



THE COMMONWEALTH OF MASSACHUSETTS

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

RATE ORDER

CTV 05-3

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.

APPEARANCES:

Peter H. Feinberg
Associate General Counsel
Comcast Cable Communications, Inc.
1500 Market Street
Philadelphia, PA 19102
FOR: COMCAST CABLE COMMUNICATIONS, INC.
Petitioner

William H. Solomon, Esq.
319 Main Street
Stoneham, MA 02180
FOR: CITY OF ATTLEBORO,
TOWNS OF FRANKLIN, HUDSON AND
STONEHAM
Intervenors

James E. Harrington
Mayor
City of Brockton
City Hall
45 School Street
Brockton, MA 02301
FOR: CITY OF BROCKTON
Intervenor

Gilbert R. Hoy, Jr.
Town of Brookline
Town Hall
333 Washington Street
Brookline, MA 02445
FOR: TOWN OF BROOKLINE
Intervenor

Philip Eliopoulos
Chairman
Board of Selectmen
Town of Chelmsford
Town Offices
50 Billerica Road
Chelmsford, MA 01824
FOR: TOWN OF CHELMSFORD
Intervenor

Edward M. Lambert, Jr.
Mayor
City of Fall River
One Government Center
Fall River, MA 02722
FOR: CITY OF FALL RIVER
Intervenor

John J. Clorite, Chairman
Cable Advisory Committee
145 Windward Drive
Somerset, MA 02726
FOR: TOWN OF SOMERSET
Intervenor

Jerry Sullivan
Board of Selectmen
Town of Yarmouth
Town Hall
1146 Route 28
South Yarmouth, MA 02664
FOR: THE TOWN OF YARMOUTH
Intervenor

Carol McDonough
5 Comanche Place
Andover, MA 01810
Interested Person

I. INTRODUCTION

On September 29, 2005, Comcast Cable Communications, Inc. (“Comcast” or “the Company”) filed with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy proposed basic service tier (“BST”) programming rates on Federal Communications Commission (“FCC”) Forms 1240 for the communities subject to rate regulation served by Comcast in Massachusetts.¹ In conjunction with its FCC Form 1240 filings, the Company filed a nationwide FCC Form 1205, with proposed equipment and installation rates based on a fiscal year ending December 31, 2004. Comcast filed revised FCC Forms 1240 for the City of Revere on October 4, 2005, and for the City of Chelsea on October 24, 2005. Comcast implemented changes to its BST programming and equipment rates on February 1, 2006 (Tr. at 4).

Subsequent to these filings, the Cable Division issued its order on the Company’s compliance filing for the previous proceeding. Comcast Cable Communications, Inc., CTV 04-3/04-4, “Order on Petition for Reconsideration and on Compliance Filing,” (March 31, 2006). Since Comcast’s initial filings did not reflect the adjustments that the Cable Division had ordered in that proceeding, the Company revised all of its FCC Forms 1240 and its FCC Form 1205 (Tr. at 3-4).² It is these forms, as revised, that are the subject of the Cable Division’s review (id. at 4).

¹ The regulated communities are listed on the attached Rate Schedule.

² The Company revised the relevant pages of each form and filed them with the Cable Division on May 19, 2006.

The Cable Division held a public and evidentiary hearing on July 19, 2006. The Cities of Attleboro, Brockton, and Fall River, and the Towns of Brookline, Chelmsford, Franklin, Hudson, Somerset, Stoneham, and Yarmouth filed timely petitions for leave to intervene as parties to the proceeding. The Cable Division granted each of these timely petitions on July 17, 2006. Comcast Cable Communications, Inc., CTV 05-3, “Order on Motions to Intervene by Municipalities” (July 17, 2006). On August 29, 2006, after the close of the record, the Town of Wellesley filed a petition to intervene in the proceeding. In this Order, the Cable Division also rules on Wellesley’s petition.

The evidentiary record consists of Comcast’s rate forms admitted as Comcast Exhibits 1 through 198, Comcast’s responses to information requests admitted as Cable Division Exhibits 1 through 29, four exhibits presented by the Town of Hudson, and Comcast’s responses to record requests issued by the Cable Division and the Town of Somerset. Comcast and the Town of Hudson filed briefs on August 11, 2006.

II. The Town of Wellesley’s Late-Filed Petition to Intervene

As noted above, on September 29, 2005, Comcast filed with the Cable Division proposed BST programming and equipment and installation rates for its Massachusetts communities subject to rate regulation, including the Town of Wellesley (“Wellesley” or “the Town”). Upon receipt of the filings, the Cable Division caused notice of the proceeding to be published in a newspaper of general circulation and cablecast where facilities were available. Comcast Cable Communications, Inc., CTV 05-3, “Order of Notice” (May 3, 2006). In addition, the Cable Division served, by first-class mail, each municipality with notice of the

proceeding. The notice advised interested persons of a public hearing to be held on July 19, 2006, and established a deadline of July 10, 2006, for petitions for intervention. Id.

On August 14, 2006, Wellesley submitted a letter to the Cable Division requesting that the Cable Division review the appropriateness of Comcast's access fee in Wellesley. Letter from Hans Larsen, Executive Director of General Government Services, Town of Wellesley, August 14, 2006 ("Wellesley Letter"). In the letter, Wellesley made no reference to the pending proceeding. Id. Then, on August 29, 2006, Wellesley filed a petition to intervene in the proceeding. Wellesley Petition to Intervene, August 29, 2006 ("Wellesley Petition").

In its petition to intervene, the Town references its August 14, 2006, letter to the Cable Division. Wellesley Petition at 1. The Town stated that it "is concerned about the accuracy of Comcast's franchise-related-costs and the status of a number of historical costs in current Wellesley rates." Id. The Town asserted that it had received a number of telephone calls from concerned Wellesley citizens about these issues and Comcast's bills. Id.

Under the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01, which govern our proceedings, a petition to intervene "may be filed at any time following a request for an Adjudicatory Proceeding or an order to show cause, but in no event later than the date of hearing." 801 C.M.R. § 1.01(9)(c). In its petition, Wellesley did not request a waiver of this requirement, and indeed did not refer to the requirement. In order for us to waive the requirement and grant Wellesley's late-filed petition for intervention, the Town must demonstrate "good cause" to do so. 207 C.M.R. § 2.04.

Wellesley has advanced no argument that good cause exists to warrant allowing the Town to intervene. First, Wellesley has not alleged that notice of the proceeding was

inadequate. Moreover, other than raising the Franchise related costs (“FRC”) issue, Wellesley has not indicated what, if any, evidence it would seek to introduce into the record. Wellesley has not identified any witness or offered any pre-filed testimony of any witness. Without an offer of proof, there is nothing on which the Cable Division could justify allowing Wellesley to participate as a full party at this stage in the proceeding. The Cable Division’s rules and policies provide for extensive community participation in rate proceedings. If the rate review process is to function efficiently, it is essential that all communities follow the established rules for intervention and participation in our rate proceedings. Accordingly, because Wellesley’s petition was filed after the close of the hearing, and because Wellesley has not demonstrated good cause to grant its late-filed petition to intervene, the Cable Division hereby dismisses the petition for intervention filed by Wellesley.

Although we have rejected Wellesley’s late-filed petition, our review of Comcast’s rates as a matter of course includes those charged in Wellesley. Wellesley’s FRC Worksheets are included in Comcast’s current rate filing for the Town (Exh. Comcast-177, at FRC Worksheets). In addition, Comcast submitted a response to the Wellesley letter. Letter from Norman Dupre, Senior Financial Analyst, Regulatory Accounting, Comcast Cable Communications, Inc., September 11, 2006.³ We address our findings with respect to the issues raised in these filings in Section III.B.5, below.

III. REVIEW OF FCC FORMS 1240

A. Standard of Review and Burden of Proof

³ On our own motion, we admit the response of Comcast as Cable Division Exhibit 29, into the record of this proceeding.

The FCC has created specific forms incorporating the provisions of its rate regulations, upon which a cable operator must calculate 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. In order that rates be adjusted on the FCC Form 1240 for projections in external costs, or for projected changes to the number of regulated channels, the cable operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. 47 C.F.R. §§ 76.922(e)(2)(ii)(A) and 76.922(e)(2)(iii)(A). Cable operators may also project for increases in FRCs to the extent they are reasonably certain and reasonably quantifiable; however, such projections are not presumed to be reasonably certain and reasonably quantifiable.

47 C.F.R. § 76.922(e)(2)(ii)(A).

The standard under which the Cable Division must review rate adjustments on the FCC Form 1240 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; 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 Per Channel Charge" as determined by federal regulations. See 47 C.F.R. § 76.922(a). 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) and (e), and 76.942.

The burden of proof is on the cable operator to demonstrate that its proposed rates for BST programming comply with Section 623 of the Communications Act of 1934, as amended,

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, at 5716, ¶ 128 (1993) (“Rate Order”); see also 47 C.F.R. § 76.937(a).

B. Discussion and Analysis

1. Comcast’s Basic Service Tier Rate Change Date

In Comcast’s previous rate proceeding, the Company reported that it had implemented its proposed BST rate changes on January 1, 2005. Comcast Cable Communications, Inc., CTV 04-3/04-4, at 1 (2005). In the current proceeding, although Comcast’s FCC Forms 1240 show a projected period starting on January 1, 2006, the Company chose to delay the implementation of its proposed rate changes until February 1, 2006 (see, e.g., Exh. Comcast-1; Tr. at 4). Thus, during January 2006, Comcast continued to charge the BST rates approved in the prior proceeding. However, in 31 communities, the BST rate charged subscribers, including the FRCs, exceeded the proposed BST maximum permitted rate (“MPR”) (RR-CTV-2).⁴

⁴ The communities affected are: Ashburnham (Exh. Comcast-6), Ayer (Exh. Comcast-10), Bedford (Exh. Comcast-12), Belmont (Exh. Comcast-14), Bernardston (Exh. Comcast-16), Boxborough (Exh. Comcast-20), Braintree (Exh. Comcast-22), Brockton (Exh. Comcast-24), Carlisle (Exh. Comcast-30), Concord (Exh. Comcast-37), Dighton (Exh. Comcast-43), Everett (Exh. Comcast-50), Holbrook (Exh. Comcast-73), Hudson (Exh. Comcast-78), Leominster (Exh. Comcast-85), Lincoln (Exh. Comcast-86), Malden (Exh. Comcast-93), Middleborough (Exh. Comcast-106), New Bedford (Exh. Comcast-116), Northfield (Exh. Comcast-124), Provincetown (Exh. Comcast-134), Randolph (Exh. Comcast-136), Saugus (Exh. Comcast-144), Sharon (Exh. Comcast-147), Springfield (Exh. Comcast-153), Townsend (Exh. Comcast-166), Truro (Exh. Comcast-167), Wayland (Exh. Comcast-176), Westford (Exh. Comcast-184), Westwood (Exh. Comcast-188), and Whitman (Exh. Comcast-190).

The FCC's rate regulations provide that "[i]n all events, a system must adjust its rates every twelve months to reflect any net decreases in external costs that have not previously been accounted for in the system's rates." 47 C.F.R. § 76.922(e)(2)(ii)(B). Our review of Comcast's FCC Forms 1240 for the 31 affected communities reveals that in every community, the decrease in the BST MPR was the result of a net decrease in total external costs, including true-up. Comcast concedes that these rates should have been decreased on January 1, 2006 (Tr. at 35). However, rather than refund the overcharges to subscribers through a one-time credit on subscribers' bills, Comcast proposed to return the overcharges to subscribers as part of the true-up adjustment on its next FCC Form 1240 filings (*id.*). Comcast argued that in many communities the amounts are "de minimis," and that, where the amounts are de minimis, the FCC does not always require an operator to issue refunds (*id.* at 36).

There are two issues with Comcast's proposal. First, there is a question as to whether the amounts at issue are of the same de minimis nature as those Comcast claimed were at issue before the FCC. The amounts at issue here vary from \$0.02 to \$2.31 (RR-CTV-2). In 17 communities, the overcharges exceed \$0.50, and in six communities, the overcharges exceed \$1.00 (*id.*). We need not reach a conclusion on this point as we find a more fundamental problem with Comcast's proposal. The purpose of the true-up reconciliation function of the rate form is to allow for the correction of prior projections. See Instructions for FCC Form 1240, at 5. Comcast's delayed rate change, and the resulting overcharges, are not related to inaccurate projections by the Company. While the Cable Division has allowed the true-up reconciliation process to correct for other calculation errors, such as clerical errors, we have never allowed the reconciliation to remedy a clear violation of FCC regulations. Here, Comcast did not err in

calculating the BST rates in these communities, as the forms were prepared properly. Rather, the overcharge resulted from Comcast's unexcused failure to decrease its rates when it was required to do so. The rule is clear: where a rate reduction is required, the operator must reduce its BST rates 12 months after the previous rate change. 47 C.F.R. § 76.922(e)(2)(ii)(B). The Company offered no authoritative citation to support allowing an operator to use the true-up reconciliation process to remedy such non-compliance with a clear FCC mandate. Therefore, we direct Comcast to refund its January 2006 overcharges to subscribers in the 31 affected communities as a one-time credit on the next available billing statement.

2. The Removal of Franchise Related Costs from the FCC Form 1240: Objections from the Town of Hudson

In CTV 04-3/04-4, at 19, the Cable Division approved a proposal of Comcast to calculate the FRCs on a separate worksheet rather than include the costs on the FCC Form 1240. The Town of Hudson ("Hudson") requested that the Cable Division reconsider this ruling (Tr. at 38-55). Hudson argued that the FCC's recent decision in Comcast of Minnesota, Inc., 20 FCC Rcd. 20, DA 05-3250 (December 21, 2005) requires us to reverse our decision, and direct Comcast to again include FRCs in the FCC Form 1240 rate calculation (Tr. at 51-52).

Hudson reiterated its position, first raised in our previous proceeding, that the FCC provides cable operators with only two options with respect to FRCs; either include them on the form, or not collect them at all (Hudson Brief at 2, n.1). In support, Hudson argued that the use of the permissive "may" in the Instructions for FCC Form 1240 provides a choice as to whether or not to recover FRCs from subscribers, not a choice as to the calculation methods (id.) Hudson asserted that subsequent to our Rate Order, the FCC clarified that external costs, if to be

recovered, must be included on the form (*id.* at 3, citing Comcast of Minnesota). Hudson argued that since our approval of Comcast's removal of its FRCs from the FCC Form 1240 was "contingent" on the conclusion that the FCC did not require FRCs to be included on the rate form, the Cable Division must require Comcast to comply with the FCC's precedent and include FRCs on the FCC Form 1240 (*id.* at 2).

Comcast disagreed that the Cable Division must reverse course (Comcast Brief at 2). Comcast argued that in Comcast of Minnesota, the FCC determined only that "the franchising authority did not act unreasonably in requiring the operator to include certain information on the form" (*id.*, see Comcast of Minnesota at 28, ¶ 22) (emphasis in original). Comcast thus argued that the FCC's decision in Comcast of Minnesota was limited to its facts (*id.*).

In support, Comcast noted that it is material that the calculation of the FRCs is not affected by the mechanics of the FCC Form 1240 (*id.* at 4). As such, the Cable Division's review of Comcast's FRCs on the attached worksheets will result in the identical maximum permitted rate that would be obtained, if the FRCs were listed on the form (*id.* at 5). The Company further asserted that the calculation and presentation of FRCs on separate worksheets is beneficial and in the public interest because FRCs are more transparent to customers (*id.* at 4). Comcast stressed that the Cable Division approved Comcast's proposal "because it was reasonable and would produce reasonable rates under the FCC's rules and policies" (*id.* at 5) (emphasis in original). This, the Company argued, is what the Cable Act and the FCC's implementing regulations are designed to accomplish (*id.*). Comcast noted that Hudson has not claimed that following the current method would produce an unreasonable rate (*id.*).

It is of no consequence that we concur with Hudson regarding the use of the permissive “may” in the Instructions for FCC Form 1240. Clearly, the FCC permits a cable operator to recover its FRCs, but the cable operator is not required to do so. Although Comcast argued a contrary interpretation of the use of the word “may” in the prior proceeding, the Cable Division did not base our decision on Comcast’s interpretation. Indeed, we never mentioned Comcast’s interpretation of “may” in our Rate Order. Rather, our decision was based on FCC precedent and sound public policy grounds. The issue here is whether the FCC’s decision in Comcast of Minnesota invalidates our rationale. We find that it does not.

The primary issue in Comcast of Minnesota was the appeal by Comcast of the local franchising authorities’ decision to require Comcast to include franchise fees attributable to non-subscriber revenue on the FCC Form 1240. Comcast of Minnesota at 23-27, ¶¶ 5-17. The FCC rejected this approach, concluding that incorporating franchise fees on the form would be inconsistent with important public policy goals and would significantly complicate the rate-setting process. Id. at 26, ¶¶ 14-15. A second issue concerned whether FCC regulatory fees should be treated as external costs and included on Worksheet 7 of the FCC Form 1240. Id. at 27-29, ¶¶ 18-22. The only mention of franchise-related costs was a general description of “the host of other external costs covered by” the FCC instructions at issue. Id. at 28, ¶ 21.

In contrast, the FCC specifically addressed excluding FRCs from the FCC Form 1240 calculation in In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation, Uniform Rate-Setting Methodology: Report and Order, CS Docket No. 95-174, FCC 97-86, at 14, ¶ 33 (1997) (“Uniform Rate-Setting Order”). There, as we noted in CTV 04-3/04-4, at 11, the FCC expressed its

willingness to allow a cable 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. Nothing in Comcast of Minnesota suggests that the FCC has reversed this position. Rather, the FCC reiterated its public policy goal set forth in the Uniform Rate-Setting Order of providing better rate information to subscribers, by stressing its policy that favors informing subscribers of how much they are paying for the cable operator's service, and how much they are paying to the franchising authority. Comcast of Minnesota, at 26, ¶ 15.

The disclosure by cable operators to subscribers of the amount of FRCs they pay was also a goal of Congress when it enacted the Cable Communications Policy Act in 1984. Section 622(c) specifically provides that cable operators may identify on subscribers' bills the amount of the total bill assessed to support PEG access. Communications Act of 1934, as amended, Section 622(c)(2); 47 U.S.C. § 542(c)(2). To achieve Congress's objective in the environment of rate regulation, it is necessary for cable operators and local rate regulators to accurately determine these FRC amounts. As we have found, FRCs are a remarkably variable component of the BST rate. CTV 04-3/04-4, at 16-20. Much of the Cable Division's rate regulatory activity over the past decade has been to ensure that cable operators correctly determine the FRCs that they charge subscribers.

The FCC Form 1240 itself does not permit the determination of the FRCs' accuracy, because it does not provide for a detailed analysis of FRCs; instead, cable operators are only required to enter a total FRC amount on Worksheet 7 of the form. Id. at 11-12. The FRC Worksheet that Comcast now attaches to all of its FCC Forms 1240 provides for a precise determination of the FRC amount by including a detailed breakdown of the capital and operating

components of the FRCs. This Worksheet reports far more detail than the FCC requires. Further, the Company is now required to provide a true-up calculation on the Worksheet, that adjusts the monthly per-subscriber FRCs for the variation in subscriber counts between the true-up and projected periods (see, e.g., Exh. Comcast-1, at FRC Worksheet, Attachment 6B). The Company will also include a true-up adjustment that is carried forward through the life of a renewal license, resulting from the timing differential between the date that the new license's franchise obligations become effective, and the date that Comcast is allowed to change its BST rate (Comcast Brief at 8-9; see, e.g., Exh. Comcast-6, at FRC Worksheet, Attachment 6B). As Comcast pointed out in its brief, when the FRC true-up is performed within the FCC Form 1240 and without the supplementary worksheet, these details become hidden in the aggregate amount on Line H14, which includes all external costs (id. at 9). These true-up adjustments are not insignificant. The Cable Division has now twice reviewed Comcast's FRC Worksheets prepared separately from the form. We have found that relatively small annual changes in total subscribers in a community often lead to significant differences in monthly per-subscriber FRCs, differences that would not be visible, if the true-up were calculated on the FCC Form 1240. Generally, we conclude that having all FRC adjustments on a single form substantially improves our ability to determine whether the Company is accurately calculating the FRC amounts that it is charging subscribers.

There is yet another advantage to the FRC Worksheet. With respect to franchise fees, the FCC noted that the itemization on bills separate from the BST rate "is intended to inform subscribers that local elected officials are imposing franchise fees so there will be a measure of political accountability for fees and fee increases." Comcast of Minnesota, at 7, ¶ 15, citing City

of Pasadena, California: Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues, 18 FCC Rcd. 18192, FCC 01-289, at 18201, ¶ 23 (2001) (“Pasadena”). It “permits subscribers to be fully apprised of the effect of the governmentally imposed costs on their bills.” Id., citing Pasadena at 18195, ¶ 7. This analysis is no less relevant to the question of whether FRCs ought to be separately calculated. In CTV 04-3/04-4, at 13-14, we found that subscribers would be fully informed about the extent to which FRCs contribute to the overall BST rate, and better understand the component costs of their cable service. Because FRCs would be fully disclosed on subscribers’ bills and on the FRC Worksheet, subscribers and municipal officials would be aware of the rate impact of FRCs as they participate in the license renewal process. Id. at 14.

Hudson alleges no harm to subscribers resulting from the separate calculation of the FRCs. Hudson seeks to apply the regulations to the letter, without regard to the well-established policies supporting the regulations. Applying the Instructions for FCC Form 1240 mechanically, as Hudson proposes, would bring no benefit to subscribers, but would make the regulated rate less transparent. Furthermore, Hudson has overlooked the difference between a simple FCC regulatory fee, which rarely changes and is the same for all communities, and FRCs, which are different for every community, vary from year to year, and are themselves comprised of many components. Whereas the FCC regulatory fee is easily identifiable, including FRCs on the rate form obscures their complexity to subscribers, communities, and regulators. The determination of FRCs is a complex process, and we have reasonably concluded that the calculation of accurate FRC amounts is effectively performed outside of the FCC Form 1240, while still remaining under our complete regulatory scrutiny. While this result might not be within the letter of the Instructions for FCC Form 1240, it is consistent with FCC policy and precedent and provides for

an accurate calculation of FRCs within the regulatory process established by the FCC.

Therefore, we conclude that the FCC's decision in Comcast of Minnesota does not require us to change our ruling in CTV 04-3/04-4.

3. Carlisle: Franchise Related Costs

On January 1, 2005, Comcast began charging its Carlisle subscribers an FRC amount of \$0.89 (Exh. CTV-11). Subsequently, Comcast determined that during 2005, it should have charged subscribers only \$0.28 (id.). The FRC amount of \$0.89 included embedded costs from the previous license, in addition to the FRCs required under the renewal license, which became effective on October 14, 2001 (id.; Exh. Comcast-30, at FRC Worksheets; see Renewal Cable Television License for the Town of Carlisle, Massachusetts (October 14, 2001) at 6, Section 1.1(j)). The Company's error appears to have been a clerical one, resulting from the Company's failure to remove these embedded costs from the FRC Worksheet, after it ceased collecting these costs on December 3, 2001 (Exh. CTV-11).⁵ While Comcast charged the correct FRC amount in 2004, Comcast transferred the wrong figure from the 2005 FRC Worksheet to represent the pass through on its 2005 rate card (Exh. Comcast-30, at FRC Worksheet, Attachment 6A 2/2; Comcast: 2006 Price Change Information at 50).⁶ On its current Carlisle form, Comcast sought to adjust for its previous over-collection of FRCs (Exh. CTV-11).

⁵ Under the Carlisle renewal license, responsibility for providing public access shifted from the cable operator to an Access Corporation that received funding through a three percent fee on subscribers' bills (Exh. CTV-11).

⁶ Comcast is required to file its proposed rate changes with the Cable Division, pursuant to 207 C.M.R. § 10.02(2). Comcast reports these changes for all of its Massachusetts communities, by providing its rate notices in a single bound volume. The cable Division hereby takes administrative notice of Comcast: 2006 Price Change Information, pursuant to G.L. c. 30A, § 11(5) and 801 C.M.R. § 1.01(10)(h).

Specifically, Comcast proposed reducing its 2006 monthly per-subscriber FRC amount from \$0.29 to \$0.24 (id.; Exh. Comcast-30, at FRC Worksheet, Attachment 6B). Comcast began charging Carlisle subscribers an FRC of \$0.24 on February 1, 2006. Comcast: 2006 Price Change Information at 50.

However, during the course of this proceeding, Comcast determined that it made a further error in calculating this true-up adjustment (Exh. CTV-11). The Company included six months rather than the full 12 months of over-collections in the true-up calculation (id.).⁷ To account for the remaining six months, Comcast proposed to return the remaining amount of overcharged FRCs to subscribers by further reducing its FRCs by another \$0.05 for the remainder of the current Carlisle license, which expires in 2011 (Exh. CTV-11; compare Exh. Comcast-30, at FRC Worksheet, Attachment 6B).

In approving Comcast's use of the separate FRC Worksheet, we accepted Comcast's representation that the true-up calculation on the FRC Worksheet would apply in two instances (id.; see Comcast Brief at 8-9). The first would be to account for subscriber variations from year to year, since changes in the number of subscribers affect how much of the total is allocated on a per-subscriber basis.⁸ The second situation arises were a license to be renewed at any point during the rate year, and the new FRCs were to vary from the FRCs incurred under the previous license. Because rates are adjusted annually, the expiring license's FRCs would be charged

⁷ This excludes January 2006, because the Company had not yet implemented its annual rate change.

⁸ For instance, in Carlisle, the total subscribers during the true-up period increased from 1,154 in 2005 to 1,247 in 2006 (Exh. Comcast-30, at FRC Worksheets, Attachment 6A 2/2, Attachment 6B). This reduced one component of the FRC, the \$25,000 in equipment for the Town Hall, from \$0.29 per subscriber per month to \$0.27 (id.).

subscribers throughout the entire rate year, even though the actual FRC obligation would have changed during the year. To adjust for any changes in the FRC amount required under the new license, Comcast includes a true-up adjustment to the next year's FRC Worksheet. This adjustment is then carried forward for the term of the new license.⁹ In this proceeding, Comcast proposes a third application of the FRC true-up process: to correct for clerical errors in calculating the FRCs.

While there may be instances where the true-up process of the FRC Worksheet might be used to correct for calculation errors, we find that this is not such an instance. Comcast overcharged subscribers \$0.61 per month for the 2005 projected period. The Cable Division finds that an amount of this magnitude should not be recovered through a long-term offset to Carlisle's FRC total. Importantly, there have been significant subscriber variations in Carlisle. The FRC Worksheets for the past three true-up periods report subscriber totals of 896, 1,154, and 1,247 subscribers, respectively (Exh. Comcast-30, at FRC Worksheets). With rapid subscriber growth, the affected subscribers' refunds would be reduced, since the amounts are spread over Carlisle's expanding subscriber base. Thus, subscribers would receive refunds that

⁹ Ashland's FRC Worksheet is an example of this true-up adjustment, where the FRC amount was reduced by \$0.03 per subscriber per month because of a license renewal (see Exh. Comcast-7, at FRC Worksheet, Attachment 6B).

are less than the amount by which they were overcharged.¹⁰ Further, Comcast's proposed true-up offset of \$0.10 per month is understated since it assumes a recovery period of the full ten-year term of the license, even though only five years of the license term remain (Exh. CTV-11; Exh. Comcast-30, at FRC Worksheets).

The Cable Division, therefore, orders Comcast to refund to Carlisle subscribers, as a one time credit, an amount equal to the 12-month FRC overcharge plus interest on its next available billing cycle.¹¹ The issue of Comcast's initial true-up adjustment and subsequent correction from six to 12 months is rendered moot by our decision that the entire amount should be immediately refunded.¹²

4. Medway: Franchise Related Costs

For its subscribers in Medway, Comcast proposed an increase of \$0.41 in its monthly per-subscriber FRCs, from \$0.91 per subscriber per month in the previous rate proceeding, to \$1.32 per subscriber per month in the current rate proceeding (Exh. Comcast-102, at Attachment 1). Despite this increase, Comcast did not claim that there was any change in

¹⁰ We note that generally, when refunds are issued, subscriber churn between the period that the overcharges are incurred and the time at which the refunds are paid will prevent an exact matching of refunds and subscribers. We allow this because of the significant administrative burden to the cable operator in identifying and possibly locating each of the specific subscribers who overpaid. However, Comcast's proposal to refund the Carlisle overpayment over a multi-year period would result in a mismatch of overpayments and refunds far outside the permissible boundaries of normal subscriber churn.

¹¹ We realize that Comcast, through the method that we have disapproved herein, has refunded a small portion of the overcharge. Rather than correcting this error through the form, we instruct Comcast to net this refund amount against the one-time credit.

¹² Comcast's overcharges to subscribers during January 2006 will be returned as part of the adjustment directed by Section III.B.1 of this Order.

Medway's FRC obligations (id. at FRC Worksheets). Medway's license was last renewed on February 22, 1998, and expires on February 22, 2008. Cable Television Renewal License, Town of Medway, Massachusetts (February 22, 1998), at 7, Section 2.2 ("Medway License").

The primary component of Medway's FRCs is its unamortized capital balance of \$47,729 for public, educational and governmental ("PEG") access equipment and facilities (Exh. Comcast-132, at FRC Worksheet, Attachment 6B, see Medway License at 12-13, Section 5.3). In preparing the FRC Worksheet, Comcast appears to have made two errors in determining the remaining life of the license for amortization purposes. First, on the FRC Worksheet for the true-up period, the Company reported that the Medway license would expire on June 22, 2008 (id. at FRC Worksheet, Attachment 6A). However, the FRC Worksheet for the current period reports the actual expiration date of February 22, 2008 (id. at FRC Worksheet, Attachment 6B; see Medway License at 7, Section 2.2). Thus, prior to 2006, Comcast was amortizing its capital balance over a period four months longer than appropriate. Second, on the current FRC Worksheet, Comcast amortized the remaining capital balance over a 14 month period, commencing on January 1, 2006 (id.). This period also conflicted with the license's actual expiration date of February 22, 2008, which is 26 months later.¹³ Comcast's allocation of the remaining capital balance over 14 months instead of 26 months results in a monthly payment per subscriber of \$1.00 for this component of the FRC, almost twice the amount if it were

¹³ The Worksheet states that as of January 1, 2006, 106 months of the license term had elapsed, and only 14 remained (Exh. Comcast-102, at FRC Worksheet, Attachment 6B). In fact, because the license became effective on February 22, 1998 and expires ten years later, only 94 months had elapsed and 26 months remained.

amortized over the correct period (id.). This error, in large part, contributed to the increase in Medway's FRCs between the previous and current years.

The Cable Division orders Comcast to refile its FRC Worksheet for Medway, using the correct license expiration date and the actual number of months remaining in the license term when calculating its monthly per-subscriber FRCs. In addition, the Cable Division orders Comcast to explain to the Cable Division how it intends to make Medway subscribers whole for any FRC overcharges.

5. Wellesley: Calculation of Franchise Fees

In Wellesley, the access fee is 5.35 percent, whereas the license specifies an access fee of 4.75 percent of "the Licensee's Gross Annual Revenues." Cable Television Renewal License, Town of Wellesley, Massachusetts (July 1, 2005), at 24, Section 6.4(a) ("Wellesley License"). Comcast explained the apparent discrepancy, stating that included in the license's definition of "gross revenues" are both "fees paid on all subscriber revenue ('fee-on-fee')" and "all home-shopping service(s) revenues and advertising revenues" (Exh. CTV- 29, at 2; see Wellesley License at 7-8, Section 1.1(21)). The Company explained that including home shopping commissions and advertising revenues in gross revenues, and dividing this amount by subscriber service cable revenue, results in an incremental percentage for pass-through purposes of 0.38 percent. The Company further explained that the "fee-on-fee" revenue requirement adds an additional increment of 0.22 percent, which brings the total pass through percentage in Wellesley to 5.35 percent.

Under the federal franchise fee statute, Wellesley's access fee is deemed a franchise fee. Communications Act of 1934, as amended, Section 622; 47 U.S.C. § 542. The issues raised

here concerning the definition of “franchise fee” are well-settled. City of Dallas v. F.C.C., 118 F.3d 393 (5th Cir. 1997) (“Dallas”); Pasadena, *supra*.¹⁴ Section 622(b) states that for any 12-month period, the franchise fees paid by a cable operator “shall not exceed 5 percent of such cable operator’s gross revenues....” Communications Act of 1934, as amended, Section 622(b); 47 U.S.C. § 542(b). In Dallas, the Federal Appeals Court held that when Congress enacted Section 622(b), “Congress intended ‘gross revenue’ to have its normal, ordinary, and common meaning.” Id. at 397. The Court concluded therefore that all money collected from subscribers, including funds used to pay franchise fees, must be included in a cable operator’s gross revenue.¹⁵ Id. at 398-399.

The question of whether franchise fees may be paid on home-shopping commissions and advertising revenues was raised in Pasadena. The FCC extended Dallas, finding that advertising revenue and home shopping commissions may be considered part of an operator’s gross revenues for franchise fee calculation purposes. Id. at 18198, ¶ 15. The FCC concluded that if the local franchising authority includes advertising revenue and home shopping commissions in its definition of gross revenue, a cable operator is permitted to pass the entire amount of the franchise fee through to subscribers. Id. The inclusion of these non-subscriber revenues in the

¹⁴ A petition to review the FCC’s Pasadena order was denied in Texas Coalition of Cities for Utility Issues v. F.C.C., 324 F.3d 802 (5th Cir. 2003).

¹⁵ The Court provided two examples of how a cable operator calculates a franchise fee equivalent to 5 percent of gross revenues. Dallas at 397. If a cable bill is \$20, the cable operator pays \$1 in franchise fees and keeps the remaining \$19. Id. If the operator intends to pass the entire cost of the fee onto the consumer, and still recover \$20, it simply charges \$21.05. Id. The operator pays \$1.05 to the franchising authority and recovers \$20. Id. In both instances, the fee percentage the subscriber sees on the bill is 5.26 percent.

calculation of the franchise fee paid by subscribers will result in a further incremental increase in the total franchise fee percentage.

The FCC noted in Pasadena that cable operators and local franchising authorities may, through contractual agreement, modify the definition of gross revenues during the franchising process, if no pertinent state or local law otherwise prohibits. Id. at 18198-18199, ¶16. The FCC observed that if local franchising authorities and cable operators do not want to burden subscribers with higher franchise fee pass throughs, they may omit certain items, such as advertising revenue and home shopping commissions, from the gross revenue definition. Id. After the Pasadena decision, Comcast's predecessor, AT&T Broadband, agreed to eliminate the home shopping element of the franchise fee, if the community agreed to forego the revenue. See AT&T Broadband, CTV 02-2, at 5, n.5 (2003). It appears that Wellesley did not opt for a revision of its license's definition of gross revenues.

Therefore, in Wellesley's case, the inclusion in its license's gross revenue definition of both revenues based on the fee-on-fee and on home-shopping commissions and advertising revenues permits Comcast to charge Wellesley subscribers for incremental additions to the total franchise fee percentage, in accordance with Dallas and Pasadena. We make no specific determination as to whether Comcast is in compliance with the Wellesley renewal license.

6. Westhampton: Franchise Related Costs

A discrepancy exists between the FRC Worksheets that Comcast provided with its Westhampton FCC Form 1240, and Comcast's rate card for Westhampton, effective February 1, 2006 (Exh. Comcast-185, at FRC Worksheets; Comcast: 2006 Price Change Information, at 262). The FRC Worksheets attached to Westhampton's FCC Form 1240 report

FRCs of \$0.31 for both 2005 and 2006 (Exh. Comcast-185, at FRC Worksheet, Attachments 6A 2/2 and 6B). However, according to Comcast's Westhampton rate card for 2006, the Company did not charge subscribers FRCs during either 2005 or 2006. Comcast: 2006 Price Change Information, at 262.

In an effort to resolve this discrepancy, we examined the FRC provisions in Westhampton's cable licenses. Westhampton renewed its cable license, effective October 16, 2004. Renewal Cable Television License, Town of Westhampton, Massachusetts (October 16, 2004). In the renewal license, there is no provision for any public access facilities. Id. at 2-3. In contrast, Westhampton's initial cable license specifically provided for the Town's use of the Company's regional studio in Northampton. Final Cable Television License for the Town of Westhampton (October 16, 1989), at 15-16, Section 21. In fact, on Westhampton's FRC Worksheet, the only cost category is titled as "Prior Operating (portion of Northampton Studio)" (Exh. Comcast-185, at FRC Worksheets). Because there are no public access provisions in the new license, or any other new license obligations for which FRC costs would be incurred, there should either be no FRC Worksheet for Westhampton, or a page attached to a rate form reporting that the community has no FRC obligations. Comcast should have refunded any FRCs in Westhampton charged after the effective date of the new license until the end of the projected period ending December 31, 2004.

The Cable Division finds that Comcast's rate card for Westhampton reflects a reasonable and appropriate BST rate. We direct Comcast to confirm that it charged BST rates in Westhampton during 2005 and 2006 that are exclusive of the FRCs, consistent with the rate card, and not with the FCC Form 1240. We further direct Comcast to file a revised FCC Form 1240

for Westhampton that includes no FRCs. For November and December, 2004, Comcast must either provide evidence that the Company has refunded the FRCs related to the previous license, or indicate how the Company intends to refund these overcharges. For the period commencing January 1, 2005, Comcast must either provide evidence that no FRCs were charged in Westhampton, or, if Comcast did charge FRCs in Westhampton after that date, the Company must explain how it intends to refund any overcharges.¹⁶

7. Yarmouth: Franchise Related Costs

Comcast's FCC Form 1240 reported FRCs of \$0.52 per subscriber per month for the projected period (Exh. Comcast-197, at FRC Worksheet, Attachment 6B). Yarmouth's 1999 Cable Television Renewal License provides that the FRCs shall not exceed \$0.50 per subscriber per month for the term of the license (Exh. CTV-22; see Cable Television Renewal License, Town of Yarmouth, Massachusetts (November 30, 1999), at 36, Section 8.6(a) ("Yarmouth License")). The Town of Yarmouth questioned whether the FRC amount that Comcast is charging in the Town complies with provisions in its license.

The question of whether a cable operator has complied with the provisions of a license is to be reviewed by the Issuing Authority, in the first instance. We will limit our discussion in this proceeding to a review of Comcast's FRC calculations in order to inform the Issuing Authority as it conducts its compliance review.

¹⁶ In most communities where FRC obligations have changed because of a license renewal, any FRC overcharges could be returned through a true-up adjustment to the renewal license FRCs. In Westhampton's case, because the renewal license provides for no FRCs, overcharges cannot be recovered through this true-up mechanism.

Comcast argued that the Yarmouth license clearly states that the \$0.50 limit is “pursuant to the FRC Settlement” (Exh. CTV-22). We proceed on the assumption that the reference is to the FRC Settlement approved by the Cable Division in MediaOne of Massachusetts, Inc., Y-96 INC, at 4-6 (1997). The FRC Settlement is predicated on the agreement that certain FRCs from the prior license are embedded in the current BST rate, and that upon license renewal, only an increase in FRCs would be recovered as an incremental cost (id at 5-6).

The FRCs in Yarmouth primarily relate to capital funding (Exh. Comcast-197, at FRC Worksheet, Attachment 6B; see Yarmouth License at 29-30, Section 6.6).¹⁷ The current license, which has a duration of 10 years, has a capital obligation for PEG access equipment funding of \$500,000, or \$0.30 per subscriber per month over the term of the license (Exh. Comcast-197, at FRC Worksheet, Attachment 6B; see Yarmouth License at 29-30, Section 6.6.)). The prior license, which also had a duration of 10 years, had a total capital obligation of \$95,479, or \$0.06 per subscriber per month (id. at Attachment 6B; see Town of Yarmouth Renewal Cable

¹⁷ The FRC Settlement provides an example of the treatment, for license renewal purposes, of PEG access capital funding. Y-96 INC, at 5-6. The example presupposes that both the old and the new licenses have terms of 10 years, and the PEG access payments are \$100,000 under both licenses. Id. It also assumes that the previous capital obligation has been completely amortized. Under the settlement, MediaOne agreed that only the incremental change in FRCs would be passed through, unless adjusted for a shorter amortization period. Id. In the FRC Settlement’s example, because there is no change, there would be no new FRC amount passed through to subscribers. Id. On the other hand, if the new capital obligation in the FRC Settlement’s example increased to \$120,000, there would be \$20,000 in new, incremental FRCs. However, if the new capital obligation had decreased to \$80,000, the embedded amount would decrease.

Television License (August 11, 1988), at 36, Section 5.3).¹⁸ On the FRC Worksheet, Comcast has offset the current license's capital obligation with its prior capital obligation, which lowers the cost of the current capital obligation to \$0.24 per subscriber per month (id.). There are no non-capital obligations carried over from the previous license (id.). The current total FRCs in Yarmouth are \$0.52 per subscriber per month (id., see Comcast: 2006 Price Change Information at 138). This includes \$0.46 in current costs, consisting of the reduced \$0.24 amount of current capital expenditures, and \$0.22 in capital and maintenance costs related to the construction and maintenance of a new institutional network, or I-Net, that is provided for in the current license. Yarmouth License at 15-17, Section 3.2. The remaining \$0.06 consists of the prior or embedded capital funding. We find that Comcast's calculation of its FRC obligations in Yarmouth satisfies the requirements of the FRC Settlement. We make no finding as to whether the FRC calculation complies with the provisions of the license.

IV. REVIEW OF THE FCC FORM 1205

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 information from the cable operator's previous fiscal year. Id. at 2. Subscriber charges

¹⁸ The total grant in the 1988 license was for \$250,000. Town of Yarmouth Renewal Cable Television License (August 11, 1988), at 36, Section 5.3. Four towns, Chatham, Dennis, Harwich, and Yarmouth, shared the Access Authority, and the total grant has been divided among the FRC Worksheets for the four towns. See Exh. Comcast-31, at FRC Worksheet, Attachment 6B; Exh. Comcast-42, at FRC Worksheet, Attachment 6B; Exh. Comcast-69, at FRC Worksheet, Attachment 6B; Exh. Comcast-197, at FRC Worksheet, Attachment 6B.

established by the FCC Form 1205 shall not exceed charges based on actual costs as determined in accordance with the FCC's regulatory requirements. 47 C.F.R. § 76.923(a)(2). As with the FCC Form 1240, the burden of proof is on the cable operator to demonstrate that its proposed rates for equipment and installations comply with Section 623 of the Communications Act of 1934, as amended, and implementing regulations. 47 U.S.C. § 543;

Rate Order at 5716, ¶ 128; see also 47 C.F.R. § 76.937(a).

Based on our review, we find that the FCC Form 1205 submitted by Comcast on May 19, 2006, establishes rates for equipment and installations that are reasonable and in compliance with applicable law.

V. CONCLUSION AND ORDER

Upon due notice, hearing and consideration, the Cable Division hereby accepts, as reasonable and in compliance with applicable statutes and regulations, Comcast's FCC Forms 1240, as filed on May 19, 2006, for all regulated communities except Medway and Westhampton.

Further, upon due notice, hearing and consideration, the Cable Division hereby rejects Comcast's FCC Forms 1240, as filed on May 16, 2006, for Medway and Westhampton. The Cable Division directs Comcast to resubmit its FCC Forms 1240 for Medway and Westhampton in compliance with this order, and to file plans in accordance with this Rate Order, on or before October 6, 2006.

Further, upon due notice, hearing, and consideration, the Cable Division directs Comcast to pay refunds to subscribers in Ashburnham, Ayer, Bedford, Belmont, Bernardston, Boxborough, Braintree, Brockton, Carlisle, Concord, Dighton, Everett, Holbrook, Hudson,

Leominster, Lincoln, Malden, Middleborough, New Bedford, Northfield, Provincetown, Randolph, Saugus, Sharon, Springfield, Townsend, Truro, Wayland, Westford, Westwood, and Whitman, in compliance with this Rate Order.

Further, upon due notice, hearing, and consideration, the Cable Division accepts, as reasonable and in compliance with applicable statutes and regulations, Comcast's FCC Form 1205 as filed on May 19, 2006, for all regulated communities.

The attached schedule provides, for each community, Comcast's previous and current actual rates, as well as its proposed and approved maximum permitted rates.

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

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

Issued: September 26, 2006

COMCAST

RATE SCHEDULE

BASIC SERVICE TIER PROGRAMMING RATES

COMCAST

RATE SCHEDULE

BASIC SERVICE TIER PROGRAMMING RATES

COMCAST

RATE SCHEDULE

BASIC SERVICE TIER PROGRAMMING RATES

COMCAST

RATE SCHEDULE

BASIC SERVICE TIER PROGRAMMING RATES

RIGHT OF APPEAL

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.