

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

In the Matter of	)	
	)	
Falcon Classic Cable	)	
v.	)	CSR-A-0363
McCreary County, KY	)	
	)	
Appeal of Rate Resolution by	)	
McCreary County, Kentucky	)	
(CUID KY0920)	)	

**MEMORANDUM OPINION AND ORDER ON RECONSIDERATION**

**Adopted: March 27, 2000**

**Released: March 29, 2000**

By the Deputy Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. Falcon Classic Cable filed a petition for reconsideration<sup>1</sup> of the Memorandum Opinion and Order released March 27, 1998 in *Falcon Classic Cable v. McCreary County, KY*, 13 FCC Rcd 6489 (CSB 1998) ("*Falcon*"), which denied as untimely filed Falcon's appeal of a local rate order adopted by McCreary County, Kentucky. No response to the petition has been filed.

2. *Falcon* found the rate order to have been published near the September 17, 1996 date of Falcon's request for a written copy of the rate order.<sup>2</sup> *Falcon* also found that Falcon filed its appeal on November 19, 1996, more than 60 days from the publication of the County's local rate order, and that the appeal was therefore untimely filed.<sup>3</sup> Accordingly, the merits of Falcon's appeal were not addressed.

**II. ANALYSIS AND DECISION**

3. Falcon asserts that *Falcon* did not specifically find the County's rate order to have been published on any particular date. Falcon contends that there is no record evidence of any publication of the order and that it had been unable to locate any publication of the order in local newspapers, contrary to the assumption in *Falcon* that Kentucky law regarding publication of local decisions had been

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<sup>1</sup> See 47 C.F.R. § 1.106.

<sup>2</sup> The County informed Falcon of the rejection of its proposed basic service tier ("BST") and related equipment rate increases by letter dated September 11, 1996. *Falcon* at 6491. Local franchising authorities are required to provide a written decision when BST and related equipment rates are disapproved. See 47 C.F.R. § 76.936(a), (b).

<sup>3</sup> An appeal of a rate order of a local franchising authority must be filed within 30 day of "the release of the text" of that order. 47 C.F.R. § 76.944(b).

followed.<sup>4</sup> Falcon argues that absent other evidence of publication, *Falcon* erred in not finding that release of the order occurred when a copy was mailed to Falcon. Falcon asserts that the envelope in which the order was delivered to Falcon on October 22, 1996 shows an October 18, 1996 postmark,<sup>5</sup> and asserts that its appeal was timely filed with respect to such delivery date, which Falcon insists must be considered the rate order's release date. Falcon further argues that since its appeal was timely filed with respect to these October 1966 dates, the merits of its appeal of the rate order must be addressed.

4. The information Falcon submitted with its reconsideration petition raises a substantial question whether the rate order was published in a local newspaper, as assumed in *Falcon* to be the case, and the County has not responded to this information. We find that the record is insufficient to determine whether the County gave public notice of the rate order pursuant to 47 C.F.R. § 76.936(b) in a manner consistent with local law and the County's regulations governing its rate review before mailing the rate order to Falcon. On reconsideration, we are remanding this proceeding so that the County can determine when it released the text of the rate order to the public and began the 30-day appeal period specified in 47 C.F.R. § 76.944(b).

5. Regarding the merits of Falcon's challenge to the County's rate order, Falcon submitted FCC Forms 1240 and 1205 proposing adjusted BST and equipment rates for County review. The rate order found that Falcon failed to provide audited financial statements related to the operation of the basic cable service tier in McCreary County in response to requirements of County Resolution 9606901.<sup>6</sup> The rate order further found that the audited financial statements submitted by Falcon did not provide specific information about the operation of the basic cable service tier within McCreary County.<sup>7</sup> For this reason, the County ordered Falcon to rescind all of its planned rate increases.<sup>8</sup>

6. Falcon contends that the County's action was unreasonable. Falcon's appeal asserts that the operator filed complete forms and supplied each clarification or explanation sought by the County except that it submitted financial statements "for all of the systems in the Falcon Classic Cable partnership," and that such financial statements were the only audited financial statements available covering McCreary County.<sup>9</sup> Falcon argues that since the Forms 1240 and 1205 submitted to the County were complete on their face and certified by the operator's signature, the financial information submitted therewith must be deemed accurate. Falcon further contends that submitting financial statements related solely to McCreary County would be an undue burden for a system as small as its 3124 subscriber

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<sup>4</sup> *Falcon* at 6490.

