COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
Cable Television Division

RATE ORDER

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.

APPEARANCES: Nancy P. Karm
Vice President, Finance
Time Warner Cable
1021 High Bridge Road
Schenectady, NY 12303

- and -

Peter M. Taubkin
Vice President, Government Relations & Public Affairs
Time Warner Cable
1021 High Bridge Road
Schenectady, NY 12303

FOR: TIME WARNER CABLE
Petitioner

I. INTRODUCTION

On October 2, 2003, Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable ("Time Warner" or "the Company") filed with the Cable Television Division ("Cable Division") of the Department of Telecommunications and Energy proposed basic service tier ("BST") programming rates on Federal Communications Commission ("FCC") Forms 1240. The Company filed two FCC Forms 1240: one for Athol and Orange (the "Athol System") ("Athol FCC Form 1240") and the other for Dalton, Pittsfield, and Richmond (the "Pittsfield System") ("Initial Pittsfield FCC Form 1240") (Exhs. Time Warner-1, Time Warner-2). In conjunction with its FCC Forms 1240 filing, Time Warner also filed a nationwide FCC Form 1205 with proposed equipment and installation rates based on fiscal year ending September 30, 2002. On December 1, 2003, the Company submitted a revised FCC Form 1240 for the Pittsfield System to reflect adjustments based on the prior proceeding's rate order ("Revised Pittsfield FCC Form 1240") (Exh. Time Warner-3). See Time Warner Entertainment-Advance/Newhouse Partnership, CTV 02-16 (2003) ("2003 Order"). Pursuant to the FCC's rate regulations, Time Warner implemented changes to its BST programming, equipment and installation rates on January 1, 2004. See 47 C.F.R. § 76.933(g).

The Cable Division held a public meeting in Pittsfield on May 18, 2004, and an evidentiary and public hearing in Boston on June 8, 2004. No communities intervened in the proceeding. The evidentiary record consists of Time Warner's rate forms admitted as Time Warner Exhibits 1 through 4, Time Warner's responses to information requests admitted as Cable Division Exhibits 1 through 27, and Time Warner's responses to record requests and briefing questions issued by the Cable Division.

II. STANDARD OF REVIEW AND BURDEN OF PROOF

The FCC has created specific forms incorporating the provisions of its rate regulations, upon which a cable operator must calculate its rates. The FCC Form 1240 allows a cable operator to annually update its BST programming rates to account for inflation, changes in external costs, and changes in the number of regulated channels. Instructions to FCC Form 1240, at 1-2; 47 C.F.R. § 76.922(e)(1). To adjust rates 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. 47 C.F.R. §§ 76.922(e)(2)(ii)(A) and 76.922(e)(2)(iii)(A).

The FCC Form 1205 establishes rates for installations and equipment, such as converters and remote controls, based upon actual capital costs and expenses. Instructions to FCC Form 1205, at 7, 12-13. The FCC Form 1205 is prepared on an annual basis using information from the cable operator's previous fiscal year. Id. at 2. Subscriber charges for

equipment shall not exceed charges based on actual costs as determined in accordance with FCC regulations. 47 C.F.R. § 76.923(a)(2).

The standard under which the Cable Division must review rate adjustments is found in the FCC's rate regulations. Specifically, the rate regulator shall assure that the rates comply with the requirements of Section 623 of the Communications Act of 1934, as amended. 47 U.S.C. § 543; see also 47 C.F.R. §§ 76.922, 76.923, and 76.930. The Cable Division may accept as in compliance with the statute BST rates that do not exceed the "Subsequent Permitted Charge" as determined by federal regulations. See 47 C.F.R. § 76.922(c). The Cable Division may also accept equipment and installation charges that are calculated in accordance with federal regulations. See 47 C.F.R. § 76.923. In addition, the Cable Division shall only approve rates it deems reasonable. G.L. c. 166A, §§ 2, 15; 47 U.S.C. § 543; 47 C.F.R. § 76.937(d); see also 47 C.F.R. § 76.942.

The burden of proof is on the cable operator to demonstrate that its proposed rates for BST programming and accompanying equipment and installations comply with federal law and implementing regulations. 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, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5716, at ¶ 128 (1993) ("Rate Order"); see also 47 C.F.R. § 76.937(a).

III. DISCUSSION AND ANALYSIS

Based on our review of Time Warner's FCC Form 1240 for the Athol System and its nationwide FCC Form 1205 for all Massachusetts communities, as well as the Company's responses to inquiries, the Cable Division determines that the Forms were prepared in compliance with federal laws and regulations. As such, we conclude that the BST maximum permitted rate ("MPR") established by the Athol FCC Form 1240 is just and reasonable and in compliance with applicable law. We further conclude that the equipment and installation rates established by the FCC Form 1205 are just and reasonable and in compliance with applicable law. However, we determine that there are four separate issues on the Pittsfield System FCC Form 1240 that necessitate further discussion.

A. Copyright Costs

In comparing the Initial Pittsfield FCC Form 1240 with the FCC Form 1240 filed for Pittsfield for the previous period, there was a reduction in copyright costs (see Exh. Time Warner-2). However, on the Revised Pittsfield FCC Form 1240, there is an

increase in copyright costs reported for the true-up period (see Exh. Time Warner-3).[1] Time Warner did not provide any justification for either the copyright cost decrease or the subsequent increase. In response to an information request, the Company acknowledged that it had miscalculated the copyright costs on the Revised Pittsfield FCC Form 1240 (Exh. CTV-25). Per the Cable Division's directive, Time Warner submitted an adjusted FCC Form 1240, on June 29, 2004 ("Adjusted Pittsfield FCC Form 1240") (CTV-RR-1). The Cable Division finds that Time Warner appropriately revised the copyright costs reflected on the Adjusted Pittsfield FCC Form 1240.

B. True-Up Rate

In the FCC Form 1240 true-up calculation, Time Warner overstated its BST rate by including a $0.54 increment attributable to the Company's upgrade of the Pittsfield System. See Worksheet 8, Column a, of Initial Pittsfield FCC Form 1240; see also Worksheet 8, Column a, of Revised Pittsfield FCC Form 1240. The upgrade segment is calculated separately on FCC Form 1235 and is not included in calculating the BST rate on the FCC Form 1240. Instructions to FCC Form 1240, at 9. Upon questioning, the Company acknowledged that the FCC Form 1235 upgrade amount was erroneously included on Worksheet 8 of the FCC Form 1240 (Exh. CTV-23). On its Adjusted Pittsfield FCC Form 1240, the Company revised the actual true-up rates included in Worksheet 8, appropriately removing those amounts attributable to the upgrade increment calculated on a previously approved FCC Form 1235 (RR-CTV-1).

C. Inflation Factor

In the Initial Pittsfield FCC Form 1240, Time Warner used an inflation factor of 2.39 percent for the projected period and calculated an inflation factor of 2.24 percent for the true-up period (Exh. Time Warner-2).[2] When Time Warner submitted its Revised Pittsfield FCC Form 1240, the Company changed its inflation factor to 1.21 percent for the projected period (Exh. Time Warner-3). The Company retained the calculated inflation factor of 2.24 percent for the true-up period (id.).

When updating forms to correct for errors, a franchising authority may require a cable operator to use the most recent inflation factors available rather than revert to the inflation factors at the time of the filing. Time Warner Cable, Memorandum Opinion and Order, DA 98-967, at ¶ 6 (1998). The Cable Division has previously adopted this methodology. See e.g., MediaOne Enterprises, Inc., Y-99B INC, Y-99B EQU (2000); Time Warner

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[1] These costs were not at issue in the previous proceeding and therefore the Cable Division would expect these costs to remain constant on the revised form.

[2] At the time of its initial filing, the Company based its calculation of the inflation factor on 1.78 percent for months 1 through 3 and 2.39 percent for months 4 through 12.

Cable, Acushnet et al., Y-97 INC (1998). The inflation adjustment for the true-up period is calculated using quarterly figures based on changes in the Gross National Product Price Index ("GNP-PI") as published by the Bureau of Economic Analysis of the United States Department of Commerce. Time Warner Cable, Memorandum Opinion and Order, DA 98-967, at ¶ 4 (1998) citing 47 C.F.R. § 76.922(e)(2)(i); see also Instructions to FCC Form 1240, at 13. The inflation factor to be used for the projected period is simply the most recent quarterly inflation figure released by the FCC. Instructions to FCC Form 1240, at 14.

