



**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

D.T.C. 13-10

November 26, 2014

Petition of Time Warner Cable for Review of FCC Forms 1240 and Form 1205 for the Great Barrington, North Adams, and Pittsfield Systems.

RATE ORDER

APPEARANCES:

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FOR: TIME WARNER CABLE INC.
Petitioner

I. INTRODUCTION

In this Order, the Department of Telecommunications and Cable (“Department”) approves Time Warner Cable Inc.’s (“Time Warner” or “Company”) proposed Maximum Permitted Rates (“MPR”) and Operator Selected Rates (“OSR”) for basic service tier programming for the Great Barrington, North Adams, and Pittsfield systems. The Department rejects Time Warner’s proposed installation and equipment rates for the basic service tier.

II. PROCEDURAL HISTORY

Time Warner filed its Federal Communications Commission (“FCC”) Forms 1240 and Form 1205 with the Department on November 27, 2013, proposing to establish the MPRs and the Company’s OSRs for equipment, installation, and basic service tier programming (“Petition”).¹ See Ex. 1; Ex. 2; Ex. 4; Ex. 5. In its Forms 1240, Time Warner proposed increased MPRs and OSRs for its monthly basic service tier programming in the Great Barrington, North Adams, and Pittsfield systems. Ex. 2; Ex. 4; Ex. 5. Time Warner proposed that the new rates become effective on March 1, 2014. Ex. 2; Ex. 4; Ex. 5. In its Form 1205, Time Warner proposed to decrease the MPR and its OSR for its remote control, and proposed to increase the MPRs and its OSRs for all other equipment and for all installation charges. See Ex. 1.

On April 28, 2014, the Department issued its First Set of Information Requests to Time Warner. Time Warner filed its responses on May 19, 2014. The Department held a public and evidentiary hearing on Time Warner’s Petition on June 12, 2014, during which it issued five Record Requests. Time Warner filed its responses to the Department’s Record Requests on July 10, 2014. On August 8, 2014, the Department requested additional information from Time

¹ Citations in this Order to Time Warner’s Form 1205 are to “Ex. 1.” Citations to Time Warner’s revised Form 1240 for the Great Barrington system (filed on May 19, 2014) are to “Ex. 2.” Citations to Time Warner’s revised Form 1240 for the Pittsfield system (filed on May 19, 2014) are to “Ex. 4.” Citations to

Warner regarding (1) Time Warner's proposed charge for the "Navigator," (2) Time Warner's proposed hourly service charge, and (3) Time Warner's proposed Additional Outlet (A/O) Service Fee. Letter from Sean M. Carroll, Hearing Officer, Dep't, to John E. Fogarty, Esq., Vice President & Assistant Chief Counsel, Time Warner (Aug. 8, 2014) ("Hearing Officer Letter"). Time Warner replied on August 22, 2014. Letter from John E. Fogarty, Esq., Vice President & Assistant Chief Counsel, Time Warner, to Sean M. Carroll, Hearing Officer, Dep't (Aug. 22, 2014) ("Fogarty Letter"). The evidentiary record includes Time Warner's exhibits,² Time Warner's responses to the Department's Information Requests, the public and evidentiary hearing transcript, Time Warner's responses to the Department's five Record Requests, and the Fogarty Letter.

III. REVIEW OF TIME WARNER'S FCC FORMS 1240

On its Forms 1240, Time Warner proposed increasing its MPRs and OSRs for its basic service tier programming for the Great Barrington, North Adams, and Pittsfield systems. Ex. 2; Ex. 4; Ex. 5. The Department determines that Time Warner's Forms 1240 were prepared in compliance with federal law, and the Department approves Time Warner's proposed basic service tier programming rates. *See* 47 C.F.R. § 76.922(a).

Form 1240 allows a cable operator to update annually its basic service tier programming rates to account for inflation, changes in the number of regulated channels, and changes in external costs, including programming costs, copyright costs, and franchise related costs. *Id.* § 76.922(e). So that rates can be adjusted on Form 1240 for projections in external costs, or for projected changes to the number of regulated channels, the cable operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. *Id.* § 76.922(e)(2)(ii)(A),

² Time Warner's exhibits include Time Warner's FCC Forms 1240, Time Warner's FCC Form 1205, Time Warner's proof of cablecasting, and Time Warner's proof of publication of the hearing notice.

(iii)(A). Projections involving copyright fees, retransmission consent fees, other programming costs, FCC regulatory fees, and cable specific taxes are presumed to be reasonably certain and reasonably quantifiable. *Id.* § 76.922(e)(2)(ii)(A).

The FCC's rate regulations establish the standard under which the Department must review rate adjustments on the FCC Form. *Id.* § 76.922(a). Specifically, the FCC directs local rate regulators, such as the Department, to ensure that the approved rates comply with the Communications Act of 1934, as amended ("Communications Act"), and do not exceed the maximum permitted charges calculated by the FCC's rate forms. *Id.* The Department may accept basic service tier rates that do not exceed the approved maximum permitted charge as determined by federal regulations. *Id.* § 76.922(c). The Department only approves rates it deems reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, §§ 2, 15; 47 C.F.R. § 76.937(d)-(e). A cable operator has the burden to demonstrate that its proposed rates for basic service tier programming comply with Section 623 of the Communications Act. 47 U.S.C. § 543; *In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Report & Order & Further Notice of Proposed Rulemaking*, FCC 93-177, ¶ 128 (rel. May 3, 1993) ("1993 FCC Rate Order"); 47 C.F.R. § 76.937(a).

In addition, the FCC permits cable operators to report projected costs, including costs associated with programming, that they believe are reasonably certain and reasonably quantifiable. *Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Report & Order & Further Notice of Proposed Rulemaking*, FCC 95-397, ¶¶ 72-73 (rel. Sept. 22, 1995). In particular, the FCC has

built into its Form 1240 a true-up mechanism to account for actual costs that vary from those Projected Period estimates.³

Time Warner's proposed MPRs of \$20.00 for the Great Barrington system, \$27.19 for the North Adams system, and \$28.83 for the Pittsfield system are reasonable. *See* Ex. 2; Ex. 4; Ex. 5. Time Warner initially included certain FCC regulatory fees in its Forms 1240 True-Up Period in error. *See* IR 1-1. Acknowledging the error, Time Warner re-filed its Forms 1240 removing the fees from its True-Up Period. *See id.* This adjustment reduced each of Time Warner's MPRs for basic service tier programming, which were still above Time Warner's OSRs for the three systems. *See id.* Additionally, there were discrepancies in Time Warner's subscriber counts between the previous year's Form 1240 and this year's Form 1240 for the North Adams system. *See* IR 1-4. Time Warner stated that it had inadvertently included data for Cheshire, an unregulated community, in the previous year's Form 1240 for the North Adams system. *Id.* Time Warner filed an amended Form 1240 for the North Adams system, correcting the error by removing the subscribers in the unregulated community. Ex. 5. This correction removed the true-up associated with the unregulated community and resulted in a slight reduction of the MPR Time Warner calculated for the North Adams system in the Form 1240 the Company filed on July 10, 2014. *See id.*; RR-2. The resulting MPR is still higher than Time Warner's OSR for the North Adams system. *See* Ex. 5. The Department finds that Time Warner appropriately amended its accounting for the North Adams system.

³ The true-up segment includes the compensation for overcharges or undercharges which have occurred during the True-Up Periods. The purpose of the true-up process is to compare the revenue a cable operator collected during the True-Up Period with the amount the operator should have been able to collect. If the sum collected is less than what should have been collected, then the operator is allowed to collect the difference during later rate periods. Conversely, if the sum collected exceeds the amount that should have been collected, then the operator must lower its rates in future rate periods to compensate subscribers for the difference. *Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services* at 5 (July 1996).

The Department finds that Time Warner's FCC Forms 1240, as revised, are reasonable and are prepared in accordance with FCC regulations. *See* 47 U.S.C. § 543; G.L. c. 166A, §§ 2, 15; 47 C.F.R. § 76.937(d)-(e). The Department therefore approves the amended Forms 1240 that Time Warner submitted on May 19, 2014, for the Great Barrington and Pittsfield systems, and on November 14, 2014, for the North Adams system.

IV. REVIEW OF TIME WARNER'S FCC FORM 1205

The Department determines that Time Warner's Form 1205 was not prepared in compliance with federal law, and the Department rejects Time Warner's proposed basic service tier equipment and installation rates. *See* 47 C.F.R. § 76.923. The Department directs Time Warner to file a refund plan in accordance with this Order. *Id.* § 76.942.

Form 1205 establishes rates for installations and equipment based upon actual capital costs and expenses. *FCC Form 1205 Instructions for Determining Costs of Regulated Cable Equip. & Installation* (July 1996). A cable operator prepares Form 1205 on an annual basis using information from its previous fiscal year. *Id.* Subscriber charges established in a Form 1205 may not exceed charges based on actual costs as determined in accordance with the FCC's regulations. *See* 47 C.F.R. § 76.923(a)(2). The cable operator bears the burden of proof to demonstrate that its proposed rates for installations and equipment comply with Section 623 of the Communications Act and the FCC's regulations. *See* 47 U.S.C. § 543; *1993 FCC Rate Order*, ¶ 128; 47 C.F.R. § 76.937(a). The FCC found that placing the burden on the cable operator is appropriate because the cable operator "possesses the factual information necessary for such a demonstration." *1993 FCC Rate Order*, ¶ 128. Thus, to meet its burden, the cable operator must provide factual information demonstrating that its rates comply with the Communications Act and FCC regulations. *See id.*; 47 C.F.R. §§ 76.937(a), (d), 76.939. Put

another way, a cable operator that does not attempt to demonstrate the reasonableness of its rates does not carry its burden of proof. *In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation Buy Through Prohibition*, MM Docket Nos. 92–262, 92–266, *Third Order on Reconsideration*, FCC 94-40, ¶ 84 (rel. Mar. 30, 1994) (“*FCC Third Rate Order*”); *see also In re Comcast Cablevision of Dallas, et al.*, CSB-A-0698, et al., DA 04-3618, *Order on Reconsideration*, ¶ 12 (rel. Nov. 18, 2004) (“*FCC Dallas Order*”) (finding that a cable operator did not meet its burden of proof when it “failed to provide information that the franchising authority requested and reasonably believed was necessary for its evaluation of the cable operator’s case”).

Upon receiving a proposed increase in equipment and installation rates, the Department must make a determination as to whether the cable operator met its burden, as well as whether the rates are reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. §§ 76.933, 76.937(d). The Department may make information requests of the cable operator that the Department reasonably believes is necessary for its evaluation of the operator’s rates. *See FCC Dallas Order*, ¶ 12. If the Department finds that the cable operator failed to provide complete information in good faith, it may find the operator in default and, “using the best information available, enter an order finding the cable operator’s rates unreasonable and mandating appropriate relief, as specified in §§ 76.940, 76.941, and 76.942.” 47 C.F.R. § 76.937(d). Whenever the Department disapproves a request for a rate increase, it must issue a written decision to that effect. *Id.* § 76.936.

In this proceeding, the Department reviews Time Warner’s Form 1205 for the fiscal year ending September 30, 2013. *See* Ex. 1. In its Form 1205, the Company proposed to decrease its

MPR and OSR for remote controls, but to increase its MPRs and OSRs for all other equipment and installation rates. *See id.*

The Department finds that Time Warner has not met the burden of proving that its Form 1205 and proposed rates therein comply with applicable law. *See* 47 U.S.C. § 543; 47 C.F.R. § 76.923. First, Time Warner did not provide requested relevant information about its proposed hourly service charge the Department needed to approve such a charge. *See, e.g.,* RR-5, Fogarty Letter at 2-6. Second, Time Warner did not provide requested relevant information the Department needed to approve its proposed Additional Outlet (A/O) Service Fee. *See* Fogarty Letter at 7. Finally, Time Warner has not met its burden of proving that the Navigator is not equipment used to receive the basic service tier. Moreover, Time Warner made no attempt to show that its charge for the Navigator is reasonable. Accordingly, the Department finds that Time Warner is in default, and using the best information available: finds that Time Warner's proposed hourly service charge, Additional Outlet (A/O) Service Fee, and fee for the Navigator are unreasonable; prescribes an hourly service charge for Time Warner; and prescribes a rate of zero for Time Warner's Additional Outlet (A/O) Service Fee and the Navigator. The Department addresses each in turn.

A. Proposed Hourly Service Charge

Time Warner proposed increasing its hourly service charge for installations and equipment but did not provide the Department with requested information needed to approve that increase. The Department thus finds Time Warner in default and, using the best information available, prescribes an hourly service charge of \$60.32.

