

Commonwealth of Massachusetts
Department of Telecommunications and Energy

April 26, 2001

D.T.E. 01-44

Appeal by CoxCom, Inc. d/b/a Cox Communications New England of the Cable Television Division's Rate Order, pursuant to G.L. c. 166A, § 2.

ORDER ON COXCOM, INC'S APPEAL OF
CABLE TELEVISION DIVISION'S RATE ORDER

APPEARANCES: Peter H. Feinberg
Gary S. Lutzker
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Alan D. Mandl
Mandl & Mandl, LLP
10 Post Office Square, Suite 630
Boston, MA 02109

FOR: COXCOM, INC. d/b/a COX
COMMUNICATIONS NEW ENGLAND
Petitioner

I. INTRODUCTION

This Order addresses an appeal of the Cable Television Division's ("Cable Division") Rate Order dated March 29, 2001, CoxCom, Inc., CTV-00-9 (2001) ("Cable Division Order") filed with the Commissioners of the Department of Telecommunications and Energy ("Department") pursuant to G.L. c. 166A, § 2. CoxCom, Inc. d/b/a Cox Communications New England ("Cox") appeals the Cable Division's rejection of its Federal Communications Commission ("FCC") Form 1240 as filed on October 23, 2000, and as amended on January 16, 2001, for the Town of Holland, Massachusetts ("Cox Appeal"). Specifically, Cox appeals the Cable Division's determination that both the original and amended FCC Forms 1240 failed to calculate and report the true-up adjustment amount¹ in compliance with applicable law.

II. PROCEDURAL HISTORY

On October 23, 2000, pursuant to 47 C.F.R. §§ 76.922, 76.923, and 76.930, Cox filed with the Cable Division proposed basic service tier ("BST") programming rates on FCC Form 1240 and equipment and installation rates on FCC Form 1205 for the Town of Holland, Massachusetts. The matter was docketed as CTV-00-9. On February 1, 2001, the Cable Division held a public hearing on Cox's filing. There were no intervenors to the proceeding.

¹ The purpose of the true-up process is to compare the revenue collected during the true-up period with the amount of revenue that should have been collected. If the sum collected is less, the cable operator is allowed to collect the difference during later rate periods. If the sum collected is more, the cable operator must lower its rates in future periods to compensate subscribers for the difference. Instructions for FCC Form 1240, at 5 (July, 1996).

On March 29, 2001, the Cable Division issued a Rate Order rejecting Cox's FCC Form 1240 filing and accepting Cox's FCC Form 1205 filing. The Cable Division determined that Cox's FCC Form 1240 was not in compliance with applicable law because of incorrect calculation and reporting of the true-up adjustment amount. Pursuant to G.L. c. 166A, § 2, Cox filed this appeal to the Department on April 12, 2001.

III. SUMMARY OF CABLE DIVISION ORDER

The Cable Division reviewed Cox's rate filings under the standard of review laid out by the FCC's rate regulations. Under these guidelines, the Cable Division reviewed FCC Form 1240 to determine whether the rates were reasonable and in compliance with the requirements of 47 U.S.C. § 543 of the Cable Television Consumer and Competition Act of 1992 as amended, 47 C.F.R. §§ 76.922(a),(c); 76.937(d),(e); 76.942 (the "Cable Act"). Cable Division Order at 1. The Cable Division found that Cox failed to comply with the applicable regulations in calculating and reporting the true-up adjustment amount on FCC Form 1240. Specifically, the Cable Division found that Cox reported the full amount of the true-up adjustment as claimed for the projected period but did not pass through the full claimed true-up amount to subscribers.² Cable Division Order at 5. The Cable Division determined that in order to comply with FCC regulations, Cox should have reported any true-up adjustment amount not being passed through to subscribers as a remaining true-up

² The full amount of the true-up adjustment Cox claimed for the projected period is \$15,361.91. See Cox's 2001 FCC Form 1240, at Line H14.

adjustment on Line H15.³ Id. The Cable Division noted that FCC Form 1240 is set up so that Cox would be able to retain any unclaimed or remaining true-up adjustment amount and pass it through to subscribers in subsequent years, but would be prevented from accruing additional interest on such amount. Id. at 4, 5.

IV. COX'S APPEAL

A. Summary of Cox's Appeal

Cox presents two primary arguments. First, Cox argues that the Cable Division misinterpreted FCC Form 1240 and the accompanying instructions and regulations by disallowing Cox's true-up adjustment unless the amount was passed through to subscribers (Cox Appeal at 6-8). Second, Cox contends that the Cable Division inappropriately concluded that it was collecting interest on interest by failing to raise its rates to the maximum permitted rate ("MPR") (id. at 7).

In addition to these primary arguments, Cox argues that the Cable Division's interpretation of FCC rules and regulations penalizes Cox for failing to charge its full MPR and serves to encourage cable operators to consistently charge the entire MPR or lose any benefit of the FCC's annual rate adjustment method (id. at 11). Cox cites FCC guidelines that allow cable operators to charge less than their MPR in support of the proposition that the Cable Division Order is in conflict with FCC principles and is also contrary to the public interest (id. citing Falcon Telecable, 15 FCC Rcd 52, at 5, 7 (1999)).

³ On Line H15, Cox entered \$0.00 as the remaining true-up adjustment amount not being passed through to subscribers. See Cox's 2001 FCC Form 1240, at Line H15.

Cox contends that its FCC Form 1240 complies fully with the letter and the spirit of FCC regulations and, therefore, the Cable Division has no authority to reject its FCC Form 1240 as filed (Cox Appeal at 5, 6). Cox bases this argument on FCC holdings that outline the power given to franchising authorities to regulate rates (id. citing TCI Cablevision of St. Louis, Inc., 9 FCC Rcd 2141, at 7 (1994)).

Cox maintains that the discretionary language in the instructions to Line H14 of FCC Form 1240 is there to distinguish discretionary inclusions from mandatory inclusions such as external costs and inflation (Cox Appeal at 9). Cox also notes these mandatory inclusions when it argues that the Cable Division is unable to determine that the difference between Cox's actual rate and its MPR is due to any true-up adjustment (id.). Cox contends that the difference can be made up of a combination of other rate segments including those mandatory segments of external costs and inflation (id.). Cox also argues that the Cable Division has allowed similar true-up schemes in the past (id. at 1, 10, citing Adelphia Cable Communications, D.T.E. Y-98 INC at 11 (1999)). Finally, Cox argues that the Cable Division Order requires it to forfeit its right to raise rates because it failed to raise rates at the earliest opportunity (Cox Appeal at 12).

B. Standard of Review

General Law Chapter 166A, § 2 provides that “any decision, order, or ruling of the [Cable] Director may be brought” to the Commissioners of the Department. General Laws c. 166A, § 2 is silent on the standard of review for an appeal of a Cable Division decision. One option for the Commission would be to conduct a de novo proceeding using the standard of review set forth in 207 C.M.R. § 4.04. The 14-day review period embodied in G.L. c. 166A, § 2, however, precludes a meaningful de novo review. In reviewing the appeals of the Cable Division’s decisions, we will not conduct a de novo review. This determination is consistent with Section 2's reference to “question[s] of substantive law.” In determining the appropriate standard of review, the Commission notes that the FCC has established a standard of reasonableness applicable to its review of Cable Division rate orders. See Harron Communications Corp., CSB-A-0622, at 1-2 (2000). Therefore, we will affirm the Cable Division’s decision as long as there is a reasonable basis for the decision in federal law and in the Cable Division’s own statute, regulations, and precedent. See City of Cambridge, D.T.E. 00-49/50, at 10-11, Interlocutory Order (May 30, 2000).

C. Analysis and Findings

Cox contends that the Cable Division Order requires Cox to immediately pass through the full true-up adjustment amount to subscribers or lose any benefit of the true-up adjustment. Cox argues that the Cable Division based its decision in the Rate Order on a single clause contained in the FCC Form 1240 instructions to Line H14. Cox maintains that the clause

“being passed through to your subscribers” involves a discretionary amount which can be passed through and is unrelated to the amount of true-up adjustment claimed at FCC Form 1240 Line H14. Cox notes that FCC Form 1240 Line H14 reflects the amount the operator intends to claim regardless of the amount charged to subscribers.

The Cable Division was reasonable in its analysis of the FCC instructions to Form 1240 as well as the overall purpose of the FCC in devising Form 1240. As the Cable Division discussed in its Order, the FCC designed Form 1240 in a manner to provide cable operators the flexibility to determine how much of a true-up adjustment to claim in any one year. Cable Division Order at 4, citing Thirteenth Order on Reconsideration, MM Docket No. 92-266, FCC 95-397, 11 FCC Rcd 388 at 422, at para. 80 (September 22, 1995). This flexibility allows cable operators to pass through any portion of the true-up adjustment to subscribers at their discretion but still retain the remaining true-up adjustment to use and pass through in subsequent years. In other words, cable operators can delay rate increases at their own discretion without losing the ability to collect these lost monies in future years. In contrast, Cox misinterprets the Cable Division’s Order because the Order does not limit Cox’s ability to recover the entire true-up amount in future years but, rather, assures that Cox will not recover any additional interest on this true-up amount. Accordingly, we find that there is a reasonable basis for the Cable Division’s decision in federal law. Therefore, we reject Cox’s claim that the Cable Division erred in finding that any true-up amount claimed on FCC Form 1240 Line H14 must be passed through to subscribers.

Cox also argues that the Cable Division was in error when it concluded that by allowing the full true-up adjustment amount to be claimed, Cox would earn interest on interest.⁴ Cox acknowledges that FCC Form 1240 Module H is designed to prevent cable operators from collecting interest on interest (Cox Appeal at 7). However, Cox maintains that once the true-up adjustment amount is incorporated into the MPR, interest will no longer accrue on the true-up adjustment amount. Once the FCC Form 1240 is completed in the proper manner so that Line H14 contains only that true-up adjustment portion being passed through to subscribers, the remaining interest on interest argument is moot. FCC Form 1240 is designed so that interest does not accrue on the remaining unclaimed true-up adjustment portion. In order for the FCC Form 1240 to work as the FCC intended, however, the Operator must enter on Line H14 only the true-up amount that the Operator actually wishes to pass through to its subscribers during the projected period; any true-up amount that the Operator does not wish to pass through to its subscribers during the projected period, but does not want to lose the benefit of, is properly entered on Line H15, not, as Cox contends, on Line H14.

Cox argues that once the true-up adjustment amount is incorporated into the MPR,

⁴ Under the FCC Form 1240 methodology, operators are allowed to recover twelve months of interest on any undercharges over the previous year. Interest on these undercharges is limited to this one-year period. An operator, at its discretion, may delay recovery of these undercharges to a later date but no further interest may accrue on this amount. See Thirteenth Order on Reconsideration, at para. 80; FCC Cable Services Bureau Letter to Richard D. Treich, DA 97-1518, CSB-1LR 97-6, at 1-2 (July 18, 1997) (“Treich Letter”).

interest will no longer accrue on the true-up adjustment amount. The MPR is increased by incorporating the true-up adjustment amount into it. In the next year, interest will accrue on the difference between this increased MPR (which includes unclaimed true-up) and the BST.

Thirteenth Order on Reconsideration, MM Docket No. 92-266, FCC 95-397, 11 FCC Rcd 388 at 422, at para. 80 (September 22, 1995). FCC Form 1240 is designed to allow interest to accrue on each true-up amount for a maximum twelve-month period only. After this twelve-month period, the true-up amount plus accrued interest is retained and may be passed through to subscribers in subsequent years. However, interest no longer accrues on any retained true-up adjustment amount. The retained true-up adjustment amount is any unclaimed portion that the cable operator chooses to hold on to and claim in a future year. Id. Therefore, the Cable Division is correct in concluding that interest would accrue on interest because of this increased MPR. Therefore, we find that there is a reasonable basis for the Cable Division's decision in federal law.

Cox also argues that the Cable Division Order will encourage cable operators to always charge the full MPR and, therefore, is contrary to the public interest. However, allowing Cox to use the calculations included in the filed FCC Form 1240 would result in additional, and impermissible, interest to subscribers. We therefore reject Cox's claim and find that the Cable Division's holding was reasonable and in the public interest.

Cox also maintains that the Cable Division has no authority to determine the amount of true-up adjustment that can be claimed. Cox relies on numerous FCC decisions which hold that

“regardless of the particular obstacles facing a local authority, the Commission expects local franchising authorities to adhere strictly to the mathematical principles underlying the benchmark approach of regulating rates in their determination of rates for basic cable service and associated equipment.” See e.g., TCI Cablevision of St. Louis., Inc., 9 FCC Rcd 2141, at 7 (Cab. Serv. Bur. 1994). Based on these FCC decisions, Cox argues that because the Cable Division “did not dispute the basis for any of the figures presented in Cox’s Form 1240 and identified no mathematical error in the form,” the Cable Division has no authority to determine that the full true-up adjustment amount cannot be included in the true-up adjustment claimed.

The Cable Division Order does adhere to mathematical principles underlying the benchmark approach of regulating rates by finding that Cox improperly claimed the full adjustment true-up amount without passing it through to subscribers as is required by the FCC’s Instructions for FCC Form 1240 at Line H14. The true-up adjustment amount in dispute is found on Line H14 of Cox’s FCC Form 1240. Line H14 is entitled “Amount of True-Up Claimed For This Projected Period,” and the instructions to Line H14 direct cable operators to “[e]nter the amount of the True-Up Adjustment *being passed through to your subscribers* during the Projected Period.” Instructions For FCC Form 1240, at Line H14 (July, 1996) (emphasis added). The instructions further state “[i]f H13 [Total True-Up Adjustment] is greater than 0, the amount *passed through* is left to your discretion.” Id. The instructions clearly indicate the only amount of true-up adjustment that should properly be entered in Line H14 is that amount being passed through to subscribers. The Cable Division reasonably concluded that Cox failed to comply with the FCC’s instructions because, although Cox entered

the full amount of the true-up adjustment in Line H14, this was not the actual amount that Cox passed through to its subscribers. Accordingly, we find that there is a reasonable basis for the Cable Division's decision in federal law.

Cox argues that the language in the instructions to FCC Form 1240 serves to distinguish the discretionary inclusion of the true-up adjustment amount from mandatory inclusions, such as external costs and inflation. Cox also maintains that the Cable Division is unable to distinguish true-up amounts from discretionary amounts in determining what makes up the difference between Cox's actual rate and its MPR. While the Cable Division did not address these two issues in its Rate Order, we find it reasonable to conclude that the discretionary language in the instructions refers only to the discretion cable operators have to claim any portion of the true-up adjustment amount in any one year. In fact, the only area of the form where there is any discretion as to what, if any, portion of cost to include in the MPR is located in the true-up adjustment section. Following this through to its logical conclusion, we find that the discretionary language contained in the FCC's instructions clearly refers only to the true-up adjustment actually claimed by the cable operator and not to mandatory inclusions such as external costs and inflation.

Cox argues that the Cable Division's own precedent precludes it from disallowing Cox's FCC Form 1240 as filed. Arguing that the Cable Division contradicted itself, Cox points to two similar cases, as well as acceptance of Cox's prior year FCC Form 1240, which used the same true-up adjustment scheme. See Adelfia Cable Communications, D.T.E. Y-98 INC, Y-98 EQU at 11 (1999); Charter Communications Entertainment I, L.L.C.,

D.T.E. Y-99 INC, Y-99 EQU at 8 (1999). Cox is correct that the Cable Division did accept a different true-up method in the past, but in the Cable Division Order, the Cable Division cites a FCC clarification of the method to be used in the true-up section of FCC Form 1240. Cable Order at 3-4, citing FCC Cable Services Bureau Letter to Richard D. Treich, DA 97-1518, CSB-1LR 97-6 (July 18, 1997) (“Treich Letter”). The Treich Letter clarified the method to be used in calculating interest on the true-up portion of FCC Form 1240. Prior to the Treich Letter, the FCC Form 1240 Instructions were unclear and appeared to conflict with the FCC’s Thirteenth Order on Reconsideration. The Treich Letter explained that when a cable operator has undercharged its subscribers, it may retain any unclaimed true-up adjustment amount. However, the cable operator may only earn interest on this retained amount for a maximum twelve-month period. Id.

It is appropriate for the Cable Division to refine its position based on FCC guidelines. While Cox’s prior year FCC Form 1240 did include a similar true-up adjustment scheme, the amount at issue was de minimis. We reject Cox’s argument that any prior method of handling of the true-up adjustment precludes the Cable Division from setting a new standard to be followed, especially in those cases where the inappropriate filing would result in substantial monetary impact to subscribers. Accordingly, we find that there is a reasonable basis for the Cable Division’s decision in federal law and in the Cable Division’s own statute, regulations, and precedent.

Cox’s final argument is that the Cable Division has erroneously stated that Cox may not raise rates until their next FCC Form 1240 filing period. As the Cable Division correctly noted

in its Order, the FCC allows those cable operators on the annual rate adjustment method to adjust their rates annually. See 47 C.F.R. § 76.922(e)(1). During this annual rate adjustment period, FCC Form 1240 is filed. This form not only allows cable operators to elect a rate, but it requires cable operators to elect the new rates which will be charged for the coming year. Cox elected a BST rate to charge for the period, and it is therefore appropriate for the Cable Division to determine that the Company has elected its rates for the annual term in question.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: CoxCom, Inc. d/b/a Cox Communications New England's Appeal is DENIED.

By Order of the Department,

/s/ James Connelly
James Connelly, Chairman

/s/ W. Robert Keating
W. Robert Keating, Commissioner

/s/ Paul B. Vasington
Paul B. Vasington, Commissioner

/s/ Eugene J. Sullican, Jr.
Eugene J. Sullivan, Jr., Commissioner

/s/ Diedre K. Manning
Deirdre K. Manning, Commissioner

Except as otherwise provided in Chapter 166A, appeals of this final Order shall be governed by Section 5 of Chapter 25. Timing of the filing of such appeal is governed by this Order and the applicable rules of the appellate body to which the appeal is made. Pursuant to Section 5, Chapter 25, appeals as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition is filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court (Sed. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).