

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

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GEOFFREY G. WHY
COMMISSIONER

May 30, 2012

VIA OVERNIGHT DELIVERY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

***In the Matter of Petition of the City of Boston, Massachusetts For Recertification to Regulate
the Basic Cable Service Rates of Comcast Cable Communications, LLC (CUID MA0182),
CSR-8488-R***

Dear Ms. Dortch:

Pursuant to Section 1.106 of the Commission's rules, I enclose an original and two copies of the Massachusetts Department of Telecommunications and Cable's Opposition to Comcast Cable Communications, LLC's Petition for Reconsideration of Rate Regulation Recertification in the above docket.

Please contact me directly at (617) 368-1161 should you have any questions.

Sincerely,

Sean M. Carroll, Hearing Officer
sean.m.carroll@state.ma.us

Encs.

cc: Steven Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau, FCC
Wesley R. Hepler, Davis Wright Tremaine LLP
Counsel for Comcast Cable Communications, LLC
Service List

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

In the Matter of

Petition of the City of Boston, Massachusetts

For Recertification to Regulate the Basic Cable Service
Rates of Comcast Cable Communications, LLC (CUID
MA0182)

CSR-8488-R

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
OPPOSITION TO COMCAST'S PETITION FOR
RECONSIDERATION OF RATE REGULATION RE-CERTIFICATION**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

GEOFFREY G. WHY, COMMISSIONER

1000 Washington Street, Suite 820
Boston, MA 02118-6500
(617) 305-3580

Dated: May 30, 2012

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

In the Matter of

Petition of the City of Boston, Massachusetts

For Recertification to Regulate the Basic Cable Service
Rates of Comcast Cable Communications, LLC (CUID
MA0182)

CSR-8488-R

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
OPPOSITION TO COMCAST'S PETITION FOR
RECONSIDERATION OF RATE REGULATION RECERTIFICATION**

I. INTRODUCTION

The Federal Communications Commission ("Commission") should deny the Petition for Reconsideration of Rate Regulation Recertification ("Petition") filed by Comcast Cable Communications, LLC ("Comcast") because the methodology used to collect the data Comcast submitted in support of the Petition is inadequate under the second prong of the Commission's "Competing Provider Test."¹ The Massachusetts Department of Telecommunications and Cable ("MDTC") files this response to the Petition pursuant to Section 1.106 of the Commission's rules, and in its capacity as regulator of cable rates in the Commonwealth of Massachusetts.²

¹ See 47 C.F.R. § 76.905(b)(2).

² 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, notwithstanding that individual cities and towns negotiate the terms of cable franchises); City of Boston Reply to Opposition at ii n.2, 7 n.17. The MDTC is also the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. *See* MASS. GEN. LAWS ch. 25C, § 1.

II. ARGUMENT

Comcast's Petition does not establish a sufficient basis for the Commission to reverse its determination that Comcast is not subject to effective competition in the City of Boston. In the Petition, Comcast asserts that reconsideration of the Commission's recent Order³ in this proceeding is warranted because Comcast has satisfied the Competing Provider Test in Boston under Section 76.905 of the Commission's rules.⁴ The MDTC disagrees with Comcast's assertion because Comcast's methodology in calculating the penetration rate of the competing providers is flawed, producing an artificially inflated penetration percentage. Until such time as Comcast can submit data correcting the flaw in its methodology, the Commission should continue to find that no effective competition exists in Boston.

A. Legal Standard.

Under its Competing Provider Test, the Commission may determine that a cable operator is subject to effective competition if the operator can establish that the franchise area is:

- (i) [s]erved by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and
- (ii) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.⁵

³ *In the Matter of Petition of the City of Boston, Massachusetts For Recertification to Regulate the Basic Cable Service Rates of Comcast Cable Communications, LLC (CUID MA0182)*, CSR-8488-R, Memorandum Opinion and Order (rel. Apr. 9, 2012).

⁴ Petition at 4.

⁵ 47 C.F.R. § 76.905(b)(2)(i)-(ii). The MDTC reiterates that regulatory relief on account of "effective competition" does not produce the intended result of basic service rates being held in check. *See, e.g., In the Matter of Charter Communications, Inc. Petition for Determination of Effective Competition in 46 Local Franchise Areas*, CSR-8558-E, et al., MDTC Opposition to Charter's Petition for Effective Competition at n.12 (filed Feb. 15, 2012) ("Charter Opposition").

Comcast argues that it meets the Competing Provider Test in Boston based upon the presence of RCN-BecoCom, LLC (“RCN”) and two direct broadcast satellite (“DBS”) providers—DirecTV, Inc. and Dish Network, Corp. (“DBS providers”).⁶

The MDTC does not dispute that Comcast meets the first prong of this test.⁷ However, given the inadequacy of the methodology behind the data submitted in support of its Petition, Comcast has failed to make the additional showing that RCN and the DBS providers (collectively, the “competing providers”) have a sufficiently high level of subscribership in Boston to overcome the presumption against effective competition.⁸ For this reason, the MDTC requests that the Commission deny the Petition, at least until such time as Comcast provides data that accurately calculates the penetration rate of the competing providers.

B. The Commission Should Deny Comcast’s Petition Because Comcast’s Calculations Under The Second Prong Of The Competing Provider Test Were Flawed.

The methodology used to collect the data Comcast submitted in support of the Petition produced artificially inflated competing provider penetration rates in Boston. The Commission, therefore, should disregard the data. Specifically, the Commission has stated that “households” do not include “college or university dormitories, seasonal or vacation homes, or nursing homes and similar assisted living facilities.”⁹ Comcast, therefore, did not include these types of housing

⁶ Petition at 4, 7.

⁷ As the MDTC noted in the Charter Opposition, however, given Commission precedent on the issue, the first prong is likely satisfied by *any* cable operator petitioning the Commission for a determination of effective competition based on the Competing Provider Test. *See, e.g., In the Matter of MCC Iowa, LLC Petition for Determination of Effective Competition for Six Local Franchise Areas*, CSR-6482-E, *Memorandum Opinion and Order*, ¶ 3 (rel. Sept. 30, 2005) (“*MCC Iowa Order*”) (holding that the first prong of the Competing Provider Test was met due to the DBS providers’ nationwide footprint, subscriber growth, and available programming.).

⁸ 47 C.F.R. § 76.906 (“In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.”).

⁹ *In the Matter of Time Warner Entertainment-Advance/Newhouse Partnership Petition for Determination of Effective Competition in Wilson, North Carolina*, CSR-7199-E, *Memorandum Opinion and Order*, ¶ 20 (rel. Mar. 16, 2011) (“*Time Warner Order*”) (citations omitted).

units in its statutory denominator. Presumably, Comcast did include subscribers in these types of housing units in its statutory numerator, resulting in an overstatement of the competing providers' penetration rates.¹⁰

Comcast obtained subscribership numbers from RCN directly, and for the DBS providers by contacting the Satellite Broadcasting and Communication Association ("SBCA").¹¹ Comcast then took the total number of subscribers from the competing providers as a numerator ("statutory numerator"), divided it by the number of households¹² in Boston ("statutory denominator"), and the result, according to Comcast, is the penetration rate of the competing providers in the city.¹³ In these calculations, however, Comcast included subscribers in its statutory numerator whose housing units did not qualify as "households" and thus were not included in Comcast's statutory denominator. The result is an artificially increased competing providers' penetration rate.

Both RCN and the SBCA explicitly included multiple dwelling units ("MDUs") in their subscriber numbers, but did not restrict the types of MDUs included.¹⁴ Based on this fact, and given the lack of any evidence in the record suggesting otherwise, it is reasonable to conclude that RCN and the SBCA included subscribers in college dormitories, nursing homes, and other assisted living facilities in their total numbers of subscribers. Likewise, given their lack of mention in Comcast's request to RCN and the SBCA's methodology, the competing providers

¹⁰ See *infra* note 14.

¹¹ Petition at 8-9.

¹² As determined by the U.S. Census Bureau ("Census"). *Id.* at 9. The Commission has ruled that for effective competition purposes, it will use the same definition of "household" as the Census. *MCC Iowa Order*, ¶ 7. Comcast claims that the competing providers' penetration in Boston is 18.37 percent. Petition at 9.

¹³ Petition at 9.

¹⁴ Petition at Exhibit 7 (indicating that in Comcast's request to RCN for subscriber information, Comcast specifically asked for subscribers in MDUs); *id.* at Exhibit 5 (showing that the SBCA included MDUs in its subscriber count).

likely included seasonal homes, vacations homes, and temporary homes in their subscriber numbers as well.¹⁵ This is problematic, not necessarily because the subscriber numbers are inaccurate, but because none of those types of housing units count as a “household” under the Commission’s definition.¹⁶ Comcast included subscribers in college dormitories, seasonal or vacation homes, nursing homes, and other assisted living facilities in its statutory numerator, but did not include those subscribers’ housing units in its statutory denominator. This methodology artificially increased the competing providers’ penetration rates.

The MDTC recognizes that it does not possess the more accurate data that Comcast should have presented in the Petition. But rather than require the MDTC (or the City of Boston) to generate such data, the MDTC submits that the Commission should not deem a penetration rate calculation a *prima facie* showing of effective competition simply because the result of the calculation is above 15 percent. If the calculation that results in the penetration rate is flawed, then the result must also be flawed. Consequently, the Commission should deny the Petition because it relies on such insufficient data.

III. CONCLUSION

While the data Comcast submitted show that the competing provider subscribership is above the 15 percent threshold as is required by the second prong of the Competing Provider Test, the MDTC urges the Commission to look closely at Comcast’s data and to evaluate the manner in which Comcast arrived at those numbers. Comcast cannot dispute that it included some subscribers in its statutory numerator without including their dwellings in its statutory denominator, a patently improper methodology that caused competing provider penetration rates to appear higher than reality. The MDTC respectfully requests that the Commission deny

¹⁵ *Id.* at Exhibit 5, Exhibit 7.

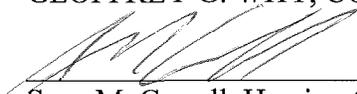
¹⁶ *Time Warner Order*, ¶ 20.

Comcast's Petition, at least until such time as the company provides data via a methodology that accurately reflects the competing providers' penetration rate.

Respectfully submitted,

GEOFFREY G. WHY, COMMISSIONER

By:


Sean M. Carroll, Hearing Officer

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May 30, 2012

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

The undersigned signatory has read the foregoing Opposition, 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,

A handwritten signature in black ink, appearing to read 'Sean M. Carroll', is written over a horizontal line.

Sean M. Carroll

Commonwealth of Massachusetts
Department of Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118-6500
(617) 368-1161

May 30, 2012

CERTIFICATE OF SERVICE

I, Catrice C. Williams, do hereby certify on this 30th day of May, 2012 that a true and correct copy of the foregoing "Opposition to Petition for Reconsideration of Rate Regulation Recertification" has been sent via U.S. mail, postage prepaid, or electronic mail to the following:

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