

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of CoxCom, LLC d/b/a Cox Communications

Petition For Determination of Effective Competition

MB 12-1
CSR ____-E

MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
MOTION FOR ABEYANCE

Commonwealth of Massachusetts
Department of Telecommunications and Cable

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I. Introduction

The Massachusetts Department of Telecommunications and Cable (“MDTC”)¹ respectfully requests that the Media Bureau (“Bureau”) of the Federal Communications Commission (“Commission”) hold the above-captioned proceeding² in abeyance (“Motion”) pending resolution of a pending appeal to the United States Court of Appeals for the First Circuit of the Commission’s recent decision finding that over-the-top (“OTT”) video streaming services satisfy section 623(l)(i)(D) (“LEC Test”),³ the decision upon which the Cox Petition relies for its showing. An abeyance pending the Court’s decision is both equitable and in accord with the

¹ The MDTC “is the certified ‘franchising authority’ for regulating basic service tier rates and associated equipment costs in Massachusetts.” 207 C.M.R. § 6.02; *see also* MASS. GEN. LAWS ch. 166A, §§ 2A, 15 (establishing the MDTC’s authority to regulate cable rates). Also, the MDTC regulates telecommunications and cable services within the Commonwealth of Massachusetts and represents the Commonwealth before the FCC. MASS. GEN. LAWS ch. 25C, § 1; MASS. GEN. LAWS ch. 166A, § 16.

² *In re Petition of CoxCom, LLC d/b/a Cox Commc’ns, LLC for a Determination of Effective Competition*, MB Docket No. 12-1, CSR ____-E (Dec. 18, 2019) (“Cox Petition”).

³ *In re Petition for Determination of Effective Competition in 32 Mass. Cmty. & Kauai, HI*, MB Docket No. 18-283, CSR 8965-E (Oct. 25, 2019) (“Charter MO&O”).

Commission's longstanding authority to allow such requests because it would save the resources of both the Bureau and of the parties to this proceeding, and would not materially prejudice the parties or the Commission. Indeed, the Bureau has the authority to hold this proceeding in abeyance, and as discussed below, extraordinary circumstances exist to do so.⁴ Given that the basis for this Motion is the avoidance of any unnecessary expenditure of resources by either the Commission or the parties to this proceeding and given the short time frame for the parties to file their opposition and reply in this proceeding,⁵ the MDTC requests expedited review of this Motion.⁶

II. The Bureau Should Hold this Proceeding in Abeyance

The Commission has broad authority to hold a proceeding in abeyance.⁷ The Bureau also has this authority, pursuant to its delegated authority.⁸ The Commission holds proceedings in abeyance for judicial and administrative efficiency and to avoid a waste of resources.⁹ The Bureau should hold this proceeding in abeyance on these same grounds.

⁴ See 47 U.S.C. § 154(i)-(j); 47 C.F.R. § 76.7(d).

⁵ Comments and oppositions to the Cox Petition are due twenty days after publication thereof, pursuant to 47 C.F.R. § 76.7(b)(1), and Cox must file any replies to oppositions or comments ten days after the filing of any oppositions or comments, pursuant to 47 C.F.R. § 76.7(c)(3).

⁶ The Bureau may expedite its review of motions filed pursuant to 47 C.F.R. § 76.7(d), pursuant to the Commission's broad authority to manage its proceedings granted by 47 U.S.C. § 154(i)-(j) and 47 C.F.R. § 1.1, which the Commission has delegated to the Bureau pursuant to 47 C.F.R. § 0.283 and 47 C.F.R. § 0.061(h).

⁷ 47 U.S.C. § 154(i)-(j) (affording the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

⁸ 47 C.F.R. § 0.283. See *In re Satellite Broadcasting & Commc'n Ass'n Petition for Declaratory Ruling*, DA 12-756, CSR 8624-O (May 14, 2012) (Media Bureau granted motion to stay public comment period pending a Commission decision in a related matter).

⁹ See *In re Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Report & Order*, 29 FCC Rcd. 6567, 6669-70 (2014) (directing the Media Bureau to hold various petitions in abeyance).

In the Cox Petition, CoxCom, LLC d/b/a Cox Communications (“Cox” or “Petitioner”) seeks a determination that it faces “effective competition” under the LEC Test in the Town of Holland, because the Commission recently ruled that Charter Communications, Inc. (“Charter”) faces effective competition in 32 of Charter’s Massachusetts franchise areas due to the presence in those areas of a streaming service, DIRECTV NOW,¹⁰ and because “the same is true in Holland.”¹¹ The MDTC has challenged the findings and arguments upon which the Commission based its decision in the Charter MO&O, pursuant to 47 U.S.C. § 402.¹² The Court’s resolution of those issues could impact the Bureau’s consideration of the Cox Petition. In addition, the Court’s acceptance of any of the MDTC’s challenge after the Bureau renders its decision in this proceeding, might require the Bureau’s reconsideration of its decision in this proceeding. In either case, an abeyance of this proceeding pending the First Circuit’s ruling would save the resources of both the Bureau and of the parties to this proceeding.

The Commission and its Bureaus have granted motions for abeyance and held proceedings in abeyance on their own motions for precisely the reason of efficiency presented by this case: the pendency of a judicial appeal of issues relevant to the current proceeding.¹³ The

¹⁰ Cox adopts the Charter MO&O’s acceptance of the currently available AT&T streaming video service, AT&T TV NOW, as a mere rebranding of AT&T’s now defunct streaming service, DIRECTV NOW. Cox Petition at iii n.1. This is among the findings in the Charter MO&O to be considered by the First Circuit.

¹¹ Cox Petition at 2.

¹² Petition for Review, *Mass. Dep’t of Telecommc’ns & Cable v. FCC*, No. 19-2282 (1st Cir. filed Dec. 23, 2019) (“MDTC Petition for Review”).

¹³ *See, e.g., MCI Telecommc’ns Corp. v. Pac. Bell*, DA 99-1863, 14 FCC Rcd. 15,362 (Sept. 13, 1999) (Common Carrier Bureau granted Joint Motion to Hold Proceedings in Abeyance pending outcome of an appeal of a similar rule adopted by the California Public Utilities Commission to the Tenth Circuit); *Call Am. Inc. v. Pac. Bell*, DA 91-105, 6 FCC Rcd. 699 (Feb. 7, 1991) (Common Carrier Bureau held proceeding in abeyance on its own motion pending outcome of an appeal of relevant issues to the D.C. Circuit).

Commission and its Bureaus have similarly granted motions for abeyance pending the resolution of other Commission proceedings that would decide issues of relevance to the proceeding at hand.¹⁴ The possibility of some change to the Commission’s ruling in the Charter MO&O is real, as that proceeding tackled a novel issue, requiring the interpretation of statutes and regulations in light of new technologies and the resulting changes in consumer and multichannel-video-programming-distributor markets.¹⁵ As the Commission wrote explaining its decision to take up the Charter Petition in Docket No. 18-283, which would otherwise have been addressed by the Media Bureau: that proceeding “involve[d] ‘novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.’”¹⁶ The Commission’s decisions holding matters in abeyance pending the resolution of the underlying issue in pending judicial or administrative reviews reflect a position common across executive branch agencies,¹⁷ as well as

¹⁴ See, e.g., *Donald J. Elardo, Stephen C Garavito*, DA 94-1176, File No. E 92 88S, 9 FCC Rcd. 7912 (Oct. 7, 1994) (Common Carrier Bureau granted petitioner’s Motion for Abeyance pending outcome of petitioner’s application for review of Bureau’s order to the full Commission, in order to “avoid unnecessary expenditure of time and resources by the parties and this Commission”); See *In re Satellite Broadcasting & Commc’ns Ass’n*, ¶ 2 (Media Bureau granted motion to stay public comment period pending a Commission decision in a related matter); *In re Policies & Rules Concerning Unauthorized Changes of Consumers’ Long Distance Carriers*, CC Docket No. 94-129, 11 FCC Rcd. 856 (Sept. 5, 1995) (Commission on its own motion stayed elements of a Report and Order pending its resolution of related issues raised by petitioners in motions for reconsideration).

¹⁵ The Court will also consider the Commission’s procedure under the Administrative Procedure Act, increasing the chance that the Charter MO&O may be overturned.

