addresses TKR's Form 1210 filed on October 26, 1994. In each local rate order, the Board established regulated rates for basic cable service and associated equipment provided by TKR, as allowed by the Cable Television Consumer Protection and

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<sup>1</sup>TCI-TKR filed two separate appeals. The first appeal concerned the Board's three local orders adopted on July 28, 1995. The second appeal concerned the local order adopted by the Board on December 15, 1995.

<sup>2</sup>Along with its July 28, 1995 appeal, TKR also filed a petition for stay. Because we are resolving the appeal on the merits, TKR's petition for stay is dismissed as moot.

Competition Act of 1992 ("1992 Cable Act").<sup>3</sup> In resolution 95-006, the Board established TKR's basic service tier rates; in resolution 95-005, the Board reduced the TKR's basic service tier rate; and in resolution 95-004, the Board reduced TKR's monthly converter charge. Each local order also requires TKR to issue refunds to subscribers. Resolutions 95-005 and 95-004 also require TKR to implement prospective rate reductions. The Board filed an Opposition to TKR's appeal on August 7, 1995.

3. In its July 28, 1995 appeal, TKR challenges the Board's rate order with respect to the following issues. First, TKR states that the Board failed to issue tolling orders and failed to issue timely accounting orders, as required by Commission rules if additional time is needed by the local authority to review a rate form. Thus, TKR alleges that the Board did not have the authority to order refunds. Second, TKR alleges that the Board's rate order does not provide a rational basis for its decision.

4. On December 15, 1995, TKR filed an appeal of a local rate order adopted by the Board on November 15, 1995.<sup>4</sup> The Board filed an opposition on January 16, 1996. In its November 15, 1995 rate order, the Board disapproved TKR's August 30, 1995 Form 1210 and ordered TKR to reduce its rates immediately.

5. In its December 15, 1995 appeal, TKR contends that the Board wrongfully decided matters beyond the local authority's jurisdiction by reviewing a courtesy copy of TKR's August 30, 1995 Form 1210 filed with the Commission to support a cable programming service tier rate increase. TKR further contends that the Board implicitly approved the operator's Basic Programming Service Tier Form 1210 rates. The Board, in response, explains that it reviewed TKR's August 30, 1995 Form 1210 and ordered basic service tier programming rate reductions in order not to "waive" its prior rate orders which reduced TKR's basic service tier rates due to TKR's allegedly incorrect external cost treatment of its public service property tax."<sup>5</sup>

## II. STANDARD OF REVIEW.

6. Under the Commission's rules, appeals of franchising authorities' local rate orders

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<sup>3</sup>Under the 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. 1002-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1992).

<sup>4</sup>Along with its December 15, 1995 appeal, TKR also filed a petition for stay. Because we are resolving the appeal on the merits, TKR's petition for stay is dismissed as moot.

<sup>5</sup>The Bureau addressed the issue of TKR's treatment of the Kentucky public service property tax in TCI-TKR of Northern Kentucky, Inc. d/b/a TKR Cable of Northern Kentucky (Kenton/Boone, Kentucky), 11 FCC Rcd 9816, 9819-22 (Cab. Serv. Bur. 1996). In lieu of a corporate tax, the Commonwealth of Kentucky requires cable operators to pay a public service corporation property tax based on a multiple of the operator's cash flow.

are reviewed by the Commission.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</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>9</sup>

### III. BACKGROUND.

7. TKR's July 28 and December 15, 1995 appeals involve the Board's review of its Forms 1200, 1205 and 1210. FCC Form 1200 is the official form used to determine whether initial regulated rates for programming are reasonable under the revised benchmark rules which apply to operators beginning May 15, 1994, or upon the expiration of the deferral period provided under our rules for operators to comply with the revisions to our rules.<sup>10</sup> Through the use of Form 1200, an operator generally calculates three sets of figures: (1) the operator's actual March 31, 1994 rate level; (2) the operator's March 31, 1994 benchmark rate level; and (3) the operator's "full reduction" rate level. These figures are used to derive an operator's maximum initial permitted rates.

8. The operator first completes Module A of the Form 1200 to calculate its March 31, 1994 per subscriber monthly regulated revenue. Next, the operator completes Module B to calculate changes in external costs which the operator is entitled to reflect in its rates but have not yet been passed through to its subscribers. In Module C the operator enters its data with respect to a number of variables to calculate its March 31, 1994 benchmark rate level on a per subscriber, per month basis. The operator's March 31, 1994 actual rate level (Module A plus external costs calculated in Module B) is then compared to the benchmark rate level derived in

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<sup>6</sup>47 C.F.R. § 76.944.

<sup>7</sup>Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); *see also* 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, 4341 (1994) ("*Third Recon. Order*").

<sup>8</sup>*Id.*

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

<sup>10</sup>*See* 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, Second Order on Reconsideration, Fourth Report and Order, Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) ("*Second Recon. Order*").

Module C, with the operator carrying forward the smaller of the two. If the March 31, 1994 actual rate level is smaller, the operator completes Module D, subtracting the monthly per subscriber equipment cost calculated in Form 1205 and adding external costs calculated from Module B. If the benchmark rate level is smaller, the operator completes Module E, subtracting the monthly per subscriber equipment cost taken from Form 1205. Depending on which is used, either Module D or E establishes per-tier rates, which the operator carries forward into Module F, as its so-called provisional rates.<sup>10</sup>

9. In the second part of Form 1200, the operator derives its full reduction rate based on its September 30, 1992 rates. To compute this rate, in Module G, the operator calculates its September 30, 1992 total monthly regulated revenues per subscriber, reduces that amount by 17%, and adjusts upward by 3% to reflect the inflation from September 30, 1992 until September 30, 1993. In Module H, the operator then adjusts the results from Module G for changes since September 30, 1992 with respect to subscribers, regulated channels, and satellite channels. In Module I, the operator subtracts a monthly per subscriber equipment cost amount from Form 1205, establishes per-tier rates, and adjusts for changes in external costs. In Module J, the operator compares its aggregate provisional rate with its aggregate full reduction rate. The maximum permitted rates an operator is actually allowed to charge are either the provisional rates (Module F) or the full reduction rates (Module I), depending on whether the aggregate provisional rate is greater or less than the aggregate full reduction rate, and are entered into Module K. In addition to Form 1200, an operator may file Form 1210, up to quarterly, to claim changes in external costs and inflation that justify rate increases.

10. FCC Form 1205 is the official form used to determine the costs of regulated cable equipment and installation.<sup>11</sup> Form 1205 has two distinct uses. First, Form 1205 is submitted along with a Form 1200 and is used to establish equipment and installation costs in determining initial rates for regulated cable services. These equipment and installation costs are converted to a monthly per subscriber cost that is subtracted from figures derived from programming and equipment revenues in the Form 1200 in order to determine maximum permitted programming service rates. In following the mathematical principles embodied in these calculations, lower equipment basket costs lead to higher programming rates, while higher equipment basket costs lead to lower programming rates.

11. The second use for Form 1205 is to update permitted regulated equipment and

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<sup>10</sup>At the time of the local rate order, a so-called "small operator" could elect "transition relief," which allowed it to keep its regulated revenue at its March 31, 1994 levels, and so was not required to complete its benchmark in Module C and its provisional rates were determined by completion of Module D. Pursuant to the Commission's Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393 (1995) ("*Small Systems Order*"), small systems eventually will have to convert to some other form of regulation, *i.e.*, by establishing rates in accordance with our benchmark or cost-of-service rules (the latter of which include the small system cost-of-service regulations adopted in the *Small Systems Order*).

<sup>11</sup>See FCC Form 1205.

installation charges based on equipment basket costs. Higher equipment basket costs on Form 1205 (resulting in lower programming rates on Form 1200) correlate with higher equipment and installation rates. Conversely, lower equipment basket costs on Form 1205 (resulting in higher programming rates on Form 1200) correlate with lower equipment and installation rates.

12. Form 1210 is the official form an operator uses to justify adjustments in the rates it computed on its FCC Form 1200, which is used to establish an operator's initial maximum permitted rates, or on a previously filed Form 1210.<sup>12</sup> In the Form 1200, an operator calculates its provisional rates and its full reduction rates. An operator's initial maximum permitted rates are the higher of the two. An operator may file a Form 1210 to adjust its rates to reflect changes in external costs, channel additions and deletions, and inflation.<sup>13</sup> External costs include the following categories of costs: state and local taxes specifically applicable to the provision of cable television service; franchise fees; costs of complying with franchise requirements; retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; other programming costs; and Commission regulatory fees.<sup>14</sup> An operator may file for changes in external costs for the period beginning at the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the Form 1210.<sup>15</sup> An operator may file a Form 1210 up to quarterly, but must file in the quarter following a decrease in costs due to channel deletions and within a year following a decrease in other costs.<sup>16</sup> An operator must file for a rate increase within a year of the cost increase in order to recover those costs in its rates.<sup>17</sup>

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<sup>12</sup>See Second Recon. Order, 9 FCC Rcd 4119 (1994).

<sup>13</sup>At the time of TKR's filing, an operator could adjust its full reduction rates for inflation, but not its provisional rates. Since that time, however, the Commission has ruled that an operator may also adjust its provisional rates for inflation. See 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, Ninth Order on Reconsideration, 10 FCC Rcd 5198 (1995).

<sup>14</sup>47 C.F.R. § 76.922(d)(3)(iv).

<sup>15</sup>47 C.F.R. § 76.922(d)(3)(iii).

<sup>16</sup>47 C.F.R. §§ 76.922(d)(3)(i) & (ii). Inflation may only be recovered for the non-external portion of the operator's rates on an annual basis. 47 C.F.R. § 76.922(d)(2).

<sup>17</sup>47 C.F.R. § 76.922(d)(3)(i).

#### IV. DISCUSSION.

##### A. July 28, 1995 Appeal.

##### 1. Tolling Orders.

##### a. July 1, 1994 Filings (Forms 1200, 1205, and 1210).

##### 1) Positions of the Parties.

13. TKR submitted its FCC Forms 1200, 1205, and 1210 to the Board on July 1, 1994.<sup>18</sup> TKR asserts that the Board failed to issue a valid tolling order within 30 days of receipt of the forms, as required by our rules, and therefore the Board is precluded from ordering refunds and from prescribing prospective rate reductions. TKR contends that the Board's resolution tolling its review of the three forms, while adopted within the thirty day period,<sup>19</sup> was not issued until sometime after August 26, 1994.<sup>20</sup> TKR further contends that the Board's tolling order was invalid because it failed to explain why the Board could not make a rate determination within its initial 30-day review period.<sup>21</sup> Finally, TKR contends that assuming *arguendo* the Board issued a valid tolling order, the tolling order applies only to TKR's Form 1200, since the order does not refer to TKR's July 1, 1994 Forms 1205 and 1210 filings.

14. The Board states that it adopted a tolling order extending the deadline for issuance of a local rate decision at its July 21, 1994 meeting. The Board admits that the tolling order only lists only TKR's Form 1200. However, the Board contends that TKR had a representative at the meeting, and thus had knowledge that the tolling order applied not only to the Form 1200 but also to the Forms 1205 and 1210. Moreover, the Board contends that, although the tolling order does not specifically reference the July 1, 1994 Forms 1205 and 1210, these forms were filed concurrently with the Form 1200. The Board further explains that on August 24, 1994, it sent TKR a request for information which explicitly provided that the Forms 1200, 1205, and 1210

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<sup>18</sup>TKR completed its July 1, 1994 Form 1210 using data from March 31, 1994 through June 30, 1994.

<sup>19</sup>The Board adopted the resolution tolling its review period on July 21, 1994.

<sup>20</sup>TKR contends that the minutes from the July 1994 meeting containing the tolling order were not approved until August 17, 1994 and TKR did not receive a copy of the minutes until sometime after August 26, 1994. In support of its claim that the minutes were not considered "issued" until it received a copy of the minutes, TKR cites Cablevision Industries Corporation, Columbia, SC, 9 FCC Rcd 4093 (Cab. Serv. Bur. 1994) ("*Cablevision Industries*") and Cablevision of Connecticut, L.P., Darien, CT *et al.*, 11 FCC Rcd 772 (Cab. Serv. Bur. 1995) ("*Cablevision of Connecticut*").

<sup>21</sup>TKR cites the Commission's *Rate Order*, in support of its argument that the Board issued an invalid tolling order. "If the franchising authority is unable to determine whether the proposed rate complies with the Commission's reasonable rate standard, then the order tolling the effective date of the proposed rate should explain why the franchising authority could not make such a determination." *Rate Order*, 8 FCC Rcd at 5709, n.311

omitted items of information, making it impossible for the Board to confirm the accuracy of the proposed rates."<sup>22</sup>

## 2) Discussion.

15. When a cable operator files either a benchmark or cost-of-service rate justification, Commission rules provide a franchising authority 30 days in which to review the rate filing before the proposed rates become effective.<sup>23</sup> In cases involving benchmark filings (i.e., filings based on FCC Form 393 or Form 1200), a franchising authority may toll this deadline for an additional 90 days, by issuing a brief written order, if it needs more time to review the filing, which gives the franchising authority a total of 120 days to issue an order before the proposed rates go into effect.<sup>24</sup> Based on our review of the record, the Board adopted a tolling order extending the review period for TKR's Form 1200 at its July 21, 1994 Board meeting, which was within the allotted time to issue such an order. With respect to TKR's complaints regarding the substance of the tolling order, the tolling order states "the Board extends the deadline for adoption and issuance of a written rate order to a date not later than October 18, 1994." Nothing in our rules requires a local franchising authority to explain in a tolling order the reasons for extending the review period. The order need only explain that additional time is needed, as it did here. The Board, by extending the review period until October 18, 1994, indicated that it needed additional time. Accordingly, we find that the Board adopted its tolling order with respect to TKR's Form 1200 on July 21, 1994 and extended its review period for ninety days, in accordance with our rules.<sup>25</sup>

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<sup>22</sup>Opposition at Exhibit E.

<sup>23</sup>See 47 C.F.R. § 76.933(a).

<sup>24</sup>See 47 C.F.R. § 76.933(b). In the case of a cost-of-service filing, the local franchising authority may extend the review period by 150 days. *Id.* This would give the local franchising authority a total of 180 days (the original 30 days plus the additional 150 days) to review the cost-of-service filing before the proposed rates would go into effect.

<sup>25</sup>TKR argues that the release date of the local order must be the date that the operator receives a written copy of the local order. In support of this argument, TKR cites *Cablevision Industries* and *Cablevision of Connecticut*. However, we do not find the two cases cited by TKR to be persuasive. The Bureau, in *Cablevision Industries*, did not conclude that the release date of an order would always be the same as the date that the operator received a written copy of the order. Rather, the Bureau determined that the latest date that could be assigned as the release date was February 7, 1994, the date that the operator received a written copy of the appeal order. *Cablevision Industries*, 9 FCC Rcd at 4093.

*Cablevision of Connecticut* involved a discrepancy between the local authority's "draft decision" and its local rate order. *Cablevision of Connecticut*, 11 FCC Rcd at 774. In *Cablevision of Connecticut*, the Bureau concluded that where a discrepancy exists between a draft decision and a local order, the operator must assume that the local order is correct until it is proven otherwise. The Bureau based its determination on the fact that 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 drafted. Such is not the case here; at issue are final orders by the Board.

16. Based on the record, the tolling order does not make reference to the July 1, 1994 Forms 1210 or 1205. However, the three forms were filed simultaneously by TKR. TKR had a representative at the meeting and should have been aware that the tolling order covered all three filings, since it was also noted at the meeting that all of the rate filings had been sent to a consulting group for an initial review.<sup>26</sup> Accordingly, we find that the Board's failure to include the Forms 1210 or 1205 in its tolling order was harmless error. Thus, we deny TKR's appeal with respect to this issue.<sup>27</sup>

**b. November 16, 1994 Tolling Order.**

17. TKR alleges that the Board's October 26, 1994 tolling order is invalid because it extends the review period for 122 days. TKR asserts that it sent the Board the Form 1210 on October 26, 1994, yet the Board's order extended the review period until June 28, 1995.<sup>28</sup> The Board asserts that it received the Form 1210 on October 28, 1994, and in support of its position attaches a date-stamped copy of the cover letter to TKR's Form 1210 submission.<sup>29</sup> In response, TKR admits that it is confused since its Form 1210 submission is dated October 26, 1994 and the Board's rate order refers to TKR's filing as "the Form 1210 submitted October 26, 1994."<sup>30</sup> The Form 1210 is considered filed when received by the local franchising authority.<sup>31</sup> Based on our review of the record, we find that the Board received the Form 1210 on October 28, 1995, and thus properly tolled its review until February 26, 1995.<sup>32</sup>

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<sup>26</sup>August 7, 1995 Opposition, Exhibit C, July 20, 1994 Minutes at 3.

<sup>27</sup>The Board requests that the Bureau disallow TKR's further depreciation of converters, if the Bureau finds that the time period for the 1205 and 1210 was not properly tolled. As we are denying TKR's appeal on this issue, we need not reach this issue.

<sup>28</sup>TKR completed its Form 1210 dated October 26, 1994 using data from July 1, 1994 through September 30, 1994.

<sup>29</sup>Opposition at Exhibit G.

<sup>30</sup>August 21, 1995 Reply *citing* Resolution 95-005.

<sup>31</sup>In the absence of a specific regulation concerning when a rate justification is considered filed, we note that pursuant to the Commission's general rules of procedure an item is not considered filed until it is received by the regulating agency. 47 C.F.R. § 1.4(f)

<sup>32</sup>TKR also contends that the November 16, 1994 tolling order was invalid because the order does not state reasons for the Board's request for additional time. We have, however, addressed this issue, *supra* ¶ 15.

**2. Accounting Orders.****a. July 1, 1994 Forms 1200, 1205, and 1210.****1) Positions of the Parties.**

18. With respect to its July 1, 1994 filings, TKR contends that the Board failed to issue a timely accounting order. TKR notes that the Board's tolling order states that the Board extended its review period until October 18, 1994, 109 days after it received TKR's filings. TKR states that the Board adopted its accounting order on December 7, 1994 and TKR received a copy of the accounting order on December 12, 1994. TKR further asserts that its filings were not facially incomplete and that the Board's August 24, 1994 request for information merely requested clarifying information.<sup>33</sup> Thus, according to TKR, the Board could not have suspended the review period automatically while waiting for information. TKR further claims that assuming *arguendo* that its filings were facially deficient, it did not receive the Board's request for information until August 26, 1994, and the Board received TKR's response to the request on October 3, 1994. Thus, TKR argues, that assuming the review period was automatically suspended during the 38 days while the Board awaited TKR's response, and assuming that the tolling order extended the review period for the full 120 days allowed by Commission regulations, the review period ended December 6, 1994. Finally, TKR asserts that the Board's accounting order was not timely issued because TKR did not receive a copy of the accounting order until December 12, 1994.

