

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

In the Matter of )  
 )  
Marcus Cable Associates, L.P. ) CUID No. IN0702 (Bartholomew)  
 )  
Petition for Reconsideration )

**ORDER ON RECONSIDERATION**

**Adopted: December 6, 1999**

**Released: December 10, 1999**

By the Deputy Chief, Cable Services Bureau:

1. In this Order we consider a Petition for Reconsideration ("Petition") filed by the above-referenced operator ("Operator") of an order ("Prior Order")<sup>1</sup> which granted complaints filed against the rates charged by Operator for its cable programming services tier ("CPST") in the community referenced above. In our Prior Order, we also rejected a refund plan ("1994 Refund Plan") filed by Operator in response to an earlier order.<sup>2</sup> On March 25, 1998, Operator filed its Petition against our Prior Order along with a revised refund plan ("1998 Refund Plan"). In this Order, we consider Operator's Petition as well as the 1998 Refund Plan.

2. Under the Communications Act,<sup>3</sup> 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. The Cable Television Consumer Protection and Competition Act of 1992<sup>4</sup> ("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 Telecommunications Act of 1996 ("1996 Act")<sup>5</sup> and our rules implementing the legislation ("Interim Rules"),<sup>6</sup> required that a complaint against the CPST rate be filed with the Commission by an LFA that has received more than one subscriber complaint.<sup>7</sup> The filing of a complete and timely complaint triggers an obligation upon the cable operator to file a justification of its CPST rates.<sup>8</sup> The Operator has the burden of demonstrating that the CPST rates

<sup>1</sup> See In the Matter of Marcus Cable Associates, L.P., DA 98-341, 13 FCC Rcd 4305 (1998).

<sup>2</sup> See In the Matter of Sammons Communications, Inc., DA 95-659 (released April 4, 1995).

<sup>3</sup> Communications Act, Section 623(c), *as amended*, 47 U.S.C. §543(c) (1996).

<sup>4</sup> Pub. L. No. 102-385, 106 Stat. 1460 (1992).

<sup>5</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

<sup>6</sup> See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 (1996).

<sup>7</sup> See Communications Act, Section 623(c), *as amended*, 47 U.S.C. Section 543(c) (1996).

<sup>8</sup> See Section 76.956 of the Commission's Rules, 47 C.F.R. §76.956.

complained about are reasonable.<sup>9</sup> If the Commission finds a rate to be unreasonable, it shall determine the correct rate and any refund liability.<sup>10</sup>

3. Operators must use the FCC Form 1200 series to justify rates for the period beginning May 15, 1994.<sup>11</sup> Cable operators may also justify rate increases based on the addition and deletion of channels, changes in certain external costs and inflation, by filing FCC Form 1210.<sup>12</sup> 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.<sup>13</sup> Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.<sup>14</sup>

4. In its Petition, Operator raises five issues. First, Operator argues that it should have been allowed to raise the issue of inter-tier offsets for the first time when it filed its 1994 Refund Plan.<sup>15</sup> Because, in our Prior Order, we rejected Operator's request for inter-tier offsets on other grounds, we find this argument to be moot and decline to address it.<sup>16</sup> Second, Operator argues that it should be permitted to offset its past CPST overcharges with its past basic service tier ("BST") undercharges.<sup>17</sup> This is essentially the same argument advanced by Operator with its 1994 Refund Plan. We rejected this argument in the Prior Order and we reject it again now.<sup>18</sup> The Commission has addressed the issue of inter-tier offsets in *Cencom Cable Income Partners ("Cencom")*.<sup>19</sup> In *Cencom*, the Commission determined that such inter-tier offsets are "inconsistent with the Commission's conclusion in the [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]<sup>20</sup> that cable operators should not balance low BST rates with CPST rates that exceed the maximum permitted rate for the tier."<sup>21</sup> Therefore, we will not allow Operator to offset its CPST overcharges with its BST undercharges.

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<sup>9</sup> *Id.*

<sup>10</sup> See Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957.

<sup>11</sup> See Section 76.922 of the Commission's Rules, 47 C.F.R. § 76.922.

<sup>12</sup> *Id.*

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

<sup>14</sup> *Id.*

<sup>15</sup> Petition at p. 1.

<sup>16</sup> Prior Order at ¶ 3.

<sup>17</sup> Petition at p. 3.

<sup>18</sup> Prior Order at ¶ 3.

<sup>19</sup> See *In the Matter of Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948 (1997).

<sup>20</sup> 8 FCC Rcd 5631 (1993).

<sup>21</sup> *Cencom* at ¶ 22 (footnote omitted).

5. In the Prior Order, we found that the time period selected for the True-Up Period on Operator's initial FCC Form 1240 ("1996 1240"), incorrectly overlapped the time period covered by Operator's previous FCC Form 1210.<sup>22</sup> As its third issue, Operator now claims that the ending date for the FCC Form 1210, September 30, 1995, was a typographical error and should have been June 30, 1995.<sup>23</sup> We find Operator's argument unpersuasive. Operator signed its FCC Form 1210 on October 17, 1995 and submitted it in support of its November 1, 1995 CPST rate increase. Subsequently, Operator supplemented the filing with information supporting its programming costs as of September 30, 1995. Once an operator has filed FCC Forms and supporting documentation with the Commission, we are entitled to act upon that information.<sup>24</sup> Moreover, once we have released an order concerning those FCC Forms, we cannot ordinarily allow an operator to amend those FCC Forms on appeal with information that should have been submitted in the original certification. However, in our review of Operator's 1996 1240 pursuant to Operator's Petition, we have included the unclaimed inflation factor of 1.0296 in our calculations. Our review resulted in a revised maximum permitted rate ("MPR") for the projected period June 1, 1996 through May 31, 1997 of \$11.60 rather than the rate of \$11.32 prescribed in our Prior Order. Therefore, we will amend our Prior Order accordingly.

6. In our Prior Order, we also adjusted the True-Up Period in Operator's second FCC Form 1240 ("1997 1240").<sup>25</sup> Pursuant to the instructions in our Prior Order,<sup>26</sup> Operator submitted with its Petition additional information regarding its programming costs for the 1997 1240 True-Up Period. As its fourth issue, Operator requested that we review the 1997 1240 with the corrected programming cost information.<sup>27</sup> Upon review of the 1997 1240, we adjusted Line A1 as a result of our modification to the 1996 1240 noted above, and we adjusted the programming costs for the True-Up Period. Our adjustments resulted in a revised MPR for the projected period June 1, 1997 through May 31, 1998 of \$12.64 rather than the rate of \$12.06 prescribed in our Prior Order. We will amend our Prior Order accordingly.

7. The final issue raised by Operator concerns its calculation of its 1998 Refund Plan. Operator contends that it should be permitted to engage in inter-tier offsetting when calculating this refund plan.<sup>28</sup> We have already dealt with this issue above; therefore, we deny Operator's request to use inter-tier offsetting in its 1998 Refund Plan. Operator also argues that it should be permitted to account for its overcharges for its 1997 1240 in its true-up calculations for its FCC Form 1240 for the projected period June 1, 1998 to May 31, 1999 ("1998 1240"). Operator argues that we should accept its "hybrid" refund plan which allows for some payment of refunds to subscribers, for the period prior to June 1, 1997, while accounting for overcharges after June 1, 1997 in its true-up calculations on its next FCC Form 1240 filing.<sup>29</sup>

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<sup>22</sup> Prior Order at ¶¶ 9-10.

<sup>23</sup> Petition at p. 6.

<sup>24</sup> See In the Matter of Time Warner Cable, 13 FCC Rcd 7336 (1998).

<sup>25</sup> Prior Order at ¶ 12.

<sup>26</sup> Prior Order at ¶ 27.

<sup>27</sup> Petition at p. 7.

<sup>28</sup> Petition at p. 8.

<sup>29</sup> *Id.*

8. Section 76.961 of the Commission's rules<sup>30</sup> requires operators to make refunds by either "returning overcharges to those subscribers who actually paid the overcharges" or through a "specifically identified, one-time credit on prospective bills to the class of subscribers that currently subscribe to the cable programming service." Once an order has been released requiring an operator to make such a refund, we will not allow an operator to avoid making the refund by one of the two methods required by the Commission's rules. We do not require an operator to pay refund liability that has been trued-up in a subsequent FCC Form 1240 when the subsequent FCC Form 1240 was reviewed simultaneously as part of our analysis of the justification of a rate which is the subject of a pending complaint.<sup>31</sup> However, we did not review Operator's 1998 1240 in our Prior Order, and there is no pending complaint requiring us to do so. In its 1998 Refund Plan, Operator calculates its refund liability from its 1996 1240 but excludes the refund liability from its 1997 1240. We recalculated Operator's refund liability by excluding the refund liability from the 1996 1240 for the period June 1, 1996 through April 30, 1997 because that period of time was trued-up in the 1997 1240 which we reviewed along with the 1996 1240 in our Prior Order to resolve a pending complaint. However, Operator is required to pay refunds for the period May 1, 1997 through May 31, 1997 and June 1, 1997 through May 31, 1998, in accordance with our rules. We reject Operator's argument and find its 1998 Refund Plan to be unacceptable.

9. Because Operator has been ordered to file refund plans to account for CPST overcharges calculated in both the Prior Order and the 1994 Order, and has failed to do so, we have calculated the total refund amount due from Operator to the CPST subscribers in the community referenced above. Our calculations take into account Operator's overcharges to subscribers for the period February 10, 1994 through May 31, 1998, including principal and interest through December 31, 1999. The total due from

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<sup>30</sup> 47 C.F.R. § 76.961.

<sup>31</sup> See, for example, In the Matter of Marcus Cable Associates, L.P., 14 FCC Rcd 3390 at n.16 (1999).

Operator to its CPST subscribers is \$196,703.00.<sup>32</sup> We order Operator to refund this amount to its CPST subscribers within 60 days of the release of this order.

10. 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 of In the Matter of Marcus Cable Associates, L.P., DA 98-341, 13 FCC Rcd 4305 (1998), IS GRANTED IN PART AND DENIED IN PART TO THE EXTENT INDICATED HEREIN.

11. 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 Marcus Cable Associates, L.P., DA 98-341, 13 FCC Rcd 4305 (1998), IS AMENDED TO THE EXTENT INDICATED HEREIN.

12. 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 franchise area referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$10.15 per month (plus franchise fees), plus interest to the date of the refund, for the period February 10, 1994 through July 14, 1994.

13. 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 franchise area referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$9.25 per month (plus franchise fees), plus interest to the date of the refund, for the period July 15, 1994 through September 30, 1995.

14. 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 franchise area referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$11.60 per month (plus franchise

<sup>32</sup> The refund liability was calculated as follows:

Month	Days/ Month	Av. Total Subs	Actual Rate	MPR	Over charge	Total Over charge	Months	Av. Int. rate	Interest Total	Total Refund + Int.
2/10/94 - 7/14/94	155	3658	\$10.47	\$10.15	\$0.32	\$6,048	71	7.6478%	\$2,737	\$8,785
7/15/94 - 9/30/95	411	3855	\$11.21	\$9.25	\$1.96	\$103,514	59	7.7966%	\$39,680	\$143,195
5/1/97 - 5/30/97	30	3982	\$11.69	\$11.60	\$0.09	\$358	32	7.6250%	\$73	\$431
6/1/97 - 5/31/98	365	4111	\$13.38	\$12.64	\$0.74	\$37,013	31	7.6129%	\$7,279	\$44,292
TOTAL										\$196,703

fees), plus interest to the date of the refund, for the period May 1, 1997 through May 31, 1997.

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 in the franchise area referenced above that portion of the amount paid in excess of the maximum permitted CPST rate of \$12.64 per month (plus franchise fees), plus interest to the date of the refund, for the period June 1, 1997 through May 31, 1998.

16. IT IS FURTHER ORDERED, pursuant to Section 76.962 of the Commission's rules, 47 C.F.R. § 76.962, that Operator's Refund Plans ARE NOT ACCEPTED.

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 franchise area referenced above the total amount of \$196,703.00 within 60 days of the release of this Order.

18. IT IS FURTHER ORDERED, pursuant to Section 76.962 of the Commission's rules, 47 C.F.R. Section 76.962, that Operator file a certificate of compliance with the Chief, Cable Services Bureau, within 90 days of the release of this Order certifying its compliance with this Order.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau