



**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

D.T.C. 11-15

October 31, 2012

Petition of Time Warner Cable for Review of FCC Forms 1240 and Form 1205 for the Great Barrington, North Adams and Pittsfield Systems.

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**RATE ORDER**

**APPEARANCES:**

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FOR: TIME WARNER CABLE  
*Petitioner*

## **I. INTRODUCTION**

In this Order the Department of Telecommunications and Cable (“Department”) approves the petition of Time Warner Cable (“Time Warner”), in which Time Warner seeks to establish basic service tier (“BST”) maximum permitted rates (“MPR”), and equipment and installation rates for its Great Barrington, North Adams, and Pittsfield systems. The Department further grants Time Warner’s request for confidential treatment of its per-channel program cost information that it provided in response to a Department information request.

## **II. PROCEDURAL HISTORY**

On November 2, 2011, Time Warner filed Federal Communications Commission (“FCC”) Forms 1240 with the Department in which Time Warner proposed BST MPRs for its 9 regulated communities in its Great Barrington, North Adams, and Pittsfield systems.<sup>1</sup> Time Warner also filed with its FCC Forms 1240 a nationwide FCC Form 1205 that proposed equipment and installation MPRs for all of its regulated Massachusetts communities. Pursuant to FCC regulations, Time Warner’s proposed BST programming, equipment, and installation rates became effective on February 1, 2012. *See* 47 C.F.R. § 76.933(g).

On June 6, 2012, the Department issued a Notice of Public Hearing, Order of Notice, Procedural Schedule, and its First Set of Information Requests. *Pet. of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Systems*, Docket 11-15 (2012) (“Docket”) at 1. Time Warner filed responses to the Department’s First Set of Information Requests on July 2, 2012. *Id.* Contemporaneous with its responses, Time Warner filed a Motion for Protective Order (“Motion”) in which it seeks confidential treatment of per-channel program cost information contained in its response to D.T.C. IR 1-6.

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<sup>1</sup> Those communities are Adams, Clarksburg, Dalton, Lee, Lenox, North Adams, Pittsfield, Richmond, and Stockbridge.

The Department held public and evidentiary hearings on July 11, 2012. *Id.* On August 9, 2012, Time Warner submitted its responses to the record requests (“Record Requests”) issued by the Department at the evidentiary hearing. *Id.* Time Warner’s responses included FCC Forms 1240 revised to address issues raised in the Record Requests.

The evidentiary record consists of four Time Warner exhibits, nine responses to Department Information Requests, and eleven responses to Department Record Requests. After review and consideration, the Department approves Time Warner’s FCC Forms 1240 and Form 1205 subject to the Department’s findings below.

### **III. ANALYSIS AND FINDINGS**

#### **A. Time Warner’s FCC Forms 1240**

The Department approves Time Warner’s FCC Forms 1240 as revised on August 9, 2012, and further directs Time Warner to ensure that future FCC Forms 1240 follow the template prescribed by the FCC. Time Warner’s approved BST MPRs and operator selected BST programming rates appear in the Rate Schedule attached hereto at Attachment 1.

A cable operator must calculate its rates upon specific FCC-created forms incorporating the provisions of its rate regulations. *See* 47 C.F.R. §§ 76.922, 76.930. Pursuant to the Form 1240 regulations, the FCC allows a cable operator to update annually its BST programming rates to account for inflation; changes in the number of regulated channels; and changes in external costs, including programming costs, copyright costs, and franchise related costs (“FRCs”). *See* 47 C.F.R. § 76.922(e). To adjust the rates 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 its projections are reasonably certain and reasonably quantifiable. *See* 47 C.F.R. §§ 76.922(e)(2)(ii)(A), 76.922(e)(2)(iii)(A). Projections involving

copyright fees, retransmission consent fees, other programming costs, FCC regulatory fees, and cable specific taxes are presumed to be reasonably certain and reasonably quantifiable. *See* 47 C.F.R. § 76.922(e)(2)(ii)(A). Cable operators may also project for increases in FRCs to the extent they are reasonably certain and reasonably quantifiable. *Id.* FRC projections, however, are not presumed to be reasonably certain and reasonably quantifiable. *Id.*