The Cable Division questioned the Company's use of an inflation factor of 1.21 percent for the projected period. In response, Time Warner indicated that the Company had mistakenly used the 1.21 percent factor for the projected period, and that the Company had meant to continue using the inflation factor of 2.39 percent from its initial filing (Exh. CTV-24). The Cable Division also questioned the Company's use of 2.24 percent as the factor for the true-up period. Additional inflation figures had become available since the initial filing that would have resulted in an adjustment to the inflation rate on the Revised Pittsfield FCC Form 1240. Time Warner asserted that according to information available to the Company, the 2.24 percent factor calculated for use in the true-up period was correct (id.).

The most recent inflation figure available at the time the Company filed its Revised Pittsfield FCC Form 1240 was 1.00 percent, and in fact, 1.21 percent had not been listed as a GNP-PI inflation factor at any point during this proceeding. Public Notice, Media Bureau Action: First Quarter 2004 Inflation Adjustment Figures for Cable Operators Using FCC Form 1240 Now Available, DA 04-2080 (FCC July 12, 2004). However, because the Cable Division has adopted a methodology by which cable operators submitting revised forms during a rate proceeding must update the inflation factors to the most recent available, the Company's use of the inflation factor in effect at the time of its Initial Filing is inappropriate. As such, on the Revised Pittsfield FCC Form 1240, even if the Company had used the correct inflation factor in effect at the time of the Initial Pittsfield FCC Form 1240 filing, i.e., 2.39 percent instead of 1.21 percent, the Company would still have been non-compliant.[3] As to the calculated inflation factor, although 2.24 percent was accurate at the time the Company filed the Initial Pittsfield FCC Form 1240, when the Company submitted its Revised Pittsfield FCC Form 1240 on December 1, 2003, to correct other information on the Form, revised inflation factors were available and should have been used in calculating the true-up inflation factor at that time.

In its Adjusted Pittsfield FCC Form 1240, Time Warner did use the most current inflation factor, i.e., 1.50 percent, as the inflation factor for the Form's projected period (RR-CTV-1). In addition, the 2.24 percent factor used during the true-up period was adjusted

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[3] Similarly, had the Company used 1.00 percent as its inflation factor, it too would have been replaced by a later figure.

by the Company to 1.71 percent reflecting the actual inflation factors that were available for the entire true-up period (id.).[4] The Cable Division finds that the inflation factors were appropriately revised on the Adjusted Pittsfield FCC Form 1240 in accordance with the FCC rules.

D. Programming Costs

1. Introduction

In the previous rate proceeding, Time Warner proposed an increase in BST programming costs of almost $407,000. See 2003 Order at 2. These increased costs were primarily associated with the addition of a local 24-hour news channel, Capital News 9, which launched in October 2002. Id. Time Warner acknowledged that Capital News 9 was an affiliate of Time Warner. Id. at 3. The Cable Division determined the rules promulgated by the FCC for affiliate transactions applied. Id. citing 47 C.F.R. § 76.922(f)(6). However, despite numerous requests from the Cable Division, Time Warner provided insufficient information to allow the Cable Division to determine the reasonableness of the proposed costs under the FCC's standards. Id. at 4. Because the costs associated with Capital News 9 were projected costs and thus subject to reconciliation in the next rate filing, we allowed recovery;[5] however, we put Time Warner on notice that in its next rate proceeding, the Company would be required to satisfy the affiliate transaction rules set forth by the FCC before any actual costs associated with Capital News 9 would be allowed. Id. at 5-6. We outlined the pertinent regulations for the Company, and in our 2003 Order, we specifically alerted the Company that it should be prepared to justify any claimed actual costs associated with the affiliate transaction by either demonstrating a prevailing company price or a fair market value for the programming. Id. at 6, citing 47 C.F.R. §§ 76.922(f)(6), 76.924(i)(1). The Cable Division further noted that recovery would be allowed only to the extent that the Company provided a comparison of the costs to the programming's fair market value. Id. citing 47 C.F.R. § 76.924(i)(1). In this proceeding, Time Warner has again included programming costs associated with Capital News 9. The Company has also stipulated that Capital News 9 is an affiliate of Time Warner (Exh. CTV-15).

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[4] At the time the Company made its initial filing on October 1, 2003, actual inflation factors were only available for the first six months of the true-up period. When the Company submitted its Revised Pittsfield FCC Form 1240 on December 1, 2003, inflation factors for an additional three months were known, and when it submitted its Adjusted Pittsfield FCC Form 1240 on June 29, 2004, the Company was able to use actual numbers for the whole 12-month period.

