

2. Under the Cable Television Consumer Protection and Competition Act of 1992,² 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.³ Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.⁴ In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.⁵

3. The Commission's original rate regulations took effect on September 1, 1993.⁶ The Commission subsequently revised its rate regulations effective May 15, 1994.⁷ 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.⁸ Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.⁹ Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.¹⁰

period after May 14, 1994 may be required to reflect the fact that NewChannels' price during the earlier period, which is used as the starting point to calculate its price for the prospective period, was unreasonable. 47 C.F.R. §76.922(b)(4)(c).

² Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), as amended, 47 U.S.C. § 543(c) (1993).

³ 47 C.F.R. § 76.956.

⁴ 47 C.F.R. § 76.956(b).

⁵ *Id.*

⁶ *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).

⁷ 47 C.F.R. § 76.922(b).

⁸ *See Second Order on Reconsideration*, 9 FCC Rcd at 4190, paras. 150-152.

⁹ *Id.*

¹⁰ 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189 n.195.

Procedural Matters

4. The first valid CPS complaint in each franchise area was completed and served on NewChannels and received by the Commission on the dates set forth in Appendix A.¹¹

5. NewChannels attempted to justify its CPS price through an FCC Form 393 filed on February 14, 1994 for CUID Nos. NY1345, NY1346, NY1348, NY1418, NY1419 and NY1420; on February 15, 1994 for CUID Nos. NY1344, NY1349 and NY1495; and on February 16, 1994 for CUID No. NY1421. NewChannels amended its justification on July 5, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.¹²

Discussion

6. NewChannels asserts that its monthly CPS tier price of \$12.99 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of \$12.99 as calculated in its most recent amended filing, dated July 5, 1994. Upon review, however, we have determined that NewChannels has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to NewChannels' calculations in Form 393:

a. In Column G of Schedules A and C of Part III of its FCC Form 393, NewChannels did not correctly account for its income tax expense. By placing entries in these columns, NewChannels confirms that it is a tax-paying entity (i.e., a "C" corporation). However, NewChannels incorrectly calculated its income tax by simply applying the corporate tax rate to its return on investment. 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).¹³ By understating its tax entries in Column G, an operator reduces its

¹¹ NewChannels has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider the mailing dates furnished by the complainants as the service dates.

¹² *Cable Operators' Rate Justification Filings*, DA 94-526, 9 FCC Rcd 7752 (Cab. Serv. Bur. 1994).

¹³ *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").

effective rate of return on equipment and installations and thereby could increase its CPS price. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. NewChannels calculated the Inflation Adjustment Factor on Form 393, Part II, Worksheet 1 as of the end of September 1993 using data released by the U.S. Department of Commerce on December 1, 1993. However, NewChannels incorrectly entered on Line 125 that 9 months, rather than 12 months, had passed between the end of the third quarter of 1992 and the third quarter of 1993. New Channels' calculation of the Inflation Adjustment Factor is thus incorrect.

c. We must therefore recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date for which NewChannels filed.¹⁴ On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("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 1.028 as the Inflation Adjustment Factor through September 1993, the base date NewChannels used in justifying its rates.

7. The cumulative effect of these adjustments is to reduce the maximum permitted monthly price for the CPS tier from \$12.99 to \$12.88.

Conclusions

8. Upon review of the record herein, we conclude that NewChannels' showing supports a maximum reasonable CPS tier price of \$12.88 per month (plus franchise fee) for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.¹⁵ However, we further determine that the refund at issue is such a de minimis amount that it would not serve the public interest to order a refund.

9. We further conclude that NewChannels must reflect in its FCC Form 1200 rate filing for the period after May 14, 1994 the fact that NewChannels' price during the earlier

¹⁴ 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).

¹⁵ This finding is based solely on the representations of NewChannels listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. 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.

period was unreasonable.¹⁶ We reserve the right to make further adjustments to NewChannels' price for the period after May 14, 1994 upon completion of our review of NewChannels' FCC Form 1200 rate filing.

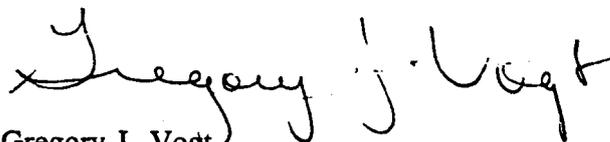
10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referenced in Appendix A against the cable programming service price charged by NewChannels Corporation in its Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495, ARE GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED that the benchmark filing submitted by NewChannels Corporation with respect to its Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495, for the period from the first filing of the first valid complaint in each franchise area (as set forth on Appendix A) to May 14, 1994, justifies a maximum price of \$12.88 per month (plus franchise fee) for the cable programming service tier.

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 NewChannels Corporation shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to Carthage, New York System, CUID Nos. NY1344, NY1345, NY1346, NY1348, NY1349, NY1418, NY1419, NY1420, NY1421 and NY1495, 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 permitted rate (plus franchise fee).

13. IT IS FURTHER ORDERED that NewChannels Corporation shall place into effect, within 30 days after its submission of the revised Form 1200 filing required above, a CPS tier price that reflects the reduction in the CPS rate determined in this Order.

FEDERAL COMMUNICATIONS COMMISSION



Gregory J. Vogt
Deputy Chief, Cable Services Bureau

¹⁶ We reviewed NewChannels' FCC Form 1200 rate filing and confirmed that NewChannels calculated its rates for the period after May 14, 1994 using the rate that we find in this Order to be unreasonable.

Appendix A

| <u>CUID No.</u> | <u>Date First Complaint Filed With FCC</u> | <u>Date Complaint Served</u> |
|-----------------|--|----------------------------------|
| NY1344 | 1-6-94 | 12-28-93 |
| NY1345 | 1-6-94 | 12-28-93 |
| NY1346 | 1-4-94 | 12-29-94 |
| NY1348 | 1-4-94 | 12-28-93 |
| NY1349 | 1-4-94 | 12-28-93 |
| NY1418 | 1-4-94 | 12-23-93 |
| NY1419 | 1-4-94 | 12-28-93 |
| NY1420 | 1-4-94 | 12-28-93 |
| NY1421 | 1-5-94 | 12-28-93 |
| NY1495 | 1-6-94 | 12-28-93 |