

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Docket No. 8301

In Re: Renewal of the Certificate of Public )  
Good of Comcast of Connecticut/Georgia/ )  
Massachusetts/New Hampshire/New York/ )  
North Carolina/Virginia/Vermont, LLC, d/b/a )  
Comcast, expiring on December 29, 2016, to )  
provide cable television service )

Order entered: 7/27/2017

**ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT**  
**PURSUANT TO V.R.C.P. RULE 59(e)**

**I. INTRODUCTION**

On February 13, 2017, Comcast of Connecticut/Georgia/ Massachusetts/New Hampshire/New York/ North Carolina/Virginia/Vermont, LLC, d/b/a Comcast (“Comcast”) filed a motion with the Vermont Public Utility Commission, formerly the Public Service Board (“Commission” or “PUC”)<sup>1</sup>, under Rule 59(e) of the Vermont Rules of Civil Procedure (“V.R.C.P.”) to alter or amend the Order (“Renewal Order”) and the renewed and consolidated certificate of public good (“Renewal CPG”) issued in this Docket on January 13, 2017. In the motion and a supporting memorandum of law, Comcast maintains that the Commission imposed certain renewal conditions that are not supported by the evidentiary record and are in conflict with the law and regulations applicable to cable CPG renewals. It asks the Commission to rescind or modify six conditions of the Renewal CPG.

In this Order, the Commission denies Comcast’s motion to alter or amend the Renewal Order and the Renewal CPG.

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1. Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

## **II. PROCEDURAL HISTORY RELATED TO COMCAST'S MOTION**

On January 13, 2017, the Commission issued the Renewal Order approving the renewal of Comcast's CPG subject to conditions and the Renewal CPG.

On January 26, 2017, in response to a procedural motion filed by Comcast on January 20, 2017, the Commission granted an enlargement of time for the filing of motions for reconsideration until February 13, 2017.<sup>2</sup>

On February 13, 2017, Comcast filed a motion with the Commission under V.R.C.P. Rule 59(e) to alter and amend the Order and CPG (the "Comcast Motion").

On February 23, 2017, and March 17, 2017, in response to motions by Vermont Access Network ("VAN") and agreements among the parties, the Commission granted extensions of time for responses to the Comcast Motion, and granted Comcast a four-week period to reply to any oppositions to its motion.

On March 22, 2017, the Vermont Department of Public Service ("Department") filed a response to the Comcast Motion ("DPS Response").

On March 28, 2017, VAN filed its opposition to the Comcast Motion ("VAN Response"), which it had submitted by e-mail on March 22, 2017.

On April 19, 2017, Comcast filed a reply to the responses of the Department and VAN ("Comcast Reply").

## **III. APPLICABLE LEGAL STANDARD**

The Comcast Motion is governed by Rule 59(e) of the V.R.C.P., which applies in Commission proceedings pursuant to Commission Rule 2.105. Rule 59(e) codifies a trial court's inherent power to "open and correct, modify or vacate its judgments."<sup>3</sup> The purpose of the rule is to allow the court to avoid an unjust result arising from "the mistake or inadvertence of the court and not the fault or neglect of a party."<sup>4</sup>

The Commission has broad power under the Rule to alter or amend a judgment and "may reconsider issues previously before it, and generally may examine the correctness of the

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2. Docket 8301, Procedural Order of 1/26/17.

3. *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

4. *Id.*; *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588 (1996).

judgment itself.”<sup>5</sup> However, a motion filed pursuant to Rule 59(e) does not provide an opportunity for parties to introduce new evidence or to raise arguments that could have been presented to the Commission prior to entry of a final order.<sup>6</sup>

#### IV. DISCUSSION AND CONCLUSION

Comcast maintains that the Commission imposed certain renewal conditions in the Renewal CPG that are not supported by the evidentiary record and are in conflict with laws and regulations applicable to cable CPG renewals.<sup>7</sup> Comcast requests that the Commission alter or amend the Renewal Order and the Renewal CPG “to correct manifest errors of law and fact, and to prevent manifest injustice that would result if the Order stands unchanged.”<sup>8</sup> Specifically, Comcast asks the Commission to alter and amend the Renewal CPG to eliminate or modify condition 22(3), eliminate conditions 33 and 34, modify conditions 21(b) and (c), and eliminate conditions 52 and 53 of the Renewal CPG.<sup>9</sup>

Comcast argues that the Renewal CPG “rests on clear errors of fact or law” in regard to the standards under 47 U.S.C. §521 et seq. (the “Federal Cable Act”) “for evaluating the reasonableness of Comcast’s CPG Renewal Proposal and would result in a manifest injustice to Comcast and Comcast customers.”<sup>10</sup> According to Comcast, the Renewal Order suffers from the following fundamental flaws:

- (i) The [Commission] imposed additional conditions in the Order that it deemed desirable without making the necessary findings as to whether Comcast’s CPG Renewal Proposal was reasonable to meet community needs and interests, taking into account the costs of meeting those needs and interests;
- (ii) The [Commission] failed to analyze the costs of certain [Commission]-imposed conditions as required by the federal Cable Act, and instead either

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5. *In re Robinson/Keir Partnership*, 154 Vt. 50, 54 (1990); *Drumheller v. Drumheller* 2009 VT 23 ¶ 28.

6. Docket 8643, *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg*, Order Denying Reconsideration of 11/6/2016 at 2. *See, also*, Dockets Nos. 6946 and 6988, *In re Cent. Vt. Pub. Serv. Corp.*, Order of 5/25/2005; Docket 7156, *Petition of UPC Vermont Wind, LLC*, Order of 2/11/2011 at 3; *Northern Sec. Ins. Co. v. Mitec Electronics, Ltd.*, 184 Vt. 303, 320-321 (2002).

7. Comcast Motion at 1.

8. Comcast Motion at 5.

9. Comcast Motion at 1-2.

10. Comcast Motion at 6.

employed an impermissible “profitability” standard or entirely ignored the requisite cost analysis; and

(iii) The [Commission] failed to consider the most important finding from the parties’ renewal ascertainment, which is the impact of CPG conditions on customer rates.<sup>11</sup>

This Order addresses these issues, as appropriate, as well as additional arguments made by Comcast in the context of the discussions below of each of the conditions challenged by Comcast in the Comcast Motion. It then discusses general considerations related to the Comcast Motion that involve arguments that Comcast makes with respect to all of the contested conditions.

**PEG Schedules on Programming Guide -- Renewal CPG condition 22(3)**

Condition 23(3) of the Existing CPG<sup>12</sup> required Comcast to allow program schedules for public, educational, and governmental (“PEG”) channels to be listed on Comcast’s electronic programming guide. Based on the record, the Commission concluded that condition 23(3) was a material term of the Existing CPG and that Comcast had failed to comply with that condition for several years.<sup>13</sup>

The Commission included condition 22(3) in the Renewal CPG to bring Comcast into compliance with its obligations under the Existing CPG, and to ensure that Comcast would be able to meet future cable-related community needs and interests in providing PEG channel program schedules to Comcast customers during the term of the Renewal CPG.

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11. Comcast Motion at 6-7.

