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

In the Matter of:	)
Falcon Telecable	)
Appeal of Local Franchising Authority's Resolutions and Orders Regulating Basic Cable Rates in Marshall, Texas	)

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1996 **Released: August 14, 1996**

By the Chief, Cable Services Bureau:

INTRODUCTION

1. By this Order, we consolidate three separate appeals filed by Falcon Telecable ("Falcon"), the franchisee in this proceeding, regarding local rate orders issued by its local franchising authority, the City of Marshall, Texas ("the City"). Specifically, Falcon filed an appeal of the City's March 6, 1994 local rate order in which the City established Falcon's regulated rates for the basic programming service tier and ordered related refunds based upon the City's review of Falcon's August 12, 1994 Forms 1200, 1205, and 1215. Falcon filed an appeal of the City's May 11, 1995 local rate order in which the City directed Falcon to rescind an April rate increase, as purportedly justified by Falcon's February 24, 1995 Forms 1210, 1205, and 1215. Finally, Falcon filed an appeal of the City's June 30, 1994 local rate order in which the City *inter alia* reduced Falcon's Hourly Service Charge (HSC), and charges for remotes and converters, and ordered corresponding refunds based upon the City's review of Falcon's February 24, 1995 Form 1210, 1205, and 1215.[1] In deciding this appeal, the Bureau has reviewed all the pleadings filed in each of the separate proceedings. We have determined that the three proceedings are sufficiently similar and related to one another to justify the joint resolution of all the issues raised by Falcon and the City in one consolidated proceeding.

[1]Falcon also filed an Emergency Petition For A Stay of Enforcement Pending Review on March 27, 1995. Because we are resolving the appeal on its merits, the petition for stay is rendered moot. The City filed separate responses to the Petition for Stay and the Appeal on April 6 and April 11, 1995, respectively. Falcon filed a Reply to the City's response to the Appeal on April 24, 1995.

STANDARD OF REVIEW

2. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[2] 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.[3] 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.[4] 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.[5] With respect to a determination made by a franchising authority on the regulatory status of an a la carte package as part of its final decision setting rates for the basic service tier, the Commission has stated that "the Commission will defer to the local authority's findings of fact if there is a reasonable basis for the local findings," and the Commission "will then apply FCC rules and precedent to those facts to determine the appropriate regulatory status of the [a la carte package] in question."[6]

3. FCC Form 1200 is the official form used to determine whether regulated rates for programming, equipment and installations are reasonable under the revised benchmark rules which began to 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.[7] Through the use of Form 1200, an operator 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 permitted rates.

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[2]*See* 47 C.F.R. § 76.944.

[3]*See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); 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, 4346 (1994) (*"Third Reconsideration Order"*).

[4]*Id.*

[5] *Id.*

[6]Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, MM Docket No. 92-266, 9 FCC Rcd 4119, 4217 (1994) *("Second Reconsideration Order"*

[7]See *Second Reconsideration Order* at 9 FCC Rcd 4119.

4. 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 which 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 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.[8]

5. 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.

DISCUSSION

A. March 6, 1995 Order

6. On March 27, 1995, Falcon Telecable filed a petition for review of a local rate order adopted on March 6, 1995. The local order established regulated rates for Falcon's basic

[8]A small operator, i.e., an operator with 15,000 or fewer subscribers that is not affiliated with a larger operator, may keep its regulated revenue at its March 31, 1994 levels, and is not required to complete its benchmark in Module C. Its provisional rates are determined by completion of Module D.

programming service tier and required Falcon to issue related refunds.[9] The City based its findings on the recommendations of an independent consulting firm hired by the City to review Falcon's Forms 1200, 1205, and 1215, all dated August 12, 1994.[10]

7. Falcon raises three challenges to the City's March 6 order. First, Falcon alleges that the City improperly decreased Falcon's external programming costs by ignoring an increase in copyright fees paid by Falcon. Second, Falcon contends that the City incorrectly calculated Falcon's monthly equipment revenue by using Falcon's actual equipment revenue for September 1992. Instead, Falcon argues that an average monthly equipment revenue figure was more representative of its equipment revenue than its actual September 1992 equipment revenue and, thus, the City should have used the average monthly equipment revenue figure. Third, Falcon alleges that the City unbundled an incorrect amount of monthly equipment costs. In response, the City contends that Falcon failed to substantiate its increase in copyright costs and its use of an average monthly equipment revenue figure. Additionally, the City disputes Falcon's claim that the local authority unbundled an incorrect amount of equipment costs.

1. External Programming Costs

8. Falcon contends that the City incorrectly reduced its external programming costs per subscriber from $0.0576 to $0.0010 on Lines B14 and I17 of Falcon's Form 1200 because the City did not include Falcon's increased copyright costs.[11] Falcon asserts that it was entitled to pass through any increases in its copyright liability from the operator's system revenues that were reflected in its August 28, 1993 copyright payments in Line B2 on Form 1200. Falcon explains that the August copyright payment was the most recent payment disbursed prior to the January 14, 1994 initial date of regulation.[12]

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[9]See March 27, 1995 Appeal, Exhibit A, Ordinance No. 0-95-02 (March 6 Order). Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act of 1934, § 623(b), 47 U.S.C. § 543(b) and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment.

[10]See March 27, 1995 Appeal, Exhibit E, Consultant's Report, December 2, 1994.