[5] Although Time Warner contended it should be permitted to recover all of its costs, the Cable Division required the Company to provide information regarding its advertising revenue as an offset to programming costs. 2003 Order at 5.

2. Standard of Review

The FCC permits cable operators to adjust BST rates annually to account for changes in external costs, including programming costs. 47 C.F.R. § 76.922; Rate Order at 5787, ¶ 251. The FCC noted that the treatment of programming cost increases as external costs would assure programmers' continued ability to develop, and cable operators' ability to purchase, programming. Rate Order at 5787, ¶ 251. However, the FCC expressed concern about abuses that might occur if vertically integrated cable operators were permitted to engage in unlimited pass-throughs of programming costs to subscribers. Id. at 5788, ¶ 252. Therefore, the FCC expressly limited the amount of pass-throughs permitted for programming acquired from affiliated programmers. Id. The FCC also noted that it designed its affiliate transaction rules to prevent favorable self-dealing between affiliated companies in order to manipulate the FCC rate rules. 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 Cable Service, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, CS Docket No. 94-28, FCC 95-502, 11 FCC Rcd 2219, 2273, at ¶ 132 (1996) ("Final Cost Order"). As a result, the FCC's affiliate transaction rules allow a cable operator to adjust its rates to reflect increases in costs of affiliate programming, provided that the programming rates charged to the cable operator by the affiliated programmer reflect either (1) the prevailing company prices offered by the programmer to unaffiliated entities or (2) the fair market value of the programming. TCI of Pennsylvania, Inc., Memorandum Opinion and Order, DA 04-1496, at ¶ 13 (May 26, 2004), citing 47 C.F.R. § 76.922(f)(6).

As Time Warner notes, the FCC adopted additional regulations that address affiliate transactions (Exh. CTV-4; Company Brief at 1; see 47 C.F.R. § 76.924(i)). In Section 76.924(i), the FCC established procedures to be used in valuing transactions between cable operators and affiliated companies for those cable operators electing a cost-of-service methodology. See 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 & 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, 4659-4668, at ¶¶ 249-271 (1994) ("Cost Order"); see also Final Cost Order at 2273-2277, ¶¶ 132-143. Because a cost-of-service rate proceeding, unlike a benchmark proceeding, includes all aspects of a cable operator's regulated business, the FCC adopted comprehensive rules applicable to all types of transactions between a cable operator and affiliated companies, e.g., the sale of vehicles and other equipment or the provision of managerial and technical assistance. See generally Cost Order at 4659-4668, ¶¶ 249-271; see also 47 C.F.R. § 76.924(i). However, the FCC noted that for cable operators electing a benchmark approach, these cost-of-service rules could be applicable only to affiliate transactions involving the provision of programming. Cost Order at 4665, ¶ 262, n. 520.

The Company asserts that "three different provisions of the FCC's rules address the pass - through of affiliated programming costs," and presents a number of theories as to the appropriate standard of review (Exh. CTV-4; RR-CTV-2; Company Brief at 2). Initially, the Company asserted that the "inherent ambiguity" in the FCC rules meant that none of the regulations applied (Exh. CTV-4). Later, the Company contended that Section 76.924(i)(3), the section governing services, should apply (RR-CTV-2). In its Brief, Time Warner stated that the issue was not whether Capital News 9 was an asset or a service, but rather that Capital News 9 is a "programming network" and should be differentiated from "programming" (Company Brief at 2). Time Warner further asserted that the FCC's failure to specifically address such programming networks indicates that none of the affiliate transaction rules are applicable (id.). In fact, the Company goes so far as to provide a new standard of review and states that the Cable Division is governed by a reasonableness test (id. at 1). Time Warner specifically asserted that "an appropriate measure of the reasonableness of its pass through for the carriage of Capital News 9 is a comparison of the actual invoiced amounts paid by the system for Capital News 9 with the operating cost of the channel" (id.).

Contrary to Time Warner's assertions, there are, in fact, only two provisions of the FCC's rules that address the pass-through of affiliate programming costs and rather than create any ambiguity, the rules are complimentary. Compare 47 C.F.R. § 76.922(f)(6) and 47 C.F.R. § 76.924(i)(1).[6] Both rules require a showing of fair market value where prevailing company price is not available, and neither of the federal regulations provide for a default to net book costs if the fair market value is not available. See 2003 Order at 4. With respect to the Company's argument that Capital News 9 is a service, rather than an asset, for purposes of affiliate transactions, the FCC has specifically classified programming as an asset. Cost Order at 4666-4667, ¶ 267. This classification is important for two reasons: First, under the cost-of-service rules, differing elements must be met depending on whether the affiliate transaction concerns an asset or a service,[7] and second, and more important, while the rules were established for cable operators electing a cost-of-service methodology, the FCC determined that for those cable operators that have elected a benchmark approach, the rules may be applied, but only for costs of programming. 47 C.F.R. §§ 76.924(i)(1), 76.924(i)(3); Cost Order at 4665, ¶ 262, n. 520. Thus, those cable operators electing the benchmark

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6 The Cable Division's mandate to establish rates that are adequate, just, reasonable, and non-discriminatory exists in conjunction with federal standards of review. See G.L. c. 166A, § 15.

7 For assets, the cable operator must provide information as to either the prevailing company price or a comparison of fair market value and net book costs; for services, the cable operator must provide information regarding either prevailing company price or cost. 47 C.F.R. §§ 76.924(i)(1), 76.924(i)(3).

approach would never be subject to the rules provided under the "service" category. Compare 47 C.F.R. § 76.924(i)(1) and 47 C.F.R. § 76.924(i)(3).

The Cable Division finds no basis for the purported differentiation between a "programming network" and "programming" as asserted by Time Warner (Company Brief at 2). Whether a channel is a local news channel or a national entertainment channel, the channel would schedule the programming, transmit the signal, and market the station. As such, Time Warner failed, in any way, to differentiate what is provided by Capital News 9 from what is provided by any other entity from which Time Warner purchases "programming." In addition, the Company did not provide any legal analysis to indicate that the FCC has made a similar differentiation. The phrase "programming network" does not appear in either the Cost Order or the Final Cost Order. See generally Cost Order and Final Cost Order.[8]

As to the Company's presentation of a new standard of review in its brief, the Company did not provide any actual invoices paid for Capital News 9 and only provided operating cost information. Therefore, the Cable Division considers this to be not only a meritless argument but a last minute effort to avoid the rules under which the Company knows it must proceed.

Clearly, Time Warner disagrees with the Cable Division's prior determination that absent a prevailing company price, fair market value must be shown regardless of which regulation is controlling, and therefore asks the Cable Division to ignore the FCC regulations and precedent related to affiliate transactions and establish a special rule that permits the Company to simply pass through all of its programming costs related to Capital News 9. In determining the appropriate standard to apply to Time Warner's programming costs related to Capital News 9, the Cable Division is not persuaded by any of the Company's arguments, and we reiterate the determination made in our 2003 Rate Order. That is, where the FCC has considered cost as a valuation method of an asset such as programming, it has done so only as such cost relates to fair market value. 2003 Order at 4, citing 47 C.F.R. § 76.924(i). Specifically, in order for a cable operator to recover actual net book affiliated programming costs, the company is required to establish that the programming's fair market value exceeds its net book costs. Id. citing 47 C.F.R. § 76.924(i)(1). Thus, we reiterate that where a cable operator is unable to provide a prevailing company price, the cable operator is required to give evidence of the fair market value of the programming under both of the applicable regulations. Id. at 4, citing 47 C.F.R. §§ 76.922(f)(6), 76.924(i)(1). Here, we need not determine which of the two regulations apply because the Company has not provided evidence of the fair market value.

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[8] The inconsistency of the Company's arguments suggests that Time Warner, having opted for benchmark regulation, is aware that it would not be governed by the cost-of-service rules if Capital News 9 were classified as a service (see Exh. CTV-4; RR-CTV-2; Company Brief at 2).

3. Discussion and Analysis

No prevailing market price exists for Capital News 9. Time Warner stated that "Capital News 9 is not sold to non-affiliates, and therefore, a prevailing market price is not available" (Exh. CTV-4). The Company further stated that Capital News 9 is not currently carried by any cable system not owned by Time Warner and that the Company is not currently negotiating with any other cable operators with respect to carriage of Capital News 9 (Exh. CTV-16; Tr. at 35). Absent a prevailing company price, the Cable Division must ascertain Capital News 9's fair market value. See 47 C.F.R. §§ 76.922(f)(6), 76.924(i)(1). Time Warner testified that it had not determined the fair market value of Capital News 9 (RR-CTV-2). Moreover, the Company provided no indication to the Cable Division that it had conducted any analysis by which a fair market value could be ascertained.

Because Time Warner failed to show a fair market value for Capital News 9, the Cable Division provided opportunities for the Company to outline information the Company considered pertinent as to fair market value (see generally Tr. at 18-33). At the hearing, the Cable Division specifically asked the Company what factors would be relevant in determining the fair market value of Capital News 9 (Tr. at 21). The Company consistently maintained that a fair market value analysis was unnecessary and simply stated that Time Warner had not established a fair market value for Capital News 9 (RR-CTV-2; see also Tr. at 20-24).

In an attempt to impute a fair market value, we inquired of Time Warner's operation of similar local programming in other markets. Time Warner noted that it operates local news stations in Austin, Charlotte, Houston, New York City, Raleigh, Rochester, San Antonio, and Syracuse (Exh. CTV-17). The Company stated that it was not aware of any reports prepared by Time Warner or any other entity as to the cost of similar news channels offered by Time Warner or other cable operators in other markets (Exh. CTV-21; Exh. CTV-22). The Company also stated that while Capital News 9 is not carried on any non-Time Warner cable system, another Time Warner local news station, NY1, is made available to Cablevision in New York City (Exh. CTV-19). However, Time Warner asserted that the terms and conditions of the Cablevision transaction are confidential and proprietary (id.). Time Warner refused to provide price information and asserted that such pricing was "not relevant to the calculations of the programming cost for Capital News 9" (RR-CTV-4).[9] The Company

[9] While arguably not relevant to the calculations of programming costs for Capital News 9, the Company was likely aware that such terms and conditions might have been helpful in estimating the fair market value of Capital News 9.

further contended NY1 is not comparable to Capital News 9 because the "the New York metro area is substantially different from the Berkshire region" (RR-CTV-5).[10]

It is evident from the record that despite numerous efforts on the part of the Cable Division to acquire reasonable information, Time Warner did not make any effort to comply and provide information relative to a fair market value for Capital News 9 (see e.g., Exh. CTV-4, Exh. CTV-19; Tr. at 20-23, Tr. at 36; RR-CTV-2; Company Brief at 1). As the federal rules indicate, cable operators must provide either the prevailing company price, the fair market value, or a comparison of the fair market value and net book costs when establishing the amount to include for affiliate programming on the FCC Form 1240. 47 C.F.R. §§ 76.922(f)(6), 76.924(i)(1). The Cable Division is concerned that Time Warner's refusal to provide evidence of a fair market value is indicative of the Company's expectation that the value would be lower than its net book costs, and that it would therefore benefit the Company to simply not provide the fair market value. In fact, Time Warner appears to be of the opinion that absent a fair market value, the pass-through amount will simply default to cost. On the contrary, the rules regarding affiliate transactions are unequivocal; absent a prevailing company price, the cable operator must provide a fair market value in order to properly determine the amount of programming costs to pass through. Id. The FCC has specifically noted that at the very least, the cable operator is expected to delineate the efforts it made to attempt to arrive at a fair market value. Cost Order at 4668, ¶ 271; see also 2003 Order at 4, citing Verizon Telephone Companies, Inc., Notice of Apparent Liability for Forfeiture, File No. EB-03-IH-0245 (2003). Further, the FCC has explicitly rejected arguments to relax its rules and allow pass-throughs of costs related to new programming until the cable operator is able to market the program to a substantial number of third parties and thus provide a prevailing company price. Final Cost Order at 2276, ¶ 140. The FCC stated that "in a regulated industry, programmers cannot expect regulated ratepayers to subsidize new programming ventures." Id.[11]

The Cable Division is charged with assuring that the proposed rates are calculated in accordance with federal law and regulations. 47 C.F.R. § 76.922(a). The Cable Division is not permitted to establish its own rules and regulations related to the appropriateness of proposed rates that diverge from federal law. As such, we have no basis to rewrite or reinterpret rules that are clearly written. The FCC's rate rules explicitly place the burden of proof on the cable operator. See 47 C.F.R. § 76.937; TCI of Pennsylvania, Inc., 19 FCC Rcd 312, DA 04-34, at ¶ 15 (Jan. 9, 2004), see also TCI of Pennsylvania, Inc.,

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[10] The Berkshire region is only a small portion of the area covered by the Albany Division and Capital News 9.

[11] The BST in Pittsfield is made up of 19 channels, four of which have costs associated with them. The programming costs attributed to Capital News 9 alone account for almost 20 percent of the total BST rate.

DA 04-1496 (May 26, 2004). When Time Warner failed to respond adequately to numerous information requests, we reminded the Company of this burden. See Time Warner Entertainment-Advance/Newhouse Partnership, CTV 03-4, Ruling on Responses to Information Requests (May 7, 2004).

Because Time Warner failed to provide evidence reasonably necessary to support the proposed rates, i.e., to demonstrate either the prevailing company price, the fair market value, or a comparison of the fair market value with net book costs, as required by the FCC rules, the Cable Division is required to disallow the programming costs associated with Capital News 9. See Cost Order at 4668, ¶ 271 (cable operators are expected to provide detailed disclosure of affiliate transactions and if they do not demonstrate that the transaction meets the requirements of the affiliate transaction rules, disallowances shall be made).[12] Absent such information, the Cable Division has no discretion, but instead must determine that Time Warner has failed to meet its burden of proof. See Cost Order at ¶ 271. Therefore, Time Warner has essentially left the Cable Division with no alternative but to deny any costs for Capital News 9. Accordingly, we reject the Initial Pittsfield FCC Form 1240, the Revised Pittsfield FCC Form 1240, and the Adjusted Pittsfield FCC Form 1240. The Company is directed to submit an updated FCC Form 1240 for the Pittsfield System as well as a refund plan showing the reduction to the BST MPR and the credit to be paid to subscribers for the overcharge.[13] The updated FCC Form 1240 and refund plan should be filed with the Cable Division no later than Tuesday, October 5, 2004.

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[12] Even if the Cable Division were to ignore the affiliate transactions rules and rely on a cost standard, the Cable Division has serious doubt as to whether the Company would have established the reasonableness of its costs. For example, Time Warner continues to assert in this proceeding that the Company should not be required to offset programming costs with advertising revenues (Exh. CTV-4; Exh. CTV-7; Tr. at 23). Also, the Company's testimony raises serious questions as to whether all of the claimed costs are properly allocable to Capital News 9 in that the Company provided a breakdown of costs including salary and advertising costs based on Pittsfield subscribers, and stated that no further allocation was necessary; however, the Company also testified that its sales team sells advertising not only for Capital News 9 but also for insertion on other channels on Time Warner's Albany system (Exh. CTV-3; Exh. CTV-11; Tr. at 50).

[13] To determine the impact of the affiliate programming costs on the BST MPR, the Cable Division directed Time Warner to provide an updated FCC Form 1240 for the Pittsfield System eliminating the Capital News 9 programming costs (Tr. at 50). The Company refused to comply (Tr. at 51; RR-CTV-8).

4. Conclusion

Based on the record as it exists, we conclude that the Company has failed to meet its burden of proof in this matter. Specifically, Time Warner has failed to provide evidence demonstrating the fair market value of Capital News 9 by which the Cable Division may determine the reasonableness of the proposed programming costs under either 47 C.F.R. § 76.922(f)(6) or 47 C.F.R. § 76.924(i)(1). We further conclude that even if the Cable Division were to apply a cost standard, significant questions exist as to the reasonableness of Time Warner's proposed programming costs.

IV. ORDER

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 filed on October 2, 2003, for Athol and Orange.

Upon due notice, hearing and consideration, the Cable Division hereby rejects Time Warner's initial 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. The Cable Division hereby directs Time Warner to resubmit its FCC Form 1240 for Dalton, Pittsfield, and Richmond in accordance with this Order and to file a refund plan on or before Tuesday, October 5, 2004, for BST overcharges that have resulted from its treatment of programming costs.

Further, 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 1205 as filed on October 2, 2003, for Athol, Dalton, Orange, Pittsfield, and Richmond.

The attached schedule provides, for Athol and Orange, Time Warner's previous and current BST programming rates, as well as its proposed and approved MPR BST programming

rates. The attached schedule also provides, for all communities, Time Warner's previous and current equipment rates, as well as proposed and approved maximum permitted equipment rates.

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

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

Issued: September 21, 2004

APPEALS

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.