



COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 14-7

November 23, 2015

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

RATE ORDER

APPEARANCES:

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FOR: TIME WARNER CABLE INC.
Petitioner

I. INTRODUCTION

In this Order, the Department of Telecommunications and Cable (“Department”) approves Time Warner Cable Inc.’s (“Time Warner” or “Company”) proposed Maximum Permitted Rates (“MPR”) and Operator Selected Rates (“OSR”) for basic service tier programming for the Company’s Great Barrington, North Adams, and Pittsfield systems. The Department rejects Time Warner’s proposed installation and equipment rates for the basic service tier.

II. PROCEDURAL HISTORY

Time Warner filed its Federal Communications Commission (“FCC”) Forms 1240 and Form 1205 with the Department on November 26, 2014, proposing to establish the MPRs and the Company’s OSRs for equipment, installation, and basic service tier programming. *See* Ex. 1; Ex. 3; Ex. 4; Ex. 5. In its Forms 1240, Time Warner proposed increased MPRs and OSRs for its basic service tier programming in regulated Massachusetts systems. Ex. 3; Ex. 4; Ex. 5. Time Warner proposed that the new rates become effective on March 1, 2015. Ex. 3; Ex. 4; Ex. 5. Time Warner also proposed several changes to its equipment and installation rates. *See* Ex. 1; Ex. 2.

On July 16, 2015, the Department issued its First Set of Information Requests to Time Warner. *Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys.*, D.T.C. 14-7 (“D.T.C. Docket 14-7”). In preparing its responses, Time Warner discovered an error in its originally filed Form 1205. Letter from John E. Fogarty, Esq., Vice President & Assistant Chief Counsel, Time Warner, to Sean M. Carroll, Hearing Officer, Dep’t (Aug. 3, 2015). As a result, Time Warner filed a revised Form 1205 on August 31, 2015. *See* Ex. 1; Ex. 2. After reviewing Time Warner’s revised Form

1205, the Department issued an Amended First Set of Information Requests to Time Warner on September 4, 2015. D.T.C. Docket 14-7. Time Warner filed its responses on September 21 and 22, 2015. *Id.* The Department held a public and evidentiary hearing on Time Warner's petition on September 24, 2015, during which it issued seven Record Requests. *Id.* Time Warner filed its responses to the Department's Record Requests on October 9 and October 16, 2015. *Id.*

The evidentiary record includes Time Warner's original Form 1205, filed on November 26, 2014 ("Ex. 1"), Time Warner's revised Form 1205, filed on August 31, 2015 ("Ex. 2"), Time Warner's Forms 1240 for the Pittsfield and Great Barrington systems, filed on November 26, 2014 ("Ex. 3" and "Ex. 4," respectively), Time Warner's Form 1240 for the North Adams system, filed on December 11, 2014 ("Ex. 5"), Time Warner's annual filing to the Department pursuant to 207 C.M.R. § 10.00, filed on March 10, 2015 ("Ex. 6"), the public and evidentiary hearing Transcript of Record ("Tr. at [page]"), Time Warner's responses to the Department's Information Requests ("D.T.C. IR 1-1" through "D.T.C. IR 1-8"), and Time Warner's responses to Record Requests the Department issued at the evidentiary hearing ("RR-1" through "RR-7").

III. REVIEW OF TIME WARNER'S FCC FORMS 1240

On its Forms 1240, Time Warner proposed increasing its MPRs and OSRs for its basic service tier programming for its Great Barrington, North Adams, and Pittsfield systems. Ex. 3; Ex. 4; Ex. 5. The Department determines that Time Warner's Forms 1240 were prepared in compliance with federal law, and the Department approves Time Warner's proposed basic service tier programming rates. *See* 47 C.F.R. § 76.922(a).

A cable operator must calculate its basic service tier programming rates using FCC forms that incorporate the FCC's rate regulations. *See id.* §§ 76.922, 76.930. Form 1240 allows a cable operator to update annually its basic service tier 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 to the extent those costs are reasonably certain and reasonably quantifiable. *Id.* § 76.922(e). 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 id.* § 76.922(e)(2)(ii)(A). Generally costs are deemed reasonably certain and quantifiable because they are based on previously agreed upon changes or cost formulas. *See In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 388, 418-19, *Thirteenth Order on Reconsideration* (1995); Letter from Meredith Jones, Chief, Cable Serv. Bureau, FCC, to Theodore Case Whitehouse, Esq., Att’y, Willkie Farr & Gallagher (Dec. 13, 1995). Cable operators may also project for increases in franchise related costs to the extent they are reasonably certain and reasonably quantifiable, but franchise related costs projections are not presumed to be reasonably certain and reasonably quantifiable. 47 C.F.R. § 76.922(e)(2)(ii)(A). The FCC has built into its Form 1240 a true-up mechanism to account for actual costs that vary from those Projected Period estimates.¹

The FCC’s rate regulations establish the standard under which the Department must review rate adjustments on the FCC Form 1240. *Id.* § 76.922(a). Specifically, the FCC directs local rate regulators, such as the Department, to ensure that the approved rates comply with the Communications Act of 1934, as amended (“Communications Act”), and to ensure that the rates do not exceed the maximum permitted charges calculated by the FCC’s rate forms. *Id.* The

¹ The true-up segment includes the compensation for overcharges or undercharges which have occurred during the True-Up Periods. The purpose of the true-up process is to compare the revenue a cable operator collected during the True-Up Period with the amount the operator should have been able to collect. If the sum collected is less than what should have been collected, then the operator is allowed to collect the difference during later rate periods. Conversely, if the sum collected exceeds the amount that should have been collected, then the operator must lower its rates in future rate periods to compensate subscribers for the difference. *Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services* at 5 (July 1996).

Department may accept basic service tier rates that do not exceed the approved maximum permitted charge as determined by federal regulations. *Id.* § 76.922(c). The Department only approves rates it deems reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. § 76.937(d)-(e). A cable operator has the burden to demonstrate that its proposed rates for basic service tier programming comply with Section 623 of the Communications Act, including a demonstration that the proposed rates are reasonable. 47 U.S.C. § 543; *In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5716-17, *Report & Order & Further Notice of Proposed Rulemaking* (1993) (“1993 FCC Rate Order”); 47 C.F.R. § 76.937(a), (d).

In its Forms 1240, Time Warner proposes increases to its MPRs for basic service tier programming on each of its systems. *See* Ex. 3; Ex. 4; Ex. 5. Time Warner proposes to increase its OSR by \$1.00 for each of its systems. *See* Ex. 3; Ex. 4; Ex. 5. The FCC Form 1235 surcharge that the Department previously approved for the Great Barrington system is set to expire and Time Warner chose not to incorporate it in its proposed rates this year.² *See* Ex. 4; *Review by the Cable Television Div. of the Dep’t of Telecomms. & Energy of Fed. Commc’ns Comm’n Forms 1240 & 1205 filed by Adelphia Commc’ns Corp.*, CTV 05-6, *Rate Order* (Apr. 27, 2006) (approving an FCC Form 1235 surcharge of \$3.87 for the Great Barrington system, to be assessed over a 12-year period, beginning in 2004).

² Cable operators making significant upgrades to their systems are allowed to use FCC Form 1235 to petition a franchising authority to recover their upgrade costs by adding an upgrade surcharge to their FCC Form 1240 rates calculated through an abbreviated cost of service showing. *In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation, & Adoption of a Unif. Accounting Sys. for Provision of Regulated Serv.*, 9 FCC Rcd 4527, 4674-76, *Report & Order & Further Notice of Proposed Rulemaking* (1994); *see also* 47 C.F.R. § 76.922(j).

The Department reviewed Time Warner's Forms 1240 and finds that Time Warner prepared the forms in accordance with the FCC's rules.³ *See* 47 U.S.C. § 543; 47 C.F.R. § 76.922(a). Specifically, the Department verified the accuracy of the data on the form and confirmed that the resulting MPRs were calculated in compliance with the relevant federal laws and regulations. *See* 47 U.S.C. § 543; 47 C.F.R. § 76.922(a); *Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services* (July 1996). The Department compared those MPRs to Time Warner's OSRs for each cable system and finds that Time Warner's proposed OSRs of \$16.04 for the Pittsfield and North Adams systems and \$15.56 for the Great Barrington system are reasonable because they are lower than the respective MPRs. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; Ex. 3; Ex. 4; Ex. 5; Attachment 1. The Department therefore approves Time Warner's Forms 1240 for the Pittsfield, Great Barrington, and North Adams systems.