[11]*See* March 27 Appeal at 3. Lines B14 and I17 require an operator to input its net external costs per subscriber per tier. An operator is required to subtract its average external cost per subscriber per tier on the beginning date of regulation from its average external cost per subscriber per tier on March 31, 1994. To calculate its total external costs per subscriber per tier, an operator must first determine its total external costs per tier (programming costs, taxes, and franchise related costs). An operator then divides the total external costs per tier by the respective number of subscribers per tier.

[12]According to the operator, Falcon's copyright fees are payable twice annually, by March 1 and August 31 of each year. Falcon states that its most recent copyright payment covering Marshall prior to the January 14, 1994 initial date of regulation was made on August 28, 1993. Falcon's first copyright payment covering Marshall after the initial date of regulation was made on February 25, 1994 and covered the period July through December 1993.

9. The City contends that it disallowed the use of the August 1993 payment on Line B2 because the Form 1200's instructions require the cable operator to use the copyright fees it paid during the "last whole calendar month" before its initial date of regulation to calculate external programming costs. Because the initial date of regulation for Falcon in Marshall, Texas, was January 14, 1994, the City asserts that Falcon should use only copyright fees paid, if any, in December 1993 in completing Line B2. The City disputes the operator's argument that its August 1993 copyright payments are representative of its increased costs. The City notes that Falcon's August 1993 copyright fee payment was based on revenue received by the operator for the period January 1993 through June 1993, but Falcon's channel line-ups and associated rates changed significantly as of September 1, 1993, rendering its earlier fee payments no longer representative of Falcon's actual expenses. Conceding that December 1993 may not be representative of Falcon's costs because the operator did not pay any copyright fees that month, the City further suggests that Falcon's February 1994 payment would be more representative of the operator's costs, since it would include Falcon's costs at the time of initial regulation and would be based on revenue received during the whole calendar month prior to the initial date of regulation.

10. The instructions for Form 1200, Line B2, require an operator to use data from the last whole calendar month before the beginning date of regulation for that operator unless that month is not representative of the operator's costs.[13] In this matter, the initial date of regulation was January 14, 1994. Because Falcon did not pay copyright costs in December 1993, the last whole calendar month prior to regulation, that month is not representative of the operator's programming costs. The City erred by calculating Falcon's external costs using December 1993 programming costs without including an adjustment for copyright costs. However, Falcon also erred by using August 1993 programming costs to calculate its programming costs. Falcon paid all of its bi-annual copyright payment in August 1993, rendering the use of that month unrepresentative of its usual monthly costs. Moreover, Falcon changed its channel line-up on September 1, 1993, subsequent to the August 1993 copyright payment, rendering the August 1993 payment unrepresentative of Falcon's costs at the time of regulation. As Falcon paid its annual copyright costs in two lump sum payments, there is no actual month that would be representative of its costs.[14] For purposes of determining Falcon's programming costs, a representative sample month must be created. In order to create such a month, the City should spread Falcon's copyright payments out over the six month period from July 1993 to December 1993.[15] After

[13]FCC Form 1200, instructions at 13.

[14]If the City were to use either of the two actual months in which the operator paid its copyright costs, the operator's costs for that month used would be unusually high in comparison to the other months. Similarly, if the City were to choose a month in which Falcon did not pay copyright costs, the costs for that month would not be representative of the operator's true costs since the costs would not include an adjustment for copyright costs.

[15]The total figure for the six month period would be Falcon's February 1994 copyright payment, which was based on revenue collected from July through December 1993 and was the first payment that reflected the operator's September 1, 1993 channel line-up modifications.

amortizing the February 1994 payment over six months, the City should use the resulting figure for December 1993 in calculating Falcon's programming costs. Accordingly, we remand this issue to the local authority for resolution in accordance with this memorandum opinion and order.

2. Monthly Equipment Revenue

11. Falcon asserts that the City improperly calculated its monthly equipment revenue by using Falcon's actual equipment revenue for the month of September 1992 on Falcon's Form 1200, Line G5, rather than the average revenue figure which Falcon used.[16] Falcon asserts that the general instructions of Form 1200 allow an operator to use other, more representative data if the data from the last month before the date the Form 1200 was submitted were not representative of the revenue during the relevant period.[17] Falcon asserts that it provided the City with evidence that the use of an average monthly revenue figure was more representative than the actual monthly equipment revenue because the September 1992 equipment revenue number was disproportionately low in comparison to the average monthly revenue for the period May through December 1992.

12. The City contends that although the FCC Form 1200 gives operators the discretion to use an average monthly revenue figure instead of the actual monthly revenue, the use of an average figure must be justified by a showing that the actual monthly revenue figure is not representative of the revenues experienced during the relevant period. The City alleges that Falcon merely provided an average monthly equipment revenue figure for May through December 1992, without any additional support or explanation as to why the September 1992 actual monthly revenue was not representative of the revenue during the period May through December 1992. Accordingly, the City used Falcon's September 1992 actual equipment revenue figure of $23,408.79.

13. We do not agree with Falcon that the general instructions of Form 1200 apply to the facts at hand. The general instructions to Form 1200 specifically state that where "the form asks [an operator] to fill in monthly data, *unless a different date is specified,* [the operator] should

[16] *See* March 27 Appeal, Exhibit D. An operator is required to report its total monthly equipment revenue as of September 30, 1992 on Line G5. Total equipment revenue is one of the factors used to compute an operator's full reduction rate. Falcon reported an average monthly equipment revenue figure of $23,741.68 on Line G5, but in its October 4, 1995 response to the City, the operator provided its monthly equipment and installation service revenue for the months May through December 1992 and listed its average monthly equipment and installation service revenue as $23,822.47. Falcon did not explain the discrepancy between the two figures. Based on our review of the operator's October 4, 1995 response, Falcon made a reporting error on Line G5 when it reported its average equipment revenue as $23,741.68. Falcon's correct average monthly equipment revenue is $23,822.47.

