

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

In the Matter of)
) File No. EB-02-TC-037
Time Warner Entertainment Company, LP)
) CUID No. WI0265 (West Allis)
Complaint Regarding)
Cable Programming Services Tier)

ORDER

Adopted: May 6, 2002

Released: May 8, 2002

By the Chief, Enforcement Bureau:¹

1. In this Order we consider a complaint² against the rates charged by the above-referenced operator ("Operator")³ for its cable programming services tier ("CPST") in the community referenced above.⁴ The Cable Services Bureau has already issued an order in which it found Operator's CPST rates in effect through May 14, 1994 to be unreasonable ("Prior Order").⁵ In the Prior Order, the Cable Services Bureau stated that its findings "do not in any way prejudice the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations."⁶ This Order addresses only the reasonableness of Operator's CPST rates in effect beginning May 15, 1994.

2. Under the provisions of the Communications Act⁷ that were in effect at the time the referenced complaints were filed, the Federal Communications Commission ("Commission") was authorized to review the CPST rates of cable systems not subject to effective competition to ensure that rates charged are not unreasonable. The Cable Television Consumer Protection and Competition Act of 1992⁸ ("1992 Cable Act") required the Commission to review CPST rates upon the filing of a valid complaint by a subscriber or local franchising authority ("LFA"). The filing of a complete and timely complaint triggers an

¹ Effective March 25, 2002, the Commission transferred responsibility for resolving cable programming services tier rate complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, FCC 02-10, 17 FCC Rcd 4672 (2002).

² The first valid complaint against Operator's CPST rate in the community referenced above was filed on February 28, 1994. There are no subsequent complaints on file.

³ The term "Operator" includes Operator's predecessors and successors in interest.

⁴ On December 3, 1997, the Federal Communications Commission received notification, pursuant to 47 C.F.R. § 76.400, of a change of ownership from Marcus Cable Partners, LP to Time Warner Entertainment Company, LP.

⁵ *See In the Matter of Crown Cable Wisconsin, Inc.*, DA 95-680, 10 FCC Rcd 7923 (CSB 1995); *refund plan denied, In the Matter of Marcus Cable Partners, LP*, DA 98-2442, 13 FCC Rcd 23411 (CSB 1998).

⁶ Prior Order at n. 2.

⁷ Communications Act, Section 623(c), *as amended*, 47 U.S.C. §543(c) (1996).

⁸ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

obligation upon the cable operator to file a justification of its CPST rates.⁹ The Operator has the burden of demonstrating that the CPST rates complained about are reasonable.¹⁰ If the Commission finds a rate to be unreasonable, it shall determine the correct rate and any refund liability.¹¹

3. Operators must use the FCC Form 1200 series to justify rates for the period beginning May 15, 1994.¹² Operators may file an FCC Form 1210 to justify quarterly rate increases based on the addition and deletion of channels, changes in certain external costs and inflation.¹³ Operators may justify their rates on an annual basis using an FCC Form 1240 to reflect reasonably certain and quantifiable changes in external costs, inflation, and the number of regulated channels that are projected for the twelve months following the rate change.¹⁴ Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.¹⁵ Additionally, an Operator may file an FCC Form 1235 (Abbreviated Cost of Service Filing for Cable Network Upgrades). The FCC Form 1235 allows cable operators to justify rate increases related to significant capital expenditures used to improve rate-regulated services. This option is extended only in cases of significant upgrades requiring added capital investment, such as bandwidth capacity and conversion to fiber optics, and for system rebuilds. Normal improvements and expansions of service remain subject to the usual rate adjustments allowed by filing FCC Form 1210s, 1220s and 1240s. Cable operators that incur increases in operating costs associated with a significant network upgrade will be permitted to charge additional rates as justified by their FCC Form 1235 filing.

