



COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

In the Matter of:	)	Docket No. CTV 02-16
	)	Date Issued: September 30, 2003
Time Warner Entertainment- Advance/Newhouse Partnership	)	Athol, CUID MA 0013
	)	Dalton, CUID MA 0027
d/b/a Time Warner Cable	)	Orange, CUID MA 0014
	)	Pittsfield, CUID MA 0028
For a Determination of Cable Television Rates	)	Richmond, CUID MA 0096
	)	

**RATE ORDER**

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

FOR: TIME WARNER CABLE  
Petitioner

## I. INTRODUCTION

On October 2, 2002, 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") Form 1240. The Company filed two FCC Form 1240s: one for Athol and Orange (the "Athol System"), and the other for Dalton, Pittsfield, and Richmond (the "Pittsfield System"). Both of these systems are operated by the Company's Albany Division. The Company also filed the Time Warner nationwide consolidated FCC Form 1205 for the 12-month fiscal year ending on September 30, 2002. Pursuant to the FCC's rate regulations at 47 C.F.R. § 76.933(g), Time Warner implemented changes to its BST programming, equipment and installation rates on January 1, 2003.

On March 25, 2003, the Cable Division held a public hearing in Boston on Time Warner's pending filings. No communities intervened in the proceeding. The evidentiary record includes three Time Warner exhibits and responses to record requests posed by the Cable Division. No party filed a brief.

## 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. In order that rates be adjusted on the FCC Form 1240 for projections in external costs, or for projected changes to the number of regulated channels, the cable operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. 47 C.F.R. §§ 76.922(e)(2)(ii)(A) and 76.922(e)(2)(iii)(A). 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).

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 established by the FCC Form 1205 shall not exceed charges based on actual costs as determined in accordance with the FCC's regulatory requirements. 47 C.F.R. § 76.923(a)(2).

The standard under which the Cable Division must review rate adjustments on the FCC rate forms is found in the FCC's rate regulations. Specifically, the regulations provide that 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; 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 Per Channel 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) and (e), and 76.942.

The burden of proof is on the cable operator to demonstrate that its proposed rates for BST programming and accompanying equipment comply with Section 623 of the Communications Act of 1934, as amended, 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 (May 3, 1993) at 5716, ¶ 128 ("Rate Order"); see also 47 C.F.R. § 76.937(a).

### III. DISCUSSION AND ANALYSIS

#### A. The Pittsfield System FCC Form 1240

For the Pittsfield System, Time Warner proposed an increase in BST programming costs from \$99,006 during the true-up period to \$505,664 during the projected period (Exh. Time Warner-2, at Worksheet 7, Line 701). Time Warner testified that the projected increase in programming costs is attributed, in large part, to the addition of Capital News 9, a 24-hour local news channel, to its BST channel lineup (Hearing Audiotape, Side A at Counter Nos. 82-92; see Exh. Time Warner-2, Comparative Lineup). Capital News 9 is owned by Time Warner through its wholly-owned subsidiary, Time Warner Entertainment/Advance Newhouse Partnership Newschannel of Albany, LLC (RR-CTV-10; RR-CTV-11; RR-CTV-12). Time Warner launched Capital News 9 in October 2002, in most of its Albany Division's systems, including the Pittsfield System (RR-CTV-5(b); RR-CTV-6(b)).<sup>1</sup> The channel carries Pittsfield news and has an office in Pittsfield (Hearing Audiotape, Side A at Counter Nos. 94-97).

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<sup>1</sup> Time Warner does not offer Capital News 9 in its Athol System (see Exh. Time Warner-1, Comparative Lineup).

Time Warner proposed a monthly per-subscriber programming cost for Capital News 9 of \$1.84. Time Warner calculated the monthly per-subscriber cost by dividing the annual projected operating costs for the channel (\$6,310,607) by the average number of subscribers receiving the channel (308,020), and then dividing by 12 to arrive at the monthly figure of \$1.71 (RR-CTV-5, Exhibit A; RR-CTV-7). The resulting \$1.71 monthly per-subscriber cost was multiplied by the allowable return of 7.5 percent<sup>2</sup> to arrive at the proposed amount of \$1.84. The proposed BST maximum permitted rate (“MPR”) increase in the Pittsfield System from \$8.20 to \$9.59 is largely attributable to the programming cost related to Capital News 9.

A cable operator is permitted to annually update its BST programming rates to account for changes in external costs. Instructions to FCC Form 1240, at 38-40; 47 C.F.R. § 76.922. The FCC has determined that cable operator’s programming costs should be treated as external costs. Rate Order, at 5787, ¶ 251. However, the FCC expressed its concern about abuses that might occur if vertically integrated cable operators were permitted to engage in unlimited pass-throughs of programming costs to their subscribers. Id. at 5788, ¶ 252. Hence, the FCC provided an express limitation on the pass-throughs permitted for programming services from affiliated programmers. Id. The FCC’s current rule specifies that when external cost adjustments are made to reflect changes in the cost of programming purchased from an affiliated programmer, the cable operator must apply one of two methods to establish price. 47 C.F.R. § 76.922(f)(6). The price will either be the prevailing company price offered in the marketplace to third parties, where the programmer has established such prices, or the fair market value of the programming. Id.