IV. REVIEW OF TIME WARNER'S FCC FORM 1205

In its FCC Form 1205 for the fiscal year ending September 30, 2014, Time Warner proposed several adjustments to its MPRs and OSRs for equipment and installation. *See* Ex. 2. Time Warner also proposed reinstating charges for which the Department had prescribed a rate of zero. Ex. 6; *In re Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys.*, D.T.C. Docket 13-10, *Rate Order* (Nov. 26, 2014) ("D.T.C. 13-10 Rate Order") (prescribing an hourly service and prescribing a rate of zero for Time Warner's Navigator and Additional Outlet (A/O) Service Fee).⁴ The Department analyzed Time Warner's proposed adjustments as well as its proposed charges as outlined on its 2015 rate card. *See* Ex. 2; Ex. 6. As fully explained below, the Department

³ The Department confirmed that the Projected Period for Time Warner's Forms 1240 ends on February 29, 2016, as opposed to February 28, 2015, as originally filed. D.T.C. IR 1-1.

⁴ The D.T.C. 13-10 Rate Order is currently under appeal at the FCC.

determines that Time Warner's Form 1205 was not prepared in compliance with federal law, because the Company used a previously rejected methodology and also omitted charges for regulated equipment. The Department rejects Time Warner's proposed basic service tier equipment and installation rates. *See* 47 C.F.R. § 76.923; Ex. 2. The Department directs Time Warner to refile its Form 1205 and file a refund plan in accordance with this Order. *Id.* § 76.942.

FCC Form 1205 establishes rates for installations and equipment based upon actual capital costs and expenses. *FCC Form 1205 Instructions for Determining Costs of Regulated Cable Equip. & Installation* (July 1996). A cable operator prepares Form 1205 on an annual basis using information from its previous fiscal year. *Id.* Subscriber charges established in a Form 1205 may not exceed charges based on actual costs as determined in accordance with the FCC's regulations. *See* 47 C.F.R. § 76.923(a)(2). The equipment regulated using FCC Form 1205 "consists of all equipment in a subscriber's home, provided and maintained by the operator, that is used to receive the basic service tier." *Id.* § 76.923(a)(1). Such regulated equipment includes, but is not limited to, converter boxes and remote control units. *Id.* The cable operator bears the burden of proof to demonstrate that its proposed rates for installations and equipment comply with Section 623 of the Communications Act and the FCC's regulations. *See* 47 U.S.C. § 543; *1993 FCC Rate Order*, 8 FCC Rcd 5631, 5716-17; 47 C.F.R. § 76.937(a). The FCC found that placing the burden on the cable operator is appropriate because the cable operator "possesses the factual information necessary for such a demonstration." *1993 FCC Rate Order*, 8 FCC Rcd at 5716-17. Thus, to meet its burden, the cable operator must provide factual information demonstrating that its rates comply with the Communications Act and FCC regulations. *See id.*; 47 C.F.R. §§ 76.937(a), (d), 76.939. An operator that does not attempt to demonstrate the reasonableness of its rates does not meet this burden. *In re Implementation of*

Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation Buy Through Prohibition, 9 FCC Rcd 4316, 4347, *Third Order on Reconsideration* (1994) (“*FCC Third Rate Order*”); *see also In re Comcast Cablevision of Dallas*, 19 FCC Rcd 10628, 10639, *Order* (MB 2004) (“*FCC Dallas Order*”) (finding that a cable operator did not meet its burden of proof when it “failed to provide information that the franchising authority requested and reasonably believed was necessary for its evaluation of the cable operator’s case”); 47 C.F.R. § 76.937(d).

Upon receiving an FCC Form 1205, the Department in its role as certified franchising authority must make a determination as to whether the cable operator met its burden, as well as whether the rates are reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. §§ 76.933, 76.937(d); 207 C.M.R. § 6.02. The Department may make information requests of the cable operator that the Department reasonably believes is necessary for its evaluation of the operator’s rates. *See FCC Dallas Order*, 19 FCC Rcd at 10639. If the Department finds that the cable operator failed to provide complete information in good faith, it may find the operator in default and, “using the best information available, enter an order finding the cable operator’s rates unreasonable and mandating appropriate relief, as specified in §§ 76.940, 76.941, and 76.942.” 47 C.F.R. § 76.937(d). Whenever the Department disapproves a request for a rate increase, it must issue a written decision to that effect. *Id.* § 76.936.

In this case, the Department finds that Time Warner has not met its burden of proving that its Form 1205 complies with applicable law. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. § 76.923. Specifically, Time Warner proposes an increased hourly service charge based primarily on a methodology that the Department previously rejected and of which Time Warner failed to demonstrate the reasonableness. *See* D.T.C. 13-10 Rate Order at 15-16; Tr. at 19-21. In

addition, Time Warner has again improperly levied charges to basic service tier subscribers for its Additional Outlets (A/O) and The Guide, without attempting to demonstrate the reasonableness of such charges.⁵ *See* Ex. 6; D.T.C. 13-10 Rate Order at 18-20, 22-26.

Accordingly, the Department finds Time Warner in default, and using the best information available: finds that Time Warner's proposed hourly service charge, Additional Outlet (A/O) Service Fee, and fee for The Guide are unreasonable; prescribes an hourly service charge for Time Warner; and prescribes a rate of zero for Time Warner's Additional Outlet (A/O) Service Fee and The Guide. The Department addresses each in turn.

A. Time Warner's Proposed Hourly Service Charge Does Not Comply With Applicable Law

Time Warner proposed increasing its hourly service charge for installations and equipment from \$60.32 to \$103.44. *Compare* D.T.C. 13-10 Rate Order at 18, *with* Ex. 2. Time Warner is required to demonstrate the reasonableness of its proposed hourly service charge. *See In re TCI TKR of Houston, Inc.*, 11 FCC Rcd 20929, 20935, *Consolidated Memorandum & Order* (CSB 1996) ("The determination of whether the cable operator's proposed [hourly service charge] is reasonable is an issue left to the discretion of the local franchising authority."); 47 C.F.R. § 76.923(a), (c), (d). The Department finds that the Company did not attempt to justify the reasonableness of its proposed hourly service charge. The Department thus finds Time Warner in default and, using the best information available, prescribes an hourly service charge of \$66.72 for the reasons set forth below.

Time Warner justifies a \$5.54 increase to last year's prescribed hourly service charge of \$60.32, but does not attempt to demonstrate the reasonableness of the remainder of its proposed increase. *See* Ex. 2. An increase of \$5.54 is reasonable on account of a decrease in Time

⁵ The terms "Navigator" and "The Guide" are used interchangeably by Time Warner and in this Order. *See* RR-6.

Warner's reported Total Labor Hours.⁶ *See* D.T.C. IR 1-6; Ex. 2. Specifically, Time Warner states that its number of regulated subscribers decreased by approximately 40% as compared to last year. D.T.C. IR 1-6; Tr. at 13-15; RR-1. As a result of this decrease, Time Warner's reported Total Labor Hours decreased as well. D.T.C. IR 1-6. Time Warner states that its reported costs included in the numerator of its hourly service charge calculation also decreased, but not as much as its Total Labor Hours. *Id.*; *see also* 47 C.F.R. § 76.923(d) (describing the FCC's formula for calculating hourly service charge). Time Warner states that the result of this is a \$5.54 increase to its proposed hourly service charge. *See* D.T.C. IR 1-6. The Department finds that this \$5.54 increase in Time Warner's proposed hourly service charge is reasonable.

However, although Time Warner justified a \$5.54 increase to its hourly service charge, the Company proposed an increase of \$43.12. *Compare* D.T.C. 13-10 Rate Order at 8, *with* Ex. 2. The Company did not attempt to demonstrate that an increase of this magnitude is reasonable, or that the proposed hourly service, as a whole, is reasonable. Rather, Time Warner points to the limited information it provided in last year's rate case, in which the Department held that Time Warner did not demonstrate the reasonableness of its proposed hourly service charge:

THE HEARING OFFICER [of the Department]: Sorry, so all of the reasoning for Time Warner's proposed hourly service charge of last year, so [\$]97[.]90. All of those reasons for that proposed hourly service charge are inherently imbedded in this year's proposed hourly service charge as well[?]

MRS. SENSINTAFFER [of Time Warner]: Yes, that is correct.