4. Upon review of Operator's FCC Form 1200, we adjusted Line A6 (Monthly Charge per Tier as of 3/31/94) to \$10.01 to conform to the maximum permitted rate ("MPR") from Operator's revised FCC Form 393 as adjusted in our Prior Order. Line A1 (Channels per Tier as of 3/31/94) and Line C1 (Channels per Tier as of 3/31/94) were adjusted to 23 channels for the CPST to reflect Operator's actual channel line-up, in accordance with the channel line-up card provided by Operator. We also adjusted Line C2 (Number of Regulated Non-Broadcast Channels per Tier) to 23 for the CPST for the same reason. Our adjustments reduced Operator's MPR from \$10.55 to \$9.36. The Commission's rules provide for a refund liability deferral period, if timely requested by Operator, beginning May 15, 1994 and ending July 14, 1994, for any overcharges resulting from Operator's calculation of a new MPR on the FCC Form 1200.¹⁶ Operator elected to defer refund liability for overcharges associated with its FCC Form 1200 pursuant to the Commission's rules.¹⁷ However, Operator will incur refund liability from May 15, 1994 through July 14, 1994 for any CPST rates charged above the FCC Form 393 MPR approved by the Commission.¹⁸ In the

⁹ See Section 76.956 of the Commission's rules, 47 C.F.R. § 76.956.

¹⁰ *Id.*

¹¹ See Section 76.957 of the Commission's rules, 47 C.F.R. § 76.957.

¹² See Section 76.922 of the Commission's rules, 47 C.F.R. § 76.922.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Section 76.922(b)(6)(ii) of the Commission's rules, 47 C.F.R. Section 76.922(b)(6)(ii).

¹⁷ See Letter dated August 12, 1994 to the Federal Communications Commission from Trudi McCollum Foushee, Vice President, Crown Cable Law and Regulatory Affairs.

¹⁸ See Section 76.922(b)(6)(ii) of the Commission's rules, 47 C.F.R. § 76.922 (b)(6)(ii).

Prior Order, the Cable Services Bureau found that Operator justified an FCC Form 393 MPR of \$10.01. Because Operator's actual CPST rate of \$10.27, effective May 15, 1994 through July 14, 1994, exceeds its FCC Form 393 MPR of \$10.01, we find Operator's actual CPST rate of \$10.27, effective May 15, 1994 through July 14, 1994, to be unreasonable.

5. Upon review of Operator's FCC Form 1210 covering the period April 1, 1994 through June 30, 1994, we adjusted Line A2 (Full Reduction Rate per Tier) to reflect Operator's revised FCC Form 1200 Line K1 (Maximum Permitted Rate) of \$9.36. Line C1 (Previous Number of Regulated Channels per Tier) and Line C2 (Current Number of Regulated Channels per Tier) were adjusted to 23 channels for the CPST as noted above. These adjustments reduced Operator's MPR from \$11.15 to \$9.96, effective July 1, 1994. Because Operator's actual CPST rate of \$10.27, effective July 15, 1994 through July 31, 1994, exceeds its revised MPR of \$9.96, we find Operator's actual CPST rate of \$10.27, effective July 15, 1994 through July 31, 1994, to be unreasonable. Because Operator's actual CPST rate of \$10.55, effective August 1, 1994 through September 30, 1994, exceeds its revised MPR of \$9.96, we find Operator's actual CPST rate of \$10.55, effective August 1, 1994 through September 30, 1994, to be unreasonable.

6. Upon review of Operator's FCC Form 1210 covering the period July 1, 1994 through September 30, 1994, we adjusted Line A2 to reflect Operator's prior FCC Form 1210 MPR of \$9.96. Line C1 and Line C2 were adjusted to 23 channels for the CPST. These adjustments reduced Operator's MPR from \$11.35 to \$10.14, effective October 1, 1994. Because Operator's actual CPST rate of \$10.55, effective October 1, 1994 through October 31, 1994, exceeds its revised MPR of \$9.96, we find Operator's actual CPST rate of \$10.55, effective October 1, 1994 through October 31, 1994, to be unreasonable. Because Operator's actual CPST rate of \$11.35, effective November 1, 1994 through December 31, 1994, exceeds its revised MPR of \$10.14, we find Operator's actual CPST rate of \$11.35, effective November 1, 1994 through December 31, 1994, to be unreasonable.

