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September 10, 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 Petition to Intervene and a Notice of Appearance.

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**

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. 12-2**

**NOTICE OF APPEARANCE,**

In the above-captioned proceeding, the undersigned hereby appears for  
and on behalf of the City of Boston.



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Dated: September 10, 2012

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

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for the communities in Massachusetts served by	)	
Comcast Cable Communications, Inc. that are	)	
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**PETITION TO INTERVENE**

**1. Introduction**

Pursuant to 220 C.M.R.1.03(1) of the Rules of Practice and Procedure of the Department of Telecommunications and Cable ("Department"), The City of Boston ("City" or "Boston") hereby petitions the Department for leave to intervene as a party in this proceeding.

**2. Status as Effective Competition Community**

Under the laws of the Commonwealth, the City of Boston, specifically Mayor Thomas M. Menino, is the issuing authority for a community served by Comcast. The status of Boston, as a community protected by the Department's rate regulatory authority has been in dispute dating back to 1997.<sup>1</sup> At the present time, the City of Boston is not subject to a finding by the Federal Communications Commission ("Commission") that effective competition exists, but rate regulation has not been returned to the Department, as there is an effective competition petition pending at the FCC.

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<sup>1</sup> See *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Petition for Special Relief, CSR 5048-E (filed Jul. 14, 1997), ("*Cablevision Effective Competition Petition*"). See also *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, Memorandum Opinion and Order, CSR 5048-E, DA 01-1731, 16 FCC Rcd. 14056 (July 20, 2001) ("*Cablevision Order*").

### 3. History of Effective Competition Proceedings

The FCC's Cable Bureau in 2001 found effective competition<sup>2</sup> to exist in Boston<sup>3</sup> under the "LEC" test, a finding that was reaffirmed by the full Commission a year later.<sup>4</sup> The City of Boston never agreed with the Commission's analysis and joined by the Department petitioned the Commission to reexamine its holding. In April of 2012, the Commission's Media Bureau reversed its prior rulings, finding that the "LEC" test was no longer met.<sup>5</sup> As mentioned above, while finding in favor of the City and Department, the Commission did not return rate regulation to Boston and the Department, but rather stayed rate regulation until Comcast could file a petition arguing for effective competition on alternative grounds. Comcast did timely file such a petition, which the City and Department opposed, and all parties eagerly await the Commission's decision.

The City is, therefore, very interested in this docket. The City hopes that soon its citizens will have the Department's rate protection. For as the City believes it documented for the Federal Communications Commission, Boston citizens currently enjoy neither the protections of

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<sup>2</sup> The reasons for the Commission's 2002 revocation of the City's regulatory jurisdiction, *i.e.*, was that Cablevision had demonstrated effective competition from RCN under 47 C.F.R. § 905(b)(4), or the LEC test. ["(4) A local exchange carrier or its affiliate (or any multichannel video programming distributor 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."]

<sup>3</sup> The FCC's Cable Bureau released a Memorandum Opinion and Order, granting the 1997 Cablevision Effective Competition Petition ("*Cablevision Order*"). The Bureau's *Cablevision Order* stated that Cablevision had demonstrated effective competition from RCN under 47 C.F.R. § 905(b)(4), the fourth effective competition test (the "LEC test"). The Bureau rejected the City's arguments that it would be premature to determine that effective competition existed in the Boston market, and dismissed the City's arguments that RCN was not "offering service" and providing effective competition as defined under the Commission's rules.

<sup>4</sup> *In re Cablevision of Boston, Inc. Petition for Determination of Effective Competition Application for Review*, Memorandum Opinion and Order, CSR 5048-E, DA 02-70, 17 FCC Rcd 4772, 4776 at ¶ 14. (March 13, 2002) ("*Cablevision Review Order*")

<sup>5</sup> A copy of the FCC's Order is attached here as Exhibit A. Insert order, *See also FCC to allow Boston to regulate basic cable rates, Boston .com* April 10, 2012 available at [http://articles.boston.com/2012-04-10/business/31311492\\_1\\_basic-cable-rates-comcast-local-regulation](http://articles.boston.com/2012-04-10/business/31311492_1_basic-cable-rates-comcast-local-regulation) (last visited August 27, 2012)

a competitive marketplace, nor the rate regulation protection of the Department. The absence of either has led to Boston consumer paying more for identical programming than their suburban neighbors, that are afforded one of these protections.<sup>6</sup>

#### 4. **Basis for Intervention**

The City is well aware that under Massachusetts regulations [801 C.M.R. § 1.01(9)] that it is not automatically entitled to be a party to a cable rate proceeding.<sup>7</sup> Therefore, pursuant to 220 C.M.R.1.03(1) of the Rules of Practice and Procedure of the Department, Boston hereby petitions the Department for leave to intervene as a party in this proceeding. In support of its Petition, Boston offers as follows:

- 4.1 The City has filed this Petition to Intervene in a timely manner.
- 4.2 Mayor Thomas M. Menino serves as the Licensing Authority for cable services in the City pursuant to Commonwealth law.
- 4.3 In his capacity as Issuing Authority, Mayor Menino issued a cable license to Comcast to provide cable service in the City on October 8, 2010. The license does not expire until October 8, 2015
- 4.4 Mayor Thomas M. Menino negotiated both the current license with Comcast and the license under which the company has operated in Boston for the previous decade.
- 4.5 Mayor Thomas M. Menino has directed staff on a regular basis to take all steps necessary to protect Boston's cable consumers in the absence of meaningful competition. Among these efforts, the Mayor negotiated a rebate to Boston ratepayers of almost one million dollars in 2010, despite the City's limited oversight of cable rates.
- 4.6 Michael Lynch is Director of Mayor Thomas M. Menino's Office of Cable & E-Government. In this role, Mr. Lynch is charged with the day-to-day oversight of cable operations in the City of Boston. Lynch is also Mayor Menino's lead staff professional on Boston's efforts to protect cable consumers.
- 4.7 As part of his efforts to protect cable consumers, Mayor Thomas M. Menino directed Mr. Lynch to pursue a decade old error by the Federal Communications

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<sup>6</sup> For a fuller discussion and basis for this assertion see the research paper by Front Range Consulting commissioned by the City and filed in the above referenced FCC proceeding, a copy of which is attached hereto as Exhibit B and made a part hereof.

<sup>7</sup> 801 C.M.R. § 1.01(9). *See also* DTC 12-2 Letter Notice to Issuing Authorities at 2.

Commission in its 2002 holding that there was effective competition in Boston.<sup>8</sup> As referenced above, those efforts have been partially successful to date, and the City hopes that rate regulation will soon return to the Boston system.

- 4.8 Cable consumers located within the City of Boston could be substantially affected by the outcome of this proceeding. A research paper that was commissioned by the City from Front Range Consulting found that consumers in Boston, with no rate protection, paid \$24 million dollars more over a 4 year period (2008 to 2011) than their neighbors for virtually identical programming. The difference being that their neighbors were protected by the Department's rate regulations. A full copy of the report as filed with the Federal Communications Commission is attached hereto as Exhibit B and made a part hereof.
- 4.9 If rate regulation is returned to the Boston system, the current proceeding before the Department will be addressing not only the cost of basic programming, but also installation and equipment rates that will likely be applied to the Boston system when regulation is restored. The City has several concerns with the FCC Form 1205 as filed and believes that the Form 1205 does not follow the rules set by the FCC.
- 4.10 If granted leave to join this matter, the City intends to participate fully, including the filing of testimony, participation in discovery and hearings, and the filing of post-hearing briefs.

## **5. Party For Service**

5.1 All correspondence and other communications regarding this proceeding should be served on the following:

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Counsel for the City of Boston, MA

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<sup>8</sup> See Cablevision Order.

WHEREFORE, the City of Boston respectfully requests leave to intervene in the proceeding with all the rights of participation as full parties.

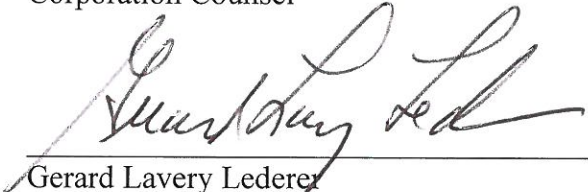
Respectfully submitted,

Mayor Thomas M. Menino  
City of Boston, MA

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By its attorneys

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Counsel for the City of Boston, Massachusetts

## **EXHIBIT A**



**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.<sup>1</sup> The City of Boston (the “City”) filed a petition on May 9, 2011, pursuant to Section 76.916 of the Commission’s rules,<sup>2</sup> seeking re-certification to regulate the basic service tier rates of the incumbent cable system.<sup>3</sup> Comcast Communications, LLC<sup>4</sup> (hereinafter “Comcast” or the “Company”), filed an opposition to the petition,<sup>5</sup> and the City filed a reply.<sup>6</sup> Comcast then filed a surreply and a motion for its acceptance.<sup>7</sup> Our rules require that the City’s petition make a clear showing that the reasons for our 2001 revocation no longer pertain.<sup>8</sup> 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.

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

<sup>2</sup> 47 C.F.R. § 76.916.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> Opposition to Petition for Recertification (“*Opposition*”).

<sup>6</sup> City of Boston Reply to Opposition (“*Reply*”).

<sup>7</sup> 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.

<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup> 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.”<sup>11</sup>

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.”<sup>12</sup> Second, the LEC’s video service area must have a substantial geographic overlap with the incumbent cable operator’s franchise area.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> Finally, the LEC must be offering video service that is “comparable” to the incumbent cable operator’s.<sup>16</sup>

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<sup>9</sup> 47 C.F.R. § 76.906.

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

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

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> *Cable Reform Order*, 14 FCC Rcd at 5304, ¶ 12.

<sup>15</sup> *Id.* at 14 FCC Rcd at 5305, ¶ 13.

<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> We find this unconvincing. The list does include RCN's predecessor, RCN-BecoCom, Inc.,<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> RCN has made similar statements to its subscribers, the Massachusetts Department of Telecommunications and Cable, and this Commission.<sup>22</sup> The current web page of "RCN Boston" unequivocally offers "phone service."<sup>23</sup> 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.

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

<sup>18</sup> Petition at 17.

<sup>19</sup> Opposition at 4.

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

<sup>21</sup> 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."

<sup>22</sup> Opposition at 4-5, Exhs. 3, 6, 7.

<sup>23</sup> 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.<sup>24</sup> The goal of Congress was “to restrain cable rates and stimulate quality cable services.”<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> Our decision deregulating Boston in 2001 was such a decision.<sup>28</sup> 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.”<sup>29</sup> 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.”<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> Comcast obtained a statement from RCN to the effect that RCN now passes 32.1 percent of the households in Boston.<sup>33</sup> 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.<sup>34</sup>

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<sup>24</sup> *Cable Reform Order*, 14 FCC Rcd at 5303, ¶ 10.

<sup>25</sup> *Id.* at 5304, ¶ 11.

<sup>26</sup> *Id.* at 5304, ¶¶ 11-12.

<sup>27</sup> 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 Commc’n, LLC*, 23 FCC Rcd 10073, 10077, ¶ 11 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 12905, 12906-07, ¶ 7 (2007).

<sup>28</sup> *Bureau Order.*, 16 FCC Rcd at 14061, ¶ 15.

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

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

<sup>31</sup> Petition at 11-13.

<sup>32</sup> *Id.* at 19.

<sup>33</sup> Opposition at 8 (using a household number from the 2010 Census).

<sup>34</sup> *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.<sup>35</sup> 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."<sup>36</sup> 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.<sup>37</sup>

### 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.<sup>38</sup> 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.<sup>39</sup> 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."<sup>40</sup>

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.

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<sup>35</sup> 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.

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

<sup>37</sup> 47 C.F.R. § 76.916(b)(3).

<sup>38</sup> Opposition at 9-15.

<sup>39</sup> 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.

<sup>40</sup> *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.<sup>41</sup>

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.<sup>42</sup> 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.<sup>43</sup>

#### 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.<sup>44</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>41</sup> 47 C.F.R. § 76.911(b).

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

<sup>43</sup> See Reply at ii n.2, 7 n.17.

<sup>44</sup> 47 C.F.R. § 0.283.

## **EXHIBIT B**





# Report to the City of Boston Regarding Comcast's Basic Service Cable Rates

Prepared by Front Range Consulting, Inc.  
April, 2011



## **I. Introduction and Summary**

This Report on the Comcast Basic Service<sup>1</sup> Cable Rates within the City of Boston was prepared upon request of the Mayor's Cable, Video and Web Service department. Specifically, Front Range Consulting, Inc. ("FRC") was requested to analyze the trends in the Comcast Basic Service Cable Rates from 2002 to the present.

FRC believes that Comcast, on being freed from the FCC rate regulation process by the FCC's Order finding Boston subject to Effective Competition, has collected from Basic Service customers approximately \$24 Million more than it charged neighboring Basic Service customers over the time period of 2008 through 2011. The Effective Competition determination was made by the FCC because of the existence of RCN as a competitive wireline cable system. (The FCC found that Cablevision\Comcast had demonstrated the presence of effective competition from RCN under 47 C.F.R. § 905(b)(4), the fourth effective competition test (the "LEC test").)

In addition to the City's legal objections to the FCC's finding of effective competition, the existence of RCN has done little to impact Comcast's ability to raise Basic Service rates above normal levels. As reflected in Chart 3 and Table 3, Comcast's Basic Service rates and percentage increases are remarkably lower in other communities in the Boston area that are still rate regulated and lack a wireline competitor.

According to the FCC Cable Price reports, the presence of a wireline competitor typically has caused rates to be lower in communities where only direct broadcast satellite exists as a competitor. The allure of price competition in Boston does not exist and will allow Comcast to continue its recent historical practice of significantly above normal rate increases for the Basic Service tier.

## **II. Recommendations**

FRC recommends that the City consider several options to impact and/or control the apparent unfettered ability of Comcast to raise its price for the Basic Service tier. The options include:

- Filing the necessary paperwork with the FCC to re-certify the City's rate regulatory authority;
- Negotiate with Comcast to withdraw this proposed rate increase and enter into a long-term rate settlement with the City; and/or

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<sup>1</sup> Basic Service cable is the lowest tier of service that can be purchased by a subscriber and contains all of the over-the-air broadcast channels plus other channels designated by the cable operator. It does not typically contain satellite delivered channels such as CNN, ESPN or pay channels like HBO and Showtime.



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- Explore federal legislative solutions to return rate regulatory authority to cities to prevent the abusive rate increases as a result of less than effective competition from other video providers.

### **III. Historical Perspective of Cable Franchises in Boston**

Cable television service began in Boston with the award of the first cable franchise to Cablevision Systems in 1982. Cablevision Systems held the franchise for the City of Boston until January 5, 2001 when the system was transferred to AT&T Broadband. AT&T Broadband was the cable operator until it was acquired by Comcast Cable in December of 2002. Comcast and the City concluded a renewal licensee agreement with the City in October 2010. The City also has an Open Video System (“OVS”) agreement with RCN Corporation to serve several small areas of the City as a competitive provider to Comcast.

### **IV. Summary of Basic Service Rates**

Basic Service is the lowest tier of service offered by a cable operator and in the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>2</sup> as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules and the Basic Service tier is rate regulated. The Basic Service tier typically contains off-air broadcast stations with public, educational and governmental access stations. The Basic tier also typically contains home shopping channels. The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>3</sup>

In the case of Boston’s Basic Service rates, the City is not allowed under FCC rules to regulate the Comcast’s Basic Service rates based on a filing made by Cablevision System asserting that the Boston system was subject to Effective Competition.<sup>4</sup>

For several years under a rate agreement with AT&T Broadband in December 2001, the Basic Service rates remained relatively low with only modest increases limited to the lesser of 6.5% or the weighted average increases in other AT&T franchises in Massachusetts. The following chart depicts those actual increases in the Basic Service rate from 2002 to 2011.

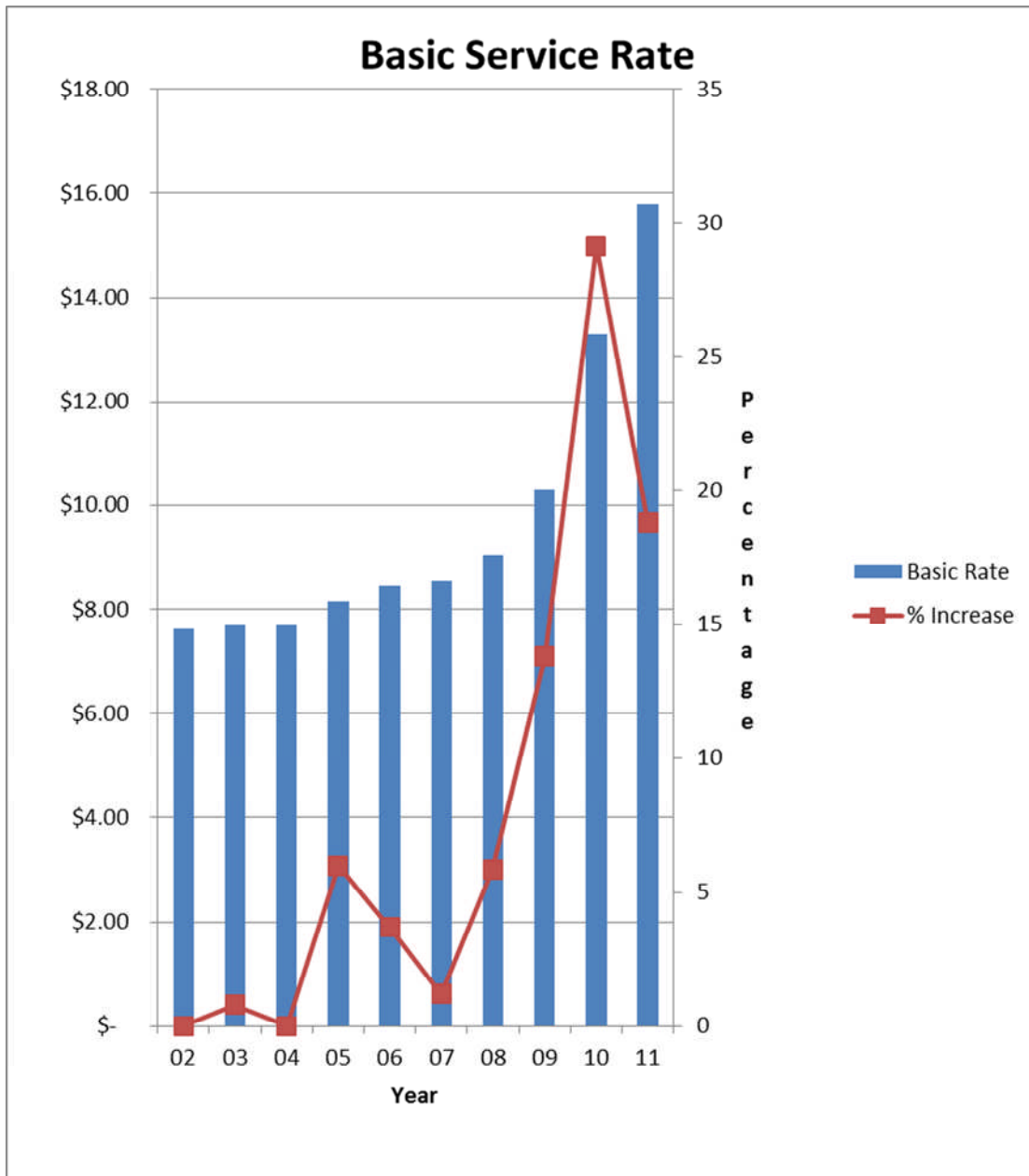
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<sup>2</sup> 47 C.F.R. § 76.906.

<sup>3</sup> See 47 C.F.R. §§ 76.906-.907(b).

<sup>4</sup> See Section VI below for a complete description.

Chart 1



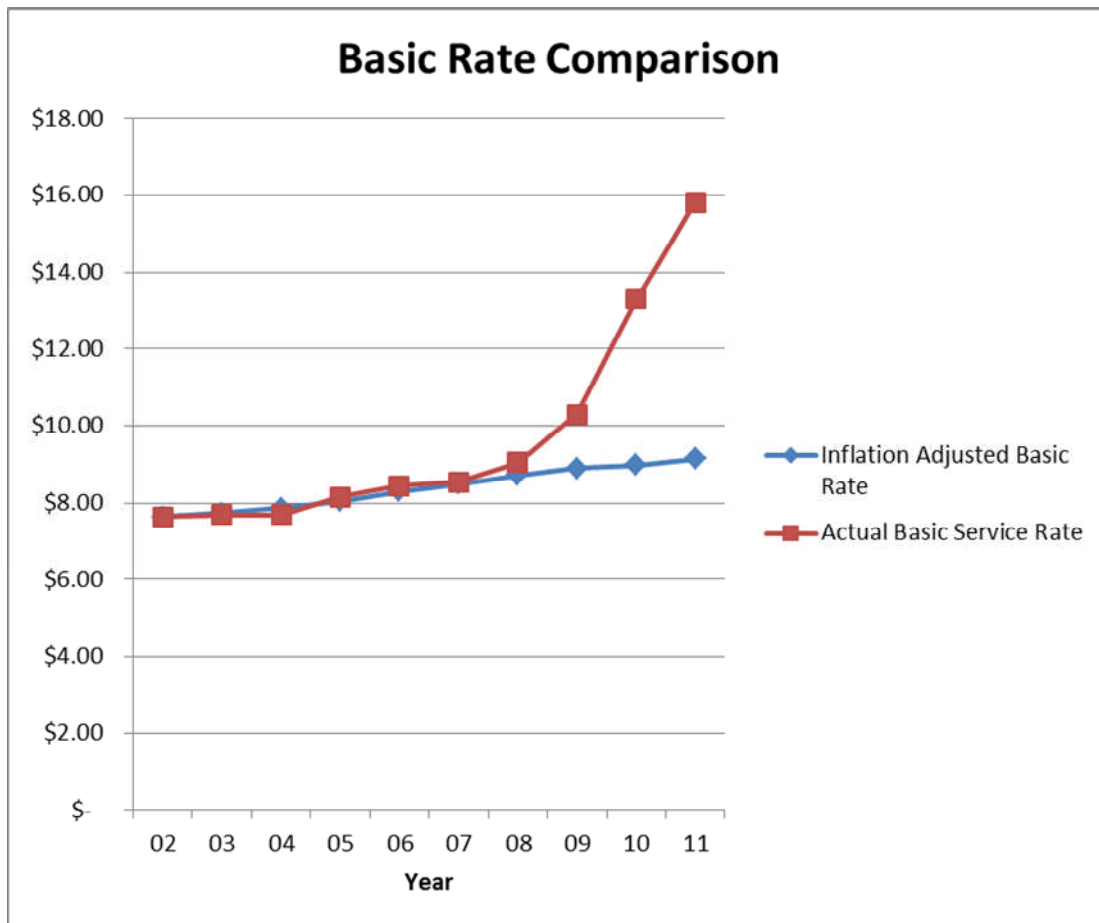
Beginning in 2002, the first year for the rate settlement, the Basic Service rate never increased by more than 6% until 2009 when it increased almost 14%, almost 30% in 2010 and another almost 19% in 2011. Table 1 below shows the actual Basic Service rates and the increases.

**Table 1**

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
<b>Rate</b>	\$7.63	\$7.69	\$7.69	\$8.15	\$8.45	\$8.55	\$9.05	\$10.30	\$13.30	\$15.80
<b>Increase</b>		\$0.06	\$0.00	\$0.46	\$0.30	\$0.10	\$0.50	\$1.25	\$3.00	\$2.50
<b>Percentage</b>		0.8%	0.0%	6.0%	3.7%	1.2%	5.9%	13.8%	29.1%	18.8%

Beginning in 2008, it appears that Comcast has changed its rate strategy with respect to the Basic Service rate. Comcast has significantly increased its Basic Service rate way above the inflation rate not being constrained by the FCC rate regulation scheme because of Effective Competition finding. One way to see what the FCC rate regulation scheme would have done to the Basic Service rates is to apply the FCC inflation rates to the Basic Service rate from 2002. Chart 2 graphs the estimated Basic Service rate compared to the actual Basic Service rate.

**Chart 2**



As this chart depicts, the actual Basic Service rate tracked closely with the estimated Basic Service rate using the FCC inflation factors until 2009, 2010 and 2011 when Comcast took very large rate increases. Table 2 details the supporting data.

**Table 2**

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
<b>Actual</b>	\$7.63	\$7.69	\$7.69	\$8.15	\$8.45	\$8.55	\$9.05	\$10.30	\$13.30	\$15.80
<b>Estimated</b>	\$7.63	\$7.73	\$7.86	\$8.05	\$8.29	\$8.50	\$8.72	\$8.90	\$8.98	\$9.14
<b>Difference</b>	-	\$-0.04	\$-0.17	\$0.10	\$0.16	\$0.05	\$0.33	\$1.40	\$4.32	\$6.66

Assuming the estimated Basic Service rate approximates what a regulated rate would be, then currently Comcast is charging its Basic Service rate customers a rate that is almost 75% higher than the estimated regulated rate.

## V. Summary of Surrounding Area Basic Service Rates

From data supplied by Comcast, Basic Service rates for the surrounding area have been compared to the Basic Service rate in Boston. Chart 3 below depicts the Basic Service rates in the area. Boston, Brookline and Everett have similar Basic Service rates and are substantially higher than the rates for Cambridge, Chelsea and Malden.

Chart 3

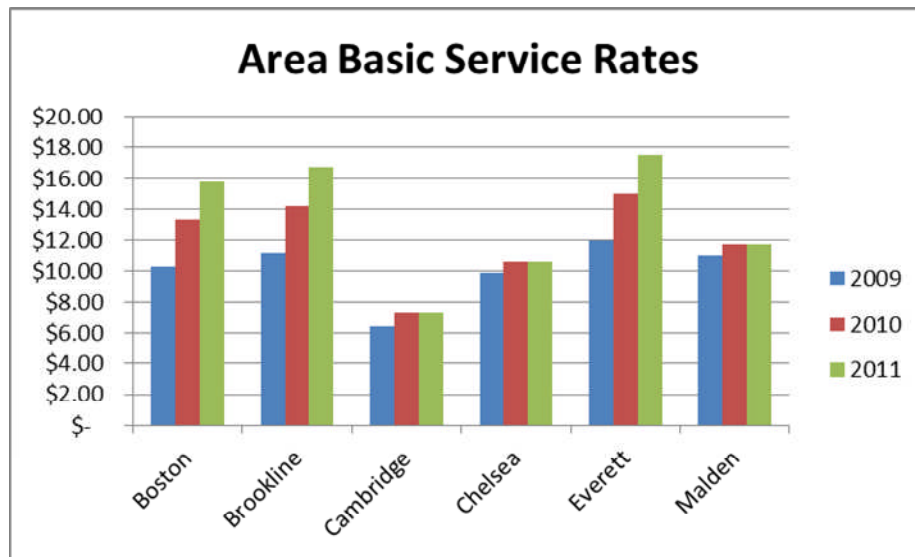


Table 3 depicts the actual rate data analyzed.

Table 3

	Boston	Brookline	Cambridge	Chelsea	Everett	Malden
<b>2009</b>	\$10.30	\$11.20	\$6.45	\$9.95	\$12.00	\$11.05
<b>2010</b>	\$13.30	\$14.20	\$7.30	\$10.63	\$15.00	\$11.72
<b>Increase</b>	29.1%	26.8%	13.2%	6.8%	25.0%	6.1%
<b>2011</b>	\$15.80	\$16.70	\$7.30	\$10.63	\$17.50	\$11.72
<b>Increase</b>	18.8%	17.6%	0.0%	0.0%	16.7%	0.0%

According to information from the Massachusetts Department of Telecommunications and Cable (“DTC”), the communities of Cambridge, Chelsea and Malden are still rate regulated by the DTC under the FCC Form 1240 methodology thereby suggesting that the lower increases and lower Basic Service rates are a result of using primarily an inflation based increase scheme. The other communities including Boston are not regulated under the FCC regulatory scheme and are not constrained by primarily inflationary increases. Comparing the range of the rate regulated rates in the surrounding areas, \$7.30 to \$11.72, the estimated rate for Boston using the FCC inflationary adjustments of \$8.98 (as shown on table 2) would fit with that rate regulated range.

## VI. Summary of Surrounding Area Basic Service Channel Line-ups

One thing that can cause differences in rates for a tier of service is the channel line-up for that tier and the attending programming carriage charges (primarily license fees or retransmission consent fees). Table 4 below shows the channel line-ups<sup>5</sup> for Boston and the two rate regulated communities of Cambridge and Chelsea.

**Table 4**

Boston			Cambridge			Chelsea		
LN	Ch #	Description	Ch #	Description		Ch #	Description	
1	2	WGBH-2 PBS	2	WGBH-2 PBS		2	WGBH-2 PBS	
2	3	HSN	3	HSN		8	HSN	
3	4	WBZ-4 (CBS)	4	WBZ-4 (CBS)		4	WBZ-4 (CBS)	
4	5	WCVB-5 (ABC)	5	WCVB-5 (ABC)		5	WCVB-5 (ABC)	
5	6	NE Cable News	6	NE Cable News		6	NE Cable News	
6	7	WHDH-7 (NBC)	7	WHDH-7 (NBC)		7	WHDH-7 (NBC)	
7	8	TV Guide	8	Access				
8	9	BNN TV	9	CCTN				
9	10	WLVI-56 (CW)	12	WLVI-56 (CW)		12	WLVI-56 (CW)	
10	11	NHPTV (PBS)	11	WENH-11 (PBS)		11	WENH-11 (PBS)	
11	12	LO						
12	14	WSBK-38 (IND)	14	WSBK-38 (IND)		14	WSBK-38 (IND)	
13	18	WZMY-50 (MyTV)	18	WZMY-50 (MyTV)		18	WZMY-50 (MyTV)	
14	19	WPX-68 (ION)	15	WPX		9	WPX-68 (ION)	
15	22	Muni Channel						
16	23	Community Access						
17	24	Ed. Channel						
18	25	WFXT-25 (FOX)	13	WFXT-25 (FOX)		13	WFXT-25 (FOX)	
19	26	Cuencavision						
20	27	WUNI-27 (UNI)	17	WUNI-27 (UNI)		17	WUNI-27 (UNI)	
21	44	WGBX-44 (PBS)	16	WGBX-44 (PBS)		10	WGBX-44 (PBS)	
22	46	WWDP-SD	71	WWDP		72	WWDP-SD	
23	47	QVC				71	QVC	
24	50	WUTF-66 (Telefutura)	21	WUTF-66 (Telefutura)		21	WUTF-66 (Telefutura)	
25	51	Boston City Council						
26	52	WMFP-62 (IND)	20	WMFP-62 (IND)		20	WMFP-62 (IND)	
27	53	WNEU-60 (Telemundo)	19	WNEU-60 (Telemundo)		19	WNEU-60 (Telemundo)	
28			10	CCTN		3	Public Access	
29			22	CCTN		15	Ed Access	
30			58	RTPi (Internet TV)		16	Govmnt Access	
31			98	EDACC				
32			99	EDACC				

<sup>5</sup> The Table identifies only the analog Basic Service line-up and ignores any digital channels part of the Basic Service tier.

Table 4 shows 27 channels for Boston, 25 channels for Cambridge and 22 Channels for Chelsea. Table 5 shows the types of channels by category for each of the three areas.

**Table 5**

	Boston	Cambridge	Chelsea
<b>Broadcaster / Regional News</b>	20 <sup>6</sup>	18	17
<b>Home Shopping</b>	2	1	2
<b>PEG</b>	4	6	3
<b>Guide</b>	1	0	0

If you ignore the two low power broadcasters in Boston and Cambridge, all three areas have identical broadcast and regional news programming suggesting there is no basis for any price discrepancies as it is reasonable to assume that all three areas would have the same retransmission fees if any. There are no channels that would appear to have any license fee except for the Guide channel in Boston which should be a very minor license fee if any. Home Shopping channels typically do not have any license fees and will return a percentage of their sales to the cable operator as an enticement for carriage. PEG channels do not charge for carriage as they are required under the franchise agreements. As a result, it does not appear that the channel line-ups for the three areas would be the reason for any price differences between Boston, Cambridge and Chelsea.

## VII. 2001 Rate Settlement with AT&T Broadband

Cablevision filed its rate forms (FCC Form 1240) with the DTC on October 2, 2000 prior to the transfer of the system to AT&T Broadband on January 5, 2001. AT&T Broadband assumed responsibility for working with the DTC and the City in getting this rate form approved. Also pending before the DTC was a FCC Form 1235 (system upgrade) filed by Cablevision. During that Form 1240 approval process, a dispute arose regarding the network upgrade fund. As part of a settlement agreement between the City and AT&T Broadband, AT&T Broadband agreed to reduce the current Basic Service from \$9.38 to \$7.63, almost a 20% reduction. Additionally, the settlement contained the following provision:

Between January 1, 2003 and May 11, 2008, the BST [Basic Service Tier] rate will not be increased each calendar year by more than the lesser of i) 6.5% per year, or ii) the weighted average of increases in BST Rates in other AT&T franchises in Massachusetts.

It was this provision that controlled and moderated the Basic Service rates for Boston until 2008. As this provision of the settlement agreement expired in 2008, Comcast was free to increase its

<sup>6</sup> Includes Cuencavision a low power Boston broadcaster.





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rates without constraint as the FCC had granted the Effective Competition petition filed by Cablevision.

## **VIII. 2001 Effective Competition Order**

Cablevision submitted Petition for Special Relief requesting a determination of Effective Competition in the City of Boston's franchise area. The Petition was based on the competitive cable services offered by RCN in the Boston area and RCN's affiliation with a Local Exchange Carrier ("LEC"). The Cable Act provides that an incumbent cable operator can petition the FCC for a determination of effective competition if the competing provider is affiliated with a LEC irrespective of the penetration of the competing provider. The FCC released its Order on July 20, 2001 granting the Petition for Determination of Effective Competition over the objection of the City. In paragraph 17, the FCC stated:

"... As Cablevision has submitted sufficient evidence demonstrating that its cable system serving Boston, Massachusetts is subject to LEC effective competition from RCN, its petition is granted, and the certification of the City of Boston is revoked."

Thirty days after the FCC released its Order, the City filed for an Application for Review requesting that the FCC reconsider the factors relied upon in its July 2001 Order. In part, the City asked the FCC to consider the LEC test for Incumbent LECs ("ILEC") and not apply this test to Competitive LECs ("CLEC"). The City's basis was that a CLEC might not fully build out its system within the franchise area. The FCC rejected this suggestion as well as the other basis submitted by the City and denied the Application for Review in March, 2002. With this final determination of Effective Competition, Comcast is allowed to adjust its rates in an unregulated fashion except for the agreement contained in the rate settlement with AT&T Broadband.<sup>7</sup>

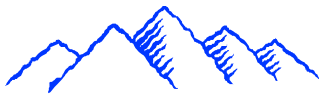
## **IX. 1992 and 1996 Cable Act Rate Regulation Overview**

The era of cable rate regulation began with the passage of the 1992 Cable Act where cable operators were required to unbundle equipment and service rates and to set their equipment rates based on costs and the service rates (Basic Service and Expanded Basic Service<sup>8</sup>) were typically initially set by an FCC derived formula. The Basic Service and Equipment and Installation rates were reviewed and approved by the Local Franchising Authority while the Expanded Basic Service rate was reviewed and approved by the FCC. The FCC also was responsible for

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<sup>7</sup> As an interesting side note, RCN's franchise agreement with the City was canceled in part because RCN could not meet its build out requirements and was converted back to an OVS agreement and eliminated all build out requirements. While RCN has continued to grow slightly, its footprint with the City is fairly small compared to the service area of Comcast limiting the competitive impacts.

<sup>8</sup> Expanded Basic Service was the next most purchased tier of service and typically included satellite delivered services like ESPN and CNN. Premium movie services like HBO and Showtime and other pay per channel services were not regulated under the Cable Act of 1992.



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adjudicating appeals by the cable operators of LFA decisions regarding Basic Service and Equipment and Installation rates.

In the fall of 1993, cable operators were required to submit the FCC Form 393 to the LFA's to determine the Basic Service and Equipment and Installation rates. In general the Form 393 used the cable operator's total revenues for all Basic, Expanded Basic and Equipment and Installation rates and compared those per channel rates to a benchmark rate. If the cable operator's per channel rates was greater than the benchmark rate, the cable operator was required to reduce its per channel rate by 10% otherwise it was required to reduce its rate to the benchmark rate. The FCC Derived formulas were all done on a per channel basis to account for the fact that there was no uniformity across the country in the number of channels carried on each of the regulated tiers.

In early 1994, the FCC revised the FCC Form 393 rate regulation process and revised the process by requiring cable operators to use a new FCC Form 1200. This Form 1200 mirrored the FCC Form 393 process but used a revised benchmark formula that included variables such as: census income, number of remote controls, and number of additional outlets. The Form 1200 also included another rate reduction of 7% like the 10% included in the Form 393 process essentially reducing cable rates by 17% (before any inflationary increases) as a result of rate regulation of Basic and Expanded Basic rates.

Cable Operators were able to recover inflationary and programming cost increases by submitting FCC Form 1210 as often as every 90 days to the LFA or the FCC. This Form allowed cable operators to keep current on their regulated rates for cost increases. This Form 1210 process became cumbersome for both the cable operators and the LFAs as it was a continuous stream of rate filings before the LFAs and the FCC where rate filings were still being reviewed while new forms were being submitted.

In recognition of this cumbersome problem, the FCC designed a new FCC Form 1240 that allowed cable operators to choose to use the quarterly Form 1210 process or a revised annual process, FCC Form 1240. The Form 1240 process allowed cable operators to estimate its inflationary and programming costs for the next year and true-up those estimates in the next annual filing. The process became more defined for the LFAs under the Form 1240 process as the cable operator had to file the Form 1240 on the same date each year and the LFA had to issue any final order before the next annual filing. Most if not all regulated rates were set using the Form 1240 since it was released in July of 1996.

Congress revised the Cable Act in 1996 to reflect many of the changes that were occurring in the cable TV arena. Two important provisions were changed in 1996: (1) deregulation of the Expanded Basic Service rates in March of 1999 and (2) the revision of the "effective competition" test which deregulated all cable rates in the affected local jurisdiction.



## **X. Summary and Conclusions**

FRC, based on the foregoing, believes Comcast has used the FCC Effective Competition determination to increase rates far in excess of the normal inflationary increases allowed under the FCC's rate regulatory scheme. Instead of the presence of a wireline competitor and direct broadcast satellite throttling rate increases, Comcast has been able to increase rates significantly for the lowest level of service, Basic Service. FRC estimates that from 2008 through 2011, Comcast has over-collected approximately \$24 Million from Basic Service customers by being freed from the FCC's rate regulatory scheme. According to the FCC Cable Price reports, the presence of a wireline competitor typically has caused rates to be lower in communities where only direct broadcast satellite exists as a competitor. The allure of price competition in Boston does not exist and will allow Comcast to continue its recent historical practice of significantly above normal rate increases for the Basic Service tier.

Further, other Boston area cable systems controlled by Comcast and which are still rate regulated for the same channel line-up on Basic Service have significantly lower Basic Service rates.