



COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

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

RATE ORDER

CTV 04-8

Review by the Cable Television Division of the Department of Telecommunications and Energy of Federal Communications Commission Forms 1240 and 1205 filed by Adelphia Cable Communications, Inc.

APPEARANCES: Leslie J. Brown
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FOR: ADELPHIA CABLE COMMUNICATIONS, INC.
Petitioner

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FOR: THE TOWN OF PLYMPTON
Intervenor

I. INTRODUCTION

On November 30, 2004, Adelphia Cable Communications, Inc.¹ (“Adelphia” or “the Company”) filed with the Cable Television Division (“Cable Division”) of the Department of Telecommunications and Energy proposed basic service tier (“BST”) programming rates on Federal Communications Commission (“FCC”) Forms 1240 for the communities subject to rate regulation that Adelphia serves in Massachusetts.² This filing was accompanied by Adelphia’s nationwide FCC Form 1205 with proposed equipment and installation rates. Pursuant to 47 C.F.R. § 76.933(g), Adelphia implemented any rate changes resulting from its FCC Forms 1240 and 1205 filings on March 1, 2005.

The Cable Division held a public and evidentiary hearing on March 22, 2005. The Town of Plympton intervened in this proceeding. The evidentiary record consists of Adelphia’s rate forms admitted as Adelphia Exhibits 1 through 20, Adelphia’s responses to information requests admitted as Cable Division Exhibits 1 through 7, and Adelphia’s responses to record requests issued by the Cable Division.

¹ The formal license held by Adelphia Cable Communications, Inc., in each of its Massachusetts communities is under one of the following names: Adelphia Cablevision Corp.; Century Berkshire Cable Corp.; Chelsea Communications, L.L.C.; FrontierVision Cable New England, Inc.; Martha’s Vineyard Cablevision, L.P., and Mountain Cable Company, L.P.

² The regulated communities are: Abington, Adams, Amesbury, Aquinnah, Bourne, Cheshire, Clarksburg, Duxbury, Edgartown, Essex, Falmouth, Gloucester, Great Barrington, Halifax, Kingston, Lee, Lenox, Manchester-by-the-Sea, Marshfield, Merrimac, North Adams, Oak Bluffs, Pembroke, Plymouth, Plympton, Rockland, Rockport, Salisbury, Sandwich, Sheffield, and Stockbridge.

II. REVIEW OF FCC FORMS 1240

A. Standard of Review and Burden of Proof

The FCC has created specific forms incorporating the provisions of its rate regulations, upon which a cable operator must calculate its rates. The FCC Form 1240 allows a cable operator to annually update its BST programming rates to account for inflation, changes in external costs, and changes in the number of regulated channels. In order that rates be adjusted on the FCC Form 1240 for projections in external costs, or for projected changes to the number of regulated channels, the cable operator must demonstrate that such projections are reasonably certain and reasonably quantifiable. 47 C.F.R. §§ 76.922(e)(2)(ii)(A) and 76.922(e)(2)(iii)(A). Cable operators may also project for increases in franchise related costs (“FRCs”) to the extent they are reasonably certain and reasonably quantifiable; however, such projections are not presumed to be reasonably certain and reasonably quantifiable. 47 C.F.R. § 76.922(e)(2)(ii)(A).

The standard under which the Cable Division must review rate adjustments on the FCC Form 1240 is found in the FCC’s rate regulations. Specifically, the rate regulator shall assure that the rates comply with the requirements of Section 623 of the Communications Act of 1934, as amended. 47 U.S.C. § 543; 47 C.F.R. §§ 76.922, 76.923, and 76.930. The Cable Division may accept as in compliance with the statute BST rates that do not exceed the “Subsequent Permitted Per Channel Charge” as determined by federal regulations. See 47 C.F.R. § 76.922(a). In addition, the Cable Division shall only

approve rates it deems reasonable. G.L. c. 166A, §§ 2, 15; 47 U.S.C. § 543; 47 C.F.R. §§ 76.937(d) and (e), and 76.942.

The burden of proof is on the cable operator to demonstrate that its proposed rates for BST programming comply with Section 623 of the Communications Act of 1934, as amended, and implementing regulations. 47 U.S.C. § 543; Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, at 5716, ¶ 128 (1993) (“Rate Order”); see also 47 C.F.R. § 76.937(a).

