

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

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

MEMORANDUM OPINION AND ORDER

Adopted: April 6, 2012

Released: April 9, 2012

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. In 2001, the Commission concluded that the incumbent cable system in Boston, Massachusetts, was “subject to effective competition” and revoked the certification of the local franchising authority to regulate the basic service tier rates.¹ The City of Boston (the “City”) filed a petition on May 9, 2011, pursuant to Section 76.916 of the Commission’s rules,² seeking re-certification to regulate the basic service tier rates of the incumbent cable system.³ Comcast Communications, LLC⁴ (hereinafter “Comcast” or the “Company”), filed an opposition to the petition,⁵ and the City filed a reply.⁶ Comcast then filed a surreply and a motion for its acceptance.⁷ Our rules require that the City’s petition make a clear showing that the reasons for our 2001 revocation no longer pertain.⁸ In the following paragraphs, we find that the City has made the clear showing that our rules require and, accordingly, we grant the City’s petition.

¹ *Cablevision of Boston, Inc.*, 16 FCC Rcd 14056 (2001) (“*Bureau Order*”), application for review denied, 17 FCC Rcd 4772 (2002) (“*Commission Order*”).

² 47 C.F.R. § 76.916.

³ Emergency Petition for Recertification of the City of Boston to Regulate Basic Subscriber Rates (“*Petition*”). In Massachusetts, local government entities such as the City grant franchises to cable operators such as Comcast, but the actual regulation of rates is performed by the Massachusetts Department of Telecommunications and Cable. *Petition* at 4, n.3.

⁴ At the time of our 2001 decision, the system was owned by Cablevision of Boston, Inc. The system was subsequently transferred to Comcast. In the interest of clarity, we will refer to the incumbent cable operator throughout this Order.

⁵ Opposition to Petition for Recertification (“*Opposition*”).

⁶ City of Boston Reply to Opposition (“*Reply*”).

⁷ Motion for Acceptance of Surreply and Surreply of Comcast Cable Communications, LLC (“*Surreply*”). Pleadings in excess of the usual *Petition*, *Opposition* and *Reply* are allowed only on a showing of extraordinary circumstances. 47 C.F.R. § 76.7(d). We find an extraordinary circumstance here, namely the emergence of a new issue in Comcast’s *Opposition* – a second possible form of effective competition in Boston. See *infra* ¶ 9. The City, addressing the new issue in its *Reply*, made some arguments for the first time. See *Reply* at 6-8. Fairness dictates that Comcast be allowed to file a *Surreply* to answer the City’s newly posited arguments. See *Surreply* at 3 n.8.

⁸ 47 C.F.R. § 76.916(b)(3).

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁹ as that term is defined by Section 623(l) of the Communications Act of 1934, as amended (“Communications Act”) and Section 76.905 of the Commission’s rules.¹⁰ In the litigation that ended in 2001, Comcast’s predecessor established that it was subject to one form of effective competition, the so-called local exchange carrier, or “LEC,” effective competition test. As defined in Section 623(l)(1)(D) of the Communications Act, a cable system is subject to LEC effective competition when:

“a local exchange carrier or its affiliate (or any multichannel video programming distributor [“MVPD”] 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.”¹¹

3. The Commission determined that a cable operator seeking to end basic rate regulation by demonstrating LEC effective competition make a number of showings. First, the cable operator must show that the alleged LEC (or its affiliate or any MVPD using the facilities of the LEC or its affiliate) fits the definition of a local exchange carrier set forth in the Communications Act, which in pertinent part provides that a “local exchange carrier is “any person that is engaged in the provision of telephone exchange service or exchange access.”¹² Second, the LEC's video service area must have a substantial geographic overlap with the incumbent cable operator's franchise area.¹³ If the LEC’s service is offered to only a geographically limited market within the franchise area, there is no “substantial overlap” and the LEC test is not satisfied.¹⁴ Third, the LEC must have actually begun offering video service to consumers, and they must be “reasonably aware” that they may purchase the LEC’s video service.¹⁵ Finally, the LEC must be offering video service that is “comparable” to the incumbent cable operator’s.¹⁶

⁹ 47 C.F.R. § 76.906.

¹⁰ See 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

¹¹ 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4).

¹² 47 U.S.C. § 153(26). The Communications Act defines the term “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). The Communications Act defines the term “telephone exchange service” as “(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” 47 U.S.C. § 153(47).