<sup>5</sup> See Falcon petition at 3, and Attachment A.

<sup>6</sup> See Falcon Petition for Review of Rate Order, Exhibit A. According to Falcon's Petition for Review of Rate Order at 2, this Resolution was issued as part of the County's review of Falcon's previous rate submissions.

<sup>7</sup> The County's September 11, 1996 letter advised Falcon that the McCreary County Fiscal Court voted to oppose any rate increase "until such time as accurate records for Falcon's McCreary County operations can be produced justifying such an increase" because accurate information for the operations in the County "can not be extrapolated." Falcon petition, Exhibit B.

<sup>8</sup> Whether the rate order applies to both Form 1240 and Form 1205 is unclear from the face of the rate order. Falcon in its Petition for Review of Rate Order at 4 complains about the flat denial of the entire rate proposal in both forms. Falcon's Exhibit C, its September 17, 1996 request for a copy of any rate order, discusses the use of financial information provided pursuant to the franchise renewal process only in the context of FCC Form 1240, the form for justifying the program service rate.

<sup>9</sup> Falcon Petition for Review of Rate Order at 1, 2, 3.

system. Falcon also argues that the County was obligated to make a decision on the best information available, even if it believed some data was not properly substantiated, rather than deny the requested relief.

7. A franchising authority is entitled to access to the information the operator uses for its rate justification so that it can make an informed decision about the reasonableness of the rate.<sup>10</sup> Thus, it may order an operator to file supplemental information supporting its asserted costs and rates, and set a deadline for submitting such information.<sup>11</sup> Information requests should be limited to information that is reasonably necessary for making a rate determination, and the franchising authority should advise the operator why it needs the information and what part of the form is addressed by the request.<sup>12</sup> This specificity enables the franchising authority to ensure the validity of the information provided and ensures that the cable operator is not required to provide additional data that is not germane to the rate setting process. A cable operator has the burden of proving that its existing or proposed rates for basic service and related equipment comply with the Commission's regulations and should facilitate the efficient and effective review of its rates by the franchising authority, including full cooperation with reasonable data requests.<sup>13</sup> If a cable operator fails to comply with the deadline or provide complete information in good faith, the franchising authority can hold an operator in default and mandate appropriate relief for the failure, including reducing a current rate and ordering refunds or prescribing a prospective rate.<sup>14</sup> Such action should be based on the best information available,<sup>15</sup> and the franchising authority should give the reasons for its decision in a written decision that is released to the public.<sup>16</sup>

8. In this case the County's rate order says only that the rates are denied because Falcon failed to provide audited financial statements for the County, which Falcon states it does not generate at that level. Just as reducing an initial rate to zero to punish an uncooperative cable operator is not within a franchising authority's regulatory authority,<sup>17</sup> denying all of an operator's requested BST and equipment rate increases solely because information was not provided in a certain audited form not maintained by the operator is not reasonable.<sup>18</sup>

9. If, on remand, the County determines that it did give public notice of its rate order pursuant to 47 C.F.R. § 76.936 more than 30 days before Falcon filed its appeal of the rate order with the

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<sup>10</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration*, 9 FCC Rcd 4316, 4344 para. 77 (1994) ("Third Reconsideration").

<sup>11</sup> *Third Reconsideration*, 11 FCC Rcd at 4348 para. 89; 47 C.F.R. § 76.937 (d), (e). See *Century Southwest Cable Television Corp.*, 9 FCC Rcd 2423, 2424 (CSB 1994).

<sup>12</sup> 47 C.F.R. § 76.938; *Third Reconsideration* at 4344 paras. 77-78.

<sup>13</sup> 47 C.F.R. S 76.937(a).

<sup>14</sup> *Third Reconsideration*, 9 FCC Rcd at 4347 para. 84, 4348 para. 90; 47 C.F.R. §§ 76.940, 76.941, 76.942.

<sup>15</sup> *Third Reconsideration*, 9 FCC Rcd at 4347 para. 84; *Falcon First Communications, L.P.* (Whitfield County, GA), 14 FCC Rcd 7277, 7282 para. 12 (CSB 1999) (if operator has had opportunity to participate meaningfully in rate review process and has failed to meet its burden, franchising authority may prescribe a rate based on the best information available).

<sup>16</sup> See 47 C.F.R. § 76.936.

<sup>17</sup> See *Century Southwest Cable Television Corp.*, 9 FCC Rcd 2423, 2424 para. 8 (CSB 1994).

<sup>18</sup> We note, for example, that the inflation rate used in the BST rate computation is set by the Commission and is not derived from an operator's financial statements.

Commission,<sup>19</sup> the County shall advise Falcon in writing of the facts and circumstances surrounding its giving of public notice within 60 days of the release of this Memorandum Opinion and Order. If Falcon disputes that the County's action constituted public notice under the Commission's rules, Falcon may file a supplement to its appeal with this Commission and the County may file an opposition within the time periods provided in the Commission's rules for filing appeals to local rate orders.

10. If the County cannot determine that it gave the required public notice more than 30 days before Falcon filed its appeal of the rate order with the Commission, the County shall review Falcon's rate justification consistent with the Commission's rate regulations and this Memorandum Opinion and Order. Any County review of Falcon's BST rate shall be based on Falcon's Forms 1240 and 1205 and supporting information. If the County seeks the information upon which Falcon based its rates, it should identify the parts of the rate forms about which it has questions and request the supporting information. Falcon should cooperate by facilitating the County's review of its rates. If Falcon is not forthcoming in responding to reasonable requests for supporting information, the County may use the best information available to review and, if appropriate, adjust Falcon's rates. After reviewing the operator's rate forms and any additional information submitted, the franchising authority may either approve the operator's requested rate increases or issue a written decision explaining why the operator's rate increases are unreasonable.<sup>20</sup> If the County does not dispute the bases for the figures presented in Falcon's rate forms and has not discovered mathematical errors in the forms, it should approve the rates as derived from the forms and allow the operator to charge up to the maximum permitted rates derived from the rate forms.

### III. ORDERING CLAUSES

11. For the foregoing reasons, **IT IS ORDERED**, pursuant to authority delegated by Section 0.321 of the Commission's rules, that the Petition for Reconsideration filed by Falcon Classic Cable **IS GRANTED** and Resolution No. 96091003 of the McCreary County Fiscal Court **IS REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

12. **IT IS FURTHER ORDERED** that, unless McCreary County, Kentucky determines that it gave public notice of Resolution No. 96091003 more than 30 days before Falcon filed its appeal of that rate order, the County shall not enforce Resolution No. 96091003 pending further action by the County pursuant to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau

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<sup>19</sup> See 47 C.F.R. § 76.944(b) (participant in ratemaking proceeding may file appeal within 30 days of the release of the text of the franchising authority's decision as computed under 47 C.F.R. § 1.4(b)).

<sup>20</sup> See *Cablevision VII, Inc.* (Fort Madison, IA), DA 00-39 at paras 9-10, 2000 WL 16450 (F.C.C.) (Cab. Serv. Bur. released Jan. 12, 2000); *Mickelson Media, Inc.*, DA 99-1264, 1999 WL 436216 (Cab. Serv. Bur. released June 30, 1999); *Century Communications Corp.* (Warrick County, IN), 14 FCC Rcd 6963 (Cab. Serv. Bur. 1999); *Falcon Cable Media* (Onslow County, NC), 13 FCC Rcd 11,996 (Cab. Serv. Bur. 1998).