State of New Jersey

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Lt. Governor

STEFANIE A. BRAND
Director

July 25, 2012

Electronically Filed
Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: I/M/O Comcast Cable Communications, LLC For a Determination of Effective Competition In Ewing et. als., New Jersey Docket No. CSR-8668-E

Dear Secretary Dortch:

Enclosed for filing is a Motion to Dismiss on behalf of the New Jersey Division of Rate Counsel in connection to the above reference matter.

This Motion is electronically filed through the Commission's Electronic Filing system.

Very truly yours,

Stefanie A. Brand
Director, Division of Rate Counsel

By: _____
José Rivera-Benitez, Esq.
Assistant Deputy Rate Counsel

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:	)	
	)	
Comcast Cable Communications, LLC	)	
On behalf of its subsidiaries and affiliates	)	
	)	
For a Determination of Effective Competition in	)	
	)	**CSR 8668-E**
Ewing, et. als	)	
	)	
	)	

To: Secretary, Federal Communications Commission
Chief, Media Bureau

MOTION TO DISMISS
ON BEHALF OF THE NEW JERSEY DIVISION
OF RATE COUNSEL

The New Jersey Division of Rate Counsel ("Rate Counsel")[1] herein submits the within Motion to Dismiss the above captioned Petition for a Declaration of Effective Competition ("Petition") filed by Comcast Cable Communications, LLC ("Comcast") on the procedural grounds that the filing is defective. The Petition is supported by data of alleged competitive subscribership that is not made available for examination under a protective order, as permitted under Federal Communications Commission ("FCC") rules. The failure of Comcast to secure an FCC sanctioned protective order for the examination of the information it wishes to maintain guarded, renders the filing defective

[1]/ The New Jersey Division of Rate Counsel is statutorily authorized to represent the public interest of New Jersey public utility ratepayers, including matters concerning cable television before both State and Federal regulatory agencies. See N.J.S.A. 52: 27 EE-48, 55.

since no interested party is able to readily examine the data and comment on the Petition. The Petition should, therefore, be dismissed.

Comcast filed this Petition with alleged competitive subscriber data to support the Petition. The allegedly competitive subscriber data includes Verizon data kept confidential based on a side agreement with Verizon. Only the FCC has been provided an unredacted copy of the filing for examination and adjudication. FCC rules governing issuance of a protective order, however, provide a process for a party to submit data on a confidential basis, allowing interested parties to obtain access to the confidential data, and hence provide the opportunity for examination and comment to the FCC. It is common practice for parties to obtain FCC protection of information claimed confidential. 47 C.F.R. § 0.459 provides for the submittal of information and access to the information on a confidential basis under the protective cloak of a protective order. The failure of Comcast to request a protective order covering the data it wishes to maintain confidential deprives the interested public of the opportunity to examine the filing under the protections afforded by the FCC sanctioned process and to comment.

Additionally, Since the FCC will rely upon the data submitted by Comcast to show compliance with the competing provider test, it is incumbent upon Comcast to allow for access to all underlying data and analyses used to derive its numbers. See, *American Radio Relay League, Incorporated v. Federal Communications Commission, et al.*, No. 06-1343, (D.C. Cir. April 25, 2008) wherein the Court of Appeals remanded an FCC decision that violated the APA due to the FCC's failure to make available for public comment certain records it relied upon in its decision. See also, *Owner-Operator Independent Drivers Association, Inc., v. Federal Motor Carrier Safety Administration,*

et. als., 494 F.3d 188, 199 (D.C. Cir. 2007). (The APA requires that critical factual material used to support the agency decision must have been made public in the proceeding and exposed for refutation. The Petitioners must submit the factual underpinnings for the percentages claimed.) See also, *Solite Corp. v. US EPA*, 952 F. 2d 473, 485 (D.C. Cir. 1991) (Courts have ruled that under the APA an agency may not rely on any information on which interested parties are not given access or the opportunity to comment.) The underlying data submitted in support of Comcast's Petition must be made available for examination, verification or challenge. A determination that effective competition exists without the ability of interested parties to review the underlying data would be arbitrary and capricious.

The failure of Comcast to secure a protective order FCC renders the filing defective. Here, Rate Counsel and all other interested parties including the New Jersey Board of Public Utilities and the local municipalities lack access to the data, which precludes filing of appropriate comments. Accordingly, the Petition should be dismissed at this time.

Respectfully submitted,

Stefanie A. Brand
Director,
New Jersey Division of Rate Counsel

By: _____
Jose Rivera-Benitez
Assistant Deputy Rate Counsel
New Jersey Division of Rate Counsel

Dated: July 25, 2012