COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
Cable Television Division

RATE ORDER

CTV 04-5 (Phase II)

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.

APPEARANCE: John E. Fogarty
Vice President & Assistant Chief Counsel, Regulatory
Time Warner Cable
290 Harbor Drive
Stamford CT 06902

FOR: TIME WARNER CABLE, INC.
Petitioner

I. INTRODUCTION

In this phase of the proceeding, the Cable Television Division ("Cable Division") of the Department of Telecommunications and Energy ("Department") investigates Time Warner Cable, Inc.'s ("Time Warner" or "the Company") Federal Communications Commission ("FCC") Form 1240, on which it seeks to justify as just, reasonable, and in compliance with applicable law, the basic service tier ("BST") programming rate the Company is charging in the communities of Dalton, Pittsfield, and Richmond (the "Pittsfield System"). See G.L. c. 166A, § 15; 47 U.S.C. § 543; 47 C.F.R. §§ 76.922; 76.937; 76.942. Specifically, the Cable Division reviews the appropriateness of including certain affiliated programming costs in the BST rate calculation. The Company filed the rate form at issue on October 4, 2004, and pursuant to federal law, implemented the proposed BST programming rate on January 1, 2005, subject to review and refund. See 47 C.F.R. § 76.933(g).

II. PROCEDURAL HISTORY

The central issue in this phase is one that has plagued the Cable Division and Time Warner for several years. This issue first arose when Time Warner sought to recover programming costs associated with its carriage of Capital News 9, a 24-hour news and local programming channel owned by an affiliate of the Company. Time Warner Entertainment-Advance/Newhouse Partnership, CTV 02-16 (2003). In CTV 02-16, at 5, the Cable Division allowed the Company to recover its net programming costs because the costs for Capital News 9 were projected costs and could be reconciled in the next rate proceeding, upon the appropriate showing. We specifically notified Time Warner that such a showing must satisfy the FCC's affiliate transaction rules. Id. at 4-6, citing 47 C.F.R. §§ 76.922(f)(6); 76.924(i)(1). Time Warner appealed the Cable Division's decision to the full Commission of the Department arguing three claims: (1) it was reasonable to use operating costs of Capital News 9 as the basis for its calculation; (2) the Cable Division erred in directing it to offset Capital News 9's operating costs with its advertising revenues; and (3) if the Department were to uphold the Cable Division on the latter issue, then Time Warner should be allowed to include additional categories of costs associated with the programming (Petition for Appeal to DTE at 1). The Department denied Time Warner's appeal as to all three claims. Time Warner Entertainment-Advance Newhouse Partnership, D.T.E. 03-97 (2003).

The Company again sought to recover Capital News 9 programming costs in the 2004 rate proceeding. There, the Company included the programming costs in both the true-up period and projected period calculations. Despite clear notice, Time Warner failed to make the showing required by the affiliate transaction rules, and, accordingly, the Cable Division was required to disallow Capital News 9's programming costs from the BST rate calculation. Time Warner Cable, Inc., CTV 03-4, at 9, 11 (2004). We directed Time Warner to refund any BST overcharges resulting from its inclusion of the costs for Capital News 9 in its BST programming rate for the Pittsfield System. Id. at 12. Time Warner appealed the decision to the FCC, claiming generally that the Cable Division misapplied the affiliate transaction rules by not allowing a valuation based on costs. Since the appeal was pending, the Cable Division granted Time Warner's request to delay the implementation of refunds until the FCC resolved the issue on the appeal. CTV 03-4, "Order on Compliance Filing" at 1, 3-4.

On July 15, 2005, the FCC's Media Bureau resolved the issue in a Memorandum Opinion and Order upholding our order in CTV 03-4. Time Warner Cable Entertainment - Advance/Newhouse Partnership d/b/a Time Warner Cable, DA 05-2030 (2005) ("Bureau Order"). Consequently, we directed Time Warner to file a revised and updated refund plan. CTV 03-4, "Order on Refund Plan" (2005). Time Warner made a timely filing, proposing to pay refunds over a 12-month period beginning in January, 2006 (Time Warner Refund Plan, July 29, 2005).[1] The Cable Division rejected Time Warner's refund plan, determining that the public interest was no longer served by delaying the implementation of refunds. CTV 03-4, "Order Rejecting Refund Plan" (2005). Time Warner filed with the FCC an Emergency Petition for Stay of the Order Rejecting Refund Plan on August 10, 2005. Then, on August 15, 2005, Time Warner filed with the FCC an Application for Review of the Bureau Order. These matters are still pending.

