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

In the matter of :	)	
	)	
Falcon Cable Systems	)	CSB-A-0662
	)	CSB-A-0675
Appeals of Local Rate Orders in Astoria (OR0011); Bay City (OR0086); Brownsville (OR 0214); Cannon Beach (OR 0042); Coburg (OR0176); Cottage Grove (OR 0340); Drain (OR0052); Garibaldi (OR0087); Lowell (OR0206); Oakridge (OR0079); Veneta (OR0209); Westfir (OR0248); Yoncalla (OR0202)	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2003 **Released: February 28, 2003**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Falcon Cable Systems ("Falcon") has filed two separate appeals on behalf of certain Oregon communities of local rate orders adopted by the Regional Cable Commission ("RCC") on February 14, 2001, and February 28, 2002. With regard to the appeal of the February 14, 2001 local rate orders ("2001 rate orders"), the RCC filed an opposition, to which Falcon filed a reply. In addition, Falcon filed an emergency stay request.[1] With regard to the February 28, 2002 local rate orders ("2002 rate orders"), no opposition to the appeal was filed. Because the 2001 and 2002 rate appeals have related issues and involve the same parties, we will consolidate our consideration of these matters in the interest of administrative convenience.

II. BACKGROUND

2. Under the Commission's rules, rate orders issued by local franchising authorities may be appealed to the Commission. In ruling on an appeal of a local rate order, the Commission will sustain the franchising authority's decision provided there is a reasonable basis for that decision, and will reverse a franchising authority's decision only if the franchising authority unreasonably applied the Commission's rules in its local rate order.[2] If the Commission reverses a franchising authority's decision, it will not substitute its own decision but will remand the issue to the franchising authority with instructions to

[1] Because we resolve the issues raised in these appeals on the merits, the emergency stay request is rendered moot.

[2] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation,* 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, Third Order on Reconsideration,* 9 FCC Rcd 4316, 4346 (1994).

resolve the case consistent with the Commission decision on appeal.[3]

3. An operator proposing an increase in basic service tier ("BST"), equipment or installation rates bears the burden of demonstrating that the proposed increase conforms with our rules.[4] In determining whether the operator's proposed increase conforms with our rules, a franchising authority may direct the operator to provide supporting information.[5] After reviewing an operator's rate forms and other additional information submitted, the franchising authority may approve the operator's requested rate increase or issue a written decision explaining why the operator's rate is nor reasonable.[6] If the franchising authority determines that the operator's proposed rate exceeds the maximum permitted rate as determined by the Commission's rules, it may prescribe a rate different from the proposed rate provided that it explains why the operator's rate is unreasonable and the prescribed rate is reasonable.

III. DISCUSSION

A. Effective Competition

4. On March 15, 2002, the Commission issued an order finding that the Falcon cable system serving 12 Oregon communities is subject to effective competition from the competing services provided by two unaffiliated direct broadcast satellite providers, DirecTV, Inc. and EchoStar Communications Corporation.[7] Section 623(l) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.[8] Falcon provided evidence of the advertising of DBS service in national and local media serving the franchise area, that the programming of the DBS providers satisfies the Commission's program comparability criterion, and that the 12 Oregon communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. With regard to the second prong of the competing provider test, Falcon demonstrated that DBS and other MVPD providers collectively attained subscriber penetration levels from 19 percent in Oakridge, Oregon, to 48 percent in Westfir, Oregon.[9] The Commission concluded that Falcon satisfied both prongs of the competing provider test. A finding of effective competition exempts a cable operator from rate regulation.[10]

5. In its appeal of the 2002 rate orders, Falcon asserts that effective competition existed in the Oregon communities by May 2000, and in seeking its effective competition determination, this evidence was presented to the Commission.[11] Falcon states that it would be improper to allow the RCC to

[3] *Rate Order* at 5732.

[4] 47 C.F.R. § 76.944.

[5] *See Rate Order,* 8 FCC Rcd at 5718-19.

[6] 47 C.F.R. § 76.936; *see Ultracom of Marple Inc.,* 10 FCC Rcd 6640, 6641-42 (CSB 1995).

[7] *See Falcon Cable Systems Company II, a California Limited Partnership, D/B/A Charter Communications,* 17 FCC Rcd 4648 (2002)("*Falcon*"). The 12 Oregon communities include: Bay City (OR0086); Brownsville (OR0214); Coberg (OR0176); Cottage Grove (OR0340); Creswell (OR0321); Drain (OR0052); Garibaldi (OR0087); Lowell (OR0206); Oakridge (OR0079); Veneta (OR0209); Westfir (OR0248); Yoncalla (OR0202). We note that the community of Creswell is not a party to these appeals.

[8] *See* 47 U.S.C. § 543((l)(1)(A)-(D).

[9] *Falcon,* 17 FCC Rcd at 4650.

[10] *See* 47 C.F.R. §76.905.

[11] Appeal Petition at 3 (CSB-A-0675). It is worth noting that Falcon's Petition for Determination of Effective Competition was filed April 13, 2001.

regulate rates for periods subsequent to May 2000 and it points out that this is precisely the period covered by the contested 2002 rate orders.[12] Falcon makes the alternative argument that even if the date that Falcon filed its petition with the Commission is used to determine the date that effective competition commenced, the 2002 rate orders would be preempted.[13] It indicates that the rates at issue were implemented on June 1, 2001 and that the 2002 rate orders must be set aside with respect to 11 of the Oregon communities because they were the subject of Falcon's effective competition petition filed April 13, 2001.[14]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] Falcon first presented its evidence to the Commission demonstrating it is subject to effective competition in its petition seeking such a finding from the Commission on April 13, 2001. In at least one other case the Commission has recognized the filing date of the petition submitted in support of a finding of effective competition as the effective date that a cable operator is subject to competition.[16] We do so here as well. The RCC cannot regulate Falcon's rates in the 11 Oregon communities at issue after April 13, 2001. Accordingly, the RCC's 2002 rate orders with respect to those 11 communities are without force or effect.

B. Rate Review

7. With respect to the 2002 rate orders of the two communities, Astoria and Cannon Beach, not affected by the Commission's effective competition finding in *Falcon,* and with respect to all of the 2001 rate orders, Falcon states the RCC ignores the impact of a Commission order that rejected various aspects of local rate orders adopted by the RCC in 1995, 1996, and 1997, and which remanded the rate cases to the RCC for further action consistent with that order (the "*1999 Remand Order*").[17] Falcon asserts that the *1999 Remand Order* increased the company's "maximum permitted rate," that the increase flowed through to subsequent periods, and that the RCC has released certain orders since that have ignored the impact of the *1999 Remand Order* upon Falcon's rates.[18] Falcon states that the issue is what impact the *1999 Remand Order* should have on RCC's review of Falcon's rate filings submitted after the *1999 Remand Order* was released.[19] In addition, Falcon asserts that the 2002 rate orders do not correct an erroneous methodology employed by the RCC in the 2001 rate orders and, consequently, pass through an erroneous rate calculation to the new period.[20] It states that RCC has chosen to ignore the *1999 Remand Order* and has refused to apply its findings to Falcon's 2000 and 2001 rate filings. The refusal is expressly premised on the fact that Falcon did not appeal the RCC's 1999 rate orders.[21] Falcon

[12] *Id.*

[13] *Id.* n.3.

[14] *Id.* Astoria (OR0011) and Cannon Beach (OR0042) are included in this Falcon appeal petition. However, these two communities were not the subject of the effective competition determination discussed herein. Therefore, the exemption from rate regulation resulting from the effective competition determination does not include Astoria and Cannon Beach.

[15] 47 C.F.R. § 76.906.

[16] *See Falcon Cablevision (Thousand Oaks, California),* 12 FCC Rcd 8229, 8234 (CSB 1997).

[17] Appeal Petition at 4. *See Falcon Cable Systems, Petition for Reconsideration and Appeals of Local Rate Orders of the Regional Cable Commission,* 14 FCC Rcd 21301 (1999) ("*1999 Remand Order").*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 4-5.

acknowledges that it did not appeal the 1999 rate orders while awaiting the Commission's release of the *1999 Remand Order*[22] but it argues that procedural requirements are not so inflexible to override the substantive issues involved in a particular proceeding.[23] In particular, Falcon asserts that in *Continental Cablevision of Ohio,* the Commission granted the cable operator rate relief where Continental Cablevision initially filed a refund request with the wrong franchising authority and thereafter corrected the filing, albeit after the filing deadline, when the City notified it of the error.[24] Falcon therefore requests that the Commission require the RCC to apply the *1999 Remand Order* to Falcon's 2000 and 2001 rate filings, notwithstanding its failure to appeal the 1999 rate order.[25]

8. In opposition, the RCC states that Falcon failed to appeal the 1999 rate orders and should not be allowed to correct that failure by challenging the RCC rate orders for 2001 and 2002.[26] RCC points out that in the *1999 Remand Order,* which dealt with rate orders issued by the RCC in 1995, 1996, and 1997, the Commission concluded that the RCC should reconsider rates in the appealed orders and in response to this direction, the RCC accepted Falcon's proposed rates for the years at issue and did not issue new orders for those years.[27] The RCC asserts that the Commission rejected Falcon's emergency petition which sought to have the Commission include review of the 1999 local orders in the *1999 Remand Order* decision, noting that the time for an appeal of the 1999 local orders had lapsed.[28] The RCC asserts that in its appeals of the 2001 and 2002 rate orders, Falcon is attacking the unappealed July 1999 rate orders by arguing that the unappealed maximum permitted rates set in those orders should not be the starting points for the next set of calculations.[29] The RCC states that had Falcon appealed the July 21, 1999 orders, as it did the 1995, 1996, and 1997 rate orders, those benefits would have continued to flow through to subsequent years.[30] Because Falcon did not appeal the 1999 rate orders, the maximum permitted rates used as the starting points for subsequent rate calculations are the rates set in the unappealed orders.[31]