Tr. at 20. As such reasoning was inadequate to demonstrate the reasonableness of last year's proposed hourly service charge, the Department cannot now, without more information, approve this year's proposed hourly service charge based on the same inadequate information. *See* D.T.C. 13-10 Rate Order at 8-16 (finding that Time Warner did not demonstrate the

⁶ This amount represents the increase from last year's proposed hourly service charge of \$97.90 to this year's proposed hourly service charge of \$103.44. *See* D.T.C. 13-10 Rate Order at 15; Ex. 2.

reasonableness of its proposed hourly service). Indeed, as Time Warner did not provide the relevant information the Department requested in last year's rate case regarding the hourly service charge, the Department again requested and was not provided with additional justification of the Company's proposed hourly service charge:

THE HEARING OFFICER [of the Department]: I just want to make clear that the reasoning that was provided last year in D.T.C. 13-10, is essentially the same reasoning for the -- or part of the same reasoning for this year's hourly service charge, is that correct? There is no additional information that would be useful in the Department[']s review of this year's hourly service charge?

MRS. SENSINTAFFER [of Time Warner]: Not that I am aware of.

Tr. at 21. Aware that the Company had not demonstrated the reasonableness of its prior proposed hourly service charge, Time Warner proposed an even higher hourly service charge, while acknowledging that its prior inadequate reasoning was built into its proposal this year. *Id.* at 20. And then when asked, Time Warner declined to provide any additional justification. *Id.* at 21. The Department thus finds that Time Warner did not attempt to justify the reasonableness of its proposed hourly service charge. *See* 47 C.F.R. § 76.937(d).

Having determined that Time Warner did not attempt to justify the reasonableness of its proposed hourly service charge, but recognizing that a cable operator is permitted to recover actual costs plus a reasonable profit, the Department, using the best information available and pursuant to its authority under, prescribes an hourly service charge of \$66.72 for Time Warner. *See* 47 C.F.R. §§ 76.937(d), 76.941.

When prescribing a rate under § 76.941, a franchising authority may use the cable operator's costs from a previous year "as a starting point but should make a reasonable effort to adjust that data" to estimate what the costs would be in the relevant year. *In re Falcon First Commc 'ns, L.P.*, 20 FCC Rcd 8567, 8571, *Memorandum Opinion & Order* (MB 2005) ("2005

FCC Falcon Order”). For example, a franchising authority may adjust a cable operator’s hourly service charge by using “the intervening changes in the price index.” *In re Falcon First Commc’ns, L.P.*, 14 FCC Rcd 7277, 7282, *Memorandum Opinion & Order* (CSB 1999) (“1999 *FCC Falcon Order*”). In prescribing a rate, a franchising authority may also rely on data from other cable operators. *In re Harron Commc’ns Corp. v. Mass. Cmty. Antenna Television Cmm’n*, 10 FCC Rcd 2349, 2351, 2352, *Consolidated Order* (CSB 1995) (“*FCC Harron Order*”); *see also In re Md. Cable Partners*, 12 FCC Rcd 11951, 11953, *Memorandum Opinion & Order* (CSB 1996) (“*FCC Maryland Order*”) (stating that a franchising authority may set the rates of a nonresponsive cable operator by using financial data from cable operators in neighboring communities, or even industry averages).

As Time Warner did not provide any information regarding the majority of its proposed increase to its hourly service charge, the Department begins with the Company’s hourly service charge from last year, and adjusts that rate taking into account the intervening changes in the price index and Charter’s justification for a \$5.54 increase to its hourly service charge. *See supra* p. 8; *2005 FCC Falcon Order*, 20 FCC Rcd at 8571; *1999 FCC Falcon Order*, 14 FCC Rcd at 7282. Time Warner’s previous year’s hourly service charge was \$60.32. D.T.C. 13-10 Rate Order at 18. According to the FCC, the intervening change in the price index for the third quarter of 2014—the quarter ending right before Time Warner filed the Petition—is 1.42%. *Inflation Adjustment Figures for Cable Operators Using FCC Forms 1210 & 1240 Now Available*, DA 15-1195, *Pub. Notice* at 2 (Oct. 19, 2015). Applying this 1.42% inflation factor to Time Warner’s previous hourly service charge of \$60.32 results in an increase of \$0.86. The Department adds this increase, along with Time Warner’s justified \$5.54 increase, to prescribe an hourly service charge of \$66.72. This hourly service charge is reasonable in light of the

