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CABLE TELEVISION RATE REGULATION

A PRACTICAL GUIDE TO THE REGULATORY PROCESS IN MASSACHUSETTS

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**Prepared by the
Massachusetts Cable Television Division
of the Department of Telecommunications and Energy
One South Station
Boston MA 02110
617-305-3580 or 1-888-622-2588
www.state.ma.us/dpu/catv**

RATE REGULATION: A PRACTICAL GUIDE

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This Practical Guide is presented by the Cable Television Division¹ (“Cable Division”) of the Massachusetts Department of Telecommunications and Energy in order to assist issuing authorities, cable advisory committees (“CACs”), cable operators, and other interested persons in understanding the general framework of the rate regulation process in Massachusetts.² The rate regulation process is based on federal and Massachusetts administrative law. While the process seeks to protect the rights of all parties, it may be confusing for those unaccustomed to practicing before this administrative agency. The Cable Division’s goal in providing this Practical Guide is to foster an efficient rate regulation process by furnishing access to pertinent information in a straightforward manner.

This Practical Guide provides the general framework of the procedural rules that govern the rate regulation process. As described in detail below, a rate proceeding is initiated when the cable operator files rate forms with the Cable Division. These rate forms are filed concurrently with the municipality as the issuing authority. While the proposed rates may be implemented subject to review by the Cable Division, there are legal requirements that ensure the cable operator provides notice to subscribers of any proposed rate increase. At the beginning of the rate regulation process, interested persons may file petitions to intervene or participate in the rate proceeding. Interested persons do not need to be represented by an attorney in order to participate in the rate proceeding. The Cable Division holds a public and evidentiary hearing after the cable operator has provided notice of the hearing. Prior to the hearing, the Cable Division and intervenors may issue information and document requests to the cable operator, and at the hearing, the Cable Division and intervenors may conduct cross-examination in order to clarify responses given to these information and document requests. The rate proceeding culminates when the Cable Division issues a decision in the form of a rate order.

¹ Formally known as Community Antenna Television Division. See M.G.L. c. 166A, § 2.

² A glossary at the end of this Practical Guide includes words and phrases that are commonly used in the rate regulation process. A more comprehensive glossary is available at the Cable Division’s website (www.state.ma.us/dpu/catv).

Hypothetical, Part 1

For illustrative purposes, reference will be made to the hypothetical town of Smallville, Massachusetts, as it progresses through a rate proceeding. The scenarios in the hypothetical are based, in part, on actual rate proceedings.

The Town of Smallville is governed by a Board of Selectmen with three Board members. The Board has appointed a CAC comprised of four members. Kent Cable Company serves the 25,000 Smallville residents.

This Practical Guide is provided for information purposes. The information provided is necessarily general in nature. Although your situation may appear similar to the hypothetical presented, other facts or circumstances may render the principles discussed herein inapplicable. The Practical Guide is not a substitute for particularized advice from an attorney. In addition, federal and Massachusetts laws and regulations are subject to change. Therefore, persons should refer to the current Massachusetts General Laws, the Code of Massachusetts Regulations, the Communications Act of 1934, as amended,³ the appropriate federal rules and regulations, or may want to consult an attorney with case-specific questions.

Reference: M.G.L. c. 166A; 207 C.M.R. § 1.00 et seq.; 47 U.S.C. § 521 et seq.;
47 C.F.R. § 76.1 et seq.

³ The Communications Act of 1934 has been amended by the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, the Telecommunications Act of 1996, and the USA Patriot Act of 2001.

OVERVIEW OF RATE REGULATION PROCESS

In Massachusetts, the Cable Division is the local franchising authority for rate regulation purposes.⁴ The Federal Communications Commission (“FCC”) certified, pursuant to Section 543 of the Communications Act of 1934, that the Cable Division is qualified to regulate basic service tier (“BST”) rates, including programming, system upgrade surcharges, and equipment and installation. BST programming includes local broadcast stations (e.g., ABC and FOX) and local public, educational, and governmental channels. The majority of subscribers also select tiers that include non-broadcast programming, such as NECN, ESPN, MTV, and CNN. These higher-level cable television tiers and services are referred to as the cable programming service tier (“CPST”), premium, or pay-per-view, and are unregulated per federal law.

The Cable Division regulates rates only in those communities that have requested rate regulation. While Massachusetts law and regulation provide that the Cable Division may regulate rates for a municipality “upon its own motion,” the Cable Division’s longstanding practice is to exercise its authority upon a municipality’s request to do so. As of September 2003, 20 municipalities had not requested rate regulation.

There are three additional situations where cable operators are exempt from BST rate regulation or are subject to limited BST rate regulation: 1) communities deemed by the FCC to have effective competition are exempt from rate regulation; 2) municipal cable operators that are the sole provider of cable services in a municipality are not subject to rate regulation; and 3) cable operators qualifying for small system status may be eligible for relief from full rate regulation through a streamlined form of rate regulation.

Additional information about these situations is available on the Cable Division’s website at www.state.ma.us/dpu/catv.

Reference: M.G.L. c. 166A, § 15; 207 C.M.R. §§ 6.02, 6.04; 47 U.S.C. §§ 543, 544; 47 C.F.R. § 76.900 *et seq.*

⁴ The municipality, as the issuing authority, grants the license to the cable operator.

INITIATION OF THE ADJUDICATORY PROCESS

Congress established a scheme of basic service tier (“BST”) rate regulation where local franchising authorities, such as the Cable Division, would regulate these rates based on federal guidelines. The FCC then created specific forms (“FCC Forms”) that set forth the methodology to be used by cable operators in justifying the proposed BST programming, equipment, and installation rates.

A cable operator subject to rate regulation in a specific municipality must file, with the Cable Division, the appropriate FCC Forms to justify adjustments to its BST rates. The filing of the FCC Forms initiates the rate proceeding.

The Cable Division reviews the FCC Forms for compliance with federal and Massachusetts law and regulations. While the rates must be reasonable pursuant to both federal and Massachusetts law, the primary determination is whether the proposed rates comply with the methodology established by the FCC. The cable operator bears the burden of proving such compliance.

