



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

D.T.C. 18-5

September 24, 2019

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

RATE ORDER

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INTERVENOR

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I. INTRODUCTION

In this Order, the Department of Telecommunications and Cable (“Department”) approves the petition of Comcast Cable Communications, LLC (“Comcast” or “Company”), in which Comcast seeks to establish basic service tier (“BST”) programming, equipment, and installation maximum permitted rates (“MPR”) for the rate-regulated Massachusetts communities it serves. A list of the rates for each of the rate-regulated Massachusetts communities served by Comcast can be found in the Rate Schedule enclosed as Attachment 1.

II. PROCEDURAL HISTORY

On October 1, 2018, Comcast filed Federal Communications Commission (“FCC”) Forms 1240 with the Department in which Comcast proposed BST programming MPRs for each of its rate-regulated Massachusetts communities.¹ *See* Exhs. 1 through 83. A number of the Forms 1240 were later amended. *See* Exh. 85; RR 3. Comcast also filed a nationwide FCC Form 1205 in which the Company proposed equipment and installation MPRs for all of its rate-regulated Massachusetts communities.² *See* Exh. 84. Consistent with FCC regulations, Comcast’s proposed BST programming, equipment, and installation rates became effective on January 1, 2019. 47 C.F.R. § 76.933(g).

¹ Citations in this Order to Comcast’s FCC Forms 1240 for the rate-regulated communities are to Exh. 1-Exh. 83. Citations to any revised Form 1240 are to the corresponding response to a Department Information Request (IR) or Record Request (RR), except for Comcast’s revised Form 1240 for Gloucester, which is cited as Exh. 85.

² Citation to Comcast’s FCC Form 1205 is to Exh. 84.

On March 19, 2019, the Department issued a Notice of Public Hearing, Order of Notice, and Letter Notice to Issuing Authorities. On April 26, 2019, the Department issued its First Set of Information Requests. On May 14, 2019, Comcast filed its responses with a motion for protective treatment of confidential information with respect to retransmission consent fee information filed in response to IR 1-9. The Department grants Comcast's motion for protective treatment of confidential information ("Motion") as discussed below.

On March 27, 2018, the Town of Somerset submitted a petition to intervene in the rate proceeding. The Department has consistently found that rate-regulated communities are substantially and specifically affected by the outcome of a rate setting proceeding. *See, e.g., 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 ("Comcast Rate Setting Petition")*, D.T.C. 14-4. Accordingly, the Department grants the town's petition.

On May 21, 2019, the Department held public and evidentiary hearings. At the hearings, Comcast submitted its return of service and proof of publication of the hearing notice, which the Hearing Officer accepted into the record. Hearing Transcript ("Tr.") at 4 (May 21, 2019). Karlen Reed attended the hearing on behalf of the PEG Access Advisory Committee of the Town of Concord and read the committee's comments into the record. *Id.* at 5-6. No other comments were received from the public.

During the evidentiary hearing, the Department issued three record requests to Comcast. *Id.* at 14, 27, 29, 30. Comcast submitted its responses to those record requests on June 12, 2019.

A. Request for Confidential Treatment

All documents and data received by the Department are generally considered public records and, therefore, are to be made available for public review under a general statutory mandate. *See* G.L. c. 66, § 10; G.L. c. 4, § 7(26). “Public records” include “all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the [C]ommonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose unless such materials or data fall within [certain enumerated] exemptions.” G.L. c. 4, § 7(26). Materials that are “specifically or by necessary implication exempted from disclosure by statute” are excluded from the definition of “public records.” *Id.*, § 7(26)(a).

G.L. c. 25C, § 5 permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. *See* G.L. c. 66, § 10; G.L. c. 4, § 7(26). Specifically, G.L. c. 25C, § 5 is an exemption recognized by G.L. c. 4, § 7(26)(a) (“specifically or by necessary implication exempted from disclosure by statute”). Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25C, § 5, which states in part that:

The [D]epartment 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 [D]epartment shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25C, § 5

The statute establishes a three-prong standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be granted confidential treatment. First, the information for which confidential treatment is sought must constitute “trade secrets, [or] confidential, competitively sensitive or other proprietary information.” Second, the party seeking confidential treatment must overcome the G.L. c. 66, § 10 statutory presumption that all such information is public information by “proving” the need for its non-disclosure. Third, even where a party proves such need, the Department may grant confidential treatment to 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.