19. The Board, in response, asserts that it should not be bound to the 109 days stated in its tolling order, but instead should be allotted the full 120 days. According to the Board, it intended to extend its review period until October 29, 1994, but due to a clerical error extended the review period merely until October 18, 1994. The Board further contends that TKR's filings were facially incomplete, thus the review period was automatically suspended for 40 days from August 24, 1994, the date of its request for information, to October 3, 1994, the date it received TKR's response. In support of its argument that the filing was facially incomplete the Board contends that TKR did not properly count its channels and failed to provide information to substantiate its depreciation of converter boxes. The Board contends that when the 40-day automatic suspension is added to the full 120 day review period, its accounting order was not due until December 7, 1994. The Board argues that its accounting order was timely issued, since it adopted the accounting order on December 7, 1994.

**2) Discussion.**

20. Our rules provide that if a franchise authority does not make a decision within the tolling period, it must issue an accounting order before the end of the tolling period to preserve

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<sup>33</sup>According to TKR, its July 1, 1994 filings were fully supported by information already in the possession of the Board from TKR's Form 393 proceeding before the Board.

its ability to order refunds.<sup>34</sup> If an operator files a facially incomplete rate justification, which includes the failure to file the necessary supporting schedules, the tolling period deadlines for the franchising authority to rule on the reasonableness of proposed rates are suspended while the franchising authority awaits receipt of the necessary information.<sup>35</sup> Similarly, if an operator files a complete filing, but one about which the local authority has questions, the deadlines may be automatically suspended if the information sought is so significant as to delay the entire examination of the rest of the rate justification.<sup>36</sup> Through these mechanisms, the franchising authority is given time to review a rate justification filing fully, while the cable operator is protected from having to operate in an uncertain regulatory environment for an indefinite period of time.<sup>37</sup> Absent a waiver granted by the Commission, both parties are bound by the deadlines provided in our rules. A franchising authority that does not issue an accounting order before its allowable period of review expires may still prescribe rates and order a prospective rate reduction.<sup>38</sup>

21. We disagree with the Board's claim that, despite its tolling order limiting the review period until 109 days, it should be allowed to take advantage of the full 120-day period allowed by Commission regulations. Although our rules allow a franchising authority to toll its review period for an additional 90 days in the case of a benchmark filing, nothing in our rules prohibits a local authority from limiting its review period to less than 120 days.<sup>39</sup> In the case at hand, based on the Board's tolling order, it appears that the Board limited its review period to 109 days. Nothing in the record shows any attempt by the Board to notify TKR of the Board's "clerical miscalculation" in extending its review period. TKR was correct to rely on the Board's order and to assume that the review period had been extended only 109 days.

22. Furthermore, the Board's argument that the review period was automatically suspended from August 24, 1994 to October 3, 1994 because TKR's Forms 1200, 1210, and 1205 were facially incomplete is unavailing. Notwithstanding the Board's characterization of the nature of TKR's Forms 1200, 1205, and 1210, the Board's request for information does not support the Board's contention that it issued the request for information because the filings were facially

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<sup>34</sup>47 C.F.R. § 76.933(c).

<sup>35</sup>See *Third Recon. Order*, 9 FCC Rcd at 4348.

<sup>36</sup>*Id.*

<sup>37</sup>"We note that where a proposed rate increase goes into effect due to franchise authority inaction, or the authority fails to take any action regarding the reasonableness of current rates, the franchise authority lacks the power to order refunds. If the authority wishes to retain the right to order such refunds, it must at minimum issue an order stating that it will need additional time to reach a decision on the merits." *Rate Order*, 8 FCC Rcd at 5711, n.314.

<sup>38</sup>*Id.*

<sup>39</sup>The 120-day review period is composed of the initial 30-day review period and the additional 90-day extension of time.

incomplete. Despite the Board's assertion, in its August 24, 1994 letter, that TKR omitted items that prevented the Board from confirming the accuracy of TKR's rates, the information requested in the August 24, 1994 letter appears to be of a clarifying or substantiating nature rather than requests for TKR to complete its Form 1200, 1205, or 1210 or provide supporting information required by the forms.<sup>40</sup> The Board was required to issue an accounting order by October 18, 1994, the conclusion of its review period. Because it did not, the Board lost the authority to order refunds, although it may still prescribe prospective rates.

