



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

RATE ORDER

CTV 04-3/04-4

Petition of Comcast Cable Communications, Inc. to establish and adjust the basic service tier programming and equipment rates for the communities currently served by Comcast that are subject to rate regulation.

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I. INTRODUCTION

On August 2, 2004, Comcast Cable Communications, Inc. (“Comcast” or “the Company”) filed with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy a proposed initial basic service tier (“BST”) programming rate on Federal Communications Commission (“FCC”) Forms 1240 for the City of Newburyport. On September 30, 2004, Comcast filed with the Cable Division proposed BST programming rates on FCC Forms 1240 for the communities already subject to rate regulation served by Comcast in Massachusetts.¹ In conjunction with its FCC Forms 1240 filings, the Company filed a nationwide FCC Form 1205, with proposed equipment and installation rates based on a fiscal year ending December 31, 2003. On October 21, 2004, the Cable Division issued an order consolidating the two proceedings and docketed the consolidated matter as CTV 04-3/04-4. Comcast Cable Communications, CTV 04-3, CTV 04-4, “Order Consolidating Proceedings” (2004). Comcast implemented changes to its BST programming, equipment and installation rates proposed in these filings on January 1, 2005.

The Cable Division held an evidentiary and public hearing in Boston on March 9, 2005. The Towns of Acton, Ashburnham, Boxborough, Brookline, Deerfield, Framingham, Franklin, Hatfield, Hudson, North Attleborough, Sherborn, Somerset, Stoneham, Sunderland, Townsend, Whitman, and Winchester, and the Cities of Attleboro, Fall River, Fitchburg,

¹ The regulated communities are listed on Attachment A.

Malden, New Bedford, Newburyport, and Peabody intervened in this proceeding.² The evidentiary record consists of 447 exhibits, sponsored by Comcast, the Towns of Brookline, Framingham, North Attleborough, Somerset, and the Cities of Fall River, Fitchburg, Malden, New Bedford, and Peabody. In addition, the record includes Comcast's responses to information requests admitted as Cable Division Exhibits 1 through 54, and Comcast's responses to record requests. The Company filed a brief on April 4, 2005. The Town of Hudson filed a reply brief on April 6, 2005.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The FCC has created specific forms incorporating the provisions of its rate regulations, upon which a cable operator calculates its rates. The FCC Form 1240 allows a cable operator to annually update its BST programming rates to account for inflation, changes in external costs, and changes in the number of regulated channels. Instructions for FCC Form 1240, at 1-2; 47 C.F.R. § 76.922(e)(1). To adjust rates 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.

47 C.F.R. §§ 76.922(e)(2)(ii)(A) and 76.922(e)(2)(iii)(A).

The FCC Form 1205 establishes rates for installations and equipment, such as converters and remote controls, based upon actual capital costs and expenses. Instructions for FCC Form 1205, at 7, 12-13. The FCC Form 1205 is prepared on an annual basis using

² The Honorable Edward M. Lambert, Jr., Mayor of the City of Fall River, provided public comment.

information from the cable operator's previous fiscal year. Id. at 2. Subscriber charges for equipment shall not exceed charges based on actual costs as determined in accordance with FCC regulations. 47 C.F.R. § 76.923(a)(2).

The standard under which the Cable Division must review rate adjustments is found in the FCC's rate regulations. Specifically, the rate regulator shall assure that the rates comply with the requirements of Section 623 of the Communications Act of 1934, as amended. 47 U.S.C. § 543; see also 47 C.F.R. §§ 76.922, 76.923, and 76.930. The Cable Division may accept as in compliance with the statute BST rates that do not exceed the "Subsequent Permitted Charge" as determined by federal regulations. See 47 C.F.R. § 76.922(c). The Cable Division may also accept equipment and installation charges that are calculated in accordance with federal regulations. See 47 C.F.R. § 76.923. In addition, the Cable Division shall only approve rates it deems reasonable. G.L. c. 166A, §§ 2, 15; 47 U.S.C. § 543; 47 C.F.R. § 76.937(d); see also 47 C.F.R. § 76.942.

The burden of proof is on the cable operator to demonstrate that its proposed rates for BST programming and accompanying equipment and installations comply with federal law and implementing regulations. 47 U.S.C. § 543; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5716, at ¶ 128 (1993) ("Rate Order") ; see also 47 C.F.R. § 76.937(a).

III. FCC FORM 1240 - DISCUSSION AND ANALYSIS

This proceeding involves the Cable Division's review of over 200 FCC Forms 1240. In this section, we first address issues that are general to many, if not all, forms. We then address specific issues that are raised by individual community filings.

A. Rate Change Implementation Date

For most communities, Comcast submitted its previous FCC Forms 1240 on or about February 28, 2003, but did not implement any resulting rate changes until January 1, 2004. Comcast Cable Communications, Inc., CTV 03-1, at 1, 4, n.4 (2003). Prior to those filings, the Company or its predecessors had adjusted BST rates annually in July. In those previous filings, Comcast included a 2003 projected period starting June 1, 2003. Id. On the current forms, filed on September 30, 2004, Comcast proposed a true-up period, a portion of which includes the months of June 2003 through December 2003, months that were part of the previous projected period but which preceded the January 1, 2004 actual rate change. By including these months as part of the true-up period, Comcast has claimed the undercharges it incurred by delaying its rate increase, as well as the accumulated interest on those undercharges. Pursuant to federal regulations, Comcast is entitled to collect the difference between what it charged and what it was legally entitled to charge during a period through the true-up reconciliation process of the FCC Form 1240. 47 C.F.R. § 76.922(e)(3). The issue is whether Comcast may collect interest on this difference from June 1, 2003 through December 31, 2003, the period during which the rate change was delayed.

Since Comcast's previous rate proceeding before the Cable Division, the FCC addressed whether a cable operator may collect interest on revenue shortfalls resulting from a decision to delay a rate increase. In the Matter of Comcast Cablevision of Dallas, Inc., 19 FCC Rcd 10628, DA 04-1703 (2004) ("Flower Mound").³ The FCC concluded that "a cable operator is not entitled to earn interest on rate increases that it chose voluntarily not to take." Id. at 10640-10641, ¶ 30. Comcast argued that Flower Mound does not provide a basis for denying the Company the recovery of interest from June 1, 2003 through December 31, 2003 (Comcast Brief at 5). Comcast specifically argued that the FCC determined Flower Mound on a very limited record, and that Flower Mound is not applicable to the present case (Comcast Brief at 5, 12). However, the issue in this proceeding is the same as that raised in Flower Mound: when a cable operator delays a rate increase for one or more months, is the operator permitted to recover, in a subsequent rate proceeding, interest on the additional revenues it chose not to collect during these months.⁴

³ Several communities, including the Town of Flower Mound, Texas, investigated an FCC Form 1240 that the cable operator had filed for the period June 2003 through May 2004. Id. at 10641, ¶ 31. Under its previous annual FCC Form 1240 filing, the operator lawfully could have changed its BST rate in June 2002, but chose to delay its rate change until July 2002. Id. at 10640, ¶ 29. The communities allowed Comcast to recover the foregone revenue from this month, but denied the Company's recovery of interest on this revenue. Id. In support, the communities cited the FCC's Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration, MM Docket No. 92-266, 11 FCC Rcd 388, FCC 95-397, at 440-441, ¶¶ 79-80 (1995) ("Thirteenth Order"). Id. The FCC upheld the communities' decision to deny Comcast the recovery of the interest. Id. at 10640-10641, ¶ 30.

