

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

Time Warner Cable Inc.,)	
)	
Petitioner,)	
)	
v.)	File No. _____
)	
Department of Telecommunications and)	
Cable, Commonwealth of Massachusetts,)	
)	
Respondent.)	

**REPLY OF TIME WARNER CABLE INC. TO OPPOSITION OF THE
MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

Pursuant to section 76.944 of the Commission’s rules,¹ Time Warner Cable Inc. (“TWC” or the “Company”), by its attorneys, hereby responds to the opposition (“Opposition”) filed by the Massachusetts Department of Telecommunications and Cable (“DTC”) to TWC’s appeal of the DTC’s “Rate Order” adopted on November 26, 2014.² As TWC demonstrated in its appeal and confirms below, the DTC acted arbitrarily and contrary to established precedent in rejecting TWC’s Hourly Service Charge (“HSC”), Navigator (or “Guide”) service charge, and Additional Outlet (“A/O”) Service Fee.

ARGUMENT

The DTC’s Opposition claims that TWC’s appeal should be denied because it failed to establish that the DTC acted unreasonably in finding that TWC had failed to demonstrate that its

¹ 47 C.F.R. § 76.944.
² The DTC served its Opposition on TWC both by U.S. mail and electronically. The DTC has assented to TWC filing the instant Reply on January 23, 2015, the due date as measured based on the use of the mail for service.

HSC calculation, Navigator charge, and A/O Service Fee complied with the Commission's rules.³ In fact, TWC's appeal conclusively shows that the DTC arbitrarily chose to disregard record evidence submitted by TWC during the review process that explained and justified the rates at issue. Consequently, the Commission should grant TWC's appeal and reverse the Rate Order.

I. THE RATE ORDER ARBITRARILY REJECTED TWC'S HSC CALCULATION.

In the Rate Order, the DTC stated that it was rejecting TWC's HSC calculation because TWC had failed to provide a sufficient explanation for the changes to the current HSC from the previous year's HSC.⁴ TWC's appeal pointed out that each year's HSC is prepared *de novo* and does not build on the prior year's form.⁵ TWC also demonstrated that it had responded to the DTC's requests for additional information to the best of its ability and as fully as possible and that, by requiring TWC to provide information that it knew TWC could not provide, the DTC was holding TWC to an arbitrary and unreasonable standard.⁶

The Opposition reiterates the DTC's assertion that it was reasonable for it to conclude that TWC had failed to demonstrate that its current Form 1205 HSC calculation complied with the Commission's rules, particularly those relating to the "double recovery" of costs.⁷ The DTC seeks to support this argument with references to a handful of cases (decided anywhere from ten to nearly twenty years ago) in which the Commission held that an operator's change in accounting practices and lack of information about the accounts of acquired systems did not relieve the operator of its burden to prove its current calculations do not include costs that were not unbundled in the original

³ Opposition at 1-2.

⁴ *Id.* at 7, 15.

⁵ Appeal at 5

⁶ *Id.* at 5-8.

⁷ Opposition at 4.

setting of equipment and service rates in 1993.⁸ In particular, the Opposition quotes at length from *TCI Cablevision of Oregon, Inc.*, 14 FCC Rcd 17685 (CSB 1999). However, that decision was vacated in 2001 and thus lacks any precedential value. See *TCI Cablevision of Oregon, Inc.*, 16 FCC Rcd 13285 (CSB 2001).

There are several other problems with the DTC's arguments and the cases cited in the Opposition. First, as TWC has explained, its responses to the DTC's inquiries pointed out that many of the categories of costs included in TWC's current Form 1240 are categories of costs that were unbundled but, because of changes in TWC's accounting practices, were omitted from the Company's more recent Form 1205s.⁹ The "re-inclusion" of these formerly unbundled costs was entirely proper and the cases cited by the DTC that involve the inclusion in a Form 1205 of costs that were never unbundled are inapposite. Second, TWC's appeal noted that other costs included in the current Form 1205 (and described in TWC's responses to the DTC's inquiries) are on their face new costs – costs that couldn't have been unbundled because they are not comparable to anything that existed in 1993.¹⁰ Third, requiring TWC to provide detailed information about precisely which cost items were or were not unbundled from each system included in its national form is unreasonable. To the extent that it ever was reasonable for the Commission to require cable operators to maintain such records, even from systems they acquire, the passage of time has made such a requirement patently unreasonable. Systems change hands multiple times. If an operator attests to the fact that the information required to prove the absence of double counting does not exist, the Commission must allow that attestation to serve as sufficient proof.

⁸ *Id.* at 4-6.

⁹ Appeal at 6-7.

¹⁰ *Id.* at 7.

For the Commission to agree with the DTC's rejection of TWC's HSC calculation would put TWC in an untenable position. Going forward, TWC will never be able to justify its HSC calculations and thus would always be held to nothing more than an inflation adjustment, even though the deployment of innovative technologies and services has resulted in TWC (along with the rest of the cable industry) incurring equipment-related costs that have outstripped inflation. Moreover, replacing TWC's national aggregate Form 1205 with a series of individual system-based forms is not a viable alternative. Not only would it be administratively burdensome, but TWC would still be unable to recreate the original unbundling calculations of many individual systems to the satisfaction of the DTC.

Given the passage of time (and it has been a more than a decade since the Commission last addressed this issue), the Commission should acknowledge that it is unreasonable and arbitrary for a rate regulation decision to be based on a cable operator's failure to provide information that does not exist and/or cannot be re-created.¹¹ And on the basis of that acknowledgement, the Commission should reverse the DTC's Rate Order as it pertains to TWC's HSC calculation.

II. THE RATE ORDER UNREASONABLY PROHIBITED TWC FROM CHARGING SUBSCRIBERS A FEE FOR ITS UNREGULATED NAVIGATOR AND A/O SERVICES.

For the reasons set forth in TWC's appeal, the Commission must find that the DTC exceeded its statutory authority when it ordered TWC to reduce its Navigator and A/O service charges to zero. The charges that TWC assesses for the Navigator and for A/O service are charges for service, not equipment. Moreover, neither the Navigator nor A/O service is a required part of the regulated basic service tier received by all subscribers. Consequently, the DTC, whose authority

¹¹ This arbitrariness is compounded by the fact that there is no mechanism by which a cable operator that changes its unbundling can increase or decrease its BST rates to reflect such an adjustment. Thus, for example, when TWC stopped recovering previously unbundled warehousing costs as part of its equipment "basket," it did not – and could not – increase its service rates to capture those costs.

is limited to the regulation of equipment used to receive the basic service tier and the basic service tier itself, acted *ultra vires* when it asserted jurisdiction over these optional, unregulated, non-basic service tier services.

A. The Navigator Service Charge.

In its Opposition to TWC’s appeal, the DTC has doubled down on the Rate Order’s analysis of TWC’s Navigator service charge. First, the DTC (which has never before challenged TWC for assessing a charge on those subscribers who elect to receive to lease a Navigator-enabled box and pay the Navigator service charge in order to obtain access to the advanced, interactive program guide and other elements of the Navigator service) argues that its decision to reduce the Navigator charge to zero was reasonable because TWC failed to meet its “burden of proving that its proposed equipment rates complied with FCC rules.”¹² Second, the DTC argues that it is “irrelevant” that subscribers can choose to receive the basic service tier without also subscribing to the Navigator service.¹³ Neither of these arguments withstands scrutiny.

The crux of the Opposition’s argument that the DTC’s rate regulatory jurisdiction encompasses the rate charged by TWC for the Navigator service is that the Navigator is “equipment” that is “used to receive the basic service tier.”¹⁴ Yet, just as a smartphone (equipment) is distinct from the applications (services) installed on and accessible via the phone, so too is TWC’s regulated converter box (equipment) distinct from the interactive programming guide and other components of the software-based Navigator service that can be accessed using a Navigator-enabled box.

¹² Opposition at 8.

¹³ *Id.* at 9.

¹⁴ *Id.* at 8-9.

Notwithstanding the Opposition's assertions to the contrary, the record evidence makes clear that the charge for the Navigator was (and always has been) a charge for the services that a subscriber receives when he or she opts to use a Navigator-enabled converter. More specifically, the DTC had before it testimony from TWC explaining that the Navigator software provides subscribers with an interactive electronic programming guide (and associated advanced tuning functionality).¹⁵ Indeed, as the DTC is well aware, TWC uses the nomenclature "The Guide" when referring to the Navigator service in communications with subscribers.¹⁶ This electronic guide, like the paper guides that preceded it (and which the Commission has held were not equipment subject to rate regulation¹⁷), is used by subscribers to complement and enhance their enjoyment of the basic service tier (and other tiers as well). It is not used to actually "receive" the basic service tier. For example, if the data stream that updates the content of the Navigator's interactive programming guide service component is interrupted, the electronic guide information about particular programs will not display on a subscriber's screen. But the subscriber will continue to be able to receive, tune and watch any and all of the basic service tier channels.

Thus, the DTC's assertion that "a subscriber who uses a Navigator-enabled set top box cannot receive the basic service tier without using the Navigator"¹⁸ is simply wrong. While the Opposition asserts that TWC never contradicted this finding, the fact is that TWC made clear in response to the DTC's inquiries that "it is possible for a customer to use a converter [to receive the

¹⁵ Appeal at 13. During the June 12, 2014 Public and Evidentiary Hearing on TWC's rates, TWC consistently used the term "guide" interchangeably with the term "Navigator." See, e.g., Exhibit 5 to TWC's Appeal at 18 (Mr. Mael (DTC): "What is Time Warner's Navigator?" Mrs. Poore (TWC): "That's the guide. The electronic guide.") (emphasis supplied).

¹⁶ For example, TWC's subscriber bills use the term "The Guide" when referring to the \$3.27 Navigator service charge. See Exhibit 1 hereto.

¹⁷ See *Paragon Cable, Irving, Texas*, 10 FCC Rcd 6012 (1995) ("a program guide is not an item subject to the equipment or installation regulation").

¹⁸ Opposition at 9.

basic service tier] without a navigator service, but it is not possible for a customer to use the navigator service without a converter.”¹⁹

The DTC also is wrong when it avers that the Navigator charge is assessed to all subscribers and thus is “regulated equipment.”²⁰ The record is clear that the basic service tier can be and is received by subscribers who do not have a Navigator-enabled box. The fact that some subscribers who only take the basic service tier level of video service are willing to pay both an equipment fee and a service fee in order to gain access to the interactive programming guide and other non-basic service tier services that are part and parcel of the Navigator service does not transform the Navigator service fee into a fee for equipment.

In short, TWC’s appeal is not, as the Opposition claims, based on “a game of semantics.”²¹ The DTC itself has recognized that when a basic service tier customer who wants to enhance his or her service with recording functionality is charged both a regulated fee for a DVR-enabled box that is used to receive the basic service tier channels and a separate, unregulated fee for the DVR service accessed through the box, the latter fee is unregulated.²² There is no justification for the DTC reaching a different conclusion when a basic service tier customer chooses to pay a regulated fee to lease a Navigator-enabled box and a separate – an unregulated – fee for the Navigator service in order to enhance his or her service with an interactive programming guide and the other features of the Navigator service.²³

¹⁹ Appeal at 13-14. As explained in TWC’s Appeal, the point TWC was making is that a subscriber who wants to receive the components of the Navigator service needs to lease a Navigator-enabled box (and pay a separate Navigator service charge), not that a subscriber needs the Navigator to “receive” the basic service tier channels. *Id.*

²⁰ Opposition at note 44.

²¹ *Id.* at 10.

²² Appeal at 15.

²³ The Opposition claims that the comparison of the Navigator service charge to the DVR service charge is not “apt” because “a subscriber can view the basic service tier without using the DVR service.” Opposition at note 43. However, as explained above, a subscriber can view the basic service tier without using the Navigator.

The Navigator service is not a new service. Depending on the system, prior to 2014 TWC either itemized the Navigator service charge separately or bundled it with other charges, never drawing any objection from the DTC.²⁴ The DTC's decision to assert authority over the Navigator service charge appears to have been triggered by TWC's decision to unbundle the charge from the charge for the equipment used to access the Navigator service. But that decision was entirely consistent with the Commission's order in the recent *Comcast (North Metro)* case.²⁵ Under the circumstances, the DTC's decision ordering TWC not to charge subscribers for the electronic program guide and other components of the Navigator service must be reversed.²⁶

B. The A/O Service Fee.

Turning to the A/O Service Fee, the Opposition asserts that the DTC acted reasonably in reducing that charge to zero because TWC failed to respond to the DTC's requests for further information about the A/O Service Fee.²⁷ However, the Opposition offers no explanation for the DTC's failure to take into consideration record evidence that describes who is charged the A/O Service Fee and makes clear that it is separate and distinct from the charge for certain types of equipment that a subscriber leases for additional connections.

The fact that the A/O Service Fee is an unregulated service charge (and not a charge for the equipment used to receive service on additional televisions in the subscriber's home) is, as TWC pointed out in its appeal, reflected in its description on subscriber bills and rate cards as an A/O Service Fee distinct from the charges imposed for each piece of equipment that a subscriber

²⁴ Appeal at 2, note 3.

²⁵ *Id.* at 10-11, citing *Comcast Cable Communications, LLC (North Metro)*, 29 FCC Rcd 2885 (MB 2014).

²⁶ As TWC suggested in its appeal, at very least, the Commission should clarify that the DTC's Rate Order is overbroad insofar as it would prevent TWC from charging subscribers who take services other than the BST who opt to receive the Navigator service and require refunds to such subscribers. Appeal at 16.

²⁷ Opposition at 10.

leases.²⁸ Furthermore, TWC's rate cards (copies of which the DTC attached to its Opposition) clearly state that the A/O Service Fee is charged "For 2nd and each additional Set-Top Box or CableCARD").²⁹ This is significant information that undermines the DTC's assertion that the rate cards fail to delineate which subscribers are assessed the A/O Service Fee.³⁰ The information provided on the rate cards establishes that the A/O Service Fee was not charged to basic service tier-only subscribers (who do not require a CableCARD because the basic service tier currently is not encrypted) unless they had elected to lease additional set-top boxes that would give them access unregulated, non-basic service tier services (*e.g.*, cable programming service tier(s), premium service(s), DVR service, VOD service, or the interactive programming guide and other components of the unregulated Navigator service).

On the basis of the information available to it, the DTC could and should have concluded that the A/O Service Fee was not an equipment charge but rather was an unregulated service charge. Moreover, even if the DTC was justified in ignoring the evidence and assuming that the A/O Service Fee was assessed against all subscribers, it should have limited the scope of its rate reduction and refund order to basic service tier-only video subscribers that were charged the A/O Service Fee.³¹

CONCLUSION

For the reasons stated above and in its appeal, the Commission should reverse the DTC's Rate Order insofar as it rejects TWC's HSC calculation and orders TWC to establish a charge of zero for its Navigator service and A/O service.

²⁸ Appeal at 16.

²⁹ See Opposition at Exhibit A.

³⁰ *Id.* at note 50.

³¹ Appeal at 17.

The undersigned verifies that he has read this Reply and that to the best of his knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not interposed for any improper purpose.

Respectfully submitted,

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January 23, 2015

CERTIFICATE OF SERVICE

I, **Glenda Thompson**, do hereby certify that a copy of the foregoing Reply of Time Warner Cable Inc. to Opposition of the Massachusetts Department of Telecommunications and Cable was served on the following by first class mail, postage prepaid, this 23rd day of January, 2015.

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Glenda Thompson

EXHIBIT 1

Statement date March 25, 2014



02/25	Previous balance	
	Balance last statement	149.34
	Total previous balance	149.34
03/13	Payments	
	Thank You For Your Payment	-149.34
	Total payments	-149.34
04/04-05/03	Current monthly services	
	Standard Triple Play	129.99
	Includes: Starter TV, Standard TV, Variety Pass, Standard Internet, Home Phone National, Voicemail (promotional offer expires 05/03/2014)	
	FCC Regulatory Fee	.09
	The Guide	3.27
	HD Set-Top Box	6.98
	Internet Modem Lease	5.99
	Total current monthly services	146.32
	<i>Basic tier (Starter TV) may be purchased by itself for \$12.79 per month</i>	
	Taxes, fees & surcharges	
	Franchise Fee	3.86
	State and Local Sales Tax	.93
	E911 Surcharge	.75
	TWC Regulatory Recovery Fee	.27
	Federal Universal Svc. Recovery Fee	1.51
	LNP Fee	.03
	Total taxes, fees & surcharges	7.35
	Total due on April 16, 2014	\$153.67

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For information on any upcoming programming changes, please consult the Legal Notices published on the first and third Wednesday of each month in the Berkshire Eagle. Customers can also visit our website at twc.com

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