[17] *See* FCC Form 1200 instructions at 5. The Commission also allows an operator, in computing its copyright costs, to use other "more representative data," if the data from the last whole calendar month before the date of regulation is not representative of the operator's copyright costs. *See supra* ¶ 11-13.

use data from the last month of the most recent calendar year."[18] The instructions go on to say that an operator can use other data if that data would be more representative. Falcon failed to provide any evidence to the City as to why the "other" data was more representative. The operator should have used the data for the date specified in the instructions for Line G5. The instructions of Line G5 direct operators to enter the total monthly equipment revenue earned for the last whole monthly billing period ending on or before September 30, 1992. Accordingly, Falcon should have entered the actual equipment revenue figure for September 1992.[19] Because the City's decision to use Falcon's actual monthly equipment revenue on Line G5 was reasonable, we deny Falcon's appeal of this issue.

3. Unbundling of Equipment Costs

14. Falcon states that the City used an incorrect figure for the operator's monthly equipment costs per subscriber to complete Line D2 of Form 1200 and on the Form 1205 worksheets, resulting in a figure of $3.2843 for monthly equipment costs per subscriber rather than the figure of $2.5781 calculated by Falcon.[20] The operator claims that the City did not challenge any of the data or computations used by Falcon in completing its Form 1205. Instead, Falcon states that the local franchising authority based its adjustments on Falcon's franchise allocation methodology and the fact that the equipment costs derived pursuant to Form 1205 were different from the equipment costs derived pursuant to Falcon's previously filed Form 393. Falcon asserts that it correctly unbundled its equipment costs per subscriber on Line D2 of Form 1200 and on the Form 1205 worksheets to calculate a figure of $3.2843. Falcon contends that it used an allocation methodology specifically approved by the Form 1205 instructions.[21] Aside from stating that the "FCC has instituted some very significant changes in Form 1205 compared with Form 393," Falcon does not explain why the figures differed.[22] Moreover, Falcon does not explain why it used a different allocation method in its FCC Form 1205 than in its FCC Form 393 to allocate costs from the system level to the local franchise level.

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[18]FCC Form 1200 General Instructions, at 5. (emphasis added)

[19]Additionally, we are not persuaded that the revenue for September 1992 was disproportionately low in comparison to the average monthly revenue for the period May through December 1992. Falcon's September 1992 actual equipment revenue was $23,408.79, whereas its average monthly equipment revenue for the same period was $23,822.47, a difference of $413.68, or less than 2 percent. In reviewing the entire eight months, the highest monthly equipment revenue was in June 1992 ($24,751.80) and the lowest was in August 1992 ($22,866.15) Thus, Falcon's actual monthly equipment revenue for September 1992 appears to be part of a normal minor fluctuation in revenue.

[20]An operator is required to input its monthly equipment and installation cost per subscriber on Line D2. This cost is used to compute an operator's restructured March 31, 1994 rates.

[21]Falcon allocated its costs based on a ratio of the number of City subscribers to the number of system subscribers.

[22]March 27, 1995 appeal at 6.

15. The City asserts that the unbundled equipment costs using the FCC Form 1205 should be equal to the unbundled equipment costs using the FCC Form 393 to "prevent the cable operator from overrecovering or underrecovering based on the combination of monthly service charges, equipment, and installation rates."[23] The City disputes Falcon's charge that the City did not challenge any of the data or computations used by Falcon. Instead, the City notes that it questioned Falcon's use of a different method in its FCC Form 1205 than in its FCC Form 393 to allocate costs from the system level to the local franchise level, and it questioned the resulting change in Falcon's equipment costs. According to the City, for the purposes of Form 393, Falcon used a ratio of the City's subscribers to the total system subscribers (40.22%) for maintenance and installation costs, and a ratio of the number of units located in the City to the total system units (55.42%) for the leased equipment costs. This resulted in a composite allocation factor of 50.55%. For purposes of the Form 1205, Falcon changed its allocation methodology to use only the ratio of the City's subscribers to the total system subscribers (40.22%) for all three costs. The City alleges that by changing to this particular ratio, Falcon allocated a significantly smaller amount to be unbundled from the monthly service rates than was unbundled using the allocation method and the mathematical computations utilized in the operator's FCC Form 393.

16. FCC Form 1205 instructions allow an operator, in cases where its accounting records are kept at a different level of organization than the franchise area level, to adjust its annual equipment and installation costs to reflect equipment costs solely at the franchise area level. Such is the case here. Accordingly, Falcon was permitted to adjust its annual equipment and installation costs to reflect those costs at the franchise level. The Commission did not specify a methodology for operators to utilize to adjust their costs to reflect costs at the franchise level. Instead, it cited as example of an acceptable methodology, the ratio of City subscribers to the total number of system subscribers. However, the Commission provided that, in order for cable operators to use this methodology, the franchise areas covered by an operator's accounting