**b. October 26, 1994 Form 1210.**

**1) Positions of the Parties.**

23. With respect to its October 26, 1994 Form 1210, TKR contends that the Board failed to issue an accounting order at all. TKR argues that the Board's failure to issue either an accounting order or a rate order by February 26, 1995 precluded the Board from ordering refunds, by operation of Section 76.933 of the Commission's rules. The Board, in response, asserts that it did not issue an accounting order because TKR claimed that it was not seeking a "regulable increase," but rather was only requesting an increase due to the adjustment for GNP-PI.<sup>41</sup> According to the Board, a subsequent March 8, 1995 review of the Form 1210 by its consultant revealed that the October 26, 1994 Form 1210 actually involved a continuation of an alleged overcharge from the July 1, 1994 Form 1200. TKR did not address these claims in its August 21, 1995 reply.

**2) Discussion.**

24. The Board contends that it did not issue an accounting order because TKR claimed that it was not seeking a "regulable (basic service tier rate) increase" and instead was seeking only a cable services programming rate increase.<sup>42</sup> If the Board sought to review the Form 1210 and possibly issue a refund order, it should have issued an accounting order. It should not merely have relied on the cable operator's statement that the Form 1210 did not involve a basic service tier increase. The Board presented no evidence that TKR intentionally misled the Board. Because the Board did not issue an accounting order before the conclusion of its review period, it lost the authority to order subscriber refunds.

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<sup>40</sup>See August 7, 1995 Opposition, Exhibit E (letter dated August 24, 26, 1994, from the Board to TKR, requesting explanations of various information contained in TKR's Form 1200, 1205, and 1210).

<sup>41</sup>August 7, 1995 Opposition at 5.

<sup>42</sup>*Id.*

### 3. Written Decision.

#### a. Positions of the Parties.

25. TKR argues that the Board failed to satisfy the procedural requirements of the Commission's rules by failing to provide a written decision stating the basis for its rate prescription and an explanation of why TKR's rates were unreasonable and why its own prescribed rates are reasonable. TKR further asserts that the Board has placed it in the untenable position of trying to guess the basis of the Board's rate decisions.<sup>43</sup> TKR contends that it cannot rebut the Board's orders until the Board provides full explanations for how and why it reached its decisions.<sup>44</sup> TKR contends that, having participated in the Board's rate proceeding, it surmises that much of the Board's decision might have been based on the Board's consultant's report, and on TKR's April 17, 1995 response to the Board's request for information.<sup>45</sup> However, TKR contends that it cannot conclusively determine that the Board's rate orders are based on the consultant's report, since the consultant's recommended rates are different from those prescribed by the rate orders.<sup>46</sup> Finally, TKR asserts that the Board failed to explain orally the basis for its rulings during its last two meetings held on May 17, 1995 and on June 21, 1995.<sup>47</sup>

26. The Board replies that, pursuant to Kentucky state law, state governmental agencies speak only through their minutes, and thus the Board was prohibited from explaining the basis for its decision in its rate orders. The Board asserts that its orders are "memorializations of the actions taken by the Board."<sup>48</sup> According to the Board, TKR was aware of the reasons behind the refund orders, "including, but not limited to" external costs issue raised in the Form 393, the depreciation issue, and other overcharges which the Board asserts are set forth in its consultant's report and in its minutes. In support of its claim, the Board attaches copies of the minutes from its July 20, 1994, May 17, 1995, and June 21, 1995 meetings. The Board contends that it provided TKR an opportunity to discuss these issues in private meetings with the Executive Director of the Board, as well as at Board meetings.

27. In response, TKR asserts that the Kentucky state law regarding what constitutes

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<sup>43</sup>July 28, 1995 Appeal at 21.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.* at n. 22.

<sup>46</sup>*Id.* The Board's consultant recommended reducing TKR's basic service programming tier rate from \$10.42 to \$9.80. The Board, however, in resolution 95-005 ordered TKR to reduce its rates from \$10.42 to \$9.40. See July 28, 1995 Appeal, Exhibit 11 (Consultant's Report) at 1. See also July 28, 1995 Appeal, Exhibit 1 (Resolution 95-005).

<sup>47</sup>In support of its argument, the Board cites the minutes of its May 17, 1995 meeting.

<sup>48</sup>August 7, 1995 Opposition.

a valid order is preempted by federal cable rate rules.<sup>49</sup> Moreover, TKR asserts that the facts do not support the Board's assertion that the July 1994, May 1995, and June 1995 meetings prove that TKR was aware of the reasons behind the rate orders. According to TKR, these minutes lack any explanation for why the rates proposed by TKR were unreasonable and why the rates set by the Board were reasonable.<sup>50</sup> TKR reiterates that it is clear that the rate orders do not merely adopt the consultant's report, since the consultant's report recommended rates different from those prescribed by the Board's rate orders. TKR further states that the consultant's report was not discussed in the Board's rate orders or in the minutes of the meeting which adopted the rate order.