B. Discussion and Analysis

1. True-Up Adjustments

On Adelphia’s FCC Form 1240 filings for a number of communities, at “Worksheet 8 - True-Up Rate Charged,” the Company entered BST rates for the first three months of the true-up period, December 2003 through February 2004, that differed from either the actual BST rates that Adelphia had charged subscribers during those months, or the BST maximum permitted rate (“MPR”) that the Cable Division had approved for that month. The communities affected are: Amesbury, Falmouth, Halifax, Kingston, Marshfield, Merrimac, Pembroke, Plymouth, Plympton and Salisbury (Exhs. Adelphia-3, at 13, -8, at 13, -11, at 13, -12, at 13, -14, at 13, -15, at 13, -16, at 13, -18 ,at 13; see Adelphia Cable Communications, Inc., CTV 03-5, at Rate Schedule (2004)). On the two filings for the

Great Barrington system,³ Adelphia entered on Worksheet 8, a rate for all 12 months of the true-up period that the Cable Division could not verify had ever been charged subscribers or been an approved BST MPR (Exhs. Adelphia-10, -19; CTV 03-5, at Rate Schedule). At issue is whether Adelphia's rate filings comply with the FCC rate regulations and the Instructions to FCC Forms 1240 and 1235.

The FCC Form 1240 true-up calculation requires cable operators to compare their actual revenue during the true-up period entered on Line H1, with the revenue the cable operator would have collected if it had charged its maximum permitted rate during the same period entered on Line H2. FCC Form 1240, at 4. The difference between the two lines becomes the true-up period adjustment, which after being adjusted for interest, may be included in the operator's maximum permitted rate ("MPR"). Id.; Instructions for FCC Form 1240, at 21-25. If the true-up amount is positive, the cable operator has the option to include it in the BST rate calculation; if the true-up is negative, it must be included. Instructions for FCC Form 1240, at 23 (Line H14). The true-up calculation, therefore, has a direct effect on the BST rate.

Cable operators calculate the actual revenue amount on Line H1 by multiplying together three variables: the average actual rate the cable operator charged during the true-up period from Worksheet 8, the number of months in the true-up period, and the average number of subscribers during the true-up period. Id. at 21. Since one of these variables is derived from Worksheet 8, the accuracy of the data entered on Worksheet 8 is essential for determining the cable operator's

³ Adelphia filed two FCC Forms 1240 for the Great Barrington system; a combined filing for Great Barrington, Lee, Lenox and Stockbridge (Exh. Adelphia-10), and an individual filing for Sheffield (Exh. Adelphia-19).

actual revenue on Line H1. The FCC instructs cable operators to enter on Worksheet 8 the actual rate that was in effect for each month of the true-up period. Id. at 43. If there were 12 months in the true-up period, as was the case with Adelphia's filings, these monthly actual rates will be reported on Lines 801 through 812 of Worksheet 8. The FCC then instructs cable operators to add up the monthly rates, and divide the total by the number of months in the true-up period. Id. The result is entered on Line 813 of Worksheet 8; it is the average monthly BST rate for the true-up period. Line 813 is then used in the Line H1 calculation. Id. at 43 (Line H13), 21 (Line H1).

A fundamental aspect of the true-up process is that, costs must have been actually incurred before the rates can be true-up. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration, MM Docket No. 92-266, 11 FCC Rcd 388, FCC 95-397, at 420, ¶ 79, n.151 (1995) ("Thirteenth Order"). Since the rate forms are filed at least 90 days prior to the rates going into effect, the cost expected to be incurred during this 90-day period cannot be true-up until a subsequent filing is made and actual cost data for these months is available. Time Warner Cable, Chatham County, NC, DA 98-967, at 3, ¶ 7 (1998);⁴ see 47 C.F.R. § 76.933(g); see also Thirteenth Order at 420, ¶ 79, n.151. Therefore, the true-up and projected periods will not reflect parallel time frames. Rather, the first three months of the true-up period will be the

⁴ Time Warner had filed its rate forms on September 29, 1997 for a rate increase beginning on January 1, 1998. Time Warner Cable, Chatham County, NC, DA 98-967, at 2, ¶ 5 (1998). However, its forms had included a true-up period that ended on December 31, 1997, three months after Time Warner had prepared its rate forms. Id. at 3, ¶ 7. The FCC rejected this approach. Id.

three months prior to the previous projected period. In this case, the previous projected period was from March 2004 through February 2005. The first three months of the true-up period are, therefore, December 2003, January 2004, and February 2004.

On the Amesbury, Merrimac and Salisbury filings, Adelphia defined the true-up period as coincident with the previous form's projected period by entering the same BST rate for all 12 months of the true-up period, even though a different rate was in effect for the first three months of that period (Exhs. Adelphia-3, at 10; -15, at 10; -18, at 10). Specifically, Adelphia entered on Lines 801 through 803, the BST MPR that did not become effective until March 2004 (*id.*). In each filing, Adelphia must revise Worksheet 8, and enter on Lines 801 through 803, the actual rate charged to subscribers in December 2003, January 2004, and February 2004.