[23]April 11, 1995 Opposition, Appendix at 4. As an illustration of its proposition, the City argues that to allow an operator to unbundle an amount less than that unbundled in the Form 393 would result in an increased monthly service charge on the FCC Form 1200, because the operator's maximum permitted equipment rate as justified by its Form 393 would not be reduced to reflect its maximum permitted rate as justified by its Forms 1200/1205. The Commission addressed the City's concern in *Mt. Hood. See TCI Cablevision of Oregon,* (Multnomah County, OR) DA 95-2269 (Cab. Serv. Bur. Rel. Nov. 14, 1995) (*"Mt. Hood"*). In *Mt. Hood*, the Commission ruled that operators that have already unbundled their equipment costs using the FCC Form 393 must wait one year from the date of the unbundling before changing these charges. In making this ruling, the Commission acknowledged that operators that are charging more for equipment than is justified by their Form 1205 costs will receive in excess of their maximum permitted revenues for some period of time. The Commission, however, noted that the Form 1205 instructions and its ruling in *Mt. Hood* apply to "changes" in equipment rates and therefore other operators that are charging less than their maximum permitted rates under their initial Form 1205 filing will earn less than their maximum permitted revenues for a similar period of time.

records must reflect similar subscriber equipment profiles.[24] Based on the record, Falcon failed to provide the City with any evidence that its accounting records met this requirement. Therefore, the City was reasonable in rejecting the allocation methodology used in Falcon's FCC Form 1205.

17. However, the City erred in mandating that Falcon's Form 1205 equipment costs should be identical to the equipment costs listed in Falcon's Form 393. The Commission designed Part III of FCC Form 393 as the vehicle that operators would utilize to determine their equipment rates for the period September 1, 1993 through May 14, 1994. Subsequently, the Commission instituted FCC Form 1205 as the official form used to determine the costs of regulated cable equipment and installation for the period beginning May 15, 1994.[25] Forms 1200 and 1205 utilize different mathematical computations in unbundling equipment costs from programming costs than the FCC Form 393, and may provide different results.[26] Accordingly, the City may not, as it did here, ignore the mathematical formula prescribed in the Form 1205 and mandate that Falcon's Form 1205 equipment costs be identical to the equipment costs listed in Falcon's Form 393. We remand this issue to the City for further consideration so that it may enter an order consistent with our findings. Upon remand, the City must determine Falcon's monthly equipment costs utilizing the Form 1205 formula and using data from fiscal year 1992.

B. May 11, 1995 Order

18. On June 12, 1995, Falcon filed a petition for review of the City's local order adopted on May 11, 1995, which directed Falcon to rescind an April 15th rate increase based on its Forms 1205, 1210, and 1215 all dated February 24, 1995 and to credit, in its next billing cycle, any charges that were the result of the rate increase.[27] Falcon contends that the City received its February 24, 1995 Forms 1205, 1210, and 1215 on March 13, 1995 and failed to act on the February 24, 1995 submission or issue a tolling order within the 30-day initial review period provided by Section 76.933.[28] Accordingly, Falcon asserts that its rates became effective

[24]*See* FCC Form 1205 instructions at 22, Line 8.

[25]*See* FCC Form 1205.

[26]The amount of the difference between the unbundled equipment cost calculated using the FCC Form 393 and the unbundled equipment cost calculated using the FCC Form 1205 will vary depending on a number of factors including the number of units of equipment in service at the time of completion of both forms; the value of the equipment at the time of completion of both forms; and the allocation methodology used in both forms.

[27]Falcon also filed an Emergency Petition For A Stay of Enforcement Pending Review on March 27, 1995. Because we are resolving the appeal on its merits, the petition for stay is rendered moot. The City did not file an opposition to either the Appeal or the Stay.

[28]*See* June 12, 1995 Appeal, Exhibit A, Ordinance No. 0-95-10 (May 12 Order). The City adopted a tolling order on April 13, 1995, thirty-one days after the date Falcon asserts that the local authority received the FCC Forms 1205, 1210, and 1215.

when the City failed to act within the 30-day review period and that it was justified in implementing its rate adjustment on April 15, 1995, increasing its monthly basic service rate to $22.24. The City did not file an opposition to Falcon's June 12, 1995 appeal. Instead the local authority addressed the issues raised in that appeal in its response to Falcon's July 31, 1995 appeal.[29]

19. Falcon argues that these rates proposed in its March 10, 1995 filing must be deemed approved because the City failed to issue a written rate order within 30 days of the date Falcon filed Forms 1200, 1205 and 1210, and failed to issue an order tolling the deadline for 90 more days, as required under the Commission's rules. Falcon contends that, as a result, the City ceded its authority to prescribe rates, to order rate reductions, and to order refunds with regard to this particular rate filing.[30] Falcon asserts that the City's inaction must be interpreted as an implicit approval of the rates justified by its filing.

20. In response, the City disputes Falcon's contention that its rate filing was received on March 13, 1995 and contends that the filing was received on March 14, 1995. In support of its contention, the City attached a date-stamped copy of the cover letter to Falcon's filing. Thus, the City argues that its April 13, 1995 tolling resolution was adopted in a timely manner.

21. When a cable operator files either a benchmark or a cost-of-service rate justification, the Commission's rules provide a franchising authority 30 days in which to take certain action with respect to the rate filing.[31] At the end of the 30-day deadline, if the franchising authority has taken no action, an operator's proposed rates become effective immediately (or its existing rates remain in effect).[32] In benchmark proceedings (*i.e.*, filings based on either FCC Form 393 or FCC Forms 1200, 1205 and 1210), such as the proceeding below, a franchising authority may issue an order tolling the 30-day deadline for an additional 90 days if it requires more time to review the filing, giving the franchising authority a total of

[29]Falcon's July 31 Appeal is discussed at ¶¶ 24-34 *infra*.

