

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

In the Matter of

City of Boston, Massachusetts  
Rate Regulation Re-Certification

Boston, MA (MA0182)

CSR-8488-R

To: Chief, Media Bureau

**REQUEST FOR WAIVER**

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**REQUEST FOR WAIVER**

The City of Boston, Massachusetts, through its counsel, hereby requests a waiver of 47 C.F.R. § 76.905(f) to the extent that the Commission reads the rule to compel inclusion of RCN's subscriber figures when the Commission aggregates "the number of subscribers of all multichannel video programming distributors that *offer service* in the franchise area." The City does not believe that the rule requires inclusion of the RCN subscriber figures as the Commission *just* concluded RCN does not "offer" service in Boston.<sup>1</sup> Should the Commission conclude otherwise, the City respectfully requests that the Commission waive the rule because counting RCN subscriber under the Competitive Provider Test would be inequitable in light of this case's unique history and facts. Further, to include the RCN numbers would frustrate the Congress's and the Commission's goal here: to protect consumers.

**I. BACKGROUND.**

For over a decade, the Commission has prevented the City from regulating Comcast's rates because it believed that RCN offered service that limited Comcast's ability to exercise

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<sup>1</sup> *In re Petition of the City of Boston, Massachusetts, For Recertification to Regulate the Basic Cable Service Rates of Comcast Cable Communications, LLC*, DA 12-553 (Apr. 9, 2012) ("Recertification Order") at ¶¶ 7-8

unrestrained market power in the City.<sup>2</sup> On April 6, 2012, however, the Commission found that the City should be re-certified to regulate Comcast's rates because of RCN's limited coverage and the "impossibility" that it will expand further.<sup>3</sup> Now, in a petition filed a mere 30 days later, Comcast asks that the Commission apply the Competitive Provider Test to find again that Comcast is subject to effective competition based in significant part on RCN's presence.<sup>4</sup>

Comcast recognizes that subscribership to satellite service alone does not begin to approach the 15% required for a finding of "effective competition."<sup>5</sup> The company apparently concedes that it is the *only* cable provider available to the overwhelming majority—over two-thirds (170,000+)—of Boston's households.<sup>6</sup> And it does not specifically dispute that there is "no realistic possibility" that these households will see a competitive offering from RCN.<sup>7</sup>

## **II. THE COMMISSION MAY EXCLUDE RCN SUBSCRIBERSHIP FROM THE 15% ANALYSIS WITHOUT WAIVING ITS RULE.**

As the City has more fully explained in the opposition that it has separately filed today, the Commission need not waive 47 C.F.R. § 76.905(f) in order to exclude RCN's subscribership data from the 15% analysis under the Competitive Provider test. The Commission has recently concluded that effective competition does not exist in Boston under the LEC Test because RCN passes only 32.1% of the City's households, and there is no "realistic possibility" that it will

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<sup>2</sup> *Cablevision of Boston, Inc.* 16 FCC Rcd. 14056 (2001), *application for review denied*, 17 FCC Rcd 4772 (2002).

<sup>3</sup> *In re Petition of the City of Boston, Massachusetts, For Recertification to Regulate the Basic Cable Service Rates of Comcast Cable Communications, LLC*, DA 12-553 (Apr. 9, 2012) ("Recertification Order") at ¶¶ 7-8.

<sup>4</sup> Petition for Reconsideration of Rate Regulation Re-Certification (May 8, 2012).

<sup>5</sup> *Id.* at 9.

<sup>6</sup> Recertification Order at ¶ 7.

<sup>7</sup> *Id.* at ¶ 8.

expand further.<sup>8</sup> This finding is rooted in the Commission’s interpretation of the word “offer[ ]” under the LEC Test:

[A] local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) *offers* video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so *offered* in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.<sup>9</sup>

Now, Comcast asks the Commission to apply 47 C.F.R. § 76.905(f) to conduct the 15% “competitive provider” test by aggregating subscribership figures from not only DBS providers, but also RCN. This is not permissible. Section 76.905(f) provides that “the number of subscribers of all multichannel video programming distributors that *offer service* in the franchise area will be aggregated.”<sup>10</sup> This rule flows from the statute’s clear language,<sup>11</sup> and Congress directed the Commission to read the rule “offer” under the same standard.<sup>12</sup> Because the Commission has concluded that RCN does not “offer” service under 47 U.S.C. § 543(l)(1)(D), it certainly may conclude that households subscribing to “services offered” by the company should also be excluded from the test under 47 U.S.C. § 543(l)(1)(B)(ii).

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<sup>8</sup> Recertification Order at ¶¶ 7-8.

<sup>9</sup> 47 U.S.C. § 543(l)(1)(D).

<sup>10</sup> 47 C.F.R. § 76.905(f) (emphasis added).

<sup>11</sup> 47 U.S.C. § 543(l)(1)(B)(ii) (counting “households subscribing to programming services *offered*” by MVPDs) (emphasis added)

<sup>12</sup> H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996).

**III. IF THE COMMISSION BELIEVES 47 C.F.R. § 76.905(f) REQUIRES IT TO INCLUDE RCN'S SUBSCRIBERSHIP COUNT, GOOD CAUSE EXISTS TO WAIVE THIS ASPECT OF THE RULE HERE.**

If the Commission believes that 47 C.F.R. § 76.905(f) forbids it from excluding RCN's subscribership count from the 15% prong of the Competitive Provider Test, good cause exists for the Commission to waive this aspect of the rule under the unique circumstances presented here.

**A. The Commission's Waiver Standards.**

The Commission will waive its effective competition rules in appropriate cases, provided that the waiver would not be inconsistent with the Communications Act.<sup>13</sup> The Commission's waiver standards are well-established. Under § 1.3 of its rules, the Commission may waive its rules when "good cause" exists.<sup>14</sup> The Commission has found no material difference between this rule and § 1.925(b)(3),<sup>15</sup> which provides that "good cause" exists where:

(1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(2) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

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<sup>13</sup> *In re Armstrong Communications Inc.*, 16 FCC Rcd 1039 ¶ 8 (2001); *In re Time Warner Entertainment-Advance/Newhouse Partnership*, 26 FCC Rcd 3840 ¶ 8 (2011); *In re CoxCom, Inc., d/b/a Cox Communications Orange County*, 25 FCC Rcd 3233 ¶ 14 (2010).

<sup>14</sup> 47 C.F.R. § 1.3.

<sup>15</sup> *In re Waiver Requests By Clarity Media Systems, LLC To Operation CARS Stations At Flying J Travel Plazas*, 22 FCC Rcd. 8382 ¶ 7 n.21 (2007).

**B. Good Cause Exists To Exclude RCN Subscribership from the Competitive Provider Test's 15% Analysis.**

Under both prongs of § 1.925(b)(3), good cause exists for the Commission to exclude RCN subscribership data from its count of “the number of subscribers of all multichannel video programming distributors that offer service in the franchise area.”<sup>16</sup>

1. ***Including RCN Subscribership Figures Would Be Inequitable, Unduly Burdensome, and Contrary to the Public Interest Based on the Unique Factual Circumstances Here.***

a. *The History of This Matter*

When the Commission typically decides a petition for a determination of effective competition under the “competitive provider” test, it does so without having previously analyzed the extent of meaningful competition presented by alternative providers in the jurisdiction. This case is different. Across its long history, the Commission has closely scrutinized RCN’s competitive role in the City. This culminated with the April decision finding that “effective competition” does not exist under the LEC Test based on RCN’s limited presence.<sup>17</sup>

Ignoring this unique history as the Commission now applies the “competitive provider” test now would be inequitable. The Commission would effectively be putting on blinders: it would count RCN as a critical competitive presence even though it has *just decided* that RCN does not constrain Comcast’s exercise of market power. This would be inequitable on its face, and it would unfairly ignore the Commission’s and the City’s considerable efforts to scrutinize the actual competitive situation in the community. Thus, to the extent that the Commission believes § 76.905(f) requires it to blindly aggregate subscribership numbers from all providers, it should waive this “willful blindness” requirement under these narrow and unique circumstances.

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<sup>16</sup> 47 C.F.R. § 76.905(f) (emphasis added).

<sup>17</sup> Recertification Order.

b. *The Documented Effect on Boston's Consumers*

Blindly including RCN subscribership to free Comcast would also burden Boston's consumers and defy the public interest, as unique facts presented here show. The record reveals that Commission's 2001 decision to free Comcast from City oversight has had a serious impact on Boston's consumers. Comcast charged Boston cable subscribers "approximately \$24 Million more than it charged neighboring Basic Service customers over the time period of 2008 through 2011."<sup>18</sup> And Comcast's percentage increases in monthly fees "are remarkably lower in other communities in the Boston area that are still rate regulated."<sup>19</sup>

These effects should not be surprising, because the competitive situation in Boston is dire. The Commission has concluded that over two-thirds of Boston's households (170,000+) are on a competitive island: they can obtain service from only a single cable provider, Comcast. And Comcast itself reports that across the entire City, a mere 10.61% of Boston's households subscribe to DBS service.<sup>20</sup> The 170,000+ households have little or no hope of benefitting from RCN's presence.

Analyzing the satellite data by Boston neighborhood confirms that large areas of the City do not see meaningful competition from DBS providers. In fact, subscribership to DBS surpasses 15% in only two City neighborhoods:

Nghbhd by zip	DBS #'s	DBS/ Nghbhd Hsg %	Nghbhd / City	Nghbhd Hsg #'s	Nghbhd
	894	5.0%	6.6%	17891	Central Boston
02116	321	1.7%	6.8%	18396	Back Bay
02118	1875	10.8%	6.4%	17422	South end, Lr.

<sup>18</sup> Front Range Consulting Inc., *Report to the City of Boston Regarding Comcast's Basic Service Cable Rates* (April 2011).

<sup>19</sup> *Id.*

<sup>20</sup> Comcast Petition Exhibit 9.

Nghbhd by zip	DBS #'s	DBS/ Nghbhd Hsg %	Nghbhd / City	Nghbhd Hsg #'s	Nghbhd	
					Rox	
02119	1715	6.9%	9.2%	24964	Roxbury	
02122	1876	7.9%	8.7%	23608	Dorchester (south)	
02125	5632	<b>50.8%</b>	4.1%	11081	Dorchester, North	
02126	1951	14.4%	5.0%	13558	Mattapan	
02127	1660	9.4%	6.5%	17623	South Boston	
02128	3907	<b>24.6%</b>	5.8%	15854	East Boston	
02129	518	6.0%	3.2%	8648	Charlestown	
02130	914	5.2%	6.5%	17650	Jamaica Plain	
02131	1406	10.3%	5.0%	13621	Roslindale	
02132	1150	8.5%	5.0%	13546	West Roxbury	
02135	1283	4.0%	11.7%	31912	Brighton	
02136	1329	10.8%	4.5%	12317	Hyde Park	
02215	267	1.9%	5.3%	14390	Kenmore	
				<b>272481</b>		

Therefore, in over 90% of the City’s total households, subscribership to satellite service falls short of the 15% level—and often by a wide margin. For example, while approximately 110,889 of the City’s households are in the City’s Back Bay, Roxbury, Dorchester (south), Charlestown, Jamaica Plain, and South Boston neighborhoods, these neighborhoods have only 7,004 DBS households (6.3%). This is not “effective” competition in any meaningful sense, and it does not become “effective” by padding the numbers with RCN’s subscribership figures. Under these circumstances, the Commission may not allow Comcast to use RCN’s subscribership to free it to set rates across the entire community without any oversight.

2. *The Underlying Purpose of the Commission’s Rule Would Be Frustrated By Including RCN’s Subscribership Figures.*

Including RCN subscribership data in the 15% analysis would also frustrate the purpose of the Commission’s rules. A driving purpose of the 1992 Act and the Commission’s rules

implementing it was a concern about “a cable operator's ability to charge low rates in parts of the franchise area where it faces competition and . . . higher unregulated rates in those parts of the franchise area where it does not face competition and has no reason to expect competitive repercussions from such pricing behavior.”<sup>21</sup> Under the 15% test, the Commission indicated that a cable operator should not escape rate regulation “if it faced only a single, ineffective competitor in the majority of its territory, along with a variety of niche competitors to whom it would not necessarily be compelled to provide a competitive response and to whom few of its customers could turn for a competitive alternative.”<sup>22</sup> For this reason, the Commission required that the 15% test would only count subscribership to providers that also passed the 50% test.<sup>23</sup>

The D.C. Circuit disagreed with the Commission’s particular means for addressing this underlying concern (ruling that extending the 50% requirement to the 15% test defied the plain language). But the court did not disagree with the Commission’s justifications (finding them “theoretically sound”).<sup>24</sup> As we explain in our opposition, we do not urge the Commission to make the 50% test an element of the 15% test. But the Commission need not throw out the baby with the bath water: the underlying statutory and regulatory concern remains, and can be addressed through other lawful means. If the Commission will not address this concern by harmonizing the meaning of “offer” across the “effective competition” decision in 47 U.S.C. § 543(1)(1), it should at least grant a waiver in this case to exclude competitive data that the Commission has already determined does not satisfy the LEC Test. Given the documented lack

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<sup>21</sup> *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 5296, 5304 ¶ 10 (1999).

<sup>22</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd 4316 ¶ 7 (1994).

<sup>23</sup> *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd. 5631, 5664-65 (1993).

<sup>24</sup> *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 188-189 (D.C. Cir. 1995).

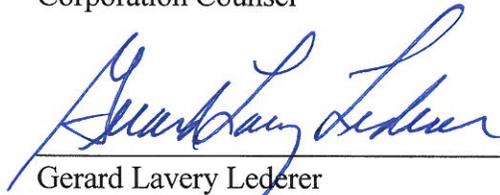
of competition here, the Commission's rules would be frustrated if Comcast were left unregulated here.

### CONCLUSION

For the reasons indicated, the Bureau should waive the requirement in 47 C.F.R. § 76.905(f) to the extent the Commission reads the rule to require it to include RCN's subscribership figures.

Respectfully submitted,

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

I have read the foregoing Request for Waiver 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.

May 23, 2012

A handwritten signature in blue ink, appearing to read "Gerard Lavery Lederer", is written over a horizontal line.

Gerard Lavery Lederer  
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Certificate of Service

I hereby certify that I have caused to be mailed this 23rd day of May 2012, copies of the foregoing Request for Waiver, by first-class mail, postage prepaid, to the following persons:

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