With regard to the first requirement of G.L. c. 25C, § 5, the Department finds Comcast has demonstrated that the information for which confidential treatment is sought constitutes confidential, competitively sensitive, or proprietary information. Comcast asserts that the retransmission consent fees information requested by the Department in IR 1-9 is proprietary, confidential, and competitively sensitive; is not publicly available to Comcast’s competitors; would provide competitors access to cost information giving them an unfair competitive advantage if disclosed; and could form the basis of pricing and marketing strategies for competitors. Motion at 1-2. In addition, Comcast asserts that the release of the information could disadvantage the parties to the contract in their pricing negotiations and that the Department has previously ruled that these types of programming costs and retransmission consent fees are entitled to confidential treatment. *Id.* at 2.

The Department agrees that disclosure of the detailed information regarding Comcast's retransmission consent fees could unfairly put Comcast in a difficult competitive position. *See, e.g., Comcast Rate Case*, D.T.C. 12-2, *Hearing Officer Ruling on Motion for Confidential Treatment* at 5-6 (Nov. 27, 2012); *Comcast Rate Case*, D.T.C. 10-8, *Tr.* at 8 (Aug. 3, 2011); *Cox Rate Case*, D.T.C. 08-8, *Hearing Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 3 (June 23, 2009) (channel specific programming costs are competitively sensitive). The Department has also specifically protected channel- or broadcaster-specific breakdowns of retransmission costs and fees provided by Comcast in previous proceedings. *See, e.g., Comcast Rate Case*, D.T.C. 10-8, *Tr.* at 8 (Aug. 3, 2011). As the Department has previously recognized specific information regarding Comcast's retransmission consent fees as being competitively sensitive, the Department finds that Comcast has satisfied the first prong of the analysis.

Turning to the second prong of its analysis, the Department is statutorily required to disclose information in its possession unless the moving party demonstrates the need for protection from public disclosure. G.L. c. 25C, § 5; *Investigation by the Dep't of Telecomms. & Energy on its own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Mass.' Intrastate Retail Telecomms. Servs. in the Commw. of Mass.*, D.T.E. 01-31 Phase I, *Interlocutory Order* at 7 (Aug. 29, 2001) ("*D.T.E. 01-31, Phase I, Interlocutory Order*").

[T]he proponent of a request for confidential treatment has the burden to prove why confidential treatment is warranted. Although the Department does not seek to put parties at a competitive disadvantage by disclosing information that is truly competitively sensitive, we are constrained by the statute requiring public

disclosure, upon receipt of a proper G.L. c. 66, [§] 10 request, absent the proper showing of compliance with [G.L. c. 25C, § 5].³

Petitions of MediaOne Telecomms. of Mass. Inc. & New England Tel. & Tel. Co. d/b/a Bell Atlantic-Mass. for arbitration, pursuant to § 252(b) of the Telecomms. Act of 1996 to establish an interconnection agreement; Petition of Greater One Media Mass. for arbitration, pursuant to § 252(b) of the Telecomms. Act of 1996 to establish an interconnection agreement with New England Tel. & Tel. Co. d/b/a Bell Atlantic-Mass. ("AT&T Broadband/Verizon Interconnect Agreement"), D.T.E. 99-42/43, D.T.E. 99-52, Order at 52 n.31 (2000).

In determining the need for confidential treatment, the Department has long held it will not automatically grant requests for confidential treatment, stating, "[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 Cox Rate Case*, D.T.C. 08-8, *Hearing Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 3 (June 23, 2009) (citing *AT&T Broadband/Verizon Interconnect Agreement* at 52 n.31 and *D.T.E. 01-31 Phase I, Interlocutory Order* at 7). The Department must balance the moving party's proof against the presumption in favor of disclosure and the specific reasons that disclosure of the information benefits the public interest. *Motion for Protective Treatment by Verizon Mass. Regarding Customer Specific Pricing Contracts*, D.T.C. 08-11, *Order* at 8 (2009); *Tracfone Wireless Inc., Annual Verification of Safelink Wireless Lifeline Subscribers*, D.T.C. 09-9, *Order* at 10-11 (2010).

