

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Revisions to Cable Television Rate Regulations)	MB Docket No. 02-144
)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation)	MM Docket No. 92-266
)	
Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation)	MM Docket No. 93-215
)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Service)	CS Docket No. 94-28
)	
Cable Pricing Flexibility)	CS Docket No. 96-157

RE: NOTICE OF PROPOSED RULEMAKING AND ORDER

COMMENTS OF THE
MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION

Introduction

The Cable Television Division (“Cable Division”) of the Massachusetts Department of Telecommunications and Energy is the administrative agency charged with regulating the cable television industry in the Commonwealth pursuant to Massachusetts General Laws, chapter 166A. The Cable Division’s responsibilities include representing the interests of the citizens of the Commonwealth before the Federal Communications Commission (the “Commission”). M.G.L. c. 166A, § 16. In addition, the Cable Division has rate

regulatory authority under M.G.L. c. 166A, §§ 2, 15, and has been certified by the Commission as the local franchise authority in Massachusetts. The Cable Division currently regulates basic service tier (“BST”) programming and equipment rates for 281 communities in the Commonwealth. Therefore, the Cable Division has a direct interest in the outcome of this proceeding.

The Cable Division supports the Commission’s efforts to ease the regulatory burdens on both local franchise authorities and cable operators. However, Congress clearly intended to protect BST subscribers when it enacted the 1992 Cable Act. 47 U.S.C. § 543(b)(1); 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 92-266, FCC 93-177, 8 FCC Rcd 5631, 4575-6, ¶ 53 (1993) (“Report and Order”). Therefore, any changes to the rate rules should balance the burden of regulation with the continued protection of these subscribers’ interests. While all of the issues raised in the Commission’s Notice of Proposed Rulemaking and Order (“NPRM”) are significant, our comments focus on areas of particular concern.

1. Rate Adjustments When Channels Are Added To Or Deleted From The BST

In the NPRM, the Commission notes that the language of 47 C.F.R. § 76.922(g) and the sunset of cable programming services tier (“CPST”) rate regulation have left questions about how BST rates should be adjusted when channels are added to or deleted from the BST. The Commission seeks comment on two methods for calculating such adjustments. The first option consists of adding or subtracting the specific “external” costs and a 7.5% programming mark-up associated with the added or deleted channel. This approach would allow operators to remove channels from the BST without any corresponding adjustment to the BST rate. As a

result, the per-channel costs would increase, imposing an unjust burden on the BST subscribers.

The second option would require operators to use the “per-channel adjustment factor” table in order to adjust the BST rate. All tier channels, both those on the regulated BST and those on the unregulated CPST, would be used in determining the total number of channels for calculating the per-channel adjustment. This method does not account for the residual, leaving those costs to be borne by BST subscribers.

Alternatively, the Commission seeks comment on the appropriateness of reinstating the Commission’s previous rules relating to the addition and deletion of channels from the BST. 47 C.F.R. § 76.922(g). Reinstatement of certain aspects of these rules is the most appropriate approach to adjust for channel additions and deletions since it would allow operators a small per-channel adjustment along with associated programming costs for any channels added to the BST. For deletions from the BST, operators would be required to follow the original Form 1240 rules pertaining to channel movements and deletions. As such, operators would be required to remove the per-channel residual (calculated on Worksheet 4 of the Form 1240) for each channel deleted from the BST. By limiting rate increases for channels added to the BST to small per-channel amounts and any associated programming costs and by removing the residual when channels are deleted, the Commission’s proposal to reinstate paragraph (g) ensures that the BST rates are reasonable.

However, reinstatement of the rule that allowed the residual of channels moved from the CPST to the BST to be added to the BST rate is inappropriate. In today’s environment, where the CPST is unregulated, allowing operators to shift the per-channel residual associated

with the CPST channels to the BST would be potentially punitive to all subscribers since there would be no corresponding offset required in the CPST rate.

