

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

In the Matter of)	
)	CUID No. CA0255 (Santa Rosa)
Post-Newsweek Cable, Inc.)	
)	
Benchmark Filing to Support)	
Cable Programming Service Price)	

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1996

Released: April 26, 1996

By the Chief, Cable Services Bureau:

1. Here we consider complaints about the rate that the above-captioned operator ("Operator") was charging for its cable programming service ("CPS") tier in the community referenced above. Operator has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This Order addresses the reasonableness of Operator's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.¹

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

¹ The findings in this Order do not in any way prejudice the reasonableness of the rate for CPS service after May 14, 1994 under subsequent rate regulations. However, to the extent 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 Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS rate determined herein might also apply from May 15, 1994 until the date on which Operator implemented its CPS rate under our subsequent regulations. See para. 3, *infra*. Further, to the extent that the rate as of March 31, 1994 is found to be excessive, a reduction in Operator's rate for the period after May 14, 1994 may be required to reflect the fact that Operator's rate during the earlier period, which is used as the starting point to calculate its rate for the prospective period, was unreasonable. See 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.

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

4. The first valid CPS complaint in the franchise area which is the subject of this Order was completed and served on Operator on September 3, 1993 and received by the Commission on October 22, 1993. Operator filed FCC Form 393 in response; Operator has also filed amended and supplemental Form 393 filings, most recently on May 16, 1995.¹¹

5. Operator asserts that its monthly CPS tier rate of \$7.89 (plus franchise fee) is justified by its benchmark filing because its rate is equal to or lower than the maximum permitted charge of \$8.01 per month (plus franchise fee), as calculated in the filing. Upon review of Operator's Form 393 filing, we have found that it has not correctly calculated its maximum permitted rate, and it is therefore appropriate to make the following adjustments to Operator's calculations in Form 393:

- a. In Column G of Schedules A and C of Part III of its FCC Form 393,

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*, 9 FCC Rcd at 4189 n.195.

¹¹ Operator filed an amended FCC Form 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).

Operator did not correctly account for its income tax expense. By placing entries in these columns, Operator confirms that it is a tax-paying entity (i.e., a "C" corporation). However, Operator 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).¹² By understating its tax entries in Column G, an operator reduces its effective rate of return on equipment and installations and thereby could increase its CPS rate. We therefore recalculate Column G of Schedules A and C (and subsequent steps) using correctly grossed-up tax entries.

b. Operator included franchise fees of \$5,887 as part of its equipment revenue in its Form 393, Part II, Worksheet 2, Line 204.¹³ Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.¹⁴ If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover those costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.¹⁵ Accordingly, we remove the \$5,887 of franchise fees on equipment revenues from Line 204. From our review of the record, it appears that Post-Newsweek Cable, Inc. has not included franchise fees

¹² *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.")

¹³ On August 25, 1994, the local franchising authority's ("LFA") cable television consultant, the Buske Group, submitted a report to the LFA summarizing the results of its review of Operator's Form 393. This report was incorporated by reference in the LFA's order changing Operator's basic service rates and was attached to Operator's appeal of that order as filed with the Commission on October 13, 1994. The Buske Group's report and Operator's appeal both confirm that the Operator included franchise fees of \$5,887 in Part II, Worksheet 2, Line 204. City of Santa Rosa Resolution No. 21935 (September 13, 1994).

¹⁴ 47 C.F.R. § 76.923(k).

¹⁵ Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

in its equipment revenue in Part II, Worksheet 1, Line 104 of its Form 393 filed with the Commission on March 24, 1994. Therefore, we make no adjustments to the figure in Line 104.

c. Operator is charging 31,000 subscribers a \$1.00 monthly maintenance fee for the maintenance of customer owned wiring, and is recovering the related costs twice since these costs have not been unbundled from programming service rates. Accordingly, we include the amount of \$31,000 to cover actual costs, return on investment, and related taxes in Form 393, Part III, Schedule C, Box 3, which subsequently increases the amount of costs unbundled in Part II, Worksheet 3, Line 301 when determining monthly programming rates.

d. Operator's 26.9% allocation of its technical costs to customer equipment and installation on Line 2, Step A, Part III, is understated. Accordingly, we have adjusted Line 2, Step A, to 31.37% as recalculated by the LFA's cable television consultant and confirmed by data provided by Operator.¹⁶ This adjustment subsequently increases the amount of equipment and installation costs unbundled from the maximum permitted rate for the CPS tier on Part II, Worksheet 3, Line 301, when determining monthly programming rates.

e. Because of these errors, we conclude that Operator has failed to demonstrate that its rate for the CPS tier was not unreasonable. We will therefore set a rate for this tier, incorporating the adjustments discussed above. In doing so, we must also recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1. On its Form 393, Operator apparently calculated the Inflation Adjustment Factor using data it relied on when it set its CPS rate. If, based on this data, Form 393 indicated that Operator's rate was reasonable, then Operator would have successfully justified its price under paragraph 94 of the *Third Order on Reconsideration*.¹⁷ However, Operator has not shown that its rate was reasonable, so we must recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date that Operator timely filed FCC Form 393.¹⁸ 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 an Inflation Adjustment Factor

¹⁶ The Buske Group, the LFA's cable television consultant, re-estimated the allocation percentage and reported hours with information that Post-Newsweek provided in its summary of installation activity for the first quarter of 1994.

¹⁷ *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316, 4348 (1994).

¹⁸ 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).

of 1.030 through October 1993.

6. Upon review of the record herein, and having incorporated the adjustments discussed above, we conclude that Operator has failed to justify the rate it was charging during the period in question. Operator's showing justifies a maximum reasonable CPS tier rate of \$7.81 per month (plus franchise fee) for the period from October 22, 1993 to May 14, 1994.¹⁹

7. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaint referenced herein against the cable programming service rate charged by Operator in the franchise area referenced in the caption, and all other complaints in this franchise area related to the same rate, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

8. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Operator shall refund to subscribers in the franchise area referenced in the caption that portion of the amount paid for cable programming service for the period from October 22, 1993²⁰ to May 14, 1994 which exceeded the maximum rate of \$7.81 per month (plus franchise fee), plus interest to the date of the refund.

9. IT IS FURTHER ORDERED that Operator shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so 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.

¹⁹ This finding is based solely on the representations of Operator 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.

²⁰ 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).

10. 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 Operator shall, within 30 days of the release of this Order, revise its Form 1200 filing with respect to the franchise area referenced in the caption, 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 price of \$7.81 (plus franchise fee).²¹

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

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

²¹ We reserve the right to make further adjustments to Operator's price for the period after May 14, 1994, upon completion of our review of Operator's Form 1200 filing.