

**THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION**

_____)	
)	Docket No. Y-93, CUID: MA 0141
In the Matter of:)	
)	Date Issued: April 30, 1999
MediaOne of)	
Massachusetts, Inc. ¹)	
)	
Order to Set)	
Basic Service Rates)	
in the Town of Natick, MA)	
_____)	

ORDER

APPEARANCE:

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FOR: MediaOne of Massachusetts, Inc.

¹ Formerly, Continental Cablevision of Massachusetts, Inc., d/b/a Continental Cablevision.

I. INTRODUCTION

On May 20, 1994, the Massachusetts Cable Television Commission (the “Cable Commission”), now the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy,² issued a rate order for the Town of Natick (“Natick”), concerning the basic service tier (“BST”) cable rates of Continental Cablevision of Massachusetts, Inc., now known as MediaOne of Massachusetts, Inc.³ (“MediaOne” or the “Company”). In the Rate Order, the Cable Commission determined that the BST rates for Natick were unreasonable and ordered the Company to refund with interest the overcharges to the BST subscribers in Natick. Continental Cablevision of Massachusetts, Inc. dba Continental Cablevision, Natick, Y-93 (issued May 20, 1994) (the “Rate Order”), at 16-17. The Rate Order directed the Company to submit a refund plan for approval. Id. On

August 4, 1994, the Cable Commission issued a letter ruling disallowing the refund plan for Natick in which the Company proposed to offset overcharges made on the BST by undercharges made on the cable programming services tier (“CPST”). The Cable Commission ordered the Company to provide rate refunds to all its Natick subscribers, including to those who subscribe to the CPST.

The Company filed with the Federal Communications Commission (“FCC”) a Request for Emergency Stay of the Letter Ruling on August 11, 1994 (the “Stay Request”) and an Appeal on September 2, 1994. The Cable Services Bureau of the FCC dismissed this appeal. Continental Cablevision of Massachusetts, Inc. d/b/a Continental Cablevision DA 94-1249, 9 FCC Rcd 6833 (released November 10, 1994). The Company made a further appeal to the full FCC, which did not affirm the Cable Services Bureau’s ruling on this appeal until almost four years later. Continental Cablevision of Massachusetts, Inc. d/b/a Continental Cablevision FCC 98-168 (released July 23, 1998) (the “Natick Order”).

On October 16, 1998, MediaOne moved for reconsideration of the Cable Commission’s Letter Ruling (the “MediaOne Motion”) or in the alternative requested a ruling from the Cable Division as to the appropriate amount of interest to be refunded.

The Cable Division forwarded the MediaOne Motion and the Natick Order to the Issuing Authority of Natick for comment on December 10, 1998. The Issuing Authority did not file any comment.

² The Cable Commission became the Cable Division effective July 1, 1997, when it became a division of the Department of Public Utilities. The Acts of 1997, Ch. 43, § 110. The Department of Public Utilities was renamed the Department of Telecommunications and Energy, effective November 25, 1997. The Acts of 1997, Ch. 164, § 2.

³ Continental Cablevision of Massachusetts, Inc. changed its name to MediaOne of Massachusetts, Inc., effective May 13, 1997.

II. DISCUSSION AND ANALYSIS

A. Inter-Tier Offset Plan

In support of its request for reconsideration of the inter-tier offset plan, MediaOne argues the local issuing authorities have latitude relative to rate regulation. MediaOne Motion at 2, citing Third Order on Reconsideration MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (released March 30, 1994) (Third Order on Reconsideration), ¶ 81. However, the FCC held that this latitude is limited to offsets *within* the BST and *not* inter-tier offsets. Cencom Cable Income Partners II, L.P.,

FCC 97-205, 12 FCC Rcd 7948 (released June 13, 1998) (Cencom Order), ¶ 22; motion for reconsideration denied in Cencom Cable Partners II, L.P., FCC 97-374, 12 FCC Rcd 22295 (released October 14, 1997) (Cencom Reconsideration Order). “None of the authorities cited by Cencom provides for aggregating revenues for services and equipment costs that are subject to review by different regulatory jurisdictions.” Cencom Order,

¶ 22. While the Cencom case differs factually from the instant case, where the Company on its rate forms inadvertently listed four channels as part of the BST, rather than on the CPST, the FCC did not base its Cencom rulings on facts specific to those in that proceeding. Rather, the FCC held that inter-tier offsets are inconsistent with the dual rate regulatory structure, which delegates BST regulation to state and local officials, while retaining CPS rate regulation at the federal level. See Cencom Order, ¶¶ 20-22; Cencom Reconsideration Order, ¶¶ 5-6.

Moreover, in the Natick Order, the FCC specifically disapproved the inter-tier offset at issue, citing its earlier rulings in the Cencom proceeding. In the Cencom Order, the FCC stated that “...allowing inter-tier offsets under the current statutory scheme would create practical problems in determining the correct BST rates for offset purposes, further burdening the administrative processes of cable rate regulation, and would be discordant with the dual regulatory structure Congress envisioned.” Cencom Order, ¶ 20.

In light of the FCC’s rulings prohibiting inter-tier rate offsets, and particularly its Natick Order, the Cable Division denies MediaOne’s motion for reconsideration of the Cable Commission’s denial of the Company’s inter-tier offset proposal. The Cable Division hereby reaffirms its decision that MediaOne shall issue refunds to all Natick subscribers, including CSPT subscribers, who were charged more than the maximum permitted rate for the basic service tier during the period at issue.

B. Accumulated Interest Waiver

In the alternative, MediaOne requests that the Cable Division “waive the interest that has accumulated” since the Cable Commission issued its order directing the Company to make refunds with interest. MediaOne Motion at 3.

The FCC's rate regulations state that "[a] franchising authority *may* order a cable operator to refund to subscribers that portion of previously paid rates determined to be in excess of the permitted tier charge..." 47 C.F.R. § 76.942(a) (Emphasis added.) The Cable Division views this provision in conjunction with FCC orders that have generally granted local and state authorities discretion in BST rate regulation. The FCC has stated: "While we have set out the general rules for regulation, we have not attempted, nor could we address, every detail of the rate regulation process. A certain amount of latitude has been left to franchising authorities." Third Order on Reconsideration ¶ 81. The FCC has also stated: "The courts have long recognized that regulatory agencies have broad discretion to choose among ratemaking methods and procedures in ratemaking determinations, provided that the resulting rates are within a range of reasonableness." Adelphia Communications Corporation: Final Resolution of Cable Programming Service Rate Complaints FCC 97-151 (released May 5, 1997), ¶ 21. Based on federal law, we find that the Cable Division has discretion regarding the treatment of accumulated interest in connection with the Company's motion.

In determining whether the Cable Division should exercise our discretion in this instance, we have considered several facts unique to this case. First, MediaOne represented that the improperly completed FCC Form 393 at issue resulted from a clerical or ministerial error. July 27, 1994 letter from Alan D. Mandl, Esq., Counsel for Continental Cablevision, to Jill M. Reddish, Acting Commissioner of the Cable Commission, at 1, n.1. According to the Company, the Cable Commission was notified of the error immediately upon its discovery. Stay Request at 2, 3. Moreover, the error appears to have occurred in connection with a corresponding *undercharge* on the CPS tier.⁴ Stay Request at 2, Natick Order, ¶ 2. Furthermore, at the time the error was made, the Company was in the process of completing a new and somewhat complex form for 95 franchises. Stay Request at 2.

Second, as a result of MediaOne's corresponding undercharge on the CPS tier the overcharge at issue was completely offset from the subscribers' perspective, due to the fact that the vast majority of Natick subscribers receive both basic and CPS tier service. With respect to BST-only subscribers, an inspection of the Cable Division's records shows that the Company fully refunded those Natick subscribers by January 30, 1995.

⁴ The Company was legally unable to recover any portion of this undercharge. Under federal law at the time, the Company was prohibited from charging subscribers to recoup lost revenues resulting from past undercharges. 47 U.S.C. § 543(c); 47 C.F.R. § 76.922(a).

⁵ When rate regulation began in 1993, 94 percent of the Company's Natick subscribers received both BST and CPST services. See Rate Order, attached FCC Form 393 at Worksheet 1. See also Natick Order, ¶ 2.

⁶ Letter dated January 30, 1995 of Joseph M. Galli, Regional Controller of Continental Cablevision, to Jill M. Reddish, Acting Commissioner of the Cable Commission. See also letter dated July 27, 1994 by Alan D. Mandl, Esq., Counsel for Continental Cablevision, to Jill M. Reddish, Acting

Third, the Town of Natick filed no opposition to MediaOne's request for a waiver of accrued interest on the order at issue.

Perhaps most important, equitable principles require us to reconsider our original order. Several years have passed since the Company first appealed our refund plan decision in 1994. According to MediaOne, as of October 31, 1998, the amount of accrued interest on the original refund judgment has risen to \$70,553, a very significant figure in comparison to the judgment itself of \$158,213. This substantial interest amount is primarily a result of the extraordinary length of time MediaOne's appeal was pending at the federal level. Requiring MediaOne to pay interest during this entire period would be more punitive than compensatory. Given the inadvertent nature of the error, we view such a punitive measure as inappropriate.

Therefore, in light of the specific factual circumstances raised by MediaOne's motion for reconsideration, we find it appropriate to order the company to pay accrued interest over a somewhat shorter, more reasonable period of time. Specifically, the Cable Division directs the Company to pay interest from the period of September 1, 1993 through July 15, 1994, the date on which MediaOne's predecessor adjusted its rate pursuant to our May 20, 1994 Rate Order⁷, plus an *additional* 12 months of interest, which we find to be a reasonable period for appellate review under the specific facts raised by this case.

III. CONCLUSION AND ORDER

Upon examining the record, the Cable Division hereby affirms our 1994 Rate Order and further finds that MediaOne shall implement a refund plan pursuant to the following directives:

1. MediaOne shall pay the full amount of its principal refund liability to all Natick subscribers who receive both the basic service tier and cable programming services tier, pursuant to our May 20, 1994 Rate Order and our August 4, 1994 letter ruling responding to the Company's initial refund plan proposal;
2. The Company shall pay interest from the period September 1, 1993 through July 14, 1994, pursuant to our May 20, 1994 Rate Order;

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Commissioner of the Cable Commission.

See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking MM Docket 92-266, FCC 94-38, 9 FCC Rcd 4119 (released March 30, 1994), at ¶¶ 135-138.

3. MediaOne shall also pay an additional 12 months of interest, covering the multi-year appeal period in this matter.

Within 14 days from the date of this Order, MediaOne shall submit a written statement to the Cable Division which, at a minimum, sets forth MediaOne's method of providing refunds to subscribers; identifies the applicable interest rate to be applied to refunds and explains how it was calculated; and explains how the rate reductions ordered herein shall be implemented. This statement, which identifies MediaOne's refund plan, is subject to the Cable Division's review.

Refunds shall be issued no later than the next full billing cycle on or after May 1, 1999. Alternatively, at its option, MediaOne may distribute the ordered refund over a maximum three-month period beginning no later than the next full billing cycle on or after May 1, 1999. If MediaOne chooses this three-month installment plan, interest would continue to accrue during the three-month period until all overcharges and interest are refunded. No later than thirty (30) days from the date of issuing refunds, MediaOne shall provide the Cable Division with a sworn statement of execution and a copy of a sample bill showing each category of refunds.

**By Order of the
Department of Telecommunications and Energy
Cable Television Division**

s/ Alicia C. Matthews

**Alicia C. Matthews
Director**

APPEALS

Appeals of any final decision, order or ruling of the Cable Division may be brought within 14 days of the issuance of said decision to the full body of the Commissioners of the Department of Telecommunications and Energy by the filing of a written petition with the Secretary of the Department praying that the Order of the Cable Division be modified or set aside in whole or in part. G.L. c. 166A, § 2, as most recently amended by St. 1997, c. 164, § 273. Such petition for appeal shall be supported by a brief that contains the argument and areas of fact and law relied upon to support the Petitioner's position. Notice of such appeal shall be filed concurrently with the Clerk of the Cable Division. Briefs opposing the Petitioner's position shall be filed with the Secretary of the Department within seven days of the filing of the initial petition for appeal.