record in this proceeding as well as the hourly service charges of the other cable operators in Massachusetts. *See FCC Maryland Order*, 12 FCC Rcd at 11953; *FCC Harron Order*, 10 FCC Rcd 2349 at 2351. Charter Communications has a Department-approved hourly service charge of \$46.93; Comcast Cable Communications, LLC has a Department-approved hourly service charge of \$35.99; and CoxCom, Inc. has a Department-approved hourly service charge of \$65.13. *See Petition of Charter Commc'ns to establish & adjust the basic service tier programming, equip. & installation rates for the cmtys. served by Charter that are currently subject to rate regulation*, D.T.C. 14-6, *Rate Order* (Oct. 30, 2015); *Petition of Comcast Cable Commc'ns, LLC to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Comcast Cable Commc'ns, LLC that are currently subject to rate regulation*, D.T.C. 14-4, *Rate Order* (Sept. 17, 2015); *Petition of CoxCom, Inc. d/b/a Cox Commc'ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the Town of Holland*, D.T.C. 15-1, *Rate Order* (Nov. 19, 2015). Indeed, the prescribed hourly service charge of \$66.72 is still higher than the other cable operators in Massachusetts, and the Department received no information to support a finding that Time Warner's actual costs are significantly greater than other cable operators.

As a result of the foregoing, the Department prescribes an hourly service charge of \$66.72 pursuant to its authority under 47 C.F.R. § 76.941. The Department directs Time Warner to resubmit its Form 1205 using this hourly service charge and to file a refund plan for its Great Barrington, North Adams, and Pittsfield system basic service tier subscribers by December 16, 2015, to account for the resulting basic service tier equipment and installation overcharges.

B. Time Warner's Proposed Additional Outlet A/O Service Fee Is Unreasonable

Time Warner again proposed to impose an Additional Outlet (A/O) Service Fee of \$1.50 on its subscribers for each additional set-top box or CableCARD that a subscriber rents. Ex. 6. The Department previously prescribed a rate of zero for the Additional Outlet (A/O) Service Fee because (1) Time Warner imposes the fee on subscribers of all of its service tiers, including its basic-only subscribers, and (2) Time Warner did not attempt to demonstrate the reasonableness of the fee. D.T.C. 13-10 Rate Order at 19, 21. Time Warner's proposed Additional Outlet (A/O) Service Fee in this proceeding is no different than the fee for which the Department prescribed a rate of zero in the D.T.C. 13-10 Rate Order. RR-7. And the Company again did not attempt to demonstrate the reasonableness of the fee. *See id.*; Ex. 2. The Department thus finds Time Warner in default and, using the best information available, directs Time Warner to include in its refund plan any Additional Outlet (A/O) Service Fees paid to date by Time Warner subscribers in its regulated Massachusetts communities.

A franchising authority has jurisdiction over a cable operator's additional outlets if the operator charges a fee for such outlets used by subscribers who subscribe to the basic service tier. *In re Comcast Cable of Ind./Mich./Tex., Inc.*, 19 FCC Rcd 16344, 16348-49 (MB 2004) ("*FCC Irving Order*"); *see also* 47 C.F.R. § 76.923(a), (h). The FCC stated that "if a cable operator charges a rate for additional outlets used by customers who subscribe to the BST, then the operator's certified franchising authority has jurisdiction over the rate for those outlets." *FCC Irving Order*, 19 FCC Rcd at 16348-49. This makes clear that the franchising authority has jurisdiction over the additional outlets, generally, even those additional outlets rented by subscribers of expanded cable packages. *See id.* Indeed, the FCC explicitly refrained from

holding that franchising authorities have jurisdiction over only those outlets rented by basic service tier-only subscribers. *Id.*

In this case, Time Warner assesses its Additional Outlet (A/O) Service Fee to subscribers of all of its service tiers, including basic service tier-only subscribers. *See* Ex. 6; RR-7. The Department thus has jurisdiction over Time Warner's additional outlets and the associated fees. *See FCC Irving Order*, 19 FCC Rcd at 16348-49; D.T.C. 13-10 Rate Order at 19-20. Time Warner bears the burden of demonstrating the reasonableness of the fee. *See 1993 FCC Rate Order*, 8 FCC Rcd 5631, 5716-17; 47 C.F.R. § 76.937(a). Notably, this case is distinguishable from a previous Department Rate Order finding that it did not have jurisdiction over Comcast's additional outlets, because in that case, Comcast did not assess a fee for additional outlets to its basic service tier-only subscribers. *Petition of Comcast Cable Commc'ns, LLC to Establish & Adjust the Basic Serv. Tier Programming, Equip., & Installation Rates for Cmtys. in Mass. Served by Comcast Cable Commc'ns, LLC that are Currently Subject to Rate Regulation*, D.T.C. 12-2, *Rate Order* at 16 (Jan. 30, 2013) (citing the *FCC Irving Order*) ("D.T.C. 12-2 Rate Order").

Time Warner did not include its Additional Outlet (A/O) Service Fee on its Form 1205 and did not provide the Department with any information regarding the fee or its reasonableness. *See* Ex. 2; Tr. at 38; RR-7. Accordingly, the Department finds that Time Warner did not attempt to demonstrate the reasonableness of its Additional Outlet (A/O) Service Fee in violation of FCC rules. *See FCC Third Rate Order*, 9 FCC Rcd 4316, 4347; 47 C.F.R. §§ 76.923(a)(1), 76.937(d). As a result, the Department finds Time Warner in default and determines that its Additional Outlet (A/O) Service Fee is unreasonable. *See FCC Irving Order*, 19 FCC Rcd at 16348-49; 47 C.F.R. § 76.937(d).

As discussed above, when a franchising authority finds a cable operator in default, it may prescribe a rate using the cable operator's costs from a previous year "as a starting point but should make a reasonable effort to adjust that data" to estimate what the costs would be in the relevant year. *2005 FCC Falcon Order*, 20 FCC Rcd 8567, 8571. In doing so, a franchising authority also may rely on data from other cable operators. *FCC Maryland Order*, 12 FCC Rcd 11951, 11953; *FCC Harron Order*, 10 FCC Rcd 2349, 2351, 2352. Time Warner has never provided the Department with any cost data in relation to its additional outlets and the Company's previous rate for its additional outlets was zero. D.T.C. 13-10 Rate Order at 20. The Department thus uses a rate of zero as the starting point of its analysis. *See 2005 FCC Falcon Order*, 20 FCC Rcd at 8571. As was the case in last year's rate proceeding, Time Warner has not provided the Department with any cost information or any other information about its additional outlets that would lead the Department to prescribe a rate other than zero. *See Ex. 2; Tr. at 38; RR-7; D.T.C. 13-10 Rate Order at 20.* Once again, the Department looks to other cable operators in Massachusetts in accordance with FCC precedent and finds that no other cable operator charges an additional outlet fee to its basic service tier subscribers. *See, e.g., D.T.C. 13-10 Rate Order at 21; D.T.C. 12-2 Rate Order at 16.* Accordingly, once again data from other cable operators also inform the Department that a rate of zero for Time Warner's additional outlets is appropriate and reasonable. *See FCC Maryland Order*, 12 FCC Rcd at 11953; *FCC Harron Order*, 10 FCC Rcd at 2351, 2352; D.T.C. 13-10 Rate Order at 21.

Because Time Warner provided the Department no information with which to adjust Time Warner's previous rate of zero for its additional outlets, and relying on data from other cable operators in Massachusetts, the Department prescribes a rate of zero. *See FCC Time Warner Order*, 20 FCC Rcd at 12224 (stating that Time Warner was in a better position to

estimate the value of a cost than the franchising authority and that Time Warner was not permitted to “pass its burden to the regulator”); *2005 FCC Falcon Order*, 20 FCC Rcd at 8571; *FCC Maryland Order*, 12 FCC Rcd at 11953 (indicating that a franchising authority may set a rate to zero so long as it is reasonable to do so and the franchising authority explains why it is reasonable to do so).

The Department directs Time Warner to include in its refund plan any Additional Outlet (A/O) Service Fees paid to date by Time Warner subscribers in its regulated Massachusetts communities. *See FCC Irving Order*, 19 FCC Rcd at 16348-49; 47 C.F.R. §§ 76.937(d), 76.942.

C. Time Warner’s Proposed Charge For Its Navigator (“The Guide”) Is Unreasonable

Time Warner again excluded from its Form 1205 its charge for The Guide, integrated software that operates the Company’s converter boxes. The Department thus finds that Time Warner did not attempt to demonstrate the reasonableness of its charge for The Guide. The Department finds Time Warner in default and prescribes a rate of zero for The Guide.