Meanwhile, Time Warner had filed its next annual FCC Forms 1240 and 1205, for Athol and Orange ("Athol System"), as well as the Pittsfield System. These filings are the subject of the current docket, CTV 04-5. After review and hearing,[2] the Cable Division determined that the FCC Form 1240 for the Athol System and the nationwide FCC Form 1205 were in compliance with applicable law. However, we were again faced with the question of the appropriateness of including programming costs of Capital News 9, in the BST rate calculation applicable to the Pittsfield System. Given the numerous opportunities the

---

[1] The Company argued that the plan was appropriate because the Company expected that the proceeding pending before the Cable Division would establish a value for Capital News 9 (id.). The Company requested that concurrently with our determination of the 2005 BST programming rate, we reconsider the 2004 rate calculation in light of the evidence it would present concerning the fair market value of Capital News 9 (id.).

[2] The Cable Division conducted a public and evidentiary hearing at our offices on August 16, 2005.

Cable Division provided the Company to supplement the record,[3] it became apparent that the record would not be complete in time for the Cable Division to issue a decision within the deadline set under FCC regulations.[4] The Cable Division bifurcated the proceeding and issued an order approving the Company's FCC Form 1240 for the Athol System, and the nationwide FCC Form 1205. Time Warner Cable Inc., CTV 04-5 (Phase I)(September 16, 2005). The Cable Division and Time Warner jointly filed a request with the FCC seeking approval to delay the issuance of the order in this matter until November 30, 2005, which the FCC's Media Bureau granted. Finally, given that resolution of the matters pending before the FCC would assist the Cable Division in resolving the current matter, the Cable Division and the Company participated in a teleconference with FCC Media Bureau staff during which the staff provided an informal opinion on the issues pending before them. The Cable Division has taken the informal staff opinion into consideration in this decision.

III. MOTION FOR PROTECTIVE TREATMENT

A. Introduction

Time Warner moved for confidential treatment for its responses to Record Requests 11, 12(c), 17, 18 and 19 ("Motion"). In its Motion, the Company claimed that the documents for which it seeks protective treatment contain information that is commercially-valuable, confidential and proprietary, or market-sensitive information that constitutes trade secrets (Motion). Time Warner asserted that it has continually used its best efforts to maintain this information as confidential and proprietary (id.). Time Warner further

---

3 The Cable Division, in an effort to fully develop the record, issued 23 record requests. Time Warner submitted the last of its responses on November 10, 2005.

4 Pursuant to 47 C.F.R. § 76.933(g)(2), the Cable Division must issue a rate order within 12 months of the date on which the cable operator had filed for its rate adjustment; in this case, by October 3, 2005.

asserted that it would be irreparably harmed competitively if this information were to become publicly available.

B. Standard of Review

Information filed with the Department or its Divisions may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The department 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 department shall protect only so much of the information as is necessary to meet such need.

The statute 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, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection 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; and third, even where a party proves such need, the Department may protect 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. 25, § 5D.

C. Analysis

Generally, the information the Company seeks to protect from public disclosure is cost and personnel information related to various programming. The response to Record Request 11 consists of a report prepared by Kane Reece Associates that provides an analysis of the fair market value of Capital News 9 (RR-CTV-11). The Company seeks to exclude information in the report that concerns the number of employees employed at various channels, the total compensation paid to these employees, and total operating costs of various channels from public disclosure (id). The response to Record Request 12(c) consists of a cost summary report highlighting the differences in net book costs between the projected and true-up periods (RR-CTV-12(c)). Record Request 17 provides a range of monthly per-subscriber costs for New England Cable News Network ("NECN"), Cable News Network ("CNN"), Fox News Channel, and ESPN (RR-CTV-17). Record Request 18 provides a breakdown of Capital News 9's cost category entitled "Committed Expenses" (RR-CTV-18). The response to Record Request 19 concerns the distinction between fixed and variable costs. The Company also seeks to protect the information concerning the amount of direct costs related to the bureau offices as well as the number of video journalists for which it incurs direct costs (RR-CTV-19).

Massachusetts law establishes the presumption that the information for which confidential protection is sought is public information, and the burden is on Time Warner to provide the need for such protection. G.L. c. 25, § 5D. In its Motion, Time Warner did not provide a specific rationale to support its claimed need for protection. In considering whether

Time Warner met its burden, however, we note that the information included in the responses is similar in nature to information we have protected from public disclosure in previous Time Warner proceedings. CTV 03-4 "Order on Request for Confidential Treatment" (2004). While a company must meet the statutory burden of proof for each request for protective treatment, Time Warner's reliance on precedent set in the previous, closely related matter is understandable. Moreover, the Cable Division continues to believe that the operating cost information Time Warner seeks to protect from public disclosure is competitively sensitive such that the requested protection is warranted. Accordingly, we grant the Company's request that the information be protected from public disclosure. However, Massachusetts law allows the Cable Division to grant such protection only to the extent necessary to avoid competitive harm. G.L. c. 25, § 5D. Because it is unlikely that these programming expenses will remain constant or that they will continue to be competitively sensitive for an indefinite length of time, we grant the information confidential treatment for five years from the date of this Order. At that time, the Company may renew its request for confidential treatment.

IV. TIME WARNER'S PROPOSAL

Time Warner maintained that there is no prevailing company price for Capital News 9 (Tr. at 16). In order to justify its claimed programming costs, Time Warner offered information to support its estimate of the fair market value of Capital News 9 (id. at 7). The Company highlighted a number of indicators that, it asserted, establish that Capital News 9 has a significant fair market value (id. at 8). These indicators are: (1) quality of presentation, production and content; (2) the volume of stories dedicated to specific areas, including Berkshire County; (3) local, regional and national recognition; (4) viewership survey information; and (5) customer feedback on channel performance (id.). Time Warner argued that Capital News 9 is a well-produced, highly professional service that provides a unique source of local news and information available 24 hours per day, and thus, based on these indicators, "clearly has significant value" (id. at 15-16). However, the Company stated that to determine a precise dollar figure for the fair market value was not simple (id. at 16). The Company, looking at Capital News 9 as a whole, estimated that the fair market value of Capital News 9 would fall within a range of between $1.83 and $4.64, for 2004, and $1.88 and $4.64, for 2005 (RR-CTV-23).

Although Time Warner offered this estimate of Capital News 9's fair market value, it did so only upon repeated requests of the Cable Division. Time Warner stressed that the best evidence of fair market value is the sale of the asset in question (Tr. at 16). But Time Warner asserted that in many instances, including the case of Capital News 9, there is no active market for the sale of the asset (id.). In such circumstances, the Company stated, one of the generally accepted methods for estimating fair market value is a cost-based approach (id.). In support, the Company asserted that the Internal Revenue Service, in its instructions for determining the fair market value of donated assets, recognizes both historical cost and replacement cost as valid reference points when there are no comparable sales available (id. at 16-17). The Company further argued that cost-based approaches are regularly used to establish the fair market value of real property and to value property in a decedent's estate (id. at 17).

V. ANALYSIS AND FINDINGS

A. Standard of Review and Burden of Proof

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, such as programming costs. The standard under which the Cable Division must review rate adjustments on the FCC Form 1240 is found in the FCC's rate regulations - we must assure that the rates are reasonable and comply with the requirements of Section 623 of the Communications Act of 1934, as amended. G.L. c. 166A, § 15; 47 U.S.C. § 543; 47 C.F.R. §§ 76.922 and 76.930.

Generally, the cable operator bears the burden to demonstrate that its projected changes to the number of regulated channels or its projections in external costs are reasonably certain and reasonably quantifiable. 47 C.F.R. § 76.937(a); 47 C.F.R. §§ 76.922(e)(2)(ii)(A) and 76.922(e)(2)(iii)(A).[5] With respect to programming costs of an affiliate channel, the cable operators must establish that the proposed external cost recovery is based on the prevailing company price, if the affiliated programmer has sold a substantial number of like assets to non-affiliates; but if a prevailing company price is not available, the cost recovery for such programming shall be the lower of their cost to the affiliated programmer less all applicable valuation reserves, or their fair market value. 47 C.F.R. §§ 76.924(i)(1); Time Warner Cable Entertainment - Advance/ Newhouse Partnership d/b/a Time Warner Cable, DA 05-2030, at 5, ¶ 9 (2005).[6]

---

5 Cable operators may also project for increases in franchise related costs to the extent they are reasonably certain and reasonably quantifiable; however, such projections are not presumed to be reasonably certain and reasonably quantifiable. 47 C.F.R. § 76.922(e)(2)(ii)(A).

6 For a complete analysis of the appropriate standard of review, see CTV 03-4, at 6-9 (2004). This analysis is incorporated by reference in this Order.

B. Analysis

1. True-Up Calculation

On its current FCC Form 1240 for the Pittsfield System, Time Warner included programming costs for Capital News 9 in both the true-up and projected periods (Exh. Time Warner-14, Worksheet 7, Line 701). The FCC Form 1240 rules require cable operators to reconcile costs projected on the previous form. 47 C.F.R. § 76.922(e)(3). In addition, through the true-up mechanism, operators may also recover costs not previously projected, such as changes in franchise related costs associated with a new license signed during the projected period. 47 C.F.R. §§ 76.922(e)(2)(iii)(B); 76.922(e)(3). To the extent the operator's actual and projected costs differ, the operator will either increase or decrease its BST programming rate depending on whether its projections were greater than or less than its actual costs. 47 C.F.R. § 76.922(e)(3).

The programming costs Time Warner included for this true-up period are costs that the Cable Division rejected in the previous rate proceeding. Thus, at issue in this proceeding are not programming costs that were mis-projected or unknown, but rather costs that were reasonably rejected by the Cable Division. See CTV 03-4, at 11-12. The Cable Division suggests that to allow an operator to include costs in a true-up period where the operator failed to justify the reasonableness of those costs would make the operator's disregard of its burden of proof inconsequential. At the very least, Time Warner's inclusion of the programming costs in the true-up of the current FCC Form 1240 provides a third opportunity to recover costs it had twice failed to justify previously. Nonetheless, the FCC's Media Bureau has indicated that the Company is entitled to seek such recovery. In balancing the likelihood of our success in arguing this point before the FCC with the value to subscribers of a final decision, we will allow, in this instance, Time Warner to include, in its true-up calculation, programming costs for Capital News 9 that are calculated in compliance with the FCC's regulations applicable to affiliate transactions.

2. Cost as a Measure of Fair Market Value

In the absence of an active market for an asset, Time Warner maintained that one of the generally-accepted methods for estimating the fair market value of the asset is a cost-based approach citing, in support, the Internal Revenue Service's instructions for determining the fair market value of donated assets, and the use of cost–based approaches to establish the fair market value of real property (Tr. at 16-17). Time Warner argued that such a measure is appropriate in this instance because using an asset's cost serves to put a ceiling on fair market value, since a rational buyer generally will not pay significantly more to purchase a product than it would have to spend to produce that product (id. at 17). Time Warner also argued that using an asset's cost places a floor on fair market value, because the seller will not continue to create that product if it cannot recover that product's cost (id).

While, as the Company argues, cost and fair market value may not be mutually exclusive concepts, they are not nevertheless interchangeable. The FCC pointed out that "programming that may be comparable from a production viewpoint, for example, may in no way be comparable from the perspective of the program viewer." Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Service, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215 and CS Docket No. 94-28, FCC 94-39, 9 FCC Rcd 4527, at 4667, ¶ 268 (1994) ("Cost Order"). In other words, two channels' programming may cost the same to produce, but the programming produced by one channel may have a much greater value to viewers, and hence a much greater fair market value to cable operators that purchase the programming, than the programming produced by the other channel. Alternatively, there are instances where the value of the programming is less than the cost of producing the programming. See Comcast Cable Communications, Inc., CTV 04-3/04-4, at 24 (2005).

Further, the FCC rejected the exclusive use of costs for valuing affiliated programming. The FCC was concerned that companies that are able to pass increases in their costs on to ratepayers may be motivated to pay excessive amounts for assets and services obtained from nonregulated affiliates." Cost Order at 4664, ¶ 261. Thus, the FCC adopted its affiliate transaction rules to prevent cable operators from passing on these excessive costs to cable subscribers. Id. at 4659, 4662, 4663-4664;¶¶ 247, 259, 261. As we have argued before the FCC, even if cost were recognized as a measure of fair market value in other circumstances, in the context of affiliate transactions, costs are to be measured against fair market value and are not equated with fair market value. See 47 C.F.R. § 76.924(i)(1); Time Warner Cable Entertainment - Advance/Newhouse Partnership d/b/a Time Warner Cable: Cable Television Division: Opposition to Application for Review, File No. CSB-A-0723, at 6 (2005). If the FCC had intended that cost be used as a surrogate for fair market value, it would not have required such a comparison.

Accordingly, we again determine that cost alone cannot be determinative of the reasonableness of the amount representing Capital News 9's programming to be included in Time Warner's BST rate calculation. Given this finding, we give little, if any, weight to the analysis prepared by Kane Reece Associates, Inc. ("Kane Reece"), of Westfield, New Jersey, assessing the market value of Capital News 9 (see RR-CTV-11). Although Kane Reece identified three broad approaches to assessing market value, the report concluded that "data was not readily available to value Capital News 9 programming utilizing the market and income approaches" and thus "relied upon the cost approach in determining the fair market value of Capital News 9" (id. at 2). The Kane Reece study, commissioned after the Company filed its proposed programming costs with the Cable Division, determined that based on the cost approach, the per-subscriber fair market value for Capital News 9 was $1.79 for 2003 and $1.59 for 2004, exactly the amounts that Time Warner had included as its net book costs for each year (RR-CTV-11, at 6; Exh. Time Warner-11, at 4; RR-CTV-6;).

Kane Reece's study did not analyze any channels that had broadly similar programming that might have made them potentially comparable in nature to Capital News 9. Instead, Kane Reece's Time Warner study simply presented a valuation based only on costs, comparing the costs of Capital News 9 with the costs of Time Warner's news stations in Syracuse, New York, and Austin, Texas (RR-CTV-11, at 5-6). In doing so, the Kane Reece study failed to apply the federal regulatory standard of "the lower of net cost or market value," and indeed, did not even address this standard. 47 C.F.R. § 76.924(i).

3. Establishing a Fair Market Value

The Cable Division, as well as the FCC, has acknowledged the difficulty in estimating fair market value of affiliated programming. CTV 03-4, at 10; Cost Order at 4667, ¶ 268. The FCC has provided no guidance with respect to the appropriate methodology for estimating the fair market value of affiliated programming. While maintaining that a cost-based approach is the most reliable measure of Capital News 9's fair market value, the Company estimated that the fair market value would fall within a range of between $1.83 and $4.64, for 2004, and $1.88 and $4.64, for 2005, if a cost-based approach were not used. The Company estimated a fair market value based on a comparative approach that is generally consistent with the Cable Division's limited precedent in this area. See CTV 04-3/04-4, at 19-26. The Company proposed a methodology that compares the prevailing market rates of high quality, originally-produced, locally-oriented live programming that appeals to a geographically limited audience (RR-CTV-23). While we approve the Company's proposed methodology generally, we find the application of that methodology flawed.

By establishing the boundaries of the geographically-limited area so broadly, Time Warner disregards the purpose for which a value is required, that is, to establish a BST maximum permitted rate ("MPR") for the Pittsfield System, whose subscribers comprise just six percent of the Albany Division's subscribers. Time Warner averaged the prevailing market rate of four sports channels to produce the low-end of its estimate of fair market value for Capital News 9, yet only one of these channels, NESN, is actually carried on the Pittsfield System (RR-CTV-14(b), RR-CTV-23).[7] The other three channels, YES, MSG, and Fox Sports NY, are New York specific channels and, for the Albany Division, are carried only in the New York portion (id.). At the same time, Time Warner excluded Fox Sports NE, which is carried in Pittsfield (id.). Specifically, Time Warner excluded Fox Sports NE from its comparison because the channel did not achieve the minimum one percent ratings threshold needed for inclusion in the Nielsen report (RR-CTV-23). However, the Neilsen report to which Time Warner referred included the entire Albany Designated Market Area ("DMA") (id. at n.2). Because Pittsfield System subscribers are such a small percentage of the total Albany DMA, a channel that is carried on the Pittsfield System and has a significant

---

[7] Time Warner's record request response inadvertently referred to NESN as "NECN," but from the context of the responses, which refer only to sports channels, it is clear that Time Warner meant to write NESN (see RR-CTV-14(b) and (c)).

viewership there, might not reach Nielsen's one percent threshold, yet attain significant ratings at specific times. For example, professional sports teams, such as the Bruins, Celtics, and Red Sox, are primarily available only on sports networks such as Fox Sports NE and NESN. Since the sporting events are occasional, some channels might not achieve the overall day to day viewership measured by the Nielsen ratings. However, it is not Nielsen ratings, but the exclusive coverage of the sports teams that these channels provide, that commands carriage.

Further, by narrowly defining "high-quality, originally-produced, locally-oriented live programming," Time Warner improperly limits its comparison to primarily regional sports programming. The only regional news channel Time Warner considered was another affiliate, News 10 Now. In calculating the high end of its estimate of fair market value, the Company offered the result of a telephone survey of evidence of Syracuse area subscribers that purported to establish the amount customers in Time Warner's Syracuse Division would be willing to pay to receive News 10 Now (RR-CTV-23; see Exh. Time Warner-12). According to this survey, 273 subscribers chose an average value of $4.64 per month for News 10 Now (Exh. Time Warner-12). The Cable Division is unable to fully evaluate the survey results because Time Warner provided the answers to only two of the survey's 64 questions (Exh. Time Warner-12; RR-CTV-22(b)). This prevents us from placing the value of News 10 Now within the context of the responses to all of the survey's questions.

More significantly, the Cable Division questions Time Warner's underlying premise that each of its regional news channels so similarly appeals to its designated region such that evidence of one region's satisfaction with a regional channel is evidence of another region's satisfaction with its channel. Two issues arise with this premise. First, the Syracuse Division and the Albany Division markets are different, in large part due to the geographic nature of the divisions. The Syracuse Division is located entirely within New York State, while the Albany Division encompasses communities in New York and in Massachusetts. News concerning political developments within New York, carried by News 10 Now, would be relevant and of interest to all of that channel's subscribers in the Syracuse Division. The entire region served by News 10 Now would appear to be the primary market for that channel.[8] In contrast, political developments in Albany, the New York state capital, that are reported on Capital News 9 would be of less interest to viewers in Berkshire County, who instead would be interested in and affected by political developments occurring in Boston.[9] The Cable Division finds that because Pittsfield subscribers are only a small percentage of those subscribers who receive Capital News 9, and because political events in Boston are not the focus of Capital News 9, that the Pittsfield System should be considered a secondary market for Capital News 9. Any value placed by Syracuse Division subscribers on News 10 Now that would be ascribed to subscribers in a secondary market must be reduced accordingly.

Further, the record is devoid of evidence concerning the demographic comparability of Time Warner's Syracuse Division with the Pittsfield System. The Cable Division explicitly asked Time Warner to explain whether the demographics of the Syracuse Division are comparable with those of the Pittsfield System (RR-CTV-22(e)). Time Warner responded that

---

8 The telephone survey was carried out in all 13 counties served by the Syracuse Division, covering a large area extending from Ithaca to the Canadian border (id.). The survey was specifically tailored, so as to ask subscribers in each geographic region served by the division, to compare News 10 Now with the broadcast channels serving that region (RR-CTV-22(b), at 27-29). Thus, the entire region served by the Syracuse Division is treated as the primary market for News 10 Now.

9 The Cable Division has received numerous complaints from legislators and subscribers in the Pittsfield System concerning the lack of Boston political coverage in their area. We note the testimonials of local politicians and representatives Time Warner offered to support the value of Capital News 9 were all from New York area politicians (Exh. Time Warner-10).

it did "not have the information to respond to this question" (id.). Without information as to whether both divisions are similar in terms of the average age, median income, or common occupations, we are not able to determine that the subscribers in Syracuse and in Pittsfield are sufficiently similar so as to respond similarly to like circumstances. Nevertheless, we find it unlikely that the subscribers in Pittsfield would be willing to pay $4.64 per month[10] for a single channel on the BST, a service that currently has a total monthly cost of $9.10.[11]

Time Warner did not provide a comparison of Capital News 9 with any non-affiliated regional cable news channels, such as NECN, Cablevision's News 12 Long Island, Comcast's CN8, and Time Warner's own New York 1 News (see Tr. at 27-29; RR-CTV-3).[12] Even though NECN is carried on the Pittsfield System, Time Warner did not consider NECN since, according to the Company, Capital News 9's "intensely local focus" and "dedication of resources" make it a far more valuable service in the area it serves when contrasted to the much more regional focus of NECN (Tr. at 27; RR-CTV-3; RR-CTV-14(e)).[13] Time Warner

---

10 The monthly charge of $4.64 is a hypothetical value, as Time Warner included a programming cost of only $1.76 on the FCC Form 1240 that it filed for its Syracuse Division in October 2004 (RR-CTV-22(d)).

11 As part of our previous Time Warner rate proceeding, CTV 03-4, we held a public meeting in Pittsfield on May 18, 2004. During this meeting, we received comments from the public about the cost of basic cable service, especially for senior citizens living on limited incomes, which are a large percentage of the Pittsfield area's population (Hearing Audiotape, Side 1, at Counter Nos. 118-192; 270-275; 290-297). It was also pointed out that basic-only subscribers were one-sixth of the total subscribers in the Pittsfield System (id. at Counter Nos. 299-307).

12 Time Warner is presumably aware of regional news channels produced by other cable operators, because Capital News 9 is a member of the Association of Regional News Channels, which "represents more than 25 local and regional cable news channels and all-news stations…". See http://www.newschannels.org/.

13 Time Warner also stated that it excluded NECN from its analysis due to NECN's failure to achieve the Neilsen ratings threshold in the Albany DMA (RR-CTV-23).

(continued…)

thus rejected comparing Capital News 9 with another news channel actually serving the Pittsfield System, while simultaneously arguing that it was appropriate to compare Capital News 9 with three sports channels that are not even carried on the Pittsfield System. It is incongruous that these three sports channels would have a more "intensely local focus" and "dedication of resources" in Berkshire County than does NECN.

Therefore, in applying Time Warner's proposed methodology we determine that a comparison of the regional channels offered on the Pittsfield System is appropriate. Although we have not considered sports programming to be comparable to news programming in the past,[14] we will accept Time Warner's argument to the extent that the regional sports networks included in a comparison are offered in the Pittsfield System. Since NESN and Fox Sports NE are carried in the Pittsfield System, the prevailing market rate of these channels should be factored in the estimate. However, the prevailing market rates of regional news channels

---

[13](...continued)
NECN provides a New England regional focus, and extensively covers Massachusetts statewide news and, in particular, political developments in Boston, which affect subscribers in Pittsfield. Like sports channels, the specialized coverage NECN provides is of a particular significance to Pittsfield subscribers, and is not reflected in the ratings of the Albany DMA.

[14] We have significant reservations whether any regional sports channel is informative as to the value of a local news programs. In general, sports programming is much more expensive than other cable programming, and sports programming costs have been increasing far more rapidly than the costs of non-sports programming. United States General Accounting Office: Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate: Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry (October 2003). The costs of sports networks are driven by the season-long coverage they provide of sports teams of interest in a particular region. Also, the sports rights fees paid by the cable sports networks in order to carry sports programming increase the monthly cost per subscriber of regional sports channels. In contrast, Capital News 9's total operating costs are projected to decrease slightly between 2004 and 2005 (RR-CTV-6). The rights fees that Capital News 9 pays are only a minor component of its total expenses (RR-CTV-12(c)). Upon Time Warner's request, the actual amount of these rights fees is protected from public disclosure.

similar to Capital News 9 offered in the Pittsfield System should also be considered, since those channels also offer high-quality, originally-produced, locally-oriented programming that appeals to a geographically limited audience. NECN is such a channel. According to Time Warner, the estimated affiliate revenue per subscriber for the projected period is $1.71 for NESN and $0.99 for Fox Sports NE (Exh. Time Warner-11, at 4). In our most recent Comcast Cable Communications, Inc. rate proceeding, we determined that the prevailing market price of NECN charged to non-affiliates was $0.27 per subscriber per month. CTV 04-3/04-4, at 26. This is consistent with information provided by Time Warner (RR-CTV-17).[15] The average of these three rates is $ 0.99 per subscriber per month. This result establishes a fair market value for Capital News 9 that is based upon the prevailing market price for the regional networks offered on the Pittsfield System.

We recognize that the value we have placed on Capital News 9 is significantly greater than the prevailing market rate of the other regional news channel serving the Pittsfield System, NECN. Time Warner has developed a record that supports this treatment. Capital News 9 has a news bureau in Pittsfield, operating from the Company's local cable office (Tr. at 8; RR-CTV-3; RR-CTV-19). Since its inception, Capital News 9 has covered over 1,000 stories specific to Pittsfield and the Berkshire County area (Tr. at 10). Because of Capital News 9's local coverage, broadcast channels have reacted either by establishing, for the first time, news bureaus in Berkshire County, or by expanding their already existing

---

15 Upon Time Warner's request, this information is protected from public disclosure. In this particular response, Time Warner provided a range of prevailing market prices for several networks: CNN, ESPN, Fox News Channel, and NECN (RR-CTV-17). Although Time Warner did not provide the specific prevailing rate for NECN, we are able to deduce from the range provided that the rate determined in CTV 04-3/04-4 is consistent.

presence (id.). We have also given due weight to Time Warner's evidence concerning the quality of Capital News 9 programming. Capital News 9 has been recognized for excellence and achievement in the news arena, and presented a list of awards that the channel has earned (Tr. at 11; Exh. Time Warner-4). Capital News 9 has earned seven awards, including two national awards, one for the best sports show from the National Horse Racing Association, and the other from the Radio-Television News Directors Association: the Edward R. Murrow award for the Best News Web Site (Exh. Time Warner-4). Most recently, the National Academy of Arts and Sciences awarded Capital News 9 an Emmy for the Best Consumer Program in the New York region (id.).

We further recognize that the fair market value of Capital News 9 in Pittsfield is less than the per-subscriber operating costs that Time Warner has assigned to it. This result is justified not only under the FCC's affiliate transaction rules, but also given that Pittsfield is, in effect, a secondary market for Capital News 9. See generally TW Fanch-One, Co., d/b/a Time Warner Cable v. State of New Jersey: Appeal of Local Rate Order, at 6 (September 22, 2003) (distinguishing costs reported in general ledger and the portion of those costs claimed in secondary market).

Accordingly, we conclude that the fair market value of Capital News 9 for the projected period is $0.99, which is less than the channel's projected period net book costs of $1.59. Therefore, because the FCC's regulations permit the cable operator to recover the lesser of fair market value or net book cost, Time Warner is entitled to recover, for the projected period, programming costs for Capital News 9 of $0.99 per subscriber per month. See 47 C.F.R. § 76.924(i)(1).

C. Conclusion

As we discussed above, the issue of the appropriate amount of Capital News 9 programming costs to be included in the calculation of the MPR has been before the Cable Division in the last three Time Warner rate proceedings. In this proceeding, Time Warner has presented evidence to justify the inclusion of $0.99 per subscriber per month. We now address how this determination is to be reflected in the MPR calculation.

The mechanics of the FCC Form 1240 are such that an MPR is built on the previously approved rate. So while the Cable Division could require Time Warner to simply adjust its proposed FCC Form 1240 filed on October 4, 2004, to reflect the approved programming cost inclusion, such an adjustment would not fully capture adjustments required previously.[16] Further as discussed above, Time Warner has not yet paid any refunds required by our Order in CTV 03-4, since its request for a stay of the refund order is pending before the FCC. Time Warner's request for a stay was predicated on its contention that the programming costs justified in this proceeding would affect the true-up calculation, and thus the amount of total refund liability. Since this issue has been resolved here in Time Warner's favor, the basis for the stay is moot, and it is likely the FCC will dismiss the request. Therefore, in the interests

[16] While Time Warner has appealed to the FCC for review of the Bureau Order, it has not requested a stay of our decision in CTV 03-4, and thus, our order is fully enforceable.

of administrative efficiency, and to prevent further subscriber confusion, the Cable Division directs Time Warner to submit a filing for our review and approval that reflects our recent orders.

Specifically, Time Warner is directed to revise the FCC Form 1240 proposed on October 4, 2004, to reflect, on Line A1, the BST MPR of $6.68 that the Cable Division approved in the previous rate case (Exh. Time Warner-14; See CTV 03-4, "Order on Compliance Filing" (2004)). The form's Module D should include the relevant amounts from the previous Module I approved by the Cable Division. CTV 03-4, "Order on Compliance Filing" (2004). Likewise, Module F, Line 8, should reflect the approved true-up calculation from Module H (id.). For the true-up period, Time Warner should adjust the programming costs reported on Worksheet 7, Line 701, to include, for the last nine months of the true-up period, monthly per-subscriber programming costs for Capital News 9. Time Warner should calculate the programming costs for the true-up period, by using a price for NECN of $0.27, and using, for Fox Sports NE and NESN, either the estimated or actual affiliate revenues per subscriber for 2004, as reported on the Company's Exhibit 11, page 4, and on RR-CTV-23. For the 12-month projected period, Time Warner must adjust the monthly per-subscriber programming costs to reflect monthly per-subscriber programming costs of $0.99, approved herein. The Company should then calculate a new BST MPR for the projected period.

Time Warner is further directed to compare the resulting projected period BST MPR with the average rate charged for the 15-month period from October, 2004, through December, 2005. If the Company has overcharged subscribers during this period, the Company is directed to refund any such overpayment. The Cable Division directs the Company to include all of these 15 months in the refund period, so that all pending refund issues from the current proceeding may be settled at this time. This will resolve any refund issues related to the three months between October and December 2004, which are not included on the current form. Otherwise, these months' refund issues would only be resolved in the 2006 rate proceeding, where they are included in the true-up period. Similarly, the extension of the refund period through December, 2005, even though this is after the date of this Order, allows Time Warner to resolve all refund issues related to the current projected period. Through this approach, the programming issues that have bedeviled the Cable Division and Time Warner for three years can be settled, and Time Warner's 2006 filing can be reviewed with no lingering refund questions.

VI. ORDER

Upon due notice, hearing, and consideration, the Cable Division hereby rejects Time Warner's FCC Form 1240, as filed on October 4, 2004, for Dalton, Pittsfield and Richmond. The Cable Division hereby directs Time Warner to resubmit its FCC Form 1240 in accordance with this Order, on or before Wednesday, December 14, 2005. The Cable Division further directs Time Warner to refund any overcharges to subscribers in compliance with this Order. Time Warner must provide the Cable Division, by December 14, 2005, a statement indicating the Company's total refund liability, the amount per subscriber to be refunded, and the earliest billing cycle during which the refunds will be made.

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

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

Issued: November 30, 2005

RIGHT OF APPEAL

Appeals of any final decision, order or ruling of the Cable Division may be brought within 14 days of the issuance of said decision to the full body of the Commissioners of the Department of Telecommunications and Energy by the filing of a written petition with the Secretary of the Department praying that the Order of the Cable Division be modified or set aside in whole or in part. G.L. c. 166A, § 2, as most recently amended by St. 2002, c. 45, § 4. Such petition for appeal shall be supported by a brief that contains the argument and areas of fact and law relied upon to support the Petitioner's position. Notice of such appeal shall be filed concurrently with the Clerk of the Cable Division. Briefs opposing the Petitioner's position shall be filed with the Secretary of the Department within seven days of the filing of the initial petition for appeal.