

2. In its appeal, Sammons raises two issues involving calculations in its two FCC Form 393s.³ First, Sammons contends that in recalculating its rates for addressable converters, the State erred in substituting data current at the time Sammons filed its FCC Form 393 for data current at the time Sammons restructured its rates.⁴ Sammons asserts that it accurately calculated its rates when it restructured several months before regulation and thus that it was not required to change its rates to reflect data current as of the date of filing. The State, in response, asserts that Sammons' restructured converter charges were based on inaccurate data, thus the State recalculated Sammons' rates using data current at the time Sammons filed its Form 393. Second, Sammons argues that the State improperly reduced the operator's regulated revenues by reducing its equipment costs without a corresponding increase in Sammons' basic tier programming rates. In response, the State claims that its order is consistent with the Commission's procedures for calculating refund liability. We consider each of these issues in turn.

3. Under our rules, rate orders adopted by local franchising authorities may be appealed to the Commission.⁵ In ruling on appeals of local rate orders, the Commission does not conduct a *de novo* review, but instead will sustain the local franchising authority's order as long as there is a reasonable basis for its decision.⁶ The Commission will therefore reverse a local authority's decision only if it is determined that the local authority acted unreasonably in applying the Commission's rules in rendering its local rate order.⁷ If the Commission reverses a local franchising authority's decision, it will not substitute its own decision but will instead remand the issue to the local authority with instructions to resolve the case consistent with the Commission's decision on appeal.⁸

³Although Sammons operates a single system in the Dover/Morris area, two separate Form 393 filings were made based on the difference in the numbers of regulated channels offered between the portions of the system which had been rebuilt and upgraded and those portions with subscribers still awaiting the additional channels.

⁴In anticipation of rate regulation, Sammons restructured its basic service and equipment rates several months prior to the September 1, 1993 deadline established by the Commission. Sammons does not provide the specific date of its restructuring. However, based on the record it appears that Sammons restructured its rates sometime in June 1993, because the operator asserts that it used May 1993 converter unit data when it restructured its rates prior to July 1993. See Reply at 4. On October 4, 1993, the State notified Sammons that it was certified to regulate basic tier rates. On November 18, 1993, Sammons filed its Form 393 with the State.

⁵47 C.F.R. § 76.944 (1993).

⁶Implementation 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, 5731 (1993) ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 ("*Third Recon. Order*").

⁷*Rate Order*, 8 FCC Rcd 5731 and *Third Recon Order*, 9 FCC Rcd at 4346.

⁸*Rate Order*, 8 FCC Rcd 5731 and *Third Recon Order*, 9 FCC Rcd at 4346.

DISCUSSION

A. Converter data

4. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the period from September 1, 1993 until May 14, 1994.⁹ 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.

5. 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 date of regulation ("current rate") or as of September 30, 1992.¹⁰ 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 and 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.

6. The Commission's rules generally require an operator to measure its maximum permitted rates from data that is current as of the initial date of regulation.¹¹ However, the

⁹To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking in MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) ("*Second Recon. Order*"), 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.

¹⁰An 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.

¹¹47 C.F.R. § 76.922(b)(1)(ii) (superseded); Form 393, Worksheet 1 -- "Calculation of Rates in Effect on Initial Date of Regulation and Benchmark Comparison." With respect to the basic service tier, the initial date of regulation is the date on which the franchising authority certifies to regulate rates. For cable programming services, the initial

Commission has created an exception to this general rule.¹² In the *Third Recon. Order*, the Commission addressed the issue of updating rate calculations due to changes in data that are material to determining an operator's permitted rates, after an operator has already restructured its rates in accordance with the Commission's rules.¹³ In the *Third Recon. Order*, the Commission stated that "[o]perators should not be penalized for making good faith attempts to comply with our rules in a timely manner."¹⁴ At the same time, the Commission was cognizant of the need for regulatory authorities to accurately verify the reasonableness of an operator's rates and to ensure that any inaccuracies were not compounded in future rate increases or adjustments.¹⁵ In order to balance these concerns, the Commission determined, for the purposes of initial rate setting, an operator would not be required to adjust its rates to reflect current data, provided that the operator was able to justify its rates.¹⁶ However, if a cable operator failed to justify its rates, those rates must be adjusted in accordance with the most accurate data available at the time of analysis.¹⁷

7. In anticipation of rate regulation, Sammons voluntarily restructured its rates prior to July 1993, using May 1993 data for determining the number of converters in service and annual converter cost data from December 31, 1992. When Sammons completed its FCC Form 393 for the City's ratemaking proceeding in November 1993, the operator used October 1993 data for determining the number of converters in service, but still used annual converter cost data from

date of regulation is the first date on which a complaint on the appropriate form is filed with the Commission concerning cable programming service tier rates. 47 C.F.R. § 76.922(b)(7) (formerly 47 C.F.R. § 76.922(b)(2)).

¹²See *Third Recon. Order*, 9 FCC Rcd at 4349-50. Pursuant to Commission regulation, the initial date of regulation for the basic service tier is the date that the franchise authority notifies the operator that the local authority is certified to regulate rates. For cable programming services, the initial date of regulation is the first date on which a complaint on the appropriate form is filed with the Commission concerning cable programming service tier rates. 47 C.F.R. § 76.922(b)(7) (formerly 47 C.F.R. § 76.922(b)(2)).

¹³*Third Recon. Order*, 9 FCC Rcd at 4349-50.

¹⁴*Third Recon. Order*, 9 FCC Rcd at 4349.

¹⁵*Id.*

¹⁶*Third Recon. Order*, 9 FCC Rcd at 4349-50.

¹⁷47 C.F.R. § 76.922(b)(9)(iii). See also *Third Recon. Order*, 9 FCC Rcd at 4349-50. "Accordingly, we will require the following actions when different rates are dictated by data used in initial rate-setting than by data current as of the time an FCC Form 393 (and/or FCC Forms 1200/1205) is actually submitted to the franchising authority or the Commission. When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates. In these circumstances, however, when such operators make any subsequent changes in their rates (such as when seeking their annual inflation increase), those changes must be made from rate levels derived from the updated information. When current rates are not justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data. In these circumstances, the resulting rates must be based on current data." (emphasis in original)

December 31, 1992. When Sammons provided the State with the underlying data used to complete its FCC Form 393, it provided the local franchising authority only the October 1993 converter unit data.¹⁸ Sammons did not provide the State with May 1993 data regarding the number of converters in service, which the operator used at the time it voluntarily set its rates in anticipation of regulation. The State reviewed the FCC Form 393s, accepted the October 1993 converter unit data contained in the form, which differed from the data Sammons originally used to restructure its rates, and set Sammons' rates based on the data Sammons submitted, the October 1993 converter unit data and the December 31, 1992 annual converter cost data.

8. On appeal, Sammons contends that the State erred in recalculating Sammons' maximum permitted rates for addressable converters by using the data contained in the operator's FCC Form 393s. First, Sammons alleges that the State erred by using "partially refreshed data" when the State used the December 31, 1992 annual converter cost data and the more recent October 1993 data regarding the number of converters in service. In support of its argument, Sammons cites the Bureau's decision in the Matter of Suburban Cablevision (Livingston, NJ) 9 FCC Rcd 4073 (Cab. Serv. Bur. 1995) ("*Suburban Cablevision*"), a petition for stay filed by Suburban Cablevision, in which we held that an operator is not permitted to calculate its rates based on a mixture of data current at the time of restructuring and data current at the time of filing its FCC Form 393.¹⁹ Sammons explains that the FCC Form 393s which it submitted to the local authority contained the October 1993 data regarding the number of converters in service because the form instructed operators to use the data most current at the time of filing. According to Sammons, after submitting its initial filing it "verbally explained" to the State that its rates set prior to regulation were accurate.²⁰

9. Sammons next alleges that since its rates were accurately calculated at the time of restructuring, it should not have to adjust those rates to reflect subsequent increases in the number of converters in service.²¹ In response, the State disputes Sammons' claim that the franchising authority used "partially refreshed data." Instead, the State asserts that the only numbers it used to review the filing were those supplied by Sammons in its FCC Form 393. The State does not specifically address Sammons' claim that its rates set prior to regulation were accurate. Rather, the State asserts that Sammons' restructured rates were not justified because the numbers were inaccurate at the time of the Commission's September 1, 1993 deadline for

¹⁸It is unclear from the pleadings whether a more recent figure for the annual cost of converters was available, and if it was available, why Sammons provided the State with the older December 31, 1992 figure.

¹⁹*Accord* In the Matter of Suburban Cablevision (Livingston, NJ), 10 FCC Rcd 10817 (Cab. Serv. Bur. 1995) affirming that an operator is not permitted to calculate its rates based upon a mixture of data current at the time of restructuring and data current the time of filing its FCC Form 393.

²⁰Appeal at 6. Sammons does not indicate that it provided the State with any documents to support its "verbal explanation."

