

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: December 15, 2016

Released: December 15, 2016

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

I. INTRODUCTION

1. Comcast Cable Communications, LLC (Comcast) has filed a petition pursuant to section 76.911 of the Commission's rules, seeking reconsideration of the Media Bureau's recertification of the City of Boston (the City) to regulate cable rates. Comcast alleges that its cable system serving the City is subject to effective competition pursuant to section 623(l)(1)(B) of the Communications Act of 1934, as amended (the Act), and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the City because of the competing service provided by two direct broadcast satellite (DBS) providers, DIRECTV, Inc. (DIRECTV) and DISH Network (DISH), and by RCN. Both the City and the Massachusetts Department of Telecommunications and Cable (MDTC) filed oppositions to which Comcast filed a reply. For the reasons set forth below, we grant the Petition and revoke the City's certification to regulate cable rates.

1 Comcast Cable Communications, LLC, Petition for Reconsideration of Rate Regulation Re-Certification (filed May 8, 2012) (Petition).

2 47 CFR § 76.911.

3 Petition of the City of Boston, Massachusetts, For Recertification to Regulate the Basic Cable Service Rates of Comcast Cable Communications, LLC (CUID MA0182), Memorandum Opinion and Order, 27 FCC Rcd 3763 (MB, Apr. 9, 2012) (Recertification Order).

4 47 U.S.C. § 543(l)(1)(B).

5 47 CFR § 76.905(b)(2).

6 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 MDTC. See Recertification Order, 27 FCC Rcd at 3763, n.3.

7 City of Boston, Massachusetts, Opposition to Petition for Reconsideration of Rate Regulation Re-Certification (filed May 23, 2012) (City Opposition); Massachusetts Department of Telecommunications and Cable, Opposition to Comcast's Petition for Reconsideration of Rate Regulation Re-Certification (filed May 30, 2012) (MDTC Opposition).

8 Comcast Cable Communications, LLC, Reply to Oppositions to Petition for Reconsideration (filed June 12, 2012) (Reply).

II. BACKGROUND

2. A franchising authority may regulate basic cable service tier rates and equipment only if the Commission finds that the cable system is not subject to effective competition.⁹ The Act defines the four types of effective competition, and the types relevant to this proceeding are known as local exchange carrier (LEC) effective competition and competing provider effective competition.¹⁰ In July 2001, the former Cable Services Bureau revoked the City's certification to regulate cable rates, finding that the presence of LEC effective competition in Boston precluded such regulation.¹¹ Nearly a decade later, the Media Bureau found that the City had made the required showing that the reasons supporting the prior finding of LEC effective competition were no longer valid.¹² Accordingly, the Media Bureau granted the City's petition for recertification.¹³ To the extent that Comcast believed it was subject to competing provider effective competition, the Media Bureau stated that it could file a petition for reconsideration, which would "stay the recommencement of basic service tier rate regulation in [the City] pending the Commission's adjudication of Comcast's petition."¹⁴ Comcast filed such a petition.

3. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to competing provider effective competition.¹⁵ Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by section 623(l) of the Act and section 76.905 of the Commission's rules.¹⁶ The Commission required all franchising authorities with existing certifications that wished to remain certified to file a revised FCC Form 328 by December 8, 2015.¹⁷ MDTC filed timely certifications for numerous Massachusetts communities, but it excluded the City from its filing.¹⁸ Nonetheless, we must address the Petition because it remains pending.¹⁹

III. DISCUSSION

4. Section 623(l)(1)(B) of the Act provides that a cable operator is subject to competing

⁹ See 47 U.S.C. § 543(a)(2)(A).

¹⁰ 47 U.S.C. § 543(l)(1)(B) and (D).

¹¹ *Cablevision of Boston, Inc., Petition for Determination of Effective Competition*, Memorandum Opinion and Order, 16 FCC Rcd 14056 (CSB, Jul. 20, 2001).

¹² *Recertification Order*, 27 FCC Rcd at 3768, para. 10.

¹³ *Id.*

¹⁴ *Id.* (citing 47 CFR 76.911(b)(1) which states, "The filing of a petition for reconsideration pursuant to paragraph (a)(1) of this section will automatically stay the imposition of rate regulation pending the outcome of the reconsideration proceeding.").

¹⁵ See *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (*Effective Competition Order*).

¹⁶ See 47 U.S.C. § 543(l)(1); 47 CFR §§ 76.905(b), 76.906.

¹⁷ See *Notice of Effective Date of Revised Effective Competition Rules*, Public Notice, 30 FCC Rcd 10124, 10125 (2015).

¹⁸ See MDTC Form 328, Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition (filed Dec. 8, 2015), available at <https://ecfsapi.fcc.gov/file/60001352672.pdf>.

¹⁹ See *Effective Competition Order*, 30 FCC Rcd at 6592, para. 27 ("The Media Bureau will issue a public notice at the conclusion of the 90-day timeframe identifying all franchising authorities that filed a revised Form 328 as well as those franchising authorities that are party to one of the above-listed pending proceedings, and stating its finding of Competing Provider Effective Competition applicable to all other currently certified franchising authorities.").

provider effective competition if the franchise area is (a) served by at least two unaffiliated multichannel video programming distributors (MVPDs), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.²⁰ Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met.²¹

A. The First Part of the Competing Provider Effective Competition Test

5. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.²² As explained in the *Effective Competition Order*, “we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH, presumptively satisfies the” first part of the test for competing provider effective competition, absent evidence to the contrary.²³ Neither the City nor MDTC disputes that Comcast has established all three elements of the first part of the test. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Comcast, we thus find that the first part of the test is satisfied.

B. The Second Part of the Competing Provider Effective Competition Test

6. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area.²⁴ As explained in the *Effective Competition Order*, “[w]ith regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD.”²⁵

7. First, the City argues that we must exclude subscribers of RCN from our calculation of the number of households subscribing to MVPDs other than the largest MVPD, given the Media Bureau’s decision in the *Recertification Order* that RCN did not “offer” service in Boston.²⁶ We clarify that even if a LEC does not “offer” service sufficient to meet the requirements of the LEC effective competition test, that LEC’s subscribers still can and should be included in a calculation of the second part of the competing provider effective competition test. Similarly, we deny the City’s request that we waive section 76.905(f) of our rules, which directs the Commission to aggregate the number of subscribers of all MVPDs that offer service in the franchise area in determining the number of households subscribing to MVPDs other than the largest MVPD.²⁷ There is no merit for the City’s arguments that we should exclude RCN subscribers from our calculation, and doing so would be inconsistent with the statutory test for competing provider effective competition and with Commission precedent.

8. Second, the City and MDTC argue that Comcast greatly overstated the number of households subscribing to MVPDs other than the largest MVPD by including residences that do not qualify as “households” such as dormitories, assisted living facilities, and seasonal or vacation homes.²⁸

²⁰ 47 U.S.C. § 543(1)(1)(B); *see also* 47 CFR § 76.905(b)(2).

²¹ *Effective Competition Order*, 30 FCC Rcd at 6587, para. 17.

²² 47 CFR § 76.905(b)(2)(i).

²³ *Effective Competition Order*, 30 FCC Rcd at 6580-81, para. 8.

²⁴ 47 CFR § 76.905(b)(2)(ii).

²⁵ *Effective Competition Order*, 30 FCC Rcd at 6581-82, para. 9.

²⁶ City Opposition at 3-9.

²⁷ City of Boston, Massachusetts, Request for Waiver (filed May 23, 2012).

²⁸ City Opposition at 9-10; MDTC Opposition at 3-5.

Consistent with Commission precedent, we will accept the figures in Comcast's Petition absent superior numbers from the City or MDTC.²⁹ According to the Petition, 26,821 households in the City are DBS subscribers, and 19,607 households in the City are RCN subscribers, for a total of 46,428 households.³⁰ Subsequently, Comcast conceded that 3,456 dormitory residents were inadvertently included in the number of RCN subscribers, and that the total number of households subscribing to competing providers also may have included approximately 551 seasonal, recreational, or occasional use housing units.³¹ If we reduce the total of 46,428 households by the 3,456 dormitory residents and by the 551 seasonal, recreational, or occasional use housing units, we still are left with a total of 42,421 households subscribing to MVPDs other than the largest MVPD. That number of households still exceeds 15 percent of the households in the franchise area,³² and accordingly, the second part of the test for competing provider effective competition is still met.

9. For the above reasons, the arguments put forth by the City and MDTC fail to rebut the presumption of competing provider effective competition.³³ In accordance with the presumption of competing provider effective competition, and based on the information submitted by Comcast, we thus find that the second part of the test is satisfied.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed in the captioned proceeding by Comcast Cable Communications, LLC, **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of the community set forth on Attachment A **IS REVOKED**.

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

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²⁹ See, e.g., *Comcast Cable Commc'ns, LLC*, 26 FCC Rcd 4901, 4903, para. 7 (MB, Mar. 28, 2011); *Cox Commc'ns Kansas, LLC*, 26 FCC Rcd 2085, 2088-89, para. 12 (MB, Feb. 24, 2011).

³⁰ Petition at Ex. 5 and Ex. 6.

³¹ Reply at 7-8, Ex. B, and Ex. D.

³² According to the 2010 U.S. Census, there are 252,699 households in Boston. See Petition at 9 and Ex. 8. If we divide the 42,421 households subscribing to competing providers by the 252,699 households in Boston, we determine that approximately 16.79 percent of households in the franchise area subscribe to competing providers.

³³ We note that the City has argued that the Commission should reconsider what constitutes effective competition. See City Opposition at ii-iii, 10-14. In response, we emphasize that the definition of effective competition is statutory, see 47 U.S.C. § 543(l)(1), and that in any event matters of general application should not be addressed in adjudicatory proceedings such as this.

³⁴ 47 CFR § 0.283.

**ATTACHMENT A
CSR 8488-R****COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC**

Community	CUID	CPR*	2000 Census Households	Estimated Competing Provider Subscribers
Boston	MA0182	16.79%	252,699	42,421

*CPR = Percent of competitive penetration rate of DBS and RCN subscribers.