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September 20, 2012

Catrice C. Williams
Secretary
Department of Telecommunications and Cable
1000 Washington Street
Suite 820
Boston, Massachusetts 02118-6500

Re: *Petition of Comcast Cable Communications, Inc. to establish and adjust the basic service tier programming, equipment, and installation rates for the communities in Massachusetts served by Comcast Cable Communications, Inc. that are currently subject to rate regulation, D.T.C. No. 12-2*

Dear Ms. Williams:

Enclosed for filing in the above-referenced matter is the City of Boston's Brief in Support of its Petition to Intervene. I will make service on all other parties by email.

Thank you for your assistance in this matter.

Respectfully submitted,

Michael Lynch

Enclosure

cc: Lindsay DeRoche, Hearing Officer

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

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to establish and adjust the basic service tier)	
programming, equipment, and installation rates)	D.T.C. No. 12-2
for the communities in Massachusetts served by)	
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**BRIEF IN SUPPORT OF
PETITION TO INTERVENE**

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City of Boston, MA

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**BRIEF IN SUPPORT OF
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I. INTRODUCTION

Pursuant to 220 CMR 1.03(1) of the Rules of Practice and Procedure of the Department of Telecommunications and Cable ("Department"), on September 10, 2012, the City of Boston ("City" or "Boston") petitioned the Department for leave to intervene as a party in the above-captioned proceeding. Objection to the City's participation was heard at a public hearing on September 12, 2012, and the City files this brief in support of its Petition. The brief supplements the Petition with issues that would not ordinarily be raised in such a filing, and should not be read to undercut the validity and sufficiency of the Petition itself.

II. PETITION SPEAKS FOR ITSELF

The City appreciates that Mass. GL Ch. 30A sec. 10, as codified 801 CMR 1.01 *et seq*, sets the standard for intervention in administrative hearings and that substantial deference is granted to the agency to determine if a petitioner has demonstrated that it is substantially and

specifically affected by the proceeding.¹ Or as Massachusetts courts have interpreted the standard, injuries to confer standing cannot be speculative, remote or indirect.²

The City of Boston believes that the Petition itself clearly demonstrates that the City meets the requirements in 220 CMR 1.03(1) *et seq.*, and that the impact on Bostonians is neither speculative, remote or indirect. In its most simple form, the basis for Boston's standing can be summarized as:

1. The Federal Communications Commission overturned its previous finding that effective competition existed in Boston,³ and it could issue an order any day returning regulation of Boston's cable rates to the Department.
2. The Department is the exclusive rate regulatory body in Massachusetts and does not believe Comcast has met its burden of demonstrating that effective competition exists in Boston.⁴
3. If the FCC restores rate regulation in the City, the Department's decisions in this matter would either be binding upon Boston or at minimum color any future decision by the Department.

¹ *KES Brockton, Inc. v. Department of Pub. Utils.*, 416 Mass. 158, 165, 618 N.E.2d 1352 (1993). The *KES* standard was positively cited as recently as this past May by the Supreme Judicial Court. See *Melone v. Department of Pub. Utils.*, 462 Mass. 1007; 1008, 967 N.E.2d 596; 2012 Mass. LEXIS 357 (2012).

² *Ginther v. Commissioner of Ins.*, 427 Mass. 319, 323 (1998); *Tofias v. Energy Facilities Sitting Board* 435 Mass. 340, 346-50 (2001).

³ In re *Petition of the City of Boston For Recertification to Regulate the Basic Cable Service rates of Comcast Cable Communications, LLC* (CSR 8488-R), Memorandum Opinion and Order (April 9, 2012).

⁴ 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), Massachusetts Department of Telecommunications and Cable, Opposition to Comcast's Petition for Reconsideration of Rate Regulation Re-certification, filed May 30, 2012, available at <http://apps.fcc.gov/ecfs/document/view?id=7021920900>. ("DTC Filing")

4. In the alternative, should the FCC not return rate regulation to the Department for cable services in Boston, the decision the Department makes in docket 12-2 will still impact Bostonians. The rate that the Department permits Comcast to charge in rate-regulated communities will establish a floor beneath which Comcast will not go in non-regulated communities. The research provided by Boston as Exhibit B to its Petition reflects that Boston cable subscribers have traditionally paid higher rates than subscribers in surrounding rate-regulated communities for virtually identical programming. Should the Department grant a rate increase in this docket, Bostonians are sure to see their rates rise accordingly.

It is clear that the impact on Boston rate payers is neither speculative, remote nor indirect. The effect on Bostonians of the Department's actions in Docket 12-2 is "substantial and specific" and grounds for intervention.

III. THE DEPARTMENT IS ON RECORD THAT BOSTON SHOULD BE AFFORDED RATE REGULATION.

That there is not effective competition in Boston has been asserted by the expert agency of Massachusetts, the Department of Telecommunications and Cable.⁵ Under Massachusetts law, this conclusion is entitled to deference.⁶ We simply ask that the Department afford itself this deference here.

⁵ *Id.* at 2.

⁶ *See Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992). (The standard of review is "highly deferential to the agency, which requires . . . according due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it."). *See also Hotchkiss v. State Racing Comm'n*, 45 Mass. App. Ct. 684, 695-696 (1998); *Friends & Fishers of the Edgartown Great Pond, Inc., v.*

In its May 20, 2012 filing with the FCC, the Department makes clear that it believes that the City is not subject to effective competition. The Department stated: “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.”⁷ Boston’s Petition to Intervene asks only that the Department take a consistent position here.

IV. BOSTON IS ENTITLED TO INTERVENE UNDER 220 CMR 1.03 (2)(b) &/or 220 CMR 1.03 (2)(c)

A. Boston Meets the “Party” of Right Standard Outlined in by 220 CMR 1.03 (2)(b)

Given the Department’s position at the Federal Communications Commission, Boston need not rely upon the Department’s discretion to allow it to be a party in this matter: Boston’s right to intervene as a party is protected by law.

Section 1.03 (2) (b) defines a “party” to a DTC proceeding as “any ... person who as a matter of constitutional right or by any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding and who enters an appearance.” As the Department told the Federal Communications Commission, the Department is the only forum in which Boston can seek to protect its residents on cable rate and equipment charges. The Department stated: “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 is also the *exclusive* state

Dept. of Env’tl. Protection, 446 Mass 830, 836-37 (2006); *Healer & Others vs. Dept. of Dept. of Env’tl. Protection*, 75 Mass. App. Ct. 8, 13 (2009).

⁷ DTC Filing at 2.

regulator of telecommunications and cable services within the Commonwealth of Massachusetts. See MASS. GEN. LAWS ch. 25C, § 1.” (Emphasis added).⁸

Massachusetts General Laws provide that any community that is not subject to effective competition may look only to the Department for rate protection for its citizens. At the present time, the City is not subject to an effective competition finding at the FCC. While rate regulation is stayed pending the Commission’s review of the alternative theory posed by Comcast, the City is nevertheless a community that is not subject to effective competition and therefore eligible for rate regulation, albeit rate regulation that is stayed. The City clearly meets the standard of a “party” pursuant to 220 CMR 1.03 (2)(b).

B. Absent a “Party” finding pursuant to 220 CMR 103 (2)(b), Massachusetts Law Favors Intervention under 220 CMR 103 (2)(c).

Were the Department not convinced that Boston is a party pursuant to 220 CMR 1.03 (2)(b), the Department should exercise its discretion to permit the City to intervene under 220 CMR 103 (2)(c).

American jurisprudence has always favored the liberal granting of intervention petitions under similar circumstances.⁹ Under 220 Code Mass. Regs., the Department has “wide discretion

⁸ *Id.* at n.2

⁹ The Supreme Court established this lenient standard in *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 (1972). In *Trbovich*, the Court found that the burden to make a showing of a right to intervene was minimal. *Id.* at 539). The First Circuit in *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39 (1st Cir. 1992), followed an equally lenient standard. Other courts have articulated the standard as “Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.” *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (11th Cir. 2008); see also *Meek v. Metropolitan Dade County, Florida*, 985 F.2d 1471, 1478 (11th Cir. 1993) (“Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed interveners because it allows the court to resolve all related disputes in a single action.”). Allowing parties to intervene serves the interests of judicial efficiency, since intervention allows courts to resolve related disputes in a single action. See *Federal Savings and Loan v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216(11th Cir.

to grant, limit, or deny a person leave to intervene." *Cablevision Sys. Corp. v. Department of Telecommunications & Energy*, 428 Mass 436, 439 (1998); *KES Brockton, Inc. v. Department of Pub. Utils.*, 416 Mass. 158, 165, 618 N.E.2d 1352 (1993). We think in the instant matter that Boston should be permitted to intervene as a right, but failing that, the Department in its broad discretion should grant Boston party status in an effort to resolve all related disputes in a single action and to have the benefit of Boston's investment in experts that have examined Comcast's FCC filings as indicated in the petition.

1993). The Ninth Circuit also agrees that the standard should be read "liberally in favor of potential intervenors." *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001).

V. CONCLUSION

In light of the above, and so as to ensure that Boston Comcast subscribers are properly protected, the Department should grant the City of Boston's Petition to Intervene as a party in Docket 12-2.

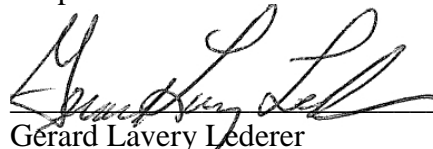
Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Gerard Lederer", is written over a horizontal line.

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