1. *Time Warner failed to comply with the Department's requests for relevant information in regards to the Company's proposed hourly service charge*

A cable operator bears the burden of demonstrating that its proposed equipment rates comply with FCC rules. *See 1993 FCC Rate Order*, ¶ 128; 47 C.F.R. § 76.937(a). In making such a demonstration, the operator “shall comply with franchising authorities’ . . . requests for information, orders, and decisions.” 47 C.F.R. § 76.939. Further, “[a]n operator failing to comply with a reasonable data request in a timely fashion or failing to provide complete information in good faith does so at the risk of being found in default and having a rate prescribed on the basis of the best information available to the franchising authority.” *In re Comcast Cablevision of Detroit, Inc.*, CSB-A-0615, DA 00-2748, *Memorandum Opinion & Order*, ¶ 3 (rel. Dec. 7, 2000) (“*FCC Detroit Order*”); *see also In re TCI TKR of Houston, Inc.*, DA 96-2105, *Consolidated Memorandum & Order*, ¶ 13 (rel. Dec. 13, 1996) (“The determination of whether the cable operator’s proposed [hourly service charge] is reasonable is an issue left to the discretion of the local franchising authority.”); 47 C.F.R. § 76.937(d) (stating that upon a finding of default, a franchising authority may also prescribe a rate reduction and a refund).

Time Warner used a new methodology in compiling its 2013 Form 1205, choosing to include certain corporate-level costs. IR 1-6; Tr. at 23-24; RR-5. Time Warner’s new methodology resulted in a proposed 66% increase—from \$59.15 to \$97.90—in the Company’s hourly service charge.⁴ *Compare* Ex. 1, with Time Warner 2012 Form 1205. Time Warner’s

⁴ Since 2009, Time Warner’s average annual increase in its hourly service charge was 4.2%. *See Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 12-10, Time Warner Form 1205 (filed on Dec. 3, 2012) (“Time Warner 2012 Form 1205”) (establishing an hourly service charge of \$59.15); *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 11-15, Time Warner Form 1205 (filed on Nov. 2, 2011) (“Time Warner 2011 Form 1205”) (establishing an hourly service charge of \$58.49); *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 09-11, Time Warner Form 1205 (filed on July 12, 2010) (“Time Warner 2010 Form 1205”) (establishing an hourly service charge of \$55.85); *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 08-14, Time Warner Form 1205 (filed on July 30, 2009) (“Time Warner 2009 Form 1205”) (establishing an hourly service charge of \$52.32).

proposed increase prompted the Department to request information from the Company so that it could adequately analyze whether the charge was reasonable and based on actual costs. *See In re TCI of Richardson, Inc.*, File No. CSB-A-0379, et al., DA 99-1408, *Memorandum Opinion & Order on Reconsideration*, ¶¶ 23, 24 (rel. July 20, 1999) (“*FCC Richardson Order*”) (affirming that, although the magnitude of a rate increase is not dispositive of reasonableness, increases of significant magnitude “raise a question” and “may be a reason to closely examine supporting information”); 47 C.F.R. § 76.923(a)(2). The Department’s concerns included whether Time Warner’s new methodology would result in double recovery. Specifically, the Department was concerned that costs that Time Warner now assigned to its equipment basket were already included in its program service rates since those costs were not part of the unbundling Time Warner conducted pursuant to the *1993 FCC Rate Order*. Tr. at 26-28; *see also In re Jones Comm’ns of Ga./S.C., Inc.*, CSB-A-0594, CSB-A-0596, DA 04-2448, *Memorandum Opinion & Order*, ¶ 10 (rel. Aug. 4, 2004) (“*FCC Jones Order*”) (“Cable operators are not allowed to restructure equipment costs recovered through regulated BST rates without making an appropriate adjustment.”);⁵ *In re TCI Cablevision of St. Louis, Inc.*, DA 97-2099, *Memorandum Opinion & Order*, ¶¶ 18-20 (rel. Sept. 29, 1997) (“*FCC TCI-SL Order*”) (affirming a franchising authority’s rejection of this practice because it would result in double recovery for the cable operator); *In re TCI Cablevision of Nev., Inc.*, DA 96-1753, *Consolidated Order*, ¶ 14 (rel. Oct. 30, 1996) (“*FCC Nevada Order*”) (confirming that the proper inquiry is not whether claimed costs are bona fide, but whether such costs were claimed when the cable operator initially unbundled its equipment rates); *1993 FCC Rate Order*.

⁵ In its *FCC Jones Order*, the FCC remanded the case to the franchising authority because it was unclear whether costs that Jones Communications included in its equipment basket were previously included as programming services charges. *FCC Jones Order*, ¶ 10. Here, the Department specifically raised this concern to Time Warner regarding its corporate costs, but as discussed in this Order, Time Warner provided insufficient evidence to show that the Company did not double count these costs. Tr. at 26-28.

The Department made several attempts to obtain information from Time Warner sufficient for the Department to approve the Company's proposed hourly service charge. *See, e.g.,* IR 1-6, Tr. 23-29, RR-5, Hearing Officer Letter. The Department first asked Time Warner to justify its proposed 66% increase in the hourly service charge on April 28, 2014. IR 1-6 ("Provide detailed documentation justifying the increase in the Hourly Service Charge from last year's Form 1205 to this year's Form 1205," where "provide detailed documentation" meant "Provide all data, assumptions, and calculations relied upon. Provide the source of and basis for all data and assumptions employed. Include all studies, reports, and planning documents from which data, estimates, or assumptions were drawn and support for how the data or assumptions were used in developing the projections or estimates. Provide and explain all supporting workpapers"). Time Warner responded by describing its new methodology, but did not explain *how* that methodology resulted in the significant increase. *Id.* Notably, Time Warner did not include a single dollar figure in its response. *Id.*

At the June 12, 2014, evidentiary hearing, the Department again asked Time Warner to justify its proposed increase in the hourly service charge, and Time Warner again described its new methodology without more information. Tr. at 23-26. In order to elicit what it needed to evaluate the reasonableness of Time Warner's proposed hourly service charge, the Department issued a Record Request asking the Company to identify the costs that it added to its 2013 Form 1205 and to compile a sample Form 1205 for 2013 that excluded those costs. *Id.* at 28-29; RR-5. When a cable operator changes its Form 1205 methodology, the Department requests a sample Form 1205 from the operator so that the Department can conduct a sufficient analysis. *See, e.g., Petition of Comcast Cable Commc'ns, LLC to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Comcast Cable*

Commc'ns, LLC that are currently subject to rate regulation, D.T.C. 13-5 (“D.T.C. 13-5”), Record Request RR-1 (Nov. 14, 2013) (providing a Form 1205 from the prior year in a Department-requested format, in addition to the format that the cable operator used nationally, so that the Department could compare the Form 1205 under review to the similarly formatted Form 1205 from the prior year); *Petition of CoxCom, Inc. d/b/a Cox Commc'ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the Town of Holland*, D.T.C. 12-1, Information Request D.T.C. 1-5 (Oct. 18, 2012) (providing the two sample Forms 1205 that the Department requested when CoxCom, Inc. changed its Form 1205 methodology). By reviewing a sample Form 1205 containing the present year’s information but using the previous year’s methodology, the Department isolates the effect the change in methodology has on the proposed rates and thus is able to determine the reasonableness of the proposed rates under the new methodology. *See, e.g.*, Tr. at 28 (“So then we can see the specific effect that adding those costs had as opposed to the normal inflationary increases that might have been experienced by the company to get a true grip on exactly what the increase was that was related to the inclusion of these new costs that were not included in the past.”). In this case, the Department asked for the sample Form 1205 and an identification of the costs Time Warner added to its Form 1205 because the Department needed from Time Warner “some form of detailed numerical analysis, cost analysis so that [it could] at least appreciate what the changes that took place were A, from the inflationary stand point and B, from including different costs and C, from perhaps additional costs, which were incurred by the company because of the [changes in methodology].” *Id.* at 29.

In response, Time Warner repeated its previously provided description of its new methodology and included generic examples of cost categories that the Company added to this year’s Form 1205 (e.g., “Certain technology licensing and maintenance costs,” “Certain generic

software costs,” “Maintenance expenses related to set-top boxes,” and “Expenses related to the procurement, inventory storage and distribution of set-top boxes”). RR-5. However, Time Warner did not provide the requested sample Form 1205 or any numerical analysis. *Id.* Rather, Time Warner explained that it no longer had the information necessary to file the requested sample Form 1205.⁶ *Id.*

On August 8, 2014, the Department made another request to Time Warner for cost information that it needed to approve the Company’s proposed hourly service charge. Hearing Officer Letter at 2; *see also FCC Richardson Order*, ¶ 23 (“A franchising authority that ‘reasonably feels it requires clarifying or substantiating information . . . has the right to request and receive clarifying or substantiating information.’”) (quoting *FCC Third Rate Order*, ¶ 89)). Although Time Warner had described its new methodology and listed a few of the generic corporate cost categories that it added to this year’s Form 1205, the information it provided lacked any numerical analysis and thus was insufficient to be a basis for the Department to determine the reasonableness of Time Warner’s proposed hourly service charge. *See FCC Richardson Order*, ¶ 20; Tr. at 23-26; RR-5. Accordingly, and given Time Warner’s lack of responsiveness regarding specific data relevant to the Department’s analysis, the Department

⁶ Massachusetts requires every corporation subject to taxation to retain financial records for at least three years. 830 C.M.R. § 62C.25.1(7); *see also* 47 C.F.R. § 76.924(b) (requiring that cable operators maintain their accounts “in accordance with generally accepted accounting principles”). In addition, Time Warner has requested confidential treatment of certain information for a period of five years with an opportunity to request an extension, indicating that the Company expects records to be retained for at least five years. *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 11-15, *Time Warner Motion for Protective Order* (filed on June 27, 2012). The Department is concerned that Time Warner’s refusal to provide the requested sample Form 1205 is indicative of the Company’s expectation that the sample Form would show that the Company’s proposed Form 1205 does not comply with FCC rules, and that it would therefore benefit the Company simply not to provide the sample Form 1205. *Cf. In re Time Warner Cable Entm’t – Advance/Newhouse P’ship*, File No. CSB-A-0723, DA 05-2030, *Memorandum Opinion & Order*, ¶ 15 (rel. July 15, 2005) (“*FCC Time Warner Order*”) (citing *Review by the Cable Television Div. of the Dep’t of Telecomms. & Energy of FCC Forms 1240 & 1205 filed by Time Warner Cable, Inc.*, CTV 03-4, *Rate Order* at 10 (Sept. 21, 2004) (highlighting the Department’s concern that Time Warner refused to provide certain information because it would weigh against Time Warner’s burden of proof to do so)).

asked Time Warner to supplement its response to RR-5 by filing all supporting documentation used to compile this year's Form 1205. Hearing Officer Letter at 2; *See FCC Richardson Order*, ¶ 20 (indicating that although a franchising authority's request for information does not make the information relevant per se, such information may be relevant when the cable operator has failed to supply enough data for the franchising authority to determine the reasonableness of the operator's rates). The Department also offered Time Warner the opportunity to file the originally requested sample Form 1205 in lieu of filing all supporting documentation.⁷ Hearing Officer Letter at 2.

Time Warner responded with another description of its new methodology and a description of the process used to fill out its Form 1205, including a general process the Company used to calculate its hourly service charge. *See* Fogarty Letter at 2-6. However, Time Warner did not provide the requested supporting documentation or sample Form 1205. *Id.* Time Warner's response was still insufficient to allow the Department to approve the Company's proposed hourly service charge.

For example, Time Warner stated that it added "Segment Managed Expenses" and "Centrally Managed Expenses" to its Form 1205, but did not provide any specifics as to what the Company included in those cost categories or assign any dollar values to those costs. *See id.* at 3-4. Instead, Time Warner attempted to justify its proposed increase by stating:

[I]n recent years the process of consolidating divisional forms previously used to create the companywide aggregate form no longer picked up certain costs pertaining to residential CPE that were originally maintained at the divisional level but were subsequently migrated to, and recorded by, TWCs corporate level advanced technology implemented function. The 2013 Form 1205 once again includes such costs.

⁷ While a franchising authority should limit its information requests to those which are relevant to its analysis, *see FCC Richardson Order*, ¶ 20, in this case Time Warner failed to provide the requested relevant information, so the Department issued a broader information request, while still affording the Company the option of providing the requested relevant information. Hearing Officer Letter at 2.

Id. at 6. Time Warner provided no evidence in support of its claim that certain costs were included in the equipment basket many years ago, but dropped from the equipment basket in recent years. *See id.* Specifically, Time Warner did not state when the corporate costs were “no longer picked up,” choosing instead to use generalities such as “over the course of the past 22 years” and “in recent years”;⁸ Time Warner did not provide any detailed identification of the costs that were no longer picked up, instead relying on generic costs categories; and Time Warner did not provide any dollar amounts of the costs that purportedly were dropped off and then re-picked up. *Id.* Time Warner’s unexplained omission of any dollar amounts in this discussion is particularly inadequate, as the Gross Book Value of Time Warner’s proposed “Other 1” category in Schedule A of its Form 1205 increased from just over \$5 million last year to over \$445 million this year. *Compare* Ex. 1, with Time Warner 2012 Form 1205 (showing a proposed increase of 8500%). Significantly, Time Warner has not argued to the Department that the requested information is irrelevant or unnecessary to its analysis.⁹

Without the requested data, the Department cannot find that Time Warner justified its proposed increase. As noted above, the Department is concerned that Time Warner may have added corporate costs to this year’s equipment basket that were already accounted for in its program service rates. *See FCC TCI-SL Order*, ¶ 20; 47 C.F.R. § 76.937 (putting the burden of proving that its equipment rates comply with FCC rules on the cable operator). Indeed, it appears that Time Warner may have included costs as a result of a change in its policy for cost

⁸ Moreover, “in recent years,” Time Warner’s hourly service charge has increased steadily each year, making it difficult, without more, for the Department to approve of Time Warner’s claim that certain costs were suddenly “no longer picked up” in these years. Fogarty Letter at 6; Time Warner 2012 Form 1205 (establishing an hourly service charge of \$59.15); Time Warner 2011 Form 1205 (establishing an hourly service charge of \$58.49); Time Warner 2010 Form 1205 (establishing an hourly service charge of \$55.85); Time Warner 2009 Form 1205 (establishing an hourly service charge of \$52.32).

⁹ Such an argument notwithstanding, as the Department has shown herein, the requested information is relevant to the Department’s analysis. *See FCC Richardson Order*, ¶ 20.

classification rather than from a change in operations, a practice that the FCC proscribed in its *FCC Nevada Order*. *FCC Nevada Order*, ¶ 16 (“A result of changes in [a cable operator’s] policy for cost classification . . . is not a sufficient justification to include the costs on Form 1205.”).

Time Warner did not provide a sample Form 1205 as requested; any detailed analysis or breakdown of the costs that the Company added to its 2013 Form 1205; or any information that allayed the Department’s concern that Time Warner’s new methodology resulted in a double recovery. *See FCC TCI-SL Order*, ¶ 20; *FCC Nevada Order*, ¶¶ 14-16; IR 1-6; Tr. at 23-26; RR-5; Fogarty Letter at 2-6. Moreover, the information that Time Warner did provide was insufficient for the Department to approve Time Warner’s proposed hourly service charge. *See, e.g.*, Fogarty Letter at 6 (“The increases in TWC’s installation and equipment rates . . . are primarily the result of increases in the hourly service computation. The increase in the hourly service charge is attributable for the most part to increases in the costs [sic] elements that go in to that calculation.”); *see also FCC Richardson Order*, ¶ 20 (stating that cable operators must provide additional relevant information if requested by the franchising authority and needed to make its decision). Time Warner’s general description of its change in methodology does not demonstrate *how* that change resulted in a proposed 66% increase in the Company’s hourly service charge. RR-5; Fogarty Letter at 2-6. Accordingly, the Department finds that Time Warner failed to comply with the Department’s requests for relevant information regarding its hourly service charge in violation of 47 C.F.R. § 76.939. The Department finds the Company in default and its hourly service charge unreasonable pursuant to the Department’s authority in 47 C.F.R. § 76.937(d).

2. *The Department prescribes a rate for Time Warner’s hourly service charge*

Having determined that Time Warner did not justify the reasonableness of its proposed hourly service, but recognizing that a cable operator is permitted to recover actual costs plus a reasonable profit, the Department, using the best information available and pursuant to its authority under 47 C.F.R. § 76.941, prescribes an hourly service charge of \$60.32 for Time Warner. *See* 47 C.F.R. §§ 76.937(d), 76.941.

When prescribing a rate under § 76.941, a franchising authority may use the cable operator's costs from a previous year "as a starting point but should make a reasonable effort to adjust that data" to estimate what the costs would be in the relevant year. *In re Falcon First Commc'ns, L.P.*, File No. CSB-A-0313, DA 05-1270, *Memorandum Opinion & Order*, ¶ 10 (rel. Apr. 29, 2005) ("2005 FCC Falcon Order"); *see also In re Md. Cable Partners*, DA 96-2172, *Memorandum Opinion & Order*, ¶ 7 (rel. Dec. 20, 1996) ("FCC Maryland Order") (stating that a franchising authority must explain how it arrives at the reduced rate when ordering a rate reduction). For example, a franchising authority may adjust a cable operator's hourly labor rate by using "the intervening changes in the price index." *In re Falcon First Commc'ns, L.P.*, File No. CSB-A-0296, et al., DA 99-891, *Memorandum Opinion & Order*, ¶ 12 (rel. May 13, 1999) ("1999 FCC Falcon Order"). In prescribing a rate, a franchising authority may also rely on data from other cable operators. *In re Harron Commc'ns Corp. v. Mass. Cmty. Antenna Television Cmm'n*, DA 95-160, *Consolidated Order*, ¶¶ 13-14, 19-20 (rel. Feb. 7, 1995) ("FCC Harron Order"); *see also FCC Maryland Order*, ¶ 5 (stating that a franchising authority may set the rates of a nonresponsive cable operator by using financial data from cable operators in neighboring communities, or even industry averages).

Without the requested information from Time Warner regarding its proposed hourly service charge, the Department begins with the Company's hourly service charge from last year,

and adjusts that rate by using the intervening changes in the price index. *See 2005 FCC Falcon Order*, ¶ 10; *1999 FCC Falcon Order*, ¶ 12. Time Warner's previous year's hourly service charge was \$59.15. Time Warner 2012 Form 1205. According to the FCC, the intervening change in the price index for the third quarter of 2013—the quarter ending right before Time Warner filed the Petition—is 1.97%. *First Quarter 2014 Inflation Adjustment Figures for Cable Operators Using FCC Form 1240 Now Available*, DA 14-979, *Pub. Notice* at 2 (July 9, 2014). Thus, the Department applies this 1.97% inflation factor to Time Warner's previous hourly service charge of \$59.15 to reach the prescribed hourly service charge of \$60.32.¹⁰

Furthermore, the prescribed hourly service charge of \$60.32 is reasonable in light of the hourly service charges of the other cable operators in Massachusetts. *See FCC Maryland Order*, ¶ 5; *FCC Harron Order*, ¶¶ 13-14, 19-20. Charter Communications has a Department-approved hourly service charge of \$42.46; Comcast Cable Communications, LLC has a Department-approved hourly service charge of \$33.21; and CoxCom, Inc. has a Department-approved hourly service charge of \$58.54. *See Petition of Charter Commc'ns to establish and adjust the basic service tier programming, equip. & installation rates for the cmtys. served by Charter that are currently subject to rate regulation*, D.T.C. 13-8, *Rate Order* (Oct. 27, 2014) (approving as reasonable Charter Ex. 20); D.T.C. 13-5, *Rate Order* (Mar. 13, 2014) (approving as reasonable Comcast's Form 1205 as filed in response to Department Information Request 1-1); *Petition of CoxCom, Inc. d/b/a Cox Commc'ns to establish and adjust the basic serv. tier programming*,

¹⁰ As noted above, Time Warner's average annual increase in its hourly service charge since 2009 is 4.2%. *See supra* n.4. In the years where Time Warner's increase was larger than the FCC's inflation factor, Time Warner provided the Department with the information needed to approve the increase. *See Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 12-10, *Rate Order* (Nov. 25, 2013); *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 11-15, *Rate Order* (Oct. 31, 2012); *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 09-11, *Rate Order* (Dec. 15, 2010); *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams & Pittsfield Sys.*, D.T.C. 08-14, *Rate Order* (July 2, 2010).

equip., & installation rates for the Town of Holland, D.T.C. 13-3, Rate Order (Oct. 7, 2013) (approving as reasonable Cox's Form 1205 as filed in response to Department Record Request 4). Indeed, the prescribed hourly service charge of \$60.32 is still higher than the other cable operators in Massachusetts, and the Department received no information to support a finding that Time Warner's actual costs are significantly greater than other cable operators.

As a result of the foregoing, the Department prescribes an hourly service charge of \$60.32 pursuant to its authority under 47 C.F.R. § 76.941. The Department directs Time Warner to resubmit its Form 1205 using this hourly service charge and to file a refund plan for its Great Barrington, North Adams, and Pittsfield system basic service tier subscribers by December 12, 2014, to account for the resulting basic service tier equipment and installation overcharges.

B. Proposed Additional Outlet A/O Service Fee

In its Form 1205, Time Warner proposed the addition of an Additional Outlet (A/O) Service Fee but did not provide the Department with the requested information needed to approve the fee. The Department thus finds Time Warner in default and, using the best information available, prescribes a rate of zero for additional outlets.

1. Time Warner did not attempt to demonstrate the reasonableness of its Additional Outlet (A/O) Service Fee

Under FCC rules, regulated equipment includes "all of the equipment located in the subscriber's home, including . . . connections for additional television receivers." *FCC Jones Order*, ¶ 9; *see also* 47 C.F.R. § 76.923(a)(1). The cable operator bears the burden of demonstrating that its proposed equipment rates comply with FCC rules. *See 1993 FCC Rate Order*, ¶ 128; 47 C.F.R. § 76.937(a). In making such a demonstration, the operator "shall comply with franchising authorities' . . . requests for information, orders, and decisions." 47

C.F.R. § 76.939. An operator that does not attempt to demonstrate the reasonableness of its rates fails to carry its burden. *FCC Third Rate Order*, ¶ 84.

Time Warner introduced an Additional Outlet (A/O) Service Fee of \$1.50 for additional set top boxes or cableCARDS on April 1, 2014. *See* Letter from John S. Mucha, Dir., Gov't Relations, Time Warner, to Andrea Nixon, Office Manager, Dep't (Mar. 12, 2014). Time Warner, however, did not include this fee on its Form 1205. *See* Ex. 1. On August 8, 2014, the Department asked Time Warner whether basic service tier subscribers are charged this fee and the justification for the fee in the Company's FCC Forms. Hearing Officer Letter at 2. The Department asked that Time Warner provide the requested information by August 22, 2014. *Id.* On August 22, 2014, Time Warner responded by saying that it "is still researching information in order to respond to this additional request for information." Fogarty Letter at 7. Time Warner stated that it "hope[d] to be able to provide the response shortly." *Id.* The Department never received a response.

The Department finds that Time Warner failed to comply with the Department's requests for relevant information regarding its Additional Outlet (A/O) Service Fee. *See* 47 C.F.R. § 76.939. Time Warner also has not argued that this information is unnecessary or irrelevant to the Department's analysis. Since Time Warner did not include this fee in its Form 1205, the Department finds that the Company did not attempt to demonstrate the reasonableness of the fee. *See FCC Third Rate Order*, ¶ 84; 47 C.F.R. §§ 76.923(a)(1), 76.937(d), 76.939. Accordingly, the Department finds Time Warner in default and determines that its proposed Additional Outlet (A/O) Service Fee is unreasonable. *See* 47 C.F.R. § 76.937(d).

2. *The Department prescribes a rate for Time Warner's Additional Outlet (A/O) Service Fee*

Absent any information justifying the proposed Additional Outlet (A/O) Fee, the Department, pursuant to its authority under 47 C.F.R. § 76.941, using the best information available, prescribes a rate of zero for Time Warner's additional outlets. *See* 47 C.F.R. §§ 76.937(d), 76.941.

As discussed above, when prescribing a rate, a franchising authority may use the cable operator's costs from a previous year "as a starting point but should make a reasonable effort to adjust that data" to estimate what the costs would be in the relevant year. *2005 FCC Falcon Order*, ¶ 10. In doing so, a franchising authority may rely on data from other cable operators. *FCC Maryland Order*, ¶ 5; *FCC Harron Order*, ¶¶ 13-14, 19-20. When ordering a rate reduction, a franchising authority also must explain how it arrives at the reduced rate. *See FCC Maryland Order*, ¶ 7.

This is the first year that Time Warner is charging a fee for additional outlets. *See, e.g.*, Time Warner 2012 Form 1205. Therefore, using Time Warner's previous year's costs as a starting point means that the Department begins its prescription analysis with a rate of zero for additional outlets. *See 2005 FCC Falcon Order*, ¶ 10. And Time Warner provided no basis for the Department to adjust that rate as the Company provided no cost information or other justification related to its Additional Outlet (A/O) Service Fee, despite the Department's request for such information. *See* Fogarty Letter at 7; Hearing Officer Letter at 2. The Department is therefore left to look at other Massachusetts cable operators for data to estimate the cost of Time Warner's additional outlets. *See FCC Maryland Order*, ¶ 5 (stating that a franchising authority may set the rates of a nonresponsive cable operator by using financial data from cable operators in neighboring communities, or even industry averages). In Massachusetts, however, no other cable operator charges an additional outlet fee to its basic service tier subscribers. Thus, data

from other cable operators also informs the Department that a rate of zero for Time Warner's additional outlets is appropriate and reasonable. *See FCC Maryland Order*, ¶ 5; *FCC Harron Order*, ¶¶ 13-14, 19-20.

Because Time Warner provided the Department no information with which to adjust Time Warner's previous rate of zero for its additional outlets, and relying on data from other cable operators in Massachusetts, the Department prescribes a rate of zero. *See FCC Time Warner Order*, ¶ 12 (stating that Time Warner was in a better position to estimate the value of a cost than the franchising authority and that Time Warner was not permitted to "pass its burden to the regulator"); *2005 FCC Falcon Order*, ¶ 10; *FCC Maryland Order*, ¶ 7 (indicating that a franchising authority may set a rate to zero so long as it is reasonable to do so and the franchising authority explains why it is reasonable to do so). The Department orders Time Warner to include in its refund plan any Additional Outlet (A/O) Service Fees that Time Warner subscribers in regulated Massachusetts communities have paid to date. *See In re Comcast Cable Commc'ns, LLC*, File No. CSB-0749-A, et al., DA 14-364, *Order*, ¶ 15 (rel. Mar. 19, 2014) ("*FCC Comcast Order*") ("[E]quipment regulations still apply to all the equipment in a subscriber's home that is provided and maintained by the cable operator and that is used to receive the BST, even if it is also used to receive additional tiers of unregulated services."); 47 C.F.R. §§ 76.937(d), 76.942.

C. Time Warner's Navigator

In its Form 1205, Time Warner included its converter boxes but excluded the Navigator software that operates the same converter boxes. Time Warner did not meet its burden to show

that it was proper to exclude the Navigator from the Company's equipment basket.¹¹ Indeed, based on the Company's own testimony, it would be inappropriate to exclude the Navigator from the Company's equipment basket. Moreover, Time Warner did not attempt to demonstrate the reasonableness of its charge for the Navigator. Accordingly, the Department finds Time Warner in default and prescribes a rate of zero for the Navigator.

1. *Time Warner failed to prove that the Navigator is not equipment used to receive the basic service tier*

FCC rules clearly state that regulated equipment includes "all equipment in a subscriber's home, provided and maintained by the operator, that is used to receive the basic service tier." 47 C.F.R. § 76.923(a)(1). In calculating proposed equipment rates, a cable operator must include in its equipment basket "all costs associated with providing [such] customer equipment." *Id.* § 76.923(c). The cable operator bears the burden of proving that its proposed equipment rates comply with these rules. *See FCC Harron Order*, ¶ 11; *1993 FCC Rate Order*, ¶ 128; 47 C.F.R. § 76.937(a).

The Department made several requests to Time Warner to provide sufficient information for the Department to approve the Company's exclusion of the Navigator from its equipment basket, but Time Warner failed to carry its burden of proving that the exclusion complied with FCC rules. *See Tr.* at 18-23; RR-4; Hearing Officer Letter.

At the evidentiary hearing, Time Warner testified that the Navigator is "not a component of the box itself." *Tr.* at 21. However, Time Warner also testified that the Navigator "goes with every box because every box . . . has to have a Navigator attached to it to use it." *Id.* at 22. Time Warner even suggested that its converter boxes are useless without the Navigator:

¹¹ The Department makes no finding with respect to software being a part of or separate from converter boxes, generally. *See, e.g., Petition of Charter Commc'ns to establish & adjust the basic serv. tier programming, equip. & installation rates for the cmtys. served by Charter that are currently subject to rate regulation*, D.T.C. 13-8, *Rate Order* at 7 (Oct. 27, 2014).

MR. MAEL [of the Department]: Okay. So the question we are asking is given that you've indicated that everyone that has a box gets Navigator because the box is pretty much useless without it.

MRS. PATTERSON [of Time Warner]: Well, I mean, it can use this Navigator, or it can use a different Navigator. I mean, Navigator is a software that is developed by [the] company.

Id. at 22. Having been told by Time Warner that the converter box cannot function without the Navigator, the Department cannot permit the Company to unbundle the Navigator from its equipment.¹² Indeed, the discrepancy in the record prevents the Department from approving the exclusion of the Navigator from Time Warner's equipment basket. *See FCC Harron Order*, ¶¶ 11-12 (affirming a franchising authority determination to disallow certain costs because the cable operator "had failed to meet its burden of proof by demonstrating that these costs should be included in the equipment basket").

In response to questions regarding the integration of the Navigator in the function of the converter box, Time Warner argued that the Navigator is not an inherent part of a converter box's function, but rather a guide service separate from the converter provided via the converter. Fogarty Letter at 2. Time Warner used on-demand programming as a comparison as "on-demand programming is an advanced video service provided via a VOD-enabled device." *Id.* Time Warner's comparison reflects a misunderstanding of the FCC's rules. While on-demand programming is a service provided via a set-top box, it is a service that clearly is not "used to receive the basic service tier," nor is it a service that is "associated with providing customer equipment" that is used to receive the basic service tier. 47 C.F.R. § 76.923(a)(1), (c). To the

¹² The FCC recently confirmed that cable operators must unbundle basic service tier equipment and service prices. *See FCC Comcast Order*. However, Time Warner misinterprets the *FCC Comcast Order* as condoning its separate, purportedly unregulated, charge for the Navigator. *See Fogarty Letter* at 2 (citing the *FCC Comcast Order*). In the very same paragraph to which Time Warner cites, the FCC made the important distinction that "*non-BST services* were now unregulated services." *FCC Comcast Order*, ¶ 15 (emphasis added). As the Department demonstrates, Time Warner has not carried its burden of proving that the Navigator is a non-basic service tier service.

contrary, based on Time Warner's own assertions, the Navigator is integral to the function of the converter box for the basic service tier. *Compare* Fogarty Letter at 2 (stating that “the ability to receive and tune different channels” is an inherent function of the converter box), *with* Tr. at 21-22 (stating that the Navigator is necessary for a converter box to allow basic service tier subscribers to pick channels because it is “a software program that the box uses *so that* the customer can go in and pick channels”) (emphasis added). Furthermore, although stating, in contradiction of its prior testimony, that it is possible for a Time Warner subscriber to use a converter box without the Navigator, Time Warner did not support that claim by stating that any of its basic service tier subscribers actually use a digital converter box without the Navigator. *See* Fogarty Letter at 2. Indeed, Time Warner never argued that the Navigator is not “used to receive the basic service tier” or that the Navigator is a cost that is not “associated with providing customer equipment” used to receive that tier. 47 C.F.R. § 76.923(a)(1), (3).

Time Warner also did not provide any cost breakdown that would indicate that the Navigator is somehow a service separate from the box itself.¹³ The Department asked Time Warner to demonstrate its claim that the Navigator is not rate-regulated equipment under 47 C.F.R. § 76.923. Hearing Officer Letter at 1. In response, Time Warner stated—again, in contradiction of its prior testimony—that the Navigator is separate from the box. Fogarty Letter at 2. However, the Company did not provide data to support this claim. *See id.* If Time Warner had provided cost data for the Navigator in response to this request, Time Warner may have proven that the Navigator is actually separate from its converter box by showing that the

¹³ This cost information also would have been useful to the Department in its prescription of a rate for the Navigator. *See infra* section IV.C.3.

Company incurred a separate cost for the Navigator. Time Warner did not make such a showing.¹⁴

In sum, the Department finds that Time Warner has not met its burden of proving that the function and cost, if any, of the Navigator is separate from its converter box. *See FCC Harron Order*, ¶¶ 11-12; 47 C.F.R. § 76.923(a)(1). Accordingly, Time Warner was required to demonstrate the reasonableness of its charge for the Navigator. 47 U.S.C. § 543; 47 C.F.R. § 76.923(a)(1), (c).

2. *Time Warner did not attempt to demonstrate the reasonableness of its rate for the Navigator*

Given that Time Warner did not prove that the Navigator is not regulated equipment, Time Warner was required to justify its fee for the Navigator. Time Warner did not do so.

As discussed above, a cable operator must demonstrate the reasonableness of the rates for all equipment in a subscriber's home used to receive the basic service tier. 47 C.F.R. § 76.923(a)(1). An operator that does not attempt to demonstrate the reasonableness of its rates does not carry that burden. *FCC Third Rate Order*, ¶ 84. And a franchising authority may find a cable operator that does not attempt to demonstrate the reasonableness of its rates in default and, using the best information available, find the rates to be unreasonable and mandate appropriate relief, including prescribing a reasonable rate and ordering the cable operator to refund subscribers the amount they were overcharged. *FCC Time Warner Order*, ¶ 14; *FCC Third Rate Order*, ¶ 84; 47 C.F.R. §§ 76.937(d), 76.941, 76.942.

Time Warner proposed to charge its subscribers \$3.27 for the Navigator. RR-4. Since Time Warner did not show that it was proper to exclude the Navigator from its equipment

¹⁴ As addressed by the Department's findings herein, the Department is concerned that Time Warner did not provide any cost data for the Navigator because the Navigator is an inherent part of the converter box and no such separate cost data exists. *See, e.g., id.*

basket, Time Warner was required to demonstrate the reasonableness of the charge. *See* 47 U.S.C. § 543(b)(1); 47 C.F.R. §§ 76.923(a)(1), (c), 76.937(d); RR-4. Time Warner did not attempt to make such a demonstration, choosing instead to maintain its claim that the Company properly excluded the Navigator from its equipment basket. *See, e.g.*, Ex. 1; Tr. at 21-22; RR-4; Fogarty Letter at 1-2. The Department thus finds Time Warner in default and determines that Time Warner's rate for the Navigator is unreasonable. *See* 47 C.F.R. § 76.937(d) ("A franchising authority . . . may find a cable operator that does not attempt to demonstrate the reasonableness of its rates in default.").

3. *The Department prescribes a rate for the Navigator*

Having found Time Warner in default and Time Warner's fee for the Navigator unreasonable, the Department, using the best information available and pursuant to its authority under 47 C.F.R. § 76.941 prescribes a rate of zero for the Navigator. *See id.* §§ 76.937(d), 76.941.

Time Warner did not provide the Department with any cost information related to the Navigator. *See* Tr. at 20-21; RR-4. Instead Time Warner maintained that the Navigator is unregulated. *See* Tr. at 20-21; RR-4. Where a cable operator maintains during a rate proceeding that certain cost information is not necessary for the franchising authority's analysis, it is reasonable for the franchising authority to disallow those costs. *FCC Time Warner Order*, ¶¶ 6, 14-15 (finding that because Time Warner maintained that the fair market value of a channel was not relevant to the franchising authority's analysis, it was reasonable for the franchising authority to disallow the costs Time Warner claimed were associated with the channel). By claiming that the Navigator is unregulated, Time Warner indicated that the Navigator cost data was

unnecessary to the Department's analysis. Accordingly, the Department disallows any costs associated with the Navigator.

Moreover, the Department finds that any costs that Time Warner may have incurred on account of the Navigator have already been accounted for and recovered by the Company in its Form 1205. *See* Ex. 1. This is because in its Form 1205, Time Warner provided cost data seeking to justify a charge for its converter box, and as discussed above, Time Warner testified that its converter boxes could not function without the Navigator. Tr. at 22; Ex. 1. The Department does not possess any cost data for the Navigator that could lead the Department to prescribe a rate other than zero. *See FCC Harron Order*, ¶¶ 11-12 (finding that it was reasonable for the franchising authority to disallow certain costs from the cable operator's equipment basket because the operator failed to provide the franchising authority with detailed information on those costs).

Additionally, as to cost information from other cable operators, the Department does not possess any cost information from other Massachusetts cable operators that would be useful in prescribing a cost for the Navigator. *See FCC Harron Order*, ¶¶ 13, 19-20 (permitting the franchising authority to use cost data from other cable operators to estimate costs for the petitioning cable operator).

As a result of the foregoing, the Department prescribes a rate of zero for the Navigator and determines that this prescription is reasonable. *See FCC Time Warner Order*, ¶ 12 (stating that Time Warner was in a better position to estimate the value of a cost than the franchising authority and that Time Warner was not permitted to "pass its burden to the regulator"). The Department orders Time Warner to include in its refund plan any charges for the Navigator that

Time Warner subscribers in regulated Massachusetts communities have paid to date. *See FCC Comcast Order*, ¶ 15; 47 C.F.R. §§ 76.937(d), 76.942.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That Time Warner's FCC Forms 1240 for the Great Barrington and Pittsfield systems, as amended on May 19, 2014, and for the North Adams system, as amended on November 14, 2014, are APPROVED; and it is

FURTHER ORDERED: That Time Warner's FCC Form 1205, as filed on November 27, 2013, is REJECTED; and it is

FURTHER ORDERED: That Time Warner resubmit its FCC Form 1205 in accordance with this Rate Order, and file a refund plan for all of its subscribers in regulated Massachusetts communities by December 12, 2014, to account for the resulting basic service tier equipment and installation overcharges, as well as the rejection of the Additional Outlet (A/O) Service Fee and the Navigator fee.

By Order of the Department

Karen Charles Peterson

Karen Charles Peterson, Commissioner

RIGHT OF APPEAL

Pursuant to G.L. c. 25, § 5, and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court. Appeals of Department Orders on basic service tier cable rates, associated equipment, or whether a franchising authority has acted consistently with the federal Cable Act may also be brought pursuant to 47 C.F.R. § 76.944.