

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

In the Matter of
TCI TKR of Georgia, Inc.,
Petitioner,
v.
City of Moultrie, State of Georgia,
Respondent.
Appeal of Local Rate Order
File Nos.
CSB-A-0646

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2003

Released: January 17, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. TCI TKR of Georgia ("TCI-G"), the franchised cable operator serving the community of Moultrie, Georgia, Inc. has appealed a local rate order adopted by the City of Moultrie ("Moultrie") on January 21, 2000 ("Rate Order"), requiring TCI-G to reduce the maximum permitted basic service tier ("BST") rate that was scheduled to take effect June 1, 1999, and to refund any excessive rates and charges paid.1 Moultrie opposes the appeal. Based upon our review of the record, we grant TCI-G's appeal of Moultrie's local rate order.

II. BACKGROUND

2. The Communications Act provides that, where effective competition is absent, cable rates for the basic service tier ("BST") are subject to regulation by franchising authorities.2 Rates for the BST should not exceed rates that would be charged by systems facing effective competition, as determined in accordance with Commission regulations for setting rates.3

3. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.4 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 a reasonable basis for that

1 The Commission previously granted TCI-G's request for a stay of Moultrie's local rate order pending resolution of the operator's appeal on the merits. In the Matter of TCI TKR of Georgia, Inc., DA 00-406 (February 25, 2000).

2 47 U.S.C. § 543(a)(2).

3 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

4 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944.

decision exists.⁵ 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

4. On March 1, 1999, TCI-G filed with Moultrie its FCC Form 1240, by which it calculated its proposed BST rate, which included a "residual" for adding certain channels from the system's CPST to its BST. TCI-G's proposed rate became effective on June 1, 1999, because Moultrie did not take action within the 90-day review period established by our rules.⁶ Subsequently, Moultrie reviewed TCI-G's Form 1240 and adopted a rate order on January 21, 2000. Moultrie reduced TCI-G's maximum permitted BST rate by the amount of the "residual" credit TCI-G took for the addition of the WB and Black Entertainment Television ("BET") channels to the BST in August and September, 1998, respectively. Moultrie also ordered refunds dating back to June 1, 1999 to recover the overcharge.

5. TCI-G filed a local rate appeal with the Commission on February 18, 2000, alleging that Moultrie erred in reducing TCI-G's maximum permitted BST rate by failing to account for the "residual" credit for channel movement pursuant to section 76.922(g)(5) of the Commission's rules. TCI-G argues that it is entitled to a "residual" credit under section 76.922(g) and that the Commission never intended for the sunset provision in 76.922(g)(8) to apply beyond subsections (g)(3) and (g)(7). Moultrie argues that TCI-G has moved channels from the CPST to the BST and although the residual for the moved channels to the BST were added, no offsetting decrease was made to the CPST because it was deregulated after TCI-G filed its Form 1240. Moultrie further argues that all of section 76.922(g) expired on January 1, 1998, and TCI-G is not entitled to a "residual."⁷

6. Subsequent to the filing of Time Warner's appeal, the Commission issued *Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order* ("NPRM/Order")⁸ in light of the confusion resulting from the sunset language in section 76.922(g)(8) and the intent expressed in the *Going Forward Order*.⁹ The Commission subsequently issued a limited reconsideration ("Reconsideration Order") of the NPRM/Order that contained an explanation of the issues surrounding section 76.922(g) of the Commission's rate regulations and included guidance on the appropriate regulatory response to channel changes.¹⁰

⁵ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5731-32 (1993) ("Rate Order"); *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4346 (1994) ("Third Reconsideration Order").

⁶ See 47 C.F.R. § 76.933(g)(2).

⁷ See 47 C.F.R. § 76.922(g).

⁸ MB Docket No. 02-144, FCC 02-177 (released June 19, 2002).

⁹ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation* ("Going Forward Order"), 10 FCC Rcd 1226, 1260 (1994).

¹⁰ *In the Matter of Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order*, FCC 02-228 (August 14, 2002), ¶ 2.

7. TCI-G removed the WB and BET from the CPST and added them to the BST in August and September, 1998, respectively, which was prior to the adoption of the *Reconsideration Order*. The *Reconsideration Order* contained an explanation of the issues surrounding section 76.922(g) of the Commission's rate regulations and included guidance on the appropriate regulatory response to channel movements from the CPST to the BST under those circumstances. The Commission stated:

In reviewing appeals of local rate orders concerning rate adjustments for the movement of channels from CPST to the BST, we will find reasonable adjustments that are consistent with section 76.922(g)(5) and the Commission's rate forms for CPST channels moved on or before March 31, 1999, the sunset of CPST rate regulation; provided that the rate adjustments are computed from CPST rates that were subject to rate regulation; and further provided that adjustments for channels moved from the BST during this same period were computed consistently with section 76.922(g)(5) and the Commission's rate forms. The provisions in section 76.922(g) of the Commission's rules concerning external costs, including the permitted 7.5% mark-up on programming cost increases, continue to apply.¹¹

Because the Commission has not put in place another mechanism for dealing with channel changes, it continues to apply the provisions of section 76.922(g) as outlined in the *Reconsideration Order* pending action on the NPRM/Order.

8. According to the record as submitted, TCI-G shifted the WB and BET from the CPST to the BST in 1998. TCI-G filed its Form 1240 on March 1, 1999, which proposed a new BST that included a "residual" credit for the addition of both the WB and BET to the BST. TCI-G argues that it is entitled to a "residual" credit for a channel movement from the CPST tier to the BST consistent with section 76.922(g)(g) of the Commission's rate regulation. We agree. When a channel is shifted between a BST and CPST, "it shall be treated as if it was dropped from one tier and the residual and programming cost associated with the shifted channel shall be shifted to the other tier."¹² TCI-G's movement of the WB and BET is consistent with a channel shift because the initial deletion of the Weather Channel from the CPST occurred in June 1998. Furthermore, the operative timing is when the channels were moved rather than when the Form 1240 was filed. Because both channels were shifted prior to March 31, 1999, they would come under the provision of section 76.922(g)(5). The addition of the WB and BET in August and September, 1998 respectively are to be treated as movement of channels between tiers and TCI-G is entitled to a "residual" credit under section 76.922(g)(5).¹³ Accordingly, we grant TCI's appeal.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the Appeal of Local Rate Order filed by TCI TKR of Georgia, Inc. on February 18, 2000 **IS GRANTED** and the local rate order of the City of Moultrie, Georgia **IS REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

¹¹ *Id.*

¹² *Going Forward Order*, 10 FCC Rcd 1226, 1256 (1994).

¹³ *Id.* at 1249.

10. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.
47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

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