2. Initial Regulated Rates

The Commission seeks comment on whether to revise the current methodology for establishing initial BST rates. The rules explicitly require operators to initially calculate the rate on the Form 1200 using data from the year 1994 and then adjust that rate annually by completing all subsequent rate forms. 47 C.F.R. § 76.922(b)(6)(i). In practice, however, many operators have argued before us that given the consolidation in the cable industry, the information necessary to complete this series of forms is simply not available. Moreover, even if the information were available, we recognize the operators cannot ensure the accuracy of the data.

Given the issues operators have presented with respect to obtaining the requisite data, and the burden on local franchise authorities charged with reviewing the accuracy of this data when provided, the Cable Division suggests that the current methodology for establishing initial BST rates be revised. A comparison of rates with those approved in regulated communities similar in size, channel line-up, and economic characteristics would be a reasonable solution. Another possibility would involve an average of all regulated rates in a region. The Cable Division does not endorse any one method, and suggests that providing operators with an option between two such methods might be appropriate. In this way, the burden on operators and franchise authorities would be properly balanced with the establishment of a just and reasonable BST rate derived from other regulated rates.

3. Rate Structures and Uniform Regional Rates

The Cable Division supports the Commission's efforts to facilitate the implementation by operators of rates that are uniform on a regional basis. Uniform pricing not only reduces subscriber confusion, but also provides a basis on which a regulatory authority may analyze and compare trends in rates and further study the efficacy and need of rate regulation.

Further, the presentation of a single rate justification for many communities significantly reduces the burden on regulators in reviewing rate filings and enhances the regulators' ability to ensure consumer protection.

The Commission, in the NPRM, asks whether there are other changes in the rules that might be useful in order to create greater flexibility in rate structures or more uniform regional rates while continuing to maintain rules designed to keep BST rates reasonable. In Massachusetts, the most significant obstacle to implementing uniform rates appears to be the disparity in franchise costs among communities. Absent this element in the rate calculation, the variation in the BST rate in similar systems is minimal. If franchise related costs like franchise fees were calculated and justified independently from the overall BST rate calculation and computed separately on a community-by-community basis, operators could use a revised methodology to calculate a uniform BST rate on a multi-community, system, or regional basis. Each community's franchise costs would then be added to this single BST rate to determine the total rate in each community. Not only would this allow rate standardization, it also would identify for subscribers that portion of their bill that supports public, educational, and government access and other franchise commitments. The benefits to subscribers as well as the reduction in regulatory burdens for operators and franchise authorities highlights the need for the Commission to continue its efforts to facilitate uniform pricing and, as part of its

considerations, implement a rule requiring that all franchise costs be computed and justified independent of the BST calculation.

4. Small System Issues

We note that all of those systems in Massachusetts that qualified for small system status have been purchased by multiple system operators. Yet, the Commission's rules allow these operators to retain the small system designation as long as the individual system remains within certain size requirements. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, FCC 95-196, 10 FCC Rcd. 7393, at 7413-4, ¶ 38 (1995). Any change to the Commission's small system rules should take into account the economies of scale now being realized by these systems and, at a minimum, include a sunset period, after which they would be subject to the rules generally applicable to all other operators.

5. Rates of Interest

The Commission seeks comment on the 11.25% rate of interest used for one time over or under estimation of projected costs on the Form 1240. As the Commission is aware, the 11.25% interest rate has been in effect since re-regulation began in 1993. Since that time, and in recent years in particular, interest rates have dropped to historically low levels. The current interest rate provided in the Form 1240 true-up mechanism may encourage operators to more conservatively project its costs in order to avail itself of this favorable rate. Since projected costs closely resemble subscriber refunds, we suggest that the rates published by the Internal Revenue Service for tax refunds and additional tax payments be applied to the over or under estimation of projected costs. See 47 C.F.R. § 76.942(e).

6. Procedures for Commission Review of Local Rate Decisions

The NPRM seeks comments as to whether the procedural aspects of the Commission's review of local rate decisions might be improved and in particular whether the deference afforded local franchise authorities should be increased. While the Commission's stated standard of review provides that the Commission will defer judgment to the local franchise authorities as long as there is a rational basis for such a decision, we encourage the Commission to afford local franchise authorities, such as ourselves, additional deference in rate decisions. Report and Order at 5641-2, ¶ 149. Adopting a more deferential standard of review would allow the Commission to intervene in egregious situations, such as when a local franchise authority is significantly deviating from the rate regulation process, and would free the Commission from review of more routine issues.

7. Re-Evaluation of the BST Rate Regulation Process

In the NPRM, the Commission solicits comments regarding broader changes to the existing process than the specific items addressed above. The Cable Division suggests that the Commission consider more comprehensive changes. The Cable Division has been regulating rates for most Massachusetts communities since re-regulation began in 1993. Since 1994, the Cable Division has seen a steady reduction in the effectiveness of the rate regulations in maintaining low BST programming and equipment rates for subscribers.

A particular concern of the Cable Division is that the Form 1240 rate process no longer functions as the Commission initially intended. When the Commission introduced the Form, with its true-up section, the Commission established a process by which an operator would charge the maximum BST programming rates it could justify under the Form's calculations, and then alter its rates only slightly each year in order to adjust for differences between the

projected costs and the actual costs. Presently, operators charge subscribers BST rates that are well below the maximum permitted rates (“MPR”) that are calculated on the Form 1240. While this has a short-term benefit for subscribers, there are significant long-term consequences.

When the Commission originally developed Form 1240, its initial concern in not adopting a “use or lose” approach was that operators may be forced to adjust rates and claim inflation that they would prefer, perhaps for business reasons, to delay. Thus, the Commission allows operators to select a rate less than its MPR. However, when an operator combines this with the Form’s true-up mechanism, the operator may achieve rate setting to meet its revenue goals, yet in addition is able to bank the unrecovered portion of the BST MPR by “selecting” a rate on Line I10, “Operator Selected Rate for Projected Period,” that is lower than the MPR established on Line I9, “Maximum Permitted Rate for Projected Period.” This adjustment allows the operator to recoup, with interest at a very favorable rate of 11.25%, the undercharge on its next Form 1240. Since the operator has banked this unrecovered BST rate, it has less concern that any aggressive projections might result in future refunds or rate reductions. In this way, operators use the regulatory process to produce results that were not intended when the Commission’s rate regulations and Form 1240 were promulgated.

Moreover, under the current system, if an operator elects to shift an unrecovered BST increase onto the CPST and charge it to subscribers, it may still retain this increase for future BST use, with interest, even though the adjustment was actually taken on the CPST. This amounts to “double dipping” as it provides the operator with two opportunities to recover the same costs. Since CPST regulation has ceased, the Commission should reassess the need to allow operators to indefinitely bank their unused BST rate adjustments.

Congress directed the Commission to establish regulations that ensure that rates for the BST are reasonable. 47 U.S.C. § 543(b)(1). If operators can afford to bank such large sums of money, the mechanics of the Form should be revisited to determine if it is providing too much return to operators. In rate setting, the concern should not be to simply delay rate increases but, rather, to ensure reasonable rates year to year. Given the problems with the true-up adjustments we have identified, a reassessment of the Form 1240 is warranted.

8. Equipment for Basic-only Subscribers

The Telecommunications Act of 1996 allowed operators to aggregate their equipment costs into broad categories, regardless of the varying levels of functionality of the equipment, on a franchise, system, regional, or company level. 47 U.S.C. § 543(a)(7)(A). However, the Act specifically provided that “[s]uch aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.” Id. Accordingly, the Commission’s rate regulations provide that the costs of customer equipment used by basic-only subscribers may not be aggregated with the costs of equipment used by non-basic-only subscribers. 47 C.F.R. § 76.923(c)(2).

Ensuring compliance with this requirement has gained greater urgency with the introduction of expensive digital equipment, making it imperative that basic-only subscribers not be burdened with equipment costs affected by technological advances. We recommend that the Commission consider revising its regulations implementing 47 U.S.C. § 543(a)(7)(B) to specifically require the computation of equipment rates for basic-only subscribers. The Form 1205 should be similarly revised to include specific entries for basic-only subscriber equipment.

In closing, we appreciate the opportunity to comment on these matters of great importance to cable television subscribers and to the cable television industry.

Respectfully submitted,

/s/ Alicia C. Matthews _____

Alicia C. Matthews

Director, Cable Television Division

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