[30]Falcon contends that it mailed the City its Forms 1205, 1210, and 1215 on March 10, 1995. It asserts that the City received the Forms on March 13, 1995 and in support of this claim attaches a May 8, 1995 letter from the City acknowledging that it received the Forms on March 13, 1995. *See* June 12, 1995 Appeal, Exhibit B, at 2. Falcon claims that the City failed to adopt a tolling resolution within the 30-day time period specified by the Commission and instead adopted a tolling resolution on April 13, 1995, thirty-one days after the receipt of Falcon's Forms.

[31]*See* 47 C.F.R. § 76.933(a).

[32]In setting initial rates under the benchmark system, an operator must set its rates before submitting its Form 393 or Form 1200 for review. Therefore, when a franchising authority reviews rates set by Form 393 or Form 1200, these rates are an operator's existing rates. After establishing initial rates, an operator must submit a Form 1210 before implementing any rate increase. When a franchising authority reviews rates set by Form 1210, these rates are an operator's proposed rates. The time periods governing a franchising authority's review of an operator's rate filing under Section 76.933 of the Commission's rules apply to the review of both existing rates and proposed rates. 47 C.F.R. § 76.933.

120 days to issue a rate order.[33] Prior to the expiration of the 120-day review period, the franchising authority may extend the deadline still further and may preserve its authority to order refunds by issuing an accounting order by which the operator is directed to keep an accurate account of its financial records.[34] If the franchising authority has not issued a rate decision or an accounting order by the end of the 120-day review period, the operator's proposed rates will go into effect without being subject to retroactive refunds.[35] If a franchising authority subsequently issues a rate order, the franchising authority may not require subscriber refunds as part of its rate order.[36] However, a franchising authority that has not rendered a rate decision or issued an accounting order before the expiration of its 120-day review period may still prescribe rates and order a prospective rate reduction when it issues its rate order.[37]

22. Falcon mailed the City its Forms 1205, 1210, and 1215 on March 10, 1995. Falcon contends that the City received the forms on March 13, 1995 and cites a May 8, 1995 letter from the City in support of its contention.[38] In response to Falcon's claims, the City explains that its May 8, 1995 letter to the operator incorrectly stated that the local authority received the filing on March 13, 1995 and that in fact the City received the filing on March 14,

[33]*See* 47 C.F.R. § 76.933(b). "This two-step approach appropriately balances the cable industry's desire for expedition in the rate determination process and the franchising authorities' need for a sufficient amount of time to obtain the views of interested parties and to make an informed and reasoned judgment on proposed rates. The first step promotes the goal of expedition to the fullest extent possible by requiring franchise authorities to evaluate a cable operator's showing within 30 days. If the franchising authority takes no action within this 30-day period, the proposed rate will go into effect. The second step permits franchising authorities sufficient time to make informed decisions by providing additional time in those cases that are likely to be complex -- *i.e.*, where it cannot be determined, based on the material submitted, whether the operator's rates are reasonable or where a cost-of-service showing is necessary to justify a rate above the permitted levels. We believe that a total of 120 days (*i.e.*, 30 initial days plus 90 additional days) should be a sufficient amount of time to resolve cases requiring further analysis or documentation to ensure that a proposed rate is within the presumptively reasonable level." *Rate Order*, 8 FCC Rcd at 5711.

[34]*See* 47 C.F.R. § 76.933(c).

[35]*Id.*

[36]"If a franchising authority has availed itself of the additional 90 or 150 days permitted in paragraph (b) of this section, and has taken no action within these additional time periods, then the proposed rates will go into effect at the end of the 90 or 150 day period, or existing rates will remain in effect at such times, subject to refunds if the franchising authority subsequently issues a written decision disapproving any portion of such rates, *provided, however,* that in order to order refunds, a franchising authority must have issued a brief written order to the cable operator by the end of the 90 or 150-day period permitted in paragraph (b) of this section directing the operator to keep an accurate account of all amounts received by reason of the rate in issue and on whose behalf such amounts were paid." 47 C.F.R. § 76.933(c) (emphasis in the original).

[37]*See* Chillicothe Cablevision, Inc. d/b/a Dimension Cable Services (Washington Court House, OH) 10 FCC Rcd 6055 (Cab. Serv. Bur. 1995) (*"Chillicothe Cablevision"*).

[38]*See* June 12 Appeal, Exhibit B at 2.

1995. As proof of its assertion, the City provides a date-stamped copy of the cover letter to Falcon's filing.[39] The Commission has considered date-stamped copies of filing to be reliable evidence of the dates of such filings.[40] Based on the date-stamped copy of the filing, we conclude that the City received Falcon's filing on March 14, 1995. Accordingly, the 30-day initial review period commenced on March 15, 1995. The City adopted a tolling resolution on April 13, 1995, within the 30-day time period specified by the Commission. Therefore, we deny Falcon's appeal of this issue.

C. June 30, 1995 Order

23. On July 31, 1995, Falcon filed a petition for review of a local rate order adopted on June 30, 1995, by the City.[41] That local order established regulated rates for Falcon's Hourly Service Charge ("HSC"), recalculated charges for remotes and converters, disallowed Falcon's inside wiring maintenance agreements, and ordered related refunds.[42] The City based its findings on the recommendations of an independent consulting firm hired by the City to review Falcon's Forms 1205, 1210, and 1215, all filed on February 24, 1995.[43]

24. Falcon raises three challenges to the City's June 30 order. First, Falcon reiterates its contention that its equipment basket charges became effective when the City failed to act on the operator's February 24, 1995 Forms 1205, 1210, and 1215, or to issue a tolling order, within the 30-day initial review period.[44] Second, Falcon alleges that the City erred in recalculating Falcon's equipment basket costs. Specifically, Falcon argues that the City improperly reduced the operator's HSC, thereby precluding Falcon from fully recovering its equipment and installation costs. Falcon further contends that the City erred by adjusting Falcon's current provision for depreciation, which resulted in flawed rates for remotes and non-addressable and addressable converters. Third, Falcon asserts that the City wrongly disallowed Falcon's inside wiring maintenance plan. In response, the City contends that it issued a timely tolling order on

[39]*See* August 15, 1995 Opposition at Attachment A.