**b. Discussion.**

28. In rate regulation proceedings, the cable operator bears the burden of proving the reasonableness of its proposed rates.<sup>51</sup> The local franchising authority must provide the cable operator with an opportunity to participate in the rate review proceeding and to provide documentation supporting its proposed rates.<sup>52</sup> Thereafter, if the local franchising authority determines that the operator's proposed rate exceeds the maximum permitted level as defined by the Commission's rate standards, it may prescribe a rate different from the proposed rate provided that the local franchising authority affirmatively demonstrates in a written decision why the operator's rate is unreasonable and why its prescribed rate is reasonable.<sup>53</sup> While there is no requirement that the franchising authority embody its rate order in a single document,<sup>54</sup> our rules do require that the franchising authority's decision be publicly available and provide a sufficient basis for its decision to allow an operator and other interested parties to know why the rate was disapproved so that the operator may appeal the local authority's decision.

29. Here, the local authority's written three decisions are each in two parts and consist of: (1) a one-page document entitled "order" dictating the maximum permitted rates that the operator may charge for basic service and equipment; and (2) the minutes from the local authority's July 20, 1994, May 17, 1995, and June 21, 1995 meetings seeking to explain the Board's basis for finding TKR's rates unreasonable and the Board's reasoning for finding that its prescribed rates are reasonable. To explain why its orders contain no basis for its rate prescription, and no explanation of why TKR's rates were unreasonable, the Board cites Kentucky

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<sup>49</sup>August 21, 1995 Reply at 15.

<sup>50</sup>*Id.*

<sup>51</sup>See 47 C.F.R. § 76.937. See also, Sammons Communications, Inc., (Cities of Burbank and Glendale, CA), 10 FCC Rcd 5089 (Cab. Serv. Bur. 1995) at ¶ 14.

<sup>52</sup>See *Rate Order*, 8 FCC Rcd at 5723-24.

<sup>53</sup>*Id.*

<sup>54</sup>Warner Communications (Cincinnati, OH), 10 FCC Rcd 6015 (Cab. Serv. Bur. 1995).

State law which requires state governmental agencies to speak only through their minutes.<sup>55</sup> We find determinative the fact that minutes, combined with the consultant's report, do not articulate a clear basis for the Board's orders. The Board cannot expect TKR, the Commission, or subscribers to rely on its consultant's report as justification for the reductions, when the consultant's recommended basic service tier programming rates are different than those prescribed by the rate orders and the Board's minutes.<sup>56</sup> Accordingly, it appears from the record below that the Board's three June 28, 1995 orders did not comport with our rules in this area.<sup>57</sup> Therefore, we remand this issue to the Board for further proceedings consistent with this decision.<sup>58</sup>

**B. December 15, 1995 Appeal.**

**1. Positions of the Parties.**

30. On August 30, 1995, TKR filed a Form 1210 with the Commission to justify a rate increase in its cable programming services tier rate. TKR provided the Board a courtesy copy of the August 30, 1995 filing. TKR asserts that the Board improperly directed TKR to reduce its basic service tier rates even though TKR's August 30, 1995 Form 1210 proposed no change in its basic service tier rates. According to TKR, the Board did not dispute its August 30, 1995 Form 1210 calculations. However, relying on its previous orders reducing TKR's basic service rate due to the operator's treatment of its public service corporation property tax, the Board, in its November 15, 1995 order, directed TKR to reduce its basic service tier programming rates from its current rate of \$11.63 to \$10.94. TKR further contends that since its August 30, 1995 Form 1210 sought only an increase in its cable programming service tier rates, and proposed no increase in its basic programming service tier rates, the Board lacked jurisdiction to review the filing. Finally, TKR requests that the Commission dismiss the Board's order with prejudice and to instruct the Board that it has no authority to review TKR's August 30, 1995 Form 1210 filing.

31. The Board, in response, asserts that its only reason for issuing the November 15,

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<sup>55</sup>However, the "orders" indicating the maximum permitted rates do not make reference to the second document containing the minutes. Thus, despite the Board's arguments to the contrary, we are unable to discern that its order refers to the minutes containing the Board's justification for its rate reductions. We find this oversight to be harmless error. Based on our review of the Board's May 17, 1995 and June 21, 1995 minutes, it is apparent that the Board discussed the issues, *e.g.*, public service property tax, depreciation of converters, that impacted its decisions.

<sup>56</sup>*See supra* n.50.

<sup>57</sup>*See* A-R Cable Services-ME, Inc., Lisbon, ME, 10 FCC Rcd 1783 (Cab. Serv. Bur. 1995); Chillicothe Cablevision, Inc. d/b/a/ Dimension Cable Services, Washington Court House, OH, 10 FCC Rcd 6055, 6057 (Cab. Serv. Bur. 1995).

