

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

In the Matter of)
)
FALCON CABLEVISION) File Nos.
) CSB-A-0335
Appeals of Local Rate Orders of) CSB-A-0350
the City of Cedartown, GA) CSB-A-0357
CUID GA0052) CSB-A-0625

CONSOLIDATED MEMORANDUM OPINION AND ORDER

Adopted: February 21, 2001

Released: February 23, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Falcon Cablevision (“Falcon”), the franchised cable operator serving the City of Cedartown, GA (“City”), has appealed local rate orders adopted by the City on June 10, 1996,¹ August 12, 1996,² September 9, 1996,³ and April 19, 1999⁴ (respectively June 1996, August 1996, September 1996, and April 1999 Rate Orders). The City opposed each of the appeals, and Falcon replied. Falcon also

¹ The pleadings in File No. CSB-A-0335 are: Falcon Petition for Review of Rate Order (Jul. 15, 1996) (“Falcon July 1996 Petition”); Opposition of Cedartown, Georgia to Petition for Review of Rate Order (Jul. 30, 1996) (“City July 1996 Opposition”); Falcon Reply to Opposition to Petition for Review (Aug. 8, 1996) (“Falcon August 1996 Reply”).

² The pleadings in File No. CSB-A-0350 are: Falcon Petition for Review of Rate Order (Sept. 11, 1996) (“Falcon September 1996 Petition”); Opposition of Cedartown, Georgia to Petition for Review of Rate Order (Sept. 24, 1996) (“City September 1996 Opposition”); Falcon Reply to Opposition to Petition for Review (Oct. 3, 1996) (“Falcon October 1996 Reply”).

³ The pleadings in File No. CSB-A-0357 are: Falcon Petition for Review of Rate Order (Oct. 9, 1996) (“Falcon October 1996 Petition”); Opposition of the City of Cedartown, Georgia to Petition for Review of Rate Order of Falcon Cablevision (Oct. 23, 1996) (“City October 1996 Opposition”); Falcon Reply to Opposition to Petition for Review (Nov. 1, 1996) (“Falcon November 1996 Reply”); City Motion for Leave to File Additional Pleading (Nov. 19, 1996); City Further Opposition to Petition for Review of Rate Order (Nov. 19, 1996) (“City November 1996 Further Opposition”).

⁴ The pleadings in File No. CSB-A-0625 are: Falcon Petition for Review of Rate Order (May 19, 1999) (“Falcon May 1999 Petition”); Opposition to Petition for Review of Rate Order (June 3, 1999) (“City June 1999 Opposition”); Falcon Reply (June 11, 1999) (“Falcon June 1999 Reply”); Falcon Petition for Stay of Enforcement Pending Review (May 19, 1999); City Opposition to Petition for Stay of Enforcement Pending Review (June 3, 1999); Falcon Reply to Opposition to Petition for Stay of Enforcement Pending Review (June 11, 1999).

petitioned for a stay of the April 1999 rate order. The City opposed the petition, and Falcon replied.⁵ We are consolidating these appeals for administrative convenience in light of the common parties and related issues.

2. Based upon our review of record, we are dismissing Falcon's appeal of the City's June 1996 Rate Order as untimely. We are granting Falcon's appeals of the City's August 1996, September 1996, and April 1999 Rate Orders with respect to the City's disallowance of programming cost increases and remanding the Rate Orders to the City for further consideration consistent with this Consolidated Memorandum Opinion and Order.

II. BACKGROUND

3. 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.⁶ 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.⁷ Rates for regulated equipment and installation services on the customer's premises, the equipment basket, must be based on the operator's actual costs.⁸ Operators using the Commission's revised benchmark methodology for determining initial regulated BST rates filed FCC Form 1200.⁹ Operators adjust BST rates periodically for changes in inflation, the number of regulated channels, and external costs, including changes in the cost of programming.¹⁰ Operators using the quarterly rate adjustment method file as often as quarterly and at least annually on FCC Form 1210. Operators using the annual rate adjustment method file on FCC Form 1240. Operators adjust regulated cable equipment and installation rates with FCC Form 1205.

4. Rate orders issued by franchising authorities may be appealed to the Commission pursuant to Commission rules.¹¹ 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 decision exists.¹² The Commission will reverse a franchising authority's rate decision only if it determines

⁵ In light of our action on the merits, the stay request is dismissed as moot.

⁶ 47 U.S.C. § 543(a)(2).

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

⁸ 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923(a)(2).

⁹ See *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, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) ("Second Reconsideration Order"); FCC Form 1200, Setting Maximum Initial Permitted Rates for Regulated Cable Services Pursuant to Rules Adopted February 22, 1994. Operators may also elect to justify rates with a cost-of-service showing.

¹⁰ 47 C.F.R. § 76.922(d), (e), (f).

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

¹² *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").

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

A. June 1996 Rate Order

5. The Commission's rules provide that a franchising authority disapproving a rate increase must issue a written decision and give public notice of the written decision, including releasing the text of the decision to the public.¹³ Any participant in the local rate proceeding may appeal the franchising authority's rate decision to the Commission within 30 days of the release of the text as computed under section 1.4(b) of the Commission's rules.¹⁴ In the instant case, the parties disagree as to what constitutes the release of the City's rate order and, depending on the release date, whether Falcon's appeal was timely.

6. The City adopted a rate order addressing Falcon's BST and equipment rates on June 10, 1996.¹⁵ Falcon appealed to the Commission on July 15, 1996, claiming in a footnote that its appeal was timely because the City mailed a copy of its Rate Order to Falcon on June 13, 1996.¹⁶ The City argues that Falcon's appeal was filed 35 days after the release and asks that the appeal be dismissed as untimely. According to the City, copies of the Rate Order were released to the public on June 10, 1996 at the public Board of Commissioners meeting during which the Rate Order was adopted.¹⁷ This statement is verified by an affidavit from the City Manager declaring that the facts in the City's Opposition "are true and correct to the best of my knowledge."¹⁸.

7. The Commission's rules require public notice but leave the method of giving public notice to local authorities.¹⁹ They also provide for counting the 30-day appeal period from the release of the text of the franchising authority's decision.²⁰ There is no provision for tolling the release date if a franchising authority later mails a copy to the cable operator.²¹ Falcon makes no claim that applicable law or

¹³ 47 C.F.R. § 76.936(b).

¹⁴ 47 C.F.R. § 76.944(b); 47 C.F.R. § 1.4(b).

¹⁵ The City reviewed Falcon's Form 1210 dated February 15, 1996 and its Form 1205 dated February 13, 1996. June 1996 Rate Order, first page, found at Falcon July 1996 Petition, Exhibit A.

¹⁶ Falcon July 1996 Appeal at 1 n.1.

¹⁷ City July 1996 Opposition at 2-3.

¹⁸ *Id.*, Affidavit of J. David Thompson, City Manager of the City of Cedartown (July 29, 1996).

¹⁹ See *Falcon Classic Cable v. McCreary City, KY*, 15 FCC Rcd 5717, 5718 para. 4 (Cab. Serv. Bur. 2000) (public notice under section 76.936(b) should be given in a manner consistent with applicable local law or regulations governing a franchising authority's rate review).

²⁰ 47 C.F.R. § 76.944(b). See *Rate Order*, 8 FCC Rcd at 5730-31 & n.394, *Third Reconsideration Order*, 9 FCC Rcd at 4341.

²¹ See *C4 Media Cable SE, L.P.*, 10 FCC Rcd 9431, 9431 para. 5 (Cab. Serv. Bur. 1995).

regulations were not followed in the City's release of its Rate Order. In its reply, it states only that it did not obtain a copy of the Rate Order on June 10th because copies were unavailable, and that the normal process in Cedartown is to make copies available after the City Clerk and City Attorney have signed the order.²² It does not elaborate on these statements or offer verification. In light of the adoption date of June 10, 1996 shown on the Rate Order and the City's verified assertion that copies were made available on the adoption date, we find that Falcon's appeal should have been filed on or before July 10, 1996, the thirtieth day after the public release of the Rate Order as computed under section 1.4(b). Because the appeal was filed July 15, 1996, five days after the deadline, it is dismissed as untimely.²³

8. Furthermore, even if we were to consider the merits of Falcon's appeal, we would not grant relief. Falcon argues that the City erred in starting the rate computation with the maximum permitted rate prescribed in its previous Rate Order, adopted February 12, 1996 ("February 1996 Rate Order"),²⁴ because that Rate Order was on appeal to the Commission. The Cable Services Bureau ("Bureau") dismissed that appeal as untimely,²⁵ leaving the City's February 1996 Rate Order in effect and rendering Falcon's argument moot.

9. Falcon complains that the City used the wrong number for the number of regulated channels in its rate review, because it treated Falcon's seven-channel a la carte package as a regulated tier of service. The City previously found in its February 1996 Rate Order that Falcon had "moved seven channels from its cable programming tier to create a new package of channels called the 'Satellite Package,'" which was subject to rate regulation under the Commission's rules.²⁶ Falcon's appeal of the February 1996 Rate Order conceded that Commission rulings allowed the City to treat the Satellite Package as a regulated tier, and Falcon did not challenge this treatment, although it did challenge the rate the City computed.²⁷ Nonetheless, Falcon continued to exclude these channels from its channel count in its next rate form, dated February 15, 1996. The City continued to include the Satellite Package channels in the count of regulated channels in its June 1996 Rate Order and also complained to the Commission about Falcon's rates for the Satellite Package and its other cable programming services tier ("CPST"). The Bureau resolved the complaint by finding that the Satellite Package was a regulated tier subject to rate regulation.²⁸ Falcon did not seek further review. The Bureau order became final and serves as precedent here. The City reasonably included the channels from Falcon's Satellite Package in the number of regulated channels used in the Form 1210 rate calculation. Falcon's appeal of the channel count would be denied.

10. The City also disallowed the 1995 programming costs on Falcon's February 15, 1996 rate form pending receipt of supporting documentation from Falcon. Falcon stated it had entered into a satisfactory confidentiality agreement with the City and its consultant and asked for a remand of the

²² Falcon Reply at 1-2.

²³ See *Meredith/New Heritage Strategic Partners, L.P.*, 9 FCC Rcd 6841 (1994).

²⁴ Resolution No. 2, 1996 ("February 1996 Rate Order"), found at Falcon Cablevision, Petition for Review of Rate Order ("Falcon March 1996 Appeal"), File No. CSB-A-0300 (filed Mar. 29, 1996), Exhibit A.

²⁵ *Falcon Cablevision*, 12 FCC Rcd. 930, reconsideration denied 12 FCC Rcd 4190 (Cab. Serv. Bur. 1997).

²⁶ February 1996 Rate Order at 4.

²⁷ Falcon March 1996 Appeal at 4.

²⁸ *Falcon Cablevision*, 11 FCC Rcd 17438, 17442 (Cab. Serv. Bur. 1996).

relevant portion of the rate order to allow for further City review.²⁹ Because the City addressed the programming costs in its August 1996 Rate Order, which is also before us, the remand request is moot.

11. Falcon also complains that the City's prescribed rate for certain converters was in error. Although conceding that its depreciation exceeded the net book value of the equipment, Falcon argues that the City failed to consider that the net book value can be increased by the amount of projected capitalized maintenance.³⁰ Falcon has subsequently conceded that this argument was misplaced. In its October 1996 Appeal, it states it did not capitalize equipment maintenance after all but should have reported that its depreciation addressed in the City's June 1996 Rate Order reflected lost equipment.³¹ Its *post hoc* and unsupported argument comes too late for consideration.³² A franchising authority is reasonable in basing its decision on the information available from the operator at the time of its decision.³³ Falcon's appeal of the prescribed converter rate would be denied.

B. August 1996, September 1996, and April 1999 Rate Orders – Programming Rates

12. In its August 1996 Rate Order, the City disallowed the entire amount of Falcon's proposed rate increase attributed to programming cost increases experienced in 1995, and carried this disallowance forward in its September 1996 Rate Order on Falcon's July 23, 1996 Form 1240. Its decisions were based on its consultant's advice that Falcon's initial programming costs reflected in Form 1200 should have been stated at a higher amount and, therefore, that the net cost increase reflected in Form 1210 should have reflected this adjustment.³⁴ The consultant could not quantify the difference because Falcon did not provide programming contract sections showing this amount. This disallowance is also reflected in the rates prescribed in the City's April 1999 Rate Order.³⁵

13. Falcon disagrees with the City's orders. Falcon explains that it calculated the programming costs in Form 1200 pursuant to the terms of contracts under which it was then operating, some of which had expired and were being renegotiated, and recorded precisely what it was paying on the relevant date.³⁶ When it later negotiated contracts to replace expired contracts, its rates increased retroactively and it was

²⁹ Falcon July 1996 Appeal at 4.

³⁰ *Id.* at 6.

³¹ Falcon October 1996 Petition at 5. Falcon stated that both the June 10, 1996 and the September 9, 1996 Rate Orders were based on the same Form 1205. *Id.* at 6 n.6.

³² *Falcon First Communications, L.P.*, 14 FCC Rcd 7277, 7282 (Cab. Serv. Bur. 1999). See discussion of depreciation adjustment in the September 1996 Rate Order, *infra*, paras. 17-18.

³³ 47 C.F.R. § 76.937(d); *Third Reconsideration Order*, 9 FCC Rcd at 4347-48.

³⁴ See Falcon September 1996 Petition, Exhibit A, August 1996 Rate Order, first page; *id.* Exhibit B, Letter from Don Schanding, Rate Analyst, Georgia Municipal Association to David Johnson, City Manager (July 24, 1996); Falcon October 1996 Petition, Exhibit A, September 1996 Rate Order, first page; *id.* Exhibit B, Letter from Schanding to Johnson (Aug. 22, 1996) at 1-2; City September 1996 Opposition, third and fourth pages; City October 1996 Opposition at 3.

³⁵ Falcon May 1999 Petition, Exhibit A.

³⁶ Falcon September 1996 Petition at 3-5; Falcon October 1996 Petition at 4-5; Falcon October 1996 Reply at 2-5; Falcon November 1996 Reply at 3-4.

required to make supplemental payments for programming carried during the preceding period. Falcon states that it uses a cash method for reporting programming costs on FCC forms and recorded only actual programming costs for the periods covered by the rate forms; it did not pass supplemental payments on to subscribers, but absorbed them instead. The City found that these adjusted programming costs were retroactive to the period covered by Form 1200, and that Falcon, therefore, did not experience these cost increases in the period covered by its Form 1210 and should not have included the increased costs in its rates. The City would have Falcon recalculate its programming costs for the period covered by Form 1200 to include the rate adjustments later agreed to with Falcon's program suppliers and then reduce the amount of the cost increase taken in Falcon's Form 1210 by this supplemental amount.³⁷ The City would not balance this adjustment, however, by bringing forward the higher recalculated Form 1200 rate as the starting point for reviewing the Form 1210 rate. The City faulted Falcon for not providing information about the supplemental payments and disallowed all of the costs pending receipt of this information. It again disallowed these costs when reviewing Falcon's Form 1240. Falcon argues that the City's rulings on this issue are inequitable and must be reversed.

14. The Commission's rules allow cable operators to pass increases in programming costs through to subscribers.³⁸ The calculation of these costs is governed by the Commission's forms. Form 1200 asks the operator to provide its programming costs as of the beginning date (the earlier of the initial date of regulation or February 28, 1994) and adjusts those costs in Module B for any changes in programming costs that have not been passed through to subscribers as of March 31, 1994.³⁹ Changes in costs incurred or recognized on the operator's books after March 31, 1994 belong in the forms provided for adjusting the operator's rates after March 31, 1994.⁴⁰ Although an operator may have been in negotiations regarding programming costs on the dates addressed in Form 1200, nothing in the Commission's rules requires the operator to redo Form 1200 when the negotiations are completed, even if the operator must make retroactive payments pursuant to a new programming contract, unless the programming cost increase was recognized on the operator's books on the beginning date or by March 31, 1994. The treatment recommended by the City's consultant and adopted by the City impermissibly denies Falcon recovery of programming costs to which it is entitled.⁴¹

15. The City does not dispute Falcon's statement that it did not seek to recover the amount of the supplemental payments from subscribers. Thus, Falcon's agreement to make supplemental payments for the period during which negotiations were ongoing has no bearing on the treatment of the costs Falcon sought to recover in its Form 1210. The City's disallowance of costs in its August 1996 and September 1996 Rate Orders pending receipt of supplemental cost information not relevant to its rate review was not reasonable.⁴² Falcon's appeals are granted with respect to the City's disallowance of Falcon's programming

³⁷See n.34, *supra*.

³⁸47 C.F.R. § 76.922(d)(3), (e)(2)(ii), (f); *see Rate Order*, 8 FCC Rcd at 5788; *Second Reconsideration Order*, 9 FCC Rcd at 4201-02, 4203 n.232.

³⁹FCC Form 1200, Module B and instructions at 3, 4, 12-14.

⁴⁰A cost is considered "incurred" for Form 1210 purposes when it is "recognized on the books . . . during the previous quarter." Q & A released June 14, 1994, at Question 3. Form 1210 could be used for changes in external costs incurred by an operator starting April 1, 1994 and could be filed as often as quarterly. *See* 47 C.F.R. § 76.922(d)(1), (3)(iii).

⁴¹*Falcon First Communications, L.P.*, 14 FCC Rcd at 7291-92.

⁴²See *id.*

costs, and these cases are remanded for further action in accordance with this Consolidated Memorandum Opinion and Order.

