

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Comcast Cable Communications, LLC

Petition for Determination of Effective Competition in
Templeton, Massachusetts (MA0127)

MB 13-172
CSR-8814-E

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
PETITION FOR RECONSIDERATION**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

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Dated: May 23, 2016

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I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable (“MDTC”) hereby respectfully requests that the Media Bureau (“Bureau”) reconsider its April 21, 2016, Memorandum Opinion and Order (“Bureau Order”) in the above-captioned proceeding with respect to the Town of Templeton.¹ Specifically, the MDTC requests that based on the specific, uncontroverted evidence the MDTC provided in its December 8, 2015, Form 328 filing, the Bureau determine that Comcast Cable Communications, LLC (“Comcast”) is not subject to effective competition in Templeton and recertify the MDTC to regulate basic cable service and equipment rates therein.² The MDTC files this Petition for Reconsideration pursuant to Section

¹ See Comcast Cable Commc’ns, LLC, Petitions for Determination of Effective Competition in Various Mass. Cmtys., MB Docket No. 13-157, DA 16-437 (2016), 2016 WL 1601848 (“Bureau Order”).

² See MDTC Form 328 (filed Dec. 8, 2015), *available at* <http://apps.fcc.gov/ecfs/proceeding/view?name=INBOX-76.910> (“MDTC Form 328”).

1.106 of the Federal Communications Commission's ("FCC") rules and in its capacity as regulator of cable rates in the Commonwealth of Massachusetts.³

II. PROCEDURAL HISTORY

In 2013, Comcast filed with the FCC a Petition for Determination of Effective Competition in Templeton ("Petition"), claiming that it satisfied the competing provider test based on the presence of direct broadcast satellite ("DBS") providers DirecTV, Inc. and Dish Network, Corp. ("DBS providers").⁴ On December 8, 2015, the MDTC filed FCC Form 328 for Templeton, demonstrating that when DBS subscriptions in seasonal housing units are properly not considered, the DBS penetration rate in Templeton is below 15%.⁵ On December 17, 2015, the Bureau issued a Public Notice stating that the MDTC's certification in Templeton remained valid, subject to the Bureau ruling on the Petition.⁶ The Public Notice stated that the Bureau would consider the Petition and the MDTC's Form 328 in making its effective competition determination in Templeton.⁷ Comcast did not file a Petition for Reconsideration of the

³ 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.

⁴ Comcast Cable Commc'ns, LLC Petition for Determination of Effective Competition in Ashby, Mass., et al., MB Docket No. 13-172, Petition for Special Relief (filed June 27, 2013) ("Petition").

⁵ *See* MDTC Form 328 at Attachment 3 at 5 (describing the MDTC's methodology), Ex. A (showing the inputs to the MDTC's effective competition calculation), Ex. D (showing the number of seasonal housing units in Templeton as determined by the U.S. Census Bureau).

⁶ Findings of Competing Provider Effective Competition Following Dec. 8, 2015 Filing Deadline for Existing Franchise Auth. Recertification, 30 FCC Rcd. 14293 (2015).

⁷ *Id.*

MDTC's Form 328 or of the Public Notice with respect to Templeton. On April 21, 2016, the Bureau released the Bureau Order, granting the Petition.⁸

III. THE MDTC HAS REBUTTED THE PRESUMPTION OF EFFECTIVE COMPETITION IN TEMPLETON

The Bureau should reverse the Bureau Order with respect to Templeton and recertify the MDTC to regulate cable rates because the MDTC has rebutted the presumption of competing provider effective competition by demonstrating that Comcast is not subject to effective competition in the town. The FCC adopted a rebuttable presumption that cable operators are subject to competing provider effective competition.⁹ As a result, absent evidence to the contrary, the Bureau presumes that a 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% 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% of the households in the franchise area.¹⁰ A franchising authority is able to rebut the presumption by presenting community-specific evidence that competing provider effective competition is not present.¹¹ The burden then shifts to the cable operator to overcome the franchising authority's rebuttal based on its own evidence.¹²

⁸ Bureau Order.

