**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of<br><br>Massachusetts Department of Telecommunications and Cable Form 328 Certification in:<br><br>Adams, MA (MA0001) | Section 76.910 INBOX |

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE SURREPLY TO TIME WARNER CABLE INC.'S REPLY**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

KAREN CHARLES PETERSON,
COMMISSIONER

1000 Washington Street, Suite 820
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Dated: February 4, 2016

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
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## I. INTRODUCTION

As explained in the Opposition the Massachusetts Department of Telecommunications and Cable ("MDTC") filed in this proceeding, the Federal Communications Commission ("FCC") should dismiss the Petition for Reconsideration ("Petition") filed by Time Warner Cable Inc. ("Time Warner" or "Company") in the above-captioned proceeding, and in doing so affirm the continued certification of the MDTC to regulate cable rates in the Town of Adams. In Time Warner's Reply to the Opposition, the Company fails to provide any specific evidence that nine direct broadcast satellite ("DBS") subscriptions in dispute belong to residential households. As a result, these subscriptions are irrelevant to, and should not be included in, a determination of effective competition, and when they are excluded, the DBS penetration rate in Adams is 14.81%. Accordingly, the FCC should promptly dismiss Time Warner's Petition, pursuant to the procedure stated in the FCC's June 3, 2015, Report and Order in this proceeding.[1] The MDTC

[1] *In re Amendment to the Comm'n's Rules Concerning Effective Competition*, MB Docket No. 15-53, FCC 15-62, *Report & Order*, ¶ 28 n.131 (rel. June 3, 2015), 2015 WL 3533156 ("The Media Bureau will promptly dismiss cable operator petitions for reconsideration that do not rebut a franchising authority's demonstration that Competing Provider Effective Competition is not present in the franchise area.").

files this Surreply pursuant to section 76.7(d) of the FCC's rules and in its capacity as regulator of cable rates in the Commonwealth of Massachusetts.[2]

## II. THE ZIP CODES THAT TIME WARNER IDENTIFIES DO NOT CONTAIN ANY RESIDENCES, RENDERING ANY DBS SUBSCRIPTIONS THEREIN IRRELEVANT

Time Warner in its Reply provides no specific evidence that the nine DBS subscriptions in the zip codes it identifies are from residential households. Rather, as fully explained in the MDTC's Opposition, these ten zip codes do not correspond with residences.[3] As a result, these subscriptions should not be included in an effective competition calculation. Time Warner includes in its Reply the methodology and results from a zip code identification report provided by Media Business Corp. ("Media Business").[4] Media Business provides Time Warner with a zip code's "Record Type" as determined by the United States Postal Service ("USPS").[5] However, nowhere does Media Business purport to classify zip codes as containing or not containing residences.[6] Indeed, Media Business does not utilize the USPS's RDI Product, which "allows customers to determine whether an address is classified as residential or business in the USPS® Address Management System (AMS) database. Addresses processed using the RDI data return an indicator denoting if an address is business or residential."[7] Because Media Business

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[2] 47 C.F.R. § 76.7(d). The MDTC also files a contemporaneous Motion for Leave to File Surreply. The MDTC "is the certified 'franchising authority' for regulating basic service tier rates and associated equipment costs in Massachusetts." 207 C.M.R. § 6.02; *see also* MASS. GEN. LAWS ch. 166A, §§ 2A, 15 (establishing the MDTC's authority to regulate cable rates).

[3] *See* MDTC Opposition at 2-3.

[4] Time Warner Reply at 3-4, Ex. A.

[5] *Id.* at Ex. A.

[6] *See id.*

[7] U.S. Postal Serv., *Address Information System Products Technical Guide*, RIBBS – USPS NATIONAL CUSTOMER SUPPORT CENTER 94 (May 2015), https://ribbs.usps.gov/addressing/documents/tech_guides/pubs/AIS.PDF.

does not use this RDI Product for its zip code identifications, it can do no more than provide the USPS's Record Type for each zip code.[8] Media Business cannot tell whether there are residences within a zip code.[9] In contrast, Melissa Data does use this RDI Product, and based on the product, Melissa Data confirmed to the MDTC that there are no residences in any of the ten zip codes that Time Warner identified in the Petition.[10]

Specifically, for the zip codes Media Business codes as "S," Time Warner makes the general assertion that "single family residential homes are coded as 'S' for street."[11] However, Media Business's methodology is devoid of any reference to "single family residential homes."[12] As is the USPS's description of its Record Types: "A street record (record type 'S') consists of a range of addresses on a street block, block face (one side of a street), cove, cul-de-sac, or other address grouping. Generally, all named or numbered streets with mail delivery or potential for mail delivery have 'S' records in the ZIP+4® product."[13] While some residential homes may be located within a zip code coded as "S," the FCC consistently rejects general evidence of this

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8 *See* Time Warner Reply at Ex. A. For more information on the USPS's record types, see U.S. Postal Serv., *Address Information System Products Technical Guide*, RIBBS – USPS NATIONAL CUSTOMER SUPPORT CENTER 79-85 (May 2015), https://ribbs.usps.gov/addressing/documents/tech_guides/pubs/AIS.PDF.

9 *See* Time Warner Reply at Ex. A.

10 *See* MDTC Opposition at Ex. B, Ex. C.

11 Time Warner Reply at 4.

12 *Id.* at Ex. A.

13 U.S. Postal Serv., *Address Information System Products Technical Guide*, RIBBS – USPS NATIONAL CUSTOMER SUPPORT CENTER 80 (May 2015), https://ribbs.usps.gov/addressing/documents/tech_guides/pubs/AIS.PDF.

nature.[14] Indeed, the inverse—that all zip codes coded as "S" contain residential homes—is not true, as demonstrated by Melissa Data's use of the USPS's RDI Product in these zip codes.[15]

Additionally, with respect to the zip codes coded as "H," Time Warner claims that "multi-residence dwelling unit buildings (such as apartments and condominiums) are coded as 'H' for high-rise."[16] Again, while Time Warner's limited assertion is not untrue, the Company omits the USPS's full description of "H" records: "An 'H' record type may be used to identify a ***commercial building***, apartment complex, high-rise, wing or floor of a building, grouping of apartment mail boxes, or other physical location other than a street."[17] Time Warner relies on the USPS's general "H" code, rather than obtaining specific evidence via the USPS's RDI Product to determine whether these H-coded zip codes contain commercial buildings or apartment complexes. In contrast, Melissa Data uses the USPS's RDI Product to show that these H-coded zip codes in fact do not contain any residences.[18]

In sum, Time Warner has not provided any specific evidence with respect to the presence of residences in the ten zip codes. The MDTC, to the contrary, has provided specific evidence that the zip codes do not contain any residences. Essentially, Time Warner states that the zip codes may contain residences, while the MDTC's evidence shows that the zip codes conclusively do not contain residences. Accordingly, any DBS subscriptions that may correspond to these zip

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14 *See, e.g.*, *In re Comcast Cable Commc'ns*, 20 FCC Rcd 20438, 20441 n.28, *Memorandum Opinion & Order* (MB 2005) (rejecting claims that "rest on generalities and offer no specific evidence").

15 *See* MDTC Opposition at Ex. B, Ex. C.

16 Time Warner Reply at 4.

17 U.S. Postal Serv., *Address Information System Products Technical Guide*, RIBBS – USPS NATIONAL CUSTOMER SUPPORT CENTER 84 (May 2015), https://ribbs.usps.gov/addressing/documents/tech_guides/pubs/AIS.PDF (emphasis added).

18 *See* MDTC Opposition at Ex. B, Ex. C.

codes are irrelevant to an effective competition decision, which Congress mandated be based on residential households.[19] The FCC should thus disregard these subscriptions, and as the DBS penetration rate in Adams is below 15% when these nonresidential subscriptions are not included, the FCC should dismiss the Petition.[20]

## III. THE DBS PENETRATION RATE IN ADAMS IS BELOW 15 PERCENT WHEN SEASONAL HOMES ARE TAKEN INTO ACCOUNT

Although as explained above, the seasonal discount is not needed to establish that effective competition does not exist in Adams, the DBS penetration rate in Adams drops further below 15% when seasonal homes are taken into account. Despite Time Warner's contention, the FCC's approval of a reduction of the Satellite Broadcasting Communications Association's ("SBCA") reported DBS subscribership by the percentage of seasonal homes in a community is beyond reproach.[21] Time Warner has not provided any reason why the FCC should change its longstanding precedent.[22] Even using Time Warner's "updated" DBS subscriber count, when the

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[19] 47 U.S.C. § 543(*l*)(1)(B); *see also In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5662, *Report & Order & Further Notice of Proposed Rulemaking* (1993) (confirming that "service to 'households' in a given franchise area" is the important measure of competing provider subscribership for effective competition purposes); 47 C.F.R. § 76.905(b)(2).

[20] *See* Ex. A.

[21] In the FCC's 2015 Adams Order, in which the FCC approved a reduction based on seasonal homes in the very community subject to the Petition, the FCC cites to several cases in which it reduced the SBCA's reported subscriber count to take into account seasonal homes, including the two cases that Time Warner attempts to distinguish in its Reply. *See In re Time Warner Cable Inc.*, 30 FCC Rcd 1067, *Memorandum Opinion & Order* (MB 2015); Time Warner Reply at 5-6.

[22] Time Warner's attempts to distinguish this case from the FCC's precedent are misguided. Specifically, in regards to *Charter*, Time Warner's assertion that the FCC applied the seasonal home discount "only to the denominator figure submitted by the cable operator" is simply untrue. Time Warner Reply at 5-6; *see also In re Charter Commc'ns*, 25 FCC Rcd 2289, 2294, 2295-96, *Memorandum Opinion & Order* (MB 2010). The competing provider test calculation consists of a DBS subscriber number in the numerator and a household number in the denominator. *See* 47 U.S.C. § 543(*l*)(1)(B). In *Charter*, the FCC applied the seasonal home discount to both the numerator (in paragraph 15) and the denominator (in paragraph 21). *Charter*, 25 FCC Rcd at 2294, 2295-96. And in *Comcast*, the FCC approved the seasonal home reduction, but simply found that the reduction was not enough to bring the DBS penetration rate below 15%. *In re Comcast Cable Commc'ns, LLC*, 22 FCC Rcd 1691, 1697-98 & n.61, *Memorandum Opinion & Order* (MB

nine nonresidential DBS subscriptions that Time Warner found in the nonresidential zip codes in Adams are not included in the effective competition calculation, the DBS provider penetration rate is 14.81%.[23] This penetration rate does not exceed 15%, so Time Warner has not met the second prong of the competing provider test in Adams.[24] Accordingly, Time Warner is not subject to effective competition in Adams, and the MDTC's certification to regulate rates in Adams remains valid.[25] The FCC should therefore promptly dismiss Time Warner's Petition.

## IV. CONCLUSION

Time Warner has not presented evidence sufficient to rebut the MDTC's showing that the Company is not subject to effective competition in Adams. Accordingly, the FCC should promptly dismiss Time Warner's Petition, and affirm the continued certification of the MDTC to regulate cable rates in Adams.

Respectfully submitted,

KAREN CHARLES PETERSON,
COMMISSIONER

By: /s/ *Sean M. Carroll*
Sean M. Carroll, Counsel

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February 4, 2016

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2007), *recons. granted on other grounds*, 22 FCC Rcd 5320 (MB 2007). In contrast, in Adams, when the FCC-approved reduction is applied, the DBS penetration rate is below 15%. Ex. A.

23 Ex. A; *see also* MDTC Opposition at Ex. C.

24 *See* 47 U.S.C. § 543(*l*)(1)(B); 47 C.F.R. § 76.905(b)(2).

25 *See* 47 U.S.C. § 543(*l*)(1)(B); *In re Amendment to the Comm'n's Rules Concerning Effective Competition*, MB Docket No. 15-53, FCC 15-62, *Report & Order*, ¶ 28 (rel. June 3, 2015), 2015 WL 3533156.

**CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)**

The undersigned signatory has read the foregoing Surreply, including all Exhibits, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

/s/ *Sean M. Carroll*
Sean M. Carroll, Counsel

Commonwealth of Massachusetts
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February 4, 2016

**DECLARATION OF MICHAEL MAEL**

I, Michael Mael, declare, under penalty of perjury that:

1. I am a senior financial analyst at the Massachusetts Department of Telecommunications and Cable ("MDTC"). My duties include, among other things, maintaining the MDTC's records of cable basic service tier rates.

2. I have read the foregoing Surreply, including all Exhibits, and I am familiar with the contents thereof and the matters referred to therein.

3. The facts contained within the Surreply, including all Exhibits are true and correct to the best of my knowledge, information, and belief.

Date: February 4, 2016 /s/ *Michael Mael*
Michael Mael

# Exhibit A

| Community | Number of Residential DBS Subscribers | 2010 Census Total Housing Units | 2010 Census Occupied Housing Units | 2010 Census Seasonal, Recreational, or Occasional Use Housing Units | % of Seasonal, Recreational, or Occasional Use Housing Units (Column E / Column C) | Number of DBS Subscribers Accounting for Seasonal Homes (Column B - (Column F * Column B)) | DBS Provider Penetration Rate In Franchise Area (Column B / Column D) or (Column G / Column D) |
|---|---|---|---|---|---|---|---|
| Adams | 583 | 4,371 | 3,907 | | | | 14.92% |
| Adams | 583 | 4,371 | 3,907 | 34 | 0.78% | 578.47 | 14.81% |

**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

# CERTIFICATE OF SERVICE

I, Sara Clark, do hereby certify that on this 4th day of February, 2016 that true and correct copies of the (1) Motion for Leave to File Surreply and (2) Surreply, have been sent via U.S. mail (postage prepaid) or electronic service via ECFS to the following:

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Sara Clark

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