

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

In the Matter of)	
)	File No. EB-02-TC-026
Marcus Cable Associates, LP)	
)	CUID No. TX0647 (Benbrook)
Petition for Reconsideration and Refund Plan)	

ORDER

Adopted: June 14, 2002

Released: June 17, 2002

By the Chief, Enforcement Bureau:¹

1. In this Order we consider a petition for reconsideration ("Petition") of Order, DA 98-422² ("Prior Order"), concerning the rates charged by the above-referenced operator ("Operator")³ for its cable programming services tier ("CPST") in the community referenced above. On April 3, 1998, Operator filed a petition for reconsideration of our Prior Order as well as an amended refund plan ("1998 Refund Plan"). In this Order we deny the Petition, reject Operator's 1998 Refund Plan and calculate Operator's refund liability.

2. Under the provisions of the Communications Act⁴ that were in effect at the time the complaints were filed, 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. The Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")⁵ and the Commission's rules 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"),⁶ and the Commission's rules implementing the legislation ("Interim Rules"),⁷ require that a complaint against the CPST rate be filed with the Commission by an LFA that has received more than one subscriber complaint. The filing of a valid

¹ Effective March 25, 2002, the Commission transferred responsibility for resolving cable programming services tier rate complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, FCC 02-10, 17 FCC Rcd 4672 (2002).

² *In the Matter of Marcus Cable Associates*, DA 98-422, 13 FCC Rcd 10530 (CSB 1998).

³ The term "Operator" includes Operator's successors and predecessors in interest.

⁴ 47 U.S.C. §543(c) (1996).

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

⁶ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁷ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937 (1996).

complaint triggers an obligation upon the cable operator to file a justification of its CPST rates.⁸ If the Commission finds the rate to be unreasonable, it shall determine the correct rate and any refund liability.⁹

3. Operators must use the FCC Form 1200 series to justify rates for the period beginning May 15, 1994.¹⁰ Cable operators may file an FCC Form 1210 to justify quarterly rate increases based on the addition and deletion of channels, changes in certain external costs and inflation.¹¹ 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.¹² Any incurred cost that is not projected may be accrued with interest and added to rates at a later time.¹³

4. In the Prior Order, the Cable Services Bureau rejected Operator's proposed refund plan ("1995 Refund Plan"), filed in response to Order, DA 95-307¹⁴ and concluded that Operator's CPST rates for the period beginning May 15, 1994 were unreasonable. In its Petition, Operator argues that it should have been allowed to raise the issue of inter-tier offsets for the first time when it filed its 1995 Refund Plan. Because we reject Operator's request for offsets on substantive grounds, we find the procedural argument to be moot and decline to address it. In its Petition, Operator also argues that it should be permitted to offset its past CPST overcharges with its past basic service tier ("BST") undercharges. The Commission has addressed the issue of inter-tier offsets in *Cencom Cable Income Partners ("Cencom")*.¹⁵ 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]¹⁶ that cable operators should not balance low BST rates with CPST rates that exceed the maximum permitted rate for the tier."¹⁷ Therefore, we will not allow Operator to offset its CPST overcharges with its BST undercharges and we will deny Operator's Petition on these grounds.

5. In its Petition, Operator also requests that we allow Operator to make adjustments to its

⁸ See Section 76.956 of the Commission's rules, 47 C.F.R. §76.956.

⁹ See Section 76.957 of the Commission's rules, 47 C.F.R. §76.957.

¹⁰ See Section 76.922 of the Commission's rules, 47 C.F.R. § 76.922.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *In the Matter of Sammons Communications, Inc.*, DA 95-307, 10 FCC Rcd 3824 (CSB 1995).

¹⁵ See *In the Matter of Cencom Cable Income Partners II, L.P.*, 12 FCC Rcd 7948 (1997).

¹⁶ 8 FCC Rcd 5631 (1993).

¹⁷ *Cencom* at ¶22 (footnote omitted).

1996 and 1997 FCC Form 1240s to take advantage of an extended true-up period in its initial 1996 FCC Form 1240 filing. Operator argues that it is entitled to make additional favorable adjustments to its filings because the Cable Services Bureau made corrections to the filings that reduced Operator's maximum permitted rate. We disagree. Once an operator has filed FCC Forms and supporting documentation with the Commission, which the operator has certified upon filing to be true and accurate, we are entitled to act upon that information.¹⁸ Moreover, once an order has been released concerning those FCC Forms, we will not ordinarily allow an operator to amend those FCC Forms on appeal with information that an operator should have submitted in the original certification. We therefore deny Operator's request for an adjustment to the 1996 Form 1240.

6. In addition, Operator requests that we allow Operator to offset its CPST overcharges with its CPST undercharges from a later time period. Operator requests that we allow intra-tier offsets across time periods when there is only one CPST. This would require subscribers to pay for undercharges that did not necessarily benefit them. Cross-period offsets could allow an operator to market a service by undercharging and then pass on that cost to a subsequent group of subscribers. Our mandate is to review an operator's actual CPST rates. In doing so, we ensure that an operator has correctly calculated, and is not charging above, its maximum permitted rate ("MPR"). We approve an operator's actual CPST rate if it is equal to or lower than the MPR as of the effective date of the MPR. If an operator chooses to charge less than its calculated MPR at one point in time, it cannot make up the difference at a different time by charging in excess of its calculated MPR. Operator's refund plan would require us to approve Operator's acknowledged overcharging of its CPST subscribers, which we cannot do. Therefore, we will not allow Operator to offset its CPST overcharges with CPST undercharges from a different time period.

7. Our review of Operator's 1998 Refund Plan¹⁹ reveals that the 1998 Refund Plan does not fulfill the requirements of the Refund Order. Operator did not calculate its 1998 Refund Plan in accordance with the Prior Order.²⁰ Therefore, we calculated Operator's refund liability as follows: For the period from January 21, 1994 through July 14, 1994, we calculated an overcharge of \$0.15 per month per subscriber; for the period from July 15, 1994 through April 5, 1995, we calculated an overcharge of \$0.26 per month per subscriber; for the period from April 6, 1995 through June 30, 1995, we calculated an overcharge of \$1.45 per month per subscriber; and for the month of May 1997, we calculated an overcharge of \$0.25 per month per subscriber. Our total calculation, including franchise fees plus interest on the overcharges and franchise fees through March 31, 2002 equals \$49,763.16. We order Operator to refund this amount, plus any additional interest accrued to the date of refund, to its CPST subscribers within 60 days of the release of this Order.

8. 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 Marcus Cable Associates, DA 98-422, 13

¹⁸ See *In the Matter of Time Warner Cable*, 13 FCC Rcd 7336 (1998).

¹⁹ Operator calculated a total refund liability of \$41,064.00.

²⁰ The Prior Order required Operator to determine the overcharges to cable programming service tier ("CPST") subscribers for the period stated in the Refund Order and file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount 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.

FCC Rcd 10530 (1998) IS DENIED.

9. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 76.962 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and §76.962, that Operator's Refund Plan IS NOT ACCEPTED.

10. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 76.962 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and §76.962, that Operator shall refund to subscribers in the franchise area referenced above the total amount of \$49,763.16, plus interest accruing from April 1, 2002 to the date of refund, within 60 days of the release of this Order.

11. IT IS FURTHER ORDERED, pursuant to Sections 0.111, 0.311 and 76.962 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and §76.962, that Operator file a certificate of compliance with the Chief, Enforcement Bureau, within 90 days of the release of this Order certifying its compliance with this Order.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau