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GEOFFREY G. WHY
COMMISSIONER

December 11, 2013

VIA U.S. MAIL

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

In the Matter of Charter Communications, Inc., Petitions for Determination of Effective Competition in 46 Communities in Massachusetts, New Hampshire, and New York, CSR-8558-E, CSR-8559-E, CSR-8560-E, CSR-8561-E

Dear Ms. Dortch:

Please find enclosed an original and four copies of the Massachusetts Department of Telecommunications and Cable's Application for Review in the above dockets. To comply with 47 C.F.R. § 1.49(f)(iii), I have also filed this Application for Review electronically with Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly, as well as in MB Docket 12-1. Please contact me directly at (617) 368-1161 should you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sean M. Carroll".

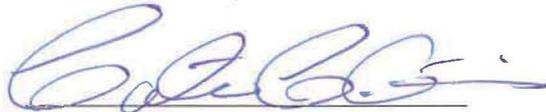
Sean M. Carroll, Hearing Officer
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Encs.

cc: Chairman Thomas Wheeler (via email)
Commissioner Mignon Clyburn (via email)
Commissioner Jessica Rosenworcel (via email)
Commissioner Ajit Pai (via email)
Commissioner Michael O'Rielly (via email)
Frederick W. Giroux, Davis Wright Tremaine LLP
Counsel for Charter Communications, Inc.
Service Lists (Attached)
MB Docket 12-1 (via ECFS)

CERTIFICATE OF SERVICE

I, Catrice Williams, do hereby certify on this 11th day of December, 2013, that a true and correct copy of the foregoing "Application for Review" has been sent via U.S. mail, postage prepaid, or electronic mail to the attached service lists.



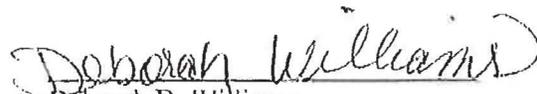
Catrice Williams

CERTIFICATE OF SERVICE

I, Deborah D. Williams, do hereby certify on this 6th day of December, 2011 that a true and correct copy of the foregoing "Petition for Special Relief" has been sent via U.S. mail, postage prepaid to the following:

Steven A. Broeckaert, Esq.
Media Bureau Policy Division
Federal Communications Commission
445 12th Street, S.W., Room 4-A865
Washington, DC 20554

Chairman, Board of Selectmen
Town of Wales
3 Hollow Road
Wales, MA 01081


Deborah D. Williams

CERTIFICATE OF SERVICE

I, Deborah D. Williams, do hereby certify on this 7th day of December, 2011 that a true and correct copy of the foregoing "Petition for Special Relief" has been sent via U.S. mail, postage prepaid to the following:

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Town Supervisor
Ghent Town Hall
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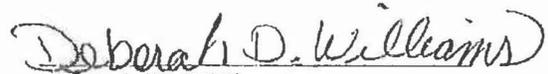
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Deborah D. Williams

CERTIFICATE OF SERVICE

I, Deborah D. Williams, do hereby certify on this 6th day of December, 2011 that a true and correct copy of the foregoing "Petition for Special Relief" has been sent via U.S. mail, postage prepaid to the following:

Steven A. Broeckaert, Esq.
Media Bureau Policy Division
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Town Administrator
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Deborah D. Williams

CERTIFICATE OF SERVICE

I, Deborah D. Williams, do hereby certify on this 8th day of December, 2011 that a true and correct copy of the foregoing "Petition for Special Relief" has been sent via U.S. mail, postage prepaid to the following:

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Administrative Assistant to Board of
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North Brookfield, MA 01535

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Southborough, MA 01772

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Ms. Blythe Robinson
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Mr. Michael Szlosek
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Mr. Tom Long
Chairman
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350 Main Street
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Mr. James Malloy
Town Administrator
34 West Main Street
Westborough, MA 01581


Deborah D. Williams

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

In the Matter of

Charter Communications, on behalf of its subsidiaries
and affiliates

Petitions for Determination of Effective Competition in
46 Communities in Massachusetts, New Hampshire, and
New York

CSR-8558-E
CSR-8559-E
CSR-8560-E
CSR-8561-E

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
APPLICATION FOR REVIEW**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

