

brownrudnick

JESSE S. REYES
direct dial: 617.856.8338
jreyes@brownrudnick.com

RECEIVED

JAN 21 2020



Mass. Dept. of
Telecommunications & Cable

January 21, 2020

VIA ELECTRONIC MAIL

Shonda D. Green, Secretary
Department of Telecommunications and Cable
Commonwealth of Massachusetts
1000 Washington Street, Suite 600
Boston, MA 02118-6500

RE: CoxCom, LLC d/b/a Cox Communications New England, D.T.C. 19-3
Responses to Department's Supplemental Record Request DTC-1

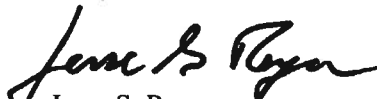
Dear Secretary Green:

On behalf of CoxCom, LLC d/b/a Cox Communications New England ("Company"), attached for filing is the Company's response to the Department of Telecommunications and Cable's Supplemental Record Request DTC-1.

Please contact me should you have any questions regarding this filing. Thank you for your attention to this matter.

Sincerely,

BROWN RUDNICK LLP


Jesse S. Reyes

Encl.

cc: William Bendetson, Hearing Officer
D.T.C. 19-3 Service List

Supplemental Record Request DTC-1

On the above-referenced [January 13, 2020] conference call, Cox provided its reasoning for including fiscal year 2017 data, as opposed to fiscal year 2018 data, in the FCC Form 1205 it filed on March 7, 2019, in this proceeding. Please provide additional support for Cox's reasoning, including any legal authority permitting Cox's choice of fiscal year.

Response

While the Company is not objecting to this record request, Supplemental Record Request DTC-1 calls for legal opinions and conclusions, which are provided below by counsel. Subject to this limitation, the Company states as follows:

As explained below, the Communications Act (the "Act") and the implementing rules of the Federal Communications Commission ("FCC") required Cox's use of fiscal year 2017 data, as opposed to fiscal year 2018 data, in the FCC Form 1205 it filed on March 7, 2019 because otherwise Cox's relevant equipment and installation rates would not recover Cox's actual historical costs of providing the equipment and installations for the period beginning June 5, 2019.

FCC rules require cable operators using the FCC's annual rate adjustment methodology, such as Cox, to file their FCC Forms 1240 and 1205 on the same date¹ and the FCC Form 1205 Instructions specify that "[t]he data in this Form 1205 should be from the operator's fiscal year indicated on the cover sheet."² Both the Communications Act and the FCC's rules also require that equipment and installation rates be based on actual historical costs,³ and, as the FCC has recognized, "Congress intended that cable operators can recover the costs of leasing equipment and service installations from charges for those services."⁴

The FCC understood that the annual rate adjustment methodology, and the associated requirement that FCC Forms 1240 and 1205 be submitted on the same date, would create a potential timing issue between the filing date and the close of the operator's fiscal year. For annual filers such as Cox, therefore, the FCC changed the former rule that required cable operators "to file Form 1205 60 days after the close of their fiscal year" and instead required that

¹ 47 C.F.R. § 76.923(n)(3).

² FCC Form 1205 Instructions at 4 (emphasis added).

³ 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923(a)(2).

⁴ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5814 at para. 294 (1993).

“[b]oth forms must be filed with franchising authorities 90 days before the rate adjustment is scheduled to go into effect so that operators propose to implement all rate adjustments on the same date.”⁵ The FCC continued its requirement that equipment and installation rate adjustments be based on past costs, but also provided operators “with flexibility to set their annual filing dates” by allowing “an alternative to the present requirement that operators must set their rates using data from the last fiscal year.”⁶ Namely, “if an operator that elects the annual rate change option chooses a filing date that does not coincide with the end of its fiscal year, the operator may use either data from the 12 months preceding the filing date or data from its most recent fiscal year.”⁷

In addition, however, the FCC has held that data from the “most recent fiscal year” may be, as in this case, “the most recently available fiscal year data.”⁸ In *Comcast Cablevision of Detroit, Inc.*, the FCC found that Comcast’s use of “data from its fiscal year closing on December 31, 1996 rather than its more recent fiscal year closing December 31, 1997”⁹ in the company’s FCC Form 1205 submitted on February 1, 1998, was “consistent with the Commission’s requirements that the operator reflect its most recent fiscal year in the rate calculations and that equipment and installation rates be based on actual cost.”¹⁰ The FCC based its finding on the facts that (i) the lag between the close of the operator’s fiscal year and the filing of its Form 1205 was consistent with and consecutive to, its previous Form 1205 filing, (ii) more recent fiscal year data was not yet available when the operator submitted its 1998 Form 1205, and (iii) the filing date of the Form 1205 was dictated by the filing of the Form 1240.¹¹

The determinative facts here and in the FCC’s *Comcast Cablevision of Detroit, Inc.* decision are identical for all intents and purposes. Cox’s use of 2017 fiscal year data on the FCC Form 1205 submitted to the Department on March 7, 2019 was consistent with and consecutive to its previous FCC Form 1205 filing, which Cox submitted on December 5, 2017 using fiscal year 2016 data, and which the Department found, as amended, “establishes MPRs for installations and equipment that are in compliance with applicable law.”¹² Prior to its March 7, 2019 filing, Cox notified the Department that it elected to change its annual filing date from to March 7,¹³ and

⁵ *Thirteenth Order on Reconsideration*, 11 FCC Rcd 388, 423-24 at para. 87 (1995).

⁶ *Id.* at 424, para. 88 (footnote omitted).

⁷ *Id.*

⁸ *Comcast Cablevision of Detroit, Inc.*, 15 FCC Rcd 24022 (Cab. Serv. Bur. 2000), *petition for reconsideration denied*, 16 FCC Rcd 13287 (Cab. Serv. Bur. 2001).

⁹ *Id.* at para. 14.

¹⁰ *Id.* at para. 16.

¹¹ *Id.* at n.40 and para 16.

¹² *Rate Order*, D.T.C. 17-7 at 7 (Mass. Dep’t of Telecomm and Cable, Dec. 21, 2018).

¹³ Cox Notice of Change in Annual Rate Filing, D.T.C. 19-3 (filed March 5, 2019).

subsequently explained that Cox had done so “due to internal accounting issues which prevented Cox from filing its FCC Forms 1240 and 1205 according to its traditional December schedule.”¹⁴ As the Department was aware, therefore, Cox’s March 7, 2019 FCC Form 1205 submission was intended to recover costs for equipment and installations that Cox incurred during the 2017 fiscal year, just as it would have if Cox had filed the Form 1205 on December 5, 2018. The Department also was aware that the FCC’s rules required Cox to file the FCC Forms 1240 and 1205 concurrently.

Fiscal year 2018 data was unavailable when Cox prepared and filed the March 7, 2019 FCC Form 1205 because data from the company’s general ledger and subsidiary records, which are maintained on a national basis, must be allocated to prepare the Holland, Massachusetts rate filing and that allocation was unavailable when Cox completed and signed the March 7, 2019 FCC Form 1205. Cox’s use of fiscal year 2017 data was therefore “consistent with the Commission’s requirements that the operator reflect its most recent fiscal year.”¹⁵ Even if fiscal year 2018 data had been available, however, the Act and the FCC’s rules still would have required Cox to use 2017 fiscal year data in its March 7, 2019 FCC Form 1205. Otherwise, Cox’s equipment and installation rates would not be recovering Cox’s actual historical costs for the relevant rate year in violation of the statute and the FCC’s implementing rules.

As discussed above, the Act and the FCC’s rules require that equipment and installation rates be based on actual historical costs, and that cable operators be able to recover their costs for equipment and installations in the rates they charge for them. Thus, only fiscal year 2017 is appropriate for use in the FCC Form 1205 under review.

¹⁴ Cox Notice of Change in Annual Rate Filing, D.T.C. 19-6 at footnote 1 (filed December 12, 2019). The Department should incorporate this filing into the record of the instant docket by reference. 207 CMR § 1.09(2).

¹⁵ *Comcast Cablevision of Detroit, Inc.*, 15 FCC Rcd 24022 at para. 16.

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

CoxCom, LLC d/b/a Cox Communications)
New England)
_____)

Docket No. 19-3

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon all persons in the service list compiled by the Secretary of the Department in this proceeding and all parties of record in accordance with the requirements of 207 CMR 1.05(1) (Department's Procedural Rules).

Dated at Boston, Massachusetts, this 21st day of January 2020.



Jesse S. Reyes