



COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 17-5

November 1, 2018

Petition of Charter Communications to establish and adjust the basic service tier programming, equipment, and installation rates for the communities in Massachusetts served by Charter Communications that are subject to rate regulation.

RATE ORDER

I. INTRODUCTION AND PROCEDURAL HISTORY

In this Order, the Department of Telecommunications and Cable (“Department”) rejects the Maximum Permitted Rates (“MPRs”) for basic service tier (“BST”) programming proposed by Charter Communications (“Charter”) for its rate-regulated Massachusetts communities. The Department approves Charter’s proposed MPRs and Operator Selected Rates (“OSRs”) for equipment and installation. The Department directs Charter to file a refund plan subject to Department approval, in accordance with this Rate Order.

On November 2, 2017, Charter filed Federal Communications Commission (“FCC”) Forms 1240, proposing BST programming MPRs for each of its regulated communities. *Petition of Charter Commc’ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc’ns that are currently subject to rate regulation*, D.T.C. 17-5 (Nov. 2, 2017); Exhs. 1-28. Contemporaneously, Charter filed an FCC Form 1205, proposing equipment and installation MPRs for its regulated communities. Exh. 29. On November 30, 2017, Charter provided an updated Current Rate Summary, as well as replacement Forms 1240 for Brookfield, Charlton, the Dalton/Pittsfield/Richmond system,

Dudley, East Brookfield, the Lee/Lenox/Stockbridge system, Spencer, Sturbridge, and West Brookfield. Exhs. 35-44. On May 4, 2018, Charter filed revised Forms 1240 for Brookfield, Charlton, Dudley, East Brookfield, and West Brookfield. Exhs. 45-49. In accordance with FCC rules, Charter's proposed BST programming, equipment, and installation rates became effective on February 1, 2018. *See* 47 C.F.R. § 76.933(g).

On April 27, 2018, the Department issued its First Set of Information Requests to Charter, an Order of Notice, and a Notice of Public Hearing in this proceeding and provided direct notice of the proceeding to each affected municipality. On May 10, 2018, Charter filed its responses to the Department's First Set of Information Requests, accompanied by a Motion for Protective Treatment of Confidential Information ("Motion One"). DTC IR 1-1 to 1-13. On May 10, 2018, the Massachusetts Office of the Attorney General ("AGO") filed a Notice of Intervention. At the May 30, 2018, evidentiary hearing in this proceeding, the Department recognized the AGO's intervention pursuant to G.L. c. 11, § 10. Transcript of Record ("Tr.") at 6. On May 16, 2018, the AGO issued its First Set of Information Requests to Charter. On May 29, 2018, Charter filed its responses to the AGO's First Set of Information Requests, accompanied by a Motion for Protective Treatment of Confidential Information ("Motion Two").¹ AG IR 1-1 to 1-8. On May 23, 2018, the Town of Southamptton filed a Petition to Intervene in this proceeding. At the evidentiary hearing, the Department conditionally granted the Town's Petition to Intervene, pending the close of the answer period on May 31, 2018. Tr. at 7. On June 1, 2018, the Department granted the Town's Petition to Intervene.² *Petition of*

¹ The Department granted Motion One and Motion Two on August 2, 2018. *Petition of Charter Commc'ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc'ns that are currently subject to rate regulation*, D.T.C. 17-5, *Ruling on Motions for Protective Treatment* (Aug. 2, 2018).

² No answers were filed in response to the Town's Petition to Intervene.

Charter Commc'ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc'ns that are currently subject to rate regulation, D.T.C. 17-5, Hearing Officer Ruling on the Town of Southampton's Petition to Intervene (June 1, 2018).

On May 30, 2018, the Department held public and evidentiary hearings and issued to Charter six Record Requests. *See* Tr. Additionally, the AGO issued to Charter three Record Requests. *Id.* Charter submitted its responses to the Record Requests on June 27, 2018. DTC RR-1 to RR-6; AG RR-1 to RR-3. On August 10, 2018, Charter submitted Supplemental Responses to DTC RR-4 and DTC RR-6. DTC RR-4 Supplement; DTC RR-6 Supplement. On August 29, 2018, the Department hosted a conference call with the parties to this proceeding, describing its preliminary findings.³ The Department received public comments from the Town of Southampton (filed May 30, 2018), Rene Wood (filed May 30, 2018), Richard Hall (filed June 18, 2018), and the Five Town Cable Advisory Committee (filed May 22, 2018).

II. ANALYSIS AND FINDINGS

After review and consideration, the Department rejects Charter's FCC Forms 1240 and approves Charter's FCC Form 1205, as described below. The Department directs Charter to file a refund plan subject to Department approval, in accordance with this Rate Order to account for overcharges discussed herein. *See* 47 C.F.R. § 76.942. Charter's approved MPRs and OSRs as contained in its FCC Form 1205 are in the Rate Schedule included as Attachment 1.

³ Participating on the call were Sean Carroll, Michael Mael, and Mark Merante for the Department; Michael Chowaniec, Denise Williams, and Steven Horvitz for Charter; Timothy Reppucci for the AGO; and Edward Gibson for the Town of Southampton.

A. Review of Charter's FCC Forms 1240

On its FCC Forms 1240, Charter proposes changes to each of the BST programming MPRs in its regulated communities. The Department rejects Charter's FCC Forms 1240 as filed.

A cable operator must calculate its BST programming rates using FCC forms that incorporate the FCC's rate regulations. *See* 47 C.F.R. §§ 76.922, 76.930. The FCC allows a cable operator to update its BST programming rates annually to account for inflation, changes in the number of regulated channels, and changes in external costs, including programming costs, copyright costs, and FRCs. *See id.* § 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, a cable operator must demonstrate that its projections are reasonably certain and reasonably quantifiable. *See id.* § 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 id.* § 76.922(e)(2)(ii)(A).

The FCC's rate regulations establish the standard under which the Department reviews 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 rates comply with the Communications Act of 1934, as amended ("Communications Act"), and to ensure that the rates do not exceed the MPRs calculated by the FCC's rate forms. *Id.* The Department may accept BST rates that do not exceed the approved MPRs as determined by federal regulations. *Id.* § 76.922(a), (c). The Department only approves rates it deems reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, §§ 2, 15; 47 C.F.R. § 76.937(d)-(e). A cable operator has the burden to demonstrate that its proposed BST programming rates 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 addition, the FCC permits cable operators to report projected costs, including costs associated with programming, that they believe are reasonably certain and reasonably quantifiable. *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). In particular, the FCC has built into its Form 1240 a true-up mechanism to account for actual costs that vary from those Projected Period estimates.⁴

If the Department finds that the cable operator charged subscribers more than the MPR that the FCC’s regulations produced or should have produced, the Department may order the cable operator to file a refund plan subject to Department approval, containing a proposal for refunding subscribers the amount they were overcharged. *See Petition of Time Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys.*, D.T.C. 13-10, *Rate Order* at 28 (Nov. 26, 2014); 47 C.F.R. § 76.942. Whenever the Department rejects a request for a rate increase, it must issue a written decision to that effect. 47 C.F.R. § 76.936.

⁴ 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. FCC, *Instructions for FCC Form 1240 Ann. Updating of Maximum Permitted Rates for Regulated Cable Servs.* at 5 (July 1996).

In this Order, the Department addresses a special true-up for Charlton which the Department approved in last year's rate case, a request from Charter to conduct a special true-up in next year's rate case to remedy an overcharge in West Brookfield, and Charter's treatment of certain channel movements.

1. Special True-Up in Charlton

The Department approves Charter's special true-up for the Town of Charlton. *See Petition of Charter Commc'ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc'ns that are currently subject to rate regulation*, D.T.C. 16-4, *Rate Order* at 11-12 (Oct. 31, 2017) ("*16-4 Order*"). In the *16-4 Order*, the Department rejected Charter's proposed OSR for the pass-through of its franchise-related costs ("FRCs") in Charlton. *Id.* Charter's revised methodology for calculating FRCs, which the Department approved in the *16-4 Order*, reduced Charter's proposed FRC MPR in Charlton from \$0.38 to \$0.04, below its proposed FRC OSR of \$0.38. *Id.* Charter acknowledged that its proposed FRC OSR in Charlton was higher than its proposed FRC MPR and requested that the Department permit a special true-up in this year's FCC Form 1240, rather than requiring the issuance of cash refunds. *See id.* The Department approved Charter's proposal, and upon review of this year's FCC Form 1240 for Charlton, the Department determines that Charter has appropriately accounted for the FRC overcharge in the previous rate year by instituting a negative true-up. *See Exhs. 5, 37, 46.*

2. Overcharges in West Brookfield

The Department rejects Charter's proposed programming rates for the Town of West Brookfield. The Department only approves cable rates that are reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. § 76.937(d)-(e). A cable operator's OSR that is above the

permitted MPR is not reasonable. *See* 47 C.F.R. § 76.922(a), (c). Charter's proposed OSR in West Brookfield is \$32.42. Exhs. 44, 49. In correcting an error in its FCC Form 1240 for West Brookfield, Charter reduced its proposed MPR from \$33.95 to \$31.76.⁵ *Compare* Exh. 26, with Exh. 49. Charter's proposed OSR in West Brookfield is higher than its proposed MPR.⁶ Accordingly, the Department rejects Charter's proposed OSR in West Brookfield.

Charter acknowledges that its proposed OSR in West Brookfield is higher than its revised proposed MPR and requests a special true-up for West Brookfield, rather than issuing cash refunds. Letter from Denise Williams, Dir. of Regulatory Compliance & Planning, Charter, to Shonda Green, Sec'y, Dep't (May 4, 2018). The Department permits refunds through a special true-up mechanism where the administrative burden on the cable operator of issuing a cash refund or bill credit to subscribers outweighs its benefit. *See 16-4 Order* at 11-12; *Petition of Comcast Cable Commc'ns, Inc. to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Comcast Cable Commc'ns, Inc. that are currently subject to rate regulation*, D.T.C. 10-8, *Order on Reconsideration* at 5 (Apr. 23, 2012); *In re Century Berkshire Cable Corp.*, Docket No. Y-98 INC, Y-98 EQU, *Rate Order* (Oct. 23, 1998).

In this case, the Department rejects Charter's proposal to conduct a special true-up in next year's rate filing to account for the overcharge in West Brookfield identified above. Charter is required to provide refunds to West Brookfield subscribers for reasons unrelated to the error identified above. *See infra* Section II.A.3. As Charter will already be providing refunds to West

⁵ This MPR is subject to change again given the Department's findings herein with respect to channel movements. *See infra* Section II.A.3.

⁶ Charter also made May 4, 2018, revisions to the MPRs in Brookfield, Charlton, Dudley, and East Brookfield. Exhs. 45-48. However, Charter's proposed OSRs in these communities remained below the respective modified proposed MPRs. *See id.*

Brookfield subscribers, the administrative burden on Charter of contemporaneously issuing cash refunds or bill credits for this overcharge is non-existent. Consequently, the administrative burden on Charter does not outweigh the benefit to subscribers of being made whole sooner via a cash refund or bill credit. The Department rejects Charter's request and directs Charter to include in its refund plan refunds to West Brookfield subscribers to account for the overcharges identified in this subsection.

3. *Channel Deletions*

Charter violated federal regulations by improperly accounting for the deletion of seven channels from its BST. Federal regulations require that if a cable operator deletes a channel from the BST in a rate-regulated community, the operator must reflect in its rate for that community the resulting net reduction in external costs, and must also lower the rate by a certain "residual" amount associated with that channel. 47 C.F.R. § 76.922(g)(4); *see also In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 10 FCC Rcd. 1226, 1256, *Sixth Order on Reconsideration, Fifth Report & Order, & Seventh Notice of Proposed Rulemaking* (1994) ("Going Forward Order"); *Petition of Charter Commc'ns to establish & adjust the basic serv. tier programming, equip. & installation rates for the cmtys. served by Charter that are currently subject to rate regulation*, D.T.C. 08-10, *Rate Order* at 6 (Nov. 3, 2009) ("The Department finds that although the rules in this case allow Charter to add channels and increase charges incrementally, the procedure for removing BST channels from the lineup requires removing the full Channel Movement and Deletion Segment from the BST rate.") (footnote omitted).⁷ Removal of the residual is not required if the operator

⁷ The FCC officially sunset 47 C.F.R. § 76.922(g) on January 1, 1998, because of the end of CPST rate regulation. *See* 47 C.F.R. § 76.922(g)(8). The FCC then reinstated 47 C.F.R. § 76.922(g) for BST rate regulation. *In re Revisions to Cable Television Rate Regulations*, 17 FCC Rcd. 11,550, 11,569-70, *Notice of Proposed Rulemaking & Order* (2002); *see also In re Revisions to Cable Television Rate Regulations*, 17

simultaneously substitutes a new channel for an existing channel. 47 C.F.R. § 76.922(g)(6); *In re Heritage Cablevision of Cal., Inc. v. City of San Jose*, 18 FCC Rcd. 436, 438, *Memorandum Opinion & Order* (MB 2003) (finding that an operator's channel addition one year after the operator's deletion of the channel did not constitute a substitution, but rather a deletion and separate addition); *see also* Tr. at 42, 44 (discussing simultaneous channel replacements); *In re AT&T Broadband*, CTV 02-2, *Rate Order* at 9 (Feb. 19, 2003) (approving an operator's simultaneous channel deletion and channel addition without requiring the operator to remove the deleted channel's residual). To properly report channel deletions, cable operators use Worksheets 4 and 5 of the FCC Form 1240. FCC, *Instructions for FCC Form 1240 Ann. Updating of Maximum Permitted Rates for Regulated Cable Servs.* (July 1996).

In this case, Charter deleted seven channels from its BST but failed to use Worksheets 4 and 5 to report those changes and failed to reduce its rates by the channels' residuals in violation of federal regulations. *See* 47 C.F.R. § 76.922(g)(4); Exhs. 1-28; DTC IR 1-10; Tr. at 41-44; DTC RR-6 Supplement.