The standard under which the Department reviews rate adjustments on the FCC Form 1240 is found in the FCC's rate regulations. *See* 47 C.F.R. § 76.922(a). Specifically, the FCC directed local rate regulators, such as the Department, to ensure that the approved rates are in compliance with the Communications Act of 1934, as amended ("Communications Act"), and do not exceed the maximum permitted charges calculated by the FCC's rate forms. *Id.* The Department may accept, as compliant with the statute, BST rates that do not exceed the approved maximum permitted charge as determined by federal regulations. *See* 47 C.F.R. §§ 76.922(a), 76.922(c). In addition, the Department shall approve only those rates that it deems reasonable. *See* 47 U.S.C. § 543; 47 C.F.R. § 76.937(d)-(e); G. L. c. 166A, §§ 2, 15. The cable operator has the burden of proving that its proposed BST programming rates comply with Section 623 of the Communications Act, and implementing regulations. *See* 47 U.S.C. § 543; *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation, Report & Order & Further Notice of Proposed Rulemaking*, 8 F.C.C.R. 5631, at 5716, ¶ 128 (May 3, 1993) ("*FCC Rate Order*"); 47 C.F.R. § 76.937(a) (regulation assigning the burden of proof to the cable operator).

In this Order, the Department first addresses issues specific to the Forms 1240 for the Pittsfield and North Adams systems. The Department next addresses issues common with Time

Warner's FCC Forms 1240 for all its communities. The Department noted no issues specific to the Form 1240 filed for the Great Barrington system.

*1. The Pittsfield System.*

The Department's review of the FCC Form 1240 for the Pittsfield system found a discrepancy in Time Warner's rate change date for the previously projected period contained in Worksheet 8. Time Warner's FCC Form 1240 for the Pittsfield system listed January 1, 2011 as the effective change date. *See* Exhibit 1. However, Time Warner's previous FCC Form 1240 for the Pittsfield system was filed on November 2, 2010. *See Pet. of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Systems*, Docket 10-9, at Exhibit 1(2011). Time Warner's listed January 1, 2011 change date was inconsistent with the FCC requirement that operators file FCC Forms 1240 with the local franchising authority a minimum of 90 days prior to the start of the Projected Period. *See* Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services at 2 (July 1996)("FCC Form 1240 Instructions"). The Department inquired into the apparent discrepancy, asking Time Warner to verify the actual date for the rate change in the previous projected period. *See* D.T.C. IR 1-3. Time Warner verified that the actual date for the rate change in the previous projected period was February 1, 2011. *Id.* Accordingly, the Department is satisfied that Time Warner's rate change for the prior projected period was changed after the appropriate 90-day notice.

*2. The North Adams System.*

In reviewing Time Warner's FCC Form 1240 for the North Adams system, the Department asked Time Warner to explain why it had included FRCs in the true-up period but not for the projected period. *See* D.T.C. IR 1-8. Time Warner explained that the FRC expense

related to a capital grant that had amortized fully and therefore was no longer passed through.

*Id.* Because the grant had expired prior to the true-up period, it should not have been included in the true-up calculation. *Id.* Accordingly, Time Warner amended its FCC Form 1240, leading to a \$0.10 reduction in MPR. *Id.* The Department notes that Time Warner amended its FCC Form 1240 for the North Adams system. *See* Exhibit 2. The Department further notes that Time Warner's current basic rate of \$11.25 is lower than its revised MPR of \$20.25, and the resultant reduction in MPR did not affect the actual rate being charged. *See* Attachment 1. Therefore, the Department finds Time Warner's amended rate reasonable and in compliance with FCC regulations.

### 3. *FCC Forms 1240 Modifications.*

In addition to the issues discussed above, the Department identified several additional discrepancies between the FCC Forms 1240 filed by Time Warner with the Department and those provided to the FCC. These discrepancies range from differences in the description of line items on the Form 1240, to the use of incorrect interest formulae in Module H. *See* D.T.C. IR 1-1, 1-2, and 1-9; D.T.C. RR 7, 8, and 10. The Department issued several Record Requests arising from these discrepancies, and Time Warner submitted revised FCC Forms 1240 as a result. *Id.* While the Record Request responses resolved some of the issues identified by the Department, other discrepancies remain.

The Department observes that Time Warner's FCC Forms 1240 were footnoted with the statement: "This Form has been modified pursuant to the Time Warner Social Contract." *See* Exhibits 1, 2, and 3. In 1995, Time Warner entered into a "Social Contract" with the FCC, whereby Time Warner was permitted to make a modification of its FCC Form 1240 in order to reduce its Lifeline basic rate by 10% while increasing the cable program service tier ("CPST")

rate by a corresponding amount. *See In the Matter of Social Contract for Time Warner*, FCC 95-478, at ¶52 (Nov. 30, 1995). However, Time Warner's agreement with the FCC called for a single adjustment not an ongoing modification. *Id.* at Appendix B.

After excluding the discrepancies specific to the Pittsfield and North Adams systems discussed above, an analysis of the discrepancies in Time Warner's Forms 1240 shows that the aggregate impact to Time Warner's MPR is *de minimis*.<sup>2</sup> Moreover, because Time Warner's operator-selected BST rates in all communities remain well below the MPRs in those communities, the Department finds that the necessary corrective adjustments have no impact on the rates actual BST customers are currently paying. Therefore, the Department finds that Time Warner's FCC Forms 1240, as revised on August 13, 2012, are reasonable. However, the FCC's requirement that operators selecting the benchmark methodology for rate setting utilize either FCC Form 1240 or FCC Form 1210<sup>3</sup> remains controlling. *See* FCC Form 1240 Instructions at 1, 2. Going forward, the Department will not accept any filings inconsistent with the FCC's most current Form 1240 without sufficient support justifying Time Warner's basis for any modifications.

#### B. Time Warner's FCC Form 1205

In its FCC Form 1205 filing, Time Warner proposes to adjust its maximum permitted equipment and installation rates consistent with FCC rate regulations. The Department has analyzed Time Warner's proposed adjustments, and approves its FCC Form 1205 as filed. Time

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<sup>2</sup> There were numerous minor discrepancies between the Form 1240 used by Time Warner and the current FCC Form 1240. These discrepancies range from Time Warner substituting its own title headings for those of the FCC's, to modifying certain steps in the FCC Form 1240 calculations. While these discrepancies had no significant affect on Time Warner's MPRs, the substitutions and modifications made by Time Warner unnecessarily overcomplicated and burdened the Department's review of Time Warner's FCC Forms 1240.

<sup>3</sup> FCC Form 1210 is used to update the maximum permissible rate by accounting for inflation, the addition and/or deletion of channels, federal regulatory fees, and external costs, i.e. programming and equipment costs including the markup existing channels 7.5% subject to a cap, retransmission consent fees, certain cable taxes, franchise related costs and franchise fees.

Warner's approved BST MPRs and operator selected rates for equipment and installations are in the Rate Schedule attached hereto at Attachment 1.

FCC Form 1205 establishes rates for installations and equipment like converters and remote controls, based upon actual capital costs and expenses. *FCC Form 1205 Instructions for Determining Costs of Regulated Cable Equipment and Installation*, at 1, 7, 11-13 (June 1996) ("*FCC Form 1205 Instructions*"). A cable operator prepares the FCC Form 1205 on an annual basis using information from its previous fiscal year. *Id.* at 2-3. In this proceeding, Time Warner's FCC Form 1205 is for the fiscal year ending September 30, 2011. *See* Exhibit 4 at 1.

In accordance with the FCC's regulatory requirements, subscriber charges established by FCC Form 1205 may not exceed charges based on actual costs. *See* 47 C.F.R. § 76.923(a)(2). The cable operator has the burden to demonstrate that its proposed rates for equipment and installations comply with Section 623 of the Communications Act and its implementing regulations. *See* 47 U.S.C. § 543; *FCC Rate Order* at 5716, ¶ 128; 47 C.F.R. § 76.937(a).

Time Warner submitted a national consolidated FCC Form 1205 covering all of its regulated communities, including those in Massachusetts, in support of its proposed MPRs for installation and equipment. *See* Exhibit 4. Time Warner's MPRs for digital converters, high definition television ("HDTV") converters, and cable cards are decreasing, as are the actual rates charged to customers for such equipment. *See* Attachment 1. Meanwhile, the MPR and actual rate charged for remote controls has increased slightly from Time Warner's previous FCC Form 1205 filing. *Id.* In Time Warner's last rate proceeding before the Department, the Department inquired into significant changes in the number of remote control units in service, as well as reductions in the overall value of Schedule A assets and Schedule B operating costs. *See Petition of Time Warner Cable for Review of FCC Form 1240 & Forms 1205 for the Great*



*Barrington, North Adams & Pittsfield Sys.*, D.T.C. 10-9, at 6 (Oct. 31, 2011). Time Warner's basis for those reductions was that it had removed from its national FCC Form 1205 filing the communities which the FCC had determined were subject to effective competition. *Id.* at 7 (reasoning that because the communities are no longer subject to regulation, their assets and costs should not be included in FCC Form 1205 filings).