⁹ See Amendment to the Comm'n's Rules Concerning Effective Competition, 30 FCC Rcd. 6574 (2015) ("Effective Competition Order").

¹⁰ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

¹¹ Effective Competition Order, 30 FCC Rcd. at 6584.

¹² *Id.*

In its initial Petition, Comcast calculated the competing provider penetration rate in Templeton by dividing the number of DBS subscribers in total housing units in Templeton by the number of occupied housing units in Templeton.¹³ However, as the FCC has repeatedly explained, a competing provider effective competition determination must be based on DBS subscribers in “households.”¹⁴ DBS subscriber counts as presented by the DBS providers’ trade association, the Satellite Broadcasting & Communications Association (“SBCA”), include subscribers from housing units that are not households, such as seasonal or vacation homes, and other temporary dwellings.¹⁵ Indeed, Comcast, in this very proceeding, acknowledges that “seasonal subscribers do not inhabit ‘occupied households’ and, therefore . . . were not included in the 2010 Census number for purposes of the Competing Provider Test.”¹⁶ To account for this, the FCC has approved and employed a methodology whereby it removes DBS subscribers in seasonal homes from a competing provider penetration calculation by using the ratio of seasonal housing units to total housing units in a franchise area.¹⁷ The result is a DBS subscriber count in

¹³ Petition at Ex. 6, Ex. 7, Ex. 8.

¹⁴ Time Warner Entm’t-Advance/Newhouse P’ship, 30 FCC Rcd. 1067, 1071 (2013) (citing 47 U.S.C. 543(l)(1)(B) and 47 C.F.R. 76.905(b)(2)).

¹⁵ See Ex. B; Time Warner Entm’t-Advance/Newhouse P’ship, 30 FCC Rcd. at 1071-72 (“[B]ecause the 2010 U.S. Census household numbers exclude seasonal, recreational, or occasional use housing, we believe that the number of DBS households reported by SBCA may be inflated by seasonal DBS households and so skew the ultimate percentage.”). For administrative ease, the MDTC refers to seasonal homes, vacation homes, and other temporary dwellings collectively as seasonal homes or housing units.

¹⁶ Comcast Cable Commc’ns, LLC, Petitions for Determination of Effective Competition in Various Mass. Cmty’s., MB Docket No. 13-157, Comcast Reply to Oppositions at 6-7 (filed Sept. 4, 2013).

¹⁷ See, e.g., Time Warner Entm’t-Advance/Newhouse P’ship, 30 FCC Rcd. at 1071; Charter Commc’ns, 22 FCC Rcd. 2289, 2294 (2010); Comcast Cable Commc’ns, LLC, 22 FCC Rcd. 1691, 1697-98 & n.61 (2007), *recons. granted on other grounds*, 22 FCC Rcd. 5320 (2007).

households only, the proper measure of effective competition under the Communications Act of 1934, as amended (“Act”).¹⁸

This methodology is precisely what the MDTC employed in its Form 328 for Templeton.¹⁹ Specifically, there are 125 seasonal homes in Templeton, which represent 3.98% of the 3139 total housing units in the town.²⁰ The MDTC used this percentage to arrive at the number of DBS subscribers in households in Templeton (420), which it then divided by the number of total households in Templeton (2882) to arrive at the competing provider penetration rate in Templeton of 14.56%.²¹ The MDTC supported this calculation (presented at page 45 of the Form 328) by introducing evidence of (1) the total number of DBS subscribers, including subscribers in seasonal homes (at page 148 of the Form 328), and (2) the number of total housing units, occupied housing units (i.e., households), and seasonal homes in Templeton according to the U.S. Census Bureau (at page 5269 of the Form 328).²² All of this evidence, reproduced herein, is sufficient to rebut the presumption of effective competition in Templeton, even in light of the data Comcast provided in its Petition, which overstated the competing provider penetration rate as outlined above.²³

Nevertheless, the Bureau dismissed the MDTC’s evidence with respect to Templeton in one sentence: “We find, however, that the evidence the MDTC submitted regarding seasonal

¹⁸ 47 U.S.C. § 543(l)(1)(B).

