



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY**

Cable Television Division

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In the Matter of)	Docket No. CTV 00-9
Cox Com, Inc.)	Date Issued: March 29, 2001
d/b/a Cox Communications)	
New England)	
)	Holland, CUID MA 0321
For a Determination of)	
Cable Television Rates)	

RATE ORDER

APPEARANCES:

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FOR: COX COM, INC.
Petitioner

(A) INTRODUCTION

On October 23, 2000, Cox Com, Inc. d/b/a Cox Communications New England (“Cox” 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”) Form 1240 and equipment and installation rates on FCC Form 1205 for the Town of Holland. Cox has not changed its BST programming rate as a result of this filing (RR-Cox-3, at amended FCC Form 1240, Proposed Rate Structure). Pursuant to 47 C.F.R. § 76.933(g), Cox put its proposed equipment and installation rates into effect on January 15, 2001 (*id.*).

The Cable Division held a public hearing on Cox’s pending filing in Boston on February 1, 2001. There were no intervenors in this proceeding. The evidentiary record includes two Cox exhibits, three Cable Division exhibits, and Cox’s responses to three record requests posed by the Cable Division.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The standard under which the Cable Division must review rate adjustments on FCC rate forms is found in the FCC’s rate regulations. Specifically, the regulations provide that the rate regulator shall assure that the rates comply with the requirements of 47 U.S.C. § 543 of the Cable Television Consumer and Competition Act of 1992 as amended (the “Cable Act”). 47 C.F.R. § 76.922(a). The Cable Division may accept as in compliance with the statute basic service tier rates that do not exceed the “Subsequent Permitted Per Channel Charge” as determined by 47 C.F.R. § 76.922(c), and may also accept equipment and installation charges that are calculated in accordance with 47 C.F.R. § 76.923. In addition, the Cable Division shall only approve rates it deems reasonable under federal law. 47 C.F.R. § 76.937(d) and (e); 47 C.F.R. § 76.942.

In establishing whether the proposed rates are reasonable and comply with federal regulations, the burden of proof is on the cable operator to demonstrate that its proposed rates for the basic service tier and accompanying equipment comply with 47 U.S.C. § 543 and implementing regulations. 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 (released May 3, 1993) at 5716, ¶ 128; see also 47 C.F.R. § 76.937(a).

The FCC has created specific forms incorporating the provisions of its rate regulations, upon which cable operators must calculate their rates. Local rate regulators, such as the Cable Division, are required to review the Company’s FCC rate form filings to determine whether the rates are reasonable and in compliance with the Cable Act. 47 C.F.R. §§ 76.922, 76.923, 76.930.

The FCC Form 1205 is prepared on an annual basis using information from the cable operator’s previous fiscal year. FCC Form 1205 Instructions at 2. Subscriber charges established by FCC Form 1205 shall not exceed charges based on actual costs as determined in

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accordance with regulatory requirements. 47 C.F.R. § 76.923(a)(2).

The FCC Form 1240 allows a cable operator to annually update its basic service tier 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 FCC Form 1240 for projections in external costs, or for projected changes to the number of regulated channels, the operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. 47 C.F.R. § 76.922(e)(ii)(A); 47 C.F.R. § 76.922(e)(iii)(A). Although cable operators may project for increases in franchise related costs to the extent they are reasonably certain and reasonably quantifiable, such projections are not presumed to be reasonably certain and reasonably quantifiable. 47 C.F.R. § 76.922(e)(ii)(A).

III. DISCUSSION AND ANALYSIS

A. Copyright Fees

The Federal Register of Copyrights charges a copyright or royalty fee on all gross receipts that cable operators receive from each tier of service that contains any broadcast signals. 17 U.S.C. § 111(d)(1); RR-Cox-3, Copyright Filing. Copyright fees are calculated as percentages of the gross receipts of the entire tier that carries the specific signal in question. 17 U.S.C. § 111(d)(1)(B). Under federal rate regulations, the fees are considered external costs for which a cable operator may adjust its BST rates. FCC Form 1240, Worksheet 7, Line 703. In its rate proposal, Cox included copyright costs as an external cost for which is sought rate relief (Exh. Cox-1).

While an operator may account for copyright costs in its rate calculation, an operator may only include in its BST calculation those copyright costs attributable to carriage of a broadcast signal on the BST. FCC Form 1240, Worksheet 7, Line 703. Since Cox has two tiers that contain broadcast signals, the basic tier and the expanded tier, Cox's total copyright costs in Holland should be apportioned between these tiers. The copyright filing provided by Cox does not separate these costs by tier (RR-Cox-3, Copyright Filing). In response to a Cable Division inquiry, Cox reported that its gross receipts calculation for Holland was overstated, and provided an amended FCC Form 1240 along with revised back-up data calculations (RR-Cox-3). In its amended filing, Cox recalculated its basic tier copyright costs, removing the expanded tier revenue from the total revenue used to calculate the copyright fee. Cox's amended data reduced copyright fees from \$2,350 to \$1,093 for the projected period, and from \$2,173 to \$1,063 for the true-up period (Exh. Cox-1, RR-Cox-3, FCC Form 1240). The changes reduced the Worksheet 7 external costs for the projected period from \$1.82 to \$1.69 and the Line H13 true-up from \$16,827 to \$15,362 (*id.*). The Cable Division finds Cox's copyright fees as calculated on the amended FCC Form 1240 to be reasonable.

B. Interest on True-Up

As stated above, the FCC Form 1240 allows a cable operator to annually update its BST rates to account for inflation, changes in external costs, and changes in the number of

regulated channels. A portion of the FCC Form 1240 computation is based upon projected costs. If a cable operator has underestimated its projected costs, it may “true-up” its projection to correct for the difference between its actual and projected costs. The issue is whether Cox calculated and reported the true-up amount in compliance with applicable law.

The FCC Form 1240, at Module H, computes true-up and the interest on true-up. FCC Form 1240 Instructions (July 1996), at 19-21. The cable operator begins by computing two versions of its true-up period revenue. First, it computes this revenue using the BST rates it actually charged, reported on Line H1, “Revenue From Period 1.”¹ *Id.* at 19. The operator then computes what its revenue would have been if it had charged its BST MPR, reported on Line H2, “Revenue From Maximum Permitted Rate for Period 1.” *Id.* at 20. Line H1 is then subtracted from Line H2 to derive Line H3, “True-Up Period 1 Adjustment,” which is the amount the operator’s actual revenue either exceeded or fell short of its maximum possible revenue. *Id.* The FCC allows interest to be accrued on the Line H3 true-up at 11.25 percent, for the period between the beginning of True-Up Period 1 and the end of the most recent Projected Period shown on the previous FCC Form 1240, reported on Line H4, “Interest on Period 1 Adjustment.” *Id.* Lines H3 and H4 are added together on Line H13, “Total True-Up Adjustment.” *Id.* at 21. Line H13 is then divided into Line H14, the “Amount of True-Up Being Claimed This Projected Rate Period,” and Line H15, “Remaining True-Up Adjustment.” *Id.*

On Cox’s FCC Form 1240, the Company claimed Line H13’s entire true-up on Line H14, and included it within the BST MPR on Line I9 (Exh. Cox-1, at 4).² However, Cox’s actual BST rate in Holland is lower than the BST MPR (*id.* at Proposed Rate Structure). Consequently, on the next annual FCC Form 1240 that Cox files, the true-up computation would incorporate the true-up included in this year’s MPR into Line H2,³ whereas Line H1 would incorporate this year’s lower actual BST rate, excluding much of this true-up.⁴ Some or

¹ FCC Form 1240 requires a cable operator to have more than one true-up period if the true-up will be performed over more than 12 months, hence the reference to “Period 1.” The Company’s FCC Form 1240 true-up covers only 12 months, between September 1, 1999 and August 31, 2000, so it completed only the True-Up Period 1 portion of Module H, Lines H1 through H4 (Exh. Cox-1, Worksheet 8).

² The true-up amount on Line H14 is carried over into the BST MPR calculation as follows. Line H14 is divided first by the estimated number of subscribers during the Projected Period (Line B3), and then by 12 for the number of months in the Projected Period; the resulting amount is included on the form as Line I8. FCC Form 1240 Instructions (July 1996) at 22-23. Line I8 is then added together with Lines I4, I5, I6 and I7 to calculate the BST MPR on Line I9. *Id.* at 23.

³ Line H2 is computed by multiplying together three numbers, including Line F9, “Maximum Permitted Rate for True-Up Period 1.” FCC Form 1240, Instructions (July 1996) at 20. Line F9 in turn is derived by adding together five numbers, including Line F8, “True-Up Segment for True-Up Period 1.” *Id.* at 18. Line F8 is computed by dividing Line H14 from the previous FCC Form 1240 by the estimated number of subscribers during the true-up period and by the number of months in the true-up period. *Id.* at 18.

⁴ The Instructions direct cable operators to report the “average rate you elected to charge.” FCC

all of this year's excess true-up would appear on the next annual Line H3 and accrue interest for a second time on Line H4. Indeed, the next annual Line H4 would accrue interest on this year's interest.

The FCC addressed interest on true-up in its rate regulations at 47 C.F.R. § 76.922(e)(3)(iii):

If an operator has underestimated its cost changes and elects not to recover these accrued costs with interest on the date the operator is entitled to make its annual rate adjustment, the interest will cease to accrue as of the date the operator is entitled to make the annual rate adjustment, but the operator will not lose its ability to recover such costs and interest.

The FCC explained the rationale for this rule in its Thirteenth Order on Reconsideration, MM Docket No. 92-266, FCC 95-397, 11 FCC Rcd. 388 (released September 22, 1995) ("Thirteenth Order"). The FCC stated that operators would be able to recover excess accrued costs with interest to the extent that the projected costs did not cover the increases that actually took place. *Id.* at 422, ¶ 80. On the operator's next filing, the operator would be entitled to recover the excess costs plus interest between the date the costs are incurred and the date the operator is entitled to make its next annual rate adjustment. *Id.* The FCC reasoned that this rule gives operators the flexibility to delay rate increases without losing the opportunity to recover interest on costs that accrued due to circumstances beyond their control, while ensuring that where an operator makes a business decision to delay a rate increase, subscribers are not required to pay for the cost of the delay. *Id.*

The FCC Form 1240 ensures an operator's compliance with this rule. First, the FCC Form 1240 Instructions state that "the accrual of interest is cut off at the end of the most recent Projected Period (except for first time filers of Form 1240.) For example, if, on your most recent Form 1240, you defined the Projected Period as running from January 1 to December 31, your next true-up has the accrual of interest stopping at the end of December 31." FCC Form 1240, Instructions (July 1996) at 5.⁵

Second, the FCC designed Module H of the FCC Form 1240 to prevent operators from accruing interest on the same true-up on two successive FCC Form 1240s. Line H13 computes the "Total True-Up Adjustment." *Id.* at 21. However, not all of this true-up adjustment is required to be reported on Line H14, "Amount of True-Up Being Claimed This Projected Rate Period," in all instances. The Instructions to Line H14 begin: "[e]nter the amount of the True-Up Adjustment being passed through to your subscribers during the Projected Period."

(...continued)

Form 1240, Instructions (July 1996) at 19.

⁵ See also the FCC's Cable Letter, Richard D. Treich, DA 97-1518, CSB-ILR 97-6 (released July 18, 1997).

(Emphasis added.) Id. Therefore, only true-up amounts that will be included in subscribers' rates at the outset of the Projected Period may be properly carried over to Line H14. The FCC provided Line H15, "Remaining True-Up Adjustment," so the cable operator could report the excess true-up it would not pass through during the Projected Period, but could elect to recover in future years. Id. The FCC Form 1240 Instructions direct that on the next annual FCC Form 1240, Line H15 shall be reported as Line H12, "Previous Remaining True-Up Adjustment." Id. The form indicates that Line H12 be added directly into the total true-up adjustment on Line H13, without any interest being accrued upon it. Id. In addition, on the next annual form, the BST rates used to compute true-up on Lines H1 and H2 shall contain the same amount of previous true-up.⁶ Id. at 19-20. Thus, none of this true-up is to be included on Line H3 and none of it is to accrue interest on Line H4.

We find that Cox's proposal to claim its entire true-up on Line H14 without passing it completely through in subscribers' rates does not comply with the Instructions to FCC Form 1240, and will result in the Company's improper accrual of interest on this true-up over a second Projected Period. The "discretion" in the Instructions to Line H14 merely gives cable operators the discretion of not passing on to subscribers the entire true-up during the Projected Period; it does not imply that true-up can be claimed and included in the MPR but not passed through to subscribers. Moreover, we determine that Cox's calculation of true-up is not in the subscribers' interest, because the subscribers would be required to pay two years' interest on the same true-up, as well as interest on interest.

Accordingly, Cox should remove the excessive true-up from Line H14, and record it on Line H15, "Remaining True-Up Adjustment." This adjustment will reduce its BST MPR, but will have no effect on the Company's revenues during the Projected Period, because the Company chose not to charge its initial MPR. We note that under the FCC's regulations, the Company is legally prohibited from raising its rates later in the Projected Period. 47 C.F.R. § 76.922(e)(1). Nevertheless, the Company is not prejudiced by this adjustment, because the unused true-up, now on Line H15, will be available on its next filing, and could be passed on to subscribers during the next Projected Period. This process "ensures that where an operator makes a business decision to delay a rate increase, subscribers are not required to pay for the cost of the delay." Thirteenth Order at 422, ¶ 80.

The Cable Division concludes that neither Cox's original nor amended FCC Form 1240s for the Town of Holland are in compliance with the applicable statutes and regulations and are therefore unreasonable as filed. The Company is therefore directed to file a further amended FCC Form 1240 filing to remove true-up which is claimed but not passed through to

⁶ Line H1 and H2 contain the same amount of true-up for two reasons. First, on this year's FCC Form 1240, the Line H14 true-up would have been carried over to Line I8 and been incorporated into both the MPR on Line I9, and the operator selected rate on Line I10. Because only true-up actually charged to subscribers on Line I10 appears on Line I9, the true-up on both lines is identical. Second, Lines H1 and H2 are both calculated by multiplying together three numbers. Two of them – the number of subscribers and the number of months in the true-up period – are the same for both lines; only the third number is different; the rates charged during the true-up period.

subscribers from Line H14, and report this true-up on Line H15. Lines I8 and I9 must also be changed to conform with Line H14, as amended. The Cable Division also directs Cox to complete Line I10 on its further amended FCC Form 1240, to show the actual BST rate being charged to subscribers.

IV. CONCLUSION AND ORDER

Upon due notice, hearing and consideration, the Cable Division hereby accepts as reasonable and in compliance with applicable statutes and regulations, Cox's FCC Form 1205 as filed on October 23, 2000 for Holland.

Further, the Cable Division rejects Cox's FCC Form 1240 as filed October 23, 2000 and as amended on January 16, 2001 for Holland, and directs Cox to refile its FCC Form 1240 for Holland in accordance with this Rate Order.

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

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

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. 1997, c. 164, § 273. 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 7 days of the filing of the initial petition for appeal.