First, in March 2017, Charter deleted EWTN, Inspirational Network, Trinity Broadcast Network, and POP from its "Spectrum BST" service product in its twenty-six Legacy Charter rate-regulated communities.⁸ Exhs. 1-6, 8-15, 17-28; *see also* DTC RR-6 Supplement (stating that the "vast majority" of subscribers in these communities receive Charter's "Legacy BST" service product and thus were unaffected by the deletion). Charter subsequently added these

FCC Rcd. 15,974, 15,974-76, *Order* (2002) (revising ¶ 55 from the first Order). The FCC specifically stated that franchising authorities should accept and may require rate adjustments for channel deletions consistent with 47 C.F.R. § 76.922(g)(4). *In re Revisions to Cable Television Rate Regulations*, 17 FCC Rcd. 15,974, 15,975, *Order* (2002).

⁸ Auburn, Belchertown, Brimfield, Brookfield, Charlton, Chicopee, Dudley, Easthampton, East Brookfield, East Longmeadow, Hadley, Hampden, Harvard, Holden, Ludlow, Paxton, Pepperell, Southampton, Spencer, Sturbridge, Upton, Uxbridge, West Boylston, West Brookfield, Wilbraham, and Worcester.

four channels to the “Spectrum BST” service product in these communities several months later in either February, March, or June 2018.⁹ Exhs. 1-6, 8-15, 17-28; DTC IR 1-10; DTC RR-6 Supplement.

Second, in April 2017, Charter deleted WCTX-My TV from the BST (both the “Spectrum BST” and “Legacy BST” service products) in ten of those twenty-six communities.¹⁰ Exhs. 2, 3, 6, 10-13, 17, 20, 27; DTC RR-6 Supplement. Charter subsequently added Catholic TV to the BST in these ten communities several months later in February 2018. Exhs. 2, 3, 6, 10-13, 17, 20, 27; DTC RR-6 Supplement.

Third, also in April 2017, Charter deleted WCVB-ABC from the BST (both the “Spectrum BST” and “Legacy BST” service products) in four of those ten communities.¹¹ Exhs. 3, 13, 17, 27. Charter subsequently added Daystar to the BST in these four communities several months later in February 2018. Exhs. 3, 13, 17, 27; DTC RR-6 Supplement.

Finally, in June 2017, Charter deleted WWLP-NBC from the BST (both the “Spectrum BST” and “Legacy BST” service products) in its six rate-regulated Legacy Time Warner

⁹ As part of the refund plan required herein, the Department directs Charter to confirm, for each community, at what point in 2018 Charter added EWTN, Inspirational Network, Trinity Broadcast Network, and POP to its BST. While it is apparent that Charter added these four channels to the “Spectrum BST” service product in each of the twenty-six communities by August 10, 2018, Charter has not provided, by community, the precise month that the channels were added. *See* DTC IR 1-10 (stating that in “about half” of the communities, Charter added the channels by “late February/early March,” but for the other half, “the Programming Department is still working to complete the last Projected Period channel additions in June.”); DTC RR-6 Supplement (confirming that the channels had been added to the “Spectrum BST” service product but not providing details on when such additions occurred).

¹⁰ Belchertown, Brimfield, Chicopee, East Longmeadow, Easthampton, Hadley, Hampden, Ludlow, Southampton, and Wilbraham.

¹¹ Brimfield, Hampden, Ludlow, and Wilbraham. In these four communities, Charter deleted a total of six channels.

communities.¹² Exhs. 7, 16. Charter subsequently added EWTN to the BST in these six communities several months later in March 2018. DTC RR-6 Supplement.

In reporting these seven channel deletions on its FCC Forms 1240, Charter removed the channels from Worksheet 3, and then added them to Worksheet 3 for the Projected Period. Exhs. 1-28, 36-49; Tr. at 41-42. This reporting violated FCC regulations because Charter did not use Worksheets 4 and 5 to remove the channels' residuals from the rates. 47 C.F.R. § 76.922(g)(4); FCC, *Instructions for FCC Form 1240 Ann. Updating of Maximum Permitted Rates for Regulated Cable Servs.* (July 1996). Charter asserts that the FCC's rule should not apply in this case, or that the Department should otherwise approve its rates, because the deletions were either inadvertent, temporary, or both. *See* DTC IR 1-10; Tr. at 41-44; DTC RR-6 Supplement. Charter's assertions fail on a number of grounds.