⁴ We contrast this issue with the issue raised in CoxCom, Inc., 17 FCC Rcd 7931

Had Comcast determined through a comparison of its projected and actual costs that it had under-projected its costs, it would have been entitled to a recovery of any undercharges, with interest. See Instructions to FCC Form 1240, at 2. In this instance, however, a substantial portion of Comcast's under-collected revenue is directly related to the Company's business decision to alter its rate change date in order to achieve a business goal, specifically, a uniform rate change date for its communities (See Comcast Brief at 12). An operator cannot collect interest on any portion of a rate undercharge that is directly related, not to an under-recovery of costs, but rather to its own business decision to defer its revenues. Where an operator makes a business decision to delay a rate increase, subscribers are not required to pay for the cost of the delay. Flower Mound at 10641, ¶ 30, n.81, citing Thirteenth Order at 421, ¶80.

We conclude that Comcast must restate the true-up amounts on its FCC Forms 1240, to exclude any interest recovery on amounts related to its delayed rate increase for the period commencing at the end of the projected period until the date the Company actually changed its BST rates. The Cable Division orders Comcast to adjust its BST rates to remove any interest on foregone revenues accrued during these months and to refile the appropriate portions of the FCC Form 1240 rate forms that reflect this adjustment.

⁴(...continued)

(2002), application for review denied, 18 FCC Rcd 6941 (2003). In CoxCom, the FCC allowed interest on the true-up amounts resulting from the company's decision to charge a BST rate less than the MPR. Id. at 6-10, see Thirteenth Order at 422, ¶ 80. We note, however, that the FCC's position on this issue is questionable. Flower Mound at 10641, ¶ 30, n.81.

B. Removal of Franchise Related Costs from the FCC Form 1240

1. Introduction

In this proceeding, the Company sought approval of the first stage of a two-stage proposal to consolidate rate filings and offer consistent BST rates to those communities that have the same channel line-ups (Tr. at 79-85). The first stage of the Company's proposal is the identification and resolution of any discrepancies with regard to FRCs embedded in the rate (Exh. CTV-1). Currently, FRCs are reported on Worksheet 7 - External Costs of the FCC Form 1240. See FCC Form 1240, at 4, and at Worksheet 7 - External Costs: True-Up Period, Lines 707 and 717; Worksheet 7 - External Costs: Projected Period, Line 707. However, in many communities, not all of the FRCs have historically been included on Worksheet 7. Some of these FRCs are embedded within the BST rate. See e.g. CTV 03-1, at 8-12. Therefore, Comcast identified the total amount of its FRCs in each community, and specifically identified any FRCs embedded within the BST rate. For future filings, Comcast proposed to change the methodology used to calculate FRCs, i.e., Comcast proposed to calculate FRCs "off form" (Exh. CTV-1).

2. Company Proposal

To identify the FRCs, Comcast categorized those communities whose rates include FRCs into one of four "scenarios" (Tr. at 82-84).⁵ Scenario 1 applies to communities for which

⁵ The list of regulated communities provided as Attachment A to this order specifically identifies the scenario, if any, applicable to each community. Four regulated communities: Boxborough, Bridgewater, Lancaster, and Pelham, have no FRCs, and hence are included in none of the scenarios (Exhs. Comcast-20, at Attachment 1;

(continued...)

the Company specifically reported the entire FRC amount on Worksheet 7 of the previous FCC Form 1240 (id. at 82-83). According to the Company, under Scenario 1, all FRCs have already been reported separately on the FCC Form 1240, and thus their removal from the form is a straightforward process (id. at 83). Scenario 2 applies to communities where a portion of the FRCs was embedded in the BST, and the remaining amount was included on Worksheet 7 (id.). To determine the amount of embedded costs, the Company stated that it reviewed each of the franchise agreements and calculated the amount of capital costs and studio operating costs as of 1993, in accordance with Cable Division precedent (id. at 88-89; see Comcast Cable Communications, Inc., CTV 03-1, “Order on Compliance Filing”). Comcast proposed to adjust Line D2 of the form, which includes the current FRC amount as an external cost, to include the embedded portion of the FRC (id.). Once identified, all FRCs would be removed from the form. Scenario 3 applies to communities where Comcast’s cable license was renewed during the true-up period (id.). In those cases, Comcast proposed to report all FRCs from the previous license on Line D2, and not include the FRCs from the renewal license on future forms (id.). However, because subscribers had been charged the previous license’s FRCs even after the renewal license had come into effect, Comcast proposed to reduce the FRC total over the term of the renewal license by the amount of the previous license’s FRCs that subscribers had overpaid (see e.g. Exh. Comcast-7, at Attachment 6B). Scenario 4 applies to communities where the Company and the community had agreed not to pass through the full FRC amount to

⁵(...continued)

Comcast-23, at Attachment 1; Comcast-83, at Attachment 1; Comcast-131, at Attachment 1).

subscribers, and however all FRCs have been included on the FCC Form 1240 (Tr. at 83-84). For these communities, Comcast proposed to remove that portion of the FRCs that exceeded the amount actually passed through to subscribers, by adjusting its true-up calculation on the form (id. at 84). For all four scenarios, once all current FRCs are removed on Line D2, no other FRC amounts would be included in the later stages of the FRC calculation on the FCC Form 1240.⁶

Comcast further proposed that once the FRCs are identified and removed from the form by one of these four scenarios, it would calculate FRCs going forward on an FRC Worksheet similar to the one it currently completes. Comcast committed to provide an FRC Worksheet to both communities and the Cable Division (id. at 43). Because the Company proposed to remove all FRCs from FCC Form 1240, the Company added a calculation to the FRC Worksheet to adjust for differences in projected versus actual subscribers during the true-up period of the FCC Form 1240 (id.). The FRC Worksheet would perform the same true-up calculation as the FCC Form 1240 to account for any undercharges or overcharges from the previous form's projected period (id.).

⁶ Specifically, Comcast included no FRC amounts on Worksheet 7 - External Costs, for either the True-Up Period on Line 707 and 717, or for the Projected Period on Line 707 (see e.g. Exh. Comcast-1, at Worksheet 7). In addition, Comcast adjusted Worksheet 8 to remove all FRCs from the rate (id. at Worksheet 8; compare Attachment 4 (rate card)).

3. Discussion and Analysis

a. The Proposal in General

The Town of Hudson (“Hudson”) raised two objections to Comcast’s proposal to remove the FRCs from the rate form. First, Hudson argued that there is no basis in any FCC rulings that permits the Company to calculate its FRCs separately from the FCC Form 1240 (Tr. at 70, 123). More specifically, Hudson claimed that the FCC provided operators with only two options with regard to FRCs: including the FRCs on the form or not collecting them at all (*id.* at 70, 71). Second, Hudson argued that removing the FRCs from Worksheet 7 was not necessary because Comcast may achieve its stated goals since it has the discretion to present the entire FRC amount on subscribers’ bills (*id.* at 73, 125).⁷

The Company argued that the flexibility and efficiency that its proposed treatment of FRCs “off-form” would provide would be consistent with other situations where the FCC has afforded operators flexibility in setting rates (Comcast Brief at 2, citing In the Matter of Falcon Telecable, DA 99-2386, at ¶ 15 (1999)(“Falcon Telecable”); TCI Cablevision of Arcadia/Sierra Madre, DA 96-1497, 11 FCC Rcd. 10557 at ¶ 13 (1996)). The Company also claimed that identifying and removing the FRCs from the rate form would benefit communities,

⁷ Hudson also questioned what it considered to be Comcast’s practice of determining what a community’s FRCs will be for the next ten years, and then using that average as its FRC amount (Tr. at 72). However, an analysis of the FRC Worksheets shows that Comcast is amortizing its capital FRC expenditures over a ten-year period. This methodology, which Comcast and its predecessors have used on FRC Worksheets since their inception in 1996, allows capital expenditures to be charged to subscribers over the useful life of the equipment, instead of making subscribers pay for the entire cost of the equipment during the year it was purchased. It is the appropriate accounting practice.

particularly during the license renewal process, by providing them with a clear understanding of the FRCs (Exh. CTV-1, Tr. at 44). According to the Company, customers would similarly benefit from a better understanding of the items listed on their monthly bills and the costs of complying with requirements of their community to provide local access channels or other services (Exh. CTV-1).

As Comcast argued, the FCC has authorized cable operators to deviate from its prescribed forms while calculating rates in other instances. See In the Matter of Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket No. 92-266, FCC 95-196, 10 FCC Rcd 7393, at 7420, ¶ 54 (1995). More significantly, the FCC expressed its willingness to allow an operator to establish BST rates exclusive of FRCs in those cases where a cable operator proposes to establish uniform rates in communities with differing FRCs. 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 Cable Division relied on the FCC's statement in considering consolidated rate filings for communities with different FRCs. Adelphia Cable Communications, CTV 03-5 (2004).

One reason the FCC allows such flexibility with respect to the calculation of FRCs is that the calculation is not affected by the mechanics of the FCC Form 1240. As Comcast observed, FRCs are external costs and, thus, are not calculated on the FCC Form 1240 (Exh. Comcast-199, at 5). Operators enter their FRCs on Worksheet 7, Lines 707 and 717, as

a total amount for the true-up or projected period. Instructions for FCC Form 1240, at 39.

There is only one necessary preliminary adjustment on FCC Form 1240 involving the FRCs: the conversion of the costs into a monthly per-subscriber amount. Id. at 39, 40. Accordingly, only three numbers appear on the FCC Form 1240: the total FRCs for True-Up Periods 1 and 2, and the total FRCs for the Projected Period. Moreover, the FCC specifically instructs operators to attach a complete list of all FRCs claimed on Line 707 and to include information on how they were calculated and when they occurred or are projected to occur. Id. As Comcast further observed, the FCC has never issued a form for calculating FRCs (Exh. Comcast-199, at 3). Therefore, we conclude that there is no FCC requirement that the FRC calculation be included on the FCC Form 1240, in order for a cable operator to recover its FRCs.⁸

We have determined that the FCC has not specified a particular method for calculating FRCs. However, the FCC has established a test to measure the reasonableness of a proposed method of calculation where no particular method is specified. Falcon Telecable at 6, ¶15. The FCC requires that the operator's choice be "revenue neutral." Id. Revenue neutrality is

⁸ Another category of external costs, FCC regulatory fees, has been routinely excluded from the FCC Form 1240 calculation, but charged to subscribers on their bills, by other cable operators whose BST rates are regulated by the Cable Division. See Charter Communications Entertainment I, LLC, CTV 03-6, at Exh. Charter-2, at Worksheet 7 -External Costs, True-Up and Projected Periods, at Line 708 (2004); compare Boylston sample bill, filed on March 15, 2004 with the Cable Division; and Adelphia Cable Communications, Inc., CTV 04-8, at Exh. Adelphia-1, at Worksheet 7 - External Costs, True-Up and Projected Periods, at Line 708 (2004); compare sample Abington sample bill, filed on March 15, 2005 with the Cable Division.

essential, because no method could be considered reasonable if it produced a higher rate than that resulting from the traditional method. Comcast's proposed removal of FRCs from FCC Form 1240 would affect only the presentation of subscribers' bills and not the amount of those bills. Under Comcast's proposal, a community's rate form that includes no FRCs should calculate a BST MPR that, when added to the separately-reported FRCs, would result in a total equaling the BST MPR (including the FRCs) that would have been calculated under the old method. Implementing the proposal would reduce the amount of the BST MPR by the amount of the FRCs, thus having a revenue neutral effect on the amount subscribers pay for their BST cable service.

With respect to bill presentation, federal law permits cable operators to report the entire amount of a community's FRCs on subscribers' bills. Communications Act of 1934, as amended, Section 622(c)(2); 47 U.S.C. §542(c)(2). Hudson, therefore, objected to the removal of FRCs from the rate form on the basis that the Company is currently able to present the full amount of the FRCs on the bills. However, Comcast would only be able to inform subscribers of the total FRC amount on their bills after the Company identifies the total amount of FRCs in each community, including that which is embedded in the BST rate. As a result of Comcast's proposal there would be, for all regulated communities, an FRC Worksheet that calculates an FRC total that is carried over and entered onto the bill as a separate line item. The import of the Company's ability to present the bills in this way is significant.

First, subscribers would be fully informed about the extent that the FRCs contribute to the overall BST rate. Since the cost of programming would be entirely separate from the cost

of franchise requirements, subscribers would be able to understand the component costs of their cable service. This will allow subscribers to appropriately react to periodic changes in the total bill, either by complaining to the Company in the first instance, or through the political process in the second instance. Second, community representatives, including elected officials and cable advisory committee members, would be able to more effectively participate in rate proceedings and more efficiently conduct the license renewal process. One of the most important elements of the renewal process is the ascertainment of communities' cable-related needs and interests and the evaluation of the costs to meet those identified needs. Investigation by the Cable Television Division on its own Motion to Review the Form 100, CTV 03-3, at 10-12 (2004). If FRCs were fully disclosed on subscribers' bills and the FRC Worksheet, subscribers and municipal officials would be aware of the rate impact of the FRCs as they participate in the ascertainment portion of the renewal process. Therefore, we find the use of the FRC Worksheet would facilitate license renewal discussions. Finally, since the FRC increment is often a major factor in the divergence of rates between otherwise similar communities, removing the FRCs from the BST rate allows the BST rates in many neighboring communities to become more unified.

Given that the Company's proposal is revenue neutral and the implementation of the proposal would benefit subscribers and municipal representatives, we find Comcast's proposal to identify FRCs, and remove them from the FCC Form 1240 rate calculation is reasonable. The Cable Division emphasizes that we do not address the second stage of Comcast's proposal, i.e., the development of uniform rates across multiple communities. Indeed, the Company has

not submitted a uniform rate proposal to the Cable Division, or proposed a methodology (Tr. at 85). Here, our decision is limited to the issue of the propriety of approving FCC Forms 1240 that establish BST MPRs exclusive of any FRCs. We conclude that the benefits of the Company's proposal to subscribers, communities and to the Company justifies its adoption, even without the development of uniform rates.

The Cable Division approves Comcast's proposed removal of its FRCs from its FCC Forms 1240. The Cable Division determines that Comcast followed the FCC's instructions in developing its FRC Worksheet. Comcast's FRC worksheets must continue to be submitted with the FCC Forms 1240, and will continue to be subject to the Cable Division's review. Comcast has also stated that it will continue to provide FRC Worksheets to communities during the license renewal process. Thus, the only regulatory change will be that FRCs are not included on the FCC Form 1240; all other documentation will remain unchanged.

In approving Comcast's proposal, the Cable Division does prescribe two requirements that the Company must follow. First, in our review of Comcast's filings, we have occasionally noticed minor discrepancies in subscriber totals between the FCC Forms 1240 and the FRC Worksheets. This can create slight differences in the calculation of the FRC amount. We direct Comcast to use the same subscriber totals for the same periods on its FCC Forms 1240 and its FRC Worksheets. Second, for some former Time Warner communities, such as Medway, Comcast has not yet prepared a standard FRC Worksheet, but has used a presentation

format inherited from Time Warner (see Exh. Comcast-102, at Attachment 6B). We direct Comcast to file standard FRC Worksheets for all regulated communities in its next rate proceeding.

b. The Proposal Applied

Having approved the proposal to remove the FRC's from the FCC Form 1240, the Cable Division addresses whether the Company has properly identified all FRCs and removed them from the rate. This issue of whether the Company properly identified all FRCs, including those embedded in the rate, pertains to only those communities whose FRCs have not been identified in the external cost section of the FCC form 1240, i.e., all those communities the Company classified as Scenarios 2, as well as a number of communities classified as Scenario 3 or 4.⁹

At the onset of regulation, the FCC anticipated that cable operators would unbundle costs from the BST rate and adjust them thereafter on the basis of actual charges only. 47 C.F.R. § 922(f)(4). In a number of instances, however, cable operators began the process of separately identifying FRCs only after they had executed a post regulation renewal license. This was due, in part, to a settlement reached with Comcast's predecessor, MediaOne, which allowed the operator to identify its FRCs upon license renewal in a specific community. Since the consolidation of systems has resulted in limiting the amount of historical cost data available

⁹ By definition, Scenario 2 communities have a portion of their FRCs embedded in the BST rate. Communities are classified in either Scenario 3 or 4 due to factors beyond how the FRCs have been treated. The FRCs in these communities, therefore, could be included on Worksheet 7 or embedded in the rate.

to many operators, the Cable Division provided specific instructions with respect to the identification of embedded FRCs upon license renewal. Comcast Cable Communications Inc., CTV 03-1, "Order on Compliance Filing" (March 19, 2004). Specifically, we instructed operators to identify all franchise related costs contained in the license in effect as of the beginning of regulation for each community. This would assure that at the time of renewal not the whole costs but only changes in FRCs would be passed through to subscribers upon renewal.

In the current case, Comcast stated that it reviewed each franchise and all FRCs contained in the applicable license for each community. For communities, particularly those acquired by Comcast from other operators, whose costs at the beginning of regulation could not be directly identified from the license, Comcast identified the most recent cost data available. Using the appropriate inflation factors, it then determined a value for those costs as of the beginning of regulation. We find that Comcast has identified all FRCs in accordance with the guidance we provided in CTV 03-1.

Removing the FRCs for Scenario 1 communities, as well as those Scenario 3 and 4 communities where the entire FRC amount was identified, is straightforward. The Company appropriately included on Line D2, the external cost amount from Worksheet 7 of the previous projected period. For the remaining communities, the Company added to Line D2, a per subscriber amount reflecting the embedded portion of FRCs together with the previous periods' Worksheet 7 external costs. In both instances, the Company appropriately reduced the Worksheet 8 true-up rates from the previous projected period by the equivalent FRC amount

that was removed from the BST rate in order to assure a valid true-up comparison.

Finally, we consider whether the Company has made the appropriate adjustments to ensure that future calculations of the BST rates and FRCs separately are accurate. For communities classified as Scenario 1 or 2, no other adjustments are necessary in order for Comcast to move forward separately computing the BST rates as well as the FRC totals. For communities included in Scenario 3, Comcast adjusted the FRC increment in order to assure that subscribers were not being charged for costs from two separate licenses. While Scenario 3 includes communities that renewed their licenses since the previous FCC Form 1240 was filed, there are a number of months during the previous projected period where the new license was in effect but the BST rate contained the previous license's FRCs. Comcast, therefore, adjusted the new FRC pass-through to reflect those costs paid by subscribers during the months prior to the rate change, when the new license was already in effect but the BST rate still contained costs from the prior license.

For communities in Scenario 4, Comcast, while contractually prohibited from passing through certain FRCs, nonetheless included these amounts in the MPR (the costs were excluded from the actual BST rate charged). As a result, these costs were merely deferred. In order to correct for this, Comcast calculated all the true-up associated with the FRCs not subject to pass-through, and adjusted the external costs lines in Modules F and G, reducing these totals and the MPRs for the true-up periods by a per subscriber increment. When compared against

the actual rate charged during the true-up period, the rate would be reduced by any amount of true-up previously recovered due to the inclusion of these non-recoverable costs in the BST rate.

The Cable Division concludes that Comcast's proposal for removing the FRC totals from the FCC Form 1240 calculations and charging them as a separate line item on subscriber bills is reasonable. We further conclude that Comcast's method of identifying and removing FRCs is reasonable and consistent with precedent. Finally, we conclude that Comcast has appropriately identified and removed all such FRCs from the BST rate calculation.

C. Programming Costs

1. Introduction

For the majority of its communities, Comcast proposed an increase in BST programming costs. These increased costs are primarily associated with two additional channels that Comcast added to the BST. The first was the addition of a local 24-hour news and programming channel, CN8, which replaced AT&T-3, a previous company-produced channel, in May 2003 (Exh. CTV-12). The second was the movement of New England Cable News (“NECN”) from the cable programming service tier (“CPST”) to the BST, in January 2004 (Exh. CTV-22). Comcast proposed to charge BST subscribers \$0.36 per month for CN8, and \$0.27 per month for NECN (see e.g. Exh. Comcast-3, at Attachment 5). Comcast stated that both CN8 and NECN are affiliates of Comcast (Exh. CTV-11).

2. Standard of Review

The FCC permits cable operators to adjust BST rates annually to account for changes in

external costs, including programming costs. 47 C.F.R. § 76.922(e)(1); Rate Order at 5787, ¶ 251. The FCC noted that the treatment of programming cost increases as external costs would assure programmers' continued ability to develop, and cable operators' ability to purchase, programming. Rate Order at 5787, ¶ 251. However, the FCC expressed concern about abuses that might occur if vertically integrated cable operators were permitted to engage in unlimited pass-throughs of programming costs to subscribers. Id. at 5788, ¶ 252.

Therefore, the FCC expressly limited the amount of pass-throughs permitted for programming acquired from affiliated programmers. Id. The FCC also noted that it designed its affiliate transaction rules to prevent favorable self-dealing between affiliated companies in order to manipulate the FCC rate rules. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, CS Docket No. 94-28, FCC 95-502, 11 FCC Rcd 2219, 2273, at ¶ 132 (1996) ("Final Cost Order"). As a result, the FCC's affiliate transaction rules allow a cable operator to adjust its rates to reflect increases in costs of affiliate programming, provided that the programming rates charged to the cable operator by the affiliated programmer reflect either (1) the prevailing company prices offered by the programmer to unaffiliated entities or (2) the fair market value of the programming. TCI of Pennsylvania, Inc., Memorandum Opinion and Order, DA 04-1496, at ¶ 13 (May 26, 2004), citing 47 C.F.R. § 76.922(f)(6).

Alternatively, the FCC established procedures to be used in valuing transactions between cable operators and affiliated companies for those cable operators electing a cost-of-service methodology. See 47 C.F.R. § 76.924(i); see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Service, Report & Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215 and CS Docket No. 94-28, FCC 94-39, 9 FCC Rcd 4527, 4659-4668, at ¶¶ 249-271 (1994) (“Cost Order”); see also Final Cost Order at 2273-2277, ¶¶ 132-143. Because a cost-of-service rate proceeding, unlike a benchmark proceeding, includes all aspects of a cable operator’s regulated business, the FCC adopted comprehensive rules applicable to all types of transactions between a cable operator and affiliated companies, e.g., the sale of vehicles and other equipment or the provision of managerial and technical assistance. See generally Cost Order at 4659-4668, ¶¶ 249-271; see also 47 C.F.R. § 76.924(i). The FCC further noted that for cable operators electing a benchmark approach, these cost-of-service rules could be applicable only to affiliate transactions involving the provision of programming. Cost Order at 4665, ¶ 262, n.520. Under these cost of service rules, the cable operator may adjust its rates to reflect increases in costs of affiliate programming based on either (1) the prevailing company price offered by the affiliate to unaffiliated entities, if the affiliate has sold a substantial number of like programming to non-affiliates, or (2) the lower of the cost to the originating activity of the affiliate group less all applicable valuation reserves, or the fair market value. 47 C.F.R. § 76.924(i)(1). Comcast

explicitly recognized the applicability of this test to the affiliated programming under review in this proceeding (Comcast Brief at 14, citing Cost Order at 4666, ¶ 267).

3. Discussion and Analysis

a. CN8

The Cable Division must first consider whether a prevailing company price exists for CN8. 47 C.F.R. § 76.924(i)(1). A prevailing company price would be established if the operator sold its programming “to a substantial number of third parties.” Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket 92-266, FCC 94-286, 10 FCC Rcd 1226, at 1231-1232, ¶ 14 (1994) (“Sixth Order on Reconsideration”). CN8 is provided to Comcast subscribers in eight northeastern states,¹⁰ and to the subscribers of Cablevision, an independent cable operator, in New Jersey (Exhs. CTV-16, -19). The Cable Division finds that the limited distribution of CN8’s programming to one operator would not satisfy the FCC’s “substantial number” test in order to develop a prevailing market price. Conceding this, the Company argued that the external recovery cost for CN8 should be based on the lower of “cost” or “fair market value” of the programming, with consideration given to the amount charged per subscribers to an independent cable operator for the carriage of CN8 (Exh. CTV-14).

¹⁰ The states are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey and Pennsylvania (Exh. CTV-16).

To establish the fair market value of CN8, Comcast provided the Cable Division with a report it had commissioned to support the fair market value of CN8 in a rate proceeding conducted by the New Jersey Board of Public Utilities (Exh. CTV-29). The report was prepared by Kane Reece Associates, Inc. (“Kane Reece”), and is entitled “Analysis of the Fair Market Value of CN8, the Comcast Network Programming as of August 22, 2003” (id.). In its report, Kane Reece estimated a fair market value for CN8 (id.). To determine this estimate, Kane Reece first reviewed 12 regional networks that operated in markets served by Comcast (id.). Kane Reece found that there were considerable differences among these networks, but some were more comparable to CN8 than others (id.). First, Kane Reece excluded Cablevision’s News 12 New Jersey, because Comcast had an agreement with Cablevision concerning the carriage of their respective regional networks.¹¹ Second, Kane Reece excluded four part time networks, all of which focused on the activities of the local state legislature (id.). Kane Reece excluded four other regional networks that essentially run news wheels all day, on the grounds that the costs and complexities involved with the amount of original programming on CN8 cannot be compared with the costs of airing repeating news wheels that are only partially updated during the day (id.). Kane Reece concluded that three of the networks, Chicagoland TV, New England Cable News, and News Channel 8 (Washington, DC), despite some differences, were the most comparable to CN8 because of the extent of their original programming, number of staff and ability to leverage existing resources

¹¹ Pursuant to this agreement, CN8 is carried by Cablevision in its Northern New Jersey systems (Exh. CTV-20).

of their respective owners (id.). After considering the range of rates for these three other channels, Kane Reece concluded that the fair market value of CN8's programming was "certainly not less than its current monthly per-subscriber charge" of \$0.36 per subscriber (id.; see e.g. Exh. Comcast-1, at Attachment 5).

Comcast also provided a cost summary report outlining the monthly per-subscriber costs incurred by CN8's New England operations (the "Cost Summary Report")(id.). The Cost Summary Report is directly material to the rate proceeding because it covered the period between May 2003, when CN8 was added to the BST, and June 2004, which was the end of the true-up period (Exh. CTV-29). The Cost Summary Report establishes that Comcast properly offset its expenses with its advertising revenues (id., see Time Warner Cable Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable, CTV 02-16, at 5 (2002)). We determine that Comcast has appropriately calculated CN8's net operating costs and that the per subscriber amount exceeds \$0.36.

Based on our review of these documents,¹² we determine that Comcast has presented sufficient evidence to establish that Comcast's net operating costs for CN8 exceed the fair market value of CN8. Further, we find that proposed monthly per subscriber cost of \$0.36 included on the FCC Forms 1240 is consistent with the fair market value of CN8, such that the rate Comcast proposed to charge its Massachusetts subscribers complies with the FCC

¹² Comcast requested confidential treatment for certain information in both the Kane Reece Report and the Cost Summary report, on the grounds that the disclosure of this information would be competitively harmful (Tr. at 12-13). The Company provided unredacted copies of the documents for the Cable Division's review (Exh. CTV-29 (Confidential))

standard. The Cable Division, therefore, approves Comcast's proposed programming costs for CN8 of \$0.36 per subscriber per month as reasonable.

b. NECN

NECN is a 24 hour news network equally owned by Comcast and the Hearst Corporation (Exh. CTV-21). Recovery of NECN's costs are subject to the FCC's affiliate transaction rules, as Comcast has admitted (Exh. CTV-11). Comcast asserted that under the FCC's rules, NECN's program service rates charged to Comcast as an affiliated entity are reasonable because they are based on a prevailing company price established by NECN through the sale of the channel to a substantial number of non-affiliated cable operators (Comcast Brief at 13). Comcast reported that NECN is also carried by ten other cable operators in New England, including Adelphia Cable Communications, Inc., Charter Communications, Inc., Time Warner Cable, RCN Corp., and Metrocast Cablevision of New Hampshire LLC (Exh. CTV-23; Comcast Brief at 15). Comcast asserted that one-third of the approximately 3.2 million subscribers who receive NECN are subscribers with non-affiliated cable operators (Comcast Brief at 15). Comcast argued that the sale of NECN to more than one million non-affiliated subscribers can be deemed "substantial" under the FCC's criteria, and thus the Company is permitted to value NECN using the prevailing company price (id. at 15-16; citing Sixth Order on Reconsideration at 1231, ¶ 14).

There is no definition in the FCC rules as to what constitutes a "substantial number" of non-affiliated operators. However, we note that the FCC rejected a proposed requirement that a prevailing company price could be applied only if 75 percent of the purchasers of the

programming were non-affiliated cable operators. Sixth Order on Reconsideration at 1232, ¶ 14). In this instance, almost every other cable operator servicing NECN's coverage area purchases the channel. The Cable Division finds that the distribution of NECN to over one million non-affiliated subscribers, served by most of the other major cable operators in New England, is a "substantial number," and permits Comcast to establish a prevailing company price for NECN pursuant to the FCC's rules. See Sixth Order on Reconsideration, at 1231-1232, ¶ 14.

With regard to the prevailing company price, the Company explained that while each operator is not necessarily charged the same price, negotiations between an operator and NECN are based upon an established formula (Exh. CTV-50). The Company further explained that since it is typical in the programming industry for the program supplier to base its charge on the size and viewership of a cable operator, this factor is included in the formula. Under a grant of protective treatment, the Company provided further information explaining how it derived the price per Comcast subscriber (Exh. CTV-49). Based on the record evidence, we find that Comcast's proposed monthly per subscriber rate for NECN of \$0.27 is consistent with the prevailing company price charged to non-affiliates, and is therefore reasonable.

D. Initial Regulated Rate for the City of Newburyport

On April 8, 2004, the City of Newburyport ("Newburyport") formally requested that the Cable Division regulate the basic tier rate in that community.¹³ On August 2, 2004, Comcast

¹³ While Massachusetts law and regulation provide that the Cable Division may regulate rates for a municipality "upon its own motion," the Cable Division's long-standing
(continued...)

submitted its initial FCC Form 1240 applicable to Newburyport for our review. As its initial regulated BST rate, Comcast proposed a rate of \$9.12 (Exh. Comcast-118, at 2, Line A1). The actual BST rate in effect in Newburyport since January 2004 was \$10.10, including \$0.98 in FRCs (id. at attachments). Comcast's FCC Form 1240 established a BST MPR for Newburyport of \$9.36 (Exh. Comcast-118, at 4; Revised). The Company implemented an actual BST rate of \$9.25 in Newburyport, effective January 1, 2005 (Comcast 2005 Price Change Information, at 67).¹⁴

Under federal regulations, a cable operator that becomes subject to rate regulation in a community files an initial FCC Form 1200 with the local franchising authority.

47 C.F.R. § 76.922(b)(6). The FCC Form 1200 allows the cable operator to justify the reasonableness of its initial BST rate. Id. Once the cable operator files the initial FCC Form 1200, the operator may file an FCC Form 1210 on a quarterly basis or an FCC Form 1240 on an annual basis to justify changes to the initial BST rate.

See 47 C.F.R. § 76.922.

Comcast has not filed an FCC Form 1200 for Newburyport. Comcast argued that the FCC's rules and regulations implemented over a decade ago are not applicable to a situation in

¹³(...continued)

policy is to exercise our authority only upon a municipality's request to do so. See G.L. c. 166A, § 15; 207 C.M.R. § 6.04.

¹⁴ Comcast's 2005 Price Change Information book was filed with the Cable Division on November 24, 2004, pursuant to the Cable Division's regulations at 207 C.M.R. § 10.02(2).

which a community seeks regulation after such a significant period had passed (Exh. CTV-7).

The Company stated that the FCC's rules would require the operator to justify current BST rates using eight- to ten-year old rate, cost, and subscriber data which, in most cases, is no longer available (id.). Comcast contended that the discretion given a franchising authority under the FCC's initial rules to review the operator's entire rate structure is irreconcilable with the FCC's policies because "it creates an uncertain business environment and imposes undue administrative burdens on cable operators" (id.). In further support, the Company noted that the FCC eliminated the review of a cable operator's entire CPST rate structure if CPST rates remained unregulated as of November 6, 1995 (id., citing Thirteenth Order at 7, ¶ 14). As a final justification of the reasonableness of its proposed Newburyport rate, Comcast offered a rate comparison showing that the BST MPR in Newburyport is lower than the BST MPR in four historically regulated neighboring Comcast communities with similar BST channel line-ups: Ipswich, Newbury, Rowley and West Newbury (RR-CTV-9).

The Cable Division has acknowledged that determining an initial regulated BST rate can be a difficult process, given the consolidation of the cable industry that has occurred since rate regulation commenced in 1993. Charter Communications Entertainment I, L.L.C., CHA Y-00 (Phase I), at 5 (2000). A cable operator is nonetheless required to justify its proposed BST MPR. While we have excused the filing of an FCC Form 1200 in the past, we have done so only where there was some other independent verification of reasonableness. Here, Comcast seeks to justify the rate based on a comparison to rates of similarly situated communities.

The BST MPRs in the four neighboring towns of Ipswich, Newbury, Rowley and West Newbury are appropriate comparisons with the BST MPR in Newburyport. These five communities' cable licenses have a common ownership history. The communities' cable systems were originally constructed by American Cablesystems Northeast during the 1980s, and purchased by Continental Cablevision in 1988. See Application for Transfer, Newburyport Cable Television License from American Cablesystems Corporation to Continental Cablevision, Inc. (December 18, 1987). Moreover, the five communities had the same channel lineup in January 1995, and since January 1, 2000. See Continental Cablevision, Rate Card for (January 1995);¹⁵ AT&T Broadband, Y-00A, CTV 00-2, CTV 00-3, CTV 00-4, at exhibit AT&T Broadband-56, at Rate Card; see Comcast 2005 Price Change Information, at 67. The Cable Division finds that these five neighboring communities have the indicia of a single system, dating back to the 1980s. Accordingly, the costs incurred in these communities are comparable to those incurred in Newburyport. The Cable Division finds that absent the information necessary to calculate Newburyport's BST MPRs from the beginning of rate regulation, a comparison of Newburyport's rate to the rates in Ipswich, Newbury, Rowley and West Newbury is a valid means of arriving at a reasonable initial BST rate.

However, the comparison offered by Comcast showing a lower proposed rate for Newburyport than the MPR in the four other communities is faulty in one regard. Because the four communities' BST rates have been regulated, the BST MPRs include a true-up component,

¹⁵ The Cable Division's regulations provide that each cable operator must file its channel lineup with the Cable Division by March 15th of each year. 207 C.M.R. § 10.02(6).

a factor that should not be included in the calculation of the Newburyport rate (see Exh. Comcast-118 at 4, Line I8; compare Exh. Comcast-81, at 4, Line I8; Exh. Comcast-117, at 4, Line I8; Exh. Comcast-142, at 4, Line I8; Exh. Comcast-181, at 4, Line I8). The comparison of Newburyport's BST rate to the BST rates in the other communities will be valid only if the true-up component is removed from the other communities' BST MPRs. After the true-up is removed from the communities' BST MPRs, the proposed initial BST MPR in Newburyport of \$9.36 is higher than the adjusted BST MPRs in the other communities, which range from \$8.89 to \$9.06.¹⁶

Since the cable service in Newburyport has historically provided the same BST channels as the services in the other four communities, and have comparable costs, it is reasonable that Newburyport's BST MPR would be approximately the same as the other four communities' BST MPRs, as adjusted. In the FCC's rate regulation process, many factors contribute to the minor differences in the current adjusted BST MPRs among the other four communities over the 12 years since rate regulation began in 1993. Since there is no way to determine how these factors would have affected Newburyport, and the cable operator does not have sufficient historical data, we find, in this specific instance, that a weighted average of the comparable communities' adjusted BST MPRs, with true-up removed, would be a reasonable method to

¹⁶ In Ipswich, the BST MPR of \$10.89 would decrease to \$8.89, if the \$2.00 in true-up were removed (Exh. Comcast-81, at 4, Lines I8 and I9). Similarly, in Newbury, the BST MPR of \$11.27 would decrease to \$9.06, if the \$2.21 in true-up were removed; in Rowley, the BST MPR of \$11.08 would decrease to \$9.01, if the \$2.07 in true-up were removed; and in West Newbury, the BST MPR of \$11.66 would decrease to \$8.91, if the \$2.75 in true-up were removed (Exh. Comcast-117, at 4, Lines I8 and I9; Exh. Comcast-142, at 4, Lines I8 and I9; Exh. Comcast-181, at 4, Lines I8 and I9).

establish Newburyport's initial BST MPR. The Cable Division orders Comcast to refile the Newburyport FCC Form 1240, reducing the BST MPR to one that reflects the weighted average of the adjusted BST MPRs in Ipswich, Newbury, Rowley and West Newbury. The Cable Division the Company to refund the amount of overcharges, if any, resulting from the revised FCC Form 1240.

E. Town of Hudson

On the Town of Hudson's ("Hudson") FCC Form 1240, Comcast included, on Line A1, a starting rate of \$18.70, reflecting the BST MPR from the previous rate form, including FRCs, and proposed a projected BST MPR of \$20.42, exclusive of any FRCs (Exh. Comcast 78, at 1, 4). Following a pre-hearing conference between Hudson and Comcast, the Company agreed to revise both the current form and the prior form to correct the distribution between the embedded FRC and the incremental FRC within the 2003 form, and bring it forward to the 2004 form (Tr. at 18-19). Comcast submitted amended versions of both the current and previous forms for Hudson (RR-Hudson-1). In restating the previous form's external costs, Comcast removed FRCs associated with the prior license that it had not previously identified (id.). As a result of the revision, Comcast reduced the MPR on the previous form from \$18.70 to \$13.95 (id.). This adjustment, when carried forward onto the amended FCC Form 1240 for the current period, reduced the proposed BST MPR from \$20.42 to \$11.48, exclusive of any FRCs (id., compare Exh. Comcast-78). Based on our review, we determine that the BST MPR of \$11.48 is reasonable and complies with applicable law.

Since the actual rate,¹⁷ Comcast is charging is greater than the revised MPR approved herein, Hudson argues that Comcast has overcharged subscribers in Hudson, and that these subscribers are entitled to the lower rate and a credit as soon as possible (Hudson Brief at 1). We agree. We therefore, direct Comcast to make refunds of any overcharges, with interest, to Hudson subscribers, for the period commencing January 1, 2005, as a one-time credit to be paid on the next available billing cycle.

F. Basic Tier Rates in the Towns of Somerset and Swansea

Comcast implemented a rate for Somerset of \$12.15, and for Swansea of \$9.53. At the hearing, Somerset questioned the disparity in these rates, given that these two communities have similar services and nearly identical licenses (Tr. at 60-61). Somerset noted that the only difference between the two licenses was that the Somerset license required Comcast to provide a \$30,000 capital grant to upgrade Somerset's studio; there is no such requirement in the current Swansea license (Tr. at 61; RR-Somerset-1). Somerset questioned whether this one difference in franchise requirements resulted in a rate differential of over \$2.00 per month (Tr. at 61).¹⁸

Comcast responded that the primary reason for the difference in rates between the two communities is that Somerset has been regulated longer than Swansea (RR-Somerset-1).

Comcast explained that for several years, the cable operator in Somerset did not increase its

¹⁷ In January 2005, the Company implemented a rate of \$13.50, a reduction from the prior rate of \$17.05 (see Comcast 2005 Price Change Information at 1).

¹⁸ On January 1, 2004 Comcast changed the BST rate in Somerset from \$8.50 to \$11.00, while the BST rate in Swansea was adjusted from \$8.93 to \$8.95 (RR-Somerset-1). On January 1, 2005 the Somerset BST rate was adjusted to \$12.15, while Swansea's BST rate increased to \$9.53 (Exhs. Comcast-150, Comcast-161). These rates include FRCs.

BST rates, resulting in the accumulation of over \$5.00 per subscriber per month of deferred true-up on its rate forms (id.). In its previous rate proceeding, Comcast decided to recover some of this accumulated true-up in Somerset through the BST rate (id.; Tr. at 63). Swansea, on the other hand, only became subject to regulation in 2003 and had no accumulated true-up, and therefore experienced a modest increase attributable to inflation and changes in external costs (RR-Somerset-1).

As Comcast explained, the disparity that currently exists between the BST rates in Somerset and Swansea results from the mechanics of the FCC Form 1240. A cable operator uses the FCC Form 1240 to calculate its MPR, however, a cable operator may charge an operator selected rate that is less than the MPR. Pursuant to the FCC's rules, if the operator selects a rate that is less than the approved MPR calculated on the FCC Form 1240, the operator may defer recovery of the difference until a later date. Instructions for FCC Form 1240, at 5, 25. In Somerset, the prior operators chose to defer recovery of certain costs they were entitled to recover as part of the approved MPR. Although Swansea subscribers were charged the same operator selected rate, there was no deferred cost recovery. Comcast's recovery of these deferred costs in Somerset's recent rate forms accounts for the disparity in the rates between the two communities.

Thus, the disproportionate increases in Somerset's rate are a direct result of Comcast's and its predecessor operators' decisions in prior periods not to increase the BST rate to the maximum permitted level. While the Swansea subscribers escape the effects of any deferred cost recovery, they have not always benefitted from being charged non-regulated rates. In the

course of our regulatory review of Somerset's rates, the Cable Division has discovered errors in the rate calculation and ordered that the operator refund overcharges to Somerset subscribers. See e.g. Cox Communications, Inc., Y-98 INC, Y-98 EQU "Order on Refund Plan" (1999). Similar errors have occurred in the calculation of the Swansea rate, but the Cable Division lacked authority at that time to order the operator to make refunds in that community. We understand that Somerset subscribers may be frustrated by the difference in BST rates, but we note that the vast majority of cable subscribers subscribe to Standard Cable, which includes both the BST and CPST. The differential in rates for these subscribers is not as significant. Effective January 1, 2005, Somerset's Standard Cable rate is \$44.50, compared with a rate of \$44.25 in Swansea, exclusive of any FRCs. Comcast 2005 Rate Change Information at 108.

IV. FCC FORM 1205 - DISCUSSION AND ANALYSIS

A. Drops

The FCC Form 1205 allows a cable operator to recover the costs associated with regulated equipment and installation of the basic service tier. Instructions for FCC Form 1205, at 1. The subscriber drop is the portion of the installation that extends from the pole to the demarcation point, i.e., that portion of the wire that is located at or about 12 inches outside of the place where the cable wire enters the subscriber's premises. 47 C.F.R. § 76.5(mm). Comcast indicated on its previous FCC Form 1205, by checking the boxes under "Labor Costs and Policy Changes," that the average time required for primary installations included the labor costs associated with subscriber drops and that labor costs were not capitalized. CTV 03-1, at exhibit Comcast-191, at 7. However, Comcast indicated on its current FCC Form 1205, by

checking different boxes under “Labor Costs and Policy Changes,” that the average time required for primary installations did not include labor costs associated with subscriber drops, and the labor costs were capitalized (Exh. Comcast-198, at 7). Despite this change in methodology, Comcast reported nearly identical hours for the time required to complete an initial installation: 1.4815 hours on the previous form, and 1.4849 hours on the current form (Compare CTV 03-1, at exhibit Comcast-191, at 3, and Exh. Comcast-198, at 3).

Comcast testified that the reported hours are similar on both forms because, despite what boxes were checked on the current form, the Company not only included the labor costs in its average installation time, but also capitalized these costs on this filing (Tr. at 121-122). Comcast further testified that the methodology it employed is consistent with FCC precedent (id. at 121; RR-CTV-8, citing Falcon First Communications, DA 99-891 (1999) (“Falcon”)).

In Falcon, the FCC stated that as a general matter, the costs of network equipment outside of the subscriber’s premises, including subscriber service drops, are recovered through the operator’s programming rates. Falcon at 4, ¶ 9. However, costs related to installing and maintaining customer premises equipment on the subscriber’s premises are included in the equipment rate. Id. The FCC continued that the only exception to this allocation of costs is for the labor cost of subscriber drops installed at the time of the primary service installation. Id. In that case, the operator may include the entire cost of the primary installation in the equipment rate, not just the cost of labor inside the demarcation point. Id.

However, we read Falcon in conjunction with the Instructions for FCC Form 1205. In the instructions, the FCC clearly provided just two options with respect to the costs and charges

associated with initial installations that include subscriber drops.

Instructions for FCC Form 1205, at 14, Step A, Note 2. The first option is to include the labor costs associated with subscriber drops in the charges for installations, the method described in Falcon. Id. The second option is to capitalize such costs in distribution plant as the cost of drops, in which case, the labor cost for drops is recovered only in programming rates, not in installation or equipment charges. Id. The FCC's instructions specify that if an operator chooses the second option, the costs and associated hours must be eliminated from all charges for equipment and installation. Id.

Thus, the FCC does not permit cable operators to recover labor costs associated with initial installations through both the installation rate and through the programming rate as capitalized costs. As Comcast acknowledged, the Company has capitalized these labor costs as well as having included them in the primary installation rate (Tr. at 121). We find that Comcast inappropriately included capitalized labor costs in the average installation time calculation. The Cable Division orders Comcast to refile its FCC Form 1205, removing the time element of the primary installation that is associated with the service drops.

B. Commissions

Comcast included in its filing, as part of Schedule B, "Salaries and Benefits," the cost category "commissions" (Exh. Comcast-198, at 2, and at Capital Assets/General Ledger Audit Report 2003, at 3). Comcast included a total commissions expense of \$207,340,113 (id.).

We address whether the commission costs are properly included in the equipment and installation rate calculation. Comcast explained that commissions are part of the total

compensation package paid to Comcast personnel for selling video services to customers (Exh. CTV-39). Thus, according to Comcast, the commissions are a marketing expense. The Instructions for FCC Form 1205, at Schedule B, provide that “Schedule B includes all annual operating expenses ... for installation and maintenance of all cable facilities for the fiscal year used to complete this Form 1205.” Instructions for FCC Form 1205, at 11. However, the FCC’s regulations are clear: “[a] cable operator shall establish an Equipment Basket, which shall include all costs associated with providing customer equipment and installation under this section. ... the Equipment Basket shall not include general administrative overhead including marketing expenses.” 47 C.F.R. § 76.923(c). Accordingly, under the FCC’s rules, Comcast’s marketing expenses cannot be included on Schedule B.

The Cable Division finds that Comcast’s cost category, “commissions,” does not fall into one of the general cost categories that cable operators may elect to include in Schedule B. The Cable Division, therefore, instructs Comcast to remove all costs associated with commissions from Schedule B of its FCC Form 1205. Comcast is also instructed to remove all marketing-related salary expenses from the Schedule B salaries category as well as from the regulated Equipment Basket in the Equipment Worksheet, Line 5.

C. Conclusion

Based on the above, we find that Comcast’s proposed maximum permitted equipment and installation rates are not reasonable and are inconsistent with applicable law. Comcast is directed to refile its FCC Form 1205 in compliance with the directives contained herein.

Comcast is further directed to refund overcharges, if any, resulting from the recalculation of these rates.

V. OTHER ISSUES

Several communities, including the Town of Brookline (“Brookline”), are involved in or have recently completed the license renewal process (Tr. at 25). Under the respective renewal licenses, Comcast has not assumed the same contractual obligations as it had in previous agreements. As examples, Brookline stated that Comcast often will no longer commit to providing senior citizen discounts, local customer service offices or local emergency alert systems (“EAS”) in renewal franchises (Tr. at 21-27). The communities recognize that although a offering is required under a franchise, the costs of that offering are not necessarily FRCs for regulatory purposes (Tr. at 35).¹⁹ Given this, the communities questioned whether subscribers should experience rate relief when an operator either voluntarily or by the terms of a renewal license no longer incurs the same level of costs (Tr. at 25).

The communities’ concern does not raise any issue specific to the Company’s rate proposal at issue. Without an actual matter in controversy on which a record is developed, we may not rule on the issue. Nevertheless, the communities state that the issue is important as it is often raised in the context of the license renewal process. Given the importance to municipalities, we provide the following advisory opinion.

The FCC has addressed the question whether subscribers should receive rate relief when

¹⁹ See e.g., Harron Communications Corp., DA 00-1002 (2000), affirming Harron Communications Corp., Y-97 INC, Y-97 EQU (1999); Rate Order at 5755, ¶ 187.

operators elect to reduce costs, by not incurring voluntary costs, or costs that were not FRCs but had been previously included in license renewals. According to the FCC, a price cap approach is an effective alternative to cost-of-service regulation. Rate Order at 3776, ¶ 228. In adopting the price cap approach, the FCC explored inclusion of a productivity factor “to assure that subscribers benefit when a cable system operates more efficiently under capped rates.” Id. at 377, ¶ 128, n.558. However, the FCC declined to adopt the assignment of any productivity factor to an operator’s cost savings. In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket 93-215, FCC 94-226, at ¶ 7 (1994). The FCC’s decision appears to have been partly based on its concern that a productivity offset would dampen operators’ incentives to invest in innovative video services. Id. at ¶ 4.

Under the price cap approach, once a cable operator’s initial BST MPR is established, the operator’s BST rate may be adjusted for only inflationary increases, adjustments resulting from the addition or deletion of channels, and any changes in certain external costs that the FCC deemed to be outside of the operator’s control, such as certain taxes, programming, copyright fees, and FRCs. 47 C.F.R. § 76.922(e)(1). Absent a cost-of-service showing, the FCC rules may be interpreted as prohibiting local franchising authorities from investigating those costs related to the non-external portion of the BST rate.

VI. ORDER

Upon due notice, hearing and consideration, the Cable Division hereby rejects the FCC Forms 1240 and FCC Form 1205 filed in this docket. We direct Comcast to refile its

FCC Forms 1240 and FCC Form 1205 with the Cable Division on or before September 13, 2005.

We further order Comcast to file with the Cable Division a plan by which the Company will implement any refunds ordered herein. The refund plan should include the total amount of refund liability, the amount of the refund credited on each subscriber's bill, and the date on which the refunds will be paid. Comcast is ordered to file the refund plan by September 13, 2005.

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

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

Issued: August 30, 2005

APPEALS

Appeals of any final decision, order or ruling of the Cable Division may be brought within 14 days of the issuance of said decision to the full body of the Commissioners of the Department of Telecommunications and Energy by the filing of a written petition with the Secretary of the Department praying that the Order of the Cable Division be modified or set aside in whole or in part. G.L. c. 166A, § 2, as most recently amended by St. 2002, c. 45, § 4. Such petition for appeal shall be supported by a brief that contains the argument and areas of fact and law relied upon to support the Petitioner's position. Notice of such appeal shall be filed concurrently with the Clerk of the Cable Division. Briefs opposing the Petitioner's position shall be filed with the Secretary of the Department within seven days of the filing of the initial petition for appeal.

ATTACHMENT A

List of Regulated Communities by “Scenario”

SCENARIO 1

Acushnet, Agawam, Avon, Ayer, Bellingham, Berkley, Beverly, Billerica, Brockton, Buckland, Burlington, Cambridge, Canton, Carlisle, Chelmsford, Chelsea, Clinton, Cohasset, Conway, Dartmouth, Dighton, Dover, East Bridgewater, Easton, Erving, Everett, Fairhaven, Foxborough, Freetown, Gill, Greenfield, Hanover, Hanson, Hardwick, Hatfield, Hingham, Holliston, Hopedale, Hudson, Hull, Ipswich, Lakeville, Lawrence, Longmeadow, Lowell, Lynn, Malden, Mansfield, Marblehead, Marion, Mattapoisett, Medfield, Medford, Medway, Melrose, Mendon, Methuen, Middleborough, Milford, Upton, Monson, Nahant, Natick, Norfolk, Northampton, Northfield, Norwell, Orleans, Palmer, Provincetown, Quincy, Randolph, Raynham, Reading, Revere, Rochester, Rowley, Salem, Scituate, Seekonk, Sharon, Shelburne, South Hadley, Southwick, Stoneham, Stoughton, Sudbury, Swampscott, Tewksbury, Topsfield, Townsend, Truro, Upton, Wakefield, Walpole, Waltham, Wareham, Wayland, Wellesley, Wellfleet, West Bridgewater, West Newbury, West Springfield, Weston, Williamsburg, Wilmington, Winchendon, Winchester, and Winthrop.

SCENARIO 2

Acton, Andover, Ashburnham, Attleboro, Bedford, Belmont, Boxford, Braintree, Brookline, Chatham, Chester, Concord, Danvers, Deerfield, Dennis, Dracut, Fall River, Fitchburg, Framingham, Franklin, Gardner, Georgetown, Granville, Groveland, Hamilton, Harwich, Haverhill, Huntington, Leominster, Lincoln, Littleton, Lunenburg, Maynard, Middleton, Millis, New Bedford, Newburyport, North Reading, Norton, Norwood, Peabody, Plainville, Sherborn, Somerset, Stow, Sunderland, Taunton, Templeton, Tyngsborough, Wenham, Westford, Westhampton, Westminster, Westwood, Whitman, and Yarmouth.

SCENARIO 3

Ashland, Barnstable, Blackstone, Holyoke, Hopkinton, Lynnfield, Marlborough, Montague, North Andover, Phillipston, Rehoboth, Swansea, Wareham, Warren, Watertown, Westfield, Weymouth, and Wrentham.

SCENARIO 4

Amherst, Bernardston, Eastham, Granby, Holbrook, Milton, Nantucket, North Attleborough, Saugus, and Springfield.

OTHER

Boxborough, Bridgewater, Lancaster, Newburyport, and Pelham.