¹⁹ MDTC Form 328 at Attachment 3 at 5, Ex. A, Ex. D.

²⁰ Ex. C; MDTC Form 328 at Ex. D.

²¹ See 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2); Ex. A; MDTC Form 328 at Ex. A.

²² MDTC Form 328 at Ex. A, Ex. C, Ex. D.

²³ See Ex. A; Ex. B; Ex. C; *supra* pp. 4-5.

homes is not specific or significant enough to demonstrate a lack of competing provider effective competition, particularly given the new presumption regarding the presence of this type of effective competition.”²⁴ Because the Bureau did not “promptly deny” the MDTC’s Form 328 for Templeton so that the Form 328 would not become effective 30 days after filing, it appears that the Bureau found that the MDTC’s Form 328 met the applicable burden by rebutting the presumption as an initial matter.²⁵ This is further evidenced by the FCC’s brief in the appeal of the Effective Competition Order, in which the FCC states that three franchising authorities, including the MDTC, attempted to rebut the new presumption, and that only the Campbell County Cable Board failed to rebut the presumption.²⁶ However, the Effective Competition Order directed the Bureau to consider also the record from Comcast’s Petition in determining whether the MDTC has overcome the presumption of effective competition.²⁷ Given this and the inclusion of Comcast’s data in Attachment A to the Bureau Order, it seems clear that the Bureau relied on Comcast’s Petition, while disregarding the MDTC’s evidence, to make its determination in Templeton.²⁸ This contravenes years of FCC precedent with regard to seasonal

²⁴ Bureau Order, ¶ 7.

²⁵ Effective Competition Order, 30 FCC Rcd. 6574, 6588 (2015) (“Once a franchising authority files revised Form 328, the Commission may deny a certification based on failure to meet the applicable burden, consistent with the Commission’s authority to dismiss a pleading that fails on its face to satisfy applicable requirements. Accordingly, if a franchising authority files a revised Form 328 that fails to meet the required standards to regulate rates, we will promptly deny the filing and it thus will not become effective 30 days after filing.”); *see also* Findings of Competing Provider Effective Competition Following Dec. 8, 2015 Filing Deadline for Existing Franchise Auth. Recertification, 30 FCC Rcd. 14293 (2015) (finding that the MDTC’s certification in Templeton would remain valid at that time).

²⁶ Brief for Respondents at 20 n.9, 38, Nat’l Ass’n of Telecomms. Officers & Advisors v. FCC, No. 15-1295 (D.C. Cir. Feb. 2, 2016) (implying that the MDTC’s Form 328 rebutted the presumption).

²⁷ *See* Effective Competition Order, 30 FCC Rcd. at 6593.

²⁸ *See* Bureau Order at Attachment A. That the Bureau did not give due consideration to the MDTC’s evidence is demonstrated by Attachment A, in which the Bureau bases its determination on 489 DBS subscribers—the number that Comcast claimed in the Petition based on an SBCA report dated April 24, 2013. *Id.*; Petition at Ex. 6. This is despite the MDTC providing an SBCA report for Templeton dated

homes, as fully explained above, as the MDTC followed FCC precedent exactly.²⁹ A federal agency may change an existing policy, but in doing so, the agency must “display awareness that it is changing position” and “show that there are good reasons for the new policy.”³⁰ Here, the Bureau has done neither with respect to its well-established policy of excluding seasonal DBS subscriptions where a franchising authority presents evidence from the U.S. Census Bureau of seasonal homes in a franchise area.

The only FCC policy change the Bureau referenced in the Bureau Order, was a reversal of the presumption of effective competition.³¹ In implementing this new policy, the FCC stated that reversing the presumption of effective competition was “merely a procedural device” and would merely “shift[] the burden of producing evidence with respect to Effective Competition.”³² The FCC stated that franchising authorities can rebut the new presumption by demonstrating with community-specific evidence that a cable operator does not face competing provider effective competition in the franchise area.³³ The FCC did not instruct the Bureau to change any of its existing policies regarding how the Bureau makes an effective competition

December 4, 2015. *See* MDTC Form 328 at Ex. C. Even if the Bureau were to err by including DBS subscribers in seasonal homes in its effective competition calculation, there is no reason—and certainly not one articulated in the Bureau Order—that the Bureau should have relied on Comcast’s subscription data that were more than two-and-a-half years older than the MDTC’s subscription data. This oversight alone is sufficient evidence for the Bureau to reconsider the Bureau Order.

²⁹ *See* MDTC Form 328; *supra* n.17 and accompanying text.

³⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

³¹ *See* Bureau Order, ¶¶ 2, 3, 6, 7, 8.

³² Effective Competition Order at 6584.

³³ *Id.*; *see also* Brief for Respondents at 32, 50, Nat’l Ass’n of Telecomms. Officers & Advisors v. FCC, No. 15-1295 (D.C. Cir. Feb. 2, 2016) (affirming that the Effective Competition Order merely shifted the burden of production and did not address or alter the evidentiary standard required under the Act to meet that burden).

determination once a franchising authority presented such evidence, nor would it have been appropriate to do so in light of the Act and the procedural nature of the presumption.³⁴ The Bureau's failure to follow its precedent in implementing in the new presumption contravenes the Effective Competition Order and constitutes reversible error. Indeed, as discussed above, a finding of effective competition based on DBS subscriptions in seasonal homes contravenes the plain language of Section 623 of the Act, which requires that effective competition decisions be based on households.³⁵ In sum, the Bureau Order "depart[s] from a prior policy *sub silentio*" and "simply disregard[s] rules that are still on the books," both of which are prohibited by the United States Supreme Court.³⁶ Accordingly, the Bureau should reverse its decision.

³⁴ 47 U.S.C. § 543(l)(1)(B); Effective Competition Order at 6584.

³⁵ 47 U.S.C. § 543(l)(1)(B) (stating that competing provider effective competition is based on "the number of **households** subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the **households** in the franchise area.") (emphasis added); *see also* 47 C.F.R. § 76.905(b)(2); *supra* pp. 4-5.

³⁶ *United States v. Nixon*, 418 U.S. 683, 696 (1974).

IV. CONCLUSION

The MDTC has demonstrated with clear, unrefuted evidence that the competing provider penetration rate in Templeton is 14.56%, below the 15% statutory threshold. Accordingly, the MDTC has rebutted the presumption of competing provider effective competition in Templeton and sufficient reason exists for the Bureau to reverse its findings with respect to Templeton in the Bureau Order, determine that Comcast is not subject to effective competition in Templeton, and recertify the MDTC to regulate basic cable service and equipment rates in Templeton.

Respectfully submitted,

KAREN CHARLES PETERSON,
COMMISSIONER

By: /s/ Sean M. Carroll
Sean M. Carroll
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May 23, 2016

CERTIFICATION PURSUANT TO 47 C.F.R. § 1.52

Undersigned counsel has read the foregoing Petition for Reconsideration, and, to the best of such counsel's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for delay or any other improper purpose.

Respectfully submitted,

/s/ Sean M. Carroll

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May 23, 2016

Exhibit A

Column A	Column B	Column C	Column D	Column E	Column F	Column G	Column H
Franchise Area	Number of DBS Subscribers Including Subscribers in Seasonal Homes	Total Housing Units (2010 U.S. Census)	Households (2010 U.S. Census)	Seasonal, Recreational, or Occasional Use Housing Units (2010 U.S. Census)	% of Seasonal, Recreational, or Occasional Use Housing Units (Column E / Column C)	Number of DBS Subscribers in Households (Column B - (Column F * Column B))	Competing Provider Penetration Rate In Franchise Area (Column G / Column D)
Templeton	437	3,139	2,882	125	3.98%	420	14.56%

Exhibit B

ECTR – Effective Competition Tracking Report



Provided by
Satellite Broadcasting and Communications Association

Pursuant to Section 76.907(c) of the FCC Rules, and your effective competition tracking request dated December 2, 2015 please find the following Direct-to-Home (DTH) satellite subscriber numbers per zip code (and/or zip+4 where necessary). The provision and use of this Effective Competition Tracking Report is governed by and subject to the terms and conditions of the Agreement for Provision and Use of Confidential Data, between your company and SBCA.

Report Date: December 4, 2015

ZIP Codes

DTH Count

Requested total for Templeton, MA	437
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Data is current through 9/30/2015

Report Prepared by:
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Methodology: Direct-To-Home (DTH) subscriber data reflects aggregated DIRECTV and DISH Network residential subscriber totals. The following data collection procedures are applied by Members in the normal course of business: a) single accounts with multiple receivers are only counted once; b) commercial and test accounts are not included; c) each occupied unit served in a multiple dwelling unit building has been counted as a separate residential subscriber; d) zip codes are taken from service locations (not billing addresses, where different); e) inactive accounts are routinely removed; f) invalid (undeliverable) addresses have been corrected where known; g) courtesy or complimentary accounts are included; and h) zip code information for Members' subscribers is periodically updated to reflect changes to zip codes by the United States Postal Service.

Exhibit C



DP-1

Profile of General Population and Housing Characteristics: 2010

2010 Demographic Profile Data

Note: This is a modified view of the original table.

NOTE: For more information on confidentiality protection, nonsampling error, and definitions, see <http://www.census.gov/prod/cen2010/doc/dpsf.pdf>.

Geography: Templeton town, Worcester County, Massachusetts

Subject	Number	Percent
HOUSING OCCUPANCY		
Total housing units	3,139	100.0
Occupied housing units	2,882	91.8
Vacant housing units	257	8.2
For seasonal, recreational, or occasional use	125	4.0

X Not applicable.

[1] Other Asian alone, or two or more Asian categories.

[2] Other Pacific Islander alone, or two or more Native Hawaiian and Other Pacific Islander categories.

[3] One of the four most commonly reported multiple-race combinations nationwide in Census 2000.

[4] In combination with one or more of the other races listed. The six numbers may add to more than the total population, and the six percentages may add to more than 100 percent because individuals may report more than one race.

[5] This category is composed of people whose origins are from the Dominican Republic, Spain, and Spanish-speaking Central or South American countries. It also includes general origin responses such as "Latino" or "Hispanic."

[6] "Spouse" represents spouse of the householder. It does not reflect all spouses in a household. Responses of "same-sex spouse" were edited during processing to "unmarried partner."

[7] "Family households" consist of a householder and one or more other people related to the householder by birth, marriage, or adoption. They do not include same-sex married couples even if the marriage was performed in a state issuing marriage certificates for same-sex couples. Same-sex couple households are included in the family households category if there is at least one additional person related to the householder by birth or adoption. Same-sex couple households with no relatives of the householder present are tabulated in nonfamily households. "Nonfamily households" consist of people living alone and households which do not have any members related to the householder.

[8] The homeowner vacancy rate is the proportion of the homeowner inventory that is vacant "for sale." It is computed by dividing the total number of vacant units "for sale only" by the sum of owner-occupied units, vacant units that are "for sale only," and vacant units that have been sold but not yet occupied; and then multiplying by 100.

[9] The rental vacancy rate is the proportion of the rental inventory that is vacant "for rent." It is computed by dividing the total number of vacant units "for rent" by the sum of the renter-occupied units, vacant units that are "for rent," and vacant units that have been rented but not yet occupied; and then multiplying by 100.

Source: U.S. Census Bureau, 2010 Census.

CERTIFICATE OF SERVICE

I, Sara Clark, do hereby certify on this 23rd day of May 2016 that a true and correct copy of the foregoing "Petition for Reconsideration" has been sent to the following:

Via ECFS

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