The Department finds that both the capital assets and operating costs are in line with expectations under Time Warner's current FCC Form 1205 filing. *See* Exhibit 4. Moreover, Time Warner has not modified its FCC Form 1205 to reflect the removal of any additional effective competition communities. The Department finds that Time Warner's FCC Form 1205 was prepared in accordance with FCC regulations, and that its proposed rates are reasonable. *See* Attachment 1.

C. Time Warner's Motion for Confidential Treatment

Contemporaneous with its response to D.T.C. – I.R. 1-6, Time Warner filed a Motion seeking to keep confidential its specific per-channel program cost information. Docket at 1. Time Warner asserts in its Motion that per-channel program cost information is confidential and competitively sensitive, and not easily discernible from publicly-available records. Motion at 2-4. Time Warner's request seeks confidential treatment of its per-channel program cost information for a five-year year period, with the opportunity for an extension upon a showing of need for continued confidential treatment. Motion at 6. The Department grants Time Warner's Motion for the reasons discussed below.

Information filed with the Department may be protected from public disclosure pursuant to G. L. c. 25C, § 5. The Department may, in certain narrowly defined circumstances, grant exemptions from the general statutory mandate that all documents and data it receives be treated

as public records, and therefore, made available for public review. *See* G. L. c. 4, § 7(26); G. L. c. 66, § 10. In particular, G. L. c. 25C, § 5, is an exemption recognized by G. L. c. 4, § 7(26)(a) (exempting from the definition of public records those documents “specifically or by necessary implication exempted from disclosure by statute”) which states in relevant part:

The department may protect from public disclosure trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the department shall protect only so much of the information as is necessary to meet such need.

G. L. c. 25C, § 5, establishes a three-part standard to determine whether, and to what extent, information may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information.” Second, the party seeking protection must overcome the statutory presumption that all such information is public information by “proving” the need for its non-disclosure. *See* G. L. c. 66, § 10. Third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need, and may limit the term or length of time such protection will be in effect. *See* G. L. c. 25C, § 5.

The Department does not automatically grant requests for confidential treatment. *See AT & T Broadband/Verizon Interconnect Agreement*, D.T.E. 99-42/43, 99-52, at n. 31 (2000) (“[w]e note that many requests for confidential treatment fail to meet the requirements of [c. 25, § 5D], and parties would be well advised...to support those requests fully”). More recently, the Department reaffirmed that “[c]laims of competitive harm resulting from public disclosure, without further explanation, have never satisfied the Department’s statutory requirement of proof

of harm.” *See Interlocutory Order on Verizon MA’s Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment*, D.T.E. 01-31 Phase I, at 7 (“*Interlocutory Order*”) (August 29, 2001).

Previous Department applications of the standard set forth in G. L. c. 25C, § 5, reflect the narrow scope of this exemption. However, the Department recognizes that disclosure of truly competitively sensitive information could “thwart the creativity and innovation benefits which flow from competition.” *Interlocutory Order* at 7. While it uses its authority judiciously, the Department “has no desire to disclose information that is truly competitively sensitive.” *Id.* Accordingly, the Department grants requests for confidential treatment of competitively sensitive information only in appropriate circumstances. *See Rate Order*, CTV 04-05 Phase II, at 7 (November 20, 2005) (channel operating cost information including programming expenses and personnel information deemed competitively sensitive such that the requested protection was warranted); *Order On Request for Confidential Treatment*, CTV 03-04, at 2 – 3 (July 1, 2004) (protection granted to operating expenses of local news channel such as employee compensation and marketing expenses because disclosure could prove detrimental to provider); *Rate Order*, CTV 05-04, at 5, n. 2 (June 12, 2006) (costs for programming produced by unaffiliated programmers granted protection because, if disclosed, potential competitors would obtain a competitive advantage from knowing the prices paid for the programming).

The Department finds that Time Warner’s Motion satisfies the first prong of G. L. c. 25C, § 5, because Time Warner has established that its channel programming costs are competitively sensitive. Time Warner asserts that “both the Department and the Federal Communications Commission (“FCC”) have consistently classified programming contracts (and programming cost information contained therein) as exempt from public disclosure.” Motion at 2. In support

of its argument, Time Warner submitted citations to affidavits relied on by the Department in granting a prior protective order to CoxCom, Inc. (“Cox”), in Docket No. D.T.C. 08-8.<sup>4</sup> Time Warner asserts “the information for which Cox sought and was granted a protective order is indistinguishable from the information for which Time Warner Cable seeks confidential treatment.” Motion at 3.

Time Warner additionally supports its argument with the affidavit of Nina Facini, the Director of Finance for its Local News Division, with regard to the cost information for Capital News 9. In her affidavit, Ms. Facini states that a third party obtaining subscriber channel cost information could easily combine that information with publicly available subscriber counts to calculate the overall operating costs of Time Warner. Affidavit of Nina Facini at ¶ 3. Ms. Facini explains that this information could be advantageous to third parties engaged in negotiations with Time Warner concerning the right to distribute their service and the price to be paid for those rights. *Id.* at ¶ 7. The Department finds this argument compelling. Historically, the Department has held programming costs generally, and Time Warner’s costs specifically, to be competitively sensitive. *See Time Warner Cable*, CTV 05-4, at 5 (June 12, 2006); *Time Warner Cable*, CTV 03-4, *Order on Request for Confidential Treatment* (July 1, 2004). Moreover, Time Warner argues, and the Department agrees, that Time Warner would be competitively disadvantaged if this information was made available to potential competitors. Motion at 5. Accordingly, the Department finds that this information is competitively sensitive.

Regarding the second prong of G. L. c. 25C, § 5, the Department finds that Time Warner’s programming cost information should be protected from public disclosure because

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<sup>4</sup> Cox requested protective treatment of similar channel by channel cost information in Docket No. D.T.C. 08-8. Cox supplied supporting affidavits from Richard. J. Warner, Vice President and Associate General Counsel of Turner Broadcasting System and John High, Senior Vice President of Affiliate Sales of TV Guide Networks, LLC. Both affiants attested to the competitively sensitive nature of channel cost information generally. *Id.*

Time Warner has consistently taken measures to protect the information from being publicly known. Time Warner testified that it keeps per-channel program cost information confidential within the company, and that the information is only accessible to those employees that need access to it. Motion at 4. Moreover, Time Warner has established safeguards in order to protect the confidentiality of its per-channel program cost information through non-disclosure requirements in its contracts with cable operators. *Id.* Because Time Warner has taken appropriate measures to protect its per-channel program cost information from public disclosure, the Department finds that Time Warner has sufficiently established the need for protection of this information.

The third prong of G. L. c. 25C, § 5, requires the Department to protect only so much of the confidential material for which the party seeking protection has established a need for such protection. Since programming costs change over time, and because stale programming costs are not competitively relevant, the Department has typically granted confidential treatment to programming costs for limited periods of time. *See Hearing Officer Ruling*, D.T.C. 07-10, at 5 (protection of channel by channel programming costs granted for a period of five years with opportunity afforded to provider to renew its request for confidential treatment at end of period); *Hearing Officer's Ruling on Motion of CoxCom, Inc. d/b/a Cox Communications New England for Protective Order*, D.T.C. 08-8, at 6 (same, with opportunity to renew request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Order on Request for Confidential Treatment*, CTV 03-04, at 3 (protection of operating expenses granted for a period of five years with opportunity afforded to provider to renew its request for confidential treatment at end of period); *Rate Order*, CTV 04-05 Phase II, at 7 (same).

Here, Time Warner requests confidential treatment of its per-channel program cost information for five years from the date of its production. Motion at 6. Time Warner asserts that this five-year period keeps with past Department precedent, and is appropriate because of the long-term relationships that exist between Time Warner and its programmers. *Id.* The Department finds that a five-year period is reasonable, and sufficiently narrowly tailored to satisfy the requirements of G. L. c. 25C, § 5. Accordingly, the Department grants confidential treatment to the per channel program cost information provided by Time Warner for a period of five years from the date of production, that is, June 28, 2012. The Department further affords Time Warner an opportunity to renew its request for confidential treatment at the end of that five-year period based upon a showing of need for continuing protection. The Department leaves to Time Warner the obligation to calendar the expiration of this time period and move for an extension of confidential treatment, if necessary, prior to the expiration of the initial five-year period.

**IV. ORDER**

Accordingly, after due notice, hearing and consideration, it is

**ORDERED:** That Time Warner's FCC Forms 1240 for Great Barrington, North Adams, and Pittsfield systems, as revised on August 9, 2012, are approved; and it is

**FURTHER ORDERED:** That Time Warner's FCC Form 1205, as submitted on November 2, 2011, is approved; and it is

**FURTHER ORDERED:** That Time Warner's Motion for Protective Order as filed on June 28, 2012, is Granted.

By Order of the Department

*/s/ Geoffrey G. Why*\_\_\_\_\_  
Geoffrey G. Why  
Commissioner

#### RIGHT OF APPEAL

Appeals of any final decision, order or ruling of the Department of Telecommunications and Cable may be brought pursuant to applicable federal and state laws.