<sup>58</sup>We differentiate our current decision from our previous decision in *Boone I*. In *Boone I*, based upon the detailed, issue-specific appeal petition filed by the operator, we found that it was apparent that TKR knew the Board's basis for the rejection of its rates. Accordingly, in *Boone I*, we found that the Board's failure to inform the operator of the availability of the minutes was harmless error. Such is not the case in the present appeal.

1995 order was to avoid being deemed to have accepted TKR's basic service tier rates appearing on Line A-1 (rate established by the previous Form 1210). The Board requests that, should the Commission choose to dismiss the November 15, 1995 rate order with prejudice, the Commission indicate that all prior rate orders on appeal before the Commission are still subject to review and enforcement, should such rate orders be upheld by the Commission.

## 2. Discussion.

32. In the case at hand, TKR provided the Board a courtesy copy of its August 30, 1995 Form 1210 seeking an increase in its cable programming service tier rates. TKR did not seek an increase in its basic service tier rates. The Board states that it did not dispute the calculations in TKR's August 30, 1995 Form 1210. Thus, the sole issue to be resolved is the maximum permitted rate to which the increase will be applied. As a starting point for calculating an increase in the maximum permitted rate, the Form 1210 uses the operator's existing maximum permitted rate established by its Form 1220/1200 or its most recently filed 1210. In this matter, the maximum permitted rate to be used as a starting point is the rate established by TKR's October 26, 1994 Form 1210.<sup>59</sup> However, the ultimate maximum permitted rate using the October 26, 1994 Form 1210 has not been established because the Board's FCC Form 1210 ratemaking determination made in its June 28, 1995 order is being remanded back to the local authority for further consideration by this instant order. As TKR's December 15, 1995 appeal is predicated on its June 28, 1995 appeal, the resolution of its December 15, 1995 appeal will flow from the resolution of its June 28, 1995 appeal. Accordingly, we deny TKR's appeal of this issue as untimely.<sup>60</sup>

## V. ORDERING CLAUSES

33. Accordingly, **IT IS ORDERED** that the July 28, 1995 appeal by TCI-TKR of Northern Kentucky, Inc. d/b/a/ TKR Cable of Northern Kentucky of the June 28, 1995 local rate orders of the Kenton/Boone Counties Cable Board, with respect to the issue of the Board's allegedly improper July 21, 1994 and November 16, 1994 tolling orders **IS DENIED**.

34. **IT IS FURTHER ORDERED** that the July 28, 1995 appeal by TCI-TKR of Northern Kentucky, Inc. d/b/a/ TKR Cable of Northern Kentucky of the June 28, 1995 local rate orders of the Kenton/Boone Counties Cable Board, with respect to the issue of the Board's December 7, 1994 accounting order **IS REMANDED** to the Board for further consideration in accordance with this memorandum opinion and order.

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<sup>59</sup>As this was not TKR's first time filing a Form 1210, the directions of the Form 1210 instructed the operator to use the most recent FCC Form 1210, in this case TKR's October 24, 1994 Form 1210 filing, as a base from which to calculate permissible increases. See FCC Form 1210, Instructions for Module A at 8.

<sup>60</sup>As we have found that TKR's December 15, 1995 appeal is untimely, we need not address whether the board was permitted to adjust TKR's basic service tier rates based upon a courtesy copy of TKR's August 30, 1995 Form 1210 seeking an increase in TKR's cable programming service tier rates.

35. **IT IS FURTHER ORDERED** that the July 28, 1995 appeal by TCI-TKR of Northern Kentucky, Inc. d/b/a/ TKR Cable of Northern Kentucky of the June 28, 1995 local rate orders of the Kenton/Boone Counties Cable Board, with respect to the issue of the Board's failure to issue an accounting order regarding TKR's October 26, 1994 Form 1210 **IS REMANDED** to the Board for further consideration in accordance with this memorandum opinion and order.

36. **IT IS FURTHER ORDERED** that the July 28, 1995 appeal by TCI-TKR of Northern Kentucky, Inc. d/b/a/ TKR Cable of Northern Kentucky of the June 28, 1995 local rate orders of the Kenton/Boone Counties Cable Board, with respect to the issue of the Board's failure to provide an adequate written decision **IS REMANDED** to the Board for further consideration in accordance with this memorandum opinion and order.

37. **IT IS FURTHER ORDERED** that the December 15, 1995 appeal by TCI-TKR of Northern Kentucky, Inc. d/b/a/ TKR Cable of Northern Kentucky of the November 15, 1995 local rate order of the Kenton/Boone Counties Cable Board **IS DENIED**.

38. **IT IS FURTHER ORDERED** that the request for stay filed by TCI-TKR of Northern Kentucky, Inc. d/b/a/ TKR Cable of Northern Kentucky is **DISMISSED** as moot.

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

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones  
Chief, Cable Services Bureau