

fee refund amount, which interest begins to accrue after the date the cable operator issues refunds to subscribers. Hence, in this example, a cable operator may earn a 2.25 percent return on franchise fee refunds. Such a result would be unconscionable. A cable operator should not be permitted to earn such a profit on the amount it has overcharged subscribers. The goal of such refunds should be simply to make the cable operator whole.

H. An Operator Should Submit Its Proposed Annual Filing Date 45 Days in Advance of Such Date, and a Franchising Authority Should Have the Right to Reject Such Date

The Local Governments agree that a cable operator should provide a franchising authority prior notice of its FCC Form 1240 filing date. However, the rule should specify how much prior notice a cable operator must provide. Otherwise, cable operators might provide such notice the day before the filing, or some other such unreasonable period, thus limiting the ability of the franchising authority to reject such date. To resolve this concern, § 76.922(e) should be amended to require that cable operators provide 45 days advance notice of the proposed filing date for the FCC Form 1240.²¹

²¹ The Local Governments have set forth proposed changes to the Commission's rule at Exhibit A.

In addition, the Local Governments are concerned about needless disputes between franchising authorities and cable operators over whether a franchising authority has "good cause" to deny the proposed filing date. A cable operator should not be permitted to refuse to negotiate another date because it disagrees with whether a franchising authority has "good cause" to reject the operator's proposed filing date. To resolve this concern, a franchising authority should have the unilateral right to reject the date, without limitation.²² The Local Governments have set forth at Exhibit A a proposed change to §76.922(e) that grants franchising authorities such a right.

I. The Commission Should Clarify a Franchising Authority's Right to Issue a Rate Order After the Initial 60-Day Review Period for New Equipment and Channel Addition Filings

The Commission should amend Sections 76.933(g)(4) and (h)(2) to clarify that franchising authorities retain the right to issue rate orders and order refunds after the initial 60-day period to review rate filings for new equipment and channel additions. The Local Governments assume the Commission intended to grant

²² As currently permitted under the rules, the operator and franchising authority still would then try to negotiate an alternative date and, if such negotiations fail, a franchising authority would have the right to choose a date up to 60 days after the date chosen by the operator.

franchising authorities such a right. However, the rules as published appear to contain an incorrect cite. Those rules state that, after the initial period, the franchising authority may order refunds and prospective rate reductions subject to the requirements under Section 76.933(g)(1). However, that section does not set forth requirements for ordering refunds and rate reductions. The Local Governments assume the Commission intended to require that franchising authorities follow the requirements in Section 76.933(g)(2), which sets forth requirements for issuing rate orders and ordering refunds after the initial review period for the FCC Form 1240. The Local Governments urge the Commission to make this clarification to its rules.

Moreover, the Local Governments urge the Commission to delete §76.933(h)(1), which requires a franchising authority to issue an accounting order at the end of the 60-day review period for new equipment if the cable operator's "most recent rate filing was based on the system that enables them to file up to once per quarter." The Local Governments believe that § 76.933(h) will cause needless confusion among franchising authorities and cable operators as to whether a franchising authority will need to issue an accounting order at the end of the 60-day review period, see § 76.933(h)(1), or instead will need to apply the

annual review filing rules for rate refunds and rate reductions after the initial review period under § 76.933(g). See § 76.933(h)(2). Moreover, franchising authorities should not be forced to sort through historical rate data to determine which rule would apply.

In addition, if the rule requiring the franchising authority to adopt an accounting order applies, the 60-day time period may be insufficient to permit the issuance of an accounting order, particularly in those jurisdictions where a legislative body must issue such an order. Many city councils and county commissions, for example, may find that the 60-day time period is insufficient to permit them to adopt an accounting order, particularly if the operator chooses a filing date when city councils and county commissions are not in session, such as during summer months.

To resolve these concerns, the Local Governments believe that the Commission should delete § 76.933(h)(1), and should simply require the franchising authority to apply the same rule that would apply to annual rate adjustments.²³ This rule would be

²³ The Local Governments have set forth the proposed amendment to § 76.933(h) at Exhibit D. As proposed by the Local Governments, a franchising authority, at the end of 60 days, would simply need to inform the cable operator if it does not intend to issue a rate order.

consistent with the Commission's rule that applies to the review of channel addition rate filings. See § 76.933(g)(4). Under that rule, a franchising authority is not required to issue an accounting order and, instead, must apply the rule that applies to the review of annual rate filings after the initial review period.

