

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

In the Matter of)
)
Falcon Cablevision)
) CUID No. GA0052 (Cedartown).
Complaints Regarding)
Cable Programming Services Tier)
Rate Increase)

ORDER

Adopted: December 19, 1996

Released: December 24, 1996

By the Chief, Cable Services Bureau:

1. In this Order we consider complaints concerning the April 1, 1996 rate increases by Falcon Cablevision ("Falcon") for its cable programming services tier ("CPST") and satellite package tier ("SATPAC") in the City of Cedartown, Georgia, CUID No. GA0052. Falcon has chosen to justify both rate increases on a single FCC Form 1210. This Order addresses the reasonableness of Falcon's CPST rate increase of \$0.56 and its SATPAC rate increase of \$0.60 that became effective April 1, 1996. We conclude, for the reasons discussed below, that the CPST rate increase Falcon implemented on April 1, 1996 is not unreasonable. We further conclude that the SATPAC tier is a regulated tier and that the rate increase is unreasonable.

2. Under the Communications Act,¹ the Federal Communications Commission ("Commission") is authorized to review the CPST rates of cable systems not subject to effective competition to ensure that rates charged are not unreasonable. The Telecommunications Act of 1996² ("1996 Act") and our rules implementing the new legislation,³ require that complaints against the CPST rates be filed with the Commission by a local franchising authority ("LFA") that has received subscriber complaints. An LFA may not file a CPST rate complaint unless, within 90 days after such increase becomes effective, it receives more than one subscriber rate

¹ Communications Act, Section 623(c), as amended, 47 U.S.C. Section 543(c)(3) (1996).

² Pub. L. No. 104-104, 110 Stat. 56.

³ See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 ("Interim Rules").

complaint.⁴ If the Commission finds the rate unreasonable, it shall determine the correct rate and any refund liability.⁵

3. To justify rates for the period beginning May 15, 1994 through a benchmark or cost of service showing, operators must use the FCC Form 1200 series. Operators are permitted to make changes to their rates on a quarterly basis using FCC Form 1210.⁶ Operators may alternatively justify adjustments to their rates on an annual basis using FCC Form 1240 to reflect reasonably certain and quantifiable changes in external costs, inflation, and the number of regulated channels that are projected for the twelve months following the rate change.⁷ Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.⁸

4. On September 27, 1996, the City of Cedartown ("City") filed valid complaints⁹ with the Commission regarding increases in Falcon's CPST and SATPAC rates in the above-referenced franchise area. The rate increases complained of went into effect on April 1, 1996. The valid complaints from the LFA trigger an obligation on behalf of the cable operator to justify its CPST and SATPAC rates.¹⁰

5. The City, in a letter submitted with the September 27, 1996 FCC Form 329 complaints, maintains that the Commission has held that a la carte packages containing more than six channels on September 1, 1993 must be treated as rate regulated.¹¹ The City cites *In the*

⁴ See Communications Act, Section 623(c), as amended, 47 U.S.C. Section 543(c)(3) (1996).

⁵ See 47 U.S.C. Section 543(c) (1993).

⁶ 47 C.F.R. Section 76.922(b)(6); see also 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, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd at 4189 n. 195 (1994) ("*Second Order on Reconsideration*").

⁷ See *In the Matter of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Thirteenth Order on Reconsideration ("*Thirteenth Reconsideration Order*"), 11 FCC Rcd 388, 391 (1996).

⁸ *Id.* at 392.

⁹ See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 ("*Interim Rules*"). In a letter dated September 6, 1996 to the Commission, J. David Johnson, City Manager of the City of Cedartown, verified that more than one complaint had been received within the 90 day statutory time frame.

¹⁰ 47 C.F.R. Section 76.956.

¹¹ See Letter dated September 6, 1996 from Mr. J. David Johnson, City Manager, City of Cedartown to the Federal Communications Commission.

