

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

DA 95-938

In the Matter of)	CUID Nos. SC0065, Laurens, SC
Cencom Cable Entertainment, Inc.)	MO0079, Florissant, MO, and
)	SC0123, Mauldin, SC
)	
Cencom Cable Television, Inc.)	CUID Nos. CA0132, La Canada, CA
)	CA0875, Alhambra, CA,
)	CA0899, Walnut, CA,
)	CA1093, Pasadena, CA, and
)	NC0024 & NC0148, Lenoir NC
)	
Benchmark Filings to Support)	
Cable Programming Service Price)	

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1995

Released: May 1, 1995

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the prices that the above-captioned operators (each "Operator" and, collectively, "Operators") were charging for their cable programming service ("CPS") tiers in the communities designated above.¹ Operators have chosen to attempt to justify their prices through benchmark showings on FCC Form 393. This Order addresses the reasonableness of Operators' prices only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the prices after that date.²

¹ Operators are wholly owned subsidiaries of Crown Media, Inc., which was purchased by Charter Communications, Inc. subsequent to the time period covered by this Order. As required by the context, the term "Operators" as used in this Order includes Operators' successors in interest.

² The findings in this Order do not in any way prejudice the reasonableness of the prices for CPS service after May 14, 1994 under our new rate regulations. However, to the extent either Operator has sought to take advantage of the refund deferral period under the Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed

2. Under the Cable Television Consumer Protection and Competition Act of 1992,³ and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.⁴ Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.⁵ In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.⁶

3. The Commission's original rate regulations took effect on September 1, 1993.⁷ The Commission subsequently revised its rate regulations effective May 15, 1994.⁸ Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.⁹ Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.¹⁰ Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form

Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS prices determined herein might also apply from May 15, 1994 until the date on which such Operator implemented its CPS prices under the new regulations. See para. 3, *infra*. Further, to the extent that the prices as of March 31, 1994 are found to be excessive, reductions in Operators' prices for the period after May 14, 1994 may be required to reflect the fact that Operators' prices during the earlier period, which are used as the starting point to calculate their prices for the prospective period, was unreasonable. See 47 C.F.R. § 76.922(b)(4)(C).

³ Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

⁴ 47 C.F.R. § 76.956.

⁵ 47 C.F.R. § 76.956(b).

⁶ *Id.*

⁷ Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

⁸ 47 C.F.R. § 76.922(b).

⁹ See *Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

¹⁰ *Id.*

1200 series.¹¹

4. The first valid CPS complaint in each of the franchise areas which is the subject of this Order was completed and served on the relevant Operator and received by the Commission on the dates set forth on Appendix A.¹² Operators filed FCC Forms 393 in response; Operators have also filed amended and supplemental Form 393 filings, most recently on March 22, 1995, in response to inquiries by Commission staff.¹³

5. For CUID Nos. CA0875, Alhambra, California; NC0024 & NC0148, Lenoir, North Carolina and SC0065, Laurens, South Carolina, Operators filed Motions to Dismiss the complaints referenced in Appendix A because the complainants, municipal entities, failed to submit copies of their cable bills. We do not require municipal entities to submit cable bills since they are not expected to subscribe to the cable service at issue. We therefore deny Operators' motions.

6. Operators assert that their monthly CPS tier prices are justified by their benchmark filings because their prices are lower than or equal to the maximum permitted charges as calculated in the filings. Upon review of Operators' Form 393 filings, we have found that Operators have not correctly calculated their maximum permitted prices, and it is therefore appropriate to make the following adjustments to Operators' calculations in their Forms 393:

a. In Column G of Schedules A and C of Part III of their FCC Forms 393, Operators did not report any income tax expense due to a net operating loss.¹⁴ Operators are Subchapter C corporations and are therefore required to pay corporate income tax.¹⁵ Therefore, Operators must complete Column G on the basis of their statutory tax rate, regardless of the rate they actually paid

¹¹ 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration*, 9 FCC Rcd at 4189, n.195.

¹² In CUID Nos. NC0024 and NC0148, the local franchising authority filed a single complaint applicable to both areas.

¹³ For example, Operators filed amended FCC Forms 393 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally. *Cable Operators' Rate Justification Filings*, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

¹⁴ Facsimiles from Trudi Foushee, Esq., Green & Foushee, to FCC (March 21, 1995)

¹⁵ *Id.*

in any given year.¹⁶ By omitting its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore calculate Operators' federal income tax allowance on Column G of Schedules A and C on the basis of a 34% corporate tax rate.¹⁷ Furthermore, the Commission has stated that tax-paying business entities must gross-up their tax entries in Column G of Schedules A and C (i.e., calculate the tax as a percentage of return on investment plus tax).¹⁸ In accordance with this principle, we recalculate Column G of Schedules A and C (and subsequent steps) using a grossed-up federal income tax rate of 51.51% of Operators' return on investment.

b. Operators' Form 393, Worksheet 1, Line 104 entries do not represent their current monthly equipment revenue as of the initial date of regulation. Since Operators restructured their rates, including their equipment rates, on September 1, 1993, in an attempt to comply with the Commission's regulations, the monthly equipment cost figures they entered on Line 34 of Step G of Part III should have been close or identical to their Line 104 entries.¹⁹ However, Operators' entries on Line 104 differed substantially from their entries on Line 34. We therefore adjusted Line 104 to equal the amounts entered on Line 34.

c. In their amended filings, Operators state that they calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data they relied on when they set their CPS prices. If Operators had done so correctly (i.e., if they had completed Form 393 with accurate data, including the most recent inflation data available as of the time they set their prices), and if, based on this data, their Forms 393 indicated that their prices

¹⁶ See Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 15 (released July 30, 1993).

¹⁷ Facsimiles from Trudi Foushee, Esq., Green & Foushee, to FCC (March 21, 1995)

¹⁸ First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428, 9 FCC Rcd 1164, 1196 n. 92 (1993) ("Our provision to gross-up the return amount for income taxes applies to all tax paying business entities to the extent that they have a state or federal income tax obligation.") See also Cable Television Rate Regulation Questions and Answers Relating to FCC Form 393, Question and Answer No. 14 (released July 30, 1993) ("The federal tax expense should be calculated based upon a pre-tax return on investment.")

¹⁹ See Questions and Answers on Completion of FCC Form 393 and Associated Filing Requirements, Question and Answer No. 7 (released Nov. 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 as on Line 301.").

were reasonable, then Operators would have successfully justified their prices under paragraph 94 of the *Third Order on Reconsideration*.²⁰ However, the errors described above are of such a magnitude that the CPS prices were excessive even when set.

d. Moreover, the figures Operators used are not consistent with data on which they should have relied in setting their CPS prices. According to Operators' amended filings, Operators calculated their prices prior to September 1, 1993. Operators used Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on May 28, 1993, to complete Lines 122, 123 and 125, but Operators claimed an Adjustment Time Period extending through September 1993 (Line 124), which is inconsistent with an attempt to justify rates based on May 1993 data. Operators' calculation of the Inflation Adjustment Factor is thus incorrect.

e. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date for which Operators filed.²¹ On their amended Forms 393, Operators entered 12 months on Line 124, indicating that their filings were as of the end of September 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through September 1993, the base date Operators used in justifying their rates, of 1.028.

7. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operators have failed to justify the rates they were charging during the periods in question. Operators' showings justify the maximum reasonable CPS tier prices shown on Appendix B (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth in Appendix A) to May 14, 1994.²²

8. ACCORDINGLY, IT IS ORDERED, pursuant to Section 0.321 of the

²⁰ Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) ("*Third Order on Reconsideration*").

²¹ See 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

²² This finding is based solely on the representations of Operators and the modifications described herein. 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.

Commission's rules, 47 C.F.R. § 0.321, that Operators' Motions to Dismiss the complaints referenced in Appendix A for CUID Nos. CA0875, NC0024 & NC0148 and SC0065 ARE DENIED.

9. IT IS FURTHER ORDERED that the complaints referred to in Appendix A against the cable programming service prices charged by Operators in the areas referenced in the caption and at Appendix A, and all other complaints in these franchise areas related to the same prices, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's rules, 47 C.F.R. § 76.961, that Operators shall refund to subscribers in the communities addressed herein that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)²³ to May 14, 1994 which exceeded the maximum price for each franchise area set forth in Appendix B (plus franchise fee) per month, plus interest to the date of the refund.

11. IT IS FURTHER ORDERED that Operators shall promptly determine the overcharges to their CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file reports with the Chief, Cable Services Bureau, stating the cumulative refund amounts so determined (including franchise fees and interest), describing the calculation thereof, and describing their plans to implement the refunds within 60 days of Commission approval of those plans.

12. IT IS FURTHER ORDERED, pursuant to Section 76.922(b)(4)(C) of the Commission's rules, 47 C.F.R. § 76.922(b)(4)(C), that Operators shall, within 30 days of the release of this Order, revise their Form 1200 filings with respect to the communities listed herein, for the period beginning May 15, 1994, to reduce the monthly charge per tier as of March 31, 1994 for Tier 2 (Line A6b) to equal the maximum price in each franchise area set forth in Appendix B (plus franchise fee).²⁴

²³ Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

²⁴ We reserve the right to make further adjustments to Operators' prices for the period after May 14, 1994, upon completion of our review of Operators' Form 1200 filings.

13. IT IS FURTHER ORDERED that Operators shall place into effect, within 30 days after their submission of the revised Form 1200 filings required above, prices that reflects the reductions in the CPS rates determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

<u>CUID No.</u>	<u>Subsidiary</u>	<u>Date First Complaint Filed with FCC</u>	<u>Date Complaint Served</u>
CA0132	Cencom Cable TV, Inc.	12/22/93	12/18/93
CA0875	Cencom Cable TV, Inc.	2/28/94	2/28/94
CA0899	Cencom Cable TV, Inc.	9/3/93	10/8/93
CA1093	Cencom Cable TV, Inc.	1/5/94	1/3/94
NC0024 & NC0148	Cencom Cable TV, Inc.	2/24/94	2/24/94
MO0079	Cencom Cable Ent., Inc.	1/5/94	12/31/93
SC0065	Cencom Cable Ent., Inc.	1/10/94	1/14/94
SC0123	Cencom Cable Ent., Inc.	1/24/94	1/17/94

Appendix B

<u>CUID No.</u>	<u>Actual Rates</u>	<u>Maximum Permitted Rates</u>
CA0132	\$11.40	\$10.98
CA0875	\$11.40	\$10.98
CA0899	\$11.40	\$10.98
CA1093	\$11.40	\$10.98
NC0024 & NC0148	\$16.32	\$16.02
MO0079	\$11.46	\$11.22
SC0065	\$14.22	\$13.92
SC0123	\$14.22	\$13.97