Time Warner conceded that Time Warner Entertainment/Advance Newhouse Partnership Newschannel of Albany, L.L.C., is an “affiliate” of Time Warner, as that term is defined by 47 C.F.R. § 76.922(f)(6) (RR-CTV-13). Therefore, the FCC rule governing pass-throughs for the programming services of an affiliated programmer apply. See 47 C.F.R. § 76.922(f)(6). We must review the proposed programming costs to determine whether they are consistent with the prevailing company price of the programming offered in the marketplace or the fair market value of the programming.

Time Warner stated that no other cable operator currently carries Capital News 9 (RR-CTV-6(d)). While the Company seeks to provide the channel to other cable operators, it

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<sup>2</sup> The FCC adopted this 7.5 percent mark-up to encourage cable operators to add new programming. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (March 30, 1994), at 4244, ¶ 246, n. 345. This mark-up is codified in the FCC’s rate regulations at 47 C.F.R. § 76.922(f)(8).

is uncertain whether there is a market for the channel outside of the Albany area (Hearing Audiotape, Side A at Counter Nos. 153-155; RR-CTV-6(d)). Based on these facts, we determine that no prevailing company price exists for Capital News 9.

Absent Time Warner's ability to establish a prevailing company price, we consider the fair market value of Capital News 9. See 47 C.F.R. § 76.922(f)(6). In establishing the valuation rules for affiliate transactions, the FCC has stated the valuation methods for cable operators are similar to those for telephone companies. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-286, 10 FCC Rcd 1226 (Nov. 18, 1994), at 1268-1269, ¶ 121. The FCC has specifically stated that while the FCC's rules do not prescribe a specific method for determining fair market value, they do require a company to make a good faith estimate. See Verizon Telephone Companies, Inc., Notice of Apparent Liability for Forfeiture, File No. EB-03-IH-0245 (Sept. 8, 2003). With respect to the fair market value of Capital News 9, Time Warner presented no estimate of the fair market value. Time Warner provided no evidence of an independent valuation of the programming at issue. Even if independent valuation methods are not easily applied to a transaction of this nature, the FCC requires the Company to maintain sufficient records to support the value determination. Id. at ¶ 10. There is no evidence of such records.

Moreover, Time Warner provided no legal argument that a value determination is inappropriate in this situation. While Time Warner, in response to record requests, provided some cost information relative to Capital News 9, the Company presented no legal argument to support the position that cost is the appropriate determination of affiliated programming cost pass-throughs, particularly given the FCC's clear admonition that such a method could lead to abuses. Rate Order at 5788, ¶ 252. Where the FCC has considered cost as a valuation method, it has done so only as such cost relates to fair market value. 47 C.F.R. § 76.924(i). As such, even if the broader affiliate transaction rules were applied to the affiliate transaction under review, in order for Time Warner to recover the actual net book costs of Capital News 9, the Company would be required to establish that the channel's fair market value exceeded its net book costs. See 47 C.F.R. § 76.924(i)(1). Time Warner has not provided evidence of the fair market value. Further, the federal regulations do not provide for a default to net book costs if the fair market value is not available. See 47 C.F.R. §§ 76.922(f)(6), 76.924(i)(1). Rather, the regulations, whether Section 76.922(f)(6) or 76.924(i)(1), require that a fair market value be provided and that a cable operator must provide evidence concerning the fair market value.

Having failed to satisfy its burden of proof, Time Warner has not established the reasonableness of the proposed programming costs. While the usual course would require exclusion of the costs from the BST MPR calculation, certain public interest considerations

require that we take a more tempered approach. The Cable Division recognizes that the carriage of a local television channel such as Capital News 9 is a public policy goal. Rate Order at 5787, ¶ 251. The FCC, in carving out rules providing for recovery of costs related to affiliate programming, suggested a need to avoid over-regulation to ensure cable operators continue providing programming to subscribers. Id. More generally, Congress recognized the value of local commercial and non-commercial programming by establishing specific rules requiring cable operators to carry such channels. 47 U.S.C. §§ 534, 535.

We anticipate that were we to exclude these costs fully, Time Warner would likely argue that under the First Amendment it has the right to choose which channels it carries on its cable systems, subject only to the constraints of the Communications Act. Under the Communications Act, a local franchising authority may only prescribe broad categories of video programming, not specific channels. 47 U.S.C. § 544(b)(2)(B). For a regulator to deny a cable operator any recovery of its affiliated local news channel costs could be construed as interference with the cable operator's discretion under federal law.

Most importantly, the costs at issue are projected costs. There is no question that some portion of these costs are reasonably certain as the Company has launched the programming in the Pittsfield System. The only question is the appropriate valuation of the programming. Therefore, if we were to exclude the programming costs from this filing's projected period calculation, in its next filing, Time Warner will certainly claim the programming costs associated with Capital News 9 as actual costs, in some amount. These actual costs will be reconciled with the projected costs of zero in the true-up portion of the next filing, subjecting subscribers to a positive true-up adjustment and accrued interest. Instructions to FCC Form 1240, at 19-21; 47 C.F.R. § 76.922(e)(3).

Given the public interests involved, the inclusion of a portion of affiliated programming costs at issue, subject to reconciliation, is warranted. Without a prevailing company price or fair market value, the most reasonable basis available to the Cable Division to calculate the amount to be included is net book cost. The Company testified on cross-examination that Capital News 9 expected to generate advertising revenue of \$1,250,000 during 2003 (RR-CTV-17). This revenue was not included in Time Warner's programming cost calculation. Therefore, we direct Time Warner to recalculate its BST MPR rate, offsetting programming costs by the advertising revenue. The Company is further directed to submit a revised FCC Form 1240 for the Pittsfield System reflecting this adjustment. The Company is further directed to submit a plan outlining refunds, if any, owed to subscribers.

The Cable Division reiterates that we allow these costs, in part, because they are subject to reconciliation in the next filing. Subscribers have an interest in receiving local programming and any short-term impact that may occur as a result of allowing such costs will be fully resolved in the next rate filing. In the next filing, Time Warner should be prepared to justify

any claimed actual costs associated with affiliated programming by either demonstrating a prevailing company price for that programming, or that costs claimed reflect the lesser of fair market value and net book costs.

B. The Athol System FCC Form 1240

On Time Warner's FCC Form 1240 for the Athol System, the Company reported \$5,789 on Line H12, "Previous True-Up Adjustment," even though no remaining true-up adjustment had been reported on Line H15 of the previous FCC Form 1240 (Exh. Time Warner-1; Hearing Audiotape, Side A at Counter Nos. 184-208). Under the FCC Form 1240 Instructions, the amount that appears on the current form's Line H12 must be the same amount that had been entered on the previous form's Line H15. Instructions to FCC Form 1240, at 21. The Company conceded that it had included the amount as a clerical error (Hearing Audiotape, Side A at Counter Nos. 207-208). Time Warner submitted a revised FCC Form 1240, with no amount entered on Line H12 (RR-CTV-1). As a result, the BST MPR in the Athol System decreased from \$10.84 to \$10.75 (id.; Exh. Time Warner-1). Since the current BST rate in the Athol System is \$10.75, no refund is necessary (Hearing Audiotape, Side A at Counter Nos. 226-228). We conclude that the BST MPR established by the revised Athol System FCC Form 1240 submitted as Cable Division Record Request 1 is just and reasonable, and in compliance with applicable law.

C. The Time Warner Nationwide FCC Form 1205

Time Warner filed its nationwide FCC Form 1205 for the fiscal year ending September 30, 2002, with the Cable Division to justify its equipment and installation rates in its Massachusetts communities (Exh. Time Warner-3). Time Warner is permitted to file a nationwide FCC Form 1205 by the Communications Act and FCC regulations. 47 U.S.C. § 543(a)(7); 47 C.F.R. § 76.923(c)(1). The Company filed this FCC Form 1205 in conjunction with its FCC Form 1240 in conformity with the FCC's rate regulations. 47 C.F.R. §§ 76.922(e)(1), 76.923(n)(3). Based on the Cable Division's review of Time Warner's FCC Form 1205, and supplemental information provided in response to Cable Division Record Requests, we conclude that the equipment and installation rates established by the FCC Form 1205 are just and reasonable, and in compliance with applicable law.

IV. CONCLUSION AND ORDER

Upon due notice, hearing and consideration, the Cable Division hereby rejects Time Warner's FCC Form 1240 as filed on October 2, 2002, for Dalton, Pittsfield and Richmond. The Cable Division hereby directs Time Warner to refile its FCC Form 1240 for Dalton, Pittsfield, and Richmond in accordance with this Order and to file a refund plan for BST

overcharges that have resulted from its treatment of programming costs on or before October 15, 2003.

Further, upon due notice, hearing and consideration, the Cable Division hereby rejects Time Warner's FCC Form 1240 as filed on October 2, 2002, for Athol and Orange. The Cable Division hereby accepts as reasonable and in compliance with applicable statutes and regulations, Time Warner's revised FCC Form 1240 submitted as response to Record Request 1 for Athol and Orange.

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, 2002, 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



### **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.