The Department previously held that The Guide is an integrated part of Time Warner’s converter boxes and is regulated equipment used to receive the basic service tier. D.T.C. 13-10 Rate Order at 22. In this proceeding, Time Warner does not provide any additional information regarding The Guide, but states that The Guide is unchanged, including the proposed charge of \$3.27, from the Navigator that the Department reviewed in D.T.C. 13-10. RR-6; *see also* D.T.C. 13-10 Rate Order at 22-28. Because The Guide is regulated equipment under the FCC’s rules, Time Warner is required to demonstrate the reasonableness of its charge for The Guide. 47 C.F.R. § 76.923(a)(1), (c). Time Warner did not attempt to demonstrate the reasonableness of this charge. *See* Ex. 2; Tr. at 36-38. Accordingly, the Department finds Time Warner in default and finds the charge to be unreasonable. *See In re Time Warner Cable Entm’t –*

Advance/Newhouse P'ship, 20 FCC Rcd 12218, 12224, *Memorandum Opinion & Order* (MB 2005) (“*FCC Time Warner Order*”) (reaffirming the authority of the Department to hold an operator that does not attempt to demonstrate the reasonableness of its rates in default); *FCC Third Rate Order*, 9 FCC Rcd 4316, 4347; 47 C.F.R. § 76.937(d).

Having found Time Warner in default and Time Warner's charge for The Guide unreasonable, the Department, using the best information available and pursuant to its authority under 47 C.F.R. § 76.941, again prescribes a rate of zero for The Guide. *See* 47 C.F.R. §§ 76.937(d), 76.941. As explained in the D.T.C. 13-10 Rate Order, any costs that Time Warner may incur on account of The Guide are already accounted for and recovered by the Company in its Form 1205. D.T.C. 13-10 Rate Order at 27; *see also* Ex. 2; *Petition of Charter Communications to establish & adjust the basic service tier programming, equip. & installation rates for the cmts. served by Charter that are currently subject to rate regulation*, D.T.C. 14-6, *Rate Order* (Oct. 30, 2015). The Department thus determines, as it did in the D.T.C. 13-10 Rate Order, that a rate of zero for The Guide is appropriate because any additional charge for either Time Warner's converter box or The Guide would amount to over recovery. *See* 47 C.F.R. § 76.923(a)(2) (“Subscriber charges for such equipment shall not exceed charges based on actual costs in accordance with the requirements set forth in this section.”); D.T.C. 13-10 Rate Order at 27. Time Warner has not provided any cost data or any other information regarding The Guide in this proceeding so the Department has nothing on which to base an alternative conclusion.⁷ Ex. 2; Tr. at 36-38; *see also FCC Time Warner Order*, 20 FCC Rcd at 12223-24 (stating that Time

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The Department notes that it still does not possess any cost information from other Massachusetts cable operators that would be useful in prescribing a rate other than zero for The Guide. *See FCC Harron Order*, 10 FCC Rcd 2349, 2351, 2352 (permitting the franchising authority to use cost data from other cable operators to estimate costs for the petitioning cable operator); D.T.C. 13-10 Rate Order at 27.

Warner was in a better position to estimate the value of a cost than the franchising authority and that Time Warner was not permitted to “pass its burden to the regulator”).

As a result of the foregoing, the Department directs Time Warner to include in its refund plan any charges for The Guide that Time Warner subscribers in its regulated Massachusetts communities have paid to date. *See In re Comcast Cable Commc’ns, LLC (N. Metro)*, 29 FCC Rcd 2885, 2890, *Order* (MB 2014) (“[E]quipment regulations still apply to all the equipment in a subscriber’s home that is provided and maintained by the cable operator and that is used to receive the BST, even if it is also used to receive additional tiers of unregulated services.”); 47 C.F.R. §§ 76.937(d), 76.942; *cf. FCC Irving Order*, 19 FCC Rcd 16344, 16348-49.

V. ORDER

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

ORDERED: That Time Warner's FCC Forms 1240 for the Great Barrington, Pittsfield, and North Adams systems are APPROVED; and it is

FURTHER ORDERED: That Time Warner's FCC Form 1205, as filed on August 31, 2014, is REJECTED; and it is

FURTHER ORDERED: That Time Warner resubmit its FCC Form 1205 in accordance with this Rate Order, and file a refund plan for all of its subscribers in its regulated Massachusetts communities by December 16, 2015, to account for the basic service tier equipment and installation overcharges, as well as the rejection of the charges for the Additional Outlet (A/O) Service Fee and The Guide, as discussed herein.

By Order of the Department



Karen Charles Peterson, Commissioner

RIGHT OF APPEAL

Pursuant to G.L. c. 25, § 5, and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court. Appeals of Department Orders on basic service tier cable rates, associated equipment, or whether a franchising authority has acted consistently with the federal Cable Act may also be brought pursuant to 47 C.F.R. § 76.944.