The two forms most commonly filed by cable operators in Massachusetts are FCC Form 1240, “Annual Updating of Maximum Permitted Rates for Regulated Cable Services,” and FCC Form 1205, “Determining Costs of Regulated Cable Equipment and Installation.” Cable operators who want to recover capital expenditures used to upgrade or rebuild a cable system may file FCC Form 1235, “Abbreviated Cost of Service Filing for Cable Network Upgrades.”

Cable operators filing FCC Forms 1240 and 1205 may change their regulated rates no more than once per year. FCC regulations also provide a mechanism by which cable operators may file BST rate adjustments on a quarterly basis by using FCC Form 1210; however, all regulated Massachusetts cable operators currently submit the annual filing, FCC Form 1240.

FCC Forms 1240, 1205, and 1235 are described in detail below. Copies of most FCC Forms and accompanying instructions, as well as further information regarding less frequently used FCC Forms, may be obtained at www.fcc.gov/formpage.html.

Reference: M.G.L. c. 166A, § 15; 47 U.S.C. §§ 543, 544; 47 C.F.R. § 76.900 et seq.; 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 5631 (May 3, 1993).

FCC FORM 1240

By the Cable Television Consumer Protection and Competition Act of 1992, Congress reinstated BST rate regulation. In implementing Congress' mandate, the FCC established a regulatory scheme that allows a cable operator to prove the reasonableness of its BST rate based on a comparison with rates charged by cable operators in competitive markets. This rate, once approved, establishes the "benchmark" from which future adjustments may be made. Cable operators may increase BST rates annually to take into account external costs, meaning those costs that are not within the control of the cable operator. External costs are generally inflation costs, copyright costs, franchise related costs, and costs associated with channel movements.

FCC Form 1240, "Annual Updating of Maximum Permitted Rates for Regulated Cable Services," allows cable operators to adjust the BST maximum permitted rate ("MPR") annually. For a one-year period, the cable operator projects its changes in programming costs, copyright fees, franchise obligations, regulated channels, and inflation. These projected changes are incorporated into the calculation of a new BST MPR on Line I9 of FCC Form 1240. This BST MPR signifies the highest rate that a cable operator may charge.

On Line I10 of FCC Form 1240, the cable operator enters the rate it is choosing to charge subscribers for the projected period. This rate, known as the operator selected rate ("OSR"), may not exceed the BST MPR. Cable operators often, for business reasons, choose to charge subscribers a lower rate than the BST MPR.

In addition, the cable operator performs a "true-up" calculation or reconciliation by comparing the costs projected on the previous FCC Form 1240 with the actual costs incurred. If the projected costs exceed the actual costs, a true-up adjustment must be passed through to subscribers. The true-up adjustment serves to mitigate any rate increase the operator would be entitled to receive. If, however, the actual costs exceed projected costs, the cable operator may either pass through the difference as an

increase on the current FCC Form 1240 or may bank the increase for use in a future year.⁵

While franchise related costs are included as external costs on the FCC Form 1240 and are part of the BST rate calculation, franchise fees are negotiated by the municipality and incorporated into the license between the municipality and the cable operator. These franchise fees, therefore, are not within the cable operator's exclusive control and are not included in the FCC Form 1240 calculation. Further, as a negotiated fee between the municipality and the cable operator, the Cable Division does not regulate the reasonableness of these franchise fees. However, the Cable Division will verify that a cable operator is charging subscribers correctly for these franchise fees.

FCC Form 1240 is filed on an annual basis, and federal regulations provide that cable operators may implement proposed BST rate changes 90 days after filing the FCC Form 1240. The cable operator is required to specify a twelve-month projected period on the FCC Form 1240. If the Cable Division determines at the conclusion of the rate proceeding that the implemented rates are not reasonable, the Cable Division may order refunds or may require the cable operator to adjust for the disapproved rate on the next filed FCC Form 1240.

Reference: 47 C.F.R. §§ 76.922, 76.925, 76.933(g), 76.936, 76.942; Instructions for FCC Form 1240, issued July 1996; Charter Communications Entertainment I, L.L.C., CTV 01-8 (Oct. 23, 2002).

FCC FORM 1205

FCC Form 1205, "Determining Costs of Regulated Cable Equipment and Installation," is a cost-based form and provides the mechanism for determining the lease rates associated with equipment, such as converters, remote controls, and inside wiring, as well as service installation. The FCC permits regulation of subscriber equipment used to receive the BST even if the same equipment is also used to receive cable

⁵ Under current FCC precedent, when a cable operator voluntarily chooses to charge subscribers an OSR that is less than the BST MPR, the cable operator may bank the unrecovered portion of the BST MPR for recovery through the true-up process on a future rate filing. CoxCom, Inc., FCC 03-72 (2003); AT&T Broadband, DA 03-1863 (2003). In addition to participating in these appeals, the Cable Division has filed comments in a pending rulemaking to highlight its concerns regarding the unintended and adverse impact on subscribers that may result from the FCC's analysis. See Revisions to Cable Television Rate Regulations, MB Docket No. 02-144, FCC 02-17, Comments of Massachusetts Department of Telecommunications and Energy Cable Television Division (Nov. 4, 2002) and Reply Comments of Massachusetts Department of Telecommunications and Energy Cable Television Division (Dec. 4, 2002).

programming service tier (“CPST”), premium, or pay-per-view services. Federal regulations allow cable operators to include regulated equipment and installation costs, plus a reasonable profit, as a separate itemized line item on subscribers’ bills.

Cable operators that file BST rate adjustments on an annual basis must file FCC Form 1205 in conjunction with FCC Form 1240. In the event a cable operator does not file a FCC Form 1240 in a particular year, the FCC Form 1205 must be filed on the anniversary date of the last FCC Form 1205 filing.

Reference: 47 C.F.R. § 76.923; Order, Extension of Time to File FCC Form 1205 Pursuant to Sections 76.922, 76.923 of the Commission’s Rules, DA 96-2161 (Dec. 20, 1996), citing Thirteenth Order on Reconsideration, MM Docket 92-266, FCC 95-397, 11 FCC Rcd 388 (1995) at ¶ 63; see also Instructions for FCC Form 1205, issued June 1996.