³ G.L. c. 25C, § 5 is identical to the statute applicable to the Department's predecessor agency, the D.T.E. *See* G.L. c. 25, § 5D. Accordingly, the precedent and standard of review, under G.L. c. 25, § 5D, developed by the former D.T.E. and applied on motions for confidentiality are applicable here.

In considering whether a moving party has met its statutory burden, the Department couples its finding as to whether the information constitutes trade secrets, confidential, competitively sensitive, or other proprietary information, with an evaluation of the measures the moving party has taken to protect the confidentiality of the information for which it seeks protection. *See Petition of YourTel Am., Inc. for Designation as Eligible Telecomms. Carrier*, D.T.C. 11-1, *Hearing Officer Ruling on Motion for Protection from Pub. Disclosure* at 5 (July 6, 2011); *Cox Rate Case*, D.T.C. 08-8, *Hearing Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 5 (June 23, 2009); *Complaint of Choice One Commc'ns of Mass. Inc., Conversent Commc'ns of Mass., LLC, CTC Commc'ns Corp., & Lightship Telecom, LLC (collectively, "One Commc'ns"), Concerning Alleged Unlawful Charges Imposed by Verizon New England Inc., d/b/a Verizon Mass. for Access Toll Connecting Trunk Ports & E911/911 Dedicated End Office Trunk Ports*, D.T.C. 08-3, *Order* at 10 (Apr. 9, 2009); *D.T.E. 01-31, Phase I, Interlocutory Order* at 9; *Application of BLC Mgmt., LLC d/b/a Angles Commc'n Solutions for Certification as an Eligible Telecomms. Carrier*, D.T.C. 09-2, *Order* at 7 (Aug. 23, 2010); *Petition of Time Warner Cable for Renewal of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys.*, D.T.C. 08-14, *Hearing Officer's Ruling on Motion for Protective Order* at 5-6 (July 10, 2010). The Department will also consider the extent to which it has previously protected similar information. *Investigation by the Dep't of Telecomms. & Energy on its own Motion, pursuant to G. L. c. 159, §§ 12, 16, into the collocation security policies of Verizon New England Inc. d/b/a Verizon Mass.*, D.T.E. 02-8, *Order* at 10-11 (May 25, 2005).

Comcast asserts that public disclosure of its retransmission consent fees would provide competitors with cost information giving them an unfair competitive advantage. *Motion* at 2.

Comcast adds that this information could form the basis for pricing and market strategies by competitors. *Id.* The Department accepts Comcast's assertion that it, cable programmers, and broadcasters treat this information as confidential and that Comcast engages in business practices to prevent disclosure of the information to a third party. *See id.* Furthermore, the Department regularly accords confidential treatment to this type of information. *See, e.g., Comcast Rate Case*, D.T.C. 14-4, *Hearing Officer Ruling on Motion for Protective Treatment of Confidential Information* (Aug. 6, 2015); *Cox Rate Case*, D.T.C. 07-10, *Hearing Officer's Ruling on Second Motion of Cox Commc 'ns New England for Protective Order* at 5 (May 30, 2008); *Review by the Cable Television Div. of the Dep't of Telecomms. & Energy of FCC Forms 1240 & 1205 filed by Time Warner Cable, Inc.*, C.T.V. 04-5 Phase II, *Rate Order* at 6-7 (Nov. 30, 2005). Accordingly, the Department finds that Comcast satisfies its burden to demonstrate that confidential treatment of IR 1-9 is warranted.

In considering the third prong of its confidential treatment standard, the Department limits confidential treatment to only so much of the information and for only the length of time necessary to meet the established need. *See* G.L. c. 25C, § 5. Comcast has limited its request to only one information request, IR 1-9. Motion at 1. Comcast also requests that if the Department must limit the period of confidentiality, it should do so for a minimum of five years, at which point these materials may no longer be of competitive value to Comcast's competitors. *Id.* at 2-3. The Department has typically granted confidential treatment to retransmission consent fees information for a limited period. *See Comcast Rate Case*, D.T.C. 17-4, *Rate Order* at 9 (Oct. 1, 2018) (granting confidential treatment for per-channel program cost information for a period of five years with opportunity to renew the request for confidential treatment at the expiration of the five-year period based upon a showing of need for continuing protection); *Petition of Time*

Warner Cable for Review of FCC Forms 1240 & Form 1205 for the Great Barrington, N. Adams, & Pittsfield Sys., D.T.C. 11-15, *Rate Order* at 12-13 (Oct. 31, 2012); *Cox Rate Case*, D.T.C. 08-8, *Hearing Officer's Ruling on Motion of Cox Commc'ns New England for Protective Order* at 6 (June 23, 2009).

