

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

In the Matter of )
Paragon Cable TV )
Appeal of Local Rate Order of Mt. Hood Cable )
Regulatory Commission Concerning the )
Communities of Portland and Multnomah County, )
Oregon )
CUID Nos. OR0305-OR0308, OR0334, OR0241 )
File No. CSB-A-0372

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 2003

Released: January 5, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Paragon Cable TV, the franchised cable operator serving Portland and Multnomah County, Oregon, appealed the December 2, 1996 rate order of the Mt. Hood Cable Regulatory Commission ("MHCRC").

II. DISCUSSION

2. When the Commission revised its rate regulations in the Second Order on Reconsideration, "transition" systems whose rates or full reduction rates fell below certain benchmarks were not required to adjust their rates by the full differential between effectively competitive and non-competitive cable rates but were prohibited from recovering inflation increases until their rates reflected this full competitive differential.

1 Paragon Cable TV, Petition for Review of Rate Order (filed Jan. 2, 1997) and Ex. A, In the matter of basic cable service rates of Paragon Cable within Paragon's Portland and Multnomah franchise areas effective 1/1/97, MHCRC Order No. 96-13 (Dec. 2, 1996).

2 MHCRC Reply to Petition for Review of Rate Order (filed Jan. 6, 1997); Paragon Reply to Response to Petition for Review of Rate Order (filed Jan. 27, 1997) (Corrected Version filed Feb. 10, 1997).

3 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4176-79 ¶¶ 123-27, 4182 ¶ 131 (1994).

the data used to determine the competitive differential and benchmarks.<sup>4</sup> It specified an inflation factor of 3% for the first year, through September 30, 1993, and an inflation factor of 2.15% through June 30, 1994, for a total maximum inflation factor of 5.21% through June 1994.<sup>5</sup> A March 8, 1995 public notice providing guidance about the application of inflation to certain transition systems erroneously stated that operators were eligible to receive an inflation adjustment up to the full 5.21%. Because benchmark rates calculated pursuant to the revised rate regulations already recovered the 3% inflation factor, the Commission later corrected the public notice to limit the inflation adjustment for the period through June 30, 1994 to a maximum inflation factor of 2.15%. Cable operators whose rates were computed with the erroneous inflation factor were to remove the excess inflation from their rates in their next rate adjustment, but no later than March 31, 1996.<sup>6</sup> The adjustment was to be made using FCC Form 1210 or the then new FCC Form 1240. The Commission explained this adjustment in public notices dated July 25, 1995 and November 9, 1995.<sup>7</sup>

3. In addition, cable operators switching from the quarterly to the annual rate adjustment methodology could build previously announced but unclaimed inflation adjustments into their true-up and projected period rates computed on their first FCC Form 1240.<sup>8</sup> The inflation factor for the period from July 1, 1994 through June 30, 1995 was 2.96%.<sup>9</sup>

4. Paragon's Portland and Multnomah County systems qualified as transition systems.<sup>10</sup> Paragon neither removed the 3% inflation factor nor claimed the 2.96% inflation factor in its first FCC Forms 1240 filed December 20, 1995 for January 1, 1996 rates.<sup>11</sup> These forms were reviewed by MHCRC and were the subject of a May 20, 1996 rate order.<sup>12</sup> When preparing its second set of FCC Forms 1240, Paragon recalculated its first forms to include the 2.96% inflation factor, revised the maximum permitted rates accordingly, and used the revised maximum permitted rates rather than the

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<sup>4</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Ninth Order on Reconsideration, 10 FCC Rcd 5198, 5202 ¶ 9, 5203 ¶¶ 12-13 (1995).

<sup>5</sup> *Id.* at 5203 ¶ 12.

<sup>6</sup> March 1, 1996 was also the deadline for recovering the inflation through the June 1994 period. *Letter to Mr. Peter Feinberg*, 10 FCC Rcd 10506 (1995).

<sup>7</sup> Public Notice, Question and Answer on Cable Television Rate Regulation, 77 Rad. Reg. 2d (P&F) 772, 1995 WL 434058 (1995); Public Notice, Cable Rates Adjustment for Inflation Applied to Transition Rates, 11 FCC Rcd 1151 (1995).

<sup>8</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Thirteenth Order on Reconsideration, 11 FCC Rcd 388, 415 ¶ 62 (1995); Instructions for FCC Form 1240 at 13, Line C1 (July 1996); MHCRC Reply, Ex. 3 at 2, Instructions for FCC Form 1240 at 12 (dated Dec. 15, 1995).

<sup>9</sup> Public Notice, New Annual Inflation Adjustment Figure for Cable Operators Now Available, DA 95-2086 (Oct. 2, 1995); FCC, Media Bureau, Inflation Updates for Forms 1210 and 1240, <http://www.fcc.gov/mb/csinfat.html> (last visited Dec. 11, 2003).

<sup>10</sup> MHCRC Opposition at 4; Rate Order Ex. B, Letter from Michael L. Katz to David C. Olson at 4 (Nov. 5, 1996) ("MHCRC Consultant's Report"). Paragon does not dispute this status.

<sup>11</sup> MHCRC Consultant's Report at 4.

<sup>12</sup> *Id.* at 1 n.1.

rates ordered by MHCRC as the starting point for its second Forms 1240.<sup>13</sup> These forms were filed September 30, 1996 for January 1, 1997 rate adjustments.

5. MHCRC disallowed this adjustment as improper and inequitable because, as explained in its consultant's report, Paragon had not corrected its rates for the excess 3% inflation factor claimed earlier.<sup>14</sup> MHCRC also found the adjustment to be procedurally impermissible because the adjustment should have been included in Paragon's first FCC Forms 1240 and MHCRC's rate order regarding those forms was final.<sup>15</sup>

6. On appeal, Paragon argues that MHCRC erred by refusing to allow the 2.96% inflation factor in the rate calculations. It claims special circumstances because it filed its first Forms 1240 quickly after entering into its Social Contract with the Commission.<sup>16</sup> It used a special version of Form 1240 and says it was uncertain how an adjustment for the 2.96% inflation factor should have been handled. It argues that there were no instructions available when it filled out its forms, and no official version of the form included a separate place for the information until the July 1996 version.

7. MHCRC disagrees that Paragon lacked information about how to handle the 2.96% inflation factor, arguing that the methodology was explained in Form 1240 instructions available in December 1995 and again in instructions for the Commission's January 1996 version of Form 1240 issued shortly after Paragon had filed its rate forms.<sup>17</sup> If the Commission nonetheless allows Paragon's adjustment, MHCRC requests that Paragon be required to make the downward adjustment it should have made in its first Forms 1240 for the excess 3% inflation rate. According to the MHCRC Consultant's Report, this adjustment was discussed with Paragon during the review of Paragon's first Forms 1240, but Paragon had resisted with the argument that its Social Contract accepted its rates and incorporated all inflation adjustments prior to July 1995.<sup>18</sup> Paragon did not attempt to amend its rate forms for the 2.96% inflation factor while this review was going on. Because the net effect of the upward 2.96% and the downward 3% adjustments was essentially zero, the consultant accepted Paragon's approach in its first Forms 1240, i.e., that neither adjustment was applied, and made no recommendations about either adjustment at that time.<sup>19</sup> Neither adjustment was addressed in MHCRC's rate order regarding the first Forms 1240, and Paragon did not appeal that rate order.

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

<sup>14</sup> Rate Order at 2 § 1.9 A and MHCRC Consultant's Report at 3-4.

<sup>15</sup> Rate Order at 2 § 1.9 A and MHCRC Consultant's Report at 4-5.

<sup>16</sup> Paragon Petition at 3-4.

<sup>17</sup> MHCRC Opposition at 4. MHCRC says that Paragon attached the December 1995 instructions to its first Forms 1240. To the best of its recollection, however, Paragon attached only the modifications to Form 1240 made pursuant to the Social Contract. Paragon Reply (Corrected Version) at 3 n.4 and Ex. A. Paragon does not dispute that the December 1995 and January 1996 instructions permitted operators to take unclaimed inflation. Paragon Reply (Corrected Version) at 3.

<sup>18</sup> MHCRC Consultant's Report at 4. The Social Contract resolved existing cable programming service tier ("CPST") rate cases and otherwise deemed then current CPST rates to be reasonable. It provided that "BST rate disputes will continue to be resolved in the ordinary course, pursuant to FCC rules." Social Contract § C.1-5, *Social Contract for Time Warner*, 11 FCC Rcd 2788, 2858 (1995); *id.* at 2792 ¶ 6 ("BST cases will not be resolved by the Social Contract.").

<sup>19</sup> MHCRC Consultant's Report at 4.

8. Paragon replies that the Commission should disregard MHCRC's arguments about the offsetting adjustment for the 3% inflation factor because MHCRC did not explicitly order the adjustment when reviewing Paragon's first Forms 1240 and the time for MHCRC review of those forms has passed.<sup>20</sup> At the same time, it repeats its request for Commission leniency regarding its late attempt to amend its first Forms 1240. It would like to recover the 2.96% inflation factor without any offset for the 3% inflation factor.

9. We find a reasonable basis for MHCRC's decision and, therefore, sustain it.<sup>21</sup> Even if Paragon was initially uncertain about recovering inflation with the new FCC Form 1240, the record shows that MHCRC through its rate consultant considered both the 2.96% inflation factor and the 3% inflation factor adjustments when reviewing Paragon's first Forms 1240. These adjustments essentially offset each other, and MHCRC was not unreasonable in rejecting Paragon's later attempt to amend its first Forms 1240 to give itself the benefit of the 2.96% inflation factor in its January 1, 1997 rates without also making an adjustment for the excessive 3% inflation factor earlier included in its rates.<sup>22</sup> Paragon may have been confused about how to complete its first FCC Forms 1240 under the circumstances of the Social Contract and its transition to a new Commission rate form, but it has not been prejudiced by these circumstances.

10. Accordingly, IT IS ORDERED that the Petition for Review of a Rate Order filed by Paragon Cable TV on January 2, 1997, IS DENIED.

11. This action is taken pursuant to authority delegated by section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

John Norton  
Deputy Chief, Policy Division, Media Bureau

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<sup>20</sup> Paragon Reply (Corrected Version) at 4-5. See 47 C.F.R. § 76.933(g)(2) (franchising authority not acting within 12-month window from the filing of the cable operator's Form 1240 "may not at a later date order a refund or a prospective rate reduction with respect to the rate filing").

<sup>21</sup> See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631, 5731 (1993); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Buy-Through Prohibition*, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994).

<sup>22</sup> Paragon relies on CPST rate cases in which the Commission credited the cable operator with the 2.96% inflation factor as an offset for excessive inflation claimed when computing some January 1, 1996 rate increases, even though the cable operator had not included the 2.96% inflation factor in the rate form. See Paragon Petition at 4 & n.6, citing *Time Warner Cable of New York City*, 11 FCC Rcd 6183, ¶ 10 (Cab. Serv. Bur. 1996); *Time Warner Cable d/b/a West Valley Cablevision Indus.*, 11 FCC Rcd 6152 (Cab. Serv. Bur. 1996); *Time Warner Cable d/b/a Paragon Cable*, 11 FCC Rcd 6086, ¶¶ 10-11 (Cab. Serv. Bur. 1996). MHCRC's treatment of Paragon's January 1, 1996 BST rates effectively credited Paragon for that inflation as an offset for a different inflation problem. *Time Warner Cable v. Town of Cary*, 14 FCC Rcd 18594, 18596 ¶ 7 (Cab. Serv. Bur. 1999), also does not require a different result. There the Cable Services Bureau remanded a rate order because the franchising authority considered the cable operator's amendments to its first FCC Form 1240 but disallowed recovery of previously unclaimed inflation. The franchising authority reviewed the amendments with the cable operator's second FCC Form 1240. In contrast to this proceeding, *Town of Cary* did not include an issue about an offset from previously claimed excess inflation.