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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 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

To: The Commission

SUPPLEMENTARY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys and pursuant to Sections 1.415(d) and 1.419 of the Commission's rules,[1] hereby submits the following supplementary comments in connection with the above-captioned *Notice of Proposed Rulemaking* (the "*Notice*").[2] The *Notice* sought comment regarding, among other things, network upgrade rate adjustments calculated under FCC Form 1235, whether this rate adjustment option continues to be necessary, and whether other adjustments are appropriate to the Commission's FCC Form

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[1] 47 C.F.R. §§ 1.415(d), 1.419. The Media Bureau staff invited these supplementary comments to provide a more complete record in connection with the Commission's network upgrade rate adjustment procedures pursuant to 47 C.F.R. § 76.922(j).

[2] Revisions to Cable Television Rate Regulations, *Notice of Proposed Rulemaking and Order*, 17 FCC Rcd 11550 (June 19, 2002), 67 Fed. Reg. 56882 (Sept. 5, 2002); *Order*, 17 FCC Rcd 15974 (August 14, 2002), 67 Fed. Reg. 56880 (Sept. 5, 2002). Cox's initial comments in this proceeding, filed November 4, 2002, are incorporated herein by reference.

1235 procedures.[3] The *Notice* also sought comment on whether procedural aspects of the Commission's review of local rate decisions could be improved.[4]

INTRODUCTION AND SUMMARY

Cox believes the Commission's network upgrade rate adjustment option continues to be necessary because under the Commission's benchmark and price cap approach cable operators are unable to recover in regulated rates any portion of the significant investment required to upgrade cable systems, bridge the digital divide, and accelerate the nationwide digital transition.[5] Without the network upgrade option, cable system revenues may not prove sufficient to attract the capital required for cable system upgrades, which are prerequisites for the timely deployment of advanced services. Indeed, the only purpose of FCC Form 1235 is to allow cable operators to justify rate adjustments for significant upgrades requiring added capital investment, such as bandwidth capacity and conversion to fiber optics, and for system rebuilds, which otherwise cannot be recovered in regulated rates.[6] The FCC Form 1235 has served, and continues to serve, these important purposes.

Years of experience in rate regulation, however, have demonstrated that the Commission should revisit the procedures applicable to local franchising authority ("LFA") review of FCC Form 1235 network upgrade rate filings submitted under Section 76.922(j) of

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[3] *Notice*, 17 FCC Rcd 11550, 11564-65 at paras. 36-37 (2002).

[4] *Id.*, 17 FCC Rcd at 11569, para. 54.

[5] *See* Implementation of Sections of the Consumer Protection and Competition Act of 1992, Rate Regulation, *Thirteenth Order on Reconsideration*, 11 FCC Rcd 388 at para. 134 (1995) (citing *Rate Order*, 8 FCC Rcd 5631, 5791-92 n. 608 (1993); *First Reconsideration Order*, 9 FCC Rcd 1164, 1216 (1993); *Second Reconsideration Order*, 9 FCC Rcd 4119, 4240-41 n. 340 (1994)).

[6] *See* FCC Form 1235 Instructions at 1 ("The recoverable costs of the upgrade would be added to the rates permitted under the benchmark and price cap approach to the extent these costs could not be recovered under that approach."). *See also* 47 C.F.R. § 76.922(j); 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, *Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd 4527, 4674-76 (1994).

the Commission's rules. As described in greater detail below, the Commission should (i) clarify that LFAs have no authority under the Commission's existing rate regulations either to "toll" the effective date of a cable operator's FCC Form 1235 network upgrade rate or subject the filing to an unlimited review period; and (ii) harmonize its annual (FCC Form 1240), quarterly (FCC Form 1210), and network upgrade (FCC Form 1235) rate adjustment rules to provide a uniform one-year period in which an LFA either must issue its rate determination or be prohibited from ordering either refunds or prospective rate adjustments with regard to the rate justification at issue.

DISCUSSION

I. The Commission's Should Clarify That Its Existing Rules Do Not Permit Tolling Or Unlimited Review Periods With Regard To FCC Form 1235 Rate Filings.

In Cox's experience, because Section 76.922(j) of the Commission's rules[7] does not specify *per se* the period in which the LFA must initially review an operator's FCC Form 1235 filing, many LFAs mistakenly believe that the effective date of such filings may be tolled for up to 180 days under Section 76.933 and that rate orders regarding them may be adopted at any time.[8] This mistaken belief has led to needless disputes between LFAs and cable operators. In fact, the Commission's well-established policies, the plain language of the Commission's regulations, and the FCC Form 1235 Instructions all confirm that LFAs are without authority to toll network upgrade cost recovery or to subject the filing to an unlimited review period. The Commission should take this opportunity to clarify its existing rules and confirm that LFA tolling and unlimited review of an operator's network upgrade rate adjustment is not permitted.

Under Section 76.933, which governs LFA review of basic cable and equipment rates, rate adjustments filed under the quarterly adjustment system generally become effective thirty

[7] 47 C.F.R. § 76.922(j).

[8] 47 C.F.R. § 76.933.

days from the date of submission.[9] Under certain circumstances, however, Section 76.933(b) allows LFAs to toll the effective date of the rate adjustment for an additional 150 days and may be interpreted to permit a potentially unlimited review period "if a cable operator has submitted a cost-of-service showing pursuant to §§ 76.937(c) and 76.924, seeking to justify a rate above the Commission's basic service tier charge as defined in §§ 76.922 and 76.923."[10] The tolling and potentially unlimited review periods that may be applicable to quarterly adjustment rate filings under Section 76.933(b), however, are inapplicable to network upgrade rate filings under Section 76.922(j) because the FCC Form 1235 is not "a cost-of-service showing pursuant to §§ 76.937(c) and 76.924."[11] Instead, the FCC Form 1235 is a network upgrade showing pursuant to Section 76.922(j).[12] A FCC Form 1235 filing therefore is excluded from tolling and unlimited review under the plain language of Section 76.933(b) of the Commission's rules, which by its terms applies only to quarterly filings under Section 76.922(d) and cost-of-service showings under Section 76.937(c).

The tolling permitted under Section 76.933(b) also is inconsistent with both the FCC Form 1235 Instructions and the Commission's network upgrade rules, which confirm that cable operators undertaking "significant upgrades shall be permitted"[13] to adjust rates for the recovery of upgrade costs as soon as "the upgrade is complete and providing benefits to customers of regulated services."[14] The FCC Form 1235 Instructions specifically permit cable operators to file for rate adjustments based upon upgrade cost estimates, and explicitly state that "[t]he pre-approval upgrade incentive add-on may be charged to subscribers as subsections of the filing entity are completed and begin providing service to subscribers in those

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[9] 47 C.F.R. § 76.933(a).

[10] 47 C.F.R. § 76.933(b). Generally, no tolling is permitted under the Commission's annual rate adjustment rules. *See* 47 C.F.R. § 76.933(g).

[11] *Id.*

[12] *See* 47 C.F.R. § 76.922(j).

[13] 47 C.F.R. § 76.922(j)(5).

[14] 47 C.F.R. § 76.922(j)(2).

subsections (Phased-In Approach)."[15] Although cable operators electing the phased-in approach must file a final FCC Form 1235 within thirty days after completion of the entire upgrade, the Commission's rules also state explicitly that "[t]his second submission will not duplicate the pre-approval process, but will primarily entail the substitution of actual costs for projected costs."[16] Inasmuch as Form 1235 rates may be charged as soon as the upgrade is complete and providing service to customers, the Commission's network upgrade rules and the FCC Form 1235 Instructions essentially prohibit tolling.

Moreover, because the Commission's network upgrade rate adjustment rules under Section 76.922(j) provide no specific review period *per se*, and because the quarterly adjustment review periods specified in Section 76.933(b) are inapplicable by their terms to FCC Form 1235 rate filings, the only relevant review periods are the ninety (90) day and twelve (12) month periods provided by Section 76.933(g),[17] which is consistent with the Commission's existing rules governing the timing of FCC Form 1205 equipment and installation rate filings.[18] Therefore, where a cable operator submits an FCC Form 1235 rate filing for implementation following completion of a system upgrade together with its annual FCC Forms 1240 and 1205, LFAs must issue any rate order with regard to those filings within twelve months. Otherwise, the LFAs are prohibited "at a later date [from] order[ing] a refund or a prospective rate reduction with respect to the rate filing."[19] If this were not the case, LFAs might issue orders determining FCC Form 1235 rates long after the applicable amortization period had expired[20] and long after the underlying service, equipment and installation rates justified on FCC Forms 1240 and 1205 were final. This would eliminate any

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[15] FCC Form 1235 Instructions at 2.

[16] *Id.*

[17] *See* 47 C.F.R. § 76.933(g), (g)(2).

[18] *See* 47 C.F.R. § 76.923(n).

[19] 47 C.F.R. § 76.922(g)(2).

[20] Cable operators must amortize network upgrade charges for a period equal to the average useful life of the facilities constructed for the system upgrade.

certainty regarding regulated rates and invite the adoption of untimely and coercive rate orders directed to non-rate matters.

Section 76.922(j) of the Commission's rules and the Form 1235 Instructions, which allows for network upgrade rate adjustments as soon as the upgrade is complete and providing benefits to customers of regulated services, obviously would be nullified if LFAs were permitted to toll the effective date of FCC Form 1235 network upgrade rate adjustments as though the Form 1235 were a quarterly filing. Moreover, Section 76.933(b), which allows LFAs to toll the effective date of specific rate adjustments under certain limited circumstances and may be interpreted to permit a potentially unlimited review period, is inapplicable by its terms to FCC Form 1235 filings. The Commission consequently should clarify that no such tolling or unlimited review is permitted under its existing rules.

II. The Commission Should Provide a Uniform Period for LFA Review of FCC Forms 1240, 1210, 1205, and 1235.

In contrast to the one-year review period provided to LFAs by the Commission's annual rate adjustment rules, the Commission's precedents under the now mostly abandoned quarterly adjustment rules permitted prospective rate reductions at any time, even many years after an operator has implemented a rate adjustment. In addition, although the Commission's network upgrade rate adjustment rules provide no explicit review period, in practice most cable operators and LFAs have adopted a review period that parallels the methodology of the underlying base rate justification; *i.e* , either annual or quarterly.[21] In Cox's experience, the lack of clarity and consistency in these provisions of the Commission's rules and procedures may lead to unnecessary disputes between cable operators and LFAs, and consequently impose undue burdens on both.

The Commission should resolve these inconsistencies. Having reasonably relied upon an LFA's acceptance of its rate justification, operators should not be prejudiced by "sleeper" rate

[21] This practice is consistent with the Commission's existing rules governing the timing of FCC Form 1205 equipment and installation rate filings. *See* 47 C.F.R. § 76.923(n).

orders issued unexpectedly years after the operator has submitted its rate filings and implemented rate adjustments without objection from the LFA. Indeed, Cox believes that in many cases LFAs adopt such untimely rate orders not in an effort to ensure reasonable rates — the existence of which the LFA's long acceptance demonstrates — but rather as an attempt to gain additional leverage in franchise renewal proceedings or other negotiations with the cable operator. The Commission, therefore, should take this opportunity to simplify its rate rules and adopt a uniform review period for all regulated cable rate justifications, whether quarterly, annual, or in the context of significant network upgrades.

In adopting its initial (quarterly adjustment) rate regulations, the Commission understood that "[f]ranchise authority review of a cable operator's . . . rates, require[s] expedition so that protracted proceedings and concomitant uncertainty do not injure an operator's ability to serve the community."[22] The Commission also understood, however, that LFAs would require a reasonable period in which to consider the views of interested parties and to review more complex rate filings. The Commission therefore permitted proposed rates to become effective under the quarterly rate adjustment rules within thirty (30) days after filing of the appropriate rate form, but also allowed certified LFAs to delay the effective date of a proposed rate adjustment for an additional ninety (90) or 150 days by issuing a brief "tolling" order.[23] Under the Commission's quarterly adjustment rules, if at the end of the tolling period the LFA remains unable to determine whether the operator's proposed rates are reasonable, the LFA must issue an "accounting order" to preserve its jurisdiction to order subsequent refunds with regard to the

[22] 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*, 8 FCC Rcd 5631, 5708 at para. 117 (footnote omitted) (1993) ("*Rate Order*").

[23] Under the quarterly adjustment rules, LFAs are permitted to toll the effective date of a "benchmark" rate filing (FCC Form 1210) for an additional ninety (90) days and are permitted to toll a "cost-of-service" rate filing (FCC Form 1220) for an additional 150 days. *See* 47 C.F.R. § 76.933(b). As demonstrated above, no such tolling is permitted for "network upgrade" rate filings (FCC Form 1235), and no tolling is permitted under the annual rate adjustment (FCC Form 1240) rules. *See* 47 C.F.R. § 76.933(g).

operator's rate filing.[24] The Commission stated that "delaying rate determinations . . . for more than 120 [for benchmark filings] or 180 days [for cost-of-service filings], and the uncertainties likely to result therefrom, may have an adverse effect on a cable operator's operations, planning and financial stability." The Commission nevertheless credited LFA arguments that "unusually complex cases" may require even longer periods to resolve.[25] In its *Rate Order*, the Commission consequently permitted LFAs "to issue a written determination after 120 or 180 days and to order refunds for up to a one year period for any amounts later found to be inconsistent with the Cable Act or [the Commission's] rules."[26]

Given the Commission's policies, the most natural and reasonable reading of the one-year period described in the *Rate Order* would apply it both to the LFA's written determination and its authority to order refunds. However, despite the former Cable Service Bureau's acknowledgement that the Commission's rules were designed to protect cable operators "from having to operate in an uncertain regulatory environment for an indefinite period of time[,]"[27] the former Bureau concluded in a series of cases that LFAs reviewing quarterly rate filings pursuant to Section 76.933(b) possessed unlimited authority to order prospective rate reductions (but not refunds) at any time, even where the LFA failed to comply with the Commission's rules regarding tolling orders and accounting orders.[28] Cox submits that no justification can support continuing to allow LFAs such an open-ended period in which to adjust rates.

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[24] 47 C.F.R. § 76.933(c). The LFA's "accounting order" must direct the operator "to keep an accurate account of all amounts received by reason of the rate in issue an on whose behalf such amounts were paid." *Id.*

[25] *Rate Order*, 8 FCC Rcd at 5712, para. 121.

[26] *Id.*

[27] *TCI-TKR of Northern Kentucky*, 11 FCC Rcd 17353, 17361 at para. 20 (Cab. Serv. Bur. 1996).

[28] *See, e.g.*, *Century Communications Corp.*, 11 FCC Rcd 9827 (Cab. Serv. Bur. 1996).

> If the franchising authority has not issued a rate decision or an accounting order by the end of the 120-day review period, the operator's proposed rates will go into effect and its existing rates will remain in effect without being subject to retroactive refunds. If the franchising authority subsequently issues a rate order, the

(continued . . .)

The Commission corrected this anomaly with regard to annual rate filings in the *Thirteenth Reconsideration Order*.[29] Under the Commission's revised rules, LFAs are provided an initial ninety (90) day review period and are required to act on the operator's rate justification within twelve (12) months after the operator submits a completed rate filing.[30] LFAs are not required to issue tolling or accounting orders to preserve their refund authority. If the LFA declines to act on the operator's rate filing within the twelve-month period, however, "it may not at a later date order a refund or a prospective rate reduction with respect to the rate filing."[31] The Commission "set this time constraint on franchising authorities because . . . one year should provide ample time for review, and because operators need to have certainty with respect to their liability for refunds and whether their rates will be permitted to remain in effect."[32]

The Commission also applied these same policies when it eliminated review of an operator's entire rate structure in response to cable programming services tier ("CPST") rate complaints.[33] The Commission held that where no rate complaint had been filed in the then two years since its rate regulations became effective, an operator's rates would be deemed reasonable because "if subscribers and the franchising authority have not filed a CPST rate complaint, it

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(. . continued)

> franchising authority may not require subscriber refunds as part of its rate order. *However, the franchising authority may still prescribe rates and order a prospective rate reduction when it issues its rate order.*

Id., 11 FCC Rcd at 9892, para. 7 (footnotes omitted) (emphasis added). *See also*, *Falcon Telecable*, 11 FCC Rcd 9197, 9206 at para. 21 (Cab. Serv. Bur. 1996); *TCI-TKR of Northern Kentucky*, 11 FCC Rcd 17353, 17361 at para. 20.

[29] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Thirteenth Order on Reconsideration*, 11 FCC Rcd 388 (1995) ("*Thirteenth Reconsideration Order*").

[30] 47 C.F.R. § 76.933(g)(2).

[31] *Id.*

[32] *Thirteenth Reconsideration Order*, 11 FCC Rcd at 426, para. 92.

[33] *Id.*, 11 FCC Rcd at 451-52, paras. 163-64.

indicates a level of satisfaction with their current rates that would not exist if they believed CPST rates were unreasonable."[34]

The Commission's policies set forth in the *Rate Order* and the *Thirteenth Reconsideration Order* apply with equal force regardless of whether the operator chooses to justify its BST rates quarterly, annually, or to seek a temporary supplement for its BST rate pursuant to the Commission's network upgrade rules under Section 76.922(j). Indeed, with regard to the Commission's underlying policies designed to protect cable operators "from having to operate in an uncertain regulatory environment for an indefinite period of time[,]"[35] no rational distinction can be drawn between the quarterly, annual, and network upgrade rate regulations. Operators electing to file BST rate justifications under the Commission's quarterly and network upgrade adjustment rules should be equally entitled "to have certainty with respect to their liability for refunds and whether their rates will be permitted to remain in effect"[36] as those filing under the Commission's annual rules.

Moreover, the inconsistent time periods reflected in the Commission's current rules often lead to confusion and uncertainty for both LFAs and cable operators. For example, in Cox's experience, LFAs may mistakenly issue tolling orders or accounting orders following submission of FCC Form 1240 (the annual rate adjustment form) or may adopt an order with regard to such a rate filing more than twelve months after filing under the mistaken belief that rate orders may be adopted at any time. This confusion and uncertainty obviously imposes unnecessary administrative burdens on both LFAs and cable operators, and ultimately on the Commission if an operator finds that it must appeal an untimely rate order.

The same is true with regard to the network upgrade rate adjustment under Section 76.922(j). Despite the Commission's specific rule excluding FCC Form 1235 rate adjustments

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[34] *Id.* at para. 164.

[35] *TCI-TKR of Northern Kentucky*, 11 FCC Rcd at 17361, para. 20.

[36] *Thirteenth Reconsideration Order*, 11 FCC Rcd at 426, para. 92.

from tolling and unlimited review under Section 76.933(b), LFAs may nonetheless mistakenly issue such orders in the belief that the filing is subject to the Commission's general cost-of-service rules. In addition, although in Cox's experience most LFAs review FCC Form 1235 filings in accordance with the operator's underlying quarterly or annual rate justification methodology,[37] the fact that the Form 1235 rules under Section 76.922(j) do not clearly address the time period for local review of the filing has led to otherwise avoidable disputes between cable operators and LFAs.[38] Cable operators sometimes have been unfairly surprised by local rate orders belatedly challenging an FCC Form 1235 adjustment many years after the operator completed significant upgrades and implemented an associated rate adjustment. In Cox's experience, such local rate orders generally have nothing to do with the reasonableness of an operator's rates, but rather are adopted by local governments to gain additional leverage over non-rate matters such as franchise renewal negotiations.[39] Under the Commission's established policies and as noted above, however, such operators are equally entitled "to have certainty with respect to their liability for refunds and whether their rates will be permitted to remain in effect"[40] as those filing under the Commission's annual rules.

The Commission consequently should harmonize its quarterly, annual, and network upgrade rate adjustment rules consistent with its existing annual rules. Namely, local franchising authorities should be allowed an initial ninety (90) day period in which to review

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[37] This essentially is the procedure applicable to the review of the FCC Form 1205 equipment and installation rate justifications submitted in conjunction with quarterly or annual rate filings under the Commission's existing rules. *See* 47 C.F.R. § 76.923(n).

[38] A request for clarification regarding timing issues associated with FCC Form 1235 filings was submitted to the former Cable Services Bureau in 1998, but was withdrawn before the Bureau could act upon it. *See* Letter, dated December 17, 1998, from Paul Glist (Cole, Raywid & Braverman) to Deborah Lathen (Chief, Cable Serv. Bur.), CSR-5344-P.

[39] Under the Commission's rules and precedents, however, LFAs are prohibited from denying rate adjustments to address non-rate matters. *See, e.g.*, *TCI Cablevision of California, Inc.*, 15 FCC Rcd 9119 (Cab. Serv. Bur. 2000); *TCI Cablevision of Texas, Inc.*, 13 FCC Rcd 6656, 6658 (Cab. Serv. Bur. 1998); *Century Cable of Southern California*, 11 FCC Rcd 501, 501-02 (Cab. Serv. Bur. 1995).

[40] *Thirteenth Reconsideration Order*, 11 FCC Rcd at 426, para. 92.

an operator's FCC Form 1210, 1235, or 1240 rate filings and should be provided a full twelve (12) months from the filing date to reach a final determination regarding the rate in issue. No tolling of rate filings should be permitted except for facially incomplete filings that render substantive review impossible. If the LFA elects not to issue a determination within that one-year period, it should be prohibited from ordering a refund or prospective rate adjustment with respect to the rate filing at a later time.

Cox suggests that the Commission revise its rules by appending the following two sentences adapted from Section 76.933(g)(2) to the end of Section 76.933(c):

> If a proposed rate filed pursuant to §§ 76.922(d), 76.922(e), or 76.922(j) goes into effect before the franchising authority issues its rate order, the franchising authority will have 12 months from the date the operator filed for the rate adjustment to issue its rate order. In the event that the franchising authority does not act within this 12-month period, it may not at a later date order a refund or a prospective rate reduction with respect to the rate filing.

The preceding revision will also require that the Commission conform Sections 76.933 (a)-(c) to provide for a consistent ninety-day initial review period and to eliminate the elective tolling of rate filings. These revisions will simplify the Commission's rate regulations for all parties and eliminate both confusion and unnecessary disputes that inconsistencies in the rules have generated over the years.

CONCLUSION

For the reasons explained above, Cox urges the Commission to adopt the recommendations set forth herein.

Respectfully Submitted,

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May 19, 2004

CERTIFICATE OF SERVICE

I, Sandra Dallas, a secretary at the law firm of Dow, Lohnes & Albertson, PLLC, certify that on this 19th day of May, 2004, I caused the foregoing Supplementary Comments of Cox Communications, Inc. to be served by first-class mail, except where hand delivery is indicated, on the following:

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