

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

In the Matter of)	CUID Nos.	MN0232 (Columbia Heights)
)		MN0233 (Hilltop)
Meredith Cable)		
)		
Complaints Regarding)		
Cable Programming Services Tier Rates)		
and)		
Petition for Reconsideration)		

**ORDER ON RECONSIDERATION
AND RATE ORDER**

Adopted: June 8, 1999

Released: June 11, 1999

By the Deputy Chief, Cable Services Bureau:

1. In this Order we consider complaints about the rates charged by the above-referenced operator ("Operator") for its cable programming services tier ("CPST") in the communities referenced above. We have already issued a separate order in which we found Operator's rates in effect before May 15, 1994 to be unreasonable ("Prior Order").¹ On November 13, 1995, Operator filed a petition for reconsideration of our Prior Order ("Petition") as well as a petition for stay. On April 4, 1996, we granted Operator's petition for stay.² On October 4, 1996, Operator filed a petition for special relief regarding its CPST rates in the communities referenced above, which was denied.³ In our Prior Order, we stated that our findings "do not in any way prejudice the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations."⁴ This Order addresses Operator's Petition and the reasonableness of Operator's CPST rates in effect after May 14, 1994.

2. Under the Communications Act,⁵ the Federal Communications Commission ("Commission") is authorized to review the CPST rates of cable systems not subject to effective competition to ensure that rates charged are not unreasonable. If the Commission finds a CPST rate to be unreasonable, it shall determine the correct rate and any refund liability.⁶

¹ See In The Matter of Meredith Cable, 10 FCC Rcd 11429 (1995).

² In the Matter of Petitions for Stay of Action, 11 FCC Rcd 4196 (1996).

³ See In The Matter of Meredith Cable, 13 FCC Rcd 16676 (1998) (denying operator's Petition for Special Relief, CSR-4855-R).

⁴ Prior Order at n. 1.

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

⁶ See Section 76.957 of the Commission's Rules, 47 C.F.R. §76.957.

3. In our Prior Order, we stated that:

Operator's Form 393, Part II, Worksheet 1, Line 104 entry does not represent its current monthly equipment revenue as of the initial date of regulation. Since Operator restructured its rates, including its equipment rates, on September 1, 1993, the current monthly equipment revenue figure it entered on Line 104 should have been close or identical to its equipment cost figure on Part III, Step G, Line 34.⁷ However, Operator's entries on these two lines differed substantially. We therefore adjusted Line 104 to equal the amount entered on Line 34. (footnote in original)

Our adjustment reduced Operator's maximum permitted rate ("MPR") from \$13.74 to \$13.55, and we ordered Operator to refund that portion of charges for the CPST which exceeded the MPR of \$13.55, for the period from February 28, 1994 through May 14, 1994.

4. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")⁸ required operators to assess charges to subscribers for cable equipment and installation on a cost basis.⁹ To implement the 1992 Cable Act, the Commission required operators to remove or "unbundle" equipment and installation rates from rates for programming services.¹⁰ FCC Form 393 is the official form used by the Commission to determine whether an operator's regulated rates for programming, equipment and installation were reasonable during the time period from September 1, 1993 until May 14, 1994. FCC Form 393 is divided into three separate but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its equipment and installation costs and maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the rates the operator has actually charged during the period of review.

5. In order to calculate an MPR for its regulated programming services, in accordance with the Commission's rules, an operator must first calculate its Base Rate Per Channel ("Base Rate") and enter that number on Line 300 of Part II.¹¹ The operator must then remove its equipment and installation costs

⁷ See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released November 10, 1993) ("Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations . . . operators will enter on Line 104 the same, or nearly the same, number on Line 301.").

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

⁹ Section 623(b)(3) of the Communications Act, *as amended*, 47 U.S.C. §543(b)(3).

¹⁰ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at 5889 (1993).

¹¹ An operator determines its Base Rate by making comparisons to the applicable benchmark rate for its system. In order to calculate a Base Rate, the operator must first calculate the actual aggregate revenues it collected for regulated programming, equipment and installation, as of the initial date of regulation ("current rate"), or as of

from the Base Rate. To do this, the operator must first calculate its Monthly Equipment and Installation Costs on Line 34 of Part III. Once this figure has been calculated, it is entered onto Line 301 (Equipment and Installation Cost, Monthly) of Part II and subtracted from the Base Rate on Line 304 of Part II.¹² Therefore, the resulting number on Line 304 (Base Service Rate Per Channel) contains no equipment and installation costs.

6. On Line 104 (Equipment Revenue, Monthly) of Part II, the operator places the amount that it receives in monthly equipment revenue as of the operator's initial date of regulation.¹³ To do this, the operator calculates the total revenues earned over the last fiscal year for (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees (6) reconnect fees; and (7) tier changing fees; and then divides that total by twelve.¹⁴ As noted in our Prior Order, in an effort to clarify the interrelation between Line 301 (which is the same number as Line 34) and Line 104, for operators that had restructured their rates as of September 1, 1993, the Commission explained in its Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements ("Public Notice"),¹⁵

[t]he instructions for completing Worksheet 1 Line 104 of FCC Form 393 specify that equipment revenues for the year preceding that date shall be used in computations of the current rate per channel which is to be compared to the benchmark. Revenues for the previous years may not be sufficiently representative where the operator already has unbundled and instituted cost-based pricing in accordance with our requirements. This answer clarifies that in completing Line 104 operators must use equipment revenues that will be representative of the equipment rates that were in effect as of the initial date of regulation. Where available, actual revenues should be used. Where operators have restructured equipment rates as of September 1, 1993 in accordance with our regulations, we would anticipate that in most cases, *absent special circumstances*, operators will enter on Line 104 the same, or nearly the same, number as

September 30, 1992, if its current rate is greater than the applicable benchmark rate. After calculating actual aggregate revenues, the operator converts those revenues to a per channel rate, and then compares the per channel figures to the applicable benchmark rate. If an operator's current per channel rate level is below the applicable benchmark rate, then the operator's current per channel rate is deemed reasonable. If the operator's current per channel rate exceeds the benchmark rate, the operator must compare its September 30, 1992 per channel rate to the applicable benchmark rate. If its September 30, 1992 per channel rate is above the benchmark rate, the operator must reduce this rate by ten percent or to the benchmark rate, whichever is higher.

¹² Line 301 is first divided by Line 302 (Channel Factor) to create a number which represents per channel, per subscriber equipment and installation costs (Line 303).

¹³ The initial date of regulation is the day the Commission first receives a complaint against an operator's CPST rates. 47 C.F.R. §76.922(b)(7).

¹⁴ FCC Form 393 at p. 10.

¹⁵ Question and Answer No. 7 (released November 10, 1993).

on Line 301. Line 301 is the anticipated revenues based on equipment rates derived in accordance with FCC rate regulations. (emphasis added)

This is because Line 104 is the operator's monthly equipment revenue, including installation fees, and Line 301 is the operator's monthly equipment and installation costs calculated in accordance with the Commission's rules. If the operator had already restructured its rates pursuant to the law and the Commission's rules that equipment and installation rates be limited to costs, the revenues collected (Line 104) would not be significantly different than the amount calculated as the operator's costs (Line 301).

7. In its Petition, Operator asserts that the "special circumstances" exception to the general rule applies in the instant case. The reference to special circumstances in the Public Notice encompasses situations where restructured rates may not equal costs. The Public Notice sought to ensure that operators did not include pre-restructuring revenues in Line 104. In completing Line 104, Operator must use equipment revenues that are representative of equipment rates in effect on the initial date of regulation. Additional revenues generated from rates established prior to the initial date of regulation are not representative of rates in effect on the initial date of regulation and distort the benchmark methodology used to determine whether a rate is reasonable. The Public Notice correctly presumed that operators who had restructured their rates as of September 1, 1993 had done so in accordance with Commission regulations. Pursuant to Commission regulations then in effect, rates for equipment were to be calculated based on actual cost methodology.¹⁶

8. Operator restructured its rates by September 1, 1993 to comply with the Commission's rules. It is reasonable to presume that Operator's entries for Lines 104 and 34 (which is the same as Line 301) on its FCC Form 393 should be the same, or nearly the same. Operator's equipment and installation costs, as found on Line 34 and then Line 301, differed significantly from Operator's entry on Line 104 of its FCC Form 393. We note that the complaints were filed on February 28, 1994, subsequent to release of the Public Notice, and that Operator had an opportunity to prepare its submission in a manner consistent with the Public Notice. The Commission released its Public Notice to ensure that operators which had restructured their rates as of September 1, 1993 were aware of the Commission's interpretation of FCC Form 393. Operator's claim that it qualifies for a "special circumstances" exception has no validity.

9. Apparently, Operator is also arguing that it is entitled to a "special circumstances" exception because it should not be penalized if it initially correctly restructured its rates in compliance with the Commission's rules. In Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 92-266, Third Order on Reconsideration,¹⁷ we addressed the issue that arises when an operator that promptly revised its rates in response to our rules is required to justify those rates several months later, and some of the facts or data on which the rates were based have changed. For example, tentative inflation adjustments have since become definite, equipment costs may have varied, or channels may have been added. We were concerned that rates adopted in an effort to comply with our rules as quickly as possible may become unreasonable solely as a result of using later data to refresh the calculations. We stated

¹⁶ See Section 76.923 of the Commission's Rules, 47 C.F.R. §76.923.

¹⁷ 9 FCC Rcd 4316 (1994).

Operators should not be penalized for making good faith attempts to comply with our rules in a timely manner. . . . At the same time, it is important that regulatory authorities are able to verify accurately the reasonableness of a current rate, and to avoid compounding any inaccuracies as subsequent rate increases are introduced, which are a function of the level of initial rates. . . . [W]e will require the following actions when different rates are dictated by data used in initial rate-setting than by data current as of the time an FCC Form 393 . . . is actually submitted to the franchising authority or the Commission. When current rates are accurately justified by analysis using the old data (and that data was accurate at the time), cable operators will not be required to change their rates. In these circumstances, however, when such operators make any subsequent changes in their rates (such as when seeking their annual inflation increase), those changes must be made from rates levels derived from the updated information. When current rates are not justified by analysis using the old data (so that a rate adjustment would be necessary in any event), cable operators will be required to correct their rates pursuant to current data. In these circumstances, the resulting rates must be based on current data.¹⁸

10. The Commission's intention was to protect an operator who made good faith attempts and used the best available data at the time it recalculated rates. The Public Notice stated that operators should refresh cost or other financial information as of the initial date of regulation, based on the most recent information available. Operators who added or deleted channels on September 1, 1993, in anticipation of rate regulation, were also instructed to use the number of channels as of the initial date of regulation. Information, such as inflation data, is subject to revision. The Commission reasoned that operators should not be penalized for making good faith attempts to comply with Commission rules. In the instant case, Operator's reliance upon the exception permitting operators to rely upon "old" data if its current rates are accurately justified using the old data and that data was accurate at the time is misplaced. The facts have not changed during the intervening time between the rate restructuring on September 1, 1993 and the initial date of regulation on February 28, 1994. Unlike the situations contemplated by the exception carved out by the Commission's rules, this case simply does not involve data that subsequently became available. The revenue figure that Operator is attempting to use on Line 104 has remained the same. The use of flawed data (i.e. pre-regulatory revenues) distorts the analysis needed to determine the permitted rate. We cannot accept Operator's claim that it qualifies for a "special circumstances" exception. Consequently, we will affirm our Prior Order.

11. We note that Operator, in support of its argument, attached a hypothetical FCC Form 393 to its Petition which purports to show that Operator is entitled to a higher MPR based on the use of pre-restructuring data. An FCC Form 393 which justified restructured rates might support a "special circumstances" exception if the facts supporting the calculation had changed prior to the initial date of regulation, as noted above. A hypothetical FCC Form 393 using pre-restructuring data does not support such a finding. Operator could have checked its rate calculation on an FCC Form 393 before establishing its initial rates under regulation. In addition, once an operator has filed FCC Forms with the Commission, each of which requires a signed certification statement that the information on the FCC Form is true and

¹⁸ *Id.* at ¶¶94-95. See also 47 C.F.R. §76.922 (b) (9).

correct, we are entitled to act upon that information.¹⁹ Once we have released an order concerning those FCC Forms, we cannot ordinarily allow an operator to submit additional FCC Forms on appeal with information that should have been submitted with the original certification, unless we have requested the additional information. Operator's additional FCC Form 393 contains new information, is unsigned and incomplete.²⁰ In the present case, we must reject the additional FCC Form 393 filed by Operator.

12. To justify rates for the period beginning May 15, 1994 through a benchmark or cost of service showing, operators must use the FCC Form 1200 series. Cable operators may file an FCC Form 1210 to justify rate increases based on the addition and deletion of channels, changes in certain external costs and inflation.²¹ In addition, Operators must file an FCC Form 1210 at least 30 days before new rates are scheduled to go into effect, where there is a pending complaint against the CPST rate.²² Operators may justify 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.²³ Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.²⁴

13. Upon review of Operator's FCC Form 1200, we find Operator's calculated MPR of \$12.12 to be reasonable. However, Operator's actual CPST rate in effect from May 15, 1994 through July 13, 1994 was \$13.76. Because Operator's actual CPST rate exceeds its MPR, we find Operator's actual CPST rate of \$13.76, effective May 15, 1994 through July 13, 1994, to be unreasonable. The Commission's rules provide for a refund liability deferral period, if timely requested by Operator, beginning May 15, 1994 through July 14, 1994, for any overcharges resulting from Operator's calculation of a new MPR on the FCC Form 1200.²⁵ Operator elected to defer refund liability pursuant to the Commission's Rules.²⁶ 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.²⁷ In our Prior Order, we approved an MPR of \$13.55. Because Operator's actual CPST rate of \$13.76 exceeds its revised FCC Form 393 MPR, we find Operator's actual CPST rate of \$13.76, effective May 15, 1994 through July 13,

¹⁹ See *In the Matter of Time Warner Cable*, 13 FCC Rcd 7336 (1998).

²⁰ Operator's additional FCC Form 393 did not include any schedules or supporting documentation.

²¹ See Section 76.922 of the Commission's Rules, 47 C.F.R. §76.922.

²² See Section 76.958 of the Commission's Rules, 47 C.F.R. §76.958.

²³ See Section 76.922 of the Commission's Rules, 47 C.F.R. §76.922.

²⁴ *Id.*

²⁵ See 47 C.F.R. §76.922(b)(6)(ii).

²⁶ See Letter dated June 10, 1994 from Kevin C. Griffin, President and General Manager, Meredith Cable, to Columbia Heights Hilltop Cable Commission.

²⁷ 47 C.F.R. §76.922(b)(6)(ii).

1994, to be unreasonable.²⁸ We find Operator's actual CPST rate of \$12.12, effective July 14, 1994, to be reasonable.

14. On October 26, 1995, Operator filed a refund plan in accordance with our Prior Order. Our review of Operator's refund plan reveals that the refund liability calculation for the period February 28, 1994 through May 14, 1994 was based on an incorrect MPR rather than the MPR of \$13.55 approved in our Prior Order. Our review also reveals that the interest was miscalculated throughout the refund period. Consequently, refund liability, including interest, is understated. Therefore, we will reject Operator's refund plan.

15. Accordingly, IT IS ORDERED, pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. §1.106, that Operator's Petition for Reconsideration IS DENIED.

16. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that In the Matter of Meredith Cable, DA 95-2114, 10 FCC Rcd 11429 (1995), IS AFFIRMED.

17. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that the stay granted to Operator in the Matter of Petitions for Stay of Action, 11 FCC Rcd 4196 (1996), IS VACATED.

18. 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 \$13.76, charged by Operator in the franchise areas referenced above effective February 28, 1994 through July 13, 1994, IS UNREASONABLE.

19. 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 \$12.12, charged by Operator in the franchise areas referenced above, effective July 14, 1994, IS REASONABLE.

20. 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 communities referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$13.55 per month (plus franchise fees), plus interest to the date of the refund, for the period February 28, 1994 through July 13, 1994.

21. IT IS FURTHER ORDERED that Operator's previously filed refund plan is NOT ACCEPTED, and 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.

²⁸ 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.