

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

FALCON TELECABLE	)	
	)	
Appeals of Local Rate Orders of Calvert City, Kentucky.	)	File Nos. CSB-A-0288
	)	CSB-A-0356
CUID KY0529	)	CSB-A-0360
	)	CSB-A-0467
	)	CSB-A-0610

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 27, 1999**

**Released: December 30, 1999**

By the Deputy Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. On January 11, 1996, Falcon Telecable ("Falcon") filed an appeal of Municipal Order No. 95-02 adopted on November 28, 1995 ("November 1995 Order"), by the City of Calvert City, Kentucky ("City") wherein the City established a maximum permitted rate ("MPR") for the basic service tier ("BST") based on its review of Falcon's Form 1210 filing. The City filed an opposition. Falcon did not file a reply. On January 11, 1996, Falcon also filed a "Petition for Stay Pending Review of Rate Order". This Memorandum Opinion and Order constitutes a ruling on the substantive facts of the case and, thus, renders moot Falcon's Petition for Stay.

2. In addition, Falcon has appealed Municipal Order No. 96-04 adopted on September 9, 1996 ("September 9, 1996 Order"); Municipal Order No. 96-05 adopted on September 23, 1996 ("September 23, 1996 Order"); and Municipal Order No. 97-01 adopted on September 25, 1997 ("September 1997 Order").<sup>1</sup> Falcon incorporated Municipal Order No. 97-03 adopted on November 10, 1997 ("November 1997 Order") into its appeal of the September 25, 1997 Order.<sup>2</sup> Falcon also appealed Municipal Order No. 98-01 adopted on December 14, 1998 ("December 1998 Order").<sup>3</sup> The City has opposed these appeals, and Falcon has replied to all except the opposition to its appeal of the December 1998 Order. These local rate appeals involve the same parties and related issues. Therefore, in the interest of administrative efficiency, we resolve each of these appeals in this Memorandum Opinion and Order.

<sup>1</sup> On October 27, 1997, Falcon filed a Petition for Stay Pending Review of Local Rate Order, which is dismissed as moot. On November 18, 1996, the City filed a Petition for Waiver of Rule, seeking waiver of the filing date in 47 C.F.R. § 76.944(b). We hereby grant the City's waiver petition, which is unopposed, and accept its late-filed Opposition for good cause shown.

<sup>2</sup> Falcon Nov. 21, 1997 Reply at 2 n.1.

<sup>3</sup> The local rate orders and appeals are listed in the Appendix.

## II. STANDARD OF REVIEW

3. Under our rules, rate orders adopted by local franchising authorities may be appealed to the Commission.<sup>4</sup> In reviewing appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision so long as there is a reasonable basis for that decision.<sup>5</sup> 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.<sup>6</sup> 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 in a manner that is consistent with the Commission's decision on appeal.<sup>7</sup>

## III. BACKGROUND

4. Once an operator's initial regulated rate has been established, the operator may adjust its rates periodically to reflect changes in external costs, channel additions and deletions, and inflation. An operator using the quarterly rate adjustment method computes the adjustments using the FCC Form 1210.<sup>8</sup> An operator using the annual rate adjustment method computes the adjustments using FCC Form 1240.<sup>9</sup> As with the 1210, the Form 1240 allows for the cable operator to update its MPR for its regulated cable services. Unlike Form 1210 which reflects costs already incurred, Form 1240 attempts to project costs that are reasonably certain and quantifiable for the twelve months following the rate change.<sup>10</sup> If actual and projected costs are different during the rate year, a "true-up" mechanism is available to match estimated costs with actual costs.<sup>11</sup> The true-up requires operators to decrease their

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<sup>4</sup>47 C.F.R. § 76.944.

<sup>5</sup>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 and Buy-Through Prohibition, MM Docket Nos. 92-266 and 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994).

<sup>6</sup>*Rate Order*, 8 FCC Rcd at 5732.

<sup>7</sup>*Id.*

<sup>8</sup>47 C.F.R. § 76.922(d).