²¹According to Sammons, as of May 1993, the number of addressable converter units in service was 55,439 and as of October 1993 the number of addressable converter units in service was 58,454. See Appeal at 7-8.

restructuring rates. In support of this position, the State claims that the May 1993 data regarding the number of converters in service was compiled three months prior to the September 1, 1993 Commission deadline whereas Sammons' October 1993 data regarding the number of converters was available only one month after the deadline. Accordingly, the State argues that it was correct in requiring rate changes based upon the October 1993 data which was used in Sammons' FCC Form 393, rather than relying on some earlier, and unsupplied, figures.

10. With respect to Sammons' claim that the rates it set in anticipation of regulation were accurate, under the Commission's rules the cable operator bears the burden of proving the reasonableness of its existing or proposed rates for basic services and associated equipment.²² If the operator fails to provide the local franchising authority with the information necessary to review an operator's rate calculations, the local franchising authority may set the operator's maximum permitted rates based upon the best available evidence.²³ In the present case, although after submitting its initial filing the operator "verbally explained" that its rates set prior to regulation were accurate, Sammons failed to provide the State with an amended rate filing utilizing the May 1993 data.²⁴ Having failed to provide the State with amended FCC 393s before the issuance of the rate order, when the record was open and the State could have considered the issue, Sammons is not entitled to have the mistake corrected by the Commission on appeal.²⁵ Moreover, Sammons has offered no reason why it could not have provided amended FCC Form 393s earlier nor why the State should be required to reopen the record in its proceeding. Therefore, the State was reasonable in relying on the data supplied by the operator in its Form 393s. To hold otherwise would prevent local authorities from issuing rate orders in a timely fashion, since constant revisions by operators could indefinitely postpone final resolution. Based upon the best available information at the time, the State acted reasonably in issuing its rate order.

B. Calculation of Refund Liability

11. Although Sammons operates a single system in the Dover/Morris area, two separate Form 393 filings were made based on the difference in the numbers of regulated channels offered between the portions of the system which had been rebuilt and upgraded and those portions with subscribers still awaiting the additional channels. After its review of Sammons' Form 393s, the State disapproved Sammons' permitted rates for addressable converters, Sammons' Hourly Service Charge (HSC), and its related installation charges for both the rebuilt

²²47 C.F.R. § 76.932(a).

²³*Third Recon. Order* at 9 FCC Rcd 4346-48.

²⁴Appeal at 7.

²⁵*See New England Cablevision of Massachusetts, Inc. (Amesbury, MA et al.)*, 10 FCC Rcd 908 (Cab. Serv. Bur. 1994) (holding that an operator that failed to bring errors in its filing to the attention of the local authority before the issuance of the order cannot raise the issue later on appeal).

and non-rebuilt portions of the system. The State directed that those rates be reduced to the maximum permitted levels which the State had calculated. The State further ordered Sammons to keep its rates for its basic service in the rebuilt portion of the system at the lower level, rather than at the higher maximum permitted levels as justified by Sammons in its original Form 393 calculations.²⁶ The State also reduced Sammons' basic tier rate for the non-rebuilt portion of the system from the \$10.24 calculated by Sammons to the State's maximum permitted rate of \$10.17 and ordered refunds based on this reduction. The State did not utilize the reduced equipment rates in determining the operator's basic service tier rates for both portions of the system. Sammons argues that the State improperly reduced Sammons' regulated revenues by reducing its rates for addressable converters and HSC without a corresponding increase of Sammons' tier charges for basic service in both portions of the system. It maintains that if a lower charge for equipment is deducted from the base rate per channel (FCC Form 393, Line 300), the base service rate (FCC Form 393, Line 304) will increase. The State disputes the existence of such a correlation.

12. Upon revising an operator's calculations, a local franchising authority must consistently use those revisions throughout its review of the operator's FCC Form 393. In the present case, for both portions of the system, the State found that Sammons failed to justify the reasonableness of an increased addressable converter cost and HSC. Thus, the State recalculated those two charges. However, the State failed to recalculate Sammons' basic service rates for portions of the system using these reduced equipment costs in Line 301. The State must do so now.²⁷ The 1992 Cable Act required operators to unbundle programming service rates from equipment and installation rates. Thus, in FCC Form 393, Worksheet 3, operators are required to separate equipment and installation rates from programming service rates. To accomplish this objective, the operator must divide equipment and installation costs in Line 301 by the channel factor in Line 302 to determine its cost per subscriber-channel. This cost is then subtracted from the operator's base rate per channel (Line 300).²⁸ Accordingly, using this formula, Sammons' base service rate per channel should increase. We are remanding this issue to the State for further consideration so that it can enter a ruling consistent with these findings.

13. We reiterate that because Sammons filed separate FCC Form 393s for the rebuilt and non-rebuilt portions of the system, we will treat the two portions as separate and distinct

²⁶On the Cover Sheet (Part I) of its Form 393 for the rebuilt portion of the Dover/Morris system, Sammons' maximum permitted rate for its basic service tier is listed as \$8.44, while its actual rate is listed as \$8.40. See Appeal at Attachment C (Form 393) and Attachment L at 2 (Rate Order).

²⁷Because Sammons filed separate FCC Form 393s for the rebuilt and non-rebuilt portions of the system, we will treat the two portions as separate and distinct systems for refund liability purposes. Thus, the State must recalculate Sammons' basic service rate using these reduced equipment costs in Line 301 of both the Form 393 for Dover and the Form 393 for Morris.

²⁸An operator's channel factor is determined by multiplying the number of channels in a tier by the number of customers who subscribe to that particular tier.

systems for refund liability purposes. Thus, upon remand, in both the rate proceedings for the rebuilt portion of the system and the rate proceedings for the non-rebuilt portion of the system, after recalculating the various regulated rates that Sammons is permitted to charge on a prospective basis, the State should then determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's actual charges exceed maximum permitted levels during the applicable period of review.²⁹ If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to subscribers.³⁰ If the operator's aggregate revenues computed from its permitted rates exceed its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by Sammons should be calculated based on this method.

14. While the Commission will sustain the decisions of franchising authorities if there is a reasonable basis for doing so, we expect franchising authorities to adhere to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.³¹ For instance, in this case, the State may not order Sammons' to set its basic service tier rates for the rebuilt portion of its system below maximum permitted levels for that portion of the system.³² Further, in both the rate proceedings for the rebuilt portion of the system

²⁹See 47 C.F.R. § 76.942.

³⁰ See *Third Recon. Order*, 9 FCC Rcd at 4353. "Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum of the new unbundled program service charge(s) and the new unbundled equipment charge(s)."

³¹See *Report and Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

³²An operator may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when it voluntarily prices equipment rates below its maximum permitted levels. To permit an operator to do so would undermine Congress's intention to create a competitive market of cable equipment providers. See Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 629(a) (1996) (operators must separately state equipment charges on subscribers' bills and equipment charges may not be subsidized by programming charges); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment, First Report and Order, 9 FCC Rcd 1981, 1982 (1994). Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); *Equipment Compatibility Order*, 9 FCC Rcd at 1982. Similarly, if a franchising authority required an operator to set its rates for equipment and installations below their maximum permitted levels, the operator could, in effect, be forced to provide equipment and installations at levels below actual cost. This result would be contrary to both the 1992 Cable Act and our rules.

Sammons' rates for the non-rebuilt portion of the system exceeded maximum permitted levels. At the time of the rate order Sammons was charging less than the maximum permitted rates for some items. However, if in the future Sammons should decide to raise the rates for these items to their maximum permitted levels, Sammons is only required to provide its subscribers and the State with 30-days written notice of the rate increase, as provided by the Commission's rules. See 47 C.F.R. 76.964. The State cannot require Sammons to obtain approval from the State

and in the rate proceedings for the non-rebuilt portion of the system, the State must offset or reduce any refunds it may order by the difference between the actual basic service tier rates that Sammons' charged and the maximum permitted rates that it could have charged during the applicable period of review.³³

ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that Sammons Communications of New Jersey, Inc.'s appeal of the State of New Jersey Board of Regulatory Commissioners' Rate Order for the Communities of Dover and Morris, regarding the issue of the State's use of refreshed addressable converter unit data is **DENIED**.

16. **IT IS FURTHER ORDERED** that Sammons Communications of New Jersey, Inc.'s appeal of the State of New Jersey Board of Regulatory Commissioners' Rate Order for the Communities of Dover and Morris, regarding the issue of Sammons' permitted charge for basic service tier rates and related refunds is **REMANDED**.

17. **IT IS FURTHER ORDERED** that, in light of the resolution of its appeal herein, the request for stay filed by Sammons Communications of New Jersey, Inc. is **DISMISSED** as moot.

18. 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

prior to increasing its rates to their maximum permitted levels.

³³See *Third Recon. Order*, 9 FCC Rcd at 4353; see also *TCI Cablevision of North Central Kentucky* (Mount Washington, KY) 10 FCC Rcd 926 (Cab. Ser. Bur. 1994).