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

In the Matter of	)
	)
TCI American Cable Holdings, II, LP	) CUID No. CA0925
(Burlingame)	)
Petitions for Reconsideration	)

ORDER ON RECONSIDERATION

Adopted: July 24, 2001   **Released: July 27, 2001**

By the Deputy Chief, Cable Services Bureau:

      1.   In this Order we consider petitions for reconsideration ("Petitions") of our Orders, DA 95-1071[1] ("First Order"); DA 96-1714[2] ("Second Order"); and DA 98-5[3] ("Third Order"), filed with the Federal Communications Commission ("Commission") by the above-referenced operator ("Operator").[4] Operator also filed a petition for stay pending resolution of its Petitions. Our First Order resolved all pending complaints against Operator's CPST rates in the above-referenced community through May 14, 1994, and found Operator's cable programming services tier ("CPST") rates to be unreasonable. Our Second Order resolved all pending complaints against Operator's CPST rates for the period May 15, 1994 through May 31, 1997, and found Operator's CPST rates to be unreasonable. Our Third Order found Operator's June 1, 1997 CPST rate increase to be unreasonable. In this Order, we grant Operator's Petitions in part, modify our prior orders and dismiss Operator's request for stay as moot.

      2.   Under the Communications Act,[5] at the time the referenced complaints were filed, the Commission was authorized to review the CPST rates of cable systems not subject to effective competition to ensure that rates charged were not unreasonable.[6] The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[7] and our rules in effect at the time the complaints were filed, required the Commission to review CPST rates upon the filing of a valid complaint by a subscriber or local franchising authority ("LFA"). The Telecommunications Act of 1996 ("1996 Act")[8] and our rules

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[1] In the Matter of Post-Newsweek Cable, Inc., 10 FCC Rcd 9839 (1995).

[2] In the Matter of Post-Newsweek Pacific Cable TV, Inc. d/b/a Pacific Cable Television, 11 FCC Rcd 13224 (1996).

[3] In the Matter of TCI American Cable Holdings, II, LP, 13 FCC Rcd 10161 (1998).

[4] The term Operator includes both Operator's successors and predecessors in interest.

[5] Communications Act, Section 623(c), as amended, 47 U.S.C. §543(c) (1996).

[6] 47 U.S.C. § 543(c) (1996).

[7] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[8] Pub. L. No. 104-104, 110 Stat. 56 (1996).

implementing the legislation ("Interim Rules"),[9] required that a complaint against the CPST rate be filed with the Commission by an LFA that has received more than one subscriber complaint.[10] The filing of a complete and timely complaint triggers an obligation upon the cable operator to file a justification of its CPST rates.[11] The Operator has the burden of demonstrating that the CPST rates complained about are reasonable.[12] If the Commission finds a rate to be unreasonable, it shall determine the correct rate and any refund liability.[13]

      3.   The Petitions raise a single issue, whether or not Operator could include three specific channels when calculating its CPST rates. In our First Order, we adjusted Operator's FCC Form 393 by reducing the number of regulated channels allocated to the CPST. We found that three channels did not carry regulated programming during a majority of the day because Operator had only certified that the channels carried regulated programming for 12 hours per day. We stated that "[o]ur policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance of use test is the only one consistent with this conceptual framework."[14] Operator argues that, had it been aware of our preponderance of use test for determining the regulatory status of channels, it would have made clear in its filing that regulated programming services were offered on all three channels at least 12 hours per day, and often more than 12 hours per day due to scheduling requirements, and each channel averaged more than 12 hours per day on a weekly basis. Complainants vigorously dispute Operator's claims that the channels in issue carried regulated programming services for more than 12 hours per day.

      4.   We understand the complainants' frustration that, under the preponderance of use test, channels included in determining the CPST rate may be used in part for unregulated pay per view programming. However, we also acknowledge that our policy on split channels was not clearly explained until after Operator filed its FCC Form 393 and it is undisputed that regulated programming was included on the channels in issue a minimum of 12 hours per day. In light of this finding, the subsequent deregulation of CPST rates, and Operator's assertions that each channel averaged more than twelve hours per day on a weekly basis, we conclude that Operator has met the preponderance of use test in this instance

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[9] *See* Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 (1996).

[10] *See* Communications Act, Section 623(c), *as amended*, 47 U.S.C. Section 543(c) (1996).

[11] *See* Section 76.956 of the Commission's Rules, 47 C.F.R. §76.956.

[12] *Id.*

[13] *See* Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957.

[14] First Order at ¶ 9e. *See also, Public Notice*, Questions and Answers on Cable Television Rate Regulation, Question 1 (released June 1, 1994).

and the three channels should be included as regulated channels in calculating the CPST rate.

5.   As a result of our determination to include three additional channels in Operator's CPST rate calculation, we find that Operator has incurred no refund liability for the FCC Form 393 period, from the date the first valid complaint was filed through July 14, 1994.[15] Upon review of Operator's FCC Form 1200, and Operator's FCC Form 1210 covering the period April 1, 1994 through June 30, 1994, we find that Operator correctly calculated its maximum permitted rate ("MPR") of $12.40, for the period July 15, 1994 through September 30, 1994. However, we find Operator's actual CPST rate of $12.78 for this period to be unreasonable. Upon review of Operator's FCC Form 1210 covering the period July 1, 1994 through September 30, 1994, we find that Operator correctly calculated its MPR of $12.61, for the period October 1, 1994 through March 31, 1995. However, we find Operator's actual CPST rate of $12.78 for this period to be unreasonable. Upon review of Operator's subsequent filings, we find Operator's actual CPST rates to be reasonable beginning April 1, 1995. Therefore, we will grant Operator's Petitions in part, amend our prior orders accordingly and dismiss Operator's petition for stay as moot.

6.   Accordingly, IT IS ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Operator's referenced petitions for reconsideration ARE GRANTED TO THE EXTENT INDICATED HEREIN.

7.   IT IS FURTHER ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. §1.106, that In the Matter of Post-Newsweek Cable, Inc., DA 95-1071, 10 FCC Rcd 9839 (1995); In the Matter of Post-Newsweek Pacific Cable TV, Inc. d/b/a Pacific Cable Television, DA 96-1714, 11 FCC Rcd 13224 (1996); and In the Matter of TCI American Cable Holdings, II, LP, DA 98-513, FCC Rcd 10161 (1998) ARE MODIFIED TO THE EXTENT INDICATED HEREIN.

8.   IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the CPST rate of $12.78, charged by Operator in the community referenced above, effective July 15, 1994 through March 31, 1995, IS UNREASONABLE.

9.   IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the CPST rates charged by Operator in the community referenced above, for the period prior to July 15, 1994 and the period beginning April 1, 1995, ARE REASONABLE.

10.   IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of $12.40 per month (plus franchise fees), plus interest to the date of the refund, for the period July 15, 1994 through September 30, 1994.

11.   IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the community referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of $12.61 per month (plus franchise

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[15] Operator elected to defer refund liability for overcharges associated with its FCC Form 1200, for the period May 15, 1994 through July 14, 1994, pursuant to the Commission's rules, 47 C.F.R. §76.922(b)(6)(ii). *See* Second Order at n. 27. Therefore Operator's refund liability for the FCC Form 1200 period does not begin until July 15, 1994.

fees), plus interest to the date of the refund, for the period October 1, 1994 through March 31, 1995.

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

13. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that Operator's petition for stay IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Cable Services Bureau