

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

In the Matter of)	CUID Nos.	MA0018 (Worcester)
)		MA0107 (Easthampton)
Greater Media Cable)		MA0209 (Sturbridge)
)		MA0260 (Boylston)
Complaints Regarding)		MA0319 (West Boylston)
Cable Programming Services Tier Rates))		
and)		
Petition for Reconsideration)		

**ORDER ON RECONSIDERATION
AND
RATE ORDER**

Adopted: June 1, 1999

Released: June 4, 1999

By the Deputy Chief, Cable Services Bureau:

1. In this Order we consider a petition for reconsideration ("Petition") of our Order, DA 95-1739 ("First Order"),¹ filed with the Federal Communications Commission ("Commission") by the above-referenced operator ("Operator") on September 15, 1995. Our First Order resolved all pending complaints against Operator's CPST rates in the above-referenced communities through May 14, 1994, and found Operator's cable programming services tier ("CPST") rates to be unreasonable. On April 17, 1997, we released an order, DA 97-802 ("Second Order")² which found that Operator is a small cable company pursuant to Section 623(m)(2) of the Communications Act³ and dismissed all complaints against Operator filed with the Commission between September 1, 1993 and February 7, 1996 in all of the above communities except Worcester, MA ("MA0018"). In this Order, we vacate our First Order in part and grant Operator's Petition in part. We also review the CPST rates charged by Operator in the community of MA0018, beginning May 15, 1994.

2. Under the Communications Act, the Commission is authorized to review the CPST rates of cable systems not subject to effective competition to ensure that rates charged are not unreasonable.⁴ The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),⁵ and our rules in effect at the time the complaints were filed, required the Commission to review CPST rates upon the filing of a valid complaint by a subscriber. The filing of a valid complaint triggers an obligation upon the cable

¹ In the Matter of Greater Media Cable, 10 FCC Rcd 8749 (1995).

² See In the Matter of Greater Media, Inc., 12 FCC Rcd 21360 (1997).

³ Communications Act, Section 623(m)(2), *as amended*, 47 U.S.C. §543(m)(2) (1996).

⁴ 47 U.S.C. §543(c) (1996).

⁵ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

operator to file a justification of its CPST rates.⁶ If the Commission finds the rate to be unreasonable, it shall determine the correct rate and any refund liability.⁷ The Telecommunications Act of 1996 ("1996 Act"),⁸ and our rules implementing the legislation ("Interim Rules"),⁹ require that a complaint against the CPST rate be filed with the Commission by a local franchising authority ("LFA") that has received more than one subscriber complaint.

3. In the 1996 Act, Congress amended Section 623 of the Communications Act and redefined a small cable operator as one that "directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁰ The Commission's rules currently define one percent of all cable subscribers in the United States as equivalent to 617,000 subscribers.¹¹ The Commission's rules also define an affiliated entity as one which "holds a 20 percent or greater equity interest, passive or active, in the operator or exercises *de jure* or *de facto* control over the operator."¹² In the 1996 Act, Congress determined that, effective February 8, 1996, the Commission shall not apply its CPST rate regulation rules, promulgated under Sections 623(a), (b) and (c) of the Communications Act,¹³ to a small cable operator in any franchise area in which that operator services 50,000 or fewer subscribers.¹⁴

4. Normally, a finding that an operator qualifies as a small cable operator would not provide a basis to vacate a prior finding of liability. It would only function to dismiss that portion of any complaints that had not yet been resolved. For example, our First Order resolved complaints through May 14, 1994. As we stated in our First Order, our findings "do not in any way prejudge the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations."¹⁵ A review of Operator's CPST rates beginning May 15, 1994 and any subsequently filed complaints was still pending when the Second Order was released. Because our Second Order found that Operator qualifies as a small cable operator and dismissed the complaints for all of the above-referenced communities with the exception of MA0018, we would not complete the pending review of Operator's CPST rates beginning May 15, 1994 and any subsequently filed complaints for those

⁶ 47 C.F.R. §76.956.

⁷ 47 C.F.R. §76.957.

⁸ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁹ See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 5937 (1996).

¹⁰ 47 U.S.C. §543(m)(2) (1996).

¹¹ 47 C.F.R. §76.1403(b).

¹² 47 C.F.R. §76.1403(c) (1996).

¹³ 47 U.S.C. §§543(a) - (c) (1996).

¹⁴ 47 U.S.C. §543(m)(1) (1996). See also 47 C.F.R. §76.1403(a).

¹⁵ First Order at n. 1.

communities. We would, however, enforce any prior orders. The instant case differs from the normal situation because Operator filed a timely appeal of our First Order. Because we have determined, prior to a resolution of that appeal, that Operator is a small cable operator and not subject to the CPST rate regulation rules, we will vacate that part of our First Order which applies to the above-referenced communities, with the exception of MA0018.

5. In its Petition, Operator argues that the recalculation of inflation in our First Order was unreasonable and unlawful because it relied on data not available at the time Operator set its rates. Operator also argues that our First Order did not afford Operator the full inflation period to which it was entitled. This issue was addressed by the Commission in *Cencom Cable Income Partners II, L.P.* ("*Cencom*").¹⁶ In *Cencom*, the Commission explained its policy regarding refreshing inflation:

The Commission is charged with protecting subscribers from paying unreasonable CPST rates, while also providing system operators with a fair return. Accurate information, including accurate inflation information, is central to setting an initial regulated rate that meets the standard. Thus, the Commission requires that data used in setting a rate be refreshed with the most current data available when an operator's rates become regulated and are justified.¹⁷ Because final inflation data for the period addressed in rate justifications may not be available when a justification is filed, the Commission directs operators to estimate inflation by using the most recently available inflation data published on an interim basis in the Commerce "Survey of Current Business" at Table 7.3, Line 5.¹⁸ The Bureau's practice when reviewing rate justifications is to verify that the operator has used this inflation data. The Bureau also determines whether the other information in the rate justification is correct, and on the basis of the inflation and other information in the form, including any corrections, whether the operator's rate meets the statutory requirement that the rate not be unreasonable. The Bureau does not find a rate unreasonable solely because more accurate inflation data has become available by the time it makes its review. This would churn rates, causing significant administrative expenses to operators and confusion to subscribers. However, if a rate is unreasonable on its face or has to be adjusted for reasons other than the availability of a more accurate inflation figure, e.g., because the operator failed to provide correct information in its rate justification or failed to complete its rate justification form correctly, the Bureau recalculates the maximum permitted rate using the most accurate inflation information

¹⁶ *In the Matter of Cencom Cable Income Partners II, L.P.*, FCC 97-205 (Released June 13, 1997).

¹⁷ See *Third Order on Reconsideration*, 9 FCC Rcd at 4349-50; FCC Form 393 at 11 Instruction for Line 122--GNP-PI (Current) (Aug. 1993). The Bureau has explained the requirement to use current data in Cable Operators' Rate Justification Filings, Sections 76.945, 76.946 of the Commissions rules, 9 FCC Rcd 7752, 7754-55 ¶ 3(8) (Cab. Serv. Bur. 1994) ("*Rate Filings*"); Nov. 10, 1993 Public Notice, Answer to Question No. 6 (in filing rate justifications, operators must refresh data used in initial rates with most current information as of the date of initial regulation); July 30, 1993 Public Notice, Answer to Question 10.

¹⁸ See FCC Form 393 at 11 Instruction for Line 122--GNP-PI (Current) (Aug. 1993).

available, rather than earlier estimates.¹⁹ This practice is consistent with 47 C.F.R. § 76.922(b)(9)(iii), which provides:

[I]f the rates charged by a cable operator are not justified by an analysis based on the data available at the time it initially adjusted its rates, the cable operator must adjust its rates in accordance with the most accurate data available at the time of the analysis.

[footnotes in original]

6. Because we find that our action in our Prior Order is consistent with the Commission's holding in *Cencom*, we reject Operator's argument regarding the adjustment of the Inflation Adjustment Factor. In accordance with the Commission's decision in *Cencom*,²⁰ however, we will afford Operator the full inflation period to which it was entitled. Our modification of Operator's FCC Form 393 results in a revised maximum permitted rate ("MPR") of \$11.58, which matches with Operator's MPR from its amended FCC Form 393 filed on June 24, 1994.²¹ Therefore, we will grant Operator's Petition in part.

7. To justify rates for the period beginning May 15, 1994, operators must use the FCC Form 1200 series.²² Operators are permitted to make changes to their rates on a quarterly basis using FCC Form 1210.²³ Operators may adjust their rates on an annual basis using FCC Form 1240.²⁴

8. Upon review of Operator's FCC Form 1200, we find Operator's calculated MPR of \$10.84 to be reasonable.²⁵ Because Operator's actual CPST rate of \$11.75 exceeds its MPR, we find Operator's actual CPST rate of \$11.75, effective May 15, 1994 through June 30, 1994, to be unreasonable.²⁶ Upon review of Operator's FCC

¹⁹ See Public Notice, Cable Services Bureau Announces Policy Regarding Inflation Adjustment on FCC Form 393, DA 95-999 at 2 (Cab. Serv. Bur. May 2, 1995). The Bureau gave operators the opportunity to review and correct errors in their benchmark rate filings. Operators who had not previously correctly calculated the inflation adjustment factor were directed to use the accurate factors through June 30, 1994. Public Notice, Cable Services Bureau Announces Optional Procedures with Respect to Pending Pre-May 15 Benchmark Cases, DA 94-1556 at 3-4 (Dec. 29, 1994). The Public Notice listed the inflation adjustment factors through June 30, 1994.

²⁰ See *Cencom* at para. 17.

²¹ See First Order at ¶4.

²² 47 C.F.R. §76.922.

²³ *Id.*

²⁴ *Id.*

²⁵ This finding is based solely on the representations of Operator. Should information come to our attention that this representations was materially inaccurate, we reserved 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.

²⁶ Operator did not elect to take advantage of the Commission's rules which 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 maximum permitted rate on its FCC Form 1200. See 47 C.F.R. Section 76.922(b)(6)(ii). If Operator did timely file such a request and can provide documentation in support thereof, we will

Form 1210 covering the period April 1, 1994 through June 30, 1994, we find Operator's calculated MPR of \$11.07 to be reasonable. Because Operator's actual CPST rate of \$11.75 exceeds its MPR, we find Operator's actual CPST rate of \$11.75, effective July 1, 1994 through September 30, 1994, to be unreasonable.

9. Upon review of Operator's FCC Form 1210 covering the period July 1, 1994 through September 30, 1994, we find Operator's calculated MPR of \$11.27 to be reasonable. Because Operator's actual CPST rate of \$11.75 exceeds its MPR, we find Operator's actual CPST rate of \$11.75, effective October 1, 1994 through December 31, 1994, to be unreasonable. Upon review of Operator's FCC Form 1210 covering the period October 1, 1994 through December 31, 1994, we find Operator's calculated MPR of \$11.71 to be reasonable. Because Operator's actual CPST rate of \$11.75 exceeds its MPR, we find Operator's actual CPST rate of \$11.75, effective January 1, 1995 through March 31, 1995, to be unreasonable.

10. Upon review of Operator's FCC Form 1210 covering the period January 1, 1995 through March 31, 1995, we find Operator's calculated MPR of \$11.40 to be reasonable. Because Operator's actual CPST rate of \$11.75 exceeds its MPR, we find Operator's actual CPST rate of \$11.75, effective April 1, 1995 through December 31, 1995, to be unreasonable. Upon review of Operator's FCC Form 1210 covering the period April 1, 1995 through December 31, 1995, we find Operator's calculated MPR of \$11.87 to be reasonable. Because Operator's actual CPST rate of \$11.75 does not exceed its MPR, we find Operator's actual CPST rate of \$11.75, effective January 1, 1996, to be reasonable.

11. 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 GRANTED IN PART TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that In the Greater Media Cable, DA 95-1739, 10 FCC Rcd 8749 (1995) IS VACATED IN PART TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. Section 0.321 that the CPST rate of \$11.75, charged by Operator in the community referenced above, effective September 1, 1993 through May 14, 1994, IS UNREASONABLE.

14. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. Section 0.321 that the CPST rate of \$11.75, charged by Operator in the community referenced above, effective May 15, 1994 through December 31, 1995, IS UNREASONABLE.

15. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. Section 0.321 that the CPST rate of \$11.75, charged by Operator in the community referenced above, effective January 1, 1996, IS REASONABLE.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. Section 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 \$11.58 per month (plus franchise fees), plus interest to the date of the refund, for the period February 2, 1994 (the date of the first valid complaint) through May 14, 1994.

17. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. Section 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 \$10.84 per month (plus franchise fees), plus interest to the date of the refund, for the period May 15, 1994 through June 30, 1994.

18. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. Section 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 \$11.07 per month (plus franchise fees), plus interest to the date of the refund, for the period July 1, 1994 through September 30, 1994.

19. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. Section 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 \$11.27 per month (plus franchise fees), plus interest to the date of the refund, for the period October 1, 1994 through December 31, 1994.

20. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. Section 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 \$11.71 per month (plus franchise fees), plus interest to the date of the refund, for the period January 1, 1995 through March 31, 1995.

21. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. Section 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 \$11.40 per month (plus franchise fees), plus interest to the date of the refund, for the period April 1, 1995 through December 31, 1995.

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, 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.

23. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaints referenced herein against the CPST rates charged by Operator in the communities referenced above, with the exception of MA0018, ARE DISMISSED.

24. IT IS FURTHER ORDERED, pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the CPST rates charged by Operator in the community of Worcester, CUID No. MA0018, IS GRANTED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

take Operator's documentation under consideration in our review of Operator's refund plan.