9. In its reply, Falcon argues that if the RCC is allowed to prevent Falcon from realizing any prospective benefits from the Commission's *1999 Remand Order* because Falcon did not appeal the intervening 1999 rate orders, the impact would be "draconian."[32] Falcon asserts that the RCC insists that Falcon is forever barred from the benefits of the Commission's *1999 Remand Order* and essentially advocates that the wrong rates should be required in perpetuity because of a single "missed" appeal.[33] Moreover, it states that the RCC gives all priority to the one "missed" appeal and none to the Commission's *1999 Remand Order*.[34] Falcon also cites *Mickelson Media, Inc.,* in which the Commission

[22] *Id.* at 5.

[23] *Id.* at 6.

[24] *See Continental Cablevision of Ohio, Inc.,* 12 FCC Rcd 21337 (CSB 1997).

[25] Appeal Petition at 7-8, Appeal Petition (CSB-A-0662) at 5.

[26] Opposition at 2. RCC filed an opposition to Falcon's 2001 rate orders, but the arguments raised are sufficiently related to Falcon's 2002 rate orders.

[27] *Id.* at 3.

[28] *Id.* at 4. *See 1999 Remand Order,* 14 FCC Rcd at 21311.

[29] *Id.* at 5.

[30] *Id.*

[31] *Id.*

[32] Reply at 1.

[33] *Id.*

[34] *Id.* at 2.

allowed a local franchising authority ("LFA") to benefit from a remand order, even though it had failed to adopt intervening orders.[35] Falcon asserts that in *Mickelson Media, Inc.,* the cable operator appealed a 1997 local rate order and refused to comply with the rate reduction required in that local order. The LFA did not contest the operator's rates for the subsequent 1999-98 or 1998-99 rate periods within the 12-month period prescribed in Section 76.933(g)(2) of the Commission's rules.[36] After the Commission denied the operator's appeal, the LFA unilaterally adjusted the 2000 rate filing, notwithstanding its failure to timely act on the intervening 1997 and 1998 rate filings.[37] The Commission upheld the LFA's action based on the ground that action on the intervening rate filings was not essential while the existing appeal was pending before the Commission.[38]

10. Although the Commission's conclusions in *Mickelson Media, Inc.* focused on the implications of an LFA's actions, the circumstances are equally applicable with respect to cable operators. *Mickelson Media, Inc.* provides guidance for resolving Falcon's appeal since the Commission concluded in that case that the LFA's inaction in failing to issue successive rate orders while an appeal was pending does not preclude the LFA from adopting the findings from the successfully defended appeal in a subsequently issued rate order. The Commission emphasized that cable operators are expected to comply with valid rate orders when issued. Applying the rationale of *Mickelson Media, Inc.* to the current case recognizes that Falcon's failure to submit an intervening filing before the appeal was resolved should not undermine or foreclose correction and submission of rate calculations and rate forms for subsequent periods. As in *Mickelson Media*, *Inc.*, Falcon seeks to correct erroneous rate calculations, and in this case it seeks correction of the 2001 and 2002 rate orders based upon the Commission's requirements issued in the *1999 Remand Order.* Falcon seeks neither to reopen the previous rate proceedings nor have refunds ordered. Falcon's effort to apply the *1999 Remand Order* to subsequent periods is not unreasonable. Falcon seeks to establish a consistency with the *1999 Remand Order.*

11. To the extent the 2001 and 2002 rate orders are inconsistent with the *1999 Remand Order*, those inconsistencies should be addressed by the RCC. Therefore, we are remanding the rate orders to the RCC for further consideration.

12. Accordingly, **IT IS ORDERED** that the Appeals of Falcon Cable Systems from the Rate Orders by the Regional Cable Commission **ARE GRANTED** to the extent indicated herein and the local rate orders of the Regional Cable Commission **ARE REMANDED** for further consideration consistent with this Memorandum Opinion and Order.

13. **IT IS FURTHER ORDERED** that request for Emergency Stay filed by Falcon Cable Systems **IS DISMISSED.**

14. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.[39]

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton

[35] *Id.* at 2. *See Mickelson Media, Inc.,* 15 FCC Rcd 13311 (2000).

[36] *Id.* at 5.

[37] *Id.*

[38] *Id.*

[39] 47 C.F.R. § 0.283.

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