

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

In the Matter of:)
)
TELERAMA, INC.)
)
Appeal of Local Rate Order)
of the City of Euclid, Ohio)

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 1996

Released: December 13, 1996

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On May 5, 1994, Telerama, Inc. ("Telerama"), filed an Appeal of the Local Cable Rate Order adopted on April 4, 1994 by its local franchising authority, the City of Euclid, Ohio ("the City").¹ The City opposes Telerama's appeal.² The rate order established a new regulated rate schedule for Telerama's basic service tier rates and associated equipment based on Telerama's Form 393.³ Specifically, the City's rate order requires Telerama to implement certain rate reductions and to issue refunds to subscribers for overcharges levied for the time period from September 1, 1993 to May 14, 1994.

2. Telerama raises eight issues in its appeal: (1) that the City failed to permit Telerama to offset equipment overcharges with basic programming service tier undercharges; (2) that the City miscalculated Telerama's Hourly Service Charge by improperly including certain installation and service hours in its calculations and/or by failing to include the costs associated with those hours; (3) that the City improperly prohibited Telerama from passing through franchise fees to subscribers; (4) that the City improperly prohibited Telerama from itemizing its franchise

¹On May 5, 1994, Telerama also filed a Petition for Stay Pending Review of the Appeal and an Emergency Petition for Stay Pending Review of Stay Petition. On May 11, 1994, the City filed a response to Telerama's two stay petitions. In its response, the City stated that it had stayed enforcement of its rate order, pending Bureau review of Telerama's appeal. Because we reach the merits of Telerama's appeal in this order, its stay petitions will be dismissed as moot.

²The City filed its opposition on May 20, 1994 to which Telerama filed a reply on June 3, 1994.

³Under 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) (1992).

fees on subscribers' bills; (5) that the City improperly ordered Telerama to reinstate a senior citizen discount which was eliminated during the City's review of its rates; (6) that the City improperly prohibited Telerama from bundling remote control units with an unregulated premium service; (7) that the City violated the Commission's due process rules in enacting the local rate order; and (8) that the City improperly ordered Telerama to issue refunds in the first billing cycle after adoption of the local rate order. Telerama claims that each of these actions resulted in a misapplication of the Commission's rate regulations and violated the 1992 Cable Act. We address each issue in turn.

II. DISCUSSION

3. Under our rules, rate orders made by local franchising authorities may be appealed to the Commission.⁴ 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.⁵ Therefore, 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.⁶ 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.⁷

A. Refund Offsets

4. Telerama argues that the City's rate order ignored the Commission's instructions for the calculation of refunds, which it asserts required that its overcharges for equipment and installation be offset by its undercharges for basic programming service tier rates. In response, the City states that it appears that Telerama is basing its offset argument "on the Commission's recently revised version of Section 76.942(a)."⁸ The City asserts that the revised rule did not become effective until May 15, 1994, and thus did not apply to the City's rate order since it was issued before that date. According to the City, nothing in the original version of Section

⁴See 47 C.F.R. § 76.944 (1993).

⁵See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5731(1993) ("*Rate Order*"); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, and Buy-Through Prohibition, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994) ("*Third Recon. Order*").

⁶*Id.*

⁷*Id.*

⁸Opposition at 35.

76.942(a) suggested that Telerama was entitled to offset its overcharges for equipment and installation with its undercharges for the basic programming service tier rates.

5. 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 time 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.

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

7. Pursuant to Commission rules for the basic service tier, if a franchising authority does not dispute the basis for the figures presented in the cable operator's filings or has not discovered any mathematical errors in the forms, the franchising authority should approve the operator's maximum permitted rates as derived by the forms.¹¹ After setting the various regulated

⁹To the extent that an operator has sought to take advantage of the refund deferral period available under our rules in Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4183-4185 (1994) ("*Benchmark 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.

¹¹See 47 C.F.R. § 76.942.

rates that an operator is permitted to charge on a prospective basis, a franchising authority should then determine if the operator is liable for any subscriber refunds. Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from unbundled rates. Refund liability should be calculated based on the difference between old unbundled rates and the sum of the new unbundled program service charges. The intent of the refund mechanism is to place subscribers in the same position they would be had they been subject to reasonable rates.¹² In calculating an operator's refund liability for purposes of the Forms 393 and 1200, offsets between program overcharges and program undercharges may be allowed. One of the primary purposes in allowing offsets is to avoid penalizing operators unfamiliar with regulation, who in anticipation of regulation, made a good faith effort to lower their rates accurately. This concern applies to both the Form 393 and Form 1200 because both Forms required the use of data from approximately the same time periods. Any errors an operator made in setting rates in anticipation of rate regulation would be carried over to the Form 393 and in turn the Form 1200 as well. In addition, offsets are allowed in the context of Form 393 and Form 1200 because the formulas for these two forms 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.¹³ In this proceeding, any refunds to be paid by Telerama should be calculated based on this method. We disagree with the City's assertion that Telerama is not entitled to offsets because the revisions to 47 C.F.R. 76.942(a) did not become effective until after the City's rate order was issued. The revisions were made to 47 C.F.R. 76.942(a) to clarify existing Commission rules regarding the calculation of refunds, *i.e.*, that in calculating refund liability, operators are permitted to offset overcharges in rates with any undercharges in rates.¹⁴

8. 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 principles underlying the benchmark methodology, particularly when calculating an operator's refund liability.¹⁵ For instance, in this case, the City must offset or reduce any refunds it may order by the difference between the actual basic programming service tier rates that Telerama charged and

¹²See *Third Recon. Order*, 9 FCC Rcd at 4353.

¹³With the 1210 Forms, however, these issues are not present. Operators filing a Form 1210 should be familiar with our rules since the Form 1210 is not a first time filing, but is used to adjust maximum permitted rates in a Form 1200 or in a previously filed Form 1210. Therefore, the reasons for permitting offsets in the context of Form 393 or Form 1200 are not present in a Form 1210 proceeding and offsets will not be allowed

¹⁴47 C.F.R. § 76.942(a) (1993).

¹⁵See *Rate Order*, 8 FCC Rcd at 5731; *Third Recon. Order*, 9 FCC Rcd at 4346.

the maximum permitted rates that it could have charged during the applicable period of review.¹⁶ According to Telerama, the City has directed Telerama to issue refunds without regard to the fact that some rates are below maximum permitted levels. We are remanding this case to the City so that it can reconsider its ruling in a manner consistent with our findings.¹⁷

B. Telerama's Hourly Service Charge

9. Telerama contends that the City improperly lowered its Hourly Service Charge (HSC), in Part III of its FCC Form 393, by increasing the total number of labor hours for maintenance and installation of customer equipment. The HSC is designed to recover the costs of service installation and maintenance of customer equipment.¹⁸ In recalculating Telerama's HSC, the City included, as hours related to service of regulated equipment and installation activities on Line 4, Step A of Form 393, work performed on its distribution plant and other nonsubscriber-specific work, such as "balancing" and "sweeping" the system. The City did not, however, enter on Line 3, Step A, the costs associated with the labor hours that the City added. Telerama further contends that the City improperly included labor hour data for additional outlet installations, outlet relocations and programming service upgrades in calculating its HSC. Again, the City did not include the associated costs for the hours it added. This resulted in a lower HSC because the total costs entered on Line 3 were divided by a larger number of hours. At a minimum, Telerama argues, the costs associated with the labor hours the City added should also be included in the HSC calculations. Finally, Telerama contends that the City improperly used data from a single week in calculating Telerama's installation hours, extrapolating to arrive at annual figures, rather than using the actual figures provided by Telerama.

10. The City answers by claiming that Telerama did not submit evidence to support any of the arguments on this issue that it made before the City. Specifically, the City claims that Telerama was given numerous opportunities to submit additional information to substantiate its claims related to the HSC after the City completed its initial report and analysis of Telerama's Form 393. The City further claims that it used the cost figure provided by Telerama in

¹⁶See *Third Recon. Order*, 9 FCC Rcd at 4353. While a franchising authority may not require an operator to set its rates below its maximum permitted rates, an operator may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. See *Rate Order*, 8 FCC Rcd at 5820-21; *United Cable Television of California, Inc. (Davis, California)*, 11 FCC Rcd 4465 (Cab. Serv. Bur. 1995). To permit operators 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); *Equipment Compatibility Order*, 9 FCC Rcd at 1982.

¹⁷See *TCI Cablevision of North Central Kentucky, Inc. (Mount Washington, KY)*, 10 FCC Rcd 926 (Cab. Serv. Bur. 1994).