7. Upon review of Operator's FCC Form 1210 covering the period October 1, 1994 through December 31, 1994, we adjusted Operator's Line A2 to reflect Operator's prior FCC Form 1210 MPR of \$10.14. Line C1 and Line C2 were adjusted to 23 channels for the CPST. These adjustments reduced Operator's MPR from \$11.56 to \$10.34, effective January 1, 1995. Because Operator's actual CPST rate of \$11.35, effective January 1, 1995 through March 31, 1995, exceeds its revised MPR \$10.34, we find Operator's actual CPST rate of \$11.35, effective January 1, 1995 through March 31, 1995, to be unreasonable.

8. Upon review of Operator's FCC Form 1210 covering the period January 1, 1995 through March 31, 1995, we adjusted Operator's Line A2 to reflect Operator's prior FCC Form 1210 MPR of \$10.34. Line C1 and Line C2 were adjusted to 23 channels for the CPST. These adjustments reduced Operator's MPR from \$11.48 to \$10.27, effective April 1, 1995. Because Operator's actual CPST rate of \$11.35, effective April 1, 1995 through May 31, 1995, exceeds its revised MPR of \$10.27, we find Operator's actual CPST rate of \$11.35, effective April 1, 1995 through May 31, 1995, to be unreasonable. Because Operator's actual CPST rate of \$11.48, effective June 1, 1995 through May 31, 1996, exceeds its revised MPR of \$10.27, we find Operator's actual CPST rate of \$11.48, effective June 1, 1995 through May

31, 1996, to be unreasonable.¹⁹

9. Upon review of Operator's FCC Form 1240 for the projected period June 1, 1996 through May 31, 1997, we adjusted Operator's Line A1 (Current Maximum Permitted Rate) and D2 (Current External Costs Segment) to conform with Operator's previous revised FCC Form 1210. We revised Worksheet 1 (True-Up Period Inflation) which adjusted Line C3 (Inflation Factor for the True-Up Period 1) to 1.0151 and Line C5 (Current FCC Inflation Factor) was adjusted to 1.0222.²⁰ These adjustments resulted in a revised MPR of \$9.33 rather than Operator's calculated MPR of \$11.88. Because Operator's actual CPST rate of \$11.88, effective June 1, 1996 through May 31, 1997, exceeds its revised MPR of \$9.33, we find Operator's actual CPST rate of \$11.88, effective June 1, 1996 through May 31, 1997, to be unreasonable.

10. Upon review of Operator's FCC Form 1240 for the projected period June 1, 1997 through May 31, 1998, we adjusted Operator's Line A1 to reflect the MPR of \$9.33 from its previous revised FCC Form 1240. We revised Worksheet 1, which adjusted Line C3 to 1.0221 and we adjusted Line C5 to 1.0177.²¹ We adjusted Line D6 (Current True-Up Segment), Line D7 (Current Inflation Segment) and Line F8 (True-Up Segment for True-Up Period 1) to conform to Operator's previous revised FCC Form 1240. Also, Operator made true-up adjustments through to the effective date of the projected period and those adjustments did not include actual data.²² Consequently, we reduced Operator's true-up period by one month and adjusted Operator's MPR in accordance with our rules and the FCC Form 1240 instructions.²³ This resulted in an adjustment to Line E2 (Number of Months in the True-up Period 1) to 12 months and Line E4 (Number of Months in True-Up Period 2 Eligible for Interest) to 2 months. Line G5 (Inflation Segment for True-Up Period 2) was adjusted to \$0.0254 and Line G8 (True-Up Segment Period 2) was adjusted to \$0.8739. These adjustments resulted in a revised MPR of \$9.79 rather than Operator's calculated

¹⁹ Because Operator's refund liability for the period July 1, 1995 through November 30, 1998, was trued up in subsequent FCC Form 1240s, which we review herein, Operator is not required to separately calculate that refund liability and submit a refund plan for those time periods.

²⁰ In accordance with the FCC Form 1240 Instructions, we used the most recent Inflation Adjustment Factors released by the Cable Services Bureau for the relevant time periods. *See* Public Notice, DA 02-791 (CSB released April 9, 2002).

²¹ *Id.*

²² Operator signed its FCC Form 1240 on April 30, 1997, one month prior to the ending date of its true-up period.

²³ Operator's true-up period, which began March 1, 1996 and originally ended on May 31, 1997, was adjusted to end on April 30, 1997. The annual adjustment afforded by FCC Form 1240 allows operators to project changes in external cost, inflation, and the number of regulated channels. This structure avoids the delay some operators experienced in recouping costs through multiple rate adjustments throughout the year. Because projections will not reflect the costs that actually occur, the Commission provided, as part of the annual adjustment, a "true-up" mechanism to correct projected cost changes with the actual cost changes. However, the Commission has noted that, as FCC Form 1240 must be filed 90 days before an increase is to take effect, the period for the true-up will not coincide with the previous year's projections. *See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Thirteenth Order on Reconsideration ("Thirteenth Reconsideration Order"), 11 FCC Rcd 388, 420 at n.151 (1995). The true-up data is intended to indicate real, not projected data. *Id.* This policy is reflected in the instructions accompanying FCC Form 1240. *See* FCC Form 1240 Instructions, "Timing" at pp. 3-4.

MPR \$14.31.²⁴ Because Operator's actual CPST rate of \$14.31, effective June 1, 1997 through September 30, 1997, exceeds its revised MPR of \$9.79, we find Operator's actual CPST rate of \$14.31, effective June 1, 1997 through September 30, 1997, to be unreasonable.

11. Operator filed an FCC Form 1235 to justify its October 1, 1997 CPST rate increase to \$16.58. Operator subsequently reduced its CPST rate on December 1, 1997 to \$16.30 and gave a credit to its subscribers for \$0.28 for the months of October and November.²⁵ Upon review of Operator's FCC Form 1235, we accept Operator's calculated MPR of \$1.99. This results in a combined CPST MPR of \$11.78, effective October 1, 1997. Because Operator's actual CPST rate of \$16.30,²⁶ effective October 1, 1997 through December 31, 1998, exceeds its revised MPR of \$11.78, we find Operator's actual CPST rate of \$16.30, effective October 1, 1997 through December 31, 1998, to be unreasonable.

12. On November 30, 1995, the Commission issued an Order approving a Social Contract that Operator entered into with the Commission ("Social Contract").²⁷ Among its terms was a provision by which Time Warner would be permitted to increase the monthly CPST rate by one dollar during each year of the contract, but would waive the right to make any other increase in rates.²⁸ Operator was given permission by Commission staff to file bifurcated FCC Form 1240s. In these bifurcated forms, Operator calculates the \$1.00 annual increase permitted by the Social Contract and its true-up on a separate FCC Form 1240 ("SCD Form 1240"). On the SCD Form 1240, Operator calculates its true-up adjustment through to the effective date of the rate increase. On its other FCC Form 1240, Operator calculates the other adjustments to its CPST rate in conformance with FCC Form 1240 Instructions for the true-up period.²⁹ As noted above, Time Warner Cable purchased this system in December 1997. Upon filing its first FCC Form 1240 for this cable system, which we review below, Time Warner Cable elected to include the system in its Social Contract, thus taking the annual Social Contract Dollar for its upgrade and rejecting the FCC Form 1235 upgrade add-on amount.

13. Upon review of Operator's non-SCD FCC Form 1240 for the projected period January 1, 1999 through December 31, 1999, we adjusted Operator's Line A1, Line D6, Line D7, Line F8, and G8 to conform to Operator's previous revised FCC Form 1240. We also added back the month that we removed from the true-up period of the previous FCC Form 1240. Consequently, Line E2 was adjusted to 12 months and Line E4 was adjusted to 7 months. Our adjustments reduced Operator's MPR from \$15.50 to \$8.18.

²⁴ We allowed Operator to claim \$0.14 for increases in external costs between September 30, 1992 and the earlier of the initial date of regulation or February 28, 1994.

²⁵ See Letter dated November 30, 1997, with attached bill, to the Honorable Jeanette Bell, Mayor, City of West Allis, WI from Marty Robinson, District Manager, Marcus Cable.

²⁶ The actual CPST rate of \$16.30 reflects Operator's rate reduction and refund for October and November.

²⁷ See *In the Matter of Social Contract for Time Warner*, 11 FCC Rcd 2788 (1996).

²⁸ *Id.* at 2798.

²⁹ The true-up data is intended to indicate real, not projected data. See *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Thirteenth Order on Reconsideration ("Thirteenth Reconsideration Order"), 11 FCC Rcd 388, 420 at n.151 (1996). The period for the true-up will not coincide with the previous year's projections. *Id.* This policy is reflected in the instructions accompanying FCC Form 1240. See FCC Form 1240 Instructions, "Timing" at pp. 3-4.

Upon review of Operator's SCD Form 1240 for the projected period January 1, 1999 through December 31, 1999, we accept Operator's calculated MPR of \$3.14 for a total MPR of \$11.32, effective January 1, 1999. Because Operator's actual CPST rate of \$18.28, effective January 1, 1999 through March 31, 1999, exceeds its revised MPR of \$11.32, we find Operator's actual CPST rate of \$18.28, effective January 1, 1999 through March 31, 1999, to be unreasonable.³⁰

14. Accordingly, IT IS ORDERED, pursuant to Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the CPST rates, charged by Operator in the community referenced above, effective May 15, 1994 through March 31, 1999, ARE UNREASONABLE.

15. 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 that portion of the amount paid in excess of the maximum permitted CPST rate of \$10.01 per month (plus franchise fees), plus interest to the date of the refund, for the period May 15, 1994 through July 14, 1994.

16. 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 that portion of the amount paid in excess of the maximum permitted CPST rate of \$9.96 per month (plus franchise fees), plus interest to the date of the refund, for the period July 15, 1994 through September 30, 1994.

17. 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 that portion of the amount paid in excess of the maximum permitted CPST rate of \$10.14 per month (plus franchise fees), plus interest to the date of the refund, for the period October 1, 1994 through December 31, 1994.

18. 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 that portion of the amount paid in excess of the maximum permitted CPST rate of \$10.34 per month (plus franchise fees), plus interest to the date of the refund, for the period January 1, 1995 through March 31, 1995.

19. 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 that portion of the amount paid in excess of the maximum permitted CPST rate of \$10.27 per month (plus franchise fees), plus interest to the date of the refund, for the period April 1, 1995 through June 30, 1995.

20. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47

³⁰ These findings are based solely on the representations of Operator. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein. Information regarding the specific adjustments made to Operator's FCC Forms can be found in the public files for the above-referenced community which are available in the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

C.F.R. §76.961, that Operator shall refund to subscribers that portion of the amount paid in excess of the maximum permitted CPST rate of \$11.78 per month (plus franchise fees), plus interest to the date of the refund, for the period from December 1, 1998 through December 31, 1998.

21. 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 that portion of the amount paid in excess of the maximum permitted CPST rate of \$11.32 per month (plus franchise fees), plus interest to the date of the refund, for the period from January 1, 1999 through March 31, 1999.

22. 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, Enforcement 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.

23. IT IS FURTHER ORDERED, pursuant to Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that the complaint referenced herein against the rates charged by Operator in the community referenced above IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau