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

In the Matter of	)	
	)	
CoxCom, Inc.	)	
d/b/a Cox Communications New England	)	File No. CSB-A-0666
	)	
Appeal of Local Rate Order of the	)	
Massachusetts Department of	)	
Telecommunications and Energy	)	
For the Town of Holland, MA (CUID MA0321)	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 2002 **Released: April 29, 2002**

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. CoxCom, Inc., d/b/a Cox Communications New England ("Cox"), the franchised cable operator serving Holland, Massachusetts, has appealed the April 26, 2001 Order ("Decision") issued by the Commonwealth of Massachusetts Department of Telecommunications and Energy ("DTE") affirming the Rate Order of the DTE's Cable Television Division ("Cable Division").[1] The Decision and Rate Order address the operator's handling of its true-up adjustment in computing its basic service tier rate using FCC Form 1240. The DTE opposed this appeal,[2] and Cox replied.[3] For the reasons stated below, we grant the appeal and remand this matter for further consideration consistent with this Memorandum Opinion and Order.

II. STANDARD OF REVIEW

2. The Communications Act provides that, where effective competition is absent, rates charged for the basic service tier ("BST") and associated equipment and installation are subject to regulation by local franchising authorities in accordance with regulations prescribed by the Commission

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[1] Order on Coxcom, Inc.'s Appeal of Cable Television Division's Rate Order ("Decision"), D.T.E. 01-44 (DTE, Apr. 26, 2001), *affirming* Rate Order, Docket No. CTV 00-9 (Cable Division, Mar. 29, 2001), *found at* CoxCom, Inc., Appeal of Coxcom, Inc. from a Rate Order of the Massachusetts Department of Telecommunications and Energy ("Cox Appeal"), Exhibits 1, 2, respectively (May 29, 2001).

[2] DTE, Opposition of the Massachusetts Department of Telecommunications and Energy to Coxcom, Inc.'s Appeal of Local Rate Order ("DTE Opposition") (June 13, 2001).

[3] Cox, Reply to Opposition (June 25, 2001).

and implemented through Commission rate forms.[4] Rate orders issued by franchising authorities may be appealed to the Commission.[5] In ruling on an appeal, the Commission will not conduct a *de novo* review, but will sustain the franchising authority's decision if it has a reasonable basis, and will reverse a franchising authority's decision only if the franchising authority unreasonably applied the Commission's rules in its rate order.[6] If the Commission reverses a franchising authority's decision, it will not substitute its own determination but will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision.[7]

III. BACKGROUND

3. An operator using the annual rate adjustment methodology on Form 1240 includes projections of reasonably certain and quantifiable cost changes in its rate computation. In the next rate filing, the operator trues up any disparities between those projections and the actual costs experienced, calculates interest on the disparity, and adjusts its new rates accordingly.[8] If this true-up adjustment shows there were undercharges, the operator may elect to defer recovery, but section 76.922(e)(3)(iii) of the Commission's rules provides that the interest will cease to accrue as of the date the operator is entitled to make the annual rate adjustment.[9] The Commission explained, "This policy will give operators the flexibility to delay rate increases without losing the opportunity to recover interest on costs that accrued due to circumstances beyond their control. At the same time, this policy ensures that where an operator makes a business decision to delay a rate increase, subscribers are not required to pay for the cost of the delay."[10] FCC Form 1240 implements the Commission's rules governing the annual rate adjustment methodology.[11]

4. An operator computes the true-up adjustment by capturing actual costs on Module F of FCC Form 1240 for the same rate segments it had used to project its MPR on Module I of its previous rate form. Then, using Module H on Form 1240, the operator compares the revenue permitted during the true-up period with the revenue collected during the true-up period. The difference is the true-up

[4] Section 623(a), (b) of the Communications Act, 47 U.S.C. § 543(a), (b).

[5] Section 76.944 of the Commission's Rules, 47 C.F.R. § 76.944.

[6] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking (*"Rate Order"*), 8 FCC Rcd 5631, 5731 (1993); *see also* MM Docket No. 92-266, Third Order on Reconsideration, 9 FCC Rcd 4316, 4346 (1994).

[7] *Rate Order*, 8 FCC Rcd at 5732.

[8] 47 C.F.R. § 76.922(e)(3)(iii). Likewise, if the operator overestimated its cost changes, it must reduce future rates to reflect the accrued amount of the overcharge plus interest.

[9] *Id*.

[10] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, MM Docket No. 92-266, Thirteenth Order on Reconsideration ("*Thirteenth Reconsideration*"), 11 FCC Rcd 388, 421 ¶ 80.

[11] *See* section 76.922(h) of the Commission's Rules, 47 C.F.R. § 76.922(h) ("[p]ermitted charges for a tier shall be determined in accordance with forms and associated instructions established by the Commission"); Instructions for FCC Form 1240, Annual Updating of Maximum Permitted Rates for Regulated Cable Services ("FCC Form 1240 Instructions") (July 1996), at 1.

adjustment. The adjustment computed using Module F is subject to interest.[12] If the true-up period exceeds 12 months, the operator separately computes an adjustment for this second period using Module G,[13] but is entitled to interest only for those months in Period 2 that were included in the previous projected period.[14] Modules F, G, and H and the associated worksheets for Form 1240 implement the limitation on interest in section 76.922(e)(3)(iii) of the Commission's rules.

5. If the true-up adjustment shows undercharges, the operator can claim some or all of the the undercharges or defer claiming them by allocating the Total True-Up Adjustment (from Line H13) to either Line H14 ("Amount of True-Up Adjustment Claimed For This Projected Period") or Line H15 ("Remaining True-Up Adjustment"), or by dividing the adjustment between Lines H14 and H15. The amount on Line H14 is used to compute the True-Up Segment on Line I8, one of the rate segments on Module I used in determining the new MPR for the projected period. Because the amount on Line H14 reflects actual costs, the same number is used to compute the True-Up Segment on the Module F of the next Form 1240. The amount entered on Line H15 is not used to determine the projected period MPR on Module I or to true up that MPR on Module F of the next Form 1240. Instead, it is entered on the next Form 1240 as "Previous Remaining True-Up Adjustment" on Line H12 and becomes part of the cumulative, running total of previous adjustments included in the Total True-Up Adjustment on Line H13. If Line H13 shows an undercharge, the amount on Line H13 can be allocated between Lines H14 and H15. The amount on Line H14 is used to compute the MPR for the new projected period and to true up that MPR in the third year.[15]

IV. DISCUSSION

A. The true-up adjustment

6. The issue before us is whether Cox was required to enter its true-up adjustment on Line H15 rather than Line H14 on its 2001 Form 1240 when it elected not to charge subscribers the full MPR. The computation on Module H showed that Cox had undercharged subscribers during the true-up period. Cox entered the full amount of the true-up adjustment on Line H14, and, consistent with the instructions for Line I8, used the Line H14 adjustment to compute the True-Up Segment on Line I8. Thus, the total true-up adjustment was included in the new MPR computed on Module I. Although it could have raised its rate to the new MPR, Cox left its old, lower rate in effect.[16]

7. Because Cox's actual rate was less than the MPR, the Cable Division found that Cox had not passed the true-up adjustment claimed on Line H14 completely through to subscribers as it believes is required by the Form 1240 instruction for Line H14.[17] This instruction directs the operator to "[e]nter the amount of the True-Up Adjustment being passed through to your subscribers during the Projected Period."[18] Because the Line H14 amount must be entered on Module F on the next rate form, the Cable

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[12] This computation is made using Lines H1-H4 of Form 1240.

[13] *See* FCC Form 1240 Instructions at 16, 18-19.

[14] This computation is made using Lines H5-H11 of Form 1240.

[15] *See* FCC Form 1240 Instructions at 6-7, 18, 21, 22-23.

[16] Cox Appeal at 4.

[17] Cable Division Rate Order at 5.

[18] FCC Form 1240 Instructions at 21 (Line H14).

Division then found that Cox would be truing up these same undercharges a second time in its next rate filing and receiving additional interest on these undercharges, as well as interest on the interest already included in the 2001 true-up adjustment.[19] It found this to be contrary to section 76.922(e)(3)(iii) as implemented in Form 1240.[20] The Cable Division ordered Cox to fix the problem by revising its 2001 Form 1240 to remove the excessive true-up adjustment from Line H14, record it on Line H15, and reduce the projected period MPR accordingly,[21] rather than by raising its subscriber rate. This change was not expected to affect the operator's revenues during the projected period, since it would not cause Cox to change its actual rate. It would affect the true-up of those revenues on Cox's 2002 Form 1240, because the true-up adjustment entered on Line H15 would not be included on Module F or any adjustment carried forward from Module F and eligible for interest on Module H. The DTE denied Cox's appeal, finding the Cable Division's analysis to be reasonable.[22] The DTE agreed that Cox had not passed on the full amount of the true-up adjustment on Line H14 to subscribers, and stated that Cox retained the ability to recover the full amount of the true-up in future years without recovering additional interest on either the 2001 true-up adjustment or the interest included in this adjustment.[23]

8. Cox disputes the DTE's interpretation of the Line H14 instruction. According to Cox, the phrase "being passed through to subscribers" can mean nothing more than being included in the MPR, a matter the Commission has left to its discretion.[24] Cox argues that it should be able to include the true-up adjustment in its MPR, regardless of whether it intends to charge the full MPR or something less,[25] and that the DTE erred in attributing the difference between the actual rate and the MPR only to the true-up segment.[26] Cox further argues that the DTE had no problem with the basis for Cox's figures presented in the Form 1240 and discovered no mathematical errors, so charging less than the MPR should not have triggered the adverse rate order.[27]

9. The DTE contends that the Cable Division's Rate Order was reasonable and should be upheld. It argues that the plain language of the instructions gives subscribers either the benefit or the burden of the true-up adjustment amount, so only the amount passed through to subscribers in the actual rate can be claimed on Line H14.[28] Because Form 1240 requires the operator to include certain elements in its projected MPR and gives the operator discretion only with respect to the true-up adjustment, any disparity between the MPR and the actual rate would first be attributable to unrecovered true-up adjustment.

10. We find that the DTE's action was not reasonable. The DTE's Decision and the Cable Division's Rate Order both attribute the difference between the MPR and the operator's selected rate only

[19] Cable Division Rate Order at 5.

[20] *Id*. at 4-5.

[21] *Id*. at 5-6.

[22] DTE Decision at 6, 8, 10, 12.

[23] *Id*. at 6; *see* DTE Opposition at 8.

[24] Cox Appeal at 5.

[25] *Id.* at 6, 8.

[26] *Id.* at 13-15; Cox Reply at 2.

[27] Cox Appeal at 8.

[28] DTE Opposition at 3.

to the true-up adjustment, although the MPR is computed from several rate segments.[29] An operator seeking to increase rates to reflect external cost increases must also fully account for both accrued and projected changes in inflation, external costs, and the number of channels occurring during the period covered by the rate form.[30] While, as the DTE argues,[31] an operator has discretion to pass through unrecovered accrued costs reflected in the true-up adjustment, an operator also has discretion to recover or not to recover amounts included in other rate segments when setting its subscriber rate. The restriction on setting the subscriber rate is that the rate not exceed the MPR. "An operator is not required . . . to raise its rates to the maximum permitted level and may voluntarily charge less than the MPR."[32]

11. No Commission rule or instruction prioritizes an operator's recovery of accrued and projected costs in its actual rate, so there is no requirement that a system allocate revenues to projected costs--or to costs included in its Line D8 base rate--before allocating revenues to the accrued costs reflected in the true-up adjustment. The Commission's rate form and accompanying instructions allow operators to elect a "last-in, first-out" approach to recovering costs by using Line H15, but do not preclude a system's election to include true-up adjustment on Line H14.[33] Thus, an operator choosing to charge less than its MPR is not required to treat its true-up adjustment as unclaimed until the difference between its actual and permitted rates is accounted for and to reflect this difference with an entry on Line H15. The *Treich Letter* cited by the DTE addresses interest should the operator elect not to recover accrued costs on the date the operator is entitled to make its next annual rate adjustment, but does not attribute any difference between the MPR and the operator's actual rate to unrecovered accrued costs.[34] The *Treich Letter* explains how Form 1240 works: "[T]he interest is calculated on the difference between the corrected maximum rate (based on the costs which actually occurred during the previous year) and the amount of revenue the operator actually collected during the previous year, with the accrual of interest ceasing at the end of the most recent projected period."[35] Charging less than the maximum permitted rate is reasonable and should not trigger adjustments to an operator's rate form, if the rate is otherwise supported by the rate form and underlying data.[36]

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[29] *See* FCC Form 1240, Module I.

[30] *See* section 76.922(e)(2)(ii) of the Commission's Rules, 47 C.F.R. § 76.922(e)(2)(ii). FCC Form 1240 Modules F and G and associated worksheets are used for changes in the true-up period; Module I and associated worksheets, for projected changes.

[31] *See* DTE Decision at 10; DTE Opposition at 3.

[32] *Falcon Telecable*, 15 FCC Rcd 52, 54 ¶ 5 (Cab. Serv. Bur. 1999).

[33] If an operator postpones filing its annual adjustment for a system, it would use Module F to for the first 12 months of the true-up period and Module G for additional months in the true-up period. By operation of the Form 1240, only the true-up adjustment from Module F is reflected in Line H3 and is automatically subject to interest. The adjustment from the second true-up period is subject to interest only for the months included in the most recent projected period. FCC Form 1240 Instructions at 5.

[34] *See Mr. Richard D. Treich* ("*Treich Letter*"), 12 FCC Rcd 10340, 10340-41 (Cab. Serv. Bur. Policy & Rules Div. 1997) (rejecting methods of calculating interest not based on the Form 1240 Instructions).

[35] *Id*. at 10342.

[36] *See Falcon Telecable*, 15 FCC Rcd at 54 ¶ 5; *see generally Media General Cable of Fairfax County, Inc.*, 12 FCC Rcd 17424, 17431-32 ¶ 22 (Cab. Serv. Bur. 1997), *review granted in part and denied in part*, 16 FCC Rcd 15617 (2001) (review granted on procedural point).

12. The DTE is correct that allocating true-up adjustment to Line H15 will lower the projected period MPR computed on Module I, and possibly result in lower unrecovered costs in the true-up adjustment for the next true-up period and, therefore, a lower true-up adjustment subject to interest.[37] But, subscribers will not necessarily benefit from lower rates if, as Cox suggests,[38] the result causes the operator to increase its rate to the full MPR in response to the Rate Order or when setting future rates. Furthermore, any benefit from requiring an allocation to Line H15 simply defers the interest of concern to the DTE, because the Remaining True-Up Adjustment entered on Line H15 in the first year must be entered on Line H12 and included in the Total True-Up Adjustment on Line H13 in the second year.[39] Any of that adjustment allocated to Line H14 in the second year would appear on Module F in the third year and would be included in the comparison of actual and permitted revenues during the true-up period. The difference would be subject to interest by operation of the rate form.

B. Implementation of a rate adjustment

13. The Cable Division's Rate Order addressed the possibility that the operator would raise its rate to the MPR in response to the Rate Order, rather than lower the MPR, by stating its view that the Commission's regulations prohibit a rate increase later in the projected period and ordering the operator to refile its Form 1240 with a lower MPR.[40] The DTE Decision agreed with the Rate Order, because Form 1240 requires the operator to select the rate that it plans to charge, and Cox selected its old rate.[41] Cox was expected to wait until it implements its next Form 1240 filing before raising its rate.[42] In challenging this provision, Cox argues that a cable operator is permitted to charge up to the maximum permitted rate,[43] and more than 12 months had passed since Cox last implemented an actual increase in the rate charged subscribers.[44]

14. Nothing in the Commission's rules or Form 1240 instructions requires an operator to implement a rate increase after the initial 90-day review period has passed but before the franchising authority acts or limits the amount of an increase to a previously noticed rate, as long as the increase does not exceed the MPR and the franchising authority and subscribers have notice of the actual rate being implemented.[45] A franchising authority should not preclude lawful responses to problems it finds with an

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[37] Depending upon the actual costs for the system during the projected period, it could also result in an overrecovery of system costs for the next true-up period and subject the operator to refund liability.

[38] Cox Appeal at 15-16.

[39] *See* FCC Form 1240 Instructions at 21 (Lines H12, H13).

[40] *See* Cable Division Rate Order at 6.

[41] *See* DTE Decision at 12.

[42] DTE Opposition at 8.

[43] *See, e.g.*, *Marcus Cable Partners, L.L.C.*, 15 FCC Rcd 8794, 8795 ¶ 4 (Cab. Serv. Bur. 2000).

[44] Cox Appeal at 17-18. *See* section 76.922(e)(1) of the Commission's Rules, 47 C.F.R. § 76.922(e)(1). Subject to certain exceptions, an operator electing the annual rate adjustment methodology may not adjust rates more than annually. An operator may change its annual filing date, but at least 12 months must pass before the operator can implement its next annual adjustment. *Id*.

[45] *See* section 76.933(g) of the Commission's Rules, 47 C.F.R. § 76.933(g) (an operator must file its rate form "*no later than* 90 days from the effective date of the proposed rates" (emphasis added)); *id.* § 76.933(g)(2) (if the franchising authority has taken no action within the 90-day review period, "the proposed rates *may* go into effect at the end of the review period, subject to a prospective rate reduction and refund if the franchising authority (continued....)

operator's ratemaking. Even if the DTE was reasonable in its analysis of the interest issue, it was not reasonable in disallowing an otherwise lawful rate increase to address the problem.

V. CONCLUSION

15. For the foregoing reasons, we find that the DTE Decision affirming the Cable Division Rate Order is not reasonable and must be remanded to the DTE for further consideration consistent with this Memorandum Opinion and Order. The assumption underlying the DTE Decision and the Cable Division Rate Order, that true-up adjustments have not been passed through to subscribers when the MPR exceeds the actual rate, is not supported by Cox's Form 1240, the Commission's ratemaking requirements, or Commission precedent. The DTE's determination that Cox must respond to its decision only by reducing its MPR is likewise not required by Commission rules or precedent.

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the Appeal of Coxcom, Inc. from a Rate Order of the Massachusetts Department of Telecommunications and Energy IS GRANTED and that the Order on Coxcom, Inc.'s Appeal of Cable Television Division's Rate Order, D.T.E. 01-44, IS REMANDED to the Commonwealth of Massachusetts Department of Telecommunications and Energy for further consideration consistent with this Memorandum Opinion and Order.

17. This action is taken pursuant to authority delegated by section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

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subsequently issues a written decision disapproving any portion of such rates" (emphasis added)); *Thirteenth Reconsideration*, 11 FCC Rcd at 392 ¶ 9; *id*. ¶ 7 ("[o]perators would not lose the right to make a rate increase at a later date if they choose not to implement a rate adjustment at the beginning of the next rate year"). *See also* section 76.1603(b) - (d) of the Commission's Rules, 47 C.F.R. § 76.1603(b) - (d) (notice requirement); section 76.933(g)(3) of the Commission's Rules, 47 C.F.R. § 76.933(g)(3) ("[a]dditional advanced notice is only required in the unlikely event that the rate exceeds the previously noticed rate").