First, the plain language of the FCC's regulation requires removal of a deleted channel's external costs and residual from the rate. *See* 47 C.F.R. § 76.922(g)(4). The regulation states: "When dropping a channel from a BST . . . operators shall reflect the net reduction in external costs in their rates Operators shall also reduce the price of that tier by the 'residual' associated with that channel." *Id.* There can be no dispute in this case that Charter dropped the seven channels at issue from the BST.¹³ *See, e.g.,* Exh. 3 ("Dropped EWTN, Inspirational Network, Trinity Broadcast Network, POP. . . . Dropped WCTX-My TV and WCVB-ABC."); Exh. 7 ("Dropped WWLP-NBC."); DTC RR-6 Supplement (referring to Charter's deletions of EWTN, Inspirational Network, Trinity Broadcast Network, and POP as "channel drops," stating that Charter "dropped WCTX and WCVB," and stating that Charter "dropped WWLP"); *cf.* DTC

¹² Dalton, Lee, Lenox, Pittsfield, Richmond, and Stockbridge.

¹³ The regulation governing channel substitutions also references a "dropped channel," but for the reasons set forth below, that regulation is inapplicable here. *See* 47 C.F.R. § 76.922(g)(6); *infra* pp. 14-15.

IR 1-10 (referring to Charter's subsequent addition of EWTN, Inspirational Network, Trinity Broadcast Network, and POP as "channel additions"). As Charter dropped seven channels from the BST, it was required to reflect the net reductions in external costs in its rates and reduce the price of the BST by the residuals associated with those channels. *See* 47 C.F.R. § 76.922(g)(4). Charter's failure to reduce its BST rates by the dropped channels' residuals violated the regulation.

Second, to the extent Charter is claiming that the regulation does not apply, because of the time elapsed between its deletions and the subsequent additions, the FCC has explicitly rejected such a contention. *In re Heritage Cablevision of Cal., Inc. v. City of San Jose*, 18 FCC Rcd. 436, 438, *Memorandum Opinion & Order* (MB 2003); *see also* Tr. at 41-42. In *Heritage*, TCI dropped the Weather Channel from its cable programming service tier ("CPST") in June 1998, and then added the channel to its BST in June 1999. *Heritage*, 18 FCC Rcd. at 438. TCI attempted to treat the channel movements as a singular shift between tiers and thus maintain a residual credit for the channel in the BST rate. *Id.* The FCC held that given the time elapsed, TCI's channel movements constituted a deletion and a subsequent addition, and ruled that TCI was not entitled to reinstate the channel's residual:

TCI's movement of the Weather Channel is not consistent with a channel shift because the initial deletion of the Weather Channel from the CPST occurred in June 1998. The addition of the Weather Channel to the BST did not occur until June 1999, one year later. The *Going Forward Order* contemplates a *simultaneous deletion and substitution by the operator*. The year separation between the deletion of the channel from the CPST and its subsequent addition to the BST is not a shift from the CPST to the BST The addition of the Weather Channel to the BST in June 1999 is to be treated as a channel addition and TCI is entitled to a per channel adjustment factor under section 76.922(g)(2), but TCI is not entitled to any residual credit for the addition of the Weather Channel to the BST.

Id. (emphasis added).

As Charter's seven channel deletions and subsequent seven channel additions were not simultaneous, Charter is not entitled to any residual credit for the channel additions. *See, e.g.*, Exhs. 3, 7; DTC RR-6 Supplement (stating that the addition of certain channels was "temporarily delayed" and that other channels were "not immediately replaced"); DTC IR 1-10 (referring to Charter's 2018 addition of EWTN, Inspirational Network, Trinity Broadcast Network, and POP as "channel additions"). The time periods between Charter's seven channel deletions and subsequent channel additions ranged from nine to fifteen months, similar to the twelve-month time period during which TCI dropped the Weather Channel in *Heritage*.¹⁴ *See Heritage*, 18 FCC Rcd. at 438; Exhs. 3, 7. *Heritage* is particularly instructive here because the channel that TCI deleted and subsequently added in *Heritage* was the same channel, negating any claim that Charter's treatment of its deletions of EWTN, Inspirational Network, Trinity Broadcast Network, and POP was acceptable because the subsequent channel additions were of the same channels.¹⁵ *See Heritage*, 18 FCC Rcd. at 438. Further, as was the case in *Heritage*, each of Charter's seven channel deletions and subsequent channel additions occurred in separate rate years, further demonstrating that the channel movements were not simultaneous.¹⁶ *See id.*; Exhs. 3, 7.

Heritage is no less applicable because the initial dispute in that case involved a claimed channel shift between regulated tiers, as opposed to channel deletions from the BST. The *Going*

¹⁴ While not material to Charter's obligations under federal law with respect to channel movements, it is notable that the record contains no evidence that Charter initially intended the channel deletions to be temporary. *See* DTC RR-6 Supplement (indicating that there were no plans to reinstate or replace EWTN, Inspirational Network, Trinity Broadcast Network, and POP until another Charter department discovered the deletions and instructed the Programming Department to do so); Tr. at 43. In other words, when Charter's Programming Department deleted these channels, the record indicates that it did so intentionally with no plan to reinstate or replace them.

¹⁵ Of course, no such claim can be made with respect to Charter's deletions of WCVB-ABC, WCTX-My TV, and WWLP-NBC, which were permanent.

