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

In the Matter of:	)
	)
FALCON CABLEVISION	)
	)
Appeal of Local Rate Order	)
of City of Calabasas, CA	)

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1996 **Released: September 10, 1996**

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On September 23, 1994, Falcon Cablevision ("Falcon"), operator of a cable system in the City of Calabasas, California ("the City"), filed an appeal challenging a local rate order adopted on August 24, 1994 by the City.[1] The rate order establishes a new regulated rate schedule for Falcon's basic service tier and equipment. In the order, the City approved Falcon's proposed equipment rates set out in its FCC Form 393 but reduced Falcon's rate for its basic service tier and its Hourly Service Charge ("HSC"). The City ordered Falcon to implement corresponding refunds dating back to September 1, 1993.[2]

2. In its appeal, Falcon raises three challenges to the City's order. Falcon asserts that the City improperly subjected the operator's a la carte package to rate regulation and incorrectly reduced Falcon's HSC from $86.97 to $28.24, an amount which Falcon contends would preclude full recovery of its equipment and installation costs.[3] Falcon also raises a refund liability offset

[1]Falcon filed a Petition for a Stay of Enforcement Pending Review on September 23, 1994. Because we are resolving the appeal on its merits, the petition for stay is rendered moot.

[2]Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b)

[3]Falcon also challenges a provision in the local order in which the City directs its staff to file a complaint with the Commission objecting to Falcon's restructuring of programming on November 22, 1993. In that restructuring, Falcon allegedly removed four channels from its basic service tier and created a new four-channel cable programming service tier. However, no such complaint was filed by the City, and the time for filing a complaint based on that

issue. In an opposition filed on October 6, 1994, the City argues that Falcon's a la carte package failed to meet the interpretative guidelines set out by the Commission for such packages.[4] The City also argues that Falcon failed to provide documentation to support its HSC in a timely fashion and in some cases was either unwilling or unable to provide requested information.

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.[5] 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.[6] 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.[7] 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.[8] 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."[9]

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particular restructuring has expired. *See* 47 C.F.R. § 944(b). Therefore, we find this issue not to have been raised for review,

[4]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, 4214-4216 (1994) (*"Second Reconsideration Order"*).

[5]*See* 47 C.F.R. § 76.944.

[6]*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 Recon. Order"*).

[7]*Id.*

[8]*Id.*

[9]*Second Recon. Order*, 9 FCC Rcd at 4217.

DISCUSSION

A. A La Carte Package

4. Falcon created an a la carte package on September 1, 1993 by removing four channels from rate regulated tiers of service. As a result of that restructuring, Falcon offered Prime Ticket, American Movie Classics, TNT, and Comedy Central on an individual basis and also as a package that Falcon alleges is not subject to rate regulation.[10] Falcon asserts that the City improperly treated the collective offering of four individually offered channels as a regulated tier. Falcon argues that this a la carte package complies with the provisions of the 1992 Cable Act, which it contends encourages cable operators to unbundle programming services from regulated tiers and offer them on a per-channel basis.[11] Falcon further argues that the a la carte package fully complies with Commission rules for unregulated treatment existing at the time the package was created.[12]

5. The facts presented in this appeal resemble the facts presented in one of our letter of inquiry orders on a la carte packages, *Comcast Cablevision, Mt. Clemens, Michigan*,[13] in which we resolved the regulatory status of an a la carte package that is similar in its material elements to the a la carte package at issue in this appeal. Specifically, the a la carte package at issue in the *Comcast of Mt. Clemens* order consisted of a four channel package, made up of channels formerly available on its basic tier and on its two cable programming service tiers, which was offered as part of a restructuring of the operator's channel line up. In that case, after considering the restructuring put into effect there under the various tests set forth in the Commission's *Rate Order*, in the *Second Reconsideration Order*, and in the *Going Forward Order*,[14] we were unable

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[10] Falcon's charges $2.00 for each of the four channels if ordered separately and $5.95 for a package of all four of these channels, or a 25% discount for the package.

[11] Appeal at 4-5.

[12] *Id. at 8. See Rate Order*, 8 FCC Rcd at 5836-5838; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 1164, 1184-85 (1993).

[13] 10 FCC Rcd 103 (1994) (*"Comcast of Mt. Clemens"*).