¹⁸The HSC is calculated by computing an operator's annual capital costs plus expenses for the maintenance of customer equipment and the installation of basic tier service. That figure is then divided by the total number of person-hours spent in those activities over the past year. FCC Form 393, Instructions for Equipment and Installation Charges, Step A.

recalculating its HSC. Moreover, the City continues, after Telerama informed it that costs related to the labor hours should be included in the City's recalculation, the City again gave Telerama the opportunity to submit additional information to support its claim. The City claims Telerama failed to take advantage of that opportunity. Finally, the City claims that it asked Telerama to provide support for the number of average installation hours on Schedule D of its Form 393. In response to that request, the City continues, Telerama provided the results of a time study covering a week in September, 1993. The City claims Telerama used this same time study to determine its average installation hours when it completed Schedule D of its Form 393.

11. In this instance, the City received an initial filing, purporting to be Telerama's Form 393, from the operator on November 16, 1993.¹⁹ Telerama submitted a new Form 393 on December 10, 1993. Due to the deficiencies in the November 16, 1993 filing, the City treated the December 10, 1993 filing as triggering the 30-day period for review.²⁰ On December 15, 1993, the City notified Telerama by letter that it was extending the review period by 90 days until April 11, 1994.²¹ Upon review, the City determined that Telerama's December 10, 1993 submission was also deficient and therefore, on January 24, 1994, the City sent Telerama a "Request for Supplemental Rate Information," which sought additional information, including a request that Telerama base its Form 393 on franchise specific data, rather than the system-wide data on which its second submission was based. On March 2, 1994, Telerama submitted a new Form 393 based on franchise-specific data. The City determined that this new filing was also deficient and, on March 7, 1994, sent Telerama a Second Request for Supplemental Rate Information. Telerama responded to this second request on March 18, 1994, just over two weeks before the City council was scheduled to meet to consider a rate determination. On March 29, 1994, the City provided Telerama with a copy of its report on Telerama's Form 393 and a draft HSC analysis. A City council committee met on March 28, 1994 and again on March 30, 1994 to discuss the rate regulation issue. Telerama was invited to send representatives to both meetings. On March 30, 1994, Telerama provided written comments on the draft report and HSC analysis. After contacting Telerama by phone to request additional information, the City sent it a revised version of the HSC analysis. Telerama told the City that it would submit the additional information, supporting the above contentions, before the City council met on April 4, 1994 to adopt a rate order. On April 4, 1994, however, Telerama informed the City that it would not provide any additional information before the council meeting. On the evening of April 4, 1994, the City council met and adopted the rate order, which included a provision requiring Telerama

¹⁹The City states that Telerama conceded that the initial filing was incomplete. In support of this claim, the City attaches a December 10, 1993 cover letter from Telerama to the City admitting that the initial filing was incomplete and supplying an amended Form 393. See Opposition, Exhibit D (December 10, 1993 Letter from Telerama to the City) at 1. For example, the filing did not contain the first four pages of Form 393, was unsigned, contained mathematical errors, and lacked much of the necessary information. Opposition at 5.

²⁰Opposition at 5 n.5.

²¹Since the City council meets on the first and third Monday of each month, a fact of which Telerama was aware, Telerama knew in December, 1993 that the last City council meeting at which an order could be adopted prior to the end of the 90-day period was on April 4, 1994.

to submit a written plan within 10 days for the payment of refunds. On April 14, 1994, Telerama sent a letter to the City disputing portions of the rate order and stating that it would provide refunds "once the rates are set, pursuant to a final FCC or judicial determination."

12. Under Commission rules, cable operators have the burden of proof in demonstrating that the existing or proposed rates for their basic service tier and associated equipment are reasonable.²² Moreover, operators also have the obligation to file timely their rate justifications with their franchising authorities.²³ Although we have stated that an operator should have an opportunity to cure any deficiencies in its original filing or respond to requests for additional information if its franchising authority has issued an order to toll the effective date of the proposed rates,²⁴ we have not required franchising authorities to accept, without supporting documentation, figures used by an operator in justifying its rates. Furthermore, we can find no basis to impose such an obligation under the facts in this proceeding. Telerama was given numerous opportunities to submit additional information for the City to consider to support its arguments regarding calculation of its HSC, but declined. Having failed to provide the necessary information to the City before the issuance of its rate order, when the record was open and the City could have considered its arguments, Telerama is not entitled to have the Bureau consider them on appeal. Moreover, Telerama has offered no reason why it could not have provided the City with the information earlier, nor did it ask the City to reconsider its rate order and provide the information to allow it to do so. To allow Telerama to now present this information on appeal, would prevent rate orders from being issued in a timely fashion, because an operator could indefinitely postpone final resolution of the rate justification process by not cooperating with its franchising authority. Based upon the best available information at the time, the City acted reasonably in issuing its rate order. Telerama's appeal regarding all the above HSC related issues, except additional outlet installations and outlet relocations, is therefore denied.