[40]*See, e.g.,* 47 C.F.R. § 1.13(a)(1), which states that a date-stamped copy indicating the time and date received by the Office of General Counsel will constitute proof of filing of a petition for review or a notice of appeal of a Commission order.

[41]Falcon also filed an Emergency Petition For A Stay of Enforcement Pending Review on July 31, 1995. Because we are resolving the appeal on its merits, the petition for stay is rendered moot. The City filed separate responses to the Appeal and the Petition for Stay on August 15, 1995. Falcon filed a Reply to the City's response to the Appeal on August 22, 1995.

[42]*See* July 31, 1995 Appeal, Exhibit A, Ordinance No. 0-95-18 (June 30 Order).

[43]*See* July 31, 1995 Appeal, Exhibit E, Consultant's Report, June 21, 1995.

[44]Because we have already addressed this argument, see ¶¶ 18-22, *supra*, and have denied Falcon's appeal on this issue, we will not address it further with respect to this third appeal.

April 13, 1995. The City further argues that it reduced Falcon's HSC because the operator had overstated its installation-related equipment basket costs by including non-regulated activities. The City asserts that it adjusted Falcon's provision for current depreciation because the operator did not include the net loss on the retired converters as part of its current provision for depreciation. Finally, the City explains that it disallowed Falcon's inside wire maintenance program because Falcon already recovered the costs related to this program in its monthly basic service charge.

1. Calculation of the Equipment Basket Costs

25. Falcon asserts that the City improperly denied it full recovery of the costs associated with providing regulated customer equipment and installations because the local authority reduced Falcon's capital costs and operating expenses by excluding those costs attributable to indirect ("non-billable") activities. Falcon contends that its HSC should have been calculated by dividing its equipment basket costs attributable to both indirect ("non-billable") and direct ("billable") activities by the number of direct hours spent engaged in equipment basket activities.

26. The City asserts that Falcon overstated its installation-related equipment basket costs in its FCC Form 1205 by including costs that should have been attributed to indirect ("non-billable") activities. The City, in recalculating the HSC, divided only those equipment basket costs attributable to direct ("billable") activities by the number of direct labor hours. To determine the amount of equipment basket costs attributable to direct activities, the City determined that the direct labor portion of the equipment basket costs and expenses was actually 48.30% of the total costs and expenses listed by Falcon, and reduced the capital costs and operating expenses for installation and equipment maintenance accordingly.[45]

27. Under our rules and Form 1205, an operator's regulated customer equipment and installation charges are limited to its actual costs, plus a reasonable profit.[46] The converse is that an operator must be permitted to recover all its costs associated with providing such equipment and installations, including a reasonable profit.[47] These costs are known as the equipment basket costs.[48] The Commission directed that an operator establish an equipment basket to which it would assign all the direct costs of service, installation, additional outlets, and leasing and

[45]Specifically, the City divided the total direct labor hours billed (2,879) by the total direct and indirect labor hours (5,942) to derive the 48.30%.

[46]47 C.F.R. § 76.923(c).

[47]*Id.*

[48]47 C.F.R. § 76.923(a). *See Rate Order*, 8 FCC Rcd at 5815-16 (1993).

repairing equipment.[49] The equipment basket should also include an allocation of all those system joint and common costs that service, installation, leasing, and equipment repair share with other system activities, excluding general system overhead.[50] The charges for installations and equipment derived in Form 1205 are calculated to provide for recovery of these costs. Central to the derivation of the permitted installation and equipment charges is the calculation of the HSC.[51] The HSC methodology "uses time spent in related activities as the factor for allocating [installation and equipment maintenance] costs to the various charges."[52] The HSC is derived by dividing the operator's annual customer equipment maintenance and installation costs by the total number of hours spent on maintenance and installation of customer equipment in that year. An operator may charge customers for installations based on the HSC multiplied by the number of hours spent on a particular installation, or alternatively, it can establish fixed charges for various types of installations by multiplying the HSC by the average time it takes to do each type of installation. An operator's various equipment lease charges are derived by multiplying the HSC by the total number of hours the operator spends annually maintaining and servicing the equipment, plus the annual capital costs for that equipment, and then allocating this total amount over the number of equipment units in service.

28. In the present case, Falcon included in its equipment basket indirect costs such as those associated with time spent driving to and from subscribers' premises, carrying out administrative chores such as stocking equipment, performing disconnections, and conducting service downgrades. All of these indirect costs are common costs shared with other system activities. Thus, a portion of these indirect costs should be allocated to equipment and installation and included in Falcon's equipment basket costs and correspondingly in the operator's HSC calculation. Neither party states whether Falcon included its entire indirect costs in the equipment basket or whether the operator allocated a portion of the indirect costs to the equipment basket to reflect the amount of indirect costs that are attributable to equipment and installation. In order to recalculate these indirect costs, Falcon must make such an allocation. The City was unreasonable in restricting Falcon's equipment basket costs to direct costs, and should allow

[49] *Rate Order* at 8 FCC Rcd 5815 (1993).

[50] *Id.*

[51] 47 C.F.R. § 76.923(d).

[52] *Rate Order*, 8 FCC Rcd at 5817 (1993).