III. CONCLUSION

For the reasons stated above, the Local Governments urge the Commission to reconsider and clarify certain of the cable rate regulations adopted by the Order.

Respectfully Submitted,


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EXHIBIT A

76.922(e) Annual rate adjustment method.

(1) Generally. Except as provided for in paragraphs (e)(2)(iii)(B) and (e)(2)(iii)(C) of this section and Section 76.923(o), operators that elect the annual rate adjustment method may not adjust their rates more than annually, but must submit a rate justification on the FCC Form 1240 at least annually, to reflect inflation, changes in external costs, changes in the number of regulated channels, and changes in equipment costs. Operators that make rate adjustments using this method must file at least 90 days in advance of such rate adjustments ~~on the same date~~ a Form 1240 for the purpose of making rate adjustments to reflect inflation, changes in external costs and changes in the number of regulated channels and a Form 1205 for the purpose of adjusting rates for regulated equipment and installation. Operators may choose the annual filing date, but they must notify the franchising authority of their proposed filing date at least 45 days prior to their filing. Franchising authorities or their designees may reject the annual filing date chosen by the operator, and, in such event, for good cause. ~~If the franchising authority or its designees finds good cause to reject the proposed filing date, the franchising authority and the operator should work together in an effort to reach a mutually acceptable date. If no agreement can be reached, the franchising authority or its designee may set the filing date up to 60 days later than the date chosen by the operator. An operator may change its filing date from year to year, but except as described in paragraphs (e)(2)(iii)(B) and (e)(2)(iii)(C) of this section, at least twelve months must pass before the operator can implement its next annual adjustment.~~

EXHIBIT B

§ 76.933(g) A cable operator that submits for review a proposed change in its existing rates for the basic service tier and associated equipment costs using the annual filing system pursuant to Section 76.922(e) shall do so no later than 90 days from the effective date of the proposed rates. The franchising authority will have 90 days from the date of the filing to review it. However, if the franchising authority or its designee concludes that the operator has submitted a facially incomplete filing, which includes, among other things, a filing that does not include attachments required by the filing, the franchising authority's deadline for issuing a decision, the date on which rates may go into effect if no decision is issued, and the period for which refunds are payable will be tolled while the franchising authority is waiting for this information, provided that, in order to toll these effective dates, the franchising authority or its designee must notify the operator of the incomplete filing within 45 days of the date the filing is made.

(1) If there is a material change in an operator's circumstances during the 90-day review period and the change affects the operator's rate change filing, the operator may file an amendment to its Form 1240 prior to the end of the 90-day review period. If the operator files such an amendment, the franchising authority will have at least 30 days to review the filing, assuming the amendment does not, in the opinion of the franchising authority or its designee, result in a substantial change to the entries on the initial filing and/or the underlying assumptions or documents supporting the initial filing. Therefore, if the amendment is filed more than 60 days after the operator made its initial filing, the operator's proposed rate change may not go into effect any earlier than 30 days after the filing of its amendment. However, if the operator files its amended application on or prior to the sixtieth day of the 90-day review period, the operator may implement its proposed rate adjustment, as modified by the amendment, 90 days after its initial filing. If the operator files an amendment that the franchising authority or its designee believes result in a substantial change to the entries on the original filing and/or to the underlying assumptions or documents supporting the initial filing, the franchising authority will have at least 90 days to review the filing.

If a franchising authority has taken no action within the later of the 90-day review period or the period for reviewing the amended filing, then the proposed rates may go into effect at the end of the review period, subject to a prospective rate reduction and refund if the franchising authority subsequently issues a written decision disapproving any portion of such rates, *provided, however, that in order to order a prospective rate reduction and refund, if an operator inquires as to whether the franchising authority intends does not intend to issue a rate order after the initial review period, the franchising authority or its designee must should notify the operator of its intent in this regard within 15 days by the end of the operator's inquiry. If a proposed rate goes into effect before the franchising authority issues its rate order, the franchising authority will have 12 months from the date the operator filed for the rate adjustment to issue its rate order. In the event that the franchising authority does not act within this 12-month applicable review period, it may not at a later date order a refund or a prospective rate reduction with respect to the rate filing.*

EXHIBIT C

Section 76.922(e)(3). True-up and Accrual of Charges Not Projected. As part of the annual rate adjustment, an operator must "true up" its previously projected inflation, changes in external costs and changes in the number of regulated channels and adjust its rates for these actual cost changes. The operator must decrease its rates for overestimation of its projected cost changes, and may increase its rates to adjust for underestimation of its projected cost changes.

(ii) Where there is an overestimation of these costs, the franchising authority pursuant to § 76.942, or the Commission pursuant to § 76.961, may order the operator to refund such costs to subscribers. future rates will be reduced or the amount of the increase will be reduced to reflect the accrued amount of the overcharge plus 11.25% interest. The operator must make adjustments within 12 months of the date the operator implemented its rates based on the projections.

(iii) If an operator has underestimated its cost changes and elects not to recover these accrued costs with interest on the date the operator is entitled to make its annual rate adjustment, the interest will cease to accrue as of the date the operator is entitled to make the annual rate adjustment, but the operator will not lose its ability to recover such costs and interest. An operator may recover accrued costs between the date such costs are incurred and the date the operator actually implements its rate adjustment.

D

EXHIBIT D

§ 76.933(g)(4) If an operator files for a rate adjustment under Section 76.922(e)(2)(iii)(B) for the addition of required channels to the basic service tier that the operator is required by federal or local law to carry, or, if a single-tier operator files for a rate adjustment based on a mid-year channel addition allowed under Section 76.922(e)(2)(iii)(C), the franchising authority has 60 days to review the requested rate. The proposed rate shall take effect at the end of this 60-day period unless the franchising authority rejects the proposed rate as unreasonable. In order to order refunds and prospective rate reductions, the franchising authority shall be subject to the requirements described in paragraph (g)(± 2) of this section.

§ 76.933(h) If an operator files an FCC Form 1205 for the purpose of setting the rate for a new type of equipment under Section 76.923(o), the franchising authority has 60 days to review the requested rate. The proposed rate shall take effect at the end of this 60-day period unless the franchising authority rejects the proposed rate as unreasonable.

~~(1) If the operator's most recent rate filing was based on the system that enables them to file up to once per quarter found at Section 76.922(d), the franchising authority must issue an accounting order before the end of the 60-day period in order to order refunds and prospective rate reductions.~~

~~(2) If the operator's most recent rate filing was based on the annual rate system at Section 76.922(e),~~ In order to order refunds and prospective rate reductions, the franchising authority shall be subject to the requirements described in paragraph (g)(± 2) of this section.

EXHIBIT E

§ 76.942(b)(1) Except for cable operators that file for annual rate adjustments pursuant to § 76.922(e), an operator's liability for refunds is limited to a one-year period, except that an operator that fails to comply with a valid rate order issued by a franchising authority or the Commission shall be liable for refunds commencing from the effective date of such order until such time as it complies with such order.

(e2) The refund period shall run as follows:

(1a) From the date the operator implements a prospective rate reduction back in time to September 1, 1993, or one year, whichever is shorter.

(2b) From the date a franchising authority issues an accounting order pursuant to § 76.933(c), to the date a prospective rate reduction is issued, then back in time from the date of the accounting order to the effective date of the rules; however, the total refund period shall not exceed one year from the date of the accounting order.

* * * *

(c) (1) Upon a finding that a proposed rate in an operator's annual rate filing pursuant to § 76.922(e) is unreasonable, a franchising authority may order the cable operator to refund to subscribers that portion of previously paid rates which is deemed unreasonable.

(2) In the event that a cable operator that previously filed for an annual rate adjustment pursuant to § 76.922(e) is later determined to have overcharged subscribers during the rate adjustment period addressed by such filing, a franchising authority may order the cable operator to refund to subscribers that portion of previously paid rates which the operator is deemed to have overcharged.

* * * *

(f) Once an operator has implemented a rate refund to subscribers in accordance with a refund order by the franchising authority (or the Commission, pursuant to paragraph (a) of this section), the

franchising authority must return to the cable operator an amount equal to that portion of the franchise fee that was paid on the total amount of the refund to subscribers. The franchising authority must promptly return the franchise fee overcharge either in an immediate lump sum payment, or the cable operator may deduct it from the cable system's future franchise fee payments. The franchising authority has the discretion to determine a reasonable repayment period, but interest shall accrue on any outstanding portion of the franchise fee starting on the date the operator has completed implementation of the refund order. In determining the amount of the refund, the franchise fee overcharge should be offset against franchise fees the operator holds on behalf of the franchising authority for lump sum payment. The interest rate on any refund owed to the operator ~~presumptively shall~~ should be ~~11.25%~~ computed pursuant to applicable rates published by the Internal Revenue Service for tax refunds and additional tax payments.