There is one exception to the general rule that an operator must report actual BST rates on Worksheet 8. If a cable operator has charged subscribers a BST rate that includes a portion of an approved upgrade surcharge and, that combined charge exceeds the BST MPR approved for that community, the operator must report the approved FCC Form 1240 BST MPR for that month. Time Warner Cable, 01-7, at 4 (2002).⁵ This ensures that no portion of the FCC Form 1235 upgrade surcharge flows through the FCC Form 1240 true-up mechanism.⁶ Accordingly, on

⁵ The Instructions for FCC Form 1235 state: “[t]he recoverable costs of the upgrade [the surcharge] 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.” Instructions for FCC Form 1235, at 1.

⁶ The FCC has stated that “[t]he FCC Form 1235 add-on is a yearly amount based on
(continued...)

Worksheet 8, a cable operator must enter for each month of the true-up period, the actual BST rate charged during that month, unless the actual BST rate exceeds the BST MPR in which case a cable operator must enter only the FCC Form 1240 BST MPR applicable to that month.

In Falmouth, Halifax, Marshfield, Pembroke and Plympton, Adelpia included an upgrade surcharge component in subscribers' BST rates effective March 1, 2004, resulting in an actual rate that was greater than the approved BST MPR. See CTV 03-5, at Rate Schedule. The Company appropriately included on Worksheet 8, Lines 804 through 812, the BST MPR approved for these communities. However, the Company included this same rate on Worksheet 8 for the first three months, even though the rate was not in effect during this period (Exhs. Adelpia-8, at 10, -11, at 8, -14, at 12). For these months, the Company must use the actual BST rate in effect at that time. In response to a Cable Division record request, the Company revised Worksheet 8 for Falmouth, entering the appropriate actual BST rate for the first three months of the true-up period (RR-CTV-1, exhibit 3, filing 3, at 13). Adelpia must similarly revise the filings for Halifax, Marshfield, Pembroke and Plympton.

⁶(...continued)

Operator's actual costs for upgrading its system. It is not a projected amount and is therefore not subject to true-up through the FCC Form 1240." Bresnan Communications Company, Bay City, MI, DA 98-1877, at 5, ¶ 10 (1998). The FCC has also stated that "[o]ur requirement that Operator fully use its benchmark rate prior to recovering the network upgrade add-on is consistent with our views and reasoning in developing the FCC Form 1235. It is only to be used if the benchmark rate alone is insufficient. The only way to calculate this is to use the full benchmark MPR as that portion of the actual rate to be applied on Worksheet 8 of the FCC Form 1240." Bresnan Communications Company, Bay City, MI, DA 99-1779, at 3, ¶ 7 (1999).

In Kingston and Plymouth, the Company implemented an upgrade surcharge earlier than in other communities. See Adelpia Communications Corporation, CTV 02-3, at Rate Schedule (2003). As a result, the actual BST rates Adelpia charged during the true-up period's first three months included the approved upgrade surcharge. On the Kingston and Plymouth filings, on Worksheet 8, Lines 801 and 803, while Adelpia did enter a BST MPR, Adelpia entered the BST MPR applicable to last nine months of the true-up period (Exhs. Adelpia-12 at 10, -16 at 10; RR-CTV-1, filing 2, at 10). In a record request, the Cable Division directed Adelpia to revise Worksheet 8 for each filing. On the Kingston form, Adelpia made no changes (RR-CTV-1). On the Plymouth form, Adelpia used the actual rate charged for the first three months of the true-up period, a rate that included an upgrade surcharge component (id.). As discussed above, in order to ensure that no portion of the FCC Form 1235 surcharge flows through the FCC Form 1240 true-up mechanism, an operator may not enter its actual BST rate on Worksheet 8, in those instances where the actual BST rate exceeds the BST MPR due to the inclusion of an upgrade surcharge. In such a case, the operator must enter the FCC Form 1240 BST MPR amount, a rate that is exclusive of the upgrade surcharge. Adelpia must revise its Worksheet 8 for Kingston and Plymouth to include on Lines 801 through 803, the BST MPR in effect from December 2003 through February 2004, respectively.