¹⁶ Charter's new rate year began in February 2018. *See, e.g.*, Exh. 1.

Forward Order's requirement of simultaneousness is not limited to tier shifts. *See Going Forward Order*, 10 FCC Rcd. 1226, 1256. Indeed, in analyzing TCI's treatment of the Weather Channel, the FCC did not limit its discussion of the *Going Forward Order* to channel shifts but stated broadly: "The *Going Forward Order* contemplates a simultaneous deletion and substitution by the operator." *Heritage*, 18 FCC Rcd. at 438. If the FCC wished to limit the simultaneousness requirement to tier shifts, it would have referred to tier shifts rather than deletions and substitutions, or to section 76.922(g)(5) rather than the entire *Going Forward Order*. Instead, the FCC broadly referred to channel deletions and channel additions, generally, finding that a channel deletion and replacement must be simultaneous for an operator to maintain the dropped channel's residual. *See Heritage*, 18 FCC Rcd. at 438 (referring broadly to channel "substitution," channel "deletion," and channel "addition," despite none of those terms appearing in section 76.922(g)(5), the tier-shift regulation).

Third, although not explicitly raised by Charter, the Department notes that Charter's channel deletions and subsequent channel additions cannot be construed as channel substitutions, because the plain language of the regulations, in addition to *Heritage*, forecloses such an argument. *See* 47 C.F.R. § 76.922(g)(6); *Heritage*, 18 FCC Rcd. at 438. The regulation states that if an operator "substitutes a new channel *for an existing channel*," the operator need not remove the per-channel residual. 47 C.F.R. § 76.922(g)(6) (emphasis added). As detailed above, the seven deleted channels were not "existing" on the BST at the time Charter added EWTN, Inspirational Network, Trinity Broadcast Network, POP, Catholic TV, and Daystar. *See* Exhs. 1-28. To the contrary, at the time these channels were added, the seven channels had been dropped from the BST several months prior. *See, e.g.,* Exhs. 3, 7. As detailed above, *Heritage* supports this conclusion, explicitly referring to a channel substitution as an act that must be

undertaken simultaneously with a channel removal. *Heritage*, 18 FCC Rcd. at 438 (citing the *Going Forward Order*'s general discussion of channel deletions and additions). As Charter's channel additions were several months after its channel deletions, the channel movements are not channel substitutions.

Fourth, Charter's position that the FCC's regulation produces unreasonable results is best directed to the FCC. *See* DTC RR-6 Supplement (requesting that the Department permit Charter's proposed treatment of its channel deletions because the removal of the dropped channels' residual would produce an unreasonable result). Charter states that if the company deletes a channel, but then adds a channel several months later, it should not be required to remove the residual associated with the deleted channel. *Tr.* at 43-44. That position, however, must be presented to the FCC, which adopted the regulation requiring such removal. *See* 47 C.F.R. § 76.922(g)(4); *Going Forward Order*, 10 FCC Rcd. 1226, 1256. The Department, as the certified franchising authority for regulating BST rates, merely applies the FCC's regulations. *See* 47 U.S.C. § 543(a)(2)(A). In fact, Charter's predecessor-in-interest, Time Warner Cable, and a trade association that represents Charter, NCTA – The Internet and Television Association ("NCTA"),¹⁷ have been presenting this argument to the FCC for over 15 years. *See, e.g., In re Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144, Time Warner Cable Reply Comments at 30 (Dec. 4, 2002); *In re Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144, NCTA Comments at 5-8 (Nov. 4, 2002) ("NCTA Comments").¹⁸ NCTA actually confirmed that the regulation, when properly applied, would produce the result seen in

¹⁷ *See* <https://www.ncta.com/about-ncta>.

¹⁸ In these comments, NCTA accurately described the regulation to the FCC, confirming that the FCC requires "that operators when deleting channel[s] reduce rates by the 'residual', but allow[s] operators that add [channels] to at most increase rates based on the per channel adjustment factor plus programming costs and 7.5% mark-up." NCTA Comments at 6 n.13.

this case. *See* NCTA Comments at 5-6 (asking the FCC to amend the regulation that would require “an operator removing channels from the BST . . . to reduce rates by a greater amount than it would be allowed to increase rates if channels were added to that tier.”). NCTA’s statement confirms that the Department is applying the FCC’s regulation in this case precisely how the FCC intended.¹⁹