¹⁶ Charter MO&O, ¶ 4. The Commission also chose to treat the Charter proceeding as “permit-but-disclose” for *ex parte* purposes, because of the likelihood that it “may have effects beyond the specific matter at issue in the Petition.” FCC Public Notice, Media Bureau Action, *Establishment of “Permit-but-Disclose” Ex Parte Procedures for Charter Commc’ns, Inc.’s Petition for Determination of Effective Competition*, MB Docket No. 18-283, CSR 8965-E, DA 18-1154 (Nov. 13, 2018), p. 2.

¹⁷ See, e.g., *Ariz. Pub. Serv. Co. v. The Burlington N. & Santa Fe Ry. Co.*, Surface Transportation Board Decision, STB Docket No. 42091, 2005 WL 79208, ¶¶ 1-2 (Jan. 14, 2005) (STB granted petitioners’ motion for abeyance of petitioners’ challenge to STB-approved rates pending court challenge to those rates); *In re John Crescio, Respondent*, Opinion and Order, Docket No. 5-CWA-98-004, ¶ 2 (Feb. 26, 1999) (EPA granted motion to stay present proceeding pending resolution in a separate proceeding of the identical legal issue at issue in the present proceeding).

federal courts¹⁸ and state agencies.¹⁹ In 1935, one year after the adoption of the Communications Act which established the Commission and granted it the broad authority which allows it to grant motions for abeyance, the U.S. Supreme Court ruled that courts have the power to stay proceedings, that such power stems from “the power inherent in every court to control the disposition of the causes on its docket,” and that the purpose of granting a stay in proceedings should be the “economy of time and effort for itself, for counsel, and for litigants.”²⁰ This power to stay proceedings in one case pending a decision in a different case, the Court found, extends both to situations where the parties in the two cases are different and to situations where the issues to be decided in each case are different but where resolution of those issues in one case would impact the other proceeding.²¹ The Court instructed lower courts to weigh the interests and equities of the parties when deciding whether to stay proceedings, noting that the party seeking a stay “must make out a clear case of hardship or inequity in being required to go

¹⁸ See, e.g., *MCI Worldcom, Inc. v. FCC*, 1999 WL 186362 (May 18, 1999) (D.C. Circuit grants petitioner’s Motion for Abeyance pending petitions for reconsideration before the Commission); *Scofield v. U.S.*, 297 F. Supp. 1353 (D.P.R. 1969) (Court held proceeding in abeyance pending resolution of a related proceeding of the administrative discharge board).

¹⁹ See, e.g., *In re Application of Virg. Elec. Power Co., for Adjustment of Rates & Charges Applicable to Elec. Util. Serv. in N.C.*, Order on Remand, Docket No. E-22, SUB 479 (N.C.U.C.), 322 P.U.R.4th 400 (granting a Motion for Abeyance suspending a rate setting proceeding pending the North Carolina Supreme Court’s decision in an appeal in a separate docket involving similar procedural questions); *Petition of Recipients of Collect Calls from Prisoners at Correctional Insts. in Mass. Seeking Relief from the Unjust & Unreasonable Cost of such Calls*, D.T.C. 11-16, *Interlocutory Order* at 14, 27 (June 14, 2016) (staying a rate proceeding pending resolution of an appeal of the Commission’s ICS Rate Order to the D.C. Circuit to avoid “administrative[] inefficien[cy]”); *In re Petition of Verizon Sw. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exch. Carriers & Commercial Mobile Radio Serv. Providers in Tex. Pursuant to Section 252 of the Commc’ns Act of 1934, as amended, & the Triennial Review Order*, Docket No. 29451, Order No. 8, 2004 (Tex. P.U.C.) (May 2, 2004) (granting a Motion for Abeyance of an interconnection proceeding pending resolution of relevant issues by the D.C. Circuit).

²⁰ *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1935).

²¹ *Id.*

forward, if there is even a fair possibility that the stay . . . will work damage to some one [sic] else.”²²

In this proceeding, the MDTC will suffer the hardship of litigating two petitions before the Bureau,²³ while simultaneously pursuing the same issues in the First Circuit challenging the Charter MO&O. On the other hand, the opposing party in this proceeding, Cox, would suffer little if any harm as a result of the requested abeyance. Should the Bureau ultimately grant Cox’s request in this proceeding, the Petition’s effective date would be the date of its filing, December 18, 2019, regardless of whether the Bureau grants the Petition before or after the First Circuit’s decision.²⁴ In addition, Cox has committed to the MDTC that it will not raise its current rates for regulated services (basic service programming, equipment, and installation) through March 16, 2021.²⁵ Consequently, the grant of this Motion will not delay possible rate increases by the Petitioner that might result from deregulation if the Commission were to grant the Cox Petition in the short-term. Finally, the MDTC has conveyed to Cox its willingness to hold its review of Cox’s December 16, 2019 rate filing in abeyance if the Bureau were to hold the Commission proceeding in abeyance, thus preserving resources at the state level as well as the federal level.²⁶

²² *Id.*

²³ Comcast Cable Communications, LLC filed a petition seeking effective competition in 84 Massachusetts communities two days before the filing of the Cox Petition. *See In re Petition of Comcast Cable Commc’ns, LLC for a Determination of Effective Competition*, MB Docket No. 19-385, CSR 8984-E (Dec. 16, 2019).

²⁴ *In re Charter Commc’ns Entm’t I, LLC, Petition for Determination of Effective Competition in St. Louis, Mo.*, DA 07-3471, CSR 6916-E, ¶ 1 n.5 (MB 2007); *Comcast Cable of Dallas, L.P.*, 20 FCC Rcd. 19,282, ¶ 3 (MB 2005).

²⁵ Cox Petition at 4.

²⁶ Pursuant to federal regulations, Cox submitted an FCC Form 1205 for review despite its decision to not file an FCC Form 1240 seeking programming rate increases. *See* 47 C.F.R. § 76.923(n)(3).

In sum, the grant of this Motion would have no negative impacts on the Petitioner, but requiring the MDTC to move forward would impose clear hardship.

The Commission should consider and grant this Motion pursuant to 47 C.F.R. § 76.7(d) because the pending appeal of the Commission’s ruling in the Charter MO&O constitutes an “extraordinary circumstance[.]”²⁷ When considering other petitions for determination of effective competition, the Commission accepts filings outside of the three described in 47 C.F.R. § 76.7(a)-(c) pursuant to subsection (d) for a variety of reasons, including because a proceeding contained complex numerical research²⁸ or the filings addressed complex facts,²⁹ as well as because new issues had emerged in the proceeding after the filing of the Petition.³⁰ Here, the Commission’s ruling upon which the Petitioner bases its Petition is under judicial review pursuant to a Petition for Review filed after the filing of the Cox Petition.³¹ The Petition for Review seeks review of the complex legal and statistical arguments implicated by the Charter Petition and the responses thereto. As a result of this extraordinary circumstance, the Bureau should accept this Motion for consideration pursuant to 47 C.F.R. § 76.7(d) and, for reasons described herein, grant the Motion.

²⁷ 47 C.F.R. § 76.7(d).

²⁸ *See In re Petition of Time Warner Entm’t-Adv. Newhouse P’ship for a Determination of Effective Competition*, DA 11-495, CSR 7395-E, 26 FCC Rcd. 3840, ¶ 4 (Mar. 17, 2011).

²⁹ *See In re Petition of Time Warner Cable, Inc. for a Determination of Effective Competition*, MB Docket No. 12-8, CSR 8562-E, 28 FCC Rcd. 16,307, ¶ 2 (Nov. 25, 2013).

³⁰ *See In re Petition of City of Boston, MA to Regulate the Basic Cable Serv. Rates of Comcast Cable Commc’ns, Inc.*, DA 12-553, CSR 8488-R, 27 FCC Rcd. 3763, ¶ 1 n.7 (Apr. 9, 2012).

³¹ *See* MDTC Petition for Review.

III. Conclusion

In the interest of administrative efficiency, the MDTC respectfully requests that the Bureau grant this Motion and hold this proceeding in abeyance pending the resolution of the judicial appeal of the Commission's ruling upon which this proceeding is based. Such a pause in this proceeding will avoid the premature expenditure of resources by the Bureau, as well as by the parties, while placing little or no burden or unfairness on the Petitioner.

Respectfully submitted,

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