Accordingly, the Department limits confidential treatment of IR 1-9 to a five-year period. The Department further affords Comcast 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.

III. ANALYSIS AND FINDINGS

The evidentiary record consists of 86 exhibits from Comcast, 12 Department information requests along with Comcast's responses, the transcripts to the public and evidentiary hearing, and three Department record requests along with Comcast's responses. After review and consideration, the Department approves Comcast's FCC Forms 1240 and Form 1205, as amended, and finds the proposed rates to be reasonable in accordance with and subject to the Department's findings below. However, as discussed below, in light of recent proposed FCC guidance, the Department may revisit in future proceedings the permissibility of Comcast's practice of including in its rates an amount of true-up that when combined with the base rate exceeds the rate actually charged to each customer.

A. Comcast's FCC Forms 1240

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. A cable operator may annually update its BST programming rates to account for inflation; changes in the number of regulated channels; and changes in external costs, including, but not limited to, programming

costs, copyright costs, and franchise related costs (“FRCs”). *Id.* § 76.922(e). A cable operator must demonstrate that any adjustment to its projections on Form 1240 for projections in external costs, or for projected changes to the number of regulated channels are reasonably certain and reasonably quantifiable. *See id.* § 76.922(e)(2)(ii)(A), 76.922(e)(2)(iii)(A). It is presumed that projections involving copyright fees, retransmission consent fee costs, other programming costs, FCC regulatory fees, and cable specific taxes are reasonably certain and reasonably quantifiable. *See id.* § 76.922(e)(2)(ii)(A). To the extent they are reasonably certain and reasonably quantifiable, cable operators may also project for increases in FRCs. *Id.* However, FRC projections are not presumed to be reasonably certain and reasonably quantifiable. *Id.*

The Department reviews proposed rate adjustments on an FCC Form 1240 pursuant to the FCC’s rate regulations. *See id.* § 76.922(a). Specifically, the FCC directs 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 MPRs calculated using the FCC’s rate forms. *Id.* As set forth in the Communications Act, the Department may accept a cable operator’s BST programming rates that do not exceed the approved MPR as determined by federal regulations. *See id.* § 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; G.L. c. 166A, §§ 2, 15; 47 C.F.R. § 76.937(d)-(e). 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; 47 C.F.R. § 76.937(a); *Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation, Report & Order & Further Notice of Proposed Rulemaking*, 8 FCC Rcd. 5631, 5716, ¶ 128 (May 3, 1993) (“FCC Rate Order”).

The enclosed Rate Schedule details for each rate-regulated community: the previous Department-approved Operator Selected Rate (“OSR”), Comcast’s proposed MPR for the projected period, and Comcast’s proposed OSR for the projected period. *See* Attachment 1. In investigating Comcast’s FCC Forms 1240, the Department sought information concerning: the BST programming OSR for each community, pending and upcoming license renewals, external costs, and programming. IR 1-6 –1-12; RR 2, 3. The Department reviewed each of the FCC Forms 1240 that Comcast filed in this proceeding.⁴ Each FCC Form 1240 consists of “a series of calculations, involving both the projection of future events and an accounting of events which are known to have happened” and implements the federal laws and regulations “pertaining to the costs of a system’s regulated tiers.” *Instructions for FCC Form 1240 Annual Updating of Maximum Permitted Rates for Regulated Cable Services (“FCC Form 1240 Instructions”)* at 1 (July 1996). The Department reviews each FCC Form 1240 to verify that the data was calculated in compliance with the relevant federal laws and regulations. If the Department determines the accuracy of the data and that the data was calculated in accordance with federal laws and regulations, the MPR is presumed reasonable. 47 C.F.R. § 76.922(a); *FCC Form 1240 Instructions* at 5. The Department then compares the OSR to the MPR on each FCC Form 1240. 47 C.F.R. § 76.922. An OSR is compliant with federal laws and regulations and considered reasonable if the OSR does not exceed the approved MPR. *See id.* § 76.922(a), 76.922(c).