12. As in the Renewal Order, the term “Existing CPG” in this Order refers to Docket 7077 CPG, as amended, that was in effect prior to the issuance of the Renewal CPG and that was issued on December 29, 2005 and amended on September 27, 2006, October 16, 2008, and April 19, 2010. Prior to the issuance of the Renewal CPG (which consolidated Comcast’s existing CPGs), Comcast also held a separate CPG that was issued in Docket 7379 on March 21, 2008, to serve seven towns in Franklin County and one town in Orleans County, Vermont. Condition 24(3) of the Docket 7379 CPG included the same requirement with respect to allowing PEG channel schedules to be listed on Comcast’s electronic programming guide. References to conditions of the Existing CPG are meant to include equivalent conditions in the Docket 7379 (although the condition number may be different).

13. Among other claims, Comcast asserts that the Commission “did not reach a formal determination that Comcast failed to comply with condition 23(3)” of the Existing CPG based on references in the Renewal Order to the “apparent failure to comply” with the condition. Comcast Motion at 23. To the extent references in the Renewal Order to apparent failures to comply with CPG conditions or with applicable law may have left any doubt as to the Commission’s determinations in the Renewal Order, the Commission clarifies that it concluded in the Renewal Order, pursuant to 47 U.S.C. § 546(c)(1)(A) and PUC Rule 8.230(A), that Comcast failed to substantially comply with condition 23(3) of the Existing CPG. Comcast’s failures to substantially comply with material terms of its existing CPGs were apparent based on the evidentiary record in this proceeding.

This Renewal CPG condition was based on findings and conclusions set forth in the Renewal Order, including the following.

- “For several years, Comcast has not had an electronic programming guide on its systems that lists the program schedules for any of the 45 PEG access channels carried by Comcast as required by its existing CPGs.”<sup>14</sup>
- The program schedule requirement in condition 23(3) of the Existing CPG was a “material PEG outreach service requirement of its existing CPGs”<sup>15</sup> and “the most important” of these requirements in terms of meeting community needs and interests.<sup>16</sup>
- “The unavailability of program schedules for PEG channels on an electronic programming guide is the result of Comcast’s system design choices related to programming guides.”<sup>17</sup>
- Comcast made and implemented its decision to change Comcast’s electronic programming guide without appropriate consideration of “the effects this would have on a material PEG outreach service requirement of its CPGs” and without petitioning the Commission for a determination as whether it would be reasonable to modify Comcast’s obligations under condition 23(3) of the Existing CPG.<sup>18</sup>
- The cost to Comcast of implementing condition 22(3) of the Renewal CPG is not unduly burdensome for Comcast under the circumstances and will not impair Comcast’s ability to earn a fair rate of return on its cable services in Vermont.<sup>19</sup>

In its motion filings, Comcast does not cite to any facts in the record to dispute the finding that for several years Comcast has not allowed PEG channel program schedules to be

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14. Renewal Order at 54; *see, also*, finding 105 of Renewal Order at 50:

105. For several years, Comcast’s customers have not been able to view program schedules on an on-screen programming guide for any of 45 PEG channels carried by Comcast. Schedule information for programs on non-PEG channels is available on Comcast’s programming guide.

15. Renewal Order at 53.

16. Renewal Order at 53 and 55.

17. Renewal Order at 51 (finding 110).

18. Renewal Order at 53.

19. Renewal Order at 54-55.

listed on Comcast's electronic programming guide<sup>20</sup> and does not make any arguments that would cause the Commission to alter or amend its determination.

Comcast continues to maintain that it fulfilled its legal obligations with respect to its former electronic programming guide and that the condition 23(3) obligations of the Existing CPG did not apply to its successor electronic programming guide, that it refers to as the interactive programming guide ("IPG").<sup>21</sup> The Commission rejects Comcast's argument, which essentially asserts that the requirement for PEG channel program schedules on Comcast's programming guide was ended by Comcast's design and adoption of its own new programming guide.<sup>22</sup> The Commission cannot allow a cable operator to avoid its CPG obligations through its system redesign choices unless a modification of such CPG obligations is expressly authorized by the Commission prior to implementation of the system redesign.

Alternatively, Comcast argues that the failure to provide program information for PEG channels on the IPG was "*de minimis* non-compliance in the context of the entire franchise" that was not sufficiently substantial to prevent the Commission from adopting Comcast's CPG proposal.<sup>23</sup> As a result of Comcast's failure to substantially comply with a material term of the Existing CPG, Comcast's customers in Vermont have been unable to view program information on Comcast's programming guide for any of the 45 PEG channels carried on Comcast's systems in Vermont for several years. As should be clear from the Renewal Order, this compliance failure is not *de minimis* in the context of Comcast's franchise in Vermont.

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20. Without citing to any evidence in the record, Comcast suggests in its motion that program information for PEG channels could have been provided on a scrolling guide on what is now the POP Channel, but that VAN rejected that option. Comcast Motion at 22; *see, also*, Comcast Reply at 9. In any case, the programming guide utilized as "Comcast's electronic programming guide" prior to 2010 was available to all subscribers, and the POP Channel is not available to all of Comcast's subscribers in Vermont, such as those receiving limited basic service. *See* exh. DMG-6.

21. Comcast Motion at 23.

22. Comcast had earlier suggested in its prefiled testimony that, because of its additional features, the IPG was not an electronic programming guide. In the Renewal Order, the Commission concluded that the IPG was now Comcast's electronic programming guide. *See* Renewal Order at 50 (finding 105) and 51 (findings 107 and 110).

23. Comcast Motion at 23.

Comcast's renewal CPG proposal contained no requirement related to the listing of program schedules for PEG channels on Comcast's electronic programming guide.<sup>24</sup> This was one of the reasons the Commission could not approve Comcast's renewal CPG proposal without modification. Comcast contends that the Commission's adoption of Comcast's CPG proposal, subject to certain modifications determined to be necessary to meet applicable legal requirements for franchise renewal, constitutes a denial of renewal for purposes of 47 U.S.C. §546(d). It states that, pursuant to such subsection, a "denial of renewal" may not be based on franchise non-compliance without notice and an opportunity to cure.<sup>25</sup> Comcast argues that the Commission was required under the Federal Cable Act to provide Comcast "with notice and a meaningful opportunity to cure the alleged deficiency *before*" issuing a decision denying Comcast's renewal CPG proposal or imposing conditions.<sup>26</sup>

The Commission does not agree with Comcast that the Renewal Order constitutes a "denial of renewal" for purposes of Section 546(d).<sup>27</sup> However, assuming that Section 546(d) applies in this case<sup>28</sup> and that the Renewal Order constitutes a denial of renewal for purposes of

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24. Renewal Order at 49-50 (finding 102). Thus, Comcast's renewal CPG proposal would have eliminated any CPG obligation with respect to the listing of program schedules for PEG channels on Comcast's electronic programming guide.

25. Comcast Motion at 23-24.

26. Comcast Reply at 11. Comcast cites a federal district court decision that upheld the denial of a cable franchise renewal on other grounds while concluding that issues with the cable operator's picture quality and service did not provide grounds for the renewal denial because the franchising authority failed to provide adequate notice to the cable operator about these issues and an opportunity to cure. *Rolla Cable Sys., Inc. v. City of Rolla*, 761 F.Supp. 1398, 1409. The Commission observes that *Rolla* involved an outright denial of franchise renewal and not, as in this case, changes required by the franchising authority to the cable operator's renewal proposal to bring it into compliance with existing franchise obligations.

27. The Commission's position on this issue does not affect any rights Comcast may have under the Federal Cable Act to appeal the Commission's decision in the Renewal Order "as if it were a denial." See Comcast Motion at 5; H.R. Rep. No. 98-934 at 75 (1984).

28. Section 546(d) applies to "a proposal for renewal that has been submitted in compliance with subsection (b)." As discussed in the Renewal Order, proceedings in this matter (at the election of Comcast and the other parties) have not been conducted in accordance with the procedures set forth in 47 U.S.C. §546(a)-(c) in that the "ascertainment" process (in which community needs and interests are identified and the cable operator's performance is reviewed), as provided for in §546(a)(1) and the proposal review process, as provided for in §546(b), that is supposed to follow the completion of the ascertainment process were combined in this proceeding. See Renewal Order at 13. If the ascertainment process had been completed prior to the proposal review process, the Commission would have already reviewed Comcast's performance under its existing CPGs, and Comcast's CPG proposal would presumably "contain such material as the franchising authority may require, including proposals for an upgrade of the cable system." See

(continued...)

47 U.S.C. §546(d), the issue becomes whether the Commission provided Comcast with appropriate notice and the opportunity to cure its non-compliance.

The Commission first observes that there was no point in this proceeding<sup>29</sup> prior to the issuance of the Renewal Order that the Commission could have provided such notice and opportunity to cure. There was no basis on which the Commission, consistent with Comcast's procedural and due process rights, could have determined Comcast's non-compliance, provided notice of such non-compliance, and an opportunity to cure such non-compliance before the technical hearing, the admission of evidence, and the filing of briefs and reply briefs. In addition, none of the parties to this proceeding contemplated or recommended a denial of renewal. Rather, the principal issues in this proceeding have related to what the appropriate conditions for CPG renewal would be based on a consideration of the evidentiary record and the applicable legal criteria for renewal.

Based on a review of the evidentiary record and the arguments of the parties, the Commission determined that Comcast's renewal CPG proposal did not satisfy applicable renewal criteria and that certain modifications to Comcast's renewal CPG proposal were necessary to satisfy such criteria. A renewal CPG containing such modifications was issued by the Commission. Little, if any, purpose would have been served if (as Comcast now seems to suggest was required) the Commission, instead of issuing the Renewal Order and Renewal CPG, had issued an order related solely to ascertainment (or alternatively simply denied Comcast's renewal CPG proposal) and directed Comcast to submit a new renewal proposal in accordance with the Commission's findings to cure its non-compliance and to reasonably meet identified community needs and interests.

In any case, Comcast has had an opportunity in its motion filings since the Renewal Order's issuance on January 13 to present the Commission with alternative cure proposals for its non-compliance. In the Comcast Reply of April 19, Comcast states that it "is prepared to accept the modified condition as proposed by the Department," which would require Comcast to make

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28. (...continued)  
47 U.S.C. §546(a)(1) and (b)(1) and (2).

29. As discussed above and in the Renewal Order, this proceeding did not involve an ascertainment process that was separate from the proposal review process. *See* Renewal Order at 13 and footnote 28, above.



its programming guide available to access management organizations (“AMOs”) in headend territories only where there is no PEG channel conflict.<sup>30</sup> However, the Department’s proposal, which Comcast now accepts as a cure, was expressly rejected by the Commission in the Renewal Order because of its limited impact in that the proposal would allow for the listing of PEG channel schedules on the programming guide only for three AMOs that serve the communities of Woodstock, Newport, and White River Junction, Vermont.<sup>31</sup> Comcast has made no other cure proposal.

“As a condition of CPG renewal,” the Renewal Order requires Comcast “at its expense to bring its system into compliance with its pre-existing obligations” under condition 23(3) of the Existing CPG and requires Comcast “to make such modifications to its facilities as are necessary to enable Comcast’s interactive programming guide to provide program-specific scheduling information for all PEG access channels carried on its systems in Vermont.”<sup>32</sup>

Comcast devotes most of its argument related to this contested condition to the effects that the condition would have on Comcast’s subscribers based on the assumption that Comcast can pass the costs of implementing the condition onto subscribers as a new PEG fee.<sup>33</sup> Comcast states that it “has complete discretion under the [Federal] Cable Act to determine how to recover any new PEG fee imposed by the CPG.”<sup>34</sup> It also takes the position that these costs are non-capital costs imposed in support of PEG access and, therefore, constitute franchise fees subject to the 5% cap on franchise fees under the Federal Cable Act.<sup>35</sup> Because Comcast already collects

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30. Comcast Reply at 4-5.

31. Renewal Order at 54.

32. Renewal Order at 54. Specifically, condition 22(3) of the Renewal CPG requires Comcast to: make such modifications to its facilities, at its expense, as are necessary to allow AMOs to access Comcast’s interactive programming guide so that all PEG channels designated by Comcast are able to have their schedules listed on the interactive programming guide (or any successor on-screen programming guide). All such modifications shall be completed no later than one year from the date of this Certificate.

Renewal CPG at 7 (condition 22(3)).

33. See Comcast Motion at 13-21.

34. Comcast Motion at 16.

35. 47 U.S. C. § 542(b). Section 542(g)(2)(c) excludes from the definition of franchise fee any “capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities.” The FCC has stated that:

5% of each customer's monthly video service bill for PEG operating support, Comcast concludes that the Renewal Order "violates the limits on franchise fees and PEG-related fees established by the [Federal] Cable Act."<sup>36</sup>

In the Comcast Motion, Comcast incorrectly assumes that the costs of making the required upgrades to its headend facilities can be passed on to subscribers as a PEG-related surcharge.<sup>37</sup> Similarly, in responding to Comcast's assertions in the Comcast Motion,<sup>38</sup> the Department expresses concern about the allocation of these costs amongst AMOs<sup>39</sup> and subscribers, and requests changes to the condition to shield ratepayers and AMOs from assuming the costs associated with upgrading the headend facilities so that the IPG will be capable of displaying program listings for PEG channels.<sup>40</sup> Comcast's assumption and the Department's concerns are based on a fundamental misunderstanding of the Renewal Order.

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35. (...continued)

[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities. These costs are distinct from payments in support of the use of PEG access facilities. PEG support payments may include, but are not limited to, salaries and training. Payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent limit.

*In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order, 22 FCC Rcd. at 5150-5151 ¶ 109.

36. Comcast Motion at 3; *see, also*, Comcast Motion at 16 and 19.

37. This assumption may be based on Comcast's belief that the Commission did not determine in the Renewal Order that Comcast failed to comply with condition 23(3) of the Existing CPG. Comcast Motion at 23. For example, Comcast states that "only one" of the "four grounds" under the Federal Cable Act for not adopting Comcast's renewal CPG proposal (that is, 47 U.S.C. §546(c)(1)(D)-- reasonableness in light of cable-related community interests) "is at issue in this proceeding." Comcast Motion at 5-6.

38. In the DPS Response, the Department expresses its belief that these costs (which it regards as capital costs) can be passed on to customers as a separate line item on bills, citing 47 U.S.C. § 542(c). DPS Response at 4-5. Section 542(c) provides that a cable operator may identify, as a separate line item on bills, the franchise fee and "(2) [t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels." *See, also*, PUC Rule 8.417(D) which provides that annual "[c]apital contributions [for PEG access] are not subject to the 5% franchise fee cap but are considered external costs eligible for pass through to subscribers pursuant to 47 U.S.C. § 542(c)."

39. Because Comcast maintains that costs to implement condition 22(3) are PEG operating fees (a position the Department disputes), Comcast contends that it would have to fund such costs as an offset against other payments to AMOs for PEG operating support so as to remain under the 5% cap on franchise fees under the Federal Cable Act.

40. DPS Response at 2-3.

The Renewal Order expressly requires Comcast to make modifications to its headend facilities at its own expense to bring its system into compliance with its pre-existing CPG obligations.<sup>41</sup> The required modifications were necessitated by Comcast's decision to design and adopt a new electronic programming guide as part of its digital enhancement project that would not allow for the listing of PEG channel schedules without such modifications. The costs of compliance to be borne by Comcast result directly from decisions made by Comcast in 2010 that were within its control. Comcast will incur these upgrade costs not because of the imposition of new PEG requirements, but because of Comcast's own actions in failing to comply with its obligations of the Existing CPG related to its electronic programming guide.<sup>42</sup>

Comcast states that is not responsible for the existing headend-facility infrastructure that does not allow for the listing of PEG channel program schedules on the IPG without upgrades because it acquired the systems from Adelphia. Comcast contends that "it is the consolidated system design Comcast inherited -- and not anything Comcast did thereafter -- that makes it extremely costly to reconfigure the IPG system to deliver PEG program listings to discrete AMO territories."<sup>43</sup> Although Comcast did not create the cable infrastructure that caused the current obstacles to listing PEG channel schedules, it now owns that infrastructure and chose to implement a new programming guide system despite the effect the adoption of this guide would have on the ability of Comcast's customers to view PEG channel program schedules on such guide.

The requirement related to the listing of PEG channel program schedules predates Comcast's acquisition of Adelphia systems.<sup>44</sup> From 2000 until Comcast's adoption of the IPG as its electronic programming guide, AMOs were allowed to access Comcast's electronic programming guide so that the AMOs could have the schedules of their PEG channels listed on such channel guide. The headend infrastructure was not an obstacle to the listing of PEG channel

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41. Renewal Order at 54.

42. Renewal Order at 51 (finding 110). "The unavailability of program schedules for PEG channels on an electronic programming guide is the result of Comcast's system design choices related to programming guides." *Id.*

43. Comcast Motion at 22.

44. Docket 6101, CPG of 4/28/00.

program schedules for either Adelphia or Comcast until Comcast's adoption of the IPG as its electronic programming guide.

Comcast's implementation of the IPG without providing for the listing of PEG channel schedules in disregard of its obligations under condition 23(3) of the Existing CPG was not Comcast's only compliance failure related to this matter. Comcast failed to take other necessary action at the time to prevent its compliance failure. Prior to implementing this system design change, Comcast should have, as it was entitled to do under both state and federal law, petitioned the Commission to consider possible changes to its CPG or proposed alternative means through which the PEG channel schedule requirement could continue to be met. As the Commission observed in the the Renewal Order, when Comcast considered the adoption of the IPG, it did not "petition the [Commission] for appropriate amendments to its existing CPGs so that the [Commission] could make a determination about the reasonableness of such proposed amendments to the CPG."<sup>45</sup> In another context, the Renewal Order also states:

[W]hen a cable operator implements technological changes or undertakes technology upgrades to its system, applicable law requires it to take account of the effect on PEG capabilities, services, and signal quality, to consider how it can effectively meet its obligations for PEG access in light of such technological changes, and to take appropriate action to ensure that it will remain in compliance with its applicable obligations after implementing the technological change.<sup>46</sup>

In its response to the Comcast Motion, VAN also points to two conditions of the Existing CPG that require Comcast to provide the Commission in advance with descriptions of planned system changes and upgrades to allow time for meaningful input.<sup>47</sup> The Commission also observes that the Federal Cable Act contains provisions related to circumstances under which a cable operator may seek modification of its franchise requirements, which includes specific standards related to PEG obligations.<sup>48</sup>

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45. Renewal Order at 53.

46. Renewal Order at 78.

47. See conditions 73 and 69 of Existing CPG; VAN Response at 15.

48. 47 U.S.C. §545 provides in applicable part as follows:

**(a) Grounds for modification by franchising authority; public proceeding; time of decision**

(1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise—

(continued...)

Comcast does not provide any authority for the proposition that costs incurred by a cable operator to cure its non-compliance with existing franchise PEG obligations can be passed on to its subscribers as PEG fees in any case, much less in cases, such as this one, where its non-compliance resulted not from external factors but from the cable operator's own decisions and actions.

Comcast's conduct resulted not only in its substantial non-compliance with a material term of its CPG, but it also caused important cable-related community needs and interests to be unfulfilled since the IPG was adopted as Comcast's electronic programming guide.

As Comcast notes, Vermont customers pay significant monthly surcharges to support local PEG channels throughout the State, which Comcast claims are "some of the highest fees in the nation to support PEG programming."<sup>49</sup> Comcast's failure to comply with the requirement to allow the listing of PEG channel schedules on its programming guide, in effect, diminished the value of the investments Comcast's cable customers have made and continue to make to support PEG channels.<sup>50</sup> The effect of Comcast's non-compliance is that Comcast's customers are less able to find PEG channel schedules and to take advantage of PEG channel content because

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48. (...continued)

(A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that

(i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or

(B) in the case of any such requirement for services, if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

....

**(e) Requirements for services relating to public, educational, or governmental access**

A cable operator may not obtain modification under this section of any requirement for services relating to public, educational, or governmental access.

**(f) "Commercially impracticable" defined**

For purposes of this section, the term "commercially impracticable" means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

49. Comcast Motion at 14.

50. *See, also*, VAN Response at 3.

Comcast does not allow for the same listing of schedules for PEG channels on its electronic programming guide that it provides for other channels, including broadcast station channels.

Condition 22(3) of the Renewal CPG requires that Comcast provide the same listing of PEG channel schedules that it provided prior to its adoption of the IPG as its electronic programming guide. To permit Comcast to pass on the costs of compliance to customers as a PEG fee surcharge would mean that Comcast's customers would bear both the burden of Comcast's non-compliance as well as the costs of remedying such non-compliance, even though such non-compliance and the magnitude of the cure costs were due to Comcast's own behavior.

In summary, there is no basis to contend, as Comcast claims, that its costs in making modifications to its headend facilities are "new PEG fees." Comcast will incur these upgrade costs not because of the imposition of new PEG requirements, but because of Comcast's decisions and actions that resulted in its failure to comply for several years with its obligation to allow PEG channel schedules to be listed on its programming guide. Accordingly, Comcast is not permitted to pass on such costs to its Vermont subscribers as a new PEG fee surcharge.

In the VAN Response, VAN once again draws the Commission's attention to the terms of the Memorandum Opinion and Order of the Federal Communications Commission ("FCC") issued in connection with Comcast's 2011 acquisition of NBC Universal ("FCC Order").<sup>51</sup> This FCC Order imposes a condition that "Comcast cannot discriminate against PEG with respect to the functionality, signal quality, and features from those of the broadcast stations it carries."<sup>52</sup> The fact that "[s]chedule information for programs on non-PEG channels is available on Comcast's programming guide," but not PEG channel schedules<sup>53</sup> raises a concern (even in the absence of an express CPG requirement and a substantial compliance failure) as to whether Comcast is illegally discriminating against PEG with respect to the features of the IPG. However, for purposes of this Order (as was the case for the Renewal Order), the Commission need not resolve the issues of whether the FCC Order conveys authority to local franchising

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51. Exh. LGD-4. *See* VAN Response at 13-14.

52. Exh. LGD-4 at 88-89 (¶ 214).

53. Renewal Order at 50 (finding 105).

authorities to enforce such a requirement in a renewal CPG or as to the binding effect of this FCC Order on this proceeding.<sup>54</sup>

**Conditions Related to Line Extensions -- Renewal CPG conditions 33 and 34**

Comcast requests that the Commission reconsider conditions 33 and 34 of the Renewal CPG related to line extensions. According to Comcast, the Renewal Order fails to demonstrate why Comcast's own line extension proposal was not a reasonable means of maximizing access to cable service after taking into account the costs of meeting such needs. Comcast's CPG proposal omitted conditions 33 to 43 of the Existing CPG related to line extensions and replaced them with a condition that simply reiterated Comcast's regulatory obligation to comply with the PUC cable rule, including PUC Rule 8.313 related to the line extension policies of cable operators.<sup>55</sup>

Comcast takes the position that, in the context of a CPG renewal, a cable operator's line extension policy defines the scope of a cable operator's obligation to build-out its cable system into unserved areas of Vermont. The Commission does not agree.

The Federal Cable Act provides that in awarding a franchise to a cable operator, the franchising authority must "allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area."<sup>56</sup> This provision limits a franchising authority's ability to impose build-out requirements in that it must give franchisees a reasonable period of time to comply with those requirements.<sup>57</sup>

Given the breadth of Comcast's service area in Vermont, which encompasses many small communities and rural areas, a reasonable time frame to build-out its system may extend over several CPG terms. The objective of long-standing state policy remains to extend cable service throughout the state even though that goal that may be accomplished only gradually over multiple

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54. See Renewal Order at 75. However, in the Renewal Order, the Commission observed that "the explicit statement in the [FCC Order] related to PEG access to a system's features and functionality suggests that the FCC would not view the consideration of the access that PEG channels have to such features relative to broadcast channels to be beyond the purview of local franchise authorities in franchise renewal proceedings." Renewal Order at 75.

55. Renewal Order at 80 (finding 183). Comcast's line extension policy determines the circumstances and conditions under which Comcast will build line extensions at the request of potential new customers.

56. 47 U.S.C. §541(a)(4)(A).

57. *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order, 22 FCC Rcd. at 5101, 5141 (March 5, 2007).

CPG terms. Under PUC Rule 8.214(B)(7), the Commission considers whether a CPG proposal provides for “the availability of service to maximum number of residences,” and has construed its consideration of this criterion within a context of reasonableness.<sup>58</sup> Comcast’s renewal CPG proposal was not reasonable to meet identified community needs and interests and did not adequately address the “availability of service to maximum number of residences” criterion of PUC Rule 8.214(B)(7).

Comcast contends that Renewal CPG condition 33, which requires 550 miles of line extensions over an 11-year term, was not adequately supported by identified community needs and interests.<sup>59</sup> Before it acquired the Vermont cable systems of Adelphia, Comcast was aware of the importance ascribed in CPG proceedings to building out cable networks to unserved areas to meet community needs.<sup>60</sup> However, Comcast presented no evidence in this proceeding that previously identified community needs and interests for cable line extensions to unserved areas were no longer as important as in the past or could be adequately met through compliance with PUC Rule 8.313. Based on the evidence, the Commission found that the condition 33 line extension requirements were supported by the needs and interests of the state to expand the availability of service in unserved areas of Vermont.<sup>61</sup>

Comcast also contends that the Commission did not adequately consider the construction costs associated with the condition.<sup>62</sup> It is true that no specific evidence was presented in this proceeding as to construction costs for line extensions and that, in taking account of costs in determining the reasonableness of condition 33, the Commission considered other relevant factors in weighing the costs and benefits of line extensions.

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58. The Commission agrees with the Department that the “availability of service to a maximum number of residences” criterion that applies in the consideration of CPG proposals is “wholly separate and distinct” from any line extension obligations under PUC Rule 8.313. DPS Response at 8.

59. Comcast Motion at 26.

60. *See* Renewal Order at 78. In the Existing CPG, Comcast assumed the remaining line extension obligations of Adelphia's renewal CPGs and completed 998 miles of line extensions in satisfaction of these obligations. Renewal Order at 82 (finding 188).

61. Renewal Order at 88.

62. Comcast Motion at 26. It also notes that the Commission “has not calculated the costs of the mandated construction nor has it calculated the number of consumers potentially served by that construction.” Comcast Motion at 31.



If Comcast believed that evidence about its line extension construction costs would support its position, it had the burden to introduce such evidence for the Commission's consideration. It offered no such evidence in support of its own proposal or in response to the Department's prefiled testimony. As the U.S. Court of Appeals for the 6th Circuit concluded in a case where a cable operator failed to present satisfactory evidence as to the costs of meeting a community need:

A court's task is to weigh the value of an identified need against its cost. Where, as here, the operator fails to present evidence of the cost of meeting a need, the operator cannot successfully argue on judicial review that that balance weighs against meeting the need.<sup>63</sup>

To the extent of the available evidence in the record, the Commission did weigh the reasonableness of the line extension requirements of condition 33 in relation to their costs. The Department made persuasive arguments in support of the reasonableness of a 550-mile line extension requirement over the 11-year Renewal CPG term based on evidence in the record. As the Department notes, the Commission considered several factors in taking into account the reasonableness of the costs related to the condition and in determining that condition 33 of the Renewal CPG "will not impair Comcast's ability to continue to earn a fair and reasonable return on its investments."<sup>64</sup> Such factors included the historic rate of line extensions in the service area, prior construction budgets for line extensions, and the profitability of Comcast's cable operations in Vermont currently and while it was completing significant line extensions in Vermont.<sup>65</sup>

Comcast maintains that the overall profitability of Comcast's cable operations in Vermont is not an appropriate subject for consideration when determining whether line extension obligations are reasonable.<sup>66</sup> It suggests that the Commission was required to conduct a strict return on investment analysis with respect to any particular line extension requirement similar to the analysis applied to line extension requests made by potential customers under PUC Rule 8.313. Essentially, Comcast argues that there must be a demonstration that a build-out

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63. *Union CATV, Inc. v. City of Sturgis, Ky.*, 107 F. 3d. 434, 442 (6th Cir. 1997).

64. Renewal Order at 89.

65. DPS Response at 7; Renewal Order at 80-82, 86-89.

66. Comcast Motion at 30-33.

requirement in a CPG will pay for itself in order for it to be reasonable. Such a construction of federal and state law is inconsistent with the legislative history of the Federal Cable Act<sup>67</sup> and with the purpose of applicable state criteria and long-standing policy objectives. Furthermore, as the Department points out, the FCC has stated that it would seem reasonable for a local franchising authority to consider build-out benchmarks for a cable operator that take into account the market success of the operator.<sup>68</sup>

Comcast additionally asserts that the discretion condition 33 affords Comcast in terms of the location of future line extensions indicates that there is no compelling need in any particular unserved geographical area for cable line extensions.<sup>69</sup> Contrary to Comcast's assertion, a compelling need for the extension of cable lines exists in almost all of the large number of currently unserved communities in Comcast's service area. By providing discretion to Comcast about where to build line extensions, condition 33 makes it more likely that Comcast's business interests (in constructing line extensions where they will have the lowest net cost to Comcast) will generally align with those unserved areas of the state where the greatest need and opportunity for line extensions exist.

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67. "[I]n assessing the costs [under § 546(c)(1)(D) ], the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates are important considerations." H.R. Rep. No. 98-934 at 74. A review of the House Report makes clear that the "fair rate of return on its investment" refers to the overall investment by the cable operator in the franchise area and does not necessarily require a fair rate of return on each CPG obligation reasonably needed to meet community needs and interests after taking into account the costs of meeting such needs.

68. DPS Response at 7, citing *In the Matter of Implementation of Section 621(a)(l) of the Cable Communications Policy Act of 1984*, Report and Order, 22 FCC Rcd. 5101, 5143 ¶ 89 (March 5, 2007). In the Comcast Reply, Comcast seeks to cast doubt as to whether the FCC would regard such a requirement as reasonable in the case of incumbent cable operators. Comcast Reply at 12-14. The FCC statement cited by the Department was made in the context of an FCC order discussing build-out requirements that unreasonably restrict the entry of new competitors into the service territory of incumbent cable operators (because of the expense of such requirements in discouraging entry). Because the underlying rationale behind that section of the FCC order (that is, the concern that "build-out requirements can serve as a barrier to new entrants") did not apply to incumbents, the FCC later concluded that the "build-out" section of that FCC order is inapplicable to incumbents. *In the Matter of Implementation of Section 621(a)(l) of the Cable Communications Policy Act of 1984*, Report and Order, 22 FCC Rcd. 19633, 19636-19637 ¶ 9 (November 6, 2007). Given the rationale of the FCC Order to lessen barriers for new entrants, any build-out requirement that seemed reasonable for a potential new entrant would also seem reasonable for an incumbent cable operator, such as Comcast.

69. Comcast Motion at 28.

In the Comcast Motion, Comcast also reiterates arguments it previously made asserting that condition 33 is punitive and discriminatory against Comcast. As should be evident from the discussions in the Renewal Order and this Order, the line extension requirement of condition 33 is in no way intended as a punitive measure, but was included in the Renewal CPG to meet continuing community needs and interests and applicable state criteria.<sup>70</sup>

In addition, the Renewal Order and the Renewal CPG do not subject Comcast to discriminatory treatment. The build out of cable systems to unserved areas is a relevant factor in CPG proceedings for every cable operator in Vermont. Consideration of the availability of service to the maximum number of households within a cable operator's service area and the reasonableness of an operator's proposed build-out requirements (or the absence thereof) to meet community needs for the extension of service to unserved areas are relevant to all cable renewal proceedings. However, the decision to include build-out requirements and the extent and nature of such obligations depends on the specific circumstances of each CPG renewal proceeding, including: (i) whether the operator's system is largely built out in its service area, (ii) whether build-out requirements would be reasonable taking into account the costs of the build-out obligations to the particular cable operator and its ability to bear such costs and still earn a fair rate of return; and (iii) whether a stipulation has been agreed to among the parties with respect to the CPG. As the Department discusses in the DPS Response, Comcast has a substantially larger service area, network, revenues, and net income than any other cable operator in the state, and there are relatively few geographic areas in which its service area overlaps with that of other cable operators.<sup>71</sup> Circumstances related to any determination of the reasonableness and extent of any cable line extension obligation are different for Comcast than for most other Vermont cable operators.

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70. *See, also*, DPS Response at 8-9 and 12. Condition 33 requires significantly fewer miles of line extensions than the Existing CPG and was "designed to ensure that Comcast continues to expand its network at a rate that is consistent with historic practices, which the Department found to be mostly satisfactory." DPS Response at 12.

71. DPS Response at 10-11. Based on cable company annual reports for 2016, the Commission observes that Comcast reported revenue of \$212 million and net income of \$65 million from its cable services in Vermont in 2016. No other cable operator reported revenue in excess of \$18 million or net income in excess of \$5.0 million, and only one reported revenue of over \$8.0 million or net income of over \$1.0 million. The Department states that Comcast's "overall scale and ubiquitous presence throughout Vermont justify the imposition of certain conditions that were not warranted or necessary" in CPG proceedings involving other cable operators. DPS Response at 11.

Finally, Comcast argues that the Commission did not give adequate consideration to the possible effect on subscriber rates that may result from the costs of condition 33, especially in light of the demonstrated public concern about the high cost of Comcast's cable services. Because Comcast makes the same argument with respect to other of the contested conditions, the Commission addresses the possible impact of the contested conditions on Comcast's prices for cable service in Vermont in its discussion below of general considerations related to the Comcast Motion.

Comcast also objects to Renewal CPG condition 34, which incorporates the requirements (in slightly modified form) of conditions 33 and 38 of the Existing CPG that Comcast perform and provide an annual calculation of qualifying density in support of Comcast's line extension tariff. In its renewal CPG proposal, Comcast eliminated the requirements of conditions 33 and 38 of the Existing CPG without any explanation of why these requirements were no longer needed. The Renewal Order also found that Comcast has not complied with the requirement of the Existing CPG to provide an annual calculation of qualifying density since its 2008 annual report was filed.

Condition 34 of the Renewal CPG continues the requirements of the Existing CPG that Comcast provide support for its line extension tariff by providing an annual calculation of qualifying density in accordance with methodology and principles that the Commission previously approved. While the condition requires Comcast to make this calculation annually and provide it with its annual report (and not just when it makes changes to its line extension tariff), the requirement is similar to PUC Rule 2.402, which requires rate filings to include complete and substantial justifications for proposed rate changes with detailed calculations of costs of service and other relevant inputs in accordance with the ratemaking methodology or principles approved or utilized by the Commission. The Commission discussed the reasons for including condition 34 in the Renewal CPG and sees no reasons to change its determination.<sup>72</sup>

**Condition Related to Remote Origination Sites -- Renewal CPG condition 21(b) and (c)**

Comcast contests Renewal CPG condition 21(b) and (c), which sets forth requirements for remote origination sites ("ROS") capable of providing live programming. Comcast contends

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72. Renewal Order 83-86.

that the Commission did not give adequate consideration of costs in its decisions not to include Comcast's proposed renewal CPG condition in the Renewal CPG and to include instead a condition based on requirements proposed by the Department.<sup>73</sup> Comcast maintains that if the Commission had properly considered costs, it would have recognized that Comcast's ROS proposal was reasonable and that the ROS condition in the Renewal CPG was "facially unreasonable."<sup>74</sup>

Comcast requested modifications to the ROS condition because technological constraints related to the introduction of non-cable television services had raised the cost of making a cable drop capable of providing two-way service and remote origination service to sites within 500 feet of its cable plant if there was not an existing "I-NET/return line designated fiber." The Commission was unable to find Comcast's ROS condition proposal to be reasonable under applicable criteria based on the evidence presented in the record. However, the Commission, in adopting the Department's proposed condition that, most significantly, allowed Comcast to employ various alternative technologies to meet its ROS requirements, considered the costs to Comcast of the existing ROS condition. As the Department notes, the new ROS condition takes into account Comcast's engineering and cost concerns without reducing the number of sites that would be eligible for remote origination drops.<sup>75</sup>

In the Comcast Motion, Comcast mischaracterizes the condition in the Renewal CPG as the retention of the exact same condition as in the prior CPG and makes no acknowledgment of its ability to use various alternative technologies to meet the condition.<sup>76</sup> In the Comcast Reply, it refers to the option to use alternative technologies only to fault (i) the Department and VAN for

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73. In general terms, the condition in the Existing CPG required Comcast to provide a cable drop capable of providing two-way and remote origination service upon request and at no charge to certain community sites located within 500 feet of its cable plant. The proposed condition in Comcast's renewal CPG proposal required Comcast to provide such a drop only if the site was within 500 feet of an existing I-NET/return line designated fiber designed for and capable of supporting the upstream transmission of live cable-casted programming. VAN and the Department each had alternative proposals. The Department's proposal required Comcast to provide a cable drop "for upstream origination" of programming to sites located within 500 feet of its cable plant, but allowed Comcast to employ various alternative technologies of its choice to provide the upstream origination capability. See Renewal Order at 41-49.

74. Comcast Motion at 40.

75. DPS Response at 14.

76. Comcast Motion at 39 and 37-40.

not citing any evidence in the record establishing cost savings for alternative technologies and (ii) the Renewal Order for not explaining how costs would be offset by the use of alternative technologies. However, Comcast itself presented little specific evidence as to the costs of the ROS condition in the Existing CPG in support of its own proposal and provided no evidence about how the use of alternative technologies might affect costs relative to its proposal.<sup>77</sup> Comcast's failure to present such evidence about costs was particularly notable given the knowledge it uniquely had concerning the costs of the pilot project in Rutland that employed an alternate technology to provide ROS service.<sup>78</sup> The Commission concludes that Comcast has not provided sufficient reason for the Commission to alter or amend the ROS condition in the Renewal CPG.

**Conditions Related to Institutional Networks -- Renewal CPG conditions 52 and 53**

Comcast's renewal CPG proposal omitted the conditions in the Existing CPG related to institutional networks without any explanation of why these conditions were no longer required to meet previously identified community needs and interests taking into account the costs of meeting such needs. Comcast presented no evidence about these conditions during this proceeding.

Comcast argues that, in the absence of new ascertainment evidence of the need for conditions 52 and 53, these conditions can't be imposed in the Renewal CPG. As discussed below in the discussion of general considerations related to the Comcast Motion, the requirements of a cable operator's current CPG are relevant as evidence of previously identified community needs in a CPG renewal proceeding. Comcast also asserts that a 11.25% cap on Comcast's rate of return to provide the contemplated network is not commercially reasonable.<sup>79</sup> The Commission disagrees and finds no basis on reconsideration to grant Comcast's request to remove conditions 52 and 53 from the Renewal CPG.

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77. See VAN Response at 28-29.

78. Renewal Order at 43 (finding 99); *see, also*, VAN Response at 29.

79. *See* Comcast Motion at 43-46; *see also*, VAN Response at 29-30.

**General Considerations related to the Comcast Motion for Reconsideration**

Although partially addressed in the discussions of the contested conditions above, the Comcast Motion raised some global concerns about the Renewal Order and the contested conditions. Comcast asserts that the Renewal Order is fundamentally flawed for: (i) imposing the contested conditions without making the necessary findings as to whether Comcast's renewal CPG proposal was reasonable; (ii) failing to properly analyze the costs of the contested conditions; and (iii) failing to consider the impact of the contested conditions on subscriber rates.<sup>80</sup>

*Reasonableness of Comcast's renewal CPG proposal*

In the Renewal Order, the Commission found on the basis of evidence related to each of the proposed conditions in Comcast's renewal CPG proposal that Comcast's proposal was not reasonable without additions to or modification of several of Comcast proposed conditions.<sup>81</sup> After reviewing Comcast's filings in support of its reconsideration motion, the Commission finds no reason to alter or amend its judgments, as the reasonableness determinations made by the Commission with respect to Comcast's proposal and with respect to each of the contested conditions are soundly based on available evidence in the record and applicable law.

The core of Comcast's argument seems to be that the Commission did not properly assess the reasonableness of Comcast's renewal CPG proposal under applicable criteria of the Federal Cable Act. The Comcast Motion generally sets forth Comcast's interpretation of applicable standards under the Federal Cable Act.<sup>82</sup> It then asserts that the Commission "did not make any finding regarding the reasonableness of Comcast's CPG Renewal Proposal before imposing the contested conditions" and instead "engaged in a comparative process that the Cable Act quite

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80. Comcast Motion at 6-13.

81. In the Renewal Order, the Commission found that:

Comcast's CPG Proposal, subject to the modifications and additional conditions approved by the [Commission] in this Order, is reasonable to meet future cable-related community interests and needs, taking into account the cost of meeting such needs and interests and is a financially sound and stable proposal.

Renewal Order at 25 (finding 44). This finding was supported by findings 45 to 217, as applicable, of the Renewal Order.

82. Comcast Motion 7-9.

clearly prohibits.”<sup>83</sup> As is more clearly indicated elsewhere in the Comcast Motion and in the Comcast Reply, Comcast objects to the Commission’s consideration of Comcast’s proposed renewal CPG conditions in relation to the conditions of the Existing CPG.<sup>84</sup> Comcast suggests that the Commission should not have given evidentiary weight to the conditions of the Existing CPG in its determinations related to Comcast’s proposal.<sup>85</sup>

Cable CPG renewal proceedings do not start with a clean slate, but rather in the context of an existing CPG. Existing CPG conditions provide evidence of previously identified community needs and interests. In addition, these conditions are based on prior determinations, pursuant to 47 U.S.C. § 546(c)(1)(D) and PUC Rule 8.230(D), that the conditions are reasonable to meet the future cable-related community needs and interests taking into account the costs of meeting such needs and interests. The Existing CPG provides evidence that may be relevant to such determinations in a renewal proceeding, just as the Department’s community needs assessment or other evidence presented by the parties provides such evidence.

A cable operator has the burden of demonstrating that the omission or modification of existing CPG conditions from its renewal CPG proposal is reasonable given changes in circumstances or other considerations it identifies. Such changed circumstances may result from changes in community needs (possibly, because the need has been largely satisfied or is no longer as important as it previously was) or as a result of changes in the costs of meeting such needs (for example, significantly higher construction or equipment costs) or in the effect such costs would now have on the cable operator (possibly, because of changes in the operator’s financial circumstances related to its Vermont cable operations).

The conditions of the Existing CPG were previously determined by the Commission to be required to meet future cable-related community needs and interests after taking into account the cost of meeting such needs or to meet other criteria applicable to cable CPGs under state and federal law. Whenever its renewal CPG proposal omitted or modified an existing condition,

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83. Comcast Motin at 9.

84. Comcast Motion at 44-45; Comcast Reply at 22.

85. “The presence of a provision in a prior CPG is legally irrelevant to the reasonableness of a current renewal proposal.” Comcast Motion at 44.



Comcast had the burden to explain the reasons for such omission or modification. Comcast did not meet this burden with respect to its own proposal.<sup>86</sup>

Comcast also asserts that the contested conditions impose requirements that “go far beyond” Comcast’s proposal.<sup>87</sup> It observes that renewal requirements of federal law are designed to provide certain protections to cable operators against possible overreach by local franchising authorities in the renewal process.<sup>88</sup>

The Commission takes seriously all of its responsibilities under federal and state law related to cable CPG renewals, including limitations under the Federal Cable Act on the authority of the Commission in such renewals. Moreover, in the case of the contested conditions, any concern about regulatory overreach is especially inapplicable. None of the contested conditions impose new obligations based on newly identified community needs. All the contested conditions are derived from or based on obligations of the Existing CPG. Furthermore, all of the conditions of the Existing CPG were agreed to by Comcast prior to its acquisition of Adelphia’s cable systems in Vermont. Finally, the requirements of the Renewal CPG are generally less onerous than the conditions of the Existing CPG. Overall, the Renewal CPG reduces the compliance burdens on Comcast as compared with the Existing CPG.

*Adequacy of cost analysis*

Comcast challenges the adequacy of the Commission’s cost analysis with respect to the contested conditions. It generally argues that the Commission did not adequately consider the costs to Comcast of meeting the contested conditions over the 11-year term of the Renewal CPG.

The Commission did consider and analyze the costs of the contested conditions to the extent of available evidence in the record. Any limitations in the evidentiary record concerning

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86. Moreover, to accept Comcast’s argument would mean that a cable operator could propose a renewal CPG with no conditions and thereby place the burden on the other parties to re-litigate, and to provide proof of, the current need and reasonableness of every condition in the existing CPG. Placing the initial burden on the cable operator to rebut the evidentiary weight of an existing condition by showing that its proposal is reasonable in the case of any omitted or modified condition provides for a fairer, less cumbersome, and more efficient process and is consistent with state law, the Federal Cable Act, and applicable evidentiary rules and procedures.

87. Comcast Motion at 3

88. Comcast Motion at 7-8.

the costs to Comcast of satisfying such conditions generally result from Comcast's failure to present specific evidence about them.<sup>89</sup> Comcast faults the Commission for its own neglect.<sup>90</sup>

In the Renewal Order, the Commission made reference to evidence presented by the Department about the profitability of Comcast's cable operations in Vermont as part of the Commission's analysis of the reasonableness of the costs of the contested conditions.<sup>91</sup> Comcast observes that profitability "is not a lawful basis for rejecting an element of the operator's renewal proposal under 47 U.S.C. § 546(c)(1)(D)."<sup>92</sup>

In the Renewal Order, the Commission did not use profitability as a basis for rejecting any condition proposed by Comcast. Comcast's profitability was only used as a metric for determining whether Comcast's Vermont operations could bear the costs of requirements determined to be necessary to meet community needs. In the Commission's view, the cost/benefit analysis contemplated under federal and state law involves not only a determination that the benefits to the community of a condition exceed the costs of meeting such needs, but also that such costs can reasonably be borne by the cable operator without impairing its cable operations or its ability to earn a fair rate of return in Vermont. Accordingly, the ability to earn a fair rate of return, market success, profitability, and other financial indicators may all be relevant to "taking into account the costs of meeting identified community needs and interests."

*Effect of Renewal CPG conditions on customer rates*

Comcast maintains that the Renewal Order failed to recognize or consider the effect that Comcast's costs in meeting the contested conditions may have on subscriber rates. Comcast correctly notes that the greatest number of public comments received by the Commission

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89. In addition to its unique knowledge of such costs, Comcast clearly had the burden of presenting evidence about such costs on rebuttal. When another party to a cable renewal proceeding presents evidence in support of the reasonableness of its own proposed conditions on the basis that the cable operator's proposed conditions are not reasonable under applicable criteria, the cable operator has the burden of presenting rebuttal evidence, which may involve, for example, providing specific evidence about the relative costs of the proposed conditions. Comcast's failure to provide specific rebuttal evidence as to its costs is particularly notable with respect to the contested conditions related to line extensions and ROS origination sites.

90. "Where, as here, the operator fails to present evidence of the cost of meeting a need, the operator cannot successfully argue on judicial review that that balance weighs against meeting the need." *Union CATV, Inc. v. City of Sturgis, Ky.*, 107 F. 3d. 434, 442 (6th Cir. 1997); *see, also*, VAN Response at 20-21.

91. *See*, for example, Renewal Order at 54-55 and 88-89.

92. Comcast Motion at 10.

expressed concern about the costs of Comcast's cable television services.<sup>93</sup> The Department has valid concerns, which are supported by its testimony and community needs assessment, about the rising cost of cable service.<sup>94</sup> Furthermore, the Renewal Order contained the following finding about the effect such costs have on Comcast customers in Vermont:

The Department's CNA report indicated that the high cost of cable service is a common reason that customers either choose not to purchase or end service with Comcast.<sup>95</sup>

The Commission fully shares the Department's concerns about the high and rising costs of cable services in Vermont. The extent to which the costs of contested conditions will contribute to higher prices for Comcast's cable services in Vermont is an important consideration for the Commission, regardless of whether prices for Comcast's services are already perceived to be high.<sup>96</sup>

The Renewal Order assessed the reasonableness of the costs to Comcast of the contested conditions based on the available evidence. In considering the effect of such costs on customer rates, the Commission first observes that, given the scale of Comcast's Vermont operations, the compliance costs related to the contested conditions (which may appear significant in absolute terms) are likely to have a relatively modest effect on Comcast's cost of service over the 11-year term of the Renewal CPG.

More importantly, however, is the fact that Comcast is generally not a rate-regulated utility with cost-based rates. Comcast sets the prices for almost all its cable services and has discretion to establish such prices based on market factors and other considerations it determines to be relevant, including costs and pricing strategies. Because Comcast is not rate-regulated, it is difficult to assess the extent to which the costs of Comcast's compliance with the contested conditions may affect the prices that Comcast chooses to charge for its cable services in Vermont. Factors, in addition to costs, including factors that are more within Comcast's control (such as the operating margins it maintains), appear to be much more significant factors in

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93. Comcast Motion at 18.

94. See DPS Response at 4, Peterson pf. at 6, and exh. DPS-CP-1 (attachment D at 12, 15).

95. Renewal Order at 100 (finding 223).

96. H.R. Rep. No. 98-934 at 74.

determining Comcast's prices for services and in resulting public perceptions about the high and rising costs of Comcast's services than any costs to Comcast attributable to the contested conditions will be.

Based on the foregoing, the Commission hereby denies Comcast's motion to alter or amend the Renewal Order and the Renewal CPG pursuant to V.R.C.P. Rule 59(e).

**SO ORDERED.**

Dated at Montpelier, Vermont, this 27<sup>th</sup> day of July, 2017.

<u>s/James Volz</u>	)	
James Volz	)	PUBLIC UTILITY
	)	
	)	
_____	)	COMMISSION
	)	
	)	
	)	OF VERMONT
<u>s/Sarah Hofmann</u>	)	
Sarah Hofmann	)	

OFFICE OF THE CLERK

FILED: July 27, 2017

ATTEST: s/Holly R. Anderson  
Deputy Clerk of the Commission

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within ten days of the date of this decision and Order.*