

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

In the Matter of	)	
	)	
Marcus Cable Associates, L.P.	)	CUID No. CA0181 (LaCrescenta)
	)	
	)	
Complaint Regarding	)	
Cable Programming Services Tier Rates	)	

**ORDER**

**Adopted: December 17, 1997**

**Released: December 19, 1997**

By the Deputy Chief, Cable Services Bureau:

1. In this Order we consider a complaint about the June 1, 1997 rate increases of the above-referenced operator ("Operator") for its cable programming services tier ("CPST") in the community referenced above for the upgrade and non-upgrade segments of the system. Operator has attempted to justify its CPST rates through a benchmark showing on FCC Form 1240 for all segments of the system and on FCC Form 1235 for the upgrade segment of the system. We have already issued a separate order addressing the reasonableness of the CPST rates prior to the implementation of the rate increases which found that Operator's rate, effective June 1, 1996, was not unreasonable ("Prior Order").<sup>1</sup> Accordingly, this Order addresses the reasonableness of Operator's CPST rates effective June 1, 1997 in the upgrade and non-upgrade segments of the system.

2. The Communications Act<sup>2</sup> authorizes the Federal Communications Commission ("Commission") 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 1992 ("1992 Cable Act")<sup>3</sup> required the Commission to review CPST rates upon the filing of a valid complaint by a subscriber. If the Commission finds the rate to be unreasonable, it shall determine the correct rate and any refund liability.<sup>4</sup>

<sup>1</sup> See In the Matter of Marcus Cable Associates, L.P., 11 FCC Rcd 13860 (1996).

<sup>2</sup> Section 623 of the Communications Act of 1934, *as amended*, 47 U.S.C. Section 543 (1996).

<sup>3</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>4</sup> See 47 C.F.R. Section 76.957.

3. To justify rates for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.<sup>5</sup> Operators may justify adjustments to their rates on an annual basis using 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.<sup>6</sup> Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.<sup>7</sup> If actual and projected costs are different during the rate year a "true-up" mechanism is available to correct estimated costs with actual cost changes.<sup>8</sup> The "true-up" requires operators to decrease their rates or alternatively permits them to increase their rates to make an adjustment for over or under estimations of these cost changes.

4. FCC Form 1235 is an abbreviated cost of service filing used in cases of network upgrades. It 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. For an operator to receive rate increases justified on an FCC Form 1235, the Commission requires: (1) that the upgrade be 'significant' and require added capital investment, such as expansion of bandwidth capacity, conversion to fiber optics or system rebuilds; (2) that the upgrade actually benefit subscribers through improvements in the regulated services subject to rate increase; (3) that the upgrade rate increase not be assessed until the upgrade is complete and providing benefits to subscribers of regulated services; (4) that the operator demonstrate its net increase in costs, taking into account current depreciation expense, projected changes in maintenance and other expenses, and changes in other revenues; and (5) that the operator allocate its costs to ensure that only costs allocable to subscribers of regulated services are imposed upon them.<sup>9</sup> Normal improvements and expansions of service will remain subject to the usual rate adjustments allowed by filings of FCC Forms 1210, 1220 and 1240. 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.

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<sup>5</sup> 47 C.F.R. Section 76.922(b)(6); *see also* Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119, 4190 (1994) ("*Second Order on Reconsideration*").

<sup>6</sup> *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, 391 (1995).

<sup>7</sup> *Id.* at 392.

<sup>8</sup> *Id.*

<sup>9</sup> Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of Uniform Accounting System for Provision of Regulated Cable Service, 9 FCC Rcd 4527, par. 287 - 289 (1994). *See* 47 C.F.R. Section 76.922(j). *See also* Public Notice: Cable Services Bureau Develops System Upgrade Form, 11 FCC Rcd 5554 (1995).

5. The Telecommunications Act of 1996 ("the 1996 Act")<sup>10</sup> and our rules implementing the new legislation ("Interim Rules"),<sup>11</sup> require that complaints against CPST rates be filed with the Commission by a local franchising authority ("LFA") that has received subscriber complaints. An LFA may not file a CPST rate complaint unless, within 90 days after such increase becomes effective, it receives subscriber complaints. On September 23, 1997, the LFA filed an FCC Form 329 ("Complaint") regarding the June 1, 1997 increases in Operator's CPST rates in the community referenced above.<sup>12</sup> In its Complaint, the LFA asserts that it has received more than one subscriber complaint against Operator's CPST rate increases, thereby triggering the Commission's jurisdiction to review this complaint. The valid Complaint from the LFA triggers an obligation on behalf of the cable operator to file a justification of its CPST rates with the LFA.<sup>13</sup> Thus, in this case, Operator is required to justify the increase in its CPST rates which are the subject of the LFA's Complaint. In its response, Operator asserts that its June 1, 1997 rate increases are justified by the FCC Forms 1240 and 1235 filed along with the LFA's Complaint on September 23, 1997.<sup>14</sup>

6. In our Prior Order, we reviewed Operator's first FCC Form 1240 for the projected period June 1, 1996 through May 31, 1997, and found no apparent errors in Operator's calculation of its maximum permitted rate ("MPR") of \$10.94.<sup>15</sup>

7. Upon review of Operator's FCC Form 1240 for the projected period June 1, 1997 through May 31, 1998 for the CPST in the non-upgrade segment of the system, in the community referenced above, we find that Operator has not correctly calculated its CPST MPR. In particular, Operator made true-up adjustments through to the effective date of the rate increase. This is incorrect. The annual adjustment afforded by FCC Form 1240 allows operators to project changes in external costs, 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" 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.<sup>16</sup> The true-up data is intended to indicate real, not projected data.<sup>17</sup> This policy is reflected in the instructions accompanying FCC Form 1240.<sup>18</sup>

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<sup>10</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (February 8, 1996).

<sup>11</sup> See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 (1996).

<sup>12</sup> The first subscriber complaint regarding the CPST rate increases in the community referenced above was received by the LFA on June 3, 1997.

<sup>13</sup> 47 C.F.R. Section 76.1402.

<sup>14</sup> Operator filed a revised FCC 1235 on October 17, 1997.

<sup>15</sup> *Supra* note 1.

<sup>16</sup> *Thirteenth Reconsideration Order*, 11 FCC Rcd 388, 420 fn 151 (1995).

<sup>17</sup> *Id.*

8. Based on this instruction and considering evidence in the filing, reasonable time for closing accounts and completing forms, we adjusted Operator's true-up period from 12 months to 9 months. This adjustment requires that we adjust Worksheet 1 accordingly by disallowing three months of inflation on Worksheet 1, Lines 110 through 112. As a result, the true-up inflation factor in Module C, Line C1 for the 9 month period was corrected to 1.0165 instead of the 1.0232 used by the Operator for a 12 month period. We also adjusted Worksheet 2 Caps Method accordingly by disallowing Lines 211, 212 and 213. As a result, Module F, Line F9 (MPR for True-Up Period 1) was corrected to \$12.52 instead of the \$12.61 used by the Operator for a 12 month period. We also adjusted the inflation segment in Module F, Line F5 to reflect the corrections made in Line C1. Additionally, we adjusted the current inflation segment in Module D, Line D7 (Current Inflation Segment) to \$0.1327 from \$0.1282 to conform with Line I5 from the prior FCC Form 1240. In addition, we adjusted Module E, and corrected the number of months on Line E2 to 9 months.

9. The reduction in the length of the true-up period also results in a reduction in Line H2 (Revenue From MPR for Period 1). This results in a corresponding reduction in Line I8 (True-Up Segment for the Projected Period). In total, our adjustments to Operator's FCC Form 1240 result in a reduction of the MPR for the Projected Period to \$15.57 (Line I9). Thus, Operator has failed to demonstrate that its June 1, 1997 rate of \$16.46 for its CPST in the non-upgrade system in community referenced above is justified.

10. To the extent that external costs from the three months disallowed from Operator's true-up period<sup>19</sup> have been averaged into the rates charged in the twelve months allowed in Operator's true-up period, and have not been removed by our adjustments, we will order Operator to make a month-by-month accounting of such external costs. Such accounting shall allow a comparison of the actual external costs for the permitted nine-month true-up period with the recovery of external costs afforded by the external cost segment for that period as calculated on Worksheet 7. We will order Operator to incorporate this accounting report into its refund plan and refund any over-recovery, plus interest, to subscribers. We will also order Operator to submit an FCC Form 1240 for the projected period June 1, 1997 through May 31, 1998 which incorporates our revisions and the adjustments described above.

11. Operator's rate increase in the upgraded segment of the system reflects not only the annual increase as reported on FCC Form 1240 for the non-upgrade segment of the system, but also the recovery of costs for its network upgrade as reflected on FCC Form 1235 for the upgraded segment of the system. Operator elected to apply all of its FCC Form 1235 allowable basic service tier and CPST increases to its CPST MPR.<sup>20</sup> Upon review of Operator's FCC Form 1235 for the upgrade segment of the system of the community referenced above, we find that Operator erred in allocating its advertising sales revenue. We adjusted Line 10 by allocating advertising revenue to the CPST because most of the advertising time available is on the CPST. This adjustment resulted in the CPST upgrade increase justified by Operator to be \$3.03, or \$0.01 less than reported.

<sup>18</sup> See FCC Form 1240 Instructions for Timing at 3-4.

<sup>19</sup> As found on Operator's Worksheets 7 and 8.

<sup>20</sup> Consistent with FCC Form 1235, Operator has elected to recover the total Monthly Network Upgrade Add-on through the CPST rate. See Operator's revised FCC Form 1235 filed October 17, 1997, Part III, Lines 4 and 5.

12. When the FCC Form 1240 MPR of \$15.57 is combined with the FCC Form 1235 MPR of \$3.03, the combined MPR is \$18.60. Operator was actually charging a combined rate of \$19.50 in the upgrade segment of the system. Therefore we find that the CPST rate of \$19.50 is unreasonable in each segment of the system that it is charged as the system upgrade progresses.<sup>21</sup>

13. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the CPST rate of \$16.46 charged by Operator in the non-upgrade segment of the system in the community referenced above, effective June 1, 1997, IS UNREASONABLE.

14. 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 \$19.50 charged by Operator in the upgrade segment of the system in the community referenced above, effective June 1, 1997, IS UNREASONABLE.

15. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the referenced complaint IS GRANTED TO THE EXTENT INDICATED HEREIN.

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 in the non-upgrade segment of the system in the community referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$15.57 per month (plus franchise fees), plus interest to the date of the refund, for the period from June 3, 1997 to the day before Operator implements the maximum permitted CPST rate of \$15.57.

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 in the upgrade area of the community referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$18.60 per month (plus franchise fees), plus interest to the date of the refund, for the period from June 3, 1997 to the day before Operator implements the maximum permitted CPST rate of \$18.60.

18. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that Operator shall conduct a month-by-month accounting of its external costs from Operator's twelve-month true-up period as found on Operator's Worksheets, and that Operator shall file, within 30 days of the release of this Order, a report detailing the over-recovery of external costs, plus interest, with the Chief, Cable Services Bureau.

19. IT IS FURTHER ORDERED, that Operator shall promptly determine the overcharges to CPST subscribers for the stated periods, including any over-recovery as detailed in its accounting report, and shall file, within 30 days of the release of this Order, a report with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing

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<sup>21</sup> This finding is 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 any 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 filing can be found in the public file for the communities referenced above which is available in the Cable Services Bureau's public reference room, or through the Commission's copy contractor, International Transcription Services (ITS), 1231 20th Street, N.W., Washington, DC 20036, or by calling ITS at (202) 857-3800.

the calculation thereof, and describing its plan to implement the refund within 60 days of the Commission approval of the plan.

20. IT IS FURTHER ORDERED, that Operator shall revise its FCC Form 1240 for the projected period June 1, 1997 through May 31, 1998 incorporating the changes detailed in this order and shall file such amended FCC Form 1240 with the Chief, Cable Services Bureau within 30 days of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

John E. Logan  
Deputy Chief, Cable Services Bureau