16. Falcon and the County have also disagreed about the City's revisions to Falcon's true up costs in the September 1996 Rate Order and about the appropriate starting rate for computing future BST adjustments when the underlying BST rate is the subject of a pending appeal. In light of the decision herein, on remand the City should review the programming costs in Falcon's February 15, 1996 Form 1210, which it addressed in its August 1996 Rate Order, and carry the resulting rate adjustment forward through the Forms 1240 addressed in its September 1996 and April 1999 rate orders.⁴³

C. September 1996 Rate Order – Addressable Converters

17. The City found in its September 1996 Rate Order that, when calculating costs associated with installations and equipment maintenance in its Form 1205 dated June 18, 1996, Falcon over-depreciated addressable converters. The City prescribed a reduced monthly lease rate for these converters. On appeal, Falcon concedes that its provision for depreciation exceeded the net book value of the equipment, but argues that the City failed to take into consideration increases to the net book value for projected capitalized maintenance.⁴⁴ In its reply, Falcon states it did not capitalize equipment maintenance after all but, instead, should have reported the loss of equipment on its books.⁴⁵ It asserts an amount of alleged losses but makes no claim that this was timely raised below, and it tenders no support for these losses. The City argues that this reply should be dismissed as an untimely attempt to introduce a new adjustment because, before adopting its Rate Order, it asked Falcon whether any allocations or adjustments were made from the general ledger entry for current depreciation and was advised there were not.⁴⁶

18. The *First Order on Reconsideration*, which Falcon cites, states that lost converters should not require separate consideration in the calculation of rates, because depreciation rates may take into account a normal loss, and retirement of such lost equipment will adjust the plant balance.⁴⁷ To the extent there is an unusual number of lost items not accounted for in depreciation rates, a reasonable adjustment may be made to recover the cost. "In such case the amount included for unusual losses should be noted and documented" so the franchising authority can assess the reasonableness of the adjustment.⁴⁸ Falcon did not

⁴³ Falcon argued in its appeal of the City's April 1999 Rate Order that City had not explained the rationale for its decision. As pointed out in the City's June 3, 1999 Opposition, the consultant's report attached to the April 1999 Rate Order explained that the rate ordered therein was based on the rate previously ordered by the City in its September 1996 decision, which the consultant carried forward. The consultant also explained he made adjustments to the true up amount for each period to reflect that Falcon would be issuing refunds. Falcon May 1999 Petition, Exhibit B, Letter from Shandling to Johnson (Mar. 26, 1999) at 1 and n.1.

⁴⁴ Falcon October 1996 Petition at 5.

⁴⁵ Falcon November 1996 Reply at 5.

⁴⁶ City November 1996 Further Opposition at 2-3, verified by Affidavit of L. David Johnson, City Manager.

⁴⁷ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, 9 FCC Rcd 1164, 1199 (1993) ("First Order on Reconsideration").

⁴⁸ *Id.* at 1200 n.97.

do this, although it has the burden of proving to the franchising authority that its rates are reasonable.⁴⁹ Falcon's tender of a new, unsupported explanation for its over-depreciation of converters in its reply in this proceeding comes too late for Bureau consideration.⁵⁰ Its appeal of the City's treatment of addressable converter depreciation is denied.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that the Petition for Review of Rate Order filed by Falcon Cablevision on July 15, 1996 (File No. CSB-A-0335) IS DISMISSED.

20. IT IS FURTHER ORDERED that the Petition for Review of Rate Order filed by Falcon Cablevision on September 11, 1996 (File No. CSB-A-0350) IS GRANTED and the matter IS REMANDED to the City of Cedartown, Georgia for further action consistent with this Consolidated Memorandum Opinion and Order.

21. IT IS FURTHER ORDERED that the Motion for Leave to File Additional Pleading filed November 19, 1996 by the City of Cedartown, Georgia IS GRANTED.

22. IT IS FURTHER ORDERED that the Petition for Review of Rate Order filed by Falcon Cablevision on October 9, 1996 (File No. CSB-A-0357) IS GRANTED IN PART and DENIED IN PART and the matter IS REMANDED to the City of Cedartown, Georgia for further action consistent with this Consolidated Memorandum Opinion and Order.

23. IT IS FURTHER ORDERED that the Petition for Review of Rate Order filed by Falcon Cablevision on May 19, 1999 (File No. CSB-A-0625) IS GRANTED IN PART and DENIED IN PART and the matter IS REMANDED to the City of Cedartown, Georgia for further action consistent with this Consolidated Memorandum Opinion and Order.

24. IT IS FURTHER ORDERED that the Petition for Stay of Enforcement Pending Review filed by Falcon Cablevision on May 19, 1999 IS DISMISSED.

25. This action is taken pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

⁴⁹ 47 C.F.R. § 76.937(a); *Rate Order*, 8 FCC Rcd at 5716. The burden is to show that the proposed rates comply with the statute and the Commission's implementing regulations.

⁵⁰ See *Falcon First Communications, L.P.*, 14 FCC Rcd at 7282.