¹³ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5303, ¶ 10 (1999) (“*Cable Reform Order*”). Although the Commission established that the LEC’s video service area must substantially overlap the incumbent cable operator’s franchise area, the LEC test for effective competition, unlike some other tests for effective competition set forth in the Communications Act, does not contain specific homes passed or subscriber penetration levels. *Id.*; see 47 U.S.C. §§ 543(l)(1)(A) & (B) (setting forth the “low penetration” and “competing provider” tests for effective competition).

¹⁴ *Cable Reform Order*, 14 FCC Rcd at 5304, ¶ 12.

¹⁵ *Id.* at 14 FCC Rcd at 5305, ¶ 13.

¹⁶ The Commission has held that a LEC’s video service is comparable if it includes “at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.” 47 C.F.R. § 76.905(g); 14 FCC Rcd at 5306-08, ¶¶ 16-18.

4. The LEC whose service was the basis for the Commission's 2001 conclusion that Comcast was subject to LEC effective competition was RCN-BecoCom, LLC. There is no dispute about the third and fourth elements of the LEC test stated above. That is, both the City and Comcast agree that RCN is offering video service to consumers, who are reasonably aware of its availability, and that RCN's programming meets the Commission's requirements for programming comparability. The parties dispute, however, the first two elements – whether RCN is a LEC and whether the area within which it offers service substantially overlaps Comcast's. We resolve these disputes in the following paragraphs.

II. ANALYSIS OF THE LEC TEST

A. RCN's Status as a LEC

5. Section 632(l)(1)(D) requires that video programming be offered by the LEC, an affiliate of the LEC, or any MVPD using the facilities of the LEC or affiliate.¹⁷ The City alleges that neither RCN nor any of its affiliates is a LEC or any other qualifying entity. The sole basis for this allegation is that neither RCN nor any of its affiliates is on the list of "Massachusetts Licensed Telecommunications Operators" that is maintained by the Massachusetts Department of Telecommunications and Cable.¹⁸ We find this unconvincing. The list does include RCN's predecessor, RCN-BecoCom, Inc.,¹⁹ and any omission of the new entity may be an oversight. More importantly, the statutory definition of LEC focuses not on lists generated by state regulatory authorities, but on whether the entity in question actually does provide local exchange service.²⁰ The City's petition includes a quotation from RCN's 2009 10-K filing with the U.S. Securities and Exchange Commission that states that RCN provides local exchange service on a network of facilities that it owns.²¹ RCN has made similar statements to its subscribers, the Massachusetts Department of Telecommunications and Cable, and this Commission.²² The current web page of "RCN Boston" unequivocally offers "phone service."²³ The City does not deny that the present MVPD in Boston, RCN-BecoCom, LLC, provides local exchange service. We conclude that RCN provides local exchange service in the City of Boston and is, accordingly, a LEC within the terms of Section 632(l)(1)(D) of the Communications Act.

¹⁷ 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4).

¹⁸ Petition at 17.

¹⁹ Opposition at 4.

²⁰ See supra ¶ 3 discussing the definitions of the terms "local exchange carrier," "telephone exchange service," and "telecommunications service."

²¹ Petition, Exh. 4, Ashpaugh & Sculco & Front Range Consulting, *Final report on the Transfer of RCN's Cable Properties to Yankee Cable & ABRY Partners* (May 28, 2010), *Excerpts from RCN Corporation's Form 10-K for the Fiscal Year Ended December 31, 2009* at 4-3:

"We provide local, long distance, and international voice telephone services. . . . We provide voice services through a traditional, switched platform . . . [and] a 'digital phone' architecture that transmits signals on our broadband network between the customer premises and an RCN switch, which then interfaces with the public switched telephone network."

²² Opposition at 4-5, Exhs. 3, 6, 7.

²³ RCN Boston, *Boston Phone*, <http://www.rcn.com/boston/phone> (visited July 28, 2011). The RCN web page is not in the record herein. Accordingly, we note its content, but do not rely on it as the decisive evidence that RCN is a LEC.

B. The “Substantial Overlap” Issue

6. In its 1999 *Cable Reform Order* interpreting the LEC test, the Commission stated that, for a cable operator to be subject to LEC effective competition, the LEC’s service area must substantially overlap the incumbent cable operator’s franchise area.²⁴ The goal of Congress was “to restrain cable rates and stimulate quality cable services.”²⁵ and clarified that “once the LECs competitive presence is sufficient to achieve these goals, even if the LEC’s buildout or roll out is not complete, the intent of the effective competition test has been met. On the other hand, service offered only . . . to a geographically limited market within the franchise area does not satisfy the test.”²⁶ The issue of substantial overlap is not one of first impression. Many of our decisions under the LEC effective competition test have involved a LEC that has begun service in a relatively small part of the incumbent cable operator’s franchise area with expansion obligations requiring the LEC to serve within a few years, most, or all, of the incumbent’s franchise area.²⁷ Our decision deregulating Boston in 2001 was such a decision.²⁸ That decision relied heavily on the City, in exchange for granting RCN a franchise, imposing specific obligations requiring RCN to build out its system to serve all of Boston. In particular, the Bureau Order noted that under its agreement with the City, RCN is required “to serve approximately 90 [percent] of Boston within 3 1/2 years of signing the franchise agreement, and complete its buildout to every Boston neighborhood six years after signing the franchise agreement.”²⁹ The Commission, in affirming the Bureau Order, further relied on the City’s buildout obligations imposed on RCN, holding that “RCN intends to build out its system to serve the entire city of Boston, albeit at a slower pace than it originally intended.”³⁰

7. Several years ago, however, apparently due to a lack of capital, RCN’s buildout halted and the City released it from any further buildout obligations. At present, RCN has neither an obligation to expand the geographic scope of its system nor any prospect of doing so.³¹ The City states that “RCN . . . pass[es] only a small percentage of the residences in the City” but gives no numerical estimate of homes passed.³² Comcast obtained a statement from RCN to the effect that RCN now passes 32.1 percent of the households in Boston.³³ The City does not dispute this number, and we accept it.

8. In *Mediacom Delaware LLC*, we found LEC effective competition to exist where the LEC’s system covered approximately one third of the territory served by the petitioning cable operator.³⁴

²⁴ *Cable Reform Order*, 14 FCC Rcd at 5303, ¶ 10.

²⁵ *Id.* at 5304, ¶ 11.

²⁶ *Id.* at 5304, ¶¶ 11-12.

²⁷ *See, e.g., Cablevision Systems Corp.*, 25 FCC Rcd 4953, 4955, ¶ 7 (2010); *CSC TKR, Inc.*, 25 FCC Rcd 4948, 4951, ¶¶ 10-11 (2010); *Comcast Cable Comm’n, LLC*, 23 FCC Rcd 10073, 10077, ¶ 11 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 12905, 12906-07, ¶ 7 (2007).

²⁸ *Bureau Order.*, 16 FCC Rcd at 14061, ¶ 15.

²⁹ *Id.*, 16 FCC Rcd at 14061, ¶ 15; *id.* at 14062, ¶ 17 (“we note the aggressive buildout requirement and liquidated damage provisions of the franchise”).

³⁰ *Commission Order*, 17 FCC Rcd at 4778, ¶ 14 (*application for review denied*).

³¹ Petition at 11-13.

³² *Id.* at 19.

³³ Opposition at 8 (using a household number from the 2010 Census).

³⁴ *Mediacom Delaware LLC*, 26 FCC Rcd 3668, 3672, ¶ 14 (2011) (“Verizon’s system covers approximately one third of the territory served by Mediacom. We conclude that Verizon’s service area is a substantial portion of Mediacom’s franchise area.”). The Delaware measurement was of territory and the present one is of households, but we do not consider this difference significant to our analysis in this case.

The percentage in that case is very similar to the percentage in this case, but there are significant differences in other material facts. In *Mediacom Delaware*, unlike the instant case, there was the expectation of further build-out by the LEC competitor.³⁵ In *Armstrong Commc 'n, Inc.*, we found LEC effective competition to exist despite having only an 18% overlap because the LEC might to continue to build-out and expand its overlap, and the incumbent cable operator had cut its rates substantially in response to the LEC's entry which, taken together, reflect a competitive environment. The Commission specifically stated in *Armstrong* that "[i]f the LEC has not shown its intention to offer service that substantially overlaps the incumbent cable operator's service, the Commission will entertain a request for waiver showing that the extent of the LEC's presence is sufficient to have a direct impact on the cable operator's services throughout its service area, and particularly on the price."³⁶ In this case, all the evidence indicates that there is no realistic possibility of RCN building out further. The LEC's one-third coverage of the incumbent's franchise area combined with the impossibility the LEC expanding are the decisive facts in this case. They amount to a clear showing that the reasons for the earlier revocation of the City's authority are no longer valid.³⁷

III. THE "COMPETING PROVIDER EFFECTIVE COMPETITION" TEST

9. Comcast claims that, independent of whether it is still subject to LEC effective competition, it is now subject to another kind of effective competition, "competing provider" effective competition.³⁸ The most significant element of this kind of effective competition in this case is that more than 15 percent of the households in Boston subscribe to RCN and the two providers of Direct Broadcast Satellite ("DBS") service.³⁹ We decline to address this claim in this Memorandum Opinion and Order. As we stated in *County of New Hanover, North Carolina*:

"Our procedures do not expressly allow for the cable operator, in the midst of a recertification case, to raise and prove alternate grounds for decertification. Instead, Section 76.916(b)(3) of our rules instructs us to focus on whether 'the reasons for the earlier . . . revocation no longer pertain.' Our rules do not contemplate, in re-certification proceedings, consideration of new evidence for decertification . . . that is raised for the first time in the middle of the pleading cycle. A partial record, unanswered arguments, and a less than thorough decision could result."⁴⁰

Accordingly, we do not address Comcast's claim of competing provider effective competition at this time. We would, however, accept a renewed request for special relief on those grounds as described in the following paragraph.

³⁵ For example, the LEC's map showing its service area described it as "initial." *Mediacom Delaware* at 26 FCC Rcd at 3669-70, ¶ 5, 3670, ¶ 7.

³⁶ *Armstrong Commc 'ns, Inc.*, 16 FCC Rcd 1039, 1043, ¶ 8 (2001).

³⁷ 47 C.F.R. § 76.916(b)(3).

³⁸ Opposition at 9-15.

³⁹ See 47 U.S.C. § 543(l)(1)(B)(ii); 47 C.F.R. § 76.905(b)(2)(ii). Comcast claims that 18.7% of Boston's households subscribe to these competing providers – the DBS providers being DIRECTV, Inc., and DISH Network. Opposition at 15.

⁴⁰ *County of New Hanover, North Carolina*, 23 FCC Rcd 15348, 15353-54, ¶ 19 (2008) (footnotes omitted); see also Reply at i-ii, 7-8.

IV. CONCLUSION

10. We grant the City's petition to be re-certified to regulate Comcast's basic rates in Boston, Massachusetts. Pursuant to Section 76.910(e), unless the Commission notifies the County otherwise and subject to the other qualifications in subsection (e), 30 days after release of this Memorandum Opinion and Order, the City will be re-certified to regulate Comcast's basic cable service. Comcast may, no later than that date, file a petition for reconsideration of the City of Boston's certification raising the competing provider effective competition issue. Comcast's filing of such a petition will stay the recommencement of basic service tier rate regulation in Boston pending the Commission's adjudication of Comcast's petition.⁴¹

11. According to our standard procedures, the City, after being re-certified to regulate Comcast's basic rates, would file a new Form 328 (Franchising Authority Certification) with us; absent intervening events, the Form would take effect 30 days later; and Comcast would file a petition for reconsideration of the Form's effectiveness another 30 days later.⁴² In this proceeding, the City included a new Form 328 as Exhibit 5 to its Petition. It appears to be in order. No useful purpose would be served by now requiring the City to re-file a new Form 328. Petitions for reconsideration are due 30 days after release of the decision of which reconsideration is sought and the City's new Form 328 is a legally valid document upon release of this Memorandum Opinion and Order. Accordingly, in the interests of expediting these proceedings, we waive our rules to the extent necessary to accept a Comcast petition for reconsideration, presumably alleging competing provider effective competition, no later than 30 days after release of this Memorandum Opinion and Order. Any petition that Comcast files may contain the same evidence that appears in its Opposition, or other additional evidence that Comcast chooses to submit. We caution Comcast to serve a copy of any such petition upon all necessary parties.⁴³

V. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Emergency Petition for Recertification filed in the captioned proceeding by the City of Boston, Massachusetts, in CSR 8488-R and dated May 9, 2011, **IS GRANTED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁴

FEDERAL COMMUNICATIONS COMMISSION

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⁴¹ 47 C.F.R. § 76.911(b).

⁴² 47 U.S.C. § 405(a); 47 C.F.R. §§ 1.106, 76.910(e), 76.911.

⁴³ See Reply at ii n.2, 7 n.17.

⁴⁴ 47 C.F.R. § 0.283.