[14] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration and Fifth Report and Order, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 1226 (1994) (*"Going Forward Order"*). New product tiers are cable programming services that, subject to certain conditions, are not rate regulated. *Going Forward Order*, 10 FCC Rcd at 1233-39. In the *Going Forward Order*, the Commission reconsidered its regulatory treatment of collective offerings of a la carte channels. Specifically, the Commission determined that such packages are cable programming service tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at 1243. However, the Commission also stated that with respect to packages created between April 1, 1993, and September 30, 1994, where it is not clear that a particular package was not a permissible offering under the a la carte rules in effect at the time it was created, the package may be treated as a new product tier. *Id.*

to find that the a la carte package at issue there clearly was not a permissible non-rate regulated offering under our rules. We further concluded that, in light of prior confusion over what constituted a permissible non-rate-regulated a la carte offering, it would be inequitable to subject the operator to refund liability or to require the operator to restructure its tiers and return the channels offered in the a la carte package to regulated tiers. Instead, we found that the a la carte package at issue there could be treated as a new product tier under the *Going Forward Order*.

6. We find that the City's determination that Falcon's a la carte package is a regulated tier is inconsistent with the action taken in our a la carte letter of inquiry orders, and in particular in *Comcast of Mount Clemens*. We further find that Falcon's a la carte package should not be treated as a standard rate-regulated tier of service and that the channels comprising it should be treated as non-rate regulated for purposes of rate justification. Accordingly, we are remanding this issue to the City for the entry of an order consistent with these findings and our findings in *Comcast of Mount Clemens*.[15]

B. Computation of Hourly Service Charge

7. The second issue raised by Falcon concerns the number of labor hours that should be used to determine Falcon's Hourly Service Charge ("HSC") and Falcon's installation and equipment rates on FCC Form 393, Part III. FCC Form 393 is submitted by cable operators to franchise authorities for their use in determining whether an operator's regulated rates for programming, equipment and installations were reasonable during the period from September 1, 1993 until May 14, 1994.[16] Form 393 is divided into three separate but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

8. The operator's maximum permitted rates are derived by completing Parts II and III of the Form 393, pursuant to which the operator calculates the actual aggregate revenues collected by the operator for regulated programming, equipment and installation, as of the initial

[15]We need not address Falcon's argument with respect to the "retroactive" application by the City of the 15 guidelines set forth in the *Second Reconsideration Order*, in light of the fact that we grant Falcon's appeal on the a la carte issue and remand this case to the City so that it may enter an order consistent with our decision in this Order.

[16]To the extent that an operator has sought to take advantage of the refund deferral period available under our rules in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

date of regulation ("current rate") or as of September 30, 1992.[17] After calculating actual aggregate revenues, the operator converts those revenues to a per-channel rate, and then compares the per-channel figures to the applicable benchmark rate. If an operator's current per-channel rate level is at or below the applicable benchmark rate, then the operator's rate level is deemed reasonable, but it must remain at its current level. If its current per-channel rate level exceeds the benchmark rate, the operator must then compare its September 30, 1992 per-channel rate level to the applicable benchmark rate. If its September 30, 1992 per-channel rate level is above the benchmark rate, it must reduce this rate level to the benchmark rate or by 10%, whichever reduction is less. After computing the permitted rate level in this manner (whether based on current rates or September 1992 rates), monthly equipment and installation costs are removed to derive the maximum permitted programming rates. Maximum permitted rates for equipment and installation are based on actual cost and are separately calculated in Part III of the Form 393.

9. The City reduced Falcon's HSC from $86.97 to $28.24, based on an upward adjustment in the number of labor hours utilized on Form 393, Part III, Step A, Line 4. Rather than the 1,898 "billable" hours used by Falcon as reflecting time installers actually spend at subscriber premises performing installations or maintenance, the City used 6,000 hours. This larger number of labor hours was based on the City consultant's estimate that 1,898 hours was not a reasonable amount of labor required to provide maintenance and installation for 14,539 system subscribers. The City used instead a service personnel-to-subscriber ratio of 1:5,000 recommended by its consultant, which produced the 6,000 labor hours used. Increasing the dividend in the HSC calculation by this much larger labor hours number reduced the resulting HSC to the lower $28.24 figure.

10. Falcon asserts that application of the City's reduced HSC will improperly deny it full recovery of the costs associated with providing regulated customer equipment and installations. According to Falcon, this results because the City included what both parties refer to as "billable" and "non-billable" labor hours in the calculation of the HSC, while applying only "billable" hours in determining the rates to be applied to various installation and equipment tasks.[18]

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[17]An operator must calculate its rate in effect on September 30, 1992, only if its current rate level is above the benchmark rate. If an operator's current rate level is at or below the benchmark rate, it is not required to calculate its September 30, 1992 per-channel rate.

[18]We note that our rules and Form 393 do not mention or provide any definition of billable or non-billable labor hours. Form 393 only requires an operator to use the "total number of person-hours" spent in service installation and maintenance of customer equipment in calculating its HSC. The parties have used the terms "billable" and "non-billable" hours to define how they arrived at these total labor hours. As described herein, how these terms are defined with respect to counting labor hours is not crucial for purposes of Form 393. As long as the same method of counting hours is applied in calculating both the HSC and in the application of rates to various installation and equipment tasks, the operator will be able to recover the proper amount of costs. For the convenience of the parties, however, we use the terms billable and non-billable hours for the purposes of this order.

11. Under our rules and Form 393, an operator's regulated customer equipment and installation charges are limited to its actual costs, plus a reasonable profit.[19] The converse is that an operator must be permitted to recover all its costs associated with provision of equipment and installations, including a reasonable profit.[20] These costs are known as the Equipment Basket costs.[21] The charges for installations and equipment derived in Part III of Form 393 are calculated to provide for recovery of these costs. The HSC methodology "uses time spent in related activities as the factor for allocating [installation and equipment maintenance] costs to the various charges."[22] Central to the derivation of the permitted installation and equipment charges is the calculation of the HSC.[23] 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 the 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 a year the operator spends 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.

12. Neither our rules nor FCC Form 393 specifies a particular method for counting labor hours; the form's instructions require operators only to explain how they derived the figures they report, and we have reviewed a variety of approaches. Using installation service as an example, an operator may count only the time an installer is actually at a subscriber's premises performing the installation (so-called billable hours). Another operator may include the time spent driving to and from the premises (so-called non-billable hours), while another operator may take a different approach by counting an installer's total paid time and dividing by the number of installations performed. Some operators may also include supervisory time. As we explain herein, none of these approaches is necessarily "better" than others; they are simply different ways of allocating costs to services. In reviewing an operator's HSC calculations, the primary concern should be to ensure that its Equipment Basket costs are fully recovered on a consistent basis, not how the operator delineated its labor hours. In order to ensure full recovery, an operator must be permitted to use the same method of counting person hours in calculating the

[19] 47 C.F.R. § 76.923(c).

[20] *Id.*

[21] 47 C.F.R. § 76.923(a). *See Rate Order*, 8 FCC Rcd at 5815-16 (1993).

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

[23] 47 C.F.R. § 76.923(d).

HSC as it does in applying the resulting specific charges for performing various installations and equipment maintenance tasks.[24]

13. Falcon included only billable labor hours in calculating its original HSC.[25] In its review of Falcon's Form 393, the City recalculated the HSC by including non-billable labor hours as well as billable hours. However the City erred because it apparently did not use the same method for counting the labor hours for the various installation and equipment charges as it used in determining the rates to be applied to various installation and equipment tasks. We remand this issue to the City to ensure that any associated non-billable labor hours added by the City are also accounted for in the determination of rates for the various installation and equipment maintenance tasks. As long as a franchising authority uses the same method 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 its HSC review will result in proper cost recovery.[26]

C. Refund Liability

14. Lastly, Falcon contends that if the City was correct in increasing the number of labor hours used to calculate the HSC, the City should have allowed Falcon to offset any overcharges resulting from the reduced HSC against any undercharges which would exist based on the increased number of labor hours in the calculation of the various equipment and installation charges. Falcon argues that the additional labor hours the City used to calculate a reduced HSC should be multiplied by the new HSC to reflect revenue for which Falcon was permitted to charge. Falcon argues that such revenue should be used to offset the finding that Falcon had set its HSC too high. This refund offset issue should become moot when, as required by this order, the City employs the same method for counting labor hours in calculating the HSC

[24]Stated another way, correct application of the HSC methodology requires that recoverable costs be allocated to the labor hours through which they can be recovered.

[25]Falcon states that its practice is to charge subscribers for installations based only on the time that an employee spends at a subscriber's premises performing the installation. In its Form 393, therefore, Falcon included 100% of the salaries of its installation staff, but less than 100% of their total work time. Falcon claims the less-than-100% figure represents the percentage of time installation personnel are actually performing installations (billable hours). Falcon's billable hours definition does not include time spent driving to and from subscribers' premises, carrying out administrative chores such as stocking equipment, performing disconnects and conducting service downgrades; Falcon refers to these as non-billable hours.

[26]*See* Falcon Cablevision (Thousand Oaks, California), DA 95-1115 (May 19, 1995); Harron Communications Corporation, DA 95-160, 10 FCC Rcd 2349 (1995) ("*Harron*"). In *Harron*, the franchising authority included only billable labor hours in calculating the operator's HSC. Since the franchising authority used the same method for counting the operator's labor hours in calculating both the HSC and the various installation and equipment charges, we held that the franchising authority's action was reasonable. The franchising authority's action did not affect the operator's total cost recovery or its total refund liability.

as is employed in determining revenues derived from application of HSC to various installation and equipment maintenance tasks covered by the HSC.

ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that Falcon Cablevision's appeal of the City of Calabasas's local rate order **IS GRANTED** to the extent indicated herein, and the matter **IS REMANDED** to the City for resolution in accordance with the terms of this Order.

16. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau