

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

Massachusetts Department of Telecommunications and Cable	)	Section 76.910 INBOX
	)	
Form 328 Certification of Franchising Authority to Regulate Basic Service Rates and Initial Finding of Lack of Effective Competition	)	PSID No. 002938 Adams, Town of (MA0001)
	)	

To: Chief, Media Bureau

**RESPONSE TO SURREPLY**

Time Warner Cable Inc. (“Time Warner Cable”) hereby responds to the Surreply filed by the Massachusetts Department of Telecommunications and Cable (the “MDTC”) in the above captioned proceeding involving Time Warner Cable’s Petition for Reconsideration of the MDTC’s Form 328 certification as it pertains to the community of Adams, Massachusetts. For the following reasons, the Bureau should confirm that the Town of Adams is subject to effective competition under the competing provider test of Section 623(l)(1)(B) of the Communications Act and thus not subject to rate regulation, and reject the MDTC’s attempted certification.<sup>1</sup>

In its Surreply, the MDTC attempts to discredit Time Warner Cable’s updated DBS penetration calculation for Adams by claiming that DBS subscribers identified in ten nine digit Zip codes should not count. In support of its argument, the MDTC claims that its Zip code data provider Melissa Data has indicated that the ten Zip codes do not correspond with “residences.” This is contrary to data produced by Time Warner Cable’s data provider Media Business Corp. (“MBC”) showing that each of the ten Zip codes is identified with either a single family

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<sup>1</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

residence, an apartment complex, a condominium building or some other multi-tenant residential structure. For the following reasons, DBS subscribers identified in each of the ten additional Zip codes are certainly residential DBS customers and should fully count in the Adams competing provider penetration calculation.

As an initial matter, it must not be overlooked that MBC Zip code identification reports have been successfully used in hundreds of effective competition proceedings involving competing provider test petitions, and the Commission has never once invalidated any portion of the Zip code data included in such reports. By contrast, there is only one reported case where a party used a Melissa Data Zip code identification report, and that attempt was rejected by the Commission due to the arbitrary and inaccurate nature of the report.<sup>2</sup>

Nevertheless, it can be demonstrated each of the DBS customers associated with the ten contested Zip codes is certainly a residential DBS customer. As explained in Time Warner Cable's Reply, each MBC report provides Zip Code Record Type identifiers from the United States Postal Service ("USPS") that indicate what type of building or buildings are associated with each particular Zip code.<sup>3</sup> Commercial businesses are identified as "F" for firm, single family residential homes are identified as "S" for street, multi-residence dwelling unit buildings (such as apartments and condominiums) are identified as "H" for high-rise, commercial drop boxes are identified as "P" for post office box, and other addresses are identified as "G" for general delivery.<sup>4</sup>

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<sup>2</sup> *Time Warner Cable-Advance/Newhouse Partnership – South Carolina Communities*, 26 FCC Rcd 3840, ¶¶ 14-15 (Med. Bur. 2008).

<sup>3</sup> See Media Business ZIP+4 Identification Report attached to Time Warner Cable's Reply as Exhibit A.

<sup>4</sup> *Id.*

MBC's Adams report indicates that each of the additional ten Zip codes at issue have been given Record Type identifiers for categories that are residential accounts. Most importantly, none of the ten Zip codes has been identified as "F" for commercial addresses. Instead, Zip codes 01220-1055 and 01220-1220 are identified as "S" for single family residential homes, and Zip codes 01220-1586, 01220-1593, 01220-1661, 01220-1667, 01220-1783, 01220-1787, 01220-1985 and 01220-2073 identified as "H" for apartments, condominiums and other multi-residence dwelling unit buildings.<sup>5</sup> As Time Warner Cable explained in its Reply, all ten Zip codes therefore contain "residences" and any DBS subscribers identified with those Zip codes should fully count in the Adams' competing provider penetration calculation.

The MDTC responds that the USPS Zip Code Record Type identifiers do not necessarily mean that each Zip code identified as "S" or "H" absolutely contains "residences." According to the MDTC, a Zip code with an "S" identifier may contain individual addresses on a street block, but those address may or may not be residential. Similarly, the MDTC argues that a Zip code with an "H" identifier means a zip codes that may contain apartments, condominium and multi-tenant buildings, but again not necessarily only residential buildings. According to the MDTC, because the USPS Zip Code Record Type identifiers do not establish with absolute certainty that the Zip codes correlate with residences, no DBS subscriber identified within should count.

A deeper look at the data says otherwise. Assuming *arguendo* that Adams Zip codes identified with USPS Zip Code Record Type identifiers "S" and "H" might include commercial or residential buildings within those Zip codes, it is then also true that DBS accounts within those same zip codes might also be commercial or residential. Except they can't – all reported DBS subscribers are residential. The Satellite Broadcasting and Communications Association

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<sup>5</sup> *Id.*

(“SBCA”), the entity that supplies the DBS providers’ subscriber counts for each Zip code, only provides DBS subscriber data for residential accounts and “commercial and test accounts are not included” in its reports.<sup>6</sup>

Thus, to the extent that a commercial DBS subscriber exists in any one of these ten Zip codes, it would never show up on the SBCA report. For this reason, each and every DBS subscriber identified within the ten Zip codes is an Adams’ residential DBS subscriber and should fully count in the Adams’ DBS provider penetration calculation. As that penetration calculation exceeds the 15 percent of households threshold contained in the competing provider test, effective competition certainly exists in Adams.

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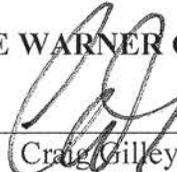
<sup>6</sup> See SBCA Adams, Massachusetts Effective Competition Tracking Report cover page at Methodology note, attached to Time Warner Cable’s Reply as Exhibit B (“Methodology: Direct-To-Home (DTH) subscriber data reflects aggregated DIRECTV and DISH Network residential subscriber totals. The following data collection procedures are applied by Members in the normal course of business: a) single accounts with multiple receivers are only counted once; **b) commercial and test accounts are not included;** c) each occupied unit served in a multiple dwelling unit building has been counted as a separate residential subscriber; d) zip codes are taken from service locations (not billing addresses, where different); e) inactive accounts are routinely removed; f) invalid (undeliverable) addresses have been corrected where known; g) courtesy or complimentary accounts are included; and h) zip code information for Members’ subscribers is periodically updated to reflect changes to zip codes by the United States Postal Service.”)(*emphasis added*).

For the foregoing reasons, there should be no doubt that the Town of Adams is subject to effective competition under the competing provider test and thus the MDTC's certification Form 328 filing should be rejected with respect to the Town of Adams. Undersigned counsel has read the foregoing Response to Surreply, and to the best of such counsel's 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 is not interposed for any improper purpose.

Respectfully submitted,

**TIME WARNER CABLE INC.**

By: \_\_\_\_\_

  
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Dated: February 18, 2016

CERTIFICATE OF SERVICE

I, Glenda Thompson, a secretary at the law firm of Mintz Levin Cohn Ferris Glovsky and Popeo PC, hereby certify that, on this 18th day of February, 2016, copies of the foregoing "Response to Surreply" were sent via first-class mail, postage prepaid, to the following:

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\*Via ECFS

  
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