Finally, although not raised by Charter, the Department notes one instance in which a channel on Charter’s BST, Cool TV, ceased operations, and Charter reduced its BST rate by only \$0.01, rather than using Worksheets 4 and 5. *See Petition of Charter Commc’ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc’ns that are currently subject to rate regulation*, D.T.C. 13-8, *Rate Order* at 4-5 (Oct. 27, 2014) (“13-8 Order”). That situation, however, is distinguishable from the present rate case for several reasons. First, both the initial addition of Cool TV and the fact that Cool TV ceased operations were outside of Charter’s control. *Id.* (stating that Charter began carrying Cool TV pursuant to the FCC’s must carry regulations and ceased carrying Cool TV only the channel ceased operations). In contrast, the deletions of the seven channels in this case were entirely within Charter’s control.²⁰ *See* DTC IR 1-10; Tr. at 41-44; DTC RR-6 Supplement. Second, while Cool TV ceasing operations placed a burden subscribers, that burden was imposed

¹⁹ On October 23, 2018, the FCC approved a Further Notice of Proposed Rulemaking that requests comment on its channel movement regulations, confirming that the regulations are applicable to Charter’s conduct in this case. *In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, *Further Notice of Proposed Rulemaking & Report & Order*, FCC 18-148, ¶ 29 (Oct. 23, 2018) (“[W]hen a channel is removed from the BST, our current rules continue to require the removal of the per channel share of the residual portion of the BST permitted charge.”); *see also* *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (“An agency is bound by its regulations so long as they remain operative, but may repeal them and substitute new rules in their place.”) (citing *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389 (1932)).

²⁰ Regardless of any invocation of non-duplication rights by ABC or NBC, Charter is still permitted to carry local news and other local programming on WCVB and WWLP. *See* 47 C.F.R. § 76.92.

by the owner of Cool TV, not Charter. *See 13-8 Order* at 4-5. Given Charter's lack of control over the fact that Cool TV ceased operations, the burden on subscribers was not unfair, because the Department had no recourse against Cool TV's owner. *See id.* at 5. In contrast, here, Charter's proposed treatment of its deletion of the seven channels would place an unfair burden on subscribers because the deletions were within Charter's control. Since Charter imposed the subscriber burden in this case there is no basis for permitting Charter to maintain the deleted channels' residuals. As the Department has stated, "limiting rate increases for channels added to the BST to small per-channel amounts and any associated programming costs and . . . removing the residual when channels are deleted . . . ensures that the BST rates are reasonable." *In re Revisions to Cable Television Rate Regulations*, MB Docket No. 02-144, Mass. Dep't of Telecomms. & Energy Comments at 3 (Nov. 4, 2002). Indeed, one of the FCC's reasons for adopting its channel movement regulations was "to make sure that system subscribers were only paying for the services they received." *In re Revisions to Cable Television Rate Regulations*, 17 FCC Rcd. 11,550, 11,558, *Notice of Proposed Rulemaking & Order* (2002). Third, Cool TV was a multicast digital broadcast channel. *13-8 Order* at 5. Charter stated in that proceeding that the FCC had not "expressly addressed the rate treatment of multicast digital broadcast channels." *Id.* In contrast, none of the seven channels at issue in this case are multicast digital broadcast channels, and, as noted above, the FCC *has* addressed the proper rate treatment in this situation. *See supra* pp. 12-14 (discussing the FCC's findings in *Heritage*). In sum, the Department's findings herein are consistent with the *13-8 Order*.

As Charter deleted these seven channels from its BST, the company was required to use the channel movement and deletion modules in Worksheets 4 and 5 to properly account for the deletions by removing the channels' residuals from its rates. Charter failed to do so. The

Department finds that Charter's FCC Forms 1240 were not prepared in accordance with the law. *See* 47 U.S.C. § 543; G.L. c. 166A, §§ 2, 15; 47 C.F.R. § 76.922(g). The Department therefore rejects Charter's FCC Forms 1240 and directs Charter to refund subscribers in accordance with this Rate Order. The Department directs Charter to file a refund plan subject to Department approval, in accordance with this Rate Order, describing in detail its plan to refund subscribers to account for overcharges related to Charter's channel deletions. *See* 47 C.F.R. § 76.942; *infra* Section II.A.4.

4. Refund Plan

The Department directs Charter to file a refund plan subject to Department approval, in accordance with this Rate Order and 47 C.F.R. § 76.942, by November 22, 2018. The Department directs Charter to adhere to the following guidelines to revise its MPRs and calculate subscriber refunds.

Refund 1

Charter shall remove the residual and any associated external costs associated with WCTX-My TV from its rate in ten communities to account for Charter's deletion of WCTX-My TV.

Charter shall remove the residual and any associated external costs associated with WCVB-ABC from its rate in four communities to account for Charter's deletion of WCVB-ABC.

Charter shall remove the residual and any associated external costs associated with WWLP-NBC from its rate in six communities to account for Charter's deletion of WWLP-NBC.²¹

Based on these removals, Charter shall revise its MPRs in the relevant communities and refund subscribers accordingly.

Charter shall include in Refund 1 a refund for overcharges to subscribers in West Brookfield due to the error Charter corrected in Exhibit 49. *See supra* Section II.A.2.