Falcon to include in its equipment basket both its direct costs and an allocation of a portion of its indirect costs to reflect the amount of indirect costs that are attributable to equipment and installation.[53] We remand this issue to the local authority so that it may enter an order consistent with these findings.

2. Calculation of Rates for Remotes, and Addressable and Non-Addressable Converters

29. Falcon alleges that the City erred by adjusting the operator's current provision for depreciation on Form 1205, Schedule C, Line J, thereby incorrectly reducing Falcon's monthly lease rates for remotes, and non-addressable and addressable converters.[54] According to Falcon, at the end of 1994 it performed a physical inventory which indicated that its asset balances did not conform to the actual total number of converters and remotes in inventory or within its customers' homes. Falcon therefore adjusted its asset balance and recorded the full amount of the adjustment as a "loss on retirement" on its profit and loss statement. Falcon contends that in order to minimize the impact on subscribers, it chose not to pass on the full amount of the loss in 1995, but instead planned to recover the loss over the course of the next five years. Falcon asserts that its actions conform to the "intent of the Commission's rules which is to permit operators to recover all of their costs related to equipment used for regulated services."[55]

30. The City asserts that Falcon incorrectly included a net loss on retirement of the converters and remotes because the net loss was not recorded on Falcon's accounting records as part of Falcon's current provision for depreciation on assets. In support of its conclusion, the City notes that the instructions of Form 1205, Schedule C, Line J, require operators to enter their current provision for depreciation based on the year-end balance for the equipment included on the schedule.

31. The Commission has recognized that operators over time may experience the loss of equipment, and has determined that lost equipment should not require separate consideration in the calculation of equipment rates. Depreciation rates should take normal loss into account, and the retirement of such lost items will adjust the net plant balance to reflect the balance of

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[53]As long as the same method is used for counting both the total number of labor hours in calculating the HSC and the labor hours for the various installation and equipment maintenance tasks in reviewing an operator's Form 393, then the HSC review will result in proper cost recovery. *See* Falcon Cablevision (Thousand Oaks, California), DA 95-1115 (May 19, 1995); Harron Communications Corporation, DA 95-160, 10 FCC Rcd 2349 (1995) ("*Harron*").

[54]The City reduced Falcon's maximum permitted charges for remotes from $0.59 to $0.18, for non-addressable converters from $3.69 to $2.20, and for addressable converters from $3.46 to $2.80. Schedule C of Form 1205 is used by operators to compute the annual costs for each type of customer premises equipment offered in connection with regulated service. The current provision for depreciation (Line J, Schedule C) is one of the factors used to compute these costs.

[55]*See* July 31, 1995 Appeal at 8 (emphasis original).

equipment on hand.[56] However, where there is an unusual number of lost items which are not provided for in depreciation rates, a reasonable adjustment may be made to recover the costs.[57] The Commission also recognized that local franchising authorities would need to be able to assess the reasonableness of such adjustments. Thus, where the recovery over the next year would not cause an unusual rate spike,[58] the Commission requires operators to make an adjustment to its current depreciation by including any unusual losses in the depreciation expense reported on Schedule C, documenting the amount included for unusual losses.[59] In cases where an unusual rate spike would occur, the Commission allows operators to defer the losses for ratemaking purposes and amortize the amount over a period of time to smooth out the rate impact, such as the average remaining life of the equipment in question.[60] In the present appeal, Falcon alleges that it suffered an unusual loss, but neither party has provided sufficient information, *i.e.*, the number of remotes or converters lost and their value, to determine whether the operator actually suffered an "unusual loss" that would result in a rate spike.[61] We remand this issue to the local franchising authority for further proceedings so that it can enter an order consistent with our order.[62]

3. Inside Wire Maintenance Agreement

32. Falcon contends that the City erred in ordering Falcon to discontinue its optional inside wire maintenance program and refund subscribers the difference between actual service

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[56]Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 1164 (1994) (*"First Reconsideration Order"*) at 1199.

[57]*Id.*

[58]A rate spike is an extraordinary increase in rates followed by a subsequent decrease in rates.

[59] *First Reconsideration Order*, 9 FCC Rcd at n.97.

[60]*Id.*

[61]Specifically, the parties did not provide the number of converters or remotes that it recorded as a loss on retirement or the amount of the adjustment. The parties also did not explain whether Falcon's 1994 inventory was an annual inventory, nor did they provide the date of the last physical inventory prior to the 1994 inventory. This information would have allowed us to determine whether the number of converters and remotes lost was an unusually high number given the time period between inventories.

[62] If the City should find that Falcon experienced only a normal loss of equipment, then Falcon's adjustment to its current depreciation reflecting the lost converters and remotes should be excluded because their depreciation rates should already take into account this normal loss of equipment. However, if the City finds that Falcon experienced an unusual loss of equipment, the recovery of which *would not* cause a rate spike, then the City should allow Falcon to adjust its depreciation rates to recover all of the costs related to the lost converters and remotes, and document the amounts included for this loss on its Schedule C. If the City should find that Falcon experienced an unusual loss of equipment, the recovery of which *would* cause a rate spike, then the City should allow Falcon to amortize the loss over a long enough time period to smooth out the rate effect.

calls and the revenue collected under the inside wire maintenance program. Falcon argues that its optional inside wire maintenance agreement is not subject to regulation because customers have the option of declining the program and choosing to pay for any internal wiring service calls at Falcon's regulated HSC rates. According to Falcon, at the time of its September 1, 1993 channel and rate restructuring, it chose to turn over the ownership of the wiring inside its subscribers' homes. At that time it offered subscribers the option of purchasing an inside wire maintenance program, paying for any internal wiring service calls at Falcon's regulated HSC rates, or obtaining the services of a third party contractor to make any needed home wiring repairs.

33. The City argues that Falcon's inside wire maintenance program is similar to a service contract and it should be based on the HSC multiplied by the amount of time required to perform the service. The City further notes that Falcon failed to state whether the costs related to the inside wire maintenance program were unbundled from its monthly service charge. The City contends that if Falcon has not unbundled the cost related to the maintenance program, it is already recovering the costs related to the program and should not be allowed to charge an additional separate monthly rate for the service.

34. Under our rules, an operator is permitted to sell customer premises equipment to subscribers, and may also offer service contracts for the maintenance and repair of equipment sold to subscribers.[63] If the subscriber owns the inside wiring, as is the case here, the operator may offer an optional maintenance plan or service contract. Pursuant to our rules, "the charge for a service contract shall be the HSC times the estimated average number of hours for maintenance and repair over the life of the equipment."[64]

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[63]47 C.F.R. § 76.923(i); *Rate Order*, 8 FCC Rcd at 5817-18; *First Reconsideration Order* at 9 FCC Rcd 1201. 47 C.F.R. § 76.923(i) states:

> A cable operator may sell customer premises equipment to a subscriber. The equipment price shall recover the operator's cost of the equipment, including costs associated with storing and preparing the equipment for sale up to the time it is sold to the customer, plus a reasonable profit. An operator may sell service contracts for the maintenance and repair of equipment sold to subscribers. The charge for a service contract shall be the HSC times the estimated average number of hours for maintenance and repair over the life of the equipment.

[64]47 C.F.R. § 76.923(i). *See also* Comcast Cablevision (Mount Clemens, MI) 10 FCC Rcd 11046 (Cab. Serv. Bur. 1995). On the other hand, if the operator owns the internal wiring, that wiring is regulated equipment, the rate for which must be justified in Form 1205. The monthly lease rate for the inside wiring includes maintenance costs. Under those circumstances, the operator cannot charge an additional maintenance fee for inside wiring. *See* 47 C.F.R. § 76.923(a)(4); *First Reconsideration Order*, 9 FCC Rcd at 1200.

35. Contrary to Falcon's assertions, the optional maintenance plan it offers is a regulated service, the charge for which is specified in our rules.[65] Pursuant to our rules, Falcon was required to provide evidence as to the costs and labor hours associated with the maintenance of the customer-owned inside wiring. For inside wiring which is customer-owned, such information is needed to identify what hours and costs have been included in the calculation of the HSC and for calculating the average charge. Neither party has indicated that Falcon provided any evidence of how it arrived at the monthly inside wire maintenance charge of $1.50, *i.e.*, the estimated average number of hours for maintenance and repair over the life of the equipment. In fact, the City inquires whether the costs have been unbundled from the monthly service charge. Without this information, we are unable to determine whether Falcon adequately justified its inside wire maintenance charge. We find that it was unreasonable for the City to disallow the inside wire maintenance charge entirely. We therefore remand this issue to the City with instructions that Falcon provide the City, within twenty (20) days of the release of this order, with detailed information necessary to justify the calculation of the inside wire maintenance charge. If, upon remand, Falcon fails to provide adequate information, the City should set the inside wire maintenance rate based on the best information available.

ORDERING CLAUSES

36. Accordingly, **IT IS ORDERED** that Falcon Telecable's appeal of the City of Marshall's March 6, 1995 local rate order, regarding the issue of the reduction of Falcon's external programming costs is **REMANDED** to the City for resolution in accordance with the terms of this Memorandum Opinion and Order.

37. **IT IS FURTHER ORDERED** that Falcon Telecable's appeal of the City of Marshall's March 6, 1995 local rate order, regarding the issue of the calculation of Falcon's monthly equipment revenue is **DENIED**.

38. **IT IS FURTHER ORDERED** that Falcon Telecable's appeal of the City of Marshall's March 6, 1995 local rate order, regarding the issue of the calculation of Falcon's equipment costs is **REMANDED** to the local franchising authority for further consideration so that it may enter an order consistent with our findings.

39. **IT IS FURTHER ORDERED** that Falcon Telecable's appeal of the City of Marshall's May 11, 1995 local rate order, regarding the issue of the City's alleged failure to issue a timely tolling order is **DENIED**.

40. **IT IS FURTHER ORDERED** that Falcon Telecable's appeal of the City of Marshall's June 30, 1995 local rate order, regarding the issue of the calculation of Falcon's Hourly Service Charge and related refund liability is **REMANDED** to the local authority so that it may enter an order consistent with these findings.

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[65] 47 C.F.R. § 76.923(i).

41. **IT IS FURTHER ORDERED** that Falcon Telecable's appeal of the City of Marshall's June 30, 1995 local rate order, regarding the issue of the calculation of Falcon's rates for the lease of remotes, and addressable and non-addressable converters is **REMANDED** to the local franchising authority for further consideration so that it can enter an order consistent with our findings.

42. **IT IS FURTHER ORDERED** that Falcon Telecable's appeal of the City of Marshall's June 30, 1995 local rate order, regarding the issue of the disallowance of Falcon's inside wire maintenance charge is **REMANDED** to the local franchising authority for further consideration so that it can enter an order consistent with our findings.

43. **IT IS FURTHER ORDERED** that, in light of the resolution of its appeal herein, the requests for stay filed by Falcon Telecable **ARE DISMISSED** as moot.

44. 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