

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

In the Matter of: )  
 )  
Century New Mexico Cable Corporation )  
 )  
Appeal of Local Rate Orders )  
of the Town of Silver City, New Mexico )  
 )  
and )  
 )  
Motion for Forfeiture )

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 10, 1996**

**Released: December 13, 1996**

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. By this Order, we consolidate three proceedings into one and rule on the merits in each.<sup>1</sup> In deciding this matter, 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 each of the concerned parties in one consolidated proceeding.

2. On August 16, 1995, Century filed an appeal of the Town's local rate order ("August 16, 1995 appeal") adopted on July 17, 1995 ("July 17, 1995 Rate Order").<sup>2</sup> The Town filed an opposition to Century's August 16, 1995 appeal on August 31, 1995, and Century filed a reply on September 11, 1995. In addition to its appeal, on August 16, 1995, Century filed a

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<sup>1</sup>Century filed separate appeals of the Town's local orders issued on August 16, 1995 and March 25, 1996. The Town filed a Motion for Forfeiture on October 9, 1995 ("Forfeiture Motion") and filed amendments to the Forfeiture Motion on October 16, 1995, January 24, 1996, and February 9, 1996. On November 3, 1995, Century responded to the Town's Forfeiture Motion and October 16, 1995 amendment. On February 6, 1996, Century responded to the Town's January 24, 1996 amendment. As part of its Forfeiture Motion and subsequent amendments, the Town requested clarification of several Bureau decisions cited in Century's replies to the Town's Forfeiture Motion and related amendments.

<sup>2</sup>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. 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).

petition for stay of enforcement pending resolution of the appeal.<sup>3</sup> In the July 19, 1995 rate order, the Town denied in part a basic service tier rate increase proposed by Century in its Form 1210 submission, and required Century to refund overcharges to subscribers. In its August 16, 1995 appeal, Century challenges the Town's decision to reduce the operator's proposed rates.

3. On March 29, 1996, Century filed an appeal of the Town's local rate order ("March 29, 1996 appeal") adopted on March 18, 1996 ("March 18, 1996 rate order").<sup>4</sup> The Town filed an opposition to Century's March 29, 1996 appeal on April 16, 1996, and Century filed a reply on April 25, 1996. In addition to its appeal, on March 29, 1996, Century filed a petition for stay of enforcement pending resolution of the appeal.<sup>5</sup> In the local rate order, the Town rejected Century's Form 1205 equipment rates in their entirety, thereby effectively setting Century's equipment and installation rates at zero.

## II. STANDARD OF REVIEW

4. Under the Commission's rules, appeals of franchising authorities' local rate orders are reviewed by the Commission.<sup>6</sup> 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.<sup>7</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>8</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 consistent with the Commission's decision on appeal.<sup>9</sup>

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<sup>3</sup>Because we are addressing the issue raised in the August 16, 1995 appeal on its merits, Century's petition for stay is rendered moot.

<sup>4</sup>Although the rate order was adopted on March 18, 1996, by its terms, it did not become effective until March 25, 1996.

<sup>5</sup>The Town filed an opposition to Century's request for stay on April 16, 1996. Because we are addressing the issue raised in the March 29, 1996 appeal on its merits, Century's petition for stay is rendered moot.

<sup>6</sup>47 C.F.R. § 76.944.

<sup>7</sup>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, 5731 (1993) ("*Rate Order*"); see 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, 4341 (1994) ("*Third Recon. Order*").

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

### III. DISCUSSION

#### A. AUGUST 16, 1995 APPEAL.

##### 1. Reduction of Programming Costs.

###### a. Positions of the Parties.

5. In its appeal, Century challenges the Town's decision to reduce its proposed rate increase for programming costs by \$0.09, from \$0.41 to \$0.32.<sup>10</sup> In the local rate order, the Town generally found that Century's proposed programming cost increases were supported by the evidence presented. However, the Town noted that two of the operator's services for which it had proposed rate increases, namely C-SPAN and Bravo, were carried on a part-time shared basis on a single channel. Therefore, the Town determined that Century could pass on to subscribers only one half of the total programming costs for these channels, *i.e.*, only \$0.0745 per month of the total programming costs of \$0.149 per month.<sup>11</sup> Century argues that it should be able to recover all of the costs that it incurs for providing programming services. The operator maintains that the fact that two programming services share a single channel is irrelevant. Century contends that the Town's decision is inconsistent with Commission rules which permit operators to pass on external programming costs to subscribers.

6. In response, the Town contends that allowing Century to recover fully its programming costs regardless of the number of programming services per channel would undermine the Commission's definition of "channel." Moreover, the Town argues that such a policy would harm subscribers by forcing them to pay the full price for services that they may access only a fraction of the time. The Town cites the instructions for completion of Form 1200<sup>12</sup> which state that, "[e]ven though several programming services may be combined on a single channel, the channel still counts as only one channel."<sup>13</sup> The Town notes that in its Form 1200 and 1210 submissions, Century has counted Bravo and C-Span as a single channel. The Town maintains that permitting Century to pass through costs on a per-programmer rather than a per-

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<sup>10</sup>July 17, 1995 Town's rate order concerned Century's March 27, 1995 Form 1210.

<sup>11</sup>In the rate order, the Town also objected to \$0.02 of Century's proposed external cost pass through attributable to an increase in the cost of the Family Channel. However, Century does not address this issue in its appeal, and in its opposition, the Town notes that Century has admitted that it did not adequately justify the proposed increase.

<sup>12</sup>Form 1200 is the official form used by regulators to determine whether initial regulated rates for programming are reasonable under the revised benchmark rules which 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. Through the use of Form 1200, an operator generally 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 initial permitted rates.

<sup>13</sup>See Form 1200 at 10.

channel basis would require subscribers to pay for more services than they actually receive.

7. In its reply to the Town's opposition, Century argues that the Town has confused benchmark and price cap rate methodologies in drafting its decision. Century explains that benchmark methodology is used to complete Form 1200. Under benchmark methodology, a maximum permitted per-channel rate is calculated regardless of the varying programming expenses associated with each channel. The benchmark calculation is not based on cost. Century argues that in contrast, under price cap rules, which are utilized in the completion of the Form 1210, the external costs of the programming carried on regulated channels are relevant. Century argues that regardless of whether the programming originates from one source or multiple sources, the operator may pass along any external costs incurred.

**b. Discussion.**

8. Form 1210 is the official form an operator uses to justify adjustments in the rates it computes on its FCC Form 1200 or to adjust rates on a previously filed Form 1210.<sup>14</sup> An operator may file a Form 1210 to adjust its rates to reflect changes in external costs, channel additions and deletions, and inflation.<sup>15</sup> External costs include the following categories of costs: state and local taxes specifically applicable to the provision of cable television service; franchise fees; costs of complying with franchise requirements; retransmission consent fees and copyright fees incurred for the carriage of broadcast signals; other programming costs; and Commission regulatory fees.<sup>16</sup> An operator may file for changes in external costs for the period beginning at the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the Form 1210.<sup>17</sup> An operator may file a Form 1210 quarterly, but must file in the quarter following a decrease in costs due to channel deletions and within a year following a decrease in other costs.<sup>18</sup> An operator must file for a rate increase within a year of the cost increase in order to recover those costs in its rates.<sup>19</sup>

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<sup>14</sup>See 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 (1994) ("*Second Recon. Order*").

<sup>15</sup>See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Ninth Order on Reconsideration in MM Docket No. 92-266, FCC Rcd (1995) ("*Ninth Recon. Order*").

<sup>16</sup>47 C.F.R. § 76.922(d)(3)(iv).

<sup>17</sup>47 C.F.R. § 76.922(d)(3)(iii).

<sup>18</sup>47 C.F.R. §§ 76.922(d)(3)(i) & (ii).

<sup>19</sup>47 C.F.R. § 76.922(d)(3)(i). Inflation may be recovered only for the non-external portion of the operator's rates on an annual basis. 47 C.F.R. § 76.922(d)(2).

9. Commission rules permit operators to pass through their external costs, including programming costs, to subscribers.<sup>20</sup> The amount that an operator may recover is determined by its costs, and not by the amount of time the programming service is available to subscribers.<sup>21</sup> In this case, Century incurs full programming costs for two different services, regardless of its decision to place both services on the same channel. In accordance with our rules, the Town should permit Century to recover its actual costs. We remand this issue to the Town for resolution in accordance with this order.

**B. MARCH 29, 1996 APPEAL.**

**1. Universal Remote Control Units.**

**a. Positions of the Parties.**

10. In its March 26, 1996 Appeal, Century contends that the Town arbitrarily rejected all of its November 21, 1995 Form 1205 ("1995 Form 1205") rates due to a disagreement between the parties regarding the price of Century's universal remote control units, a new equipment offering. Century further contends that as a result of this disagreement, the Town refused to establish alternative rates for any of Century's equipment or installation. According to Century, it set the price of the universal remote control units based on "the average expected time required to maintain the unit."<sup>22</sup> Century states that it used an estimated maintenance rate of 15 minutes per unit, based upon its estimate of the time needed to receive, store, program, distribute and maintain each remote.<sup>23</sup> Century further argues that the Town erred by finding that Century increased its equipment labor time and costs due to the addition of the universal remote control units without simultaneously reducing costs attributable to basic programming service rates, and correspondingly reducing the basic programming service tier rate. Century contends that it was not required to reduce its basic programming service tier rates.<sup>24</sup>

11. The Town contends that it rejected Century's 1995 Form 1205 equipment rates not because of a disagreement over the pricing of the universal remote control units, but because of Century's "cumulative errors in calculating its entire labor costs."<sup>25</sup> With respect to the universal

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<sup>20</sup>See 47 C.F.R. § 76.922(d)(3)(iv).

<sup>21</sup>*Id.*

<sup>22</sup>March 26, 1996 Appeal at 3.

<sup>23</sup>*Id.*

<sup>24</sup>In support of its argument that it was not required to reduce basic programming service tier rates, Century cites *TCI Cablevision of Oregon, Inc.* (Multnomah County, OR), 10 FCC Rcd 12547, 12550 n. 29 (Cab. Serv. Bur. 1995) ("*TCI Oregon*").

<sup>25</sup>The Town does not specify what the cumulative errors were.

remote control units, the Town contends that Century failed to use the formula approved by the Commission for interim rate setting.<sup>26</sup> Instead, Century used the expected service hours for "extremely old converter boxes."<sup>27</sup> Moreover, the Town contends that once it rejected the proposed rate for the universal remote control units, it did not bear the burden of determining a reasonable rate.<sup>28</sup> Instead, the Town asserts that it was up to Century to properly calculate and justify a rate for the universal remote units. With respect to the labor costs associated with the universal remote control units, the Town contends that 100% of Century's technical personnel time is devoted to installation and no time is devoted to plant maintenance.<sup>29</sup> Accordingly, the Town asserts that if Century recovered costs for the maintenance of universal remote control units, costs which the Town claims have already been recovered for basic service equipment and installation, Century would be allowed to double charge for the labor costs incurred.