Refund 2

Charter shall remove the residual associated with EWTN, Inspirational Network, Trinity Broadcast Network, and POP, as well as any associated programming costs, from its "Spectrum BST" rate in twenty-six communities to account for Charter's deletions of these four channels.²² With respect to these four channels, however, the residual removal will be required only for the time period during which the channels were deleted. As of the date Charter added each channel to its "Spectrum BST" service product in 2018, Charter may reinstate that channel's residual and any associated programming costs into the "Spectrum BST" rate. A refund with respect to these four channels is required only for those subscribers who lost the four channels. A refund is not required with respect to these four channels for those subscribers who subscribed to Charter's "Legacy BST" service product and thus did not lose the four channels. As part of the refund plan, Charter shall provide details of its refund calculation methodology.²³

²¹ In all communities in which Charter provides a refund for its deletion of WCTX-My TV, WCVB-ABC, and WWLP-NBC, Charter may reduce the rates reported on Worksheet 8 to account for those refunds for applicable months during the True-Up Period in future rate years.

²² As noted above, Charter shall confirm, for each community, at what point in 2018 Charter added EWTN, Inspirational Network, Trinity Broadcast Network, and POP to its BST. *See supra* note 9.

²³ Essentially, Charter will, "off-Form," calculate the residuals for the four deleted channels, and then will calculate refunds to the affected Spectrum BST subscribers accordingly.

This treatment is appropriate and reasonable in this limited circumstance because Charter deleted these four channels from its “Spectrum BST” service product only. *See* DTC RR-6 Supplement. Charter stated that the “vast majority” of subscribers in the twenty-six affected communities receive Charter’s “Legacy BST” service product and thus were unaffected by the deletion of these four channels, as Charter did not delete these four channels from its “Legacy BST” service product.²⁴ *Id.* Because only “Spectrum BST” subscribers lost the channels, a refund is required for only those subscribers.²⁵

In any community in which Charter’s OSR for affected subscribers effective February 1, 2018, remains below Charter’s MPR as revised in accordance with Refund 1, Charter can use this difference to reduce any required “off-Form” refund as a result of Charter’s deletion of EWTN, Inspirational Network, Trinity Broadcast Network, and POP.²⁶

B. Review of the FCC Form 1205

In Charter’s FCC Form 1205 for its fiscal year ending December 31, 2016, Charter proposed several adjustments to its MPRs and OSRs for equipment and installation. *See* Ex. 29. The Department analyzed Charter’s proposed rate adjustments and accepts its FCC Form 1205 as filed. Charter’s MPRs and OSRs for equipment and installations are in the Rate Schedule included as Attachment 1.

²⁴ This fact does not change the Department’s overall analysis with respect to the four channels, both because the FCC Forms 1240 that Charter presented for Department approval pertain to the “Spectrum BST” service product from which the channels were deleted, and because even if Charter deleted these channels for only a minority of subscribers, that minority is nevertheless entitled to compensation to account for Charter’s improper treatment of the deletions. *See* DTC RR-6 Supplement.

²⁵ This rationale does not apply with respect to Charter’s deletion of WCVB-ABC, WCTX-My TV, and WWLP-NBC, because Charter’s deletion of those three channels affected all subscribers in the communities. DTC RR-6 Supplement.

²⁶ Charter may use the OSR-MPR difference only as it pertains to affected subscribers; Charter cannot reduce the required refunds by any OSR-MPR difference applicable to subscribers unaffected by the channel deletions.

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); *see also* 47 U.S.C. § 543(b)(3). A cable operator prepares FCC Form 1205 on an annual basis using information from its previous fiscal year. FCC, *Form 1205 Instructions for Determining Costs of Regulated Cable Equip. & Installation* (July 1996). Subscriber charges established in an FCC 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 an 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. In reviewing regulated equipment rates, 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.

After review and investigation, the Department determines that the data on Charter's FCC Form 1205 were calculated in compliance with federal laws and regulations. *See* Exh. 29. The Department approves Charter's proposed equipment and installation MPRs. The Department also finds that Charter's proposed equipment and installation OSRs do not exceed the approved MPRs. *See id.* As such, the proposed OSRs comply with federal laws and regulations and are reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. § 76.923(a)(2). Accordingly, the Department approves Charter's FCC Form 1205.

III. ORDER

After due notice, hearing, and consideration, it is

ORDERED: That Charter's proposed programming rates and FCC Forms 1240, as filed on November 2, 2017, and updated on November 30, 2017, and May 4, 2018, are REJECTED; and it is

FURTHER ORDERED: That Charter file a refund plan subject to Department review, in accordance with this Rate Order, by November 22, 2018; and it is

FURTHER ORDERED: That Charter's FCC Form 1205, as filed on November 2, 2017, is APPROVED.

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.