13. With regard to additional outlet installations and outlet relocations, however, the rate order is remanded because the City did not follow our rules in regard to these items.²⁵ Our

²²47 C.F.R. § 76.937 (1993).

²³47 C.F.R. § 76.930 (1993) (A cable operator shall file its schedule of rates for the basic service tier and associated equipment with a franchising authority within 30 days of receiving notification from the franchising authority that the franchising authority has been certified by the Commission to regulate rates for the basic service tier.)

²⁴*Rate Order*, 8 FCC Rcd at 5709 ". . . To toll the effective date of the proposed rates, the franchising authority must issue a brief order, within the initial 30-day period, explaining that the franchising authority needs additional time to review the proposed rates. During these 90 or 150-day [for cost-of-service filings] periods, the franchising authority *can* solicit additional information from the cable operator, if necessary, and consider the views of interested parties." (emphasis added)).

²⁵See ¶ 9 *supra*.

rules state that rates for additional outlet installations should be based on actual costs.²⁶ Though our actual cost rules do not specifically include outlet relocations, outlet relocations are sufficiently similar to additional outlet installations to be accorded such treatment. Since charges for these items are based on actual cost, their rates must be calculated separately. No data for additional outlet installations and outlet relocations should be included in HSC calculations. The City must therefore reconsider these items on remand. Upon remand we note that in reviewing Telerama's additional outlet installations and outlet relocations, the primary concern should be to ensure that its Equipment Basket costs are fully recovered, not how the operator counted its labor hours. In order to ensure full recovery, an operator must be permitted to use the same method of counting person hours in calculating the HSC as it does in calculating the specific charges for its various installations and equipment.²⁷ As long as a franchising authority uses the same method for counting both the total number of labor hours in calculating the HSC and the labor hours for the various installation and equipment charges in reviewing an operator's Form 393, then its equipment and installation charges review will result in proper cost recovery.²⁸

C. Franchise Fee Pass Through

14. Telerama next contends that the City's rate order improperly prevents it from "passing through" its franchise fee obligation to subscribers.²⁹ The City contends, however, that this portion of the rate order reflects a settlement between Telerama and the City regarding past franchise fees that Telerama allegedly failed to pay. Specifically, the City claims that because of the franchise fee underpayment dispute, the parties entered a settlement agreement under which Telerama made a cash payment to the City and increased its franchise fee payment to the City from its previous level of 3% of gross receipts to 5% of those receipts on a going-forward basis. Moreover, the City contends that Telerama agreed not to pass through the 2% franchise fee increase to subscribers until the current franchise expires. In response, Telerama argues that the 1992 Cable Act preempted the franchise fee settlement agreement and it was therefore relieved of any obligation to the City on the effective date of the Act, September 1, 1993. Telerama contends it fully complied with the agreement from the date of its adoption, December 21, 1992, including the franchise fee pass-through limitation, until the effective date of the 1992 Cable Act,

²⁶47 C.F.R. § 76.923(h) (1993).

²⁷ Stated another way, correct application of the HSC and the equipment and installation methodology requires that recoverable costs be allocated to the labor hours through which they can be recovered.

²⁸See *Harron Communications Corporation* (Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich, Mass.), 10 FCC Rcd 2349 (Cab. Serv. Bur. 1995) ("*Harron*"). In *Harron*, the franchising authority included only direct labor hours in calculating the operator's HSC. Since the franchising authority used the same method for counting the operator's labor hours in calculating both the HSC and the various installation and equipment charges, we held that the franchising authority's action was reasonable. The franchising authority's action did not affect the operator's total cost recovery or its total refund liability.

²⁹A franchise fee is a fee paid by the cable system to the local franchising authority for the right to provide cable service to subscribers in a given community. See Communications Act, § 622, 47 U.S.C. § 542 (1992).

September 1, 1993, on which it began passing through to subscribers the full amount of the 5% franchise fee.

15. We disagree with Telerama's preemption argument. Telerama cites 47 U.S.C § 543(a) for authority in making its preemption argument and contends that this section authorizes local regulation of cable rates only pursuant to the Act and the Commission's rules.³⁰ We do not discern how this section of the U. S. Code has any effect on the parties' dispute.³¹ Based on the record before us, there appears to be no basis for preemption. Accordingly, we deny Telerama's appeal with respect to this issue.³²

D. Franchise Fee Itemization/Calculation

16. Telerama next contends that the City improperly invalidated the method by which it itemizes its franchise fees. The City claims it does not dispute Telerama's right to itemize franchise fees. Instead, the City contends Telerama is attempting to underpay franchise fees owed to the City through improper itemization. The City argues that Telerama's method of itemization has resulted in the City receiving less than five percent of the amount that Telerama collects from subscribers. According to the City, the franchise fee must equal 5 percent of a subscriber's total bill, not a 5 percent charge on top of what the subscriber would otherwise pay.³³ The City argues that Telerama's practice of charging subscribers a franchise fee in addition to charges related to cable service and equipment violates the requirement that the franchise fee be calculated as a percentage of the cable operator's total gross revenue. In short, the City concludes, because the franchise fee amount is added to other charges and does not represent five percent of the total bill, Telerama is underpaying its franchise fee obligation.

17. In its recent decision in *United Artists Cable of Baltimore*, the Commission noted that it would ". . . exercise jurisdiction over franchise fee disputes that impinge on a 'national policy concerning cable communications.'"³⁴ The Commission indicated that it intended to exercise jurisdiction over disputes arising directly under the provisions of the Communications

³⁰47 U.S.C. § 543(a).

³¹In the *Rate Order*, we interpreted that section as authority for preempting all provisions in franchising agreements that barred rate regulation. *Rate Order*, 8 FCC Rcd at 5679-80.

³²While we hold that the parties' franchise fee settlement agreement is not preempted by the 1992 Cable Act, other than the above analysis of the applicable law and the Commission's rules, we will not attempt to interpret the parties' franchise fee settlement agreement. Any disputes the parties have regarding the agreement should be resolved according to state law by a court of competent jurisdiction. See 47 C.F.R. § 76.944(a) (1993).

³³Opposition at 28.

³⁴FCC 96-188, para. 28 (released April 26, 1996).

Act, as opposed to specific fact patterns concerning various local issues.³⁵ The Commission gave as an example the fact that § 622(b) states that franchise fees are to be calculated based on "gross revenues . . . derived from the operation of the cable system."³⁶ The Commission reasoned that the issue of precisely what constitutes "gross revenues . . . derived from the operation of a cable system" does not arise from individual franchise agreements, but from a specific provision of the statute itself.³⁷ When Congress enacted this provision, it established a uniform federal standard governing the calculation of franchise fees, and the issue of franchise fee calculation necessarily impinges upon a national policy on cable franchise fees, according to the Commission.³⁸ The Commission concluded its decision in *United Artists Cable of Baltimore* by exercising jurisdiction to resolve the franchise fee dispute and providing an interpretation of the statutory term to serve as precedent in future cases.

18. In *United Artists Cable of Baltimore*, the Commission also upheld the Bureau's conclusion that the franchise fee a cable operator collects from subscribers should not be included in calculating an operator's "gross revenues," because franchise fees are a charge levied by the franchising authority, rather than revenues derived from the operation of the cable system.³⁹ Moreover, given the statutory franchise fee cap of 5%,⁴⁰ a cable operator could be obligated to pay more than the maximum franchise fee permitted under the Cable Act, were the franchise fee itself subject to a franchise fee. We hold, therefore, that Telerama is correct in its contention that the franchise fee it collects from its subscribers for the City does not constitute gross revenues from the operation of the cable system, and that the City is not entitled to charge a 5% franchise fee on the total amount that Telerama collects from its subscribers, including the franchise fee.

E. Senior Citizen Discount

19. Telerama next contends that the City improperly ordered it to retain a 10% senior citizen discount on basic service tier rates and make appropriate refunds, including interest, to senior citizens, pending City approval of the discount's elimination. The City counters that Telerama's unilateral elimination of its 10% basic service discount for senior citizens constituted a "rate increase," thereby requiring prior City approval.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Supra* at para 9.

⁴⁰*See* Communications Act § 622(b), 47 U. S. C. § 542(b), which limits the amount of franchise fees paid by a cable operator to 5% of its "gross revenues" and which also limits the term "gross revenues" only to those revenues derived ". . . from the operation of the cable system."

20. In a similar context, we held that elimination of a senior citizen discount did not result in a fundamental change in service, although it resulted in a price change for affected subscribers.⁴¹ We further held that cable operators may eliminate a senior citizen discount without implicating the Commission's negative option billing prohibition because senior subscribers continued to receive the same level of service they previously requested.⁴² That same reasoning is applicable here. Commission customer service rules require operators to give subscribers 30 days' notice of any changes in rates,⁴³ thereby giving senior subscribers the opportunity to cancel service before the rate change caused by elimination of the discount would take effect. Furthermore, since an operator may charge up to its maximum permitted rates,⁴⁴ as determined by Form 393, as long as elimination of the discount does not result in a rate exceeding the maximum permitted one, an operator may eliminate a senior citizen discount without prior approval from its franchising authority.⁴⁵ Elimination of a senior citizen discount, resulting in a new rate that does not exceed the applicable maximum permitted one, is not a "rate increase" under our rules. This issue is therefore remanded to the City for further proceedings consistent with our findings here.

F. Remote Controls with Premium Service

21. Telerama next contends that the City's rate order improperly prohibits it from offering remote control units as part of a premium package. In effect, Telerama continues, the City is imposing two requirements. First, the City is requiring Telerama to offer remotes to all subscribers, and not solely to premium subscribers, as is Telerama's current practice. Second, the City is requiring Telerama to offer the remotes at the rate approved by the City. The City contends that it is not requiring Telerama to offer remotes. Instead, the City continues, its rate order simply states that if Telerama offers equipment which can be "used by subscribers to receive basic tier service," it may not bundle such equipment with an unregulated premium service. This practice, the City concludes, violates the Commission's unbundling policy.

22. We agree with the City's conclusion. Congress defined equipment subject to rate regulation broadly as "equipment used by subscribers to receive basic tier service."⁴⁶ In the *Rate Order*, we "agree[d] with commenters who argue[d] that we should require complete unbundling

⁴¹Paragon Cable (Irving, Texas), 10 FCC Rcd 6012, 6013. (Cab. Serv. Bur. 1995).

⁴²*Id.*

⁴³*See Rate Order*, 8 FCC Rcd at 5907.

⁴⁴*See* TCI Cablevision of North Central Kentucky, Inc., *supra*, 10 FCC Rcd at 927 n. 14.

⁴⁵Telerama has indicated that senior citizen discounts are not addressed in the parties franchise agreement. *See* Appeal at 11 n. 29. Our ruling here is therefore limited to the situation where the franchise agreement is silent on the issue of senior citizen discounts.

⁴⁶Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

of the charges for equipment and installation."⁴⁷ The *Rate Order* also stated the Commission's belief that Congress intended all equipment used to receive the basic service tier, even if also used to receive other cable services, to be subject to rate regulation, on the basis of actual cost.⁴⁸ Here, the remotes offered by Telerama as part of a premium package were also used to receive the basic service tier. The City's action, requiring that such remotes be offered at their maximum permitted rate and ordering refunds for remotes offered above that rate, was reasonable. Telerama's appeal of this issue is therefore denied.

G. Due Process

23. Telerama next contends that the City violated the Commission's due process rules in adopting the local rate order. Specifically, Telerama states that our rules were violated by the City's action in failing to provide Telerama adequate opportunity to comment on the proposed rate order before it was adopted. The City responds by stating that Telerama was given ample opportunity to participate in the rate-making process and that the Commission's due process rules were followed in all other respects. The City states that it had numerous phone conversations with representatives from Telerama during the rate making process, exchanged several letters with Telerama related to its Form 393, conducted several informal meetings on Telerama's Form 393, to which representatives from Telerama were invited, and passed its local rate order at a public meeting of the City Council.

24. Our rules require that a franchising authority must provide a reasonable opportunity for consideration of the views of interested parties.⁴⁹ Our rules also require the franchising authority to issue a written report if it disallows the operator's proposed rates.⁵⁰ The written report must affirmatively demonstrate why the operator's proposed rates are unreasonable and why the prescribed rates are reasonable.⁵¹ We do not require evidentiary hearings, although such hearings are permitted. We deem it sufficient for the local authority to consider the written

⁴⁷*Rate Order*, 8 FCC Rcd at 5810. We therefore required separate charges for each significantly different type of remote, converter box and installation. *Id.*

⁴⁸*Id.* at 5806-07. The Commission found 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. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 9 FCC Rcd 5631, 1164 (1993) ("*First Recon. Order*") (emphasis in original).

⁴⁹47 C.F.R. § 76.935 (1993).

⁵⁰47 C.F.R. § 76.936 (1993).

⁵¹*Rate Order*, 8 FCC Rcd at 5723-24.

views of interested persons on issues raised about the operator's proposed rates.⁵² Here, the City met with Telerama representatives on numerous occasions, exchanged written correspondence on issues raised by Telerama and had two informal meetings, at both of which Telerama's Form 393 was the exclusive item considered. The rate order also sets forth and affirmatively demonstrates the City's findings with regard to the issues that had been discussed previously. It is clear from the record below that the City conducted its review of Telerama's Form 393 in compliance with the procedural safeguards established by the Commission.⁵³ We conclude that, in considering Telerama's Form 393 and in adopting its local rate order reflecting that consideration, the City acted reasonably and met our procedural requirements. Accordingly, we deny Telemedia's appeal with respect to this issue.

H. Refund Timetable

25. Telerama next contends that the City's requirement that Telerama issue refunds for overcharges no later than the next bill sent to subscribers after the date the local rate order was adopted violates Commission procedural rules. Specifically, Telerama relies on language in our rules which, in the context of cable programming service rate orders, requires operators to issue rate reductions or refunds within 60 days from the date an order is released which declares rates unreasonable and mandates a remedy.⁵⁴ The City counters that neither the 1992 Cable Act nor Commission rules address the time period in which a cable operator may be required to implement a refund for the basic service tier.

26. The 60-day requirement, on which Telerama relies, applies to cable programming service rate reductions or refunds ordered by the Commission.⁵⁵ We have stated, however, that franchising authorities should follow the procedures we adopted for cable programming services in ordering refunds for basic service rates.⁵⁶ We have also stated that cable operators should be given the opportunity to provide 30 days' notice of any rate changes or refunds to its subscribers.⁵⁷ In providing operators such an opportunity, we further stated that the franchising authority should consider the amount of time required to prepare and send notices and bills reflecting the rate change with particular attention paid to the impact of cycle billing, if

⁵²Rate Order, 8 FCC Rcd at 5724, n. 367.

⁵³For more detail regarding the process given Telerama during the City's rate-setting proceeding, see, *supra*, ¶¶ 10-12.

⁵⁴Rate Order, 9 FCC Rcd at 5867-68.

⁵⁵*Id.*

⁵⁶*Id.* at 5726.

⁵⁷Times Mirror Cable Television of Springfield, Inc. (Springfield, Illinois), 10 FCC Rcd 2340 (Cab. Serv. Bur. 1995); Questions and Answers on Cable Television Rate Regulation, Question/Answer 3 (released May 18, 1994).

applicable.⁵⁸ The City's timetable for issuing refunds does not give Telerama the opportunity to provide its subscribers notice, nor does it appear from the record below that the City gave proper consideration to other issues, such as whether Telerama uses cycle billing. This issue is therefore remanded to the City for further proceedings consistent with this order.

III. ORDERING CLAUSES

27. Accordingly, **IT IS ORDERED** that Telerama's appeal of the City of Euclid's local rate order, with regard to the issues of refund offsets, additional outlet installations and outlet relocations rates, franchise fee pass through and itemization/calculation, senior citizen discount and refund timetable, **IS REMANDED** to the local franchising authority for resolution in accordance with the terms of this Order.

28. **IT IS FURTHER ORDERED** that Telerama's appeal of the City of Euclid's local rate order, with regard to the issues of Hourly Service Charge calculation, remote controls with premium service and due process, **IS DENIED**.

29. **IT IS FURTHER ORDERED** that Telerama's Petition for Stay Pending Review of the Appeal and Emergency Petition for Stay Pending Review of Stay Petition **ARE DISMISSED** as moot.

29. 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 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

⁵⁸*Id.*