<sup>9</sup>47 C.F.R. § 76.922(e).

<sup>10</sup>Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 391 (1995) ("*Thirteenth Order*"). Form 1240 projections include the following costs: external costs; inflation; and changes in the number of regulated channels for the relevant period. 47 C.F.R. § 76.922(e)(1), (e)(2).

<sup>11</sup>47 C.F.R. § 76.922(e)(3). As the true-up period examines only costs actually incurred, it includes costs incurred before the Form 1240 is filed and does not coincide exactly with the previous year's projected rate period. *Thirteenth Order* 11 FCC Rcd at 420 n.151; see Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services, FCC Form 1240, "Timing" at 3-4 (July 1996).

rates if costs were overestimated or, alternatively, allows operators to increase their rates if costs were underestimated.<sup>12</sup>

5. The cable operator bears the burden of proving the reasonableness of its proposed rates through its filings.<sup>13</sup> In adopting a local rate order, the local franchising authority must provide the operator with an opportunity to participate in the rate review proceedings and to provide documentation supporting its proposed rates.<sup>14</sup> If the local franchising authority does not dispute the basis for the figures presented in a cable operator's filings or has not discovered any mathematical errors in the form, the franchising authority should approve the operator's MPR as calculated in the form.<sup>15</sup> A franchising authority should not require the operator to set a particular rate for its BST at any level less than the MPR, even if the operator's current or actual rate is below the MPR.<sup>16</sup> Instead, the franchising authority should allow the operator to charge up to the MPR approved in the most recent rate order. An operator is not required, however, to raise its rates to the maximum permitted level and may voluntarily charge less than the MPR.<sup>17</sup> In the event the local franchising authority disapproves the operator's MPR, it must provide a sufficient explanation in the rate order informing the operator and other interested parties why the rate was disapproved so that the operator may appropriately and timely appeal the local rate order to the Commission.<sup>18</sup>

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<sup>12</sup>*Thirteenth Order*, 11 FCC Rcd at 420-21 ¶¶ 79-80.

<sup>13</sup>See 47 C.F.R. § 76.937; see also *Sammons Communications, Inc.*, 10 FCC Rcd 5089, 5091 ¶ 14 (Cab. Serv. Bur. 1995).

<sup>14</sup>See *Rate Order*, 8 FCC Rcd at 5723-24.

<sup>15</sup>*A-R Cable Service-ME Inc.*, 10 FCC Rcd 1783, 1784 ¶ 6 (Cable Serv. Bur. 1995); *TCI of Northern New Jersey*, 10 FCC Rcd 1657, 1658 ¶ 6 (Cable Serv. Bur. 1995); *TCI Cablevision of Northern Central Kentucky, Inc.*, 10 FCC Rcd 926, 927 ¶ 6 (Cable Serv. Bur. 1994). Although the preceding cases discuss the local franchising authority's obligations in the context of reviewing FCC Form 393, the same standards of review are applicable to Form 1200 series (1200, 1205, 1210, 1215, 1220, 1225, 1230, 1235, 1240). *TCI of Northern New Jersey*, 10 FCC Rcd 1657, 1657 ¶4 (Cab. Serv. Bur. 1995). Both the Form 393 and Form 1200 series constitute official forms to be used for calculating regulated rates.

<sup>16</sup>*Sammons Communications of New Jersey, Inc.*, 11 FCC Rcd 17246, 17253-54 ¶14 (Cable Serv. Bur. 1996); *American Cable TV Investment*, 10 FCC Rcd 12577, 12579 ¶11 (Cable Serv. Bur. 1995); *TCI Southeast Mississippi*, 10 FCC Rcd 8728, 8730 at ¶ 13 (Cable Serv. Bur. 1995).

<sup>17</sup>*A-R Cable Services-ME Inc.*, 10 FCC Rcd 1783, 1784 n.10.

<sup>18</sup>*TCI-TKR of Northern Kentucky Inc.*, 11 FCC Rcd 17353, 17365 ¶ 28 (Cab. Serv. Bur. 1996), citing *Warner Cable Communications of Cincinnati, Inc.*, 10 FCC Rcd 6015, 6018 ¶ 16 (Cab. Serv. Bur. 1995).

#### IV. DISCUSSION

##### A. November 1995 Order

6. Falcon has appealed the City's November 1995 Order. In the previous rate order adopted in February 1995 ("February 1995 Order"), the City approved Falcon's actual rate of "\$16.79 per month, which is within the maximum permitted rate . . .,"<sup>19</sup> but did not specifically address the \$17.25 MPR shown on the rate form. When Falcon filed for the rate adjustment now before us using FCC Form 1210, the City disapproved the rate, stating the operator should have calculated its new rate from the actual rate approved in the February 1995 Order, not the underlying MPR. In its appeal, Falcon argues that the new rate should have been calculated from its previous MPR, not its actual rate, and that the City's February 1995 Order approved its MPR. The City opposes the appeal, arguing that its previous rate order approved Falcon's actual rate as the MPR.

7. A franchising authority is not required to issue a written decision if it approves an unopposed rate adjustment.<sup>20</sup> If it disapproves the maximum permitted rate shown in the operator's rate justification, however, it must advise the operator of its action and the reasons for its action in a written decision.<sup>21</sup> The February 1995 Order states only that the operator's actual rate was approved as "within the maximum permitted rate." Nothing on the face of the City's February 1995 Order suggests that the City had rejected the operator's rate calculation on FCC Form 1210 and found a lower MPR justified pursuant to the Commission's rules and rate form. The explanation in the November 1995 Order for rejecting the previous permitted rate, that Falcon had "voluntarily chosen to undercharge" for the previous period,<sup>22</sup> is not a valid reason for substituting the operator's lower actual rate for the permitted rate specified by the Form 1210 instructions. The instructions for Module A provide that the previous applicable permitted charge to be entered as the starting rate on Line A2 is the updated full reduction rate if the operator previously used the May 1994 version of the form or the updated permitted charge if the operator used a later version of the form.<sup>23</sup> An operator may choose to charge less than its MPR, and that rate would be reasonable, but doing so does not affect the permitted rate it can carry forward for the next

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<sup>19</sup> February 1995 Order at ¶ 3. Specifically, the relevant sentence reads as follows: "[T]he basic service rate of \$16.79 per month, which is within the maximum permitted rate for 18 channels are reflected on Form 1210 dated October 5, 1994 is HEREBY APPROVED."

<sup>20</sup> 47 C.F.R. § 76.936(a).

<sup>21</sup> *Id.*; see *TCI-TKR of Northern Kentucky, Inc.*, 11 FCC Rcd 17353; *A-R Cable Services-ME, Inc.*, 10 FCC Rcd at 1784-85 ¶ 10.

<sup>22</sup> November 1995 Order at 3 ¶ 9. The City speculates that Falcon set its BST rate below the MPR, because Falcon may have overcharged for its CPST rates. Opposition at 2-3. Until the sunset of CPST rate regulation, issues regarding CPST rates were to be raised to the Commission in a timely-filed complaint. See 47 U.S.C. § 543(a)(2)(B), (c); 47 C.F.R. § 76.950. The February 1995 Order at ¶ 2 states that the City had filed and supplemented a complaint with the Commission regarding CPST rates. The City may not use BST rate proceedings to offset alleged CPST overcharges or refund underpayments. See *Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948 (1997).

<sup>23</sup> Instructions for FCC Form 1210 at 8 (May 1995).

rate adjustment or prevent the operator from raising its rate to the MPR calculated on the rate form.<sup>24</sup> Because the Commission's rules and the rate form do not support the City's action, it is not reasonable. The City's November 1995 Order is being remanded for further consideration consistent with this Memorandum Opinion and Order.

#### B. September 9, 1996, September 23, 1996, and September 1997 Orders

8. Since appealing the November 1995 Order, Falcon has submitted four rate filings to update its MPR. In rate orders issued on September 9, 1996, September 23, 1996, and September 25, 1997, the City adjusted the starting rate for the rate adjustment calculations by building on the MPR determined in its November 1995 Order.<sup>25</sup> Falcon has challenged the City's starting rate adjustments in appeals of each of these rate orders. Because the November 1995 Order was not reasonable, we are remanding these subsequent rate orders for further consideration. On remand, the City should recalculate the MPRs addressed in each of these rate orders to reflect the further consideration of the City's November 1995 Order required by this Memorandum Opinion and Order. The starting rate for computing each rate adjustment should be the starting rate specified by the instructions for the rate form used by Falcon.<sup>26</sup> Any franchising authority requirement that an operator use an actual rate that differs from the starting rate specified in the instructions for Form 1210 or Form 1240, whichever form is under review, would not be consistent with the Commission's requirements.<sup>27</sup>

9. In its appeal of the City's September 1997 Order, Falcon also questions the City's treatment of the true-up on Worksheet 8 of FCC Form 1240. Operators using Form 1240 use cost projections in setting rates and then true-up the projections against actual costs in the next rate adjustment. Module H of the Form 1240 computes the true-up adjustment (Line H3) by comparing revenue from "the average rate [the operator] elected to charge" from Worksheet 8 with revenue that

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<sup>24</sup> See *Media General Cable of Fairfax County, Inc.*, 12 FCC Rcd 17424, 17431-32 ¶ 22 (Cab. Serv. Bur. 1997), application for review pending; *A-R Cable Services-ME, Inc.*, 10 FCC Rcd at 1784 n.10. On the other hand, 47 C.F.R. § 76.922(d)(3)(i) requires operators using the quarterly rate adjustment method on FCC Form 1210 to adjust the permitted charge at least annually to reflect external cost and inflation increases if the changes are to be reflected in regulated rates. "A system that does not adjust its permitted rates annually to account for those changes will not be permitted to increase its rates subsequently to reflect the changes."

<sup>25</sup> The BST rate addressed in the September 9, 1996 Order was computed on FCC Form 1210; the BST rates addressed in the subsequent Orders were computed on FCC Form 1240.

<sup>26</sup> See Instructions for FCC Form 1210 at 8 (May 1995) (entry in Module A for previous applicable permitted charge is the updated permitted charge from the previous Form 1210); Instructions for FCC Form 1240 at 12 (July 1996) (entry in Module A for current maximum permitted rate is the rate the operator is currently permitted to charge for regulated programming services pursuant to Commission regulations).

<sup>27</sup> In light of our remand of the September 1997 Order for recalculation of the MPR, we need not reach Falcon's argument that the City erred in its September 1997 Order when refusing to consider Falcon's revised Form 1240. According to Falcon, it filed its initial Form 1240 on June 30, 1997 and submitted a revised Form 1240 on August 28, 1997 to incorporate undisputed corrections requested by the City's Rate Regulation Officer and use the starting rate to which it believed it was entitled rather than the rate previously ordered by the City. Falcon Oct. 27, 1997 Appeal at 5-6. The City rejected this revised form as "untimely" and because "Falcon has made no showing of any change in conditions." September 1997 Order at 1.

10. After the City's September 23, 1996 Order, Falcon resubmitted its 1996 Form 1240 as required by the Order. It showed the City-ordered MPR of \$18.82 as both the new MPR on Line I9 and the operator-selected rate it intended to charge on Line I10, and it used this rate on its rate card. In trueing up its 1996 rate on its 1997 Form 1240, Falcon entered \$18.20 as its 1996 actual or operator-selected rate on Worksheet 8.<sup>28</sup> The City ordered Falcon to use \$18.82 on Worksheet 8, because it was the rate shown on the rate card and the City viewed the lesser rate as a discount.<sup>29</sup> According to Falcon, it showed the \$18.82 rate on Line I10 and the rate card only to avoid forfeiting the right to use the MPR in future calculations under the City's interpretation in the November 1995 Order.<sup>30</sup> It argues that the actual rate was not a special discount or promotional rate and, therefore, should be the rate entered in Worksheet 8. The City opposes using the \$18.20 rate in Worksheet 8, arguing that the true-up is designed for discrepancies between actual and projected costs, not to allow an operator to make up for voluntary discounts or promotions or recover voluntary undercharges.<sup>31</sup> When Falcon did not submit a revised Form 1240 using the \$18.82 figure on Worksheet 8, the City issued its November 1997 Order finding Falcon in violation of the September 1997 Order, specifying the MPR it calculated using the \$18.82 figure, and directing Falcon to comply with its order.<sup>32</sup>

11. As discussed above, an operator is not required to charge the full MPR in order to carry the MPR forward in computing subsequent rate adjustments on FCC Form 1240. In addition, the Commission explained in the *Thirteenth Order* establishing the annual rate adjustment method that it was adopting the new method to address concerns that the quarterly adjustment method embodied in FCC Form 1210 encouraged operators to charge higher rates than they might otherwise elect to charge and delayed recovery of costs to which operators were entitled.<sup>33</sup> Therefore, the Commission allows operators using the annual method to build into projected rates any revenues lost from charging less than the MPR.<sup>34</sup>

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<sup>28</sup> Falcon Oct. 27, 1997 Appeal at 4-5.

<sup>29</sup> September 25, 1997 Order.

<sup>30</sup> Falcon Oct. 27, 1997 Appeal at 4-5.

<sup>31</sup> City Nov. 12, 1997 Opposition at 3-6.

<sup>32</sup> November 1997 Order at 2. This local rate order was issued during the comment period, and Falcon incorporated it into its appeal of the September 1997 Order. See Falcon Nov. 21, 1997 Reply at 2 n.1 & Attach. A. The City did not file an objection at the time. However, the December 1998 Order states that Falcon did not appeal the November 1997 Order. We are treating the November 1997 Order as part of Falcon's appeal of the September 1997 Order. The November 1997 Order sought to enforce the September 1997 Order and prescribed a rate based on the revisions to Falcon's rate calculation required by the September 1997 Order. Falcon has not claimed that the November 1997 Order requires consideration of issues or facts not addressed in its appeal of the September 1997 Order. Under the circumstances here, an additional appeal is not required. Falcon has not waived its right to an adjudication on the merits by incorporating the November 1997 Order into its appeal of the September 1997 Order.

<sup>33</sup> *Thirteenth Order*, 11 FCC Rcd at 413 ¶ 57, 414 ¶ 60.

<sup>34</sup> *Id.* at 414 ¶ 58, 415 ¶ 62, 421 ¶¶ 80-81 (operator does not lose ability to recover costs it defers). Operators may also recover revenues lost when franchising authorities are found to have denied rate adjustments unreasonably. *Id.* at 428 ¶ 98.

12. While the City is correct that discounted or promotional rates cannot be used in Worksheet 8,<sup>35</sup> the City explained in its Opposition that it treated Falcon's \$18.20 rate as a discount because it was less than what Falcon could have charged and less than the rate shown on the rate card. An operator's election to charge a uniform rate below the MPR does not make the elected rate a discount. The City's erroneous conclusion that an operator must reduce its MPR if it elects a lower rate may have caused Falcon to issue a rate card showing the MPR rather than the actual rate. Under these circumstances, the City's refusal to consider that Falcon's actual rate might differ from the City-ordered MPR shown on the rate card was unreasonable. On remand the City should determine Falcon's actual rate for the true-up period from reliable information and use this rate on Worksheet 8.<sup>36</sup>

### C. December 1998 Order

13. Like the local rate orders discussed above, the December 1998 Order uses the previous MPR ordered by the City as the starting rate. In its appeal of the December 1998 Order, Falcon states it has conceded the validity of adjustments to its Form 1240 that were made by the City.<sup>37</sup> It complains, however, that it could not replicate the MPR calculated by the City from the determinations in the City's rate order and that the rate order failed to include the attachment referenced therein. Falcon asks the Bureau either to revise the December 1998 Order to provide an MPR as recalculated by Falcon or to remand the matter to the City for a satisfactory resolution, unless the City can explain the discrepancy in its response to Falcon's appeal.<sup>38</sup> In opposing the appeal, the City states that Falcon was given an opportunity to review and comment on the revised Report of the City's Rate Regulation Officer and the proposed rate order before the City adopted the rate order.<sup>39</sup> The revised Report was attached to the Opposition as Exhibit B and included the Rate Regulation Officer's recalculation of Falcon's Form 1240. The City does not explain why some entries in the Officer's report differ from entries in Falcon's recomputed Form 1240 attached as Appendix B to its appeal, but Falcon did not file a reply questioning this Report. Because Falcon appears to have received the requested relief with the City's Opposition, we need not further address the timeliness of its receipt of the Officer's Report. We are remanding the December 1998 Order, however, so that Falcon can claim the MPR determined on remand of the September and November 1997 Orders as the starting rate for the rate at issue in the December 1998 Order.

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<sup>35</sup> Instructions for FCC Form 1240 at 41.

<sup>36</sup> See generally *Time Warner Cable*, DA 99-1887 ¶ 7, 1999 WL 717273 (FCC) (Cab. Serv. Bur. released Sept. 16, 1999) (Bureau accepted reliable information showing that rate card rate was not implemented on the date shown and adjusted Worksheet 8 accordingly).

<sup>37</sup> Falcon Jan. 13, 1999 Appeal at 1.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> City Feb. 4, 1999 Opposition at 1-2, Exh. A.

**V. ORDERING CLAUSES**

14. Accordingly, IT IS ORDERED that the Falcon Telecable's appeal filed with the Commission on January 11, 1996, IS GRANTED, and Calvert City Municipal Order No. 95-02 IS REMANDED to the City for further action consistent with this Memorandum Opinion and Order.

15. IT IS FURTHER ORDERED that the Falcon Telecable's appeal filed with the Commission on October 9, 1996, IS GRANTED, and Calvert City Municipal Order No. 96-04 IS REMANDED to the City for further action consistent with this Memorandum Opinion and Order.

16. IT IS FURTHER ORDERED that the Falcon Telecable's appeal filed with the Commission on October 23, 1996, IS GRANTED, and Calvert City Municipal Order No. 96-05 IS REMANDED to the City for further action consistent with this Memorandum Opinion and Order.

17. IT IS FURTHER ORDERED that the Falcon Telecable's appeal filed with the Commission on October 27, 1997, IS GRANTED, and Calvert City Municipal Orders No. 97-01 and 97-03 ARE REMANDED to the City for further action consistent with this Memorandum Opinion and Order.

18. IT IS FURTHER ORDERED that the Falcon Telecable's appeal filed with the Commission on January 13, 1999, IS GRANTED IN PART, and Calvert City Municipal Orders No. 98-01 IS REMANDED to the City for action consistent with this Memorandum Opinion and Order.

19. IT IS FURTHER ORDERED that Falcon Telecable's January 11, 1996 and October 27, 1997 filed Petitions for Stay Pending Review of Rate Order ARE DISMISSED as moot.

20. IT IS FURTHER ORDERED that Calvert City's Petition for Waiver of Rule 47 C.F.R. § 76.944(b) IS GRANTED and Calvert City's November 18, 1996 Opposition is accepted as late-filed.

21. IT IS FURTHER ORDERED that the City of Calvert City shall not enforce matters remanded for further consideration herein pending further action by the City on those matters.

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

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau



**APPENDIX**

<u>Date Appeal Filed by Falcon Telecable to Commission</u>	<u>Calvert City Municipal Order No. (issued date)</u>	<u>FCC Form Filing</u>
1. January 11, 1996	95-02 (November 28, 1995)	1210
2. October 9, 1996	96-04 (September 9, 1996)	1210
3. October 23, 1996	96-05 (September 23, 1996)	1240
4. October 27, 1997	97-01 (September 25, 1997) 97-03 (November 10, 1997)	1240
5. January 13, 1999	98-01 (July 24, 1998)	1240