

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

In the Matter of:	)	<b>DA 95-784</b>
	)	
UNITED CABLE TELEVISION	)	
OF CALIFORNIA, INC. d/b/a	)	
TCI CABLEVISION OF DAVIS	)	
	)	
Appeal of Local	)	
Rate Order of City of	)	
Davis, California	)	
(FCC Community Unit ID No. CA1058)	)	

**MEMORANDUM OPINION AND ORDER**

Adopted: April 10, 1995

Released: April 12, 1995

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. On November 23, 1994, United Cablevision of California, Inc. d/b/a TCI Cablevision of Davis ("TCI"), the franchisee in the above matter, filed an appeal of a local rate order adopted on October 26, 1994 by its local franchising authority, the City of Davis, California ("the City").<sup>1</sup> The rate order establishes a new regulated rate schedule for TCI's basic service tier and associated equipment and installations.<sup>2</sup> Specifically, the City's rate order requires TCI to implement certain rate reductions and to issue refunds to subscribers, dating back to September 1, 1993.

2. Under our rules, rate orders made by local franchising authorities may be

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<sup>1</sup> Along with its appeal, TCI also filed a request for emergency stay on November 18, 1994. The City of Davis has not filed an opposition to either the stay petition nor the appeal on the merits and the Commission's deadlines for receiving both filings have passed. Because we are resolving this dispute on the merits presented in the appeal, the petition for stay has been rendered moot.

<sup>2</sup> Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. See Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act of 1934 § 623(b), 47 U.S.C. § 543(b).

appealed to the Commission.<sup>3</sup> In ruling on appeals of local rate orders, the Commission will not conduct a *de novo* review, but instead will sustain the franchising authority's decision as long as there is a reasonable basis for that decision.<sup>4</sup> Therefore, the Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules in rendering its local rate order.<sup>5</sup> If the Commission reverses a franchising authority's decision, it will not substitute its own decision but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.<sup>6</sup>

3. In its review of TCI's Form 393, the City set TCI's rates for its basic service tier and associated equipment and installations at their maximum permitted levels. The City also ordered TCI to issue refunds to its subscribers to compensate for overcharges from rates for particular services that were above their maximum permitted levels. While TCI does not dispute that it is liable for some subscriber refunds, TCI does dispute the method that the City has adopted to compute its overall refund liability, claiming that it is unduly restrictive and results in refunds beyond those allowed by our rules.

## II. DISCUSSION

### A. CALCULATION OF REFUNDS

4. According to TCI, due to mistakes it made in its initial attempt to comply with the Commission's rate regulations, some of TCI's actual rates were priced above their maximum permitted levels, while some of its rates were priced below their maximum permitted levels during the applicable period of review. As a result, TCI had been "overcharging" for some of its regulated services, while "undercharging" for others. Specifically, TCI had been overcharging its subscribers for its basic service tier and each category of regulated installations. At the same time, however, TCI had also been undercharging its subscribers for remote controls and converter boxes. In an attempt to compensate for TCI's undercharges in computing its total refund liability, the City ordered that approximately 41 percent of TCI's total undercharges for equipment be offset against the subscriber refunds that it had ordered to compensate subscribers for TCI's total overcharges

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<sup>3</sup> See 47 C.F.R. § 76.944.

<sup>4</sup> See Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, 8 FCC Rcd 5631, 5731 (1993) ("*Rate Order*"); Third Order on Reconsideration, MM Docket 92-266, 9 FCC Rcd 4316, 4346 (1994) ("*Third Recon. Order*").

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

for basic service and installations.<sup>7</sup> The City required that the remainder of TCI's undercharges be applied against the cable programming services ("CPS") tier. TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly inflated TCI's actual refund liability by not allowing TCI to offset its total amount of undercharges against the total basic service- and installation-related refunds ordered by the City.

5. FCC Form 393 is the official form used by regulators to determine whether an operator's regulated rates for programming, equipment and installations were reasonable during the time period from September 1, 1993 until May 14, 1994.<sup>8</sup> Form 393 is divided into three separate, but interrelated parts. In Part II, the operator calculates its maximum permitted programming rates, while in Part III, the operator calculates its maximum permitted equipment and installation rates. Part I is a cover sheet that lists the various programming, equipment and installation rates that have been calculated in Parts II and III and compares them to the current rates the operator has actually been charging during the period of review.

6. Under our regulations, after setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority then must determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's charges exceed maximum permitted levels during the applicable period of review.<sup>9</sup> If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to its subscribers.<sup>10</sup> If the operator's aggregate revenues that would result from its

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<sup>7</sup> Specifically, the City apportioned 41.18% of the refund offset to the basic service tier and 58.82% to the CPS tier, according to the relative number of regulated channels on each tier. The City believed that this was a fair method to apportion the offset because the converter box and remote control charges were paid by both basic tier and cable programming services subscribers.

<sup>8</sup> To the extent that an operator has sought to take advantage of the refund deferral period available under the Second Order on Reconsideration, Fourth Report an Order, and Fifth Notice of Proposed Rulemaking, MM Docket 92-266, 9 FCC Rcd 4119, 4183-4185 (1994) ("*Second Recon. Order*"), the maximum permitted rates determined under Form 393 may also apply from May 15, 1994 until the date that the operator implemented its new rates, as determined under the Form 1200 series.

<sup>9</sup> See 47 C.F.R. § 76.942.

<sup>10</sup> See *Third Recon. Order*, 9 FCC Rcd at 4353 ("Although maximum permitted rates are always determined on an unbundled basis, *i.e.*, separately for program service and equipment, refund liability may stem from bundled rates. We conclude that the refund liability should be calculated based on the difference between old bundled rates and the sum

for basic service and installations.<sup>7</sup> The City required that the remainder of TCI's undercharges be applied against the cable programming services ("CPS") tier. TCI argues that because of this misapplication of the Commission's rate regulations, the City has improperly inflated TCI's actual refund liability by not allowing TCI to offset its total amount of undercharges against the total basic service- and installation-related refunds ordered by the City.

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6. Under our regulations, after setting the various regulated rates that an operator is permitted to charge on a prospective basis, a franchising authority then must determine if the operator is liable for any subscriber refunds. A refund liability can be imposed when an operator's charges exceed maximum permitted levels during the applicable period of review.<sup>9</sup> If an operator's aggregate revenues computed from its actual rates exceed its revenues computed from its permitted rates during the period of review, the operator must refund the difference to its subscribers.<sup>10</sup> If the operator's aggregate revenues that would result from its

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permitted rates exceed its aggregate revenues computed from its actual rates, the operator will not be required to issue any refunds for that period of review. In this proceeding, any refunds to be paid by TCI should be calculated based on this method.

7. In this case, while the City found that TCI had been overcharging subscribers for its basic service tier as well as for regulated installations, it also found that TCI had been undercharging subscribers for remote controls and converter boxes. Each of these findings were appropriately made by the City because it has regulatory authority over TCI's rates for the basic service tier and associated equipment and installations.<sup>11</sup> Because it is the City that has regulatory authority over these rates, the City must also account for 100 percent of TCI's undercharges and overcharges subject to its authority in computing TCI's overall refund liability.<sup>12</sup> We have previously stated that the rate regulation for basic equipment covers all equipment used by subscribers to receive the basic service tier, even if the equipment is also used for other cable services.<sup>13</sup> Therefore, all rate calculations involving such equipment, including offsets, are properly confined to the basic tier. Apportioning refund offsets between basic and CPS tiers, based on equipment charges, would not be consistent with our regulatory scheme which considers all equipment used to receive basic service as basic equipment.<sup>14</sup> In calculating the offset, the City may not, as it suggests, apportion the amount

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of the new unbundled program service charge(s) and the new unbundled equipment charge(s). The intent of the refund mechanism is to place subscribers in the same position they would be had they been subject to reasonable rates. . . . This analysis also applies to unbundled charges where an operator was charging separately for program services and equipment but the rates did not comply with our rules (because, for example, the equipment rates were higher than actual cost). In this situation, the operator's overall refund liability will be calculated by adding the old charges together and comparing the total with the new sum of the new, unbundled program service and equipment charges").

<sup>11</sup> See Communications Act of 1934 § 623(a)(2)(A), 47 U.S.C. § 543(a)(2)(A).

<sup>12</sup> See *Third Recon. Order*, 9 FCC Rcd at 4353. However, we note that operators may not set programming service rates at higher than permitted maximum rates to recover lost equipment revenues when they voluntarily price equipment rates below their maximum permitted levels. To permit operators to do so would undermine Congress's intention to create a competitive market of cable equipment providers. See Communications Act, § 624A(c)(2)(C), 47 U.S.C. § 544A(c)(2)(C); Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: *Compatibility Between Cable Systems and Consumer Electronics Equipment*, First Report and Order, 9 FCC Rcd 1981, 1982 (1994).

<sup>13</sup> See *Rate Order*, 8 FCC Rcd at 5800; see also 47 C.F.R. § 76.923(a).

<sup>14</sup> We note that none of our decisions to date have allowed for any type of refund offsets between tiers.

of the offset between the basic service and CPS tiers; instead, it must compute TCI's refund liability by incorporating in the calculations all of those rates that are subject to its authority. We find that the City may not apportion refund offsets between the basic tier and the CPS tier.<sup>15</sup> We are remanding this issue to the City so that it can reconsider its ruling in a manner consistent with these findings.

## **B. TREATMENT OF PROMOTIONAL DISCOUNTS**

8. TCI also claims that the City, in computing TCI's refund liability, has not allowed TCI to account for any promotional discounts, offered in lieu of its published installation rates, in order to accurately compute the total actual revenues that it collected during the applicable review period. TCI asserts that the City is requiring TCI to calculate its refund liability based solely on its past published rates, without regard to promotional discounts. TCI argues that the City's method overstates the actual revenues that it collected during the period of review and, consequently, requires TCI to issue refunds to its subscribers that are greater than the level allowed under our rules.

9. Our rules provide that, in ordering subscriber refunds, franchising authorities must allow undercharges of certain permitted rates to be offset against overcharges of other permitted rates.<sup>16</sup> However, our rules do not allow operators to recover the cost of promotional discounts through a refund offset. The Commission has stated that operators should not have the ability to recover the costs of promotional offerings by increasing rates on other types of equipment.<sup>17</sup> This prohibition should also apply to the calculation of subscriber refunds. The cost of promotions should not be recovered by reducing an operator's refund liability any more than the cost of promotions should be recovered by increasing other equipment rates.

10. Our rules provide that an operator's refund liability is computed by comparing the sum of its past charges to the total of its new permitted charges.<sup>18</sup> If an operator attempted to restructure its rates in compliance with our rules, this restructuring may have resulted in certain rates being set at levels below or greater than the final permitted rate levels approved by a regulatory authority. Promotional charges are different from such undercharges because promotional charges reflect a conscious business decision to offer services or equipment to subscribers at prices below their permitted levels.

11. We believe that the benchmark rates already reflect an element of promotional

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<sup>15</sup> See *Third Recon. Order*, 9 FCC Rcd at 4353.

<sup>16</sup> See *Third Recon. Order*, 9 FCC Rcd at 4353.

<sup>17</sup> *Rate Order*, 8 FCC Rcd at 5820.

<sup>18</sup> See *Third Recon. Order*, 9 FCC Rcd at 4353.

costs because, prior to the inception of rate regulation, it was fairly routine for the cable industry to run promotional offerings.<sup>19</sup> Therefore, our benchmark regulations set an operator's programming rates at a level that should allow for the recovery of promotional costs.<sup>20</sup> To the extent that a particular operator believes that the rates set under the benchmark rules are not at this level, that operator may submit a cost-of-service showing if it wishes to justify higher rates than the benchmark rules would provide.<sup>21</sup> In such cases, the cost of promotions may be captured in general system overheads.<sup>22</sup> However, in this case, TCI used the benchmark regulations to justify its rates and makes no claim that the rates set by the City were set at an inappropriate level. Therefore, we reject TCI's argument and affirm the City's decision with respect to the treatment of promotional rates in calculating subscriber refunds.

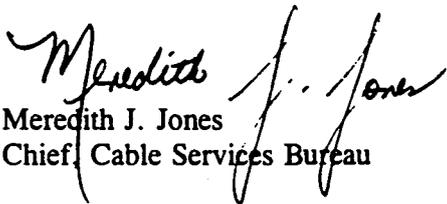
### III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that TCI Cablevision's appeal of the City of Davis' local rate order, with respect to offsetting TCI Cablevision's refund liability with its total undercharges of permitted rates **IS REMANDED** to the City for resolution in accordance with the terms of this Order.

13. **IT IS FURTHER ORDERED** that TCI Cablevision's appeal of the City of Davis' local rate order with respect to offsetting TCI Cablevision's refund liability with promotional discounts **IS DENIED**.

14. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

  
Meredith J. Jones  
Chief, Cable Services Bureau

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<sup>19</sup> See *Third Recon. Order*, 9 FCC Rcd at 4370.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*