12. In reply, Century contends that the Town is mistaken as to the facts. Century explains that it proposed rates for two types of remotes. The first type of remote is a standard remote that comes with the converter boxes that Century provides subscribers. With respect to this remote, the operator alleges that it does not keep separate maintenance records and instead keeps joint maintenance records for the standard remote and associated converter. Accordingly, Century calculated its maintenance/service hours for the standard remotes by multiplying the total number of standard remotes in service by 8%.<sup>30</sup> The second type of remote is a universal remote. With respect to this remote, Century explains that it set the price of the universal remote control units based on the average expected time required to maintain the unit.

**b. Discussion.**

13. The Commission has determined that recalculation of rates for each equipment type is allowed annually and should be based on the annual data for the operator's previous fiscal

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<sup>26</sup>See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 425 (1995) ("*Thirteenth Recon. Order*").

<sup>27</sup>April 6, 1996 Response at 3.

<sup>28</sup>The Town contends that it did not know the failure rate for universal remote control units and should not be forced to research the failure rate.

<sup>29</sup>Century contends that the only reason it now allocates 100 percent of its employees' time to installation and maintenance activities is because in its 1993 Form 1205 review the Town required Century to do so.

<sup>30</sup>According to Century, eight percent of all standard remotes/converters in service require maintenance and repair during the year. The Town approved this maintenance rate in a previous Form 393 filing. See *supra* ¶¶ 23-24.

year.<sup>31</sup> As newer equipment models are employed by an operator, a separate rate must be developed. When new equipment types are introduced during the interim period between annual justifications, operators may calculate and utilize a rate for the new equipment.<sup>32</sup> In order to calculate the rate for equipment introduced during this interim period operators must complete a Form 1205 and provide the Form to the local franchising authority for review. The Commission determined that operators must file the Form 1205 no earlier than 60 days prior to the date the new type of equipment is scheduled to be introduced to subscribers.<sup>33</sup> In calculating the maintenance and service hours for the new equipment, the operator should base its entry on the average annual expected time required to maintain the unit, *i.e.*, expected service hours over the life of the equipment unit being introduced divided by the equipment unit's expected life.<sup>34</sup> The proposed rate for the new equipment will go into effect at the end of this 60-day period unless the franchising authority rejects the proposed rate as unreasonable or the franchising authority finds that the operator has submitted an incomplete filing.<sup>35</sup>

14. According to Century, it set the price of its universal remote control units based on "the average expected time required to maintain the unit."<sup>36</sup> This average expected time was determined based upon Century's estimate of the time needed to receive, store, program, distribute, and maintain each remote.<sup>37</sup> Based on the record, there is no indication that Century calculated those hours over the life of the unit. As such, Century's formula does not conform to our instructions that an operator must determine its average expected annual maintenance time by taking the expected service hours over the life of the equipment unit being introduced and dividing the product of this calculation by the equipment unit's expected life. Therefore, the Town was justified in rejecting Century's calculations.

15. However, the Town acted unreasonably by refusing to establish a rate for the universal remotes. While a local franchising authority may question the reasonableness of an

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<sup>31</sup>Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1200 (1993) ("*First Recon. Order*").

<sup>32</sup>*Id.* at 1198.

<sup>33</sup>*Thirteenth Recon. Order*, 11 FCC Rcd at 425.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>April 25, 1996 Reply at 4.

<sup>37</sup>Century multiplied the total number of remotes in service by .25 (1/4 hour). The Company chose 1/4 hour because it estimated that its cost to receive, store, program, distribute and maintain each remote consumes a total of 15 minutes per hour. Reply, Exhibit B, Explanation to Schedule C, Line B and Line 10 of Step C (Remote 2). Century did not explain whether the basis of its cost estimate *i.e.* whether it was yearly, bi-yearly, or over the life of the equipment.

operator's calculations, if it rejects an operator's proposed rate, the franchising authority must establish a rate and provide a reasonable basis for its recalculation.<sup>38</sup> For example, the local authority may request additional information from the operator regarding the calculations in question. Upon receiving answers to its questions, the local authority may recalculate the questioned figure based upon the operator's responses. If the operator fails to comply with the request, the local authority may recalculate the figure based upon the best available evidence. For example, a franchising authority could set rates for a nonresponsive operator by using financial data from cable operators in neighboring communities, if available. A franchising authority could also use industry financial data from the National Cable Television Association or another entity which makes such information available based on industry averages. Accordingly, upon rejecting Century's rates, the Town should have set the rates for the universal remote control units based on the best available evidence.<sup>39</sup> We remand this issue to the Town so that it may recalculate Century's universal remote control rates based on the best available evidence. On remand, we note that post-Form 1200/1205 changes in programming rates are determined independent of changes in equipment and installation rates.<sup>40</sup> Therefore, for purposes of setting the rates for the universal remote control unit, Century must be allowed to allocate some labor hours to maintenance of the remote control units.

## 2. Converter Box Rates.

### a. Positions of the Parties.

16. Century further disputes the Town's assertion that Century miscalculated its Form 1205 equipment rates by "failing to subtract the costs associated with unregulated converters that are used to receive premium programming."<sup>41</sup> Century contends that the converter boxes that it uses to provide premium service are also used by subscribers to receive the basic programming service tier. Century argues that the premium converters are regulated equipment, and as such, it was required to include these converter boxes in its Form 1205 calculations.

17. The Town contends that the premium converters at issue were used solely to receive premium service programming, and thus were unregulated. According to the Town, it received numerous complaints from subscribers who were required to lease converter boxes even

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<sup>38</sup>Novato Cable Company (Novato, CA), 10 FCC Rcd 5158, 5159 (Cab. Serv. Bur. 1995).

<sup>39</sup>See *Third Recon. Order*, 9 FCC Rcd at 4347.

<sup>40</sup>See *TCI Oregon*, 10 FCC Rcd at 12550 n.29. The formulas for both the Form 393 and the Form 1200 establish a direct relationship between equipment rates and programming rates. Higher equipment basket costs and correspondingly higher equipment rates result in lower programming costs and correspondingly lower programming rates. Similarly, lower equipment basket costs and correspondingly lower equipment rates result in higher programming costs and correspondingly higher programming rates. No such interdependency exists between the Form 1210/1240 and the Form 1205.

<sup>41</sup>The Town labeled these converters as "premium converter boxes."

though they had cable-ready television sets or who were required to lease two converter boxes from Century, one for basic service and one for premium channels.<sup>42</sup> In its opposition, the Town requests that Century substantiate that none of the converters are being leased only to receive premium programming. In response, Century contends that if subscribers receive two converter boxes, it is because they have two television sets.<sup>43</sup> With respect to those subscribers with cable-ready television sets, Century admits that subscribers with such sets do not need a converter unless they take a scrambled premium service. However, Century argues that those subscribers' converters are also used to transmit the non-premium channel signals.

**b. Discussion.**

18. Congress defined equipment subject to rate regulation broadly as "equipment used by subscribers to receive basic tier service."<sup>44</sup> In the *Rate Order*, we "agree[d] with commenters who argue[d] that we should require complete unbundling of the charges for equipment and installation."<sup>45</sup> The *Rate Order* also stated the Commission's belief that Congress intended all equipment used to receive the basic service tier to be subject to rate regulation on the basis of actual cost, even if also used to receive other cable services.<sup>46</sup> As the Town has not offered anything more than an unsubstantiated assertion to support its claim that the "premium" converter boxes are used solely for the provision of premium service, we find that the "premium" converter boxes are, in fact, equipment used by subscribers to receive the basic tier. As such, Century was required by our regulations to unbundle the costs and charges associated with them. We remand this issue to the Town for resolution in accordance with this order.

**3. Labor Costs.**

**a. Positions of the Parties.**

19. Century disputes the Town's finding that Century incorrectly completed its 1995 Form 1205 by using actual costs for fiscal year 1995, rather than the reduced labor costs that it

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<sup>42</sup>The Town has not provided copies of the complaints.

<sup>43</sup>April 25, 1996 Reply at 7.

<sup>44</sup>Communications Act § 623(b)(3), 47 U.S.C. § 543(b)(3).

<sup>45</sup>*Rate Order*, 8 FCC Rcd at 5810. We therefore required separate charges for each significantly different type of remote, converter box and installation. *Id.*

<sup>46</sup>*Id.* at 5806-07. The Commission found that Congress' decision to change the terminology from equipment necessary to receive the basic service tier, found in the House Report, to equipment used to receive the basic service tier, found in the Conference Report and adopted in the 1992 Cable Act, was significant and specifically intended to broaden the class of equipment subject to regulation on an actual cost basis. *First Recon. Order*, 9 FCC Rcd at 1164 (emphasis in original).

anticipated it would incur for fiscal year 1996.<sup>47</sup> Century contends that it followed Commission regulations requiring it to complete Form 1205 using data from the most recently completed fiscal year. Accordingly, it filled out its 1995 Form 1205 using data from fiscal year 1995. Specifically, for fiscal year 1995, Century alleges that it employed five people, and thus included the salary costs of these five employees in its 1995 Form 1205.<sup>48</sup> However, for fiscal year 1996 so far, Century has employed three people.<sup>49</sup> Thus, Century contends when it completes its 1996 Form 1205, if it continues to employ only three people, its salary costs will decline and that decline will be reflected in its 1996 Form 1205.

20. According to the Town, during a portion of fiscal year 1995 Century employed only two installers and did not have a plant manager for seven months. Therefore, the Town alleges that Century's labor costs for its 1995 Form 1205 should reflect the reduced number of people which the operator employed for fiscal year 1995 and correspondingly should reflect the reduced labor costs which the operator incurred during that fiscal year.

**b. Discussion**

21. In reviewing Century's filing, the Town determined that for fiscal year 1995 Century listed only three installers, yet reported actual wages of \$93,103.20 and an average wage of \$31,034 per year per installer. The Town compared the fiscal year 1995 average wage with Century's 1993 fiscal year average wage and determined that Century's fiscal year 1995 average wage was unreasonably high.<sup>51</sup> Accordingly, the Town rejected Century's Hourly Service Charge ("HSC"). Our review of Century's Form 1205 reveals that Century listed four installers and reported actual wages of \$93,103.20. Accordingly, Century's correct average wage per installer per year is \$23,275.80. Therefore, we remand this issue to the Town for further consideration. Upon remand, it is reasonable for the Town to question Century's fiscal year 1995 average wage based upon a comparison of its fiscal year 1995 average wage and its fiscal year 1993 average wage.<sup>52</sup> If, based upon this comparison, the Town determines that the average wage is unjustified, the Town must establish a new average wage based upon the best available evidence and recalculate any other related portions of the Form 1205 using this new average wage.<sup>53</sup> It

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<sup>47</sup>Century's 1995 fiscal year began June 1, 1994 and ended May 31, 1995.

<sup>48</sup>Century had actual operating wages of \$93,103.20 in fiscal year 1995.

<sup>49</sup>Century's fiscal year 1996 encompasses June 1995 through May 1996.

<sup>51</sup>Neither party provided the fiscal year 1993 average wage, head count, or total operating wages. Century was not required to file a form 1205 for fiscal year 1994. See *supra* ¶¶ 32-36.

<sup>52</sup>We note that in determining the average wage, Century must be allowed to claim the actual amount that it paid in wages. While Century cannot claim 12 months in wages for an employee who worked only a portion of the year, Century is allowed to claim the amount of wages that the person earned during their period of employment.

<sup>53</sup>See *infra* ¶¶ 11-16 (Calculation of universal remote control unit rates).

cannot, as it has done here, simply reject the HSC.

### C. MOTION FOR FORFEITURE

#### 1. Background

22. In *Century New Mexico Cable Corporation* (Silver City, NM), 10 FCC Rcd 9403, 9404 (Cab. Serv. Bur. 1995) ("*Century I*"),<sup>54</sup> the Cable Services Bureau ("the Bureau") addressed the Town's request that Century be assessed fines under a local ordinance and forfeitures pursuant to Section 503(b) of the Communications Act for its "failure to respond to the franchising authority's requests for information."<sup>55</sup> The Bureau concluded that the Town failed to provide substantiation for these allegations.<sup>56</sup> The Bureau explained that the fact that Century relied on estimates for certain equipment basket figures did not constitute a willful and repeated failure to comply with our rules or the Communications Act.<sup>57</sup> Accordingly, the Bureau declined to impose forfeitures against Century.<sup>58</sup>

#### 2. October 9, 1995 Request for Forfeitures

23. On October 9, 1995, the Town filed another Motion for Forfeiture requesting that the Commission impose forfeiture fines against Century for "willful and repeated violations of

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<sup>54</sup>On January 23, 1995, Century filed an appeal ("January 23, 1995 appeal") of a rate order adopted on December 19, 1994 ("December 19, 1994 rate order") by its local franchising authority, the Town of Silver City, New Mexico (the "Town"). Century challenged the Town's December 19, 1994 rate order with respect to two issues. First, Century contended that the Town arbitrarily and unreasonably increased Century's equipment basket figure by including in it 100 percent of the wages attributable to certain employees. Second, Century asserted that the Town inappropriately recalculated its rate for converters in Step D of Part III of Form 393 (and the parallel portion of Form 1200) to reflect an estimated converter failure rate of eight percent of the units in service, rejecting Century's own figure of five percent. On May 23, 1995, the Bureau released its decision resolving Century's January 23, 1995 appeal. See *Century I*, 10 FCC Rcd 9403, 9404 (Cab. Serv. Bur. 1995). The Bureau upheld the Town's allocation of 100 percent of the wages of certain employees to the equipment basket. The Bureau found that because the Town did not receive satisfactory explanations or justifications from Century regarding its equipment basket figure, the Town made changes to Century's rate filing to reflect what it believed to be more representative data, including data on the salary adjustment. With respect to Century's converter failure rate, the Bureau concluded that in its appeal and in the proceedings below, Century provided no explanation or justification for its estimated converter failure rate of five percent. The Town was able to provide a reasonable basis for its revised figure of 8 percent and the Bureau affirmed the Town's recalculation of the converter failure rate.

<sup>55</sup>*Century I*, 10 FCC Rcd at 9405.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

the [Commission's] rules.<sup>59</sup>

a. **Position of the Parties.**

24. Taking as a basis its October 9, 1994 Motion and subsequent amendments, the Town alleges that Century's actions constitute a "systematic course of deception" which warrants forfeitures.<sup>60</sup> As basis for its position, the Town contends that Century did not implement the refund plan called for in its December 19, 1994 local rate order by July 23, 1995.<sup>61</sup> Instead, Century implemented the plan starting with the billing cycle beginning December 22, 1995. The Town further contends that Century failed to respond to several requests for information.<sup>62</sup> Specifically, the Town contends that, *inter alia*, Century failed to respond to requests for information regarding Century's implementation of the refund plan required by the Town's December 19, 1994 rate order. As additional evidence of Century's alleged "systematic course of deception," the Town contends that on numerous occasions Century has failed to provide subscribers 30 days' notice of rate reductions or increases. Specifically, the Town claims that Century implemented the rate reduction required by the Town's December 19, 1994 order without providing subscribers 30 days' notice, as required by the Commission's regulations. Moreover, the Town claims that when Century increased its *Century Select Tier a la carte* channel rates, it failed to notify subscribers of their right to file a Form 329 complaint regarding the increase and failed to provide subscribers with the address and phone number of the Cable Services Bureau. Finally, as further evidence of Century's alleged systematic course of deception, the Town contends that Century failed to provide the Town with a "certification of compliance" within 90

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<sup>59</sup>See *infra* ¶ 4 for a discussion of the various amendments to the October 9, 1995 Forfeiture Motion and related responses.

<sup>60</sup>March 14, 1996 Reply at 7. In support of its assertion, the Town cites Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 91 L. Ed. 204 (1946). However, we have reviewed the Supreme Court's decision in *WOKO* and determined that the case is inapplicable to this proceeding, since it does not concern the imposition of forfeitures. Rather, *WOKO* concerns the Commission's refusal to renew a radio broadcast license.

<sup>61</sup>In a June 6, 1995 letter, the Town directed Century to implement refunds and rate rollbacks by July 23, 1995.

<sup>62</sup>The Town contends that Century failed to answer requests for information dated January 27, 1995, January 31, 1995, and February 2, 1995 regarding Century's "work orders" used in its Forms 393 and 1200/1205. The Town claimed it needed the information to prepare its opposition to Century's January 23, 1995 appeal. While the Town may request information in the context of a local rate proceeding, there is no basis for the Town to request information relating to an appeal to the Commission of its decisions. Accordingly, we do not find that Century's actions warrant punitive sanctions.

The Town further contends that Century failed to answer requests for information dated July 27, 1995 and September 25, 1995. However, despite Century's failure to respond to the Town's requests, the parties were able to reach an agreement regarding the refund implementation plan on November 18, 1995. Under these circumstances, we do not find that Century's actions constituted a course of deception. The Town further alleges that Century failed to respond to requests for information dated November 6, 1995, and December 18, 1995. The record indicates that Century responded to those requests for information on January 3, 1996 and January 24, 1996.

days of the implementation of the plan to refund Form 393 overcharges, as required by Commission rules.<sup>63</sup>

25. Century disputes the Town's claims. Specifically, with respect to its delay in implementing the refund plan required by the Town's December 1994 rate order and the operator's failure to provide requested information regarding the implementation of the plan, Century alleges that a cable operator may not be held in breach of a local rate order while the operator's refund plan is in dispute.<sup>64</sup> According to Century, on June 23, 1995, it provided the Town with a detailed refund implementation plan which the Town rejected on July 27, 1995.<sup>65</sup> The Town and Century then entered into negotiations regarding the refund implementation and on November 14, 1995, the Town approved a new refund implementation plan. Century contends that once it was notified of the Town's July 27, 1995 rejection, its desire was to reduce its rates to subscribers as quickly as possible, thus it did not give subscribers 30 days' notice, and instead immediately implemented the rates rollback. Thus, Century contends that its failure to provide subscribers notice of implementation of the rate rollback does not warrant the imposition by the Commission of punitive sanctions. With respect to its failure to provide subscribers notice of its a la carte channel rate increase, Century argues that, because its a la carte channels qualify for New Product Tier ("NPT") treatment, it did not have to provide subscribers information as to how to file a Form 329. With respect to its failure to provide a certificate of compliance, Century contends that the Commission's rules requiring a certification of compliance apply only to the cable programming service tier. Finally, Century contends that the Town erred in relying on 47 C.F.R. § 76.963 (Imposition of Forfeitures) and contends that section applies only to cable programming service tier rate orders.

#### b. Discussion

26. Our rules provide that a forfeiture may be assessed against any person who has willfully or repeatedly failed to comply substantially with an order or regulation issued by the Commission or with any provision of the Communications Act.<sup>66</sup> While the relationship between the parties has been acrimonious, the record before us does not demonstrate that Century either willfully or repeatedly violated the Commission's regulations in such a manner necessitating the

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<sup>63</sup>The Town cites Century's refusal to file a 1994 Form 1205 as further evidence of Century's "systematic course of deception." However, Century was not required to file a 1994 Form 1205. *See supra* ¶¶ 32-35. Therefore, Century's failure to file a 1994 Form 1205 does not support the Town's allegation of deception.

<sup>64</sup>In support of its position, Century cites *American Cable TV Investors, Ltd (Chino, CA)*, 10 FCC Rcd 12577 (Cab. Serv. Bur. 1995) ("*American Cable Partners*"). However, we find that this case is not on point. The Bureau in *American Cable Partners* addressed the issue of the timeliness of filing an appeal and whether the local authority's action in prohibiting an operator from implementing its refund plan triggered a second appellate review period, but did not address the instant issue.

<sup>65</sup>In a June 6, 1995 letter, the Town directed Century to implement refunds and rate rollbacks by July 23, 1995.

<sup>66</sup>47 C.F.R. § 1.80(a).

imposition of forfeitures. First, with respect to Century's delay in implementing the refund plan, the Town by a June 6, 1995 letter required Century to implement a refund plan by July 23, 1995. Century submitted a refund implementation plan to the Town for approval on June 23, 1995. The Town did not notify Century until July 27, 1995, four days after the implementation deadline, that the implementation plan had been rejected. The Town cannot now claim that Century willfully failed to meet the July 23, 1996 deadline. While we acknowledge that Century failed to respond promptly to the subsequent information requests dated July 27, 1995 and September 25, 1995, the two parties did reach agreement regarding the implementation plan. The record does not allow us to conclude that Century's delay in responding to these requests was so egregious to warrant forfeitures.

27. Second, with respect to Century's increase of its a la carte channel rates, Century claims that its Century Select Tier qualified for NPT treatment, and thus Century was not required to provide subscribers with information regarding how to file a Form 329.<sup>67</sup> In support of its argument, Century cites the Bureau's orders in *Century Cable TV* and *Century Cable TV Huntington* in which the Bureau found that Century's Century Select package, composed of three a la carte channels, qualified for NPT treatment. Although the Bureau has not yet addressed the Town's Form 329, the Bureau has found that the operator's Century Select Package, which is the same package at issue here, qualified for NPT treatment.<sup>68</sup> Accordingly, Century's subscribers were not entitled to information on how to file a complaint regarding increases in the Century Select Tier rates. As Century provided its subscribers with 30 days' notice of the Century Select Tier rate change, it complied with our rules.

28. Third, with respect to Century's failure to provide subscribers adequate notice of the implementation of the rate rollback mandated by the December 19, 1994 rate order, Century, by its own admission, failed to provide adequate notice in accordance with our rules. It did, however, implement the rollback. Again, we are unwilling to conclude that the overall circumstances warrant a forfeiture action.

29. Fourth, with respect to Century's alleged failure to provide a "certification of

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<sup>67</sup> On June 7, 1995 the Town filed a Form 329 with the Commission regarding Century's increase in the rates for the Century Select a la carte package. In response to the Town's Form 329, Century argued that the Town's Form 329 should be dismissed because the Century Select package qualified for NPT treatment. See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd 1226, 1233044 (1994) ("*Going Forward Order*"). In support of its argument, Century cited the Bureau's decisions in *Century Cable TV (Hanceville, AL et al.)* 10 FCC Rcd 3349 (Cab. Serv. Bur. 1995) ("*Century Cable TV*") and *Century Cable TV Huntington, West Virginia (Huntington, WVA)*, 9 FCC Rcd 7337 (Cab. Serv. Bur. 1994) ("*Century Cable TV Huntington*") in which the Bureau found that the operator's Century Select package, composed of three a la carte channels, qualified for NPT treatment.

<sup>68</sup>To create the Century Select a la carte offering, Century restructured its rate offerings in Silver City in essentially the same way as it did in *Century Cable TV* and *Century Cable TV Huntington, West Virginia*. See November 3, 1995 Reply, Attachment C, Initial Section 76.987(g) Notice.

compliance," the Commission's regulations regarding "certification of compliance" expressly apply only to "Commission orders mandating remedial requirements."<sup>69</sup> This is not the case here. In this case, the order at issue is not a Commission order, but rather is a local franchising authority rate order.<sup>70</sup> Accordingly, Century was not required by the Commission's rules to provide the Town with a certification of compliance.<sup>71</sup> Overall, we do not endorse the range of actions, or inactions, on Century's behalf. We cannot conclude that Century either willfully or repeatedly violated the Commission's regulations in such a manner as to necessitate the imposition of forfeitures. We, therefore, decline to impose forfeitures against Century in this proceeding.

#### D. REQUESTS FOR CLARIFICATION

##### 1. Positions of the Parties

30. Along with its Motion for Forfeiture and subsequently filed amendments, the Town also made several requests for clarification of past Bureau decisions.<sup>72</sup> Specifically, the Town requests clarification of the Bureau's *Times Mirror Cable Television of Orange County, Inc.*<sup>73</sup> decision and "whether the waiver granted to Century by the Commission for the filing of Form 1205 for fiscal year 1995 entitled Century not to file a revised Form 1205 based on fiscal year 1994 data."<sup>74</sup> Moreover, the Town requests that the Commission explain how Century's refund liability for 1994 is to be recalculated to reflect its equipment and installation charges for that

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<sup>69</sup>47 C.F.R. § 76.962(b).

<sup>70</sup>The Town contends that Century should have filed a certification of compliance with the Town after implementing the refunds ordered in the Town's December 1994 local rate order.

<sup>71</sup>There may be cases in which a local franchising authority, as part of its local rate order or its local rate regulations, requires the filing of a certification of compliance. In the present matter, neither party has provided any indication that the December 1994 local rate order or the local rate regulations require such a filing.

<sup>72</sup>Normally, a local authority requesting clarification of a Commission decision would be required to file a Request for Declaratory Ruling. However, in the interest of administrative efficiency, we will respond to the Town's request.

<sup>73</sup>*Times Mirror Cable Television of Orange County (Laguna Hills, CA)*, 10 FCC Rcd 4011 (Cab. Serv. Bur. 1995).

<sup>74</sup>On March 1, 1995, the Bureau granted a blanket waiver to operators to file Form 1205 up to 90 days after the close of their fiscal year rather than 60 days as required in the Instructions for the Form 1205. On July 28, 1995, the Bureau granted Century a waiver to allow the operator to file its Form 1205 when it filed its Form 1210 in the fourth quarter of 1995, rather than within 90 days after the close of its fiscal year as required by the Commission's blanket waiver. See Letter from Meredith Jones, Esq., Cable Services Bureau, to Seth Davidson, Esq., 10 FCC Rcd 10485 (Ca. Serv. Bur. 1995).

fiscal year.<sup>75</sup>

31. In response to the Town's requests, Century explains that it does not believe that the waiver of the Form 1205 filing deadline for fiscal year 1995 entitled the company not to file a revised Form 1205 based on fiscal year 1994 data. Rather, it is Century's position that it was not required to make a fiscal year 1994 Form 1205 filing based upon the Commission's rules, Form 1205 instructions, and the Bureau's decision in *TCI Oregon*.<sup>76</sup>

## 2. Discussion

32. Century contends that, even though the data in its attached Form 1205 affects its Form 1200 maximum permitted basic service tier rates, it is not required to make concomitant adjustments to its equipment and installation rates until after it files a new Form 1205 after the close of its next fiscal year. We agree.

33. The Town is correct in asserting that Forms 1200 and 1205 establish a direct linkage between programming service rates and equipment and installation costs and charges. When setting rates or calculating refund liability, a franchising authority should normally adhere to the principles underlying the benchmark methodology described above, thereby assuring that an operator is allowed to earn neither more nor less than its maximum permitted revenues.<sup>77</sup> Therefore, Form 1205 calculations resulting in lower equipment basket costs should normally lead to higher programming service rates and correspondingly lower equipment and installation rates. When the Commission initially promulgated FCC Forms 1200 and 1205 it created an exception

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<sup>75</sup>The Town also requested clarification as to whether the Commission's certificate of compliance rules are restricted to Commission decisions involving the cable programming service tier rates. As stated in ¶30 *supra*, the Commission's certificate of compliance rules apply only to Commission decisions involving cable programming service tier rates.

The Town further requests clarification as to whether the Bureau's decision in *Times Mirror Cable Television of Orange County* empowered the local franchising authority to impose fines for an operator's failure to comply with a local rate order or Commission order. Specifically, the Town alleges that Century failed to comply promptly with the Town's December 1994 rate order by refusing to implement refunds promptly. However, we resolved this issue in ¶27 *supra*. Moreover, the Bureau's *Times Mirror Cable Television of Orange County* decision does not address the issue of a local franchising authority imposing sanctions. Rather, the *Times Mirror Cable Television of Orange County* decision establishes that local franchising authorities are required to provide at least 60 days for an operator to implement refunds. *Times Mirror Cable Television of Orange County*, 10 FCC Rcd at 4013. In other contexts, however, the Commission has stated that if a franchising authority has the power under state or local law to impose fines or forfeiture for violations of its rules, orders, or decisions, there is nothing in the 1992 Cable Act or the Commission's regulations to prevent them from taking such action. *Third Recon Order*, 9 FCC Rcd at 4345-46.

<sup>76</sup>*TCI Oregon*, 10 FCC Rcd at 12547.

<sup>77</sup>See *Paragon Cable (Portland, Multnomah County and Linton, Oregon)*, 9 FCC Rcd 4091 (Cab. Serv. Bur. 1994); *Ventura County Cablevision (City of Thousand Oaks, California)*, 10 FCC Rcd 13394 (Cab. Serv. Bur. 1995).

to this direct linkage. The instructions to Form 1205 state that, if an operator has already unbundled equipment and installation charges at cost, the operator must wait one year from the date on which it unbundled equipment and installation charges before changing these charges.<sup>78</sup>

The instructions go on to state that an operator does not even need to complete the Worksheet for Calculating Permitted Equipment and Installation Charges on Schedule D, which lists the average hours by type of installation, if the operator is filing Form 1205 only as part of establishing its initial maximum permitted rates for programming services.<sup>79</sup> These instructions comport with our previous determination that equipment rates can be changed only annually.<sup>80</sup> Since Century had restructured its rates on September 1, 1993, Century could not change its equipment and installation rates before September 1, 1994.

34. Moreover, as we stated in *TCI Oregon*, we believe that the postponement of equipment and installation rate changes until the filing of the first fiscal year Form 1205, which took place at least one year after the operator unbundled its equipment and installation rates, was permissible since it could serve to limit administrative expenses for the operators and confusion for consumers. If we had required changes to these rates to become effective on September 1, 1994, operators might have had to adjust their rates twice in a relatively short time period. Accordingly, Century reasonably relied on the form instructions and was not required to file its next Form 1205 until after the close of its fiscal year on May 31, 1995.<sup>81</sup> Century's next 1205 filing should have been its 1995 Form 1205 reflecting data from fiscal year 1995. It was at that time that Century should have changed its equipment and installation rates if its filing indicates a change in its maximum permitted rates. The Town is not permitted to recalculate Century's refund liability retroactively to reflect Century's equipment and installation charges for fiscal year 1994. The Bureau recognized that its finding in *TCI Oregon* would allow some operators, such as Century, who were charging more for equipment than is justified by their Form 1205 costs, to receive in excess of their maximum permitted revenues for some period of time.<sup>82</sup> However, because the Form 1205 instructions and the Bureau's ruling in *TCI Oregon* apply to "changes" in equipment rates, this ruling should have a neutral effect industry wide. Therefore, other operators who were charging less than their maximum permitted rates under their initial Form 1205 filing earned less than their maximum permitted revenues for a similar period of time.<sup>83</sup>

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<sup>78</sup>FCC Form 1205 at 2.

<sup>79</sup>*Id.* at 3, 13.

<sup>80</sup>See Public Notice, Cable Television Rate Regulation Questions and Answers, Question No. 33 (released May 13, 1993).

<sup>81</sup>Century was not required to file a revised Form 1205 based on fiscal year 1994 data since the date on which that fiscal year ended (May 31, 1994) was less than one year after the system's initial unbundling (September 1, 1993).

<sup>82</sup>*TCI Oregon*, 10 FCC Rcd at 12550 n.36.

<sup>83</sup>*Id.*

**III. ORDERING CLAUSES**

35. Accordingly, **IT IS ORDERED** that Century New Mexico Cable Corporation's January 23, 1995 appeal of the Town of Silver City, New Mexico's December 19, 1994 local rate order, regarding the Form 1210 submission **IS GRANTED**, and the cause **IS REMANDED** for further consideration consistent with this order.

36. **IT IS FURTHER ORDERED** that Century New Mexico Cable Corporation's March 29, 1996 appeal of the Town of Silver City, New Mexico's December 19, 1994 local rate order, regarding the issue of Century's universal remote control unit rates **IS GRANTED**, and the cause **IS REMANDED** for further consideration consistent with this order.

37. **IT IS FURTHER ORDERED** that Century New Mexico Cable Corporation's March 29, 1996 appeal of the Town of Silver City, New Mexico's December 19, 1994 local rate order, regarding the issue of Century's converter box rates **IS GRANTED**, and the cause **IS REMANDED** for further consideration consistent with this order.

38. **IT IS FURTHER ORDERED** that Century New Mexico Cable Corporation's March 29, 1996 appeal of the Town of Silver City, New Mexico's December 19, 1994 local rate order, regarding the issue of Century's labor costs **IS GRANTED**, and the cause **IS REMANDED** for further consideration consistent with this order.

39. **IT IS FURTHER ORDERED** that the Town of Silver City, New Mexico's request for forfeiture **IS DENIED**.

40. 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