GEOFFREY G. WHY, COMMISSIONER

1000 Washington Street, Suite 820
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(617) 305-3580

Dated: December 11, 2013

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SUMMARY

Pursuant to 47 C.F.R. § 1.115, the Massachusetts Department of Telecommunications and Cable (“MDTC”) seeks full Federal Communications Commission (“FCC”) review of the Media Bureau’s (“Bureau”) September 30, 2013, Memorandum Opinion and Order in the above-captioned proceedings (“Bureau Order”). The FCC should reverse and remand the Bureau Order because the Bureau: (1) placed the burden of proof on the MDTC in contravention of FCC regulation, (2) granted effective competition in two communities that have multichannel video programming distributor (“MVPD”) penetration rates over 100 percent in contravention of established FCC policy and precedent, and (3) erred in finding as *de minimis* Charter Communications, Inc.’s (“Charter”) overstatements of direct broadcast satellite (“DBS”) subscribership.

APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115, the MDTC¹ seeks full FCC review of the Bureau's September 30, 2013, Memorandum Opinion and Order in the above-captioned proceedings Bureau Order.² In the Bureau Order, the Bureau granted three petitions for effective competition filed by Charter, deregulating the basic cable service and equipment rates in 33 Massachusetts communities.³ The FCC should reverse and remand the Bureau Order because the Bureau: (1) placed the burden of proof on the MDTC in contravention of FCC regulation; (2) granted effective competition in two communities that have MVPD penetration rates over 100 percent in contravention of established FCC policy; and (3) based its conclusions, in part, on its erroneous finding that Charter's overstatements of DBS subscribership is *de minimis*.

I. BACKGROUND AND PROCEDURAL HISTORY

In December 2011, Charter filed its Petitions for Determination of Effective Competition ("Petitions") with the FCC for 33 Massachusetts communities. In its Petitions, Charter claimed that it satisfied the "Competing Provider Test" under Section 623(l)(1)(B) of the Communications Act of 1934 ("Act") and Section 76.905 of the FCC's rules.⁴ Under its

¹ 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). The MDTC also regulates telecommunications services in Massachusetts and represents the Commonwealth before the FCC. *See* MASS. GEN. LAWS ch. 25C, § 1.

² *In the Matter of Charter Commc'ns on behalf of its subsidiaries & affiliates*, CSR 8558-E, CSR 8559-E, CSR 8560-E, CSR 8561-E, DA 13-2008, *Memorandum Opinion & Order* (rel. Sept. 30, 2013) ("Bureau Order"). Charter filed a motion to withdraw a petition for effective competition in Wales, Massachusetts. *In the Matter of Charter Commc'ns on behalf of its subsidiaries & affiliates*, CSR 8558-E, *Charter Motion to Withdraw* (Feb. 27, 2012). The Bureau granted Charter's motion and the MDTC does not request FCC review of that decision. Bureau Order, ¶ 2.

³ Bureau Order.

⁴ *See* 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2); *In the Matter of Charter Commc'ns on behalf of its subsidiaries & affiliates*, CSR 8561-E, *Petition for Special Relief* (Dec. 8, 2011) ("Auburn Petition"); *In the Matter of Charter Commc'ns on behalf of its subsidiaries & affiliates*, CSR 8559-E, *Petition for Special Relief* (Dec. 7, 2011) ("Hinsdale Petition"); *In the Matter of Charter Commc'ns on behalf of its subsidiaries & affiliates*, CSR 8560-E, *Petition for Special Relief* (Dec. 6, 2011) ("Westport Petition").

Competing Provider Test, the FCC may determine that a cable operator is subject to effective competition in a franchise area if that area is:

- (i) served 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 programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.⁵

In a proceeding to determine whether effective competition exists, the FCC presumes that a cable operator is not subject to effective competition, and the cable operator has the burden of proof to show that effective competition exists.⁶ Charter argued that it met the burden of proving effective competition under the Competing Provider Test based upon the presence of two DBS providers—DirecTV, Inc. and Dish Network, Corp. (“DBS providers”)—in each of the franchise areas.⁷ Charter also identified Verizon New England Inc. (“Verizon”) as an additional competitor offering cable service in certain franchise areas.⁸

⁵ 47 U.S.C. § 543(l)(1)(B). It is particularly important for the Bureau to scrutinize closely Charter’s data and ensure that it carried its burden because the FCC has a duty to protect “subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.” *Id.* § 543(b)(1); *see also In the Matter of Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd 4316, MM Docket No. 92-266, ¶ 2, *Third Order on Reconsideration* (rel. Mar. 30, 1994) (“Our rate regulations are designed to set ‘reasonable’ rates, which we construe to be rates that would be charged by cable operators subject to effective competition.”). As the MDTC demonstrated, granting regulatory relief on account of effective competition does not always fulfill this duty. *In the Matter of Charter Commc’ns on behalf of its subsidiaries & affiliates*, CSR 8558-E, et al., *MDTC Opposition* at Exhibit 1, Exhibit 2 (Feb. 15, 2012) (showing that the rates and rate increases experienced by basic service tier subscribers in franchise areas that are unregulated far outpace the increases in franchise areas that are still subject to regulation) (“MDTC Opposition”). The MDTC’s continuing oversight in this realm resulted in a refund of over \$81,000 to Charter basic service tier subscribers in November 2012. Letter from Melissa Bennett, Senior Regulatory Analyst, Charter, to Catrice Williams, Secretary, MDTC (Nov. 19, 2012).

⁶ 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.”); *see also id.* § 76.907(b).

⁷ Auburn Petition at 3, 9; Hinsdale Petition at 3, 8; Westport Petition at 2, 7.

⁸ Auburn Petition at 6. These franchise areas are Dunstable, Grafton, Groton, Millbury, Northborough, Southborough, Sutton, and Westborough. *Id.*

The MDTC, in its February 15, 2012, Opposition to the Petitions, however, demonstrated that the data Charter submitted in support of the Petitions were insufficient to carry its burden.⁹ Among other things, the MDTC demonstrated that Charter's data showed overall MVPD penetration rates exceeding 100 percent in certain franchise areas, a fact where the FCC has previously rejected effective competition petitions.¹⁰ The MDTC also demonstrated that Charter inappropriately used zip code centroids in determining which households to include for purposes of DBS subscriber data, in that zip code centroids have no direct relationship to whether a housing unit is within a particular franchise area.¹¹

On September 30, 2013, the Bureau released the Bureau Order granting the Petitions.¹² The MDTC now asks that the FCC reverse and remand the Bureau Order for the reasons set forth below.

II. THE FCC SHOULD REVERSE AND REMAND THE BUREAU ORDER

The FCC may grant an application for review when it is shown that: (i) the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established FCC policy; (ii) the action involves a question of law or policy which has not been previously resolved by the FCC; (iii) the action involves application of a precedent or policy

⁹ MDTC Opposition; *see* 47 C.F.R. § 76.907(b).

¹⁰ MDTC Opposition at 5-6, Exhibit 3.

¹¹ *Id.* at 9-10. Charter filed a Reply to the MDTC Opposition on February 27, 2012. In addition, the Town of Berlin filed an Opposition to the Auburn Petition on February 27, 2012, and Charter filed a Reply to that Opposition on March 7, 2012.

¹² Bureau Order. On October 25, 2013, the MDTC filed a Petition for Reconsideration of the Bureau Order as it pertained to the Town of West Brookfield. Charter filed an Opposition to the Petition for Reconsideration on November 18, 2013. The MDTC is filing a Motion to Withdraw its Petition for Reconsideration concurrently with this Application for Review. The filing its Petition for Reconsideration tolled the appeal periods prescribed in Sections 1.104(b), 1.106(f), and 1.115(d) of the FCC's rules, rendering this Application for Review timely. *See, e.g., Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593, 596-97 (D.C. Cir. 1997); *L.A. SMSA Ltd. P'ship v. FCC*, 70 F.3d 1358, 1359 (D.C. Cir. 1995); *Novartis AG v. Kappos*, 904 F.Supp.2d 58, 66 (D.D.C. 2012); *see also* 47 C.F.R. § 1.104(d) ("Any person who has filed a petition for reconsideration may file an application for review within 30 days from the date of public notice of such action.").

which should be overturned or revised; (iv) there was an erroneous finding as to an important or material question of fact; or (v) there was prejudicial procedural error.¹³

The Bureau Order conflicts with FCC regulation and established FCC policy, and is based in part on an erroneous finding of material fact. Accordingly, the FCC should overturn the Bureau's findings of effective competition in its Bureau Order and remand the matter to the Bureau for analysis consistent with this Application for Review.¹⁴

A. The Bureau Order Conflicts with FCC Regulation.

The FCC should remand the Bureau Order for more thorough analysis because the Bureau contravened Sections 76.906 and 76.907 of the FCC's rules by placing the burden of proof on the MDTC.¹⁵ FCC rules explicitly state that "the cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined in § 76.905, exists in the franchise area."¹⁶ The Bureau has stated repeatedly that its method of granting petitions for effective competition does not shift this burden to the opposing parties.¹⁷ The MDTC recognizes that once a petitioner "meets the burden of proving that effective competition exists," the burden shifts to the opposing party.¹⁸ But, the burden has not been met in this case. The FCC must base its finding of effective competition on

¹³ 47 C.F.R. § 1.115(b)(2).

¹⁴ In addition, although the presence of the DBS providers may provide a competitive alternative to cable at the more expansive service tiers, that competition simply does not exist at the basic service tier because the DBS providers do not offer a basic service package. For available DBS provider packages, see http://www.directv.com/DTVAPP/new_customer/base_packages.jsp and <http://www.dish.com/entertainment/packages/offers/value/> (last visited Oct. 29, 2013).

¹⁵ 47 C.F.R. §§ 76.906, 76.907(b).

¹⁶ *Id.* § 76.907(b).

¹⁷ *See, e.g., In the Matter of Subsidiaries of Cablevision Sys. Corp.*, 23 FCC Rcd 17012, 17013, CSR-7118-E, et al., ¶ 5, *Memorandum Opinion & Order* (rel. Nov. 20, 2008); *In the Matter of Mcc Iowa LLC*, 22 FCC Rcd 12829, 12831, ¶ 8, *Memorandum Opinion & Order* (rel. July 11, 2007); *In the Matter of Comcast Cable Commc'ns, LLC, on behalf of its subsidiaries & affiliates*, 22 FCC Rcd 694, 699, ¶ 14, *Memorandum Opinion & Order* (rel. Jan. 24, 2007).

¹⁸ *In the Matter of Comcast Cable Commc'ns, LLC, on behalf of its subsidiaries & affiliates*, 22 FCC Rcd 694, 699, ¶ 14, *Memorandum Opinion & Order* (rel. Jan. 24, 2007).

“substantial evidence.”¹⁹ And although agencies receive substantial deference in adducing facts, “no deference is due when the agency has stopped shy of carefully considering the disputed facts.”²⁰

As the MDTC stated in a different proceeding, the FCC “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.”²¹ Here, the Bureau based its findings of effective competition on Charter’s calculations without considering the flaws in those calculations, in violation of the requirement that an agency base its decision “on the record as a whole and not merely on that part which happens to be favorable to the agency’s finding.”²²

Throughout the Bureau Order, the Bureau relied on qualified declarations to reach its conclusions:

- “[t]he sums the MDTC has produced *may result* from different kinds of counts,”²³
- “[a]ny overstatement of DBS subscribership that result from the phenomena the MDTC has identified *are likely to be*” *de minimis*,²⁴
- “*we expect that* for every nine-digit zip code whose centroid is barely inside a Community but most of whose DBS-subscribing households are outside it, there is

¹⁹ 5 U.S.C. § 706(2)(E); *Kisser v. Cisneros*, 14 F.3d 615, 619 (D.C. Cir. 1994).

²⁰ *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1447 (D.C. Cir. 1995) (citing *Cities of Carlisle & Neola v. FERC*, 741 F.2d 429, 433 (D.C. Cir. 1984)); see also *AT&T Corp. v. FCC*, 86 F.3d 242 (D.C. Cir. 1996) (holding that a single affidavit was an insufficient basis for an agency ruling where the record also contained evidence contradicting the affidavit); *Baker v. U.S.*, 338 F.Supp. 331, 335 (E.D. Pa. 1972) (upholding an Interstate Commerce Commission decision that found that data presented by carriers were inconclusive and that the carriers did not carry their burden due to an absence of “clear and precise” evidence).

²¹ *In the Matter of Petition of Boston, Mass. For Recertification to Regulate the Basic Cable Serv. Rates of Comcast Cable Commc’ns, LLC (CUID MA0182)*, CSR-8488-R, MDTC Opposition to Comcast’s Petition for Reconsideration at 5 (May 30, 2012).

²² *Baker*, 338 F.Supp. at 334 (citing *Universal Camera v. NLRB*, 340 U.S. 474, 490 (1951)).

²³ Bureau Order, ¶ 12 (emphasis added).

²⁴ *Id.*, ¶ 16 (emphasis added).

another nine-digit zip code on the edge of the same Community whose centroid is barely outside it but most of whose DBS-subscribing households are inside it,”²⁵

- “*it is highly likely that, if MBC made any mistaken assignments, the small number of DBS subscribers in nine-digit zip codes would make any mistakes inconsequential,*”²⁶
- “*what the MDTC has identified may not be mistaken assignment by Charter at all.*”²⁷

The Bureau even went so far as to recommend that Charter make its petitions as accurate as possible.²⁸

While the Bureau’s statements “may have theoretical validity,” its speculative conclusions based on predictions and “expect[ations]” improperly placed the burden of proof on the MDTC.²⁹ The Bureau did not require Charter to provide clear and precise evidence of DBS subscription data to prove the existence of effective competition, but rather, accepted Charter’s evidence at face value and disregarded the MDTC’s “valid[.]” theories and Charter’s “mistakes.”³⁰ In sum, the Bureau did not require Charter to carry its burden, and Charter did not meet its burden. Accordingly, the FCC should remand the Bureau Order and direct the Bureau to require Charter to prove the existence of effective competition with substantial evidence of DBS subscription data, as required by FCC rules, rather than simply submitting unverified data.

B. The Bureau Order Conflicts with Case Precedent and Established FCC Policy.

The FCC should reverse the Bureau Order with respect to Westport and Northborough because the Bureau’s grant of effective competition in those communities conflicts with the FCC’s policy of dismissing evidence that shows MVPD penetration rates in excess of 100

²⁵ *Id.*, ¶ 16 (emphasis added).

²⁶ *Id.*, ¶ 17 (emphasis added).

²⁷ *Id.*, ¶ 17 (emphasis added).

²⁸ *Id.*, ¶ 12.

²⁹ *Id.*, ¶ 16.

³⁰ *Id.*, ¶¶ 16, 17.

percent. In 2008, the FCC stated that MVPD penetration rates exceeding 100 percent are “obviously inaccurate.”³¹ Indeed, the FCC stated that it would dismiss any such evidence “regardless of the format.”³² The Bureau later confirmed that when the combined MVPD subscribership exceeds 100 percent, the underlying data are “patently inaccurate and unreliable.”³³

Here, the Bureau determined that there is effective competition in Northborough and Westport despite evidence that the overall MVPD penetration rate is 103.23 percent in Northborough and 104.68 percent in Westport.³⁴ The Bureau’s reasoning was that the MDTC’s data “may result from different kinds of counts made on different dates and for different purposes.”³⁵ The Bureau’s erroneous burden shifting notwithstanding,³⁶ its rationale contravenes FCC policy. The MDTC’s data come mostly from *Charter’s Petitions*, including data from 2011 SBCA reports,³⁷ the MDTC’s website,³⁸ and the 2010 U.S. Census.³⁹ The Bureau apparently found these data reliable enough to use as the basis for its determinations of effective competition.⁴⁰ The only data that the MDTC added to its analysis were Charter’s 2011

³¹ *Comm’n Announces New Standards for Showings of Effective Competition for Cable Serv.*, DA 08-1892, *Public Notice* (rel. Aug. 13, 2008).

³² *Comm’n Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Serv.*, DA 09-1361, *Public Notice* (rel. June 18, 2009) (emphasis added); see also, e.g., *In the Matter of Time Warner Cable Inc. & Time Warner Entm’t-Advance Newhouse P’ship*, 23 FCC Rcd 18355, 18357, CSR-7490-E, ¶ 10, *Memorandum Opinion & Order* (rel. Dec. 29, 2008); *In the Matter of Time Warner Cable Inc., & Time Warner Entm’t-Advance/Newhouse P’ship*, 23 FCC Rcd 12069, 12072, CSR-7234-E, et al., ¶ 10, *Memorandum Opinion & Order* (rel. Aug. 13, 2008), *recons. denied*, 23 FCC Rcd 16483 (rel. Nov. 7, 2008).

³³ *In the Matter of Time Warner Cable Inc.*, 26 FCC Rcd 1728, 1732, CSR 7233-E, ¶ 13 n.38, *Memorandum Opinion & Order* (rel. Feb. 15, 2011).

³⁴ Bureau Order, ¶ 12; MDTC Opposition at Exhibit 3.

³⁵ Bureau Order, ¶ 12.

³⁶ For a full discussion of this issue, see *supra* Section II.A.

³⁷ Auburn Petition at Exhibit 7; Westport Petition at Exhibit 4.

³⁸ Auburn Petition at Exhibit 4.

³⁹ *Id.* at Exhibit 8; Westport Petition at Exhibit 5.

⁴⁰ See Bureau Order, ¶ 18; MDTC Opposition at Exhibit 3 at 2 nn.1-2 & 4 (citing to the Auburn Petition and the Westport Petition).

subscriber counts, which the MDTC gleaned from the FCC's own Form 1240.⁴¹ The Bureau's acceptance of "different kinds of counts made on different dates and for different purposes" when Charter submits them and dismissal of the same data when the MDTC submits them is the very definition of "arbitrary"⁴² and is certainly inconsistent with the FCC's established policy of dismissing this type of flawed evidence.⁴³ Accordingly, the FCC should reverse the Bureau Order with respect to Northborough and Westport and determine that Charter has not established that it is subject to effective competition in those communities.

C. In the Bureau Order, the Bureau Relies on an Erroneous Finding as to a Material Question of Fact.

The FCC should remand this matter to the Bureau for further/actual evaluation of Charter's data because the Bureau incorrectly found that Charter's overstatements of DBS subscribership is *de minimis*.⁴⁴ The MDTC demonstrated that by using zip code centroids to obtain DBS provider subscriber counts, Charter included DBS provider subscribers whose households are not within the relevant franchise areas, resulting in higher claimed DBS penetration rates in the Petitions.⁴⁵ Specifically, the MDTC pointed out that if a zip code's centroid were located just on the inside of a franchise area's border, Charter included DBS subscribers from the entire zip code in its calculations, including a number of subscribers who

⁴¹ MDTC Opposition at Exhibit 3 at 2 n.3. Using the DBS subscriber data in the Petitions and 2012 Charter and Verizon subscribership actually increases the overall MVPD penetration rates to 108.22 percent in Northborough and 106.48 percent in Westport. For 2012 subscriber data, see <http://www.mass.gov/ocabr/docs/dtc/catv/stats/subscriber-counts-2012.xls> (last visited Nov. 15, 2013).

⁴² See BLACK'S LAW DICTIONARY (9th ed. 2009) (defining an arbitrary decision as one that is based on individual discretion rather than reason or fact).

⁴³ Bureau Order, ¶ 12; *Comm'n Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Serv.*, DA 09-1361, *Public Notice* (rel. June 18, 2009). The MDTC also notes that it is virtually impossible to obtain all of the data necessary for such a calculation reported on the same day.

⁴⁴ See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 39 (2005) (expressing that a finding that something is *de minimis* is a factual finding); *Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n*, 735 F.2d 577, 584 (D.C. Cir. 1984) (same).

⁴⁵ MDTC Opposition at 9-10.

are actually outside the franchise area.⁴⁶ The Bureau seemingly agreed with the MDTC, stating that the MDTC's objection "may have theoretical validity," but goes on to find that such errors are "likely to be" *de minimis*.⁴⁷

Burden shifting notwithstanding, the Bureau's determination is erroneous. The Bureau based its finding on a claim that the "typical [nine-digit zip code] contains no DBS subscribers or one or two."⁴⁸ The Bureau supported this claim by analyzing *the first page* of Exhibit 7 to the Auburn Petition.⁴⁹ Exhibit 7 to the Auburn Petition contains 584 pages.⁵⁰ While the Bureau is correct that many nine-digit zip codes contain few DBS subscribers, to base its determination of statistical significance on a "typical" zip code and ignore myriad data in a proceeding where as few as two DBS subscribers affect the outcome is inappropriate.⁵¹ There are numerous nine-digit zip codes listed on pages 2 through 584 of Exhibit 7 that contain more than two DBS subscribers.⁵² Many contain six or seven.⁵³ One nine-digit zip code contains 45.⁵⁴ Simply put,

⁴⁶ *Id.* at 10. The Bureau recently rejected a similar argument, but similarly did so seemingly without any actual analysis. *In the Matter of Comcast Cable Commc'ns, LLC*, 28 FCC Rcd 5508, 5512, CSR 8008-E, ¶ 13 *Memorandum Opinion & Order* (rel. Apr. 24, 2013) ("Blaine Order") (basing its findings on "typical" zip codes). Importantly, the Bureau's reasoning in that proceeding carved out communities with DBS provider penetration rates barely over 15 percent. *Id.* ("It is improbable in the extreme that areas in a nine-digit zip code that fall outside a Community would alter the applicable percentages below the statutory requirement of 15 percent or more, especially given the subscribership percentages shown in Attachment A, all of which are substantially above 15 percent.") (emphasis added). In these proceedings, there are a number of communities where the claimed competing provider subscribership is not substantially above 15 percent. Auburn Petition at Exhibit 9; *see also infra* n.57 and accompanying text. The Blaine Order has been appealed to the full FCC. *In the Matter of Comcast Cable Commc'ns, LLC*, CSR 8008-E, *Application for Review* (May 23, 2013).

⁴⁷ Bureau Order, ¶ 16. Given that the Bureau is not even certain that Charter's errors are *de minimis*, the Bureau clearly has not made the showing that such errors are *de minimis*. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) ("Determination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing.").

⁴⁸ Bureau Order, ¶ 16.

⁴⁹ *Id.*, ¶ 16 & n.48 ("The first page of Exhibit 7 lists 51 nine-digit zip codes. Of them, 24 have no DBS subscribers, 11 have only 1, and 8 have 2.").

⁵⁰ Auburn Petition at Exhibit 7.

⁵¹ Bureau Order, ¶ 16. In West Brookfield, removing two DBS subscribers from Charter's calculation reduces the DBS provider penetration rate below the 15 percent statutory threshold ($221 / 1,479 = .1494$). *See* 47 U.S.C. § 543(l)(1)(B); Charter Reply to MDTC Petition for Reconsideration at 2.

⁵² Auburn Petition at Exhibit 7.

the Bureau's generalization that any Charter overstatement of DBS subscribers is *de minimis* is flawed.

The Town of Charlton is instructive. Charter lists two zip codes with seven DBS subscribers and four zip codes with six DBS subscribers for Charlton.⁵⁵ If the MDTC's "valid[]"⁵⁶ theory applies in as few as three Charlton zip codes, the DBS provider penetration rate would be below the statutory threshold in Charlton where Charter claims to reach the threshold by a mere 17 subscribers.⁵⁷ The MDTC does not suggest that Charter's use of zip code centroids necessarily increased the DBS provider penetration rates to above 15 percent in each of the communities in the Petitions. Rather, the MDTC requests that the FCC remand the Bureau Order to require the Bureau to conduct the analysis that it is required to conduct.⁵⁸

III. CONCLUSION

The FCC should reverse and remand the Bureau Order. First, the Bureau placed the burden of proof in this proceeding on the MDTC in contravention of FCC regulation. Second, the Bureau granted Charter effective competition in Northborough and Westport, which each have a claimed MVPD penetration rate over 100 percent, in contravention of established FCC

⁵³

Id.

⁵⁴

Id. (01603-1246).

⁵⁵

Id.

⁵⁶

Bureau Order, ¶ 16.

⁵⁷

See Auburn Petition at Exhibit 9. ($691 / 4,608 = .1499$). There are many other communities where Charter's claimed DBS provider penetration rates are barely over the 15 percent threshold and where the Bureau should conduct further analysis, including, but not limited to: Berlin, where Charter reports zip codes containing seven and six DBS subscribers, and two zip codes containing five DBS subscribers, while meeting the threshold by a mere 21 subscribers (Auburn Petition at Exhibit 7, Exhibit 9); Brookfield, where Charter reports zip codes containing seven and five DBS subscribers, and two zip codes containing eight DBS subscribers, while meeting the threshold by a mere 24 subscribers (Auburn Petition at Exhibit 7, Exhibit 9); East Brookfield, where Charter reports two zip codes containing six DBS subscribers, while meeting the threshold by a mere 12 subscribers (Auburn Petition at Exhibit 7, Exhibit 9); and Millville, where Charter reports zip codes containing 11, six, and five DBS subscribers, and multiple zip codes containing four DBS subscribers, while meeting the threshold by a mere 23 subscribers (Auburn Petition at Exhibit 7, Exhibit 9). There are other, similarly situated zip codes, but to avoid redundancy the MDTC merely requests that the FCC require the Bureau to conduct a thorough analysis of Charter's data.

⁵⁸

See 47 U.S.C. § 543.

policy and precedent. Finally, the Bureau erroneously found that Charter's overstatements of DBS subscribership is *de minimis*. Accordingly, the FCC should reverse the Bureau Order with respect Northborough and Westport and remand the remainder of the Bureau Order for further analysis consistent with the above.

Respectfully submitted,

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