Matter of: Multimedia Cablevision, Inc., Benchmark Filing to Support Cable Programming Services Prices, DA 95-1124, 10 FCC Rcd 9866 (1995) (Seven channels - regulated) and *In the Matter of: Vision Cable of Salisbury, Inc., Benchmark Filing to Support Cable Programming Prices*, DA 95-295, released February 22, 1995 (Seven channels - regulated). The City maintains that the SATPAC tier contained eight channels as of September 1, 1993 and that the tier is therefore subject to regulation as a cable programming tier. The City further points out that Falcon stated in its Petition for Review of Rate Order filed March 29, 1996 that "As to the a la carte package, Falcon concedes that the Commission's rulings allowed Cedartown to treat the package as a regulated tier".¹²

6. On August 27, 1996 Falcon requested that the LFA dismiss the LFA's draft FCC Form 329 that challenged the rate increases associated with the CPST and SATPAC tiers.¹³ At that time, Falcon asserted that the SATPAC tier is a new product tier ("NPT") and that it is therefore not subject to regulation. Citing the *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd 1226 (1994)* ("Going Forward Order"), Falcon argues that because the SATPAC tier is a new product tier, Falcon was not required to complete any forms or obtain agency approval. Falcon filed with the LFA a single rate justification on an FCC Form 1210 for the period January 1, 1995 to March 31, 1996. In addition, on October 7, 1996 Falcon filed with the Commission a response to the City of Cedartown's comments regarding the SATPAC increase.¹⁴ Falcon asserts that as of September 1, 1993, the SATPAC tier in Cedartown consisted of seven channels. Falcon argues that the above-referenced concession was taken out of context. Falcon continues to maintain that the SATPAC tier is not subject to regulation and that due to the uncertainty of guidelines for such packages at the time of their creation, these packages should now be grandfathered as new product tiers.

7. In order to determine whether or not Falcon's SATPAC tier is rate regulated, we must first evaluate its status under the rules that were in effect September 1, 1993. The Commission held in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993)* ("Rate Order") that it will not regulate collective a la carte offerings so long as two essential conditions are met.¹⁵ The

¹² See Letter dated September 6, 1996 from Mr. J. David Johnson, City Manager, City of Cedartown to the Federal Communications Commission; and *see also* In re Falcon Cablevision, Petitioner v. City of Cedartown, Georgia, Respondent, Petition for Review of Rate Order dated March 29, 1996 at 4.

¹³ See Letter dated August 23, 1996 from Emerson Yearwood, Director of Government Relations, Falcon Cablevision to Mr. David Johnson, City Manager, City of Cedartown.

¹⁴ See Letter dated October 4, 1995 from Emerson Yearwood, Director of Government Relations, Falcon Cable TV to Mr. William Caton, Acting Secretary, Federal Communications Commission.

¹⁵ *Rate Order* at Para. 327-329 & n. 808.

Commission determined that a la carte packages would be exempt from rate regulation if: 1) the price for the combined package does not exceed the sum of the individual charges for each component service and 2) the cable operator continues to provide the component part of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice." Channel lineup cards for the period in question indicate that on August 30, 1993, Falcon changed its lineup to create eight a la carte channels which were sold for \$2.00 each or at a discount package rate of \$4.50. Falcon states that it only actually moved 7 channels because of contract problems with one of the providers. All eight channels were taken from a regulated tier. The tier was eliminated and the remaining channels were moved to the basic tier. The combination of a low package price and a high individual channel price makes the per channel offerings an unrealistic service choice. An application of this test favors regulation of the SATPAC tier.

8. 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, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994)* ("*Second Order on Reconsideration*"), the Commission identified several factors that local franchising authorities and the Commission should consider in assessing whether an a la carte package enhances consumer choice and therefore does not constitute an evasion of rate regulation. In applying the factors set forth in the *Second Order on Reconsideration*, we conclude that the SATPAC tier is a regulated tier. The standard allowing nonregulated treatment for a la carte offerings commences with selections that enhance consumer choice and were not established to evade rate regulation. We think that several elements enumerated in the *Second Order on Reconsideration* indicate that the circumstances of this case do not meet this standard. The offering was created on the eve of rate regulation. The entire tier from which the channels were taken was eliminated. Moreover, while a channel can be purchased separately, the price of the a la carte offering is deeply discounted, when compared to the sum of the individual channels.¹⁶

9. Finally, in our *Going Forward Order*, we reconsidered our regulatory treatment of a la carte offerings. Specifically, we determined that such packages are cable programming tiers within the meaning of Section 3(1)(2) of the 1992 Cable Act and will be subject to our general rate regulation rules. We also established criteria for creating New Product Tiers (NPTs) that would not be subject to rate regulation. While stating that an operator may not simply remove channels from regulated tiers and offer them on NPTs, we acknowledged that difficult questions arise concerning some a la carte packages created between April 1, 1993 and September 30, 1994. We think the circumstances here are outside allowable parameters. Generally speaking, while we have allowed the movement of six channels to an a la carte/offering to be

¹⁶ *Second Order on Reconsideration*, 9 FCC Rcd at Para. 196 (1994)

considered an NPT under the *Going Forward Order*,¹⁷ we have also found that the movement of seven channels or more to an a la carte/offering as an attempt to evade rate regulation and therefore subject to regulation.¹⁸

10. Based on an analysis of the Commission's *Rate Order*, application of the factors established in the *Second Order on Reconsideration* to the available information, and a review of our treatment of NPTs in the *Going Forward Order*, we conclude that the SATPAC tier is a regulated tier. We find that the number of channels moved from regulated tiers and the lack of consumer choice, along with Falcon's acknowledgment of the regulatory status of its SATPAC tier, all weigh heavily in our determination that the SATPAC tier is subject to regulation.

11. Upon review of Falcon's FCC Form 1210, we find that Falcon has not provided the appropriate data to evaluate the SATPAC tier as a regulated tier. We have insufficient information to evaluate its SATPAC rate increase implemented on April 1, 1996.¹⁹ We conclude, therefore, that at the present time, Falcon's SATPAC rate increase of \$0.60 which went into effect on April 1, 1996 is not justified.

12. Upon review of Falcon's FCC Form 1210, we find no apparent errors in Falcon's calculation of its CPST rate increase.²⁰ We conclude, therefore, that Falcon's CPST rate increase of \$0.56 which went into effect on April 1, 1996 is justified.

13. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that Falcon Cablevision's CPST rate increase of \$0.56 which went into effect on April 1, 1996 IS NOT UNREASONABLE.

14. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321; that the complaint referenced herein against the April 1, 1996 CPST rate increase charged by Falcon Cablevision in Cedartown, CUID No. GA0052, IS DENIED.

¹⁷ See Falcon Cable TV, Port Orchard, Washington, 10 FCC Rcd 998 (1994), released Dec. 22, 1994 (Six channels - not regulated) and Falcon Cable TV, Southern Shores, North Carolina, 10 FCC Rcd 1002 (1994) (Seven channels (later 10) - regulated).

¹⁸ See Falcon Holding Group, Inc., 10 FCC Rcd 7267 (1995) (2-6 channels - not regulated); Multimedia Cablevision, Inc., 10 FCC Rcd 9866 (1995) (Seven channels - regulated) and Vision Cable of Salisbury, Inc., DA 95-295, released February 22, 1995 (Seven channels moved from regulated tiers, three channels later added to tier - regulated).

¹⁹ This finding is based solely on the representations of Falcon in its rate filings. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

²⁰ *Id.*

16. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that Falcon Cablevision's SATPAC rate increase of \$0.60 which went into effect on April 1, 1996 IS UNREASONABLE.

17. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the April 1, 1996 SATPAC rate increase charged by Falcon Cablevision in Cedartown, CUID No. GA0052, IS GRANTED.

18. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Falcon shall refund to subscribers in CUID No. GA0052 any increase in SATPAC rates made effective on April 1, 1996 and billed to subscribers on that date or thereafter.

19. IT IS FURTHER ORDERED that Falcon shall promptly determine the overcharges to SATPAC subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 60 days of Commission approval of the plan.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau