



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

**DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY
Cable Television Division**

ORDER ON COMPLIANCE FILING

CTV 03-4

Review by the Cable Television Division of the Department of Telecommunications and Energy of Federal Communications Commission Forms 1240 and 1205 filed by Time Warner Cable, Inc.

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FOR: TIME WARNER CABLE
Petitioner

I. INTRODUCTION

On September 21, 2004, the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy issued a decision rejecting Time Warner Entertainment-Advance/Newhouse Partnership’s (“Time Warner”) initial Federal Communications Commission (“FCC”) Form 1240 as filed on October 2, 2003, the Company’s revised FCC Form 1240 as submitted on December 1, 2003, and the Company’s adjusted FCC Form 1240 as submitted on June 29, 2004, for Dalton, Pittsfield, and Richmond (“Pittsfield System”). Time Warner Cable, Inc., CTV 03-4 (Sept. 21, 2004) (“Rate Order”). The Cable Division directed Time Warner to recalculate its basic service tier (“BST”) maximum permitted rate (“MPR”) to remove all programming costs related to Capital News 9, and to refile its FCC Form 1240 for the Pittsfield System reflecting this recalculation. The Cable Division further directed Time Warner to file a refund plan for any BST overcharges that resulted from its treatment of programming costs related to Capital News 9. The Cable Division ordered Time Warner to refile its FCC Form 1240 and accompanying refund plan on or before October 5, 2004.

The Company submitted a revised FCC Form 1240 and a refund plan¹ on October 4, 2004. The Company informed the Cable Division that it intended to pursue an appeal of the Rate Order with the FCC, and asked that the Cable Division agree to a delay in the implementation of any required refunds pending resolution of its appeal. On October 14, 2004, Time Warner appealed the Rate Order to the FCC where the matter is currently pending.

II. DISCUSSION AND ANALYSIS

A. Compliance Filing

In reviewing the Company’s FCC Form 1240 as submitted in response to our Rate Order, we note that Time Warner used as its base of calculation a BST MPR of \$9.22, which had been approved in the previous proceeding. See Time Warner Entertainment-Advance/Newhouse Partnership, Order on Compliance Filing, CTV 02-16, at 2 (2003). In addition, the Company removed all of the programming costs related to Capital News 9 for both the projected period and the true-up period. See FCC Form 1240 at Worksheet 7, submitted Oct. 4, 2004; see also Exh. CTV-3. Overall, the revised calculation resulted in a BST MPR of \$6.6775 for the projected period, i.e., January 1, 2004, to December 31, 2004. Based on our review, we conclude that the FCC Form 1240, as submitted on October 4, 2004, complies with applicable federal and state law, regulations, and precedent.

¹ We expected the Company to provide an analysis of the refund that would be due to each subscriber. Instead, the refund plan was non-specific in nature.

B. Implementation of Refunds

Time Warner asserts that delaying implementation of any refunds until a decision on the appeal by the FCC is in the best interests of all of the parties. Time Warner specifically argues that subscribers will not be disadvantaged since any potential refunds will bear interest pending the outcome of the appeal to the FCC. Time Warner also asserts that delaying implementation of any refunds until the FCC has issued its decision will be less disruptive to subscribers since only one adjustment will appear on their bills. The Company finally argues that waiting until the FCC has made a decision on the appeal will ensure that the appropriate amount is refunded to subscribers.

The FCC has previously stated that when a franchising authority adopts a rate order, and it takes effect, the decisions made therein are binding absent certain clearly recognized exceptions. Comcast Cable of Indiana/Michigan/Texas, Inc., DA 04-2615, CSB-A-0709 (Aug. 24, 2004). The FCC goes on to delineate these exceptions as: 1) a decision by the FCC to stay the rate order; 2) an FCC decision granting an appeal from the rate order; or 3) an agreement by the franchising authority and the cable operator to make other arrangements, e.g., agreeing to maintain rates in effect pending an appeal. Id.

The Company does not ask for, and the Cable Division does not grant, a stay of its Rate Order. In considering the appropriateness of agreeing to a delay in the implementation of refunds as required by the Rate Order, we balance the interests of the Company and of subscribers. The Company asserts that subscribers will not be harmed by a delay in the implementation of refunds because interest will accrue on any required refunds. The Company correctly notes that under FCC regulations, cable operators are required to pay interest on any refunds to subscribers. See 47 C.F.R. § 76.942(e).² Further, while it is possible that individual subscribers might be harmed, e.g., individuals that disconnect service prior to the implementation of refunds, the FCC has specifically found that the impact on an individual is not a relevant factor in determining harm to subscribers. Falcon Cable Systems, DA 95-2276 (1995), citing 47 C.F.R. § 76.942(d). In fact, the FCC rules are structured so that individuals who were actually overcharged might not receive refunds in the future. Id. As such, we find that subscribers in general will not be harmed if the Cable Division allows a delay in the implementation of refunds.

In addition, Time Warner contends that delaying implementation will be less disruptive since subscribers will only see one adjustment on their bills. According to the Company, a delay until the FCC's decision on appeal will also ensure that the appropriate refunds are

² Interest due on refunds to subscribers is computed at the rate for tax refunds and additional tax payments as published by the Internal Revenue Service; the current rate is five percent. See <http://www.irs.gov>.

provided to subscribers. The findings made by the Cable Division and set forth in the Rate Order were based on federal and state law, regulations, and precedent. While we have the utmost confidence in our Rate Order, we recognize that it is the FCC that will make a finding as to the outcome in this matter, and therefore, there is a degree of uncertainty as to whether Time Warner will ultimately be required to make refunds. Should the FCC reverse our decision, it might be disruptive for subscribers to be provided a refund only to have the rates increased at a later date. This is especially true given the amount of monies in question.³ In addition, as previously noted, Time Warner is required to provide interest on any refund to its subscribers. 47 C.F.R. § 76.942(e). However, the converse is also true. FCC regulations specifically permit cable operators to collect interest at a rate of 11.25 percent on any undercharges. 47 C.F.R. § 76.922(e)(3)(i). Hence, if the FCC were to grant Time Warner's appeal, and the Cable Division had already required the Company to implement refunds, subscribers might be in a worse situation than if we had permitted the Company to delay implementation of the refunds.

Because the Cable Division has found that subscribers will not be harmed by a delay in implementation of refunds and the public interest favors such a delay, we will allow Time Warner to delay temporarily the implementation of refunds. We specifically reiterate that we do not grant a stay of our Rate Order. Time Warner has filed, for review and approval, its next annual rate adjustments, docketed as CTV 04-5. Since our Rate Order remains in full force and effect, we must use the MPR BST approved therein as the initial point in our review of Docket CTV 04-5. Furthermore, in the next proceeding, the rates listed at FCC Form 1240, Worksheet 8, must reflect the refunds paid to subscribers. As a result, the delay may not be indefinite. The Company has asked the FCC to resolve its appeal on an expedited basis. The Cable Division did not oppose this request. If the FCC grants such a request, we would anticipate that its decision would be issued within the next several months and a delay until this time would be appropriate. However, if the FCC has not acted on the appeal before we notice hearings in CTV 04-5, we will issue an order requiring the Company to implement the refunds at that time⁴ and to revise the file pending in Docket CTV 04-5 accordingly.

³ During the projected period, Time Warner charged a BST rate of \$10.25, while the revised FCC Form 1240 allows a maximum BST rate of \$7.22 (comprised of BST MPR of \$6.6775 and an upgrade charge of \$0.54).

⁴ The Cable Division will notice hearings as necessary to provide sufficient time to complete the rate proceeding prior to the deadline of October 3, 2005.

III. CONCLUSION

Upon due notice, hearing, and consideration, the Cable Division hereby accepts as reasonable and in compliance with applicable statutes and regulations, Time Warner's FCC Form 1240 as submitted on October 4, 2004, for the Pittsfield System.

Further, the Cable Division allows Time Warner to temporarily delay the implementation of refunds as outlined above.

By Order of the
Department of Telecommunications and Energy
Cable Television Division

/s/ Alicia C. Matthews
Alicia C. Matthews
Director

Issued: December 16, 2004