FCC FORM 1235

In order to recover costs associated with upgrading a cable system within a community, a cable operator must file for approval an FCC Form 1235, “Abbreviated Cost of Service Filing for Cable Network Upgrades.” The FCC Form 1235 may be filed prior to completion of any upgrade of services. Cable operators use projected upgrade costs and, if approved, may then begin charging subscribers a surcharge once the upgraded cable services are available. This pre-approval option is provided to assist cable operators in projecting cash flows and obtaining capital for construction.

The additional cost related to the upgraded services is allocated, in part, on a calculation involving the total number of channels available. This allocation ensures that the upgrade cost imposed on a subscriber is in direct proportion to the number of channels that the particular subscriber receives. Hence, while BST-only subscribers receive a benefit from the upgraded services in terms of reliability, subscribers who also purchase CPST, premium, or pay-per-view services bear a larger part of the additional costs.

Reference: 47 C.F.R. § 76.924; Instructions for FCC Form 1235, issued Feb. 1996.

Hypothetical, Part 2

On July 1, 2003, Kent Cable Company files FCC Forms 1240 and 1205 for rate changes effective October 2003 with the Cable Division and the Smallville Board of Selectmen. Copies are distributed to each member of the Board. The CAC in Smallville is very active and the Board values input from the CAC members. As such, the Board furnishes each member of the CAC with a copy of the FCC Forms 1240 and 1205.

After an initial discussion, the Board decides to have two members review the FCC Form 1240 while the remaining member will review the FCC Form 1205. The CAC members are asked to review both FCC Forms in whatever manner they determine is appropriate. Discussion of the FCC Forms is added as a topic to the next Board of Selectmen meeting.

At the Board of Selectmen meeting, the Board and the CAC discuss each members' review of the FCC Forms. Several individuals state that, in reviewing the FCC Form 1240, they noted that Kent Cable Company included \$30,000 in franchise related costs ("FRCs") on the FCC Form 1240, Worksheet 7, at Line 707. In discussing the reviewed FCC Forms, the \$30,000 included in the FRCs is the only item that members of both the Board and the CAC find questionable. Because there are concerns regarding the appropriateness of including these monies in the FRCs, the Board agrees to file a petition to intervene in the rate proceeding. While the Board has not yet received notice of any upcoming rate hearing, members know from past experience that a petition to intervene will need to be filed with the Cable Division and that such intervention will need to be granted before the Board may direct questions to Kent Cable Company regarding the FCC Forms and the FRCs. The Board designates a person to draft and submit a petition to intervene to the Cable Division.

IMPLEMENTATION OF RATE CHANGES

Cable operators often adjust their basic service tier (“BST”), cable service programming tier (“CPST”), and premium service rates at the same time. While cable operators may implement rate changes to its different tiers of service simultaneously, only the BST rate is subject to review. Cable operators must notify all affected subscribers, the issuing authority, and the Cable Division at least thirty days prior to implementing any rate increase. Massachusetts regulations provide that subscribers may downgrade services during this thirty day notification period without incurring downgrade fees.

The Cable Division is allowed a period of twelve months from the filing date of the FCC Forms to conduct and complete the rate regulation proceeding, which includes reviewing the FCC Forms, holding a public and evidentiary hearing, and issuing a rate order. Rather than requiring cable operators to wait for the completion of the rate process, federal regulations allow cable operators to implement the proposed operator selected rate (“OSR”), located on Line I10 of FCC Form 1240, ninety days after filing the FCC Forms.

Once the Cable Division approves the BST maximum permitted rate (“MPR”), it will compare the BST MPR to the OSR. If the OSR (the rate the cable operator charged subscribers) exceeded the approved BST MPR (the maximum rate that the cable operator could charge), the Cable Division may order the cable operator to provide a refund or credit to subscribers. If the Cable Division determines that the OSR is less than the approved BST MPR, the cable operator is allowed to calculate a “true-up” on a future rate filing in order to recover the undercharged amount.

Reference: 207 C.M.R. §§ 10.02(2), 10.06; 47 U.S.C. § 543(b)(6);
47 C.F.R. §§ 76.922, 76.933, 76.942, 76.1603.

Hypothetical, Part 3

The Smallville Board of Selectmen, as the issuing authority, as well as individual subscribers, receive notification on September 1, 2003, that the BST programming and equipment and installation rates will be increased effective October 1, 2003. The Board has already begun reviewing the FCC Forms 1240 and 1205 and so is aware of the pending rate increase.

In addition, the Board has previously filed a petition to intervene on August 15, 2003 (see Smallville Hypothetical, Parts 2 and 4).

Massachusetts law requires that a public hearing be held as part of the rate proceeding in order to afford all parties an opportunity for a full and fair hearing.

The public and evidentiary hearing held by the Cable Division fulfills two purposes: 1) as a public hearing, it provides all persons, including the general public, an opportunity to participate and voice their views on the cable operator's rates; and 2) as an evidentiary hearing, it enables the Cable Division to develop a record on which it may determine the appropriateness of the proposed rate changes.

Reference: M.G.L. c. 166A, § 15; M.G.L. c. 30A, § 10; see also 47 C.F.R. § 76.935 (franchising authority must have procedures that provide reasonable opportunities for consideration of views of interested parties).

SCHEDULING

The Cable Division will schedule the date, time, and location for the hearing upon receipt of the FCC Forms filed by the cable operator. The hearing is typically scheduled by the Cable Division at least three months in advance in order to provide an appropriate period of time for filing of petitions for intervention or participation, the granting or denying of such petitions, and participation in the discovery process by those persons granted status as intervenors. The three month notice also provides an adequate time period for cable operators to comply with the legal requirements related to the hearing and provides issuing authorities, CACs, and the general public with sufficient time to arrange for attendance.

Where feasible, hearings are held in an affected community; however, the hearing may be held at the Cable Division's offices in Boston.

Reference: M.G.L. c. 30A, §§ 10, 11.

LEGAL NOTICE

Once the hearing date, time, and location is set, the Cable Division issues an Order of Notice to the cable operator directing it to provide reasonable legal notice of the hearing to the public. Massachusetts regulations require that the cable operator publish the notice in a local newspaper. If the cable operator has local cable facilities within its control, the notice must also be cablecast.

The Cable Division provides the cable operator with the text of the legal notice and a date by which the notice must be published in the newspaper and, where applicable, cablecast. While Massachusetts regulations provide that legal notice be published in the newspaper in two successive weeks, the Cable Division has often waived these regulations to provide notice in non-consecutive weeks. The first notice is published several months prior to the hearing, giving parties ample time to prepare for the hearing, and the second notice is published just prior to the hearing, reminding the public of the hearing.

Cable operators must provide proof of publication and, where applicable, proof of cablecasting to the Cable Division prior to the hearing. The Order of Notice issued by the Cable Division establishes the compliance date for these notice requirements.

In addition to the published notice, municipalities are notified of the hearing directly by the Cable Division. The Cable Division sends a letter to issuing authorities and CACs alerting them that the cable operator has been ordered to provide legal notice of the scheduled hearing. The letter provides the schedule and text of the legal notice, including information explaining how to apply to become an intervenor or limited participant.

Reference: M.G.L. c. 166A, § 15; M.G.L. c. 30A, § 11(1); 207 C.M.R. § 2.02.

INTERVENTION AND PARTICIPATION

A party to a proceeding is any entity whose legal rights, duties, or privileges are being determined. A party has the right to call, examine, and cross-examine witnesses, to introduce exhibits, to submit rebuttal evidence, and to appeal the Cable Division's

decision. In a rate proceeding, the cable operator's right to "a fair and reasonable rate of return from subscription rates" in a given municipality is being determined. M.G.L. c. 166A, § 15. As such, the cable operator becomes a party to a rate proceeding by filing the required FCC Forms.

Other persons, such as issuing authorities, CACs, state officials, and subscribers, may petition the Cable Division to become parties or to participate in the rate proceeding to a lesser extent. The various levels of participants are described below:

1. All persons who want to attend the hearing and observe the rate proceeding are encouraged to do so. Members of the public may comment on the rate proceeding during the public portion of the hearing and may remain to observe the evidentiary portion of the hearing. Members of the public who wish to attend the hearing are not required to notify the Cable Division or any party in advance.
2. Persons who want to be a party to the rate proceeding must file a petition for intervention by the deadline specified by the Cable Division. The petitioner must be substantially and specifically affected by the rate proceeding in order to be granted intervention status. The petition for intervention must provide a rationale as to how the petitioner is substantially and specifically affected. The rationale will enable the Cable Division to determine whether it is appropriate to grant intervention status. Any person granted status as an intervenor by the Cable Division will have the full rights of a party.
3. Alternatively, if the Cable Division determines that a person filing a petition for intervention is not substantially and specifically affected, the Cable Division may allow limited participation. Limited participation might include such rights as being included on the service list, which would require all parties to serve the limited participant with documents, or being allowed to file a brief relevant to the rate proceeding. In addition, persons who have an interest in the proceeding but who are not substantially and specifically affected may petition to be allowed to participate as a limited participant. The petition for limited participation must provide an explanation of how the petitioner is affected by the rate proceeding.

Petitions for intervention or limited participation must be filed with the Clerk of the Cable Division, with a copy sent to the cable operator and other parties, within the filing deadlines set by the Cable Division. These deadlines are set at the time the Cable Division schedules the hearing. In setting the filing deadline, the Cable Division attempts to provide adequate time prior to the hearing for filing of petitions to participate or intervene, the granting or denying of such petitions, and the participation in discovery by those persons granted status as intervenors. However, the Cable Division understands the unique time constraints faced by municipalities and therefore

suggests that issuing authorities review the FCC Forms filed by the cable operator upon receipt. An initial review will allow issuing authorities to determine whether to file a petition to intervene or participate. Legal notice provided by cable operators will include information regarding the deadline for filing petitions as well as filing procedures.

In drafting a petition to intervene, care should be taken to ensure compliance with both the substantive and formal filing procedures. For example, the petition must be in writing and served on both the Cable Division and the cable operator. The petition must include a rationale explaining how the petitioner is substantially and specifically affected by the proceeding. In past years, the Cable Division provided a form for use by persons desiring to petition to intervene in a rate proceeding. Where municipalities have drafted their own petitions, the rationales have been more in-depth and as such provided the Cable Division with a better basis on which to determine the appropriateness of granting or denying the petition.

The cable operator and any other party may oppose any petition to intervene or participate but must do so within seven days of the petition's filing date and must send the petitioning person a copy of the opposition. The Cable Division may, upon request, allow the petitioning person to file a reply to the opposition.

Given the time constraints for conducting discovery, the Cable Division acts promptly on petitions for intervention. Where appropriate, e.g., where numerous parties have requested status as intervenors, the Cable Division will issue a pre-hearing procedural order.

Reference: M.G.L. c. 30A, §§ 1(3), 11(3); 801 C.M.R. §§ 1.01(7) and (9).

Hypothetical, Part 4

In its petition to intervene, the Smallville Board of Selectmen states that it is specifically and substantially affected by the rate proceeding due to its concern that certain franchise-related costs (“FRCs”) are improperly included in the basic service tier (“BST”) rate calculation on Worksheet 7 of FCC Form 1240. The Board notes that the only cost required under the license agreement signed in late 2002 is a one-time grant of \$275,000 to construct and equip an access studio. The access studio is to be built as part of a new high school, and construction is scheduled to begin in the Fall of 2005. The Board states that it has a responsibility to ensure that the FRCs included on FCC Form 1240 are appropriate.

Kent Cable Company does not file an opposition to the petition. After reviewing the Board’s petition to intervene, the Cable Division finds that the Smallville Board of Selectmen has established that it is specifically and substantially affected by the rate proceeding and issues an order granting the petition.

DISCOVERY

Discovery is a process that allows parties to gather information to prepare for the hearing.⁶ For example, given the complex and technical nature of the rate forms, parties may need to ask the cable operator to respond to specific written questions prior to the hearing. The Cable Division routinely issues and relies on information requests and document requests during the discovery process.

In most cases, the discovery schedule is set by a pre-hearing procedural order and will include dates by which discovery must be conducted. A pre-hearing procedural order may also be used to settle discovery disputes between parties. Discovery must be completed prior to the hearing.

⁶ All information submitted to the Cable Division is presumed to be a public record. A party may petition for confidential treatment of those records. For more information regarding public records and confidential treatment of records, see the section below on “Public Records and Confidential Treatment.”

All responses to information requests generally are received at least two weeks prior to the hearing in order to provide the requesting party with sufficient time to review the responses and formulate appropriate questions for cross-examination. Any information request or document request issued by the Cable Division will include a due date.

Cable operators are expected to cooperate with reasonable discovery requests. However, the Cable Division may limit discovery requests “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”

Certain documents provided by a cable operator during discovery, such as information request responses, franchise agreements, and copies of bills and payrolls from access studios, may be marked for identification as exhibits at the hearing. The Cable Division marks these responses exhibits, numbered consecutively, e.g., Exh. CTV-1. At the conclusion of the hearing, parties may move to admit any pre-marked exhibits into the record.

Reference: 801 C.M.R. § 1.01(8).

Hypothetical, Part 5

After receipt of the order granting the Smallville Board of Selectmen status as an intervening party in the pending rate case,

the Board issues a series of questions to Kent Cable Company concerning the \$30,000 amount included in FRCs.

The Board issues the following questions to Kent Cable Company:

1. Please explain the appropriateness of including \$30,000 in FRCs on the FCC Form 1240, Worksheet 7, Line 707.
2. Please explain whether this \$30,000 is related to the \$275,000 capital grant provided in the license signed November 16, 2002.
3. If the \$30,000 is related to the \$275,000 capital grant, please explain why it is included on the FCC Form 1240 for this projected period when construction is not scheduled to begin until Fall of 2005.
4. Please provide a revised calculation of the BST rate reducing the FRCs by \$30,000.

Kent Cable Company provides its response in the appropriate time frame. Generally, Kent Cable Company responds that the \$30,000 was a portion of the \$275,000 capital grant. Kent Cable Company justifies its inclusion on the FCC Form 1240 due to its willingness to disburse the monies to the Town during the projected period. Kent Cable Company also provides a revised calculation of its BST rate.

HEARING DECORUM AND RECORDINGS

All rate hearings are recorded onto audio tape by the Cable Division. Oral testimony is part of the evidentiary record, and the audio tape allows the Cable Division to review the testimony during its deliberations. Parties and witnesses at the hearing must be sworn in by the Director of the Cable Division, as the presiding officer, prior to providing any testimony.

Because the oral testimony is referred to by the Cable Division in making its determination, there are certain ground rules that ensure the oral testimony is recorded properly. First, all persons wishing to speak at the hearing must identify themselves for the record. Second, parties and other persons providing comments should speak to be heard and be careful not to speak when others are talking. Third, commenters should be aware that the audio tape is unable to pick up body language, such as head nodding or gestures, and as such all questions, answers, and comments should be audible. Finally, as in any courtroom, all persons are expected to conduct themselves in a professional manner and treat other parties and the Cable Division staff in a respectful manner.

All audio recordings related to rate proceedings are a part of the public record and are maintained in the docket file. Copies of audio recordings may be obtained from the Cable Division upon request and for a fee sufficient to cover the cost of such copying.

Occasionally, a cable operator will provide a stenographer for purposes of maintaining a written transcript of the hearing. In such event, the cable operator shall provide a copy of the written transcript to the Cable Division at no cost.

Reference: 801 C.M.R. § 1.01(10).

WITNESS TESTIMONY AND EXHIBITS

The FCC Forms typically constitute a cable operator's direct case and pre-filed testimony. The filing is marked for identification purposes as a company exhibit, e.g., Exh. Kent-1. The cable operator is given an opportunity to provide witnesses to supplement that testimony at the hearing. When the cable operator's witnesses have finished presenting supplemental testimony, these witnesses are then subject to cross-examination by the Cable Division and all parties.

Cross-examination provides the Cable Division and parties with the opportunity to ask questions relevant to the rate proceeding. Cross-examination is limited to testimony, and thus, parties should use the cable operator's filing and marked exhibits as the basis for cross-examination questions.

The Cable Division first conducts cross-examination of the cable operator's witnesses, and then any intervenors are called in alphabetical order to conduct cross-examination of these witnesses. In the past, the Cable Division has been lenient in permitting intervening parties to engage in what amounts to discovery during cross-examination of the cable operator's witnesses. Attorneys appearing on behalf of a party are put on notice that discovery will not be permitted during cross-examination. The Cable Division will continue to provide some latitude to intervening parties who are proceeding without legal representation.

Any party may call a witness to testify and present that party's case. Any party may also seek to enter exhibits into the record. To do so, a party should provide a copy to the bench and all other parties, including the cable operator, and request that the document be marked for identification purposes, e.g., Exh. Smallville-1. The party may then question its witness directly concerning that document. The cable operator and other parties will be given an opportunity to cross examine the witness. At the conclusion of the hearing, each party moves, by making an oral request, that its exhibits be admitted into the record.

Reference: M.G.L. c. 30A, § 11; 801 C.M.R. § 1.01(1).

Hypothetical, Part 6

CarlyAnn Morgan, a member of the Smallville Board of Selectmen, represents the Board at the hearing. Following the cross-examination by the Cable Division, Ms. Morgan indicates that she will be conducting cross-examination on behalf of the Smallville Board. She asks the Presiding Officer, the Cable Division Director, to mark for identification four documents. Each of the documents is Kent Cable Company's response to Smallville's information requests. The Cable Division marks for identification the Company's responses to Smallville's information requests one through four as Exhs. Smallville-1-4, respectively.

Ms. Morgan then asks Trey Spencer, Kent Cable Company's representative, to clarify the Company's response to the Board's information requests. Specifically, Ms. Morgan asks whether Kent Cable Company has ever received a request from the Town of Smallville requesting disbursement of any portion of the \$275,000. Mr. Spencer responds on behalf of the Company that the Town of Smallville has not made such a request. Ms. Morgan then asks whether construction of the access studio had been undertaken. Mr. Spencer responds that the construction has not yet been started. Ms. Morgan asks when construction of the access studio is anticipated to begin. Mr. Spencer responds that it is the Company's understanding that construction will begin in the Fall of 2005.

Ms. Morgan then asks why current Smallville subscribers should be forced to pay for franchise costs related to the access studio when construction of the studio is not scheduled to begin until 2005. Mr. Spencer responds that the Company is willing to distribute the monies to the Town at any time.

Later in the proceeding, Ms. Morgan calls the Town of Smallville's witness, Ben Nixon, who testifies that the access studio construction was delayed to 2005. Ms. Morgan presents a letter and asks that it be marked for identification as an exhibit. The Cable Division marks the letter as Exh. Smallville-5. Ms. Morgan then asks Mr. Nixon to explain the letter. Mr. Nixon testifies that the letter constitutes a side agreement between the cable operator and Smallville to build an access studio after completion by Smallville of the new school. Mr. Nixon further testifies that the new school construction was to be completed in 2005.

RECORD REQUESTS

Where the testifying party's memory fails or the testifying party is unable to compute calculations on the spot, the Cable Division may allow the answer to be provided as a response to a record request. Record requests that are issued at the hearing are considered an extension of the testifying party's testimony and therefore are provided under oath. Record requests are identified as e.g., RR-CTV-1, RR-Smallville-1.

Any objection to a record request should be made at the time the request is made at the hearing.

The Director of the Cable Division will, at the hearing, provide a deadline for responses to record requests. Typically, responses are due within ten days. The testifying party must supply copies of the record request to all parties. Upon receipt of the responses to record requests, parties may request that the Cable Division allow an opportunity to respond to the information provided.

CLOSE OF HEARING

Once all direct and cross-examination is complete, the Cable Division will ask parties if they would like to move any of the exhibits that were marked for identification into the record. Parties may object to certain exhibits at this point. The Cable Division will also move to admit its exhibits into the record. Once, the exhibits are admitted into the record, the Cable Division Director, as the presiding officer, will close the evidentiary record (except for any outstanding record requests). Once the record is closed, additional evidence may not be admitted unless the presiding officer determines it is appropriate to re-open the record to admit such evidence.

At this time, the presiding officer will also set a schedule for submitting briefs.

BRIEFS

A brief is a written document that allows parties to take facts on the record, analyze those facts pursuant to law and policy, and present an argument regarding the appropriateness of the proposed rates. Because a brief is an analysis of law and fact, rather than a presentation of additional evidence, briefs received after the record is closed are considered to be a part of the record without requiring that the record be re-opened. In the brief, parties should include case citations in order to give their arguments the appropriate weight.

Reference: 801 C.M.R. §§ 1.01(1)(j) and (k).

Hypothetical, Part 7

The Smallville Board of Selectmen submits a brief outlining its analysis of the facts presented at the hearing. Specifically, the Board cites the instructions to the FCC Form 1240, Worksheet 7 at Line 707, which direct the cable operator to “*enter the total monthly franchise related costs (“FRCs”) for the period. You should attach a complete list of all costs being claimed in Line 707 and include information on how they were calculated and when they occurred (or are projected to occur).*” The Board also notes that according to federal regulations, only those costs that are reasonably certain and reasonably quantifiable during the projected twelve-month period should be included in the FRCs on Worksheet 7. The Board provides the federal regulations citation (47 C.F.R. § 76.922(e)(2)(ii)(A)).

The Board goes on to cite testimony provided by Kent Cable Company as responses to information requests (Exhs. Smallville-1-4) and at the hearing. Specifically, the Board notes that Kent Cable Company stated that while the funds for the access studio and equipment were available to the Town of Smallville, construction on the access studio has not yet begun. The Board cites the side agreement between the Town of Smallville and Kent Cable Company (Exh. Smallville-5) as well as testimony by both Kent Cable Company and its own witness, Ben Nixon, that the access studio construction is scheduled to begin in the Fall of 2005. Finally, the Board notes that given the requirement that any costs included as a part of the FRCs on Worksheet 7 be reasonably certain and reasonably quantifiable, and given that the access studio construction is not set to begin for at least two years, such costs are not reasonably certain and reasonably quantifiable.

Based on the cited information, the Board concludes that the Cable Division should order Kent Cable Company to remove the \$30,000 from the FRCs calculation on Worksheet 7 of the FCC Form 1240. The Board cites the basic service tier (“BST”) rate calculation provided by Kent Cable Company as a response to an information request (Exh. Smallville-5) and argues that this revised BST rate should be put in place and the appropriate refunds provided to subscribers.

Kent Cable Company submits a brief and argues that the \$275,000 is reasonably certain and reasonably quantifiable due to its inclusion in the license. Kent Cable Company also states that it is willing to distribute the monies at any time. Kent Cable Company asks the Cable Division to approve its BST rate as originally calculated.

DECISION-MAKING PROCESS

The record includes all of the information allowed to be considered by the Cable Division in making a decision regarding the appropriateness of proposed rates. The record is comprised of: 1) exhibits; 2) oral testimony at the hearing; 3) record requests; and 4) briefs.

Once the record is closed, the Cable Division will complete its analysis of the information received during the rate proceeding. The Cable Division will then draft its decision as a rate order for issuance to the parties. In the rate order, the Cable Division may order a cable operator to refile its FCC Forms in a different manner, to refund money to subscribers, or to make a change in its next rate filing. All subsidiary findings and conclusions of law must be in writing and included in the rate order.

Upon finalization of the rate order, the Cable Division will provide copies of its rate order to all parties and persons included on the service list. Copies are provided via facsimile and First Class mail and will be provided by e-mail upon request. The Cable Division also posts the rate order on its website.

Reference: M.G.L. c. 30A, § 11.

Hypothetical, Part 8

On February 10, 2004, the Cable Division issues its Rate Order. In the Rate Order, the Cable Division finds that the inclusion of the \$30,000 in FRCs related to the access studio and equipment is not appropriate. Specifically, the Cable Division finds that while cable operators are permitted to project for increases in FRCs to the extent that they are reasonably certain and reasonably quantifiable, Kent Cable Company has not established, as required under federal regulations found at 47 C.F.R. § 76.922(e)(2)(ii)(A), that the \$30,000 access cost was reasonably certain and reasonably quantifiable during the projected period.

Based on its analysis, the Cable Division rejects Kent Cable Company's FCC Form 1240 filed for Smallville and directs the Company to file a revised FCC Form 1240 removing the \$30,000 in FRCs. Further, the Cable Division accepts as accurate the BST rate as calculated by Kent Cable Company and submitted in response to an information request from the Smallville Board of Selectmen (Exh. Smallville-5). As such, the Cable Division orders Kent Cable Company to refile its FCC Form 1240 in compliance with this recalculated rate.

The Cable Division accepts Kent Cable Company's FCC Form 1205 as in compliance with the applicable statutes and regulations.

APPEALS

Attached to each final rate order is a statement regarding the appellate process ("Appeal Page"). This Appeal Page outlines that parties have the right to appeal the final decision of the Cable Division to the Commission of the Department of Telecommunications and Energy. Any appeal must be in writing and must be filed within 14 days of the issuance of the decision. The Appeal Page also outlines the policies and procedures relating to filing an appeal.

Reference: M.G.L. c. 166A, § 2.

OTHER PROCEDURAL ISSUES

CONFIDENTIAL TREATMENT AND PUBLIC RECORDS

All information submitted to the Cable Division is presumed to be a public record. Any letter, email, or facsimile sent to any Cable Division staff member is also presumed to be a public record. All public records are filed in the Cable Division's public dockets and may be viewed by any person upon request.

A party desiring confidential treatment of certain information sought during discovery must request confidential treatment in writing. The party seeking confidential treatment bears the burden of demonstrating that the information is deserving of confidential treatment, *i.e.*, 1) the information for which protection is sought must constitute trade secrets, [or] confidential, competitively sensitive or other proprietary information; and 2) the party seeking protection must overcome the statutory presumption that all such information is public information by proving the need for its non-disclosure. In addition, even where a party proves such a need, the Cable Division may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect.

Parties should be aware that confidential treatment must be sought prior to submitting the information to the Cable Division since upon receipt, all information that has not been granted confidential treatment is immediately considered to be a part of the public record. While it may appear obvious that confidential treatment should be sought prior to submitting the information, the Cable Division has, on occasion, been presented with requests for confidential treatment of information that has been in the public record for a period of time.

Reference: M.G.L. c. 25, § 5D.

EX PARTE COMMUNICATION

Discussions, relevant to the merits of a proceeding, between a party and an Agency employee who is reasonably expected to be involved in the decision-making process in an adjudicatory proceeding are considered to be ex parte communications and are specifically prohibited by Massachusetts regulations. Thus, Cable Division staff may not discuss substantive matters concerning ongoing rate cases with parties. Ex parte communication regulations ensure, in part, that: 1) inappropriate pressure or influence related to an ongoing rate proceeding is not exerted on Cable Division staff; and 2) all relevant factual information is made a part of the record of the proceeding. All parties

appearing before the Cable Division are expected to abide by these ex parte communication regulations.

Cable Division staff may speak on procedural matters relating to ongoing rate cases. Persons seeking information regarding procedural matters related to a specific rate proceeding, such as filing deadlines, should contact the Clerk of the Cable Division.

Reference: 801 C.M.R. § 1.03(6).

ADDITIONAL RESOURCES

Information regarding open dockets may be found at the Cable Division's website at www.state.ma.us/dpu/catv. The Cable Division's website also provides general information regarding the rate regulation process. The Federal Communications Commission's website at www.fcc.gov has most rate forms available for download, as well as additional information regarding rate regulation.

GLOSSARY OF TERMS

The following list includes terms that are frequently used in the cable television industry. While not all of these terms are used in this Practical Guide, they are included to provide a reference for interested readers. A more comprehensive glossary of cable-related terms is available at the Cable Division's website at www.state.ma.us/dpu/catv.

Access Channels: Cable channels, including public, educational, and governmental, made available to community members on a free or leased basis either with or without studio and production facilities. An Issuing Authority may require that such channels be provided as part of a licensing agreement. The cable operator may not exercise editorial control over the programming on these channels, except that a cable operator may refuse to transmit any programming that contains obscenity or indecency, 47 U.S.C. § 531.

Access Corporation: A corporation organized within a municipality for the purpose of operating that municipality's access channel(s).

Analog: Technology originally designed for transmitting voice (e.g., telephones) where signals are sent as electromagnetic waves. For video service, the signal is sent from the television broadcaster to the local cable operator and then to the subscriber's home. Along the way, there are a series of amplifiers; however, the manner in which the signal is sent is analogous to making a photocopy of a photocopy of a photocopy so that by the time the signal gets to the subscriber's home, the quality of the picture or audio may not be as clear as the original, meaning there may be snow or noise interference (compare *Digital*).

Basic Service Tier (also referred to as *BST*): Lowest level of service available and required by federal law to include, at a minimum, the retransmission of local television broadcast signals and local public access channels. Rates for the basic service tier are the only programming rates currently regulated. Subscribers with cable-ready television sets do not need to rent or purchase cable converters in order to obtain only the basic service tier.

Broadband: Descriptive term for evolving digital technologies that provide consumers with a single-switched facility offering integrated access to voice, video, video-on-demand, high-speed data, and interactive information delivery.

Cable Advisory Committee (also referred to as *CAC*): Appointed by the Issuing Authority, and its role varies according to the authority defined by the Issuing Authority. Typical responsibilities include informing and educating the public about cable television service, overseeing the ascertainment process during license renewals, acting as liaison to the cable operator, supervising the cable operator's response to complaints, responding to residents' questions regarding the cable system, and staying abreast of community programming issues.

Converter: Equipment authorized by and often provided by a cable operator for a fee that allows access to cable services. Both analog and digital converters are currently available. Analog converters use traditional radio wave technology and provide programming through the one-way transmission of information from the cable operator to the subscriber. Digital converters use computer technology and provide two-way transmission resulting in access to digital programming and interactive services, such as the on-screen purchase of pay-per-view movies and on-screen television guides.

Cable Programming Service Tier (also referred to as *CPST*): Unregulated service tier that typically includes channels such as CNN, ESPN, Lifetime, MTV, and Nickelodeon. Subscribers wishing to obtain CPST programming must subscribe to the basic service tier and in some circumstances must rent or purchase a converter.

Digital: Computer technology that transmits signals by breaking up the message into electronic bits, sending the message over the network, and recreating the message at the other end. Since the signal is recreated at the end location, the system is less sensitive to interference such as noise and snow. In addition, digital technology allows for compression so that more channels can be carried. Often cable operators who utilize digital technology will offer digital cable television, high-speed data (Internet), and digital telephone services (compare *Analog*).

Effective Competition: Where two or more cable operators provide service in the same municipality, one or both of the cable operators may seek a determination from the Federal Communications Commission ("FCC") that there is sufficient competition to control basic service tier rates and thus government regulation is no longer required. If the FCC grants the cable operator's petition, the FCC deems the municipality to have effective competition and revokes the Cable Division's authority to establish basic service tier rates for the cable operator in that municipality.

Federal Communications Commission (also referred to as *FCC*): Federal agency responsible for the regulatory oversight of the communications infrastructure in the United States.

Franchise Fees: Under federal law, non-capital costs relating to license requirements are considered franchise fees and may be passed on to subscribers. For example, local officials, in negotiating the cable license, may require cable operators to set aside channels for public, educational, and governmental use. The monies spent to maintain the access studio, equipment, and personnel are considered franchise fees and may be passed on to subscribers. A municipality may request up to five percent of the cable operator's annual gross revenue from operating in the municipality less the required License Fee (compare *License Fee*).

Franchise Related Costs (also referred to as *FRCs*): Any capital expenses incurred by the cable operator as a result of required public, educational, and governmental channels, such as purchasing or upgrading access equipment and facilities. These franchise-related costs may be recovered from subscribers through basic service tier rates or alternatively, may be listed as a separate fee on subscribers' monthly bills.

Franchising Authority (also referred to as *Franchise Authority*): Legal term for governmental entity authorized to regulate rates, oversee license process, and enforce customer service standards. In Massachusetts, the Cable Television Division of the Department of Telecommunications & Energy is the Franchising Authority (compare *Issuing Authority*).

Homes Passed: Those homes within a municipality that are located close enough to a cable line to be able to connect with cable service, regardless of whether those households actually opt to subscribe to the cable service.

Institutional Network (also referred to as *I-Net*): A separate closed loop network for municipal institutional use only. Used to connect police, fire departments, town or city hall, and schools; can contain both video and data; can also be used to monitor heat, light, and security systems.

Information Requests: Prehearing discovery in the nature of interrogatories and requests for documents, Mass. R. Civ. P. 33, 34.

Issuing Authority: Legal term for the governmental entity authorized to grant a license or franchise to a cable operator. Under Massachusetts law, the Issuing Authority is either the local city manager, the Mayor, or the Board of Selectmen (compare *Franchising Authority*).

License or Franchise: An agreement between the Issuing Authority and the cable operator that authorizes the construction or operation of a cable system. It also establishes the terms and conditions of cable service such as the length of the contract, customer service standards, and procedures for funding public access channels. Under Massachusetts law, the term of an initial license may not exceed fifteen years and the term of a renewal license may not exceed ten years.

License Fee: A fee of \$1.30 per subscriber per year that cable operators are required to pay pursuant to Massachusetts law to offset the cost of regulation. The License Fee is divided between the municipality and the Commonwealth with the municipality receiving 50 cents and the Commonwealth receiving 80 cents (compare *Franchise Fee*).

Pass-Through Costs: Certain costs that may be recovered directly from subscribers (see *Franchise Fees* and *License Fee*).

Pay-Per-View: Programming, typically movies or special events, that a subscriber specifically requests to receive for a single fee added to the monthly cable bill. In order to obtain pay-per-view programming, cable operators are allowed to require that the subscriber purchase the basic service tier and rent or purchase a converter box. Some cable operators have the capability of determining whether the pay-per-view program was purchased via telephone or by on-screen interactive remote control and whether the converter channel was then set on the appropriate movie channel in order to receive the programming. Rates for pay-per-view programming are not regulated.

PEG: Public, educational, and governmental channels (see *Access Channels*).

Premium Channels: Channels not included in a cable operator's regular service tiers. HBO and Showtime are examples of premium channels. In order to obtain premium channels, cable operators are allowed to require that the subscriber purchase the basic service tier, rent or purchase a converter box, and pay additional fees. Rates for premium channels are not regulated.

Rebuild: Process where the cable television system in a municipality is reconstructed as if there were no existing wires or capabilities (compare *Upgrade*).

Record Request: Where fault of memory or complexity of subject precludes a responsive answer by the witness at the hearing, a request for written response may be issued. The response to the record request is part of the record and the evidence, unless challenged as unresponsive and expunged in whole or part.

Service List: List of parties and limited participants in a proceeding. Persons named on the service list receive all documents issued in the case.

Service Tier: Grouping of cable channels for which a separate rate is charged by the cable operator.

Small System: A small system is defined by federal regulations as “a cable television system that serves 15,000 or fewer subscribers. The service area of a small system shall be determined by the number of subscribers that are served by the system’s principal headend, including any other headends or microwave receive sites that are technically integrated to the principal headend,” 47 C.F.R. § 76.905(c).

Upgrade: Process where cable television system is modified through the addition of electronic components capable of providing enhanced services. Upgrade typically occurs on a municipality basis (compare *Rebuild*).

Glossary Sources: 47 U.S.C. § 521, et seq.; 47 C.F.R. § 76.1, et seq.; Federal Communications Commission website (www.fcc.gov); National Cable & Telecommunications Association website (www.ncta.com); *The Essential Guide to Telecommunications*, Annabel Z. Dodd (1998).