On the filings for the Great Barrington system, Adelpia entered the same monthly rate, \$10.23, on Lines 801 through 812 of Worksheet 8 (Exhs. Adelpia-10, at 13, -19, at 13). Adelpia provided no rationale for using this rate, as it does not appear on any rate schedule

applicable to these communities. See CTV 02-3, at Rate Schedule; CTV 03-5, at Rate Schedule. For the first three months included on Worksheet 8, Adelphia should have entered the actual BST rate charged during this period. For the remaining nine months, Adelphia should have reported the BST MPR approved for these months, since the Company included an upgrade surcharge in these communities' BST rates, effective March 1, 2004. See CTV 03-5, at Rate Schedule. In response to a record request, Adelphia revised Worksheet 8 for these communities, appropriately reporting the actual BST rates for the first three months, and the BST MPRs for the last nine months (RR-CTV-1, exhibit 3, filing 5 at 13, filing 6, at 13; RR-CTV-5, exhibit 3, at 13).⁷

2. Channel Changes - Great Barrington System

On December 1, 2003, in the Great Barrington System, Adelphia deleted 12 channels from the BST and added three new channels, for a net decrease in total BST channels from 30 to 21 channels (Exhs. Adelphia-10, at 6, 9, -19, at 6, 9). The Great Barrington system has carried 21 channels on the BST since December 1, 2003 (Exhs. Adelphia-10, at 6, 7; and -19, at exhibit IV). Also, Adelphia reported that it has made no changes to its lineup since that date (Exh. CTV-5). Two issues arise from these channel changes. Not only must Adelphia adjust its BST rate to reflect a reduction in external programming costs, but Adelphia must also adjust its rate to reflect the reduction in the number of regulated channels.

⁷ Adelphia submitted revised versions of both FCC Forms 1240 for the Great Barrington system in response to the Cable Division's first record request, correcting Worksheet 8 (RR-CTV-1, exhibit 3, filings 5 and 6). The Company also filed a further revised version of its FCC Form 1240 for Great Barrington, Lee, Lenox and Stockbridge only, in order to adjust its franchise related costs (RR-CTV-5, exhibit 3). This second filing did not change Worksheet 8 (id.).

a. Number of Regulated Channels

The FCC's rate regulations provide that a cable operator must reduce its rate for the BST when it decreases the number of channels carried on the tier. 47 C.F.R. § 76.922(g)(4).⁸ This is accomplished by first identifying what the FCC calls the "residual" for the BST tier, which is that portion of the BST rate that remains after subtracting out the Worksheet 7 external costs reported on the form. Id.; Instructions for FCC Form 1240, at 34. This residual BST rate is then reduced, to reflect the channels removed from the BST. Instructions for FCC Form 1240, at 33-35.

Cable operators calculate the amount of the "residual" applicable to each deleted channel on Worksheet 4. Id. at 34. Worksheet 4 may be completed for either a true-up period or a projected period, depending on when the channel deletion occurred. Id. Adelphia completed Worksheet 4 for the true-up period because the Company, on its "Worksheet 3 - Markup Method, True-Up Period, Basic Tier," reported that the net deletion of nine channels had occurred during the first month of the true-up period (Exhs. Adelphia-10, at 6, -19, at 6). The

⁸ The FCC officially sunsetted 47 C.F.R. § 76.922(g) effective on January 1, 1998, because of the end of cable programming services tier rate regulation; see 47 C.F.R. § 76.922(g)(8). As the FCC later admitted, this sunseting created confusion for cable operators completing rate forms, if channels had been deleted from the BST tier. Revisions to Cable Television Rate Regulations, MM Docket No. 02-144; FCC 02-177, at 8-9, ¶ 15 (2002). The FCC has reinstated 47 C.F.R. § 76.922(g) for BST rate regulation. Id. at 20, ¶ 55; Revisions to Cable Television Rate Regulations, MM Docket No. 02-144; FCC 02-228, at 1-4, ¶¶ 2-4 (2002) (revising ¶ 55 from the first Order). The FCC specifically stated that franchising authorities should accept and may require rate adjustments for channel deletions consistent with 47 C.F.R. § 76.922(g)(4). Revisions to Cable Television Rate Regulations, MM Docket No. 02-144; FCC 02-228, at 2, ¶ 2 (2002).

instructions state that when computing the residual on Worksheet 4 for the true-up period, the cable operator first enters, on Line 401, the average actual BST for the true-up period, calculated on Line 813 of Worksheet 8. Instructions for FCC Form 1240, at 34. Then the cable operator enters, on Line 402, the average external costs from Line 710 of Worksheet 7 - External Costs, True-Up Period. Id. After further calculations on Worksheets 4 and 5, the amount of the rate decrease resulting from the net decrease in BST channels, known as the “Channel Residual Segment,” is then entered into the rate calculations, at Lines F3 and I3, and adjusts the BST MPR. Id. at 34-37.

On its initial FCC Forms 1240 for the Great Barrington system, although the Company had incorrectly completed Worksheet 8, it had correctly followed the mechanics of the form carrying over onto Worksheet 4, Line 813 from Worksheet 8 and Line 710 of Worksheet 7 - External Costs, True-Up Period (Exhs. Adelpia-10, at 8, 11, 13, -19, at 8, 11, 13). Thus, while the data entered was incorrect, the methodology Adelpia used complied with applicable law. However, Adelpia adopted a different approach on the FCC Forms 1240 that it subsequently submitted in response to record requests (RR-CTV-1, exhibit 3, filing 5, at 8; filing 6, at 8; RR-CTV-5, exhibit 3, at 8). On Line 401, Adelpia entered the same amount that appears on Line A1 of the form, which is the BST MPR approved for the previous projected period (id. at 2, 8). On Line 402, Adelpia entered the same amount that appears on Line D2 of the form, which is the external costs segment from the previous form’s projected period, not the external costs segment calculated on Line 710 for the true-up period (id. at 3, 8, 11). The Company explained that it “believes the correct approach is to include Line A1 at Line 401 and

Line D2 at Line 402 of Worksheet 4, since the channel deletions occurred at the beginning of the True-Up Period” (RR-CTV-1).

Under the Company’s approach, the Company completes Line 401 as if the rates had been lowered in December 2003 simultaneously with the channel deletions. However, the reduced MPRs of \$9.58 and \$9.92 established in CTV 03-5 were not implemented and did not become legally effective until the beginning of the projected period on March 1, 2004.

Adelphia’s proposed approach not only disregards the FCC’s clear instructions, but also overlooks the fact that Adelphia’s subscribers continued to pay the higher monthly rate in these communities from December 2003 through February 2004. As for Line 402, the replacement of Worksheet 7's external cost average for the true-up period is equally problematic. First, the average external cost figure from Worksheet 7, True-Up Period, is an actual number, reporting the external costs Adelphia incurred during the 12 months of the true-up period. In contrast, Line D2, which Adelphia proposes to enter on Line 402 (the same as Line I7 from the previous FCC Form 1240), is a projected figure that is yet to be reconciled. Furthermore, the previous projected period is not the same as the current true-up period, because the previous form’s projected period began on March 1, 2004.

Clearly, the issue is magnified in this case because Adelphia had never submitted a rate form that projected the months of December 2003 through February 2004. As a result, Adelphia’s first projection of these channel movements was for the projected period beginning March 2004, three months after the actual deletions had occurred. The problem would have been averted had Adelphia filed FCC Forms 1240 that had included the months from December 2003

through February 2004 in a projected period. In that instance, the rate produced from these filings would have reflected the impact of these channel movements at the time they occurred. The end result, however, would have been the same. Adelphia's true-up calculation for the three months December 2003 through February 2004 would still be included in the current form. We direct Adelphia to follow the unambiguous instructions to Worksheet 4, and report Line 813 from Worksheet 8 on Line 401, and Line 710 from Worksheet 7 - True-Up Period on Line 402, on the FCC Forms 1240 for the Great Barrington, Lee, Lenox, Sheffield and Stockbridge. This will ensure that an accurate channel movement and deletion segment is used to calculate the BST MPR in these communities.

b. External Programming Costs

During the true-up period, Adelphia reported monthly per-subscriber programming costs of \$0.92 per subscriber for December 2003, which increased to \$1.14 for July 2004, but then dropped to \$0.08 on August 2004, which and have remained at that same level for the remainder of the true-up period and all of the projected period (Exhs. Adelphia-10 at exhibits VI and VII, -19 at exhibits VI and VII). In response to a record request, Adelphia explained that it claimed higher programming costs through July 2004, because, in previous periods, the Company had failed to pass on the programming costs associated with three channels, MTV, Nickelodeon and VH-1 (RR-CTV-3). The Company has provided channel line-ups with its last three rate proceedings. On each of these, MTV and Nickelodeon are not listed as BST channels, but are included on the cable programming services tier ("CPST") (Exhs. Adelphia-10, at exhibits IV, V, -19, at exhibits IV, V; CTV 03-5 (Exhs. Adelphia-10, at exhibits IV, V, -19,

at exhibits IV, V) CTV 02-3 (Exhs. Adelpia-10, at exhibits IV, V, -19, at exhibits IV, V)).

Adelpia also reported that VH-1 was one of the 12 channels deleted from the BST as of December 1, 2003; this is confirmed by the channel line-ups, which also show that the channel was moved to the CPST (Exh. CTV-5; compare CTV 02-3 (Exhs. Adelpia-10, at exhibits IV, V, -19, at exhibits IV, V), CTV 03-5 (Exhs. Adelpia-10, at exhibits IV, V; -19, at exhibits IV, V)). Since MTV and Nickelodeon were not previously included in the BST, we determine that Adelpia improperly included programming costs for MTV and Nickelodeon. Moreover, Adelpia should have included no costs for VH-1 in this filing, since that channel had been moved to the CPST at the beginning of the current form's true-up period, and none of its costs should therefore have been reported as BST programming costs. The Cable Division directs Adelpia to refile both FCC Forms 1240 for the Great Barrington system, removing all programming costs associated with MTV, Nickelodeon, and VH-1, as well as any costs associated with other channels that were not carried on the BST during the true-up period.

3 . Franchise Related Costs – Great Barrington, Lee, Lenox and Stockbridge

As stated above, a cable operator may adjust its rates for changes in FRCs. On the FCC Form 1240 for Great Barrington, Lee, Lenox and Stockbridge, Adelpia reported no FRCs for the true-up period, and \$25,000 in FRCs for the projected period (Exh. Adelpia-10, at 11, 12 (Worksheet 7, Line 707)). The four communities have identical licenses with concurrent terms of ten years commencing on March 1, 2003, and have joint public, educational and governmental (“PEG”) access facilities and operations. See Great Barrington, Renewal Cable Television License, at 6, 20 (February 24, 2003); Lee, Renewal Cable Television License,

at 6, 20 (February 24, 2003); Lenox, Renewal Cable Television License, at 6, 20 (February 26, 2003); Stockbridge, Renewal Cable Television License, at 6, 20 (February 21, 2003) (the “Licenses”). The Licenses provide for a \$50,000 capital payment to support PEG access, to be paid to either the four communities or the access corporation. See e.g. Great Barrington License at 22-23. The Company provided supporting documentation showing that the Company made the \$50,000 capital payment to the four communities on May 22, 2003 (Exh. Adelpia-10, at exhibit IX). The Company initially proposed to collect this payment over a two-year period from March 2005 through February 2007 (*id.*). The Cable Division questioned Adelpia’s proposal to amortize the grant over a two-year period, even though eight years remained on the communities’ licenses (RR-CTV-5).

The FCC has specifically addressed the issue of amortization of capital costs. Thirteenth Order at 442, ¶ 136 (1995). The FCC has held that a cable operator must amortize the cost of franchise imposed capital expenditures over the useful life of the items. *Id.* The FCC reasoned that such treatment is appropriate, because current subscribers should not be required to pay all costs associated with a service that will benefit future ratepayers as well. *Id.*

In response to a record request, Adelpia submitted a revised FCC Form 1240 that extended the recovery of the \$50,000 payment over a ten-year period, commencing on December 1, 2003 (RR-CTV-5, exhibit 3, at exhibit IX). By the revised method, the Company would recover \$5,000 during each of the ten years (*id.*). Adelpia’s revised form includes the pro-rata amount of the payment in both the true-up and projected periods (*id.*). The Cable Division finds that Adelpia’s revised filing, adjusting the recovery period from two to

ten years and commencing the payment during the form's true-up period, appropriately amortizes the capital payment over the useful life of the items in accordance with the Thirteenth Order. The Cable Division instructs Adelphia to include this adjustment in the FCC Form 1240 to be filed in compliance with this Rate Order.

4. Franchise Related Costs - Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich

PEG access programming is provided in Rockland and Sandwich by a community-operated studio funded by a percentage of revenue, and in Abington, Bourne, Halifax, Pembroke, and Plympton by a local origination studio operated by Adelphia. CTV 03-5, at 3-4. On Adelphia's proposed FCC Form 1240 filings in the previous proceeding, the Company had allocated the FRCs of its local origination studios among all seven communities. Id. at 3. The Cable Division specifically instructed Adelphia to adjust the FRC allocation, in order to ensure that Rockland and Sandwich subscribers were not charged for Adelphia's local origination studios. Id. at 6. Adelphia made the requested adjustments, removing the shared FRC costs from the filings for Rockland and Sandwich, and adjusting the percentage allocated to the remaining five communities. CTV 03-5, "Order on Compliance Filing" (October 15, 2004).

On Adelphia's pending FCC Form 1240 filings for these communities, the Company included no FRCs on Worksheet 7 for either the true-up or projected periods (Exhs. Adelphia-1, at 6-7, -5, at 6-7, -11, at 6-7). Adelphia explained its omission of FRCs by stating that it had, as a matter of policy, "decided to forego any current or future recovery of these costs" (Exh. CTV-6). The Company stated that in many cases, information on the PEG amounts included in the base rate was not available because of the passage of time and the

number of different operators involved (Tr. at 20). The Company further stated that in 2003, it began tracking PEG costs and grants at the franchise level for the first time (Tr. at 21).

We find Adelpia's decision to forego recovery of the FRCs is reasonable. We note that Adelpia may not later seek recovery of the costs they decided to forego.

5. Conclusion

Based on our review of the record, we conclude that the BST MPRs established by the forms submitted for Abington, Adams, Aquinnah, Bourne, Cheshire, Clarksburg, Duxbury, Edgartown, Essex, Gloucester, Manchester-by-the-Sea, North Adams, Oak Bluffs, Rockland, Rockport, and Sandwich are just and reasonable and in compliance with applicable law. We further conclude that the BST MPR established by the revised form submitted for Falmouth, RR-CTV-1, is just and reasonable and in compliance with applicable law.

We further conclude that Adelpia's FCC Forms 1240 for Amesbury, Great Barrington, Halifax, Kingston, Lee, Lenox, Marshfield, Merrimac, Pembroke, Plymouth, Plympton, Salisbury, Sheffield and Stockbridge do not comply with applicable law. For Amesbury, Merrimac and Salisbury, we direct Adelpia to revise, in each filing, Worksheet 8, Lines 801 through 803, by entering the actual rate charged to subscribers in December 2003, January 2004 and February 2004. For Halifax, Marshfield, Pembroke and Plympton, we direct Adelpia to revise Worksheet 8 in each filing, by entering the appropriate actual BST rate for the first three months of the true-up period. For Plymouth and Kingston, we direct Adelpia to revise Worksheet 8 for each filing to include on Lines 801 through 803, the BST MPR in effect from December 2003 through February 2004, respectively.

For the Great Barrington system, Adelphia's revised Worksheet 8 for these communities, submitted in RR-CTV-1 and RR-CTV-5, appropriately report the actual BST rates for the first three months, and the BST MPRs for the last nine months. The Cable Division directs Adelphia to further revise its FCC Forms 1240 for these communities by removing all programming costs associated with MTV, Nickelodeon, and VH-1, as well as any costs associated with other channels that were not carried on the BST during the true-up period. Further, for Great Barrington, Lee, Lenox, Sheffield and Stockbridge, we direct Adelphia to revise the FCC Forms 1240, Worksheet 4, in accordance with this Order.

In the revised filings, Adelphia must retain any other revisions approved in this Order. Adelphia must make only adjustments ordered herein, and refrain from making any additional adjustments.

III. REVIEW OF THE FCC FORM 1205

The FCC Form 1205 establishes rates for installations and equipment, such as converters and remote controls, based upon actual capital costs and expenses. Instructions for FCC Form 1205, at 7, 12-13. The FCC Form 1205 is prepared on an annual basis using information from the cable operator's previous fiscal year. Id. at 2. Subscriber charges established by the FCC Form 1205 shall not exceed charges based on actual costs as determined in accordance with the FCC's regulatory requirements. 47 C.F.R. § 76.923(a)(2). As with the FCC Form 1240, the burden of proof is on the cable operator to demonstrate that its proposed rates for equipment and installations comply with Section 623 of the Communications

Act of 1934, as amended, and implementing regulations.

47 U.S.C. § 543; Rate Order at 5716, ¶ 128; see also 47 C.F.R. § 76.937(a).

Based on our review, we find that the FCC Form 1205 filed by Adelphia establishes rates for equipment and installations that are reasonable and in compliance with applicable law.

IV. FCC FORM 1235 FILINGS

Cable operators making significant upgrades to their systems are allowed to recover their upgrade costs, by adding an upgrade surcharge to the FCC Form 1240 rates calculated through an abbreviated cost of service showing. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, and Adoption of a Uniform Accounting System for Provision of Regulated Service: Report & Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215 and CS Docket No. 94-28, FCC 94-39, 9 FCC Rcd 4527, at 4674-4676 (1994) (“Cost Order”); see 47 C.F.R. § 76.922(j).

The FCC does not require a cable operator to delay the recovery of its costs until the entire upgrade is complete. Instead, the FCC allows cable operators to file an FCC Form 1235 for pre-approval, using projected upgrade costs. Instructions for FCC Form 1235, at 2. A pre-approval filing may be made at any time before the services become available to subscribers, using projected upgrade costs. Id. The pre-approval upgrade surcharge may be charged to subscribers as soon as their portion of the cable system has been upgraded and providing upgraded services. Id. If the pre-approval option is exercised, the cable operator must again file

its FCC Form 1235 for final approval. Id. This second filing will primarily entail the substitution of actual costs for projected costs. Id.

In the previous Adelphia rate proceeding, the Cable Division approved four FCC Form 1235 filings that the Company had submitted for pre-approval. CTV 03-5, at 11-15, 17. These consisted of individual filings for Falmouth and Marshfield, and two combined filings: one for the seven communities of Abington, Bourne, Halifax, Pembroke, Plympton, Rockland and Sandwich; and the second for the Great Barrington system. Id. at 11.⁹ In its pre-approval proceeding, Adelphia filed an FCC Form 1235 for the Great Barrington system showing 30 BST channels. Id. at 14. Adelphia later removed some channels from the BST, which required it to resubmit the FCC Form 1235. Id. This reduced the Great Barrington system's permitted network upgrade surcharge from \$6.17 to \$4.53. Id. The Cable Division approved this \$4.53 upgrade surcharge. Id. at 17, Rate Schedule.

There are two issues related to the upgrade surcharge in this proceeding. First, the Company testified that it had completed the rebuild and was offering upgraded service in each community (Tr. at 12-13). Yet, the Company did not submit any FCC Forms 1235 for final approval in this proceeding (id. at 12). Adelphia explained that the projects remain open, since some vendor invoices have not yet been accounted for and booked (id.). When all invoices have been booked, Adelphia will close the projects and submit its final FCC Forms 1235 (id., Exh. CTV-1). The Cable Division finds the Company's delay in filing the

⁹ The Cable Division also approved an FCC Form 1235 for Kingston and Plymouth that Adelphia had submitted for final approval. CTV 03-5, at 15-17.

FCC Forms 1235 to be reasonable, but expects it to file the final FCC Forms 1235 as part of its next rate proceeding.

Second, on the FCC Forms 1240 filed for the Great Barrington system in this proceeding, the Company reported a network upgrade surcharge of \$6.17 (Exhs. Adelpia-10, at exhibit I, -19, at exhibit I). The Company admitted that it should have included \$4.53 on the forms, instead of \$6.17. The Cable Division directs Adelpia to report \$4.53 at the appropriate location on the exhibit I of the FCC Forms 1240 for the Great Barrington group and Sheffield submitted in accordance with this Order. The Cable Division further directs Adelpia, in the Great Barrington system, to make any adjustments to its basic service rates and to pay refunds to subscribers, if necessary.

V. CONCLUSION AND ORDER

Upon due notice, hearing and consideration, the Cable Division hereby accepts, as reasonable and in compliance with applicable statutes and regulations, Adelpia's FCC Forms 1240 as filed on November 26, 2003, for Abington, Adams, Aquinnah, Bourne, Cheshire, Clarksburg, Duxbury, Edgartown, Essex, Gloucester, Manchester-by-the-Sea, North Adams, Oak Bluffs, Rockland, Rockport, and Sandwich.

Upon due notice, hearing and consideration, the Cable Division hereby accepts, as reasonable and in compliance with applicable statutes and regulations, Adelpia's FCC Form 1240 for Falmouth submitted as RR-CTV-1, exhibit 3, filing 3.

Further, upon due notice, hearing and consideration, the Cable Division hereby rejects Adelpia's FCC Forms 1240 as filed on November 26, 2003, for Amesbury, Great Barrington,

Halifax, Kingston, Lee, Lenox, Marshfield, Merrimac, Pembroke, Plymouth, Plympton, Salisbury, Sheffield and Stockbridge. The Cable Division directs Adelpia to resubmit its FCC Forms 1240 for these communities, in compliance with this Rate Order, on or before June 15, 2005.

Further, upon due notice, hearing and consideration, the Cable Division hereby accepts, as reasonable and in compliance with applicable statutes and regulations, Adelpia's FCC Form 1205 as filed on November 26, 2003, for Abington, Adams, Amesbury, Aquinnah, Bourne, Cheshire, Clarksburg, Duxbury, Edgartown, Essex, Falmouth, Gloucester, Great Barrington, Halifax, Kingston, Lee, Lenox, Manchester-by-the-Sea, Marshfield, Merrimac, North Adams, Oak Bluffs, Pembroke, Plymouth, Plympton, Rockland, Rockport, Salisbury, Sandwich, Sheffield and Stockbridge.

The Cable Division further directs Adelpia to comply with all other directives contained in this order.

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

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

Issued: June 8, 2005

APPEALS

Appeals of any final decision, order or ruling of the Cable Division may be brought within 14 days of the issuance of said decision to the full body of the Commissioners of the Department of Telecommunications and Energy by the filing of a written petition with the Secretary of the Department praying that the Order of the Cable Division be modified or set aside in whole or in part. G.L. c. 166A, § 2, as most recently amended by St. 2002, c. 45, § 4. Such petition for appeal shall be supported by a brief that contains the argument and areas of fact and law relied upon to support the Petitioner's position. Notice of such appeal shall be filed concurrently with the Clerk of the Cable Division. Briefs opposing the Petitioner's position shall be filed with the Secretary of the Department within seven days of the filing of the initial petition for appeal.