After review and investigation, the Department determines that the data on each of Comcast’s FCC Forms 1240 was calculated in compliance with federal laws and regulations. *See*

⁴ The FCC recently issued an Order in which it reversed its 2016 finding that the Town of Templeton was subject to effective competition. *Comcast Cable Comme'ns, LLC Petition for Determination of Effective Competition in Templeton, Mass.*, MB Docket No. 13-172, *Memo. Opinion & Order* (June 27, 2019). Templeton is not a part of the current rate proceeding which was initiated prior to the FCC’s Order, but Comcast’s next rate proceeding with the Department will include the town.

Exh. 1-Exh. 83, Exh. 85; RR 3. As such, the proposed MPRs comply with federal laws and regulation, and are approved. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. § 76.922(a), 76.922(c). The Department also finds that the proposed OSR in each community does not exceed the approved MPR for each community. IR 1-1. As such, the proposed OSRs comply with federal laws and regulation and are therefore reasonable. *See* 47 U.S.C. § 543; G.L. c. 166A, § 15; 47 C.F.R. § 76.922(a), 76.922(c). Accordingly, the Department approves Comcast's FCC Forms 1240.

Although the Department approves Comcast's FCC Forms 1240, it takes note of a pending Notice of Proposed Rulemaking ("NPRM") issued by the FCC which, if adopted, would prohibit the practice of including True-Up in the calculation of an MPR where that True-Up is not actually charged to the customer.⁵ If adopted, this clarification may affect MPRs in future proceedings for the communities for which Comcast includes in its respective FCC Forms 1240 an amount of True-Up that approaches or equals the OSR without including any other rate inputs. Relatedly, in response to Department questioning, Comcast reduced the MPRs in Bridgewater, Dracut, Montague, Haverhill, Lowell, Quincy, Groveland, and Amesbury, because in those communities, the amount of True-Up that Comcast initially included exceeded the OSR without including any other rate inputs. *See* RR 3.

B. Comcast's FCC Form 1205

Cable operators use FCC Form 1205 to calculate rates for installations and equipment such as 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 (June 1996) ("*FCC Form 1205 Instructions*"). A cable operator prepares its FCC Form 1205

⁵ *See In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, *Further Notice of Proposed Rulemaking & Report & Order*, FCC 18-148, ¶ 31 (Oct. 23, 2018).

annually using information from its previous fiscal year. *Id.* at 2. In this proceeding, the Department reviewed Comcast's FCC Form 1205 for the fiscal year ending December 31, 2017. *See* Exh. 84.

Subscriber charges established by FCC Form 1205 may not exceed charges based on actual costs. 47 C.F.R. § 76.923(a)(2). The burden is on the cable operator 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; 47 C.F.R. § 76.937(a); *FCC Rate Order*, 8 FCC Rcd. 5631, 5716, ¶ 128. In its FCC Form 1205, Comcast proposed adjusting its MPRs and OSRs for equipment and installations. *See* Exh. 84; *FCC Form 1205 Instructions* at 2-3. In examining the changes to Comcast's MPRs and OSRs for installation and equipment, the Department reviews the information and calculations Comcast reported on its FCC Form 1205, and the accompanying explanation of the calculations. The Department also considers Comcast's responses to Department inquiries and testimony from the evidentiary hearing. In this case, the Department determines that Comcast's FCC Form 1205 has been prepared in compliance with federal laws and regulations, and that the proposed rates are reasonable. G.L. c. 166A, § 15; 47 C.F.R. § 76.923. Accordingly, the Department approves Comcast's Form 1205.

IV. ORDER

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

ORDERED: That Comcast's FCC Forms 1240, as filed on October 1, 2018, and as later amended, are approved; and it is

FURTHER ORDERED: That Comcast's FCC Form 1205, as filed on October 1, 2018, 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 be brought to the Federal Communications Commission pursuant to 47 C.F.R. § 76.944.