



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

D.T.C. 08-10

November 3, 2009

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

RATE ORDER

APPEARANCES:

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FOR: Charter Communications
Petitioner

I. INTRODUCTION AND PROCEDURAL HISTORY

On December 1, 2008, Charter Communications (“Charter”) filed Federal Communications Commission (“FCC”) Forms 1240 with the Department of Telecommunications and Cable (“Department”) that proposed basic service tier (“BST”) maximum permitted rates (“MPR”) for 29 of its regulated Massachusetts communities.¹ Charter also filed a nationwide FCC Form 1205 that proposed equipment and installation MPRs for all 49 of its regulated Massachusetts communities.² On December 26, 2008, Charter submitted an updated FCC Form 1240 for Southamptton. Exh. Charter-27A.³ Pursuant to FCC regulations, Charter’s proposed BST programming, equipment, and installation rates became effective on March 1, 2009. *See* 47 C.F.R. § 76.933(g); Exh. Charter-4, at 1.

The Department issued the Notice of Public Hearing, Order of Notice, Procedural Schedule, and its First Set of Information Requests on May 8, 2009. *Petition of Charter Communications to establish and adjust the basic service tier programming, equipment and*

¹ These communities are Auburn, Boylston, Brimfield, Chicopee, Douglas, Dudley, East Longmeadow, Easthampton, Grafton, Hampden, Holden, Leicester, Ludlow, Millbury, Northborough, Northbridge, Oxford, Paxton, Southamptton, Southborough, Southbridge, Spencer, Sturbridge, Upton, West Boylston, West Brookfield, Westborough, Wilbraham, and Worcester. Charter is not required to file FCC Forms 1240 for the 20 regulated communities whose BST rates were previously established under the FCC’s small system rules. *See Pegasus Cable Television, Inc.*, Y-94 COS, Y-96 SMA (March 29, 1996), for Brookfield, Charlton, East Brookfield, Hinsdale, Lanesborough, North Brookfield, and West Stockbridge; *Amrac Clear View, A Limited Partnership*, Y-93 COS, Y-94 COS, Y-96 SMA (April 17, 1996), for Belchertown and Hadley; and *Charter Communications Entertainment I, L.P.*, Y-94 COS, Y-95 EQU, Y-95 SMA (June 18, 1996), for Barre, Berlin, Groton, Harvard, Hubbardston, Oakham, Pepperell, Rutland, Sutton, Uxbridge, and Westport. For the Department’s explanation of these communities’ continuing small system rates, with special reference to Berlin, see *Charter Communications*, C.T.V./D.T.C. 06-5, at 13-20 (November 30, 2007).

² These communities include Barre, Belchertown, Berlin, Brookfield, Charlton, East Brookfield, Groton, Hadley, Harvard, Hinsdale, Hubbardston, Lanesborough, North Brookfield, Oakham, Pepperell, Rutland, Sutton, Uxbridge, West Stockbridge, and Westport, as well as those communities for which Charter filed an FCC Form 1240.

³ Citations in this Order to Charter’s Forms 1240 and 1205, admitted as Charter exhibits, are to “Exh. Charter.” Citations to Department Information Requests and Charter’s responses thereto, issued before the public and evidentiary hearing, and admitted as Department exhibits at the hearing, are to “Exh. D.T.C.” Citations to Charter’s responses to Record Requests issued at the hearing are to “R.R. D.T.C.” Citations to the public and evidentiary hearing transcript are to “Tr. at (page).”

installation rates for the communities served by Charter that are currently subject to rate regulation, Docket, 08-10 (2009) (“Docket”) at 1. On May 14, 2009, Charter filed responses to the Department’s First Set of Information Requests. *Id.* The Department held a public and evidentiary hearing on June 4, 2009. *Id.* On June 19, 2009, Charter submitted responses to the Department’s Record Requests. *Id.* The Department issued its Second Set of Information Requests on July 14, 2009. *Id.* Charter filed responses to the Department’s Second Set of Information Requests on July 23, 2009. *Id.* The evidentiary record consists of 31 Charter exhibits; nine Department exhibits; four responses to Record Requests; and two revised responses to Record Requests. After review and consideration, the Department approves Charter’s FCC Forms 1240 and FCC Form 1205, subject to the Department’s findings discussed below.

II. ANALYSIS AND FINDINGS

A. Review of the FCC Form 1240

Charter has proposed in its FCC Form 1240 filings to increase the MPR in 15, and decrease the MPR in the remaining 14, of the 29 Massachusetts communities that Charter serves. *See* Rate Schedule at Attachment 1. After careful review, the Department determines, as discussed below, that Charter’s FCC Forms 1240 have been prepared in compliance with federal laws and regulations. In reviewing Charter’s FCC Forms 1240, the Department identified two primary issues to be addressed: (i) Charter’s addition of BST channels in several Massachusetts communities and corresponding programming rate adjustments; and (ii) Charter’s inclusion of franchise related costs in its filing for the Town of Southampton. As explained below, the Department is satisfied with Charter’s responses to the Department’s

inquiries concerning these two issues. Charter's approved BST MPRs and operator selected BST programming rates appear in the Rate Schedule below, at Attachment 1.

The FCC has created specific forms incorporating the provisions of its rate regulations, upon which a cable operator must calculate its rates. *See* 47 C.F.R. §§ 76.922, 76.930. The FCC Form 1240 allows a cable operator to annually update its BST programming rates to account for inflation; changes in the number of regulated channels; and changes in external costs, including programming costs, copyright costs, and franchise related costs ("FRCs"). *See* 47 C.F.R. § 76.922(e). In order that rates be adjusted on the FCC Form 1240 for projections in external costs, or for projected changes to the number of regulated channels, the cable operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. *See* 47 C.F.R. §§ 76.922(e)(2)(ii)(A), 76.922(e)(2)(iii)(A). Projections involving copyright fees, retransmission consent fees, other programming costs, Commission regulatory fees, and cable specific taxes are presumed to be reasonably certain and reasonably quantifiable. *See* 47 C.F.R. § 76.922(e)(2)(ii)(A). Cable operators may also project for increases in FRCs to the extent they are reasonably certain and reasonably quantifiable. However, such projections are not presumed to be reasonably certain and reasonably quantifiable. *See id.*

The standard under which the Department must review rate adjustments on the FCC Form 1240 is found in the FCC's rate regulations. *See* 47 C.F.R. § 76.922(a). Specifically, the FCC directed local rate regulators, such as the Department, to ensure that the approved rates are in compliance with the Communications Act of 1934, as amended ("the Communications Act"), and do not exceed the maximum permitted charges calculated by the FCC's rate forms. *See id.* The Department may accept, as in compliance with the statute, BST rates that do not exceed the approved maximum permitted charge as determined by federal

regulations. *See* 47 C.F.R. §§ 76.922(a), 76.922(c). In addition, the Department shall only approve rates it deems reasonable. *See* 47 U.S.C. § 543; 47 C.F.R. § 76.937(d)-(e); G. L. c. 166A, §§ 2, 15. The cable operator has the burden of proof to demonstrate that its proposed rates for BST programming comply with Section 623 of the Communications Act, and implementing regulations. *See* 47 U.S.C. § 543; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 F.C.C.R. 5631, at 5716, ¶ 128 (May 3, 1993) (“FCC Rate Order”); 47 C.F.R. § 76.937(a) (regulation assigning the burden of proof to the cable operator).

1. Addition of Channels to the BST

First, the Department addresses the increase in the number of basic tier channels reported by Charter for several Massachusetts communities and Charter’s corresponding programming rate adjustments. As set forth below, the Department will permit Charter’s addition of these basic tier channels and corresponding per-channel rate adjustments.

In the FCC Form 1240 filings for the communities of Chicopee, East Longmeadow, Easthampton, Hampden, Ludlow, Southampton, and Wilbraham (“Chicopee system communities”), Charter reported an increase in the number of basic tier channels. *See* Exh. Charter-29, Exh. Charter-25, Exh. Charter-26, Exh. Charter-24, Exh. Charter-22, Exh. Charter-27A, Exh. Charter-23. The five added channels for the Chicopee system communities include three PBS channels: WGBY DT 4 PBS Create, WGBY DT 3 PBS World, and WGBY DT 2 PBS Kids, all of which are digital multiplexed signals of WGBY;⁴ as well as WFSB DT 2 CBS News⁵

⁴ Charter maintains that under its agreement with WGBY, Charter must carry the three WGBY multiplexed signals. Tr. at 17:17-18:8.

and WTIC FOX 61. Tr. at 39:18-22. Charter added WGBY DT 3PBS World and WGBY DT 2 PBS Kids in October 2005; WFSB DT 2 CBS News in March 2007; WGBY DT 4 PBS Create in October 2007; and WTIC Fox 61 in March 2008. *Id.*

Charter states that these channels were not included on earlier rate filings because Charter's channel lineups listed the "Digital Only" basic channels separately from the basic tier channels. R.R. D.T.C.-2. In preparing the filing for this year, Charter noticed that these basic tier channels were listed mistakenly under the digital channel section of the channel lineup, and added these channels to its rate filing. *Id.* Charter adjusted its BST programming rates for the Chicopee system communities according to the per-channel adjustment method specified in 47 C.F.R. § 76.922(g). *Id.* Charter asserts that the added channels are all different channels, and provide neither duplicate nor time-shifted programming to that already provided on the basic tier. Tr. at 18:17-23. In addition, Charter states that removal of these channels would involve using the regulations applicable to BST channels. R.R. D.T.C.-3. 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 Segment⁶ from the BST rate. *See* 47 C.F.R. § 76.922(g)(4). As a result, the cost of removing a channel, for any reason, from Charter's BST lineup has the potential to far exceed the increase in charges Charter gains by adding a channel.

Additionally, the Department notes that with the transition from analog to digital programming, the definition of the term "channel," for purposes of rate regulation, appears to be in flux. In an analog system, each channel is simply 6 MHz of spectrum. *In re Carriage of*

⁵ In February 2005, Charter had to remove WFSB, the Hartford-based CBS affiliate, when a Springfield-based affiliate, WHSM-CBS, was launched. R.R. D.T.C.-1. As WHSM is a low power station and does not offer an HD signal, Charter has continued carrying both WFSB HD and its multi-cast all news/weather digital signal. R.R. D.T.C.-1.

⁶ The channel movement and deletion segment is calculated by taking the BST rate less any external costs, true-up and inflation divided by the number of channels on the BST.

Digital Television Broadcast Signals, 16 F.C.C.R. 2598, at 2614, ¶ 37. Thus, a “channel,” in an analog system, is equated to the specific amount of system capacity it takes to broadcast. By contrast, the newer digital compression technology allows digital systems to fit multiple programming streams within the same 6 MHz of spectrum. *Id.* Therefore, digital systems can broadcast the same number of individual programming streams as analog systems while using only a fraction of the available bandwidth. *Id.* Because adding digital programming takes up so much less spectrum, the FCC has sought comment on possible changes to the per-channel rate adjustment methodology for the addition of digital broadcast programming. *Id.* at 2656-57, ¶ 133. In its request for comment, the FCC proposed changing its rules to direct “cable operators adding digital broadcast signals to their channel line-ups, to increase rates for each 6 MHz of capacity devoted to carriage of such signals.” *Id.* at 2657, ¶ 134. This seems to suggest the FCC may change the current pricing methodology (which allows a carrier to increase rates per channel added) to a formula that would permit digital carriers to increase rates for every 6MHz of new programming added. The FCC, however, has yet to implement any changes. *See id.* As such, the Department will follow the existing FCC rules and permit Charter’s rate treatment of the digital “channels” as channel additions for the purposes of the per-channel rate adjustment. However, the Department reserves the right to revisit this issue pending future guidance from the FCC.

2. Franchise Related Costs in Southampton

The Department also examines Charter’s inclusion of franchise related costs (“FRCs”) in its filing for the Town of Southampton, and concludes that Charter’s treatment of these FRCs is reasonable. In particular, the FCC Form 1240 filed for the Town of Southampton includes FRCs of \$10,000 for the projected period. Exh. Charter-27A, at Worksheet 7: Projected Period.

Charter states that these FRCs are for a one-time \$30,000 cash grant payment for purchasing PEG Access equipment and supplies. Exh. D.T.C.-5. Under its license, Charter is responsible for providing a “one-time cash grant to the Town in the amount of \$30,000 ... for purchase of PEG Access equipment and supplies.” Cable Communications Renewal License between Greater Easthampton Cablevision, Inc. and the Board of Selectmen for the Town of Southampton at §6.2(a) (Apr. 11, 1995) (“Southampton License”). This payment was due in full “upon 30 days’ advance written notice of the Licensee from the Issuing Authority.” *Id.* at §6.2(a). The Town of Southampton requested the initial capital grant at the end of the license term. Tr. at 30: 8-18. Charter states that this payment, which was made on December 18, 2008, will be amortized over a three-year period. Exh. D.T.C.-5. *See* 47 C.F.R. § 76.922(e) (permitting operators to adjust BST rates to account for FRC annually). Typically, these types of grant payments are negotiated at the time the license is signed and are amortized over the term of a license, not (as here) after the license term has expired. However, because cable licenses are generally executed with the expectation that they will be renewed, the Department finds that FRCs of \$10,000 per-year for the projected period are reasonable. *See* 47 U.S.C. § 543; 47 C.F.R. §§ 76.922(e), 76.937(d)-(e); G. L. c. 166A, §§ 2, 15. Moreover, the Department notes that if the Southampton License is not renewed for some reason, the harm will accrue to Charter and not to ratepayers.

B. Review of the FCC Form 1205

In its FCC Form 1205 filing, Charter proposes to adjust its maximum permitted equipment and installation rates consistent with FCC rate regulations. The Department has analyzed Charter’s proposed adjustments, and approves Charter’s FCC Form 1205, as filed on December 1, 2008. Charter’s approved BST MPRs and operator selected rates for equipment

and installations appear in the Rate Schedule in Attachment 1. However, as discussed below, while the Department will accept Charter's methodology for calculating its installation time elements and resulting hourly service charge ("HSC") for this filing, on all future FCC Form 1205 filings, Charter is directed to adjust its methodology in accordance with this Order.

The FCC Form 1205 establishes 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, 7, 11-13 (June 1996) ("*FCC Form 1205 Instructions*"). A cable operator prepares the FCC Form 1205 on an annual basis using information from the cable operator's previous fiscal year. *See id.* at 2-3. In this proceeding, the Department reviews Charter's nationwide FCC Form 1205 for the fiscal year ending December 31, 2007. *See* Exh. Charter-30, at 1.

Subscriber charges established by the FCC Form 1205 may not exceed charges based on actual costs in accordance with the FCC's regulatory requirements. *See* 47 C.F.R. § 76.923(a)(2). The burden of proof 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; *FCC Rate Order* at 5716, ¶ 128; 47 C.F.R. § 76.937(a).

Here, the Department's review of Charter's FCC Form 1205 raised questions concerning Charter's reported installation time elements and the resulting HSC and installation rates. More specifically, in its FCC Form 1205 filing, Charter reported that the average time to complete an unwired installation is 1.69 hours. Exh. Charter-30, at schedule D. For a pre-wired installation, Charter reported that the average time is 1.47 hours. *Id.* The Department observes that these times, as well as the times Charter reported for all other installations, are high in comparison to

installation times reported by other cable providers in Massachusetts. *See FCC Form 1205 for the Mass. Communities Currently Served by Comcast Cable Communications, LLC, and Subject to Rate Regulation*, D.T.C. 08-6 at 3 (stating the primary installation for unwired is 1.3939 hours and for pre-wired is 0.9603 hours); *FCC Form 1205 for the Mass. Communities Currently Served by Time Warner Cable and Subject to Rate Regulation*, D.T.C. 08-13 at 3 (stating the primary installation for unwired is 1.19 hours and for pre-wired is 0.82 hours); *FCC Form 1205 for the Mass. Communities currently served by Cox Communications and Subject to Rate Regulation*, D.T.C. 08-8 at 3 (stating the primary installation for unwired is 1.1548 hours and for prewired is 0.6389 hours). In view of the seemingly high installation times reported by Charter, the Department next examines Charter's method for calculating its installation time elements and the resulting HSC and installation rates.

The FCC Form 1205 instructions for completing Line 6 of Step A (calculation of the HSC) of the Worksheet for Calculating Permitted Equipment and Installation Charges advise the operator to include "the total number of person hours that were spent on maintenance of equipment and service installation in your fiscal year." *See FCC Form 1205 Instructions, Equipment Form* at 15 (June 1996). Because both direct and indirect costs are recoverable through the HSC, operators might believe that the term "person hours" means both direct and indirect hours are to be included in this calculation. However, as the Department clarified in 1994, "[a]ppropriate HSC and equipment cost recovery can only be realized when both the applicable direct and indirect costs are entered on Line 3 of Step A, and the associated direct hours (but not associated indirect hours) are entered on Line 6 of Step A." *In re The City of Chelsea Time Warner Cable for a Determination of Cable Television Rate Regulation*, CATV Docket No: Chelsea, Y-93, Rate Order, at 6 (May 20, 1994) (emphasis in original). The

Department reasoned that if indirect hours were included as part of the total hours, then the denominator of the HSC calculation would be increased and thereby deny the cable operator the full cost recovery to which it is entitled. *Id.*

In support of its HSC calculation, Charter provided the Department with detailed data showing the allocation of installation time elements for all its employees. *See* R.R. D.T.C.-8. This data revealed that Charter's HSC calculation does not follow the Department's precedent, by including the time elements of employees other than the primary installer in its HSC calculation.⁷

The Department issued a record request asking Charter to provide a calculation showing how the HSC and various equipment lease rates would be affected by removing the time elements of personnel secondary to the installation. *See* R.R. D.T.C.-4, 6. Charter's revised calculations show that its HSC would increase from \$34.85 to \$36.65; the lease rates for converters would increase by between \$0.03 and \$0.05; and, finally, the average installation rates would decrease on average by about 20% or roughly \$10. *See* Charter's Revised Response to R.R. D.T.C.-6.

Generally, the Department would require an operator to make retroactive adjustments to rates under such circumstances. However, in this case, the Department declines to do so. The Department recognizes that despite the substantial reduction in installation rates that would result from the modifications described above, Charter is presently charging installation rates that are lower than the revised maximum permitted rate (MPR), that is, the MPR after adjusting for the new HSC of \$36.65. Given that Charter's installation rates are lower than the post-adjustment rate, and that lease rates would actually increase by a small amount, the Department finds no

⁷ In its response to R.R. D.T.C.-8 Charter indicates that installation times include the time of dispatch, warehouse, and work in progress ("WIP") personnel.

subscriber benefit in requiring Charter to undertake the burdensome task of changing rates and notifying customers of these changes in the middle of its rate year. Therefore, the Department approves Charter's FCC Form 1205 as filed. However, the Department directs Charter to adjust its methodology for calculating its installation and equipment rate justifications in accordance with this Order on future Massachusetts equipment rate form filings.

In sum, based on the Department's review of Charter's FCC Forms 1205 and 1240, as well as Charter's responses to inquiries, the Department determines that all of Charter's equipment and installation, and programming rate forms are in compliance with federal laws and regulations and are reasonable. 47 C.F.R. § 76.922(a). As such, the Department concludes that the BST MPRs established by Charter's FCC Forms 1240 for the projected period from March 1, 2009 to March 1, 2010, are in compliance with applicable law. 47 C.F.R. § 76.922(a). Charter's proposed and approved BST programming and equipment MPRs and actual BST programming and equipment rates appear in the Rate Schedule below, at Attachment 1.

III. ORDER

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

ORDERED: That Charter's FCC Forms 1240, as filed on December 1, 2008, for the communities of Auburn, Boylston, Chicopee, Dudley, East Longmeadow, Easthampton, Grafton, Hampden, Holden, Leicester, Ludlow, Millbury, Northborough, Northbridge, Oxford, Paxton, Southampton, Southborough, Southbridge, Spencer, Sturbridge, Upton, West Boylston, West Brookfield, Westborough, Wilbraham, and Worcester, are approved; and it is

FURTHER ORDERED: That Charter's FCC Form 1240, as filed on December 26, 2008, for the community of Southampton, is approved, and it is

FURTHER ORDERED: That Charter's FCC Form 1205, as filed on December 1, 2008,
is approved; and it is

FURTHER ORDERED: That the parties comply with all other directives herein.

By Order of the Department

Geoffrey G. Why
Geoffrey G. Why, Commissioner

RIGHT OF APPEAL

Appeals of any final decision, order or ruling of the Department of Telecommunications and

Cable may be brought pursuant to applicable federal and state laws.