



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
Cable Television Division**

ORDER ON COMPLIANCE FILING

CTV 03-5

Review by the Cable Television Division of the Department of Telecommunications and Energy of Federal Communications Commission Forms 1240, 1205 and 1235 filed by Adelphia Cable Communications, Inc.

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FOR: Adelphia Cable Communications, Inc.
Petitioner

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Intervenor

I. INTRODUCTION

On August 23, 2004, the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy issued a Rate Order concerning Adelphia Cable Communications, Inc.’s (“Adelphia” or “the Company”) proposed Federal Communications Commission (“FCC”) Forms 1240, 1205 and 1235 for its regulated Massachusetts communities. Adelphia Cable Communications, Inc., CTV 03-5 (2004) (“Order”). In the Order, the Cable Division determined that several of Adelphia’s proposed rates were not calculated in compliance with federal law and regulations. Id. at 5, 10. Specifically, for some communities, the Company inappropriately included certain Public, Educational, Governmental (“PEG”) access costs and, in another, inappropriately included a network upgrade surcharge in the rate calculation. Id. at 5-6, 10. As a result, the Cable Division ordered Adelphia to recalculate the rates at issue and submit revised FCC forms. The Cable Division further ordered that, in the event the revised rates were lower than the rates currently being charged, Adelphia must refund any overcharges. Id. at 6. The Cable Division directed the Company to file a plan by which the refunds would be made. Id.

On September 9, 2004, Adelphia submitted a filing to the Cable Division (“Compliance Filing”) consisting of a revised consolidated FCC Form 1240 for Abington and Rockland, a revised consolidated FCC Form 1240 for Bourne and Sandwich, and a revised consolidated FCC Form 1240 for Halifax, Pembroke and Plympton. Adelphia also submitted separate refund plans for Amesbury, Merrimac and Salisbury (Compliance Filing at 3). Here, the Cable Division reviews the Company’s filing for compliance with the Order.

II. ANALYSIS AND FINDINGS

A. PEG Access Costs

1. Introduction

In this proceeding, the Cable Division reviewed Adelphia's proposed basic service tier ("BST") maximum permitted rates ("MPR") for seven communities previously served by Harron Cablevision on three FCC Form 1240 filings. Order at 3. The forms combined neighboring communities: Abington and Rockland; Bourne and Sandwich; and Halifax, Pembroke and Plympton. Id. In calculating the proposed BST rates, Adelphia had allocated the local origination PEG access expenses it had incurred in these three systems among the three forms, based upon the number of subscribers reported on each form. Id. We found, however, that the Company actually provides local origination PEG access for only five of the seven communities. Id. at 3-4. In each of the other two, Rockland and Sandwich, the community itself operates the PEG access studio, which is funded by a percentage PEG access fee added to subscribers' bills. Id. The Cable Division found that Adelphia inappropriately charged Rockland and Sandwich subscribers for both Adelphia's local origination costs and the community's own PEG access costs. Id. We concluded that Adelphia may allocate its local origination costs only to those franchises whose subscribers receive the benefits of local origination programming. Id. at 6. We directed Adelphia to submit separate FCC Form 1240 filings for Abington, Bourne, Rockland and Sandwich, and a revised FCC Form 1240 filing for Halifax, Pembroke and Plympton. Id. We specifically directed that no Adelphia local origination costs should appear on the Rockland and Sandwich forms. Id. We further

directed that, to the extent a revised form produced a BST MPR less than the Company's current rate in that community, the Company must refund any resulting overcharges to subscribers. Id.

In its Compliance Filing, the Company recalculated its local origination costs by allocating them among the five communities for whom the Company provides local origination PEG access, resulting in a monthly per-subscriber charge of \$0.61 (Compliance Filing at 1, 5). Adelphia did not file separate FCC Forms 1240 for Abington, Bourne, Rockland and Sandwich, but instead filed consolidated forms. Adelphia explained that it wished to continue consolidated filings for these communities and determine uniform rates exclusive of PEG access costs (Compliance Filing at 1).

2. The Abington and Rockland FCC Form 1240

Adelphia's initial FCC Form 1240 for Abington and Rockland proposed a BST MPR of \$13.26 (Exh. Adelphia-1, at 4). The Company's revised FCC Form 1240 for Abington and Rockland established a BST MPR of \$12.75, since the Company included no PEG access costs on Worksheet 7 for either True-Up Period 2 or the Projected Period (Compliance Filing at 1, 11-12; 21-22). Adelphia proposed, however, to continue its current BST rate of \$13.26 in both communities. To accomplish this in Abington, the Company added \$0.51 of its recalculated local origination costs to the Abington BST MPR (id. at 1, 4). In Rockland, Adelphia maintained its rate at \$13.26¹ by adding \$0.51 of the \$2.71 monthly upgrade

¹ Subscribers in Rockland pay an additional 5 percent of the total bill to support PEG access.

surcharge to the BST MPR.² Consequently, Adelphia contends that no refund liability exists with respect to Rockland subscribers.

The Company's filing for Abington and Rockland raises two issues. The Cable Division must consider, first, whether Adelphia is permitted to maintain its current BST rate in Rockland and avoid refund liability by including a portion of the upgrade surcharge not previously claimed. Second, we must consider whether Adelphia may continue to file a consolidated FCC Form 1240 for Abington and Rockland.

A cable operator seeking to recover the costs of a system upgrade is not required to delay such recovery until the upgrade is complete and actual costs are determined. The FCC allows cable operators to file an FCC Form 1235 for pre-approval, using projected costs. Instructions to FCC Form 1235, at 2. The need for local franchising authority approval of an FCC Form 1235 filed for pre-approval would seem to suggest that the surcharge may be charged to subscribers only after it has been approved. However, FCC regulations indicate that upon simultaneous filing of FCC Forms 1235 and 1240, an operator may implement its proposed network upgrade surcharge prior to regulatory approval but subject to review and

² The Cable Division approved Adelphia's proposed FCC Form 1235 filed for all seven former Haddon communities. Order at 14, 17.

refund. 47 C.F.R. § 76.933(g)(2). This is the approach the Cable Division adopted in the Order.³

On the FCC Form 1240 that Adelphia initially filed for Abington and Rockland on November 26, 2003, the Company proposed an actual BST rate of \$15.98, which included the proposed BST MPR of \$13.27 and proposed upgrade surcharge of \$2.71 (Exh. Adelphia-1, at 4, exhibit I). Adelphia later decided to charge, effective April 1, 2004, an actual BST rate of \$13.26, foregoing recovery of the upgrade costs (Tr. at 9). Nevertheless, the proposed upgrade surcharge would have been available to Adelphia in Abington and Rockland as of April 1, 2004, had Adelphia decided to charge a BST rate higher than \$13.27. Moreover, we have found that an operator is permitted to reduce its refund amount by a previously uncharged amount of an FCC Form 1235 upgrade segment. Time Warner Entertainment-Advance/Newhouse Partnership, Order on Compliance Filing CTV 02-16 (2003), citing Marcus Cable Associates, L.P., DA 99-378 (1999). Therefore, we conclude that because the upgrade surcharge was available to Adelphia as of April 1, 2004, the Company may avoid its refund liability in Rockland and consider the upgrade as charged since April 1, 2004. We come to this conclusion reluctantly, and recognize that it is an unfortunate result for Rockland subscribers. We have determined that Rockland subscribers have overpaid for PEG access. Nonetheless, rather than refund these overcharges, the Company has altered its cost recovery

³ In 10 other Adelphia communities, the Cable Division approved BST MPRs where the Company had added part of the proposed upgrade surcharge to the FCC Form 1240 BST MPR to determine the actual BST rate charged to subscribers. The communities are: Falmouth, Great Barrington, Halifax, Lee, Lenox, Marshfield, Pembroke, Plympton, Sheffield and Stockbridge. Order at 14, 16, 17; See also Exhs. Adelphia-8, -10, -11, -14, -19, at exhibit I; Tr. at 9.

plan and now seeks to recover costs associated with an upgrade, costs which the Company originally decided to forego. Unfortunately, the remedies available to us are limited. The FCC Form 1235 ratemaking process and FCC precedent permit Adelphia to avoid refund liability in this way.

With reference to the consolidated filing, Adelphia removed all of its local origination costs from Worksheet 7, for both True-Up Period 2 and the Projected Period. A consolidated FCC Form 1240 may be filed for more than one community, if uniform services are offered in multiple communities. In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation, Uniform Rate-Setting Methodology, CS Docket No. 95-174, FCC 97-86, at 5, ¶ 12 (1997). Here, uniform services are not offered; local origination is offered in only one of the two communities. While it is necessary that Adelphia remove local origination costs for Rockland, Adelphia seeks to recover a portion of these costs from Abington subscribers. Under current FCC rules, franchise related costs such as local origination costs are calculated on Worksheet 7 of the FCC Form 1240. Instructions to FCC Form 1240, at 39.

As we noted in our Order, the FCC has stated that it would consider a requirement that an operator's uniform rates be determined exclusive of franchise related costs, adding that in such a case, the operator likely would be permitted to add these costs onto the uniform rate on a franchise-by-franchise basis. Order at 5, n.5, citing In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation, Uniform Rate-Setting Methodology, CS Docket No. 95-174, FCC 97-86, at 14,

¶ 33 (1997). The Company seeks to establish uniform rates. We have recognized, at least in principle, the merit of establishing uniform rates. Order at 5, n.5. In this case, since the rates proposed in the Compliance Filing have actually been in effect since April 1, 2004, the subscriber confusion that would ensue from a rate change is avoided. More importantly, since the Company removed the local origination costs for True-Up Period 2, even though such costs were incurred for Abington during that period, Adelphia's BST MPR in Abington is less than that would have been calculated on an individual FCC Form 1240. If Adelphia had followed our directive in the Order and submitted separate filings, the Abington filing would have included, in True-Up Period 2, local origination costs as reallocated among the five communities.⁴ Further, the Company's desire to maintain uniformity in rates for Abington and Rockland does not cause harm to Rockland subscribers. The Company would have been able to avoid refund liability in Rockland even were the Company to calculate the rates for Abington and Rockland on separate FCC Forms 1240. While the Company seeks to charge the same amount in both communities, it is not necessary that the Company consolidate a filing to accomplish this. The same result for Rockland would have occurred had Adelphia filed separately for Rockland. Therefore, we accept the consolidated filing, in this instance, because the consolidated filing causes no harm to Rockland subscribers, while it benefits Abington subscribers by computing a lower BST MPR than an individual form would have derived.

⁴ Adelphia cannot recover the amount it could have entered on the Abington form's True-Up Period 2 in its next rate filing. True-up period costs are actual costs incurred during a specific time period, and therefore they may only be reported on the FCC Form 1240 that includes this specific time period within a true-up period. Instructions to FCC Form 1240, at 4, 5. The FCC has explicitly stated that a cable operator "may not perform a true-up on the same period of time twice." Id. at 4.

Nevertheless, we make no finding on whether the Company may consolidate these filings in the future. The Company has not proposed a method by which it would calculate the true-up adjustment on the next consolidated form, particularly with respect to the local origination costs in Abington. Further, the Company did not address how it plans to reconcile the rates herein approved for Rockland and Abington with the consolidated Worksheet 8 rate, which includes local origination costs but does not include any of the rate related to the upgrade segment. If the Company intends to file a consolidated form for Abington and Rockland, it should be prepared to address these issues.

3. The Bourne and Sandwich FCC Form 1240

Adelphia submitted a consolidated FCC Form 1240 for Bourne and Sandwich as part of the Compliance Filing (Compliance Filing at 14-23). This form, like the consolidated form for Abington and Rockland, excludes all PEG access costs from Worksheet 7 for True-Up Period 2 and the Projected Period (id. at 1, 21-22). The form calculated a BST MPR of \$25.48, compared with the Company's actual BST rate in these communities of \$14.50; a difference of \$10.98 (id. at 19; Tr. at 9).⁵ Although Sandwich subscribers in theory should have a lower actual BST rate than Bourne subscribers because local origination costs are no longer included in the rate calculation, the BST MPR is so much greater than the actual rate charged in both

⁵ However, because Sandwich subscribers also pay a PEG access fee equal to 3 percent of their bill, their overall rate will be higher by 3 percent than the rate paid by Bourne subscribers.

communities that Adelphia has the discretion to establish the same BST rate in both communities, and indeed establish any rate that does not exceed the BST MPR. 47 C.F.R. § 76.922(a); Time Warner Cable, DA 00-123, at ¶ 3 (2000). We will, in this instance, accept Adelphia's consolidated filing for Bourne and Sandwich. However, we have the same concerns regarding the true-up reconciliation on the next Bourne and Sandwich filing that we have with the next Abington and Rockland filing. Therefore, while we accept the current form now, we make no finding concerning future consolidated filings.

4. The Halifax, Pembroke and Plympton FCC Form 1240

Adelphia also filed a consolidated form for Halifax, Pembroke and Plympton (Compliance Filing at 2; 24-33). The Company included its local origination PEG access costs, as recalculated at \$0.61 monthly per subscriber, on Worksheet 7, Line 707, for both True-Up Period 2 and the Projected Period (*id.* at 31-32).⁶ As a result, the BST MPR increased from \$13.03 to \$13.56 (*id.* at 2). Although Adelphia's BST MPR was \$13.03, the Company was charging subscribers \$13.70, including \$0.67 for the network upgrade surcharge (see footnote 3, above). Adelphia seeks to continue this actual rate of \$13.70 (Tr. at 9, Compliance Filing at 24). Because of the increase in the BST MPR, the Company proposed to reduce the amount of the network upgrade surcharge included in the actual rate to \$0.14, compared with \$0.67 on the original form (Compliance Filing at 24; see Exh. Adelphia-11, at exhibit I). This reduction

⁶ Adelphia reallocated its costs among the five communities receiving Adelphia's local origination programming for True-Up Period 2 and the Projected Period, using the number of subscribers in each community (Compliance Filing at 25). Therefore, the Company included only these communities' share of the total costs; approximately 40 percent (*id.*).

is in compliance with the FCC's conclusion that where an operator's BST rate charged to subscribers contains an FCC Form 1235 upgrade segment, the operator must first exhaust the entire FCC Form 1240 BST rate, in this case \$13.56, before availing itself of the upgrade segment. Bresnan Communications Company, DA 99-1779, at ¶ 7 (1999). The Cable Division finds that the consolidated FCC Form 1240 filed for Halifax, Pembroke and Plympton is in compliance with applicable law, and that the rate proposed therein is reasonable.

B. Network Upgrade Surcharge

In this proceeding, the Company had filed for pre-approval an FCC Form 1235 for Amesbury, Merrimac, and Salisbury and included the network upgrade surcharge in each community's actual BST rates. Order at 9. Subsequently, Adelphia conceded that this FCC Form 1235 did not qualify as an upgrade filing and requested that the form be withdrawn from consideration, a request the Cable Division granted. Id. at 9-10. Because the actual BST rate charged in each community exceeded the BST MPR established by its approved FCC Form 1240 less the network upgrade surcharge, the Cable Division ordered the Company to refund the difference to subscribers in these communities. Id. at 10. The Cable Division directed Adelphia to submit a filing detailing its plan to implement the refunds. Id. at 10, 17.

Adelphia submitted separate refund plans for Amesbury, Merrimac and Salisbury. Compliance Filing at 3. On the Amesbury plan, the Company included in its calculation subscribers in South Hampton, New Hampshire. The inclusion of South Hampton subscribers on the form has no effect on the refund calculation. While the Cable Division does not have

jurisdiction over these subscribers, we find it appropriate in this instance that these subscribers, who are part of the Amesbury system, receive the refund as well.

The Cable Division finds that Adelphia's refund plans for Amesbury, Merrimac and Salisbury comply with our Order. They appropriately calculate the overcharges in the BST rate owed to subscribers. We find that Adelphia's refund plans for these communities are in compliance with applicable law, and that the refunds to be paid thereunder are reasonable.

III. CONCLUSION AND ORDER

After review and consideration, the Cable Division hereby accepts, as reasonable, Adelphia's FCC Forms 1240 as submitted on September 9, 2004, for Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich.

Further, after review and consideration, the Cable Division hereby accepts, as reasonable and in compliance with applicable law, Adelphia's refund plans, as submitted on September 9, 2004, for Amesbury, Merrimac and Salisbury. The Cable Division directs Adelphia to file, within 30 days of the payment of its refunds, a report that describes: (1) the amount of the refund credited to each subscriber's bill; (2) the total amount of the refunds paid in each community.

**By Order of the
Department of Telecommunications and Energy
Cable Television Division**

**/s/ Alicia C. Matthews
Alicia C. Matthews
Director**

Issued: October 15, 2004