

September 21, 2012

Ms. Catrice C. Williams
Secretary
Department of Telecommunications and Cable
1000 Washington Street
Suite 820
Boston, MA 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 proceeding is Comcast Cable Communications, LLC's Opposition to the City Of Boston's Petition to Intervene.

Very truly yours,



Steven J. Horvitz

DWT 20400790v1 0107080-000156

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

Petition of Comcast Cable Communications, Inc.
to establish and adjust the basic service tier
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D.T.C. No. 12-2

OPPOSITION TO THE CITY OF BOSTON'S PETITION TO INTERVENE

Comcast Cable Communications, LLC ("Comcast"), hereby submits this brief in opposition to the Petition to Intervene ("Petition") filed by the City of Boston (the "City") in the above-referenced proceeding. This submission is made pursuant to the request of the Hearing Officer at the Department's September 12, 2012 hearing. Intervention may only be granted to a petitioner "who is *likely to be substantially and specifically affected by the proceeding.*"¹ As a community currently without rate regulation, the City does not and cannot meet that test.

I. BACKGROUND

The Department's authority to regulate cable rates is carefully circumscribed by federal law. The Department is permitted to regulate cable rates only in communities where the cable operator is not subject to "effective competition."² The Federal Communications Commission ("FCC") deregulated cable rates in Boston based on a finding of effective competition more than a decade ago.³ The Department has consistently complied with that 2001 FCC decision, and

¹ 801 C.M.R. § 1.01(9)(d) (emphasis added).

² See 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(a).

³ See *Cablevision of Boston*, 16 FCC Rcd. 14056 (2001), *application for review denied*, 17 FCC Rcd. 4772 (2002).

while it has continued to regulate Comcast's rates in many other Massachusetts communities over the past decade, none of the Department's rate proceedings have included Boston.

In May 2011, the City filed a petition with the FCC seeking recertification of its authority to regulate cable rates on the grounds that the basis for the FCC's 2001 effective competition finding no longer existed. Specifically, the City argued that Comcast no longer faced competition from a local exchange carrier and thus no longer met the FCC's "LEC Test." Comcast opposed the City's recertification petition, asserting that the original basis for the FCC's decision continued to be met and that, in any event, Comcast was subject to effective competition under the FCC's "Competing Provider Test."

The FCC released a decision on April 9, 2012 (the "Stay Order"),⁴ concluding that while the original LEC Test basis for deregulating local cable rates was no longer satisfied, it would not authorize the City to commence rate regulation without first providing Comcast the opportunity to file a formal petition requesting deregulation under the Competing Provider Test.⁵ The Stay Order expressly provides that "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."⁶ Consistent with the FCC's invitation, Comcast filed a new effective competition petition based on the Competing Provider Test on May 8, 2012.⁷ That petition remains pending before the FCC.

⁴ See *Petition of the City of Boston, MA*, 27 FCC Rcd. 3763 ¶¶ 8-9 (2012) ("Stay Order").

⁵ See *id.* ¶ 9 ("[W]e 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 . . .").

⁶ *Id.* ¶ 10 (emphasis added).

⁷ See Comcast Petition for Reconsideration of Rate Regulation Re-Certification, CSR No. 8488-R (May 8, 2012) ("Comcast Petition for Reconsideration").

The City does not dispute that the FCC's Stay Order prohibits rate regulation of Comcast's Boston cable operations. The Petition acknowledges:

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 ... and all parties eagerly await the Commission's decision.⁸

Comcast's pending effective competition filing demonstrates that competing MVPDs serve 18.37 percent of Boston households – far above the 15 percent statutory threshold.⁹ Although the City and the Department challenged Comcast's Petition for Reconsideration on various grounds, Comcast demonstrated in reply that, even if the challenges to its subscriber data were fully accepted, the resulting penetration rate would be at least 16.79 percent -- still well above the Competing Provider Test's 15 percent standard.¹⁰

II. THE FCC'S STAY ORDER PRECLUDES THE CITY'S INTERVENTION

The City's intervention request is at odds with both the letter and spirit of the FCC's Stay Order. The Stay Order expressly bars the "recommencement" of rate regulation in Boston.¹¹ Nowhere does the Stay Order suggest that it is permissible to "recommence" rate regulation as long as the results of that regulation are not immediately enforced against Comcast. Yet that is exactly what the City is proposing with its request to "participate fully" in this proceeding.

If rate regulation were administered in Massachusetts by the local licensing authority, rather than by the Department, the City clearly would be barred by the FCC's Stay Order from demanding that Comcast submit and defend rate forms applicable to Boston. That same

⁸Petition at 2.

⁹See Comcast Petition for Reconsideration at 9; 47 U.S.C. § 543(l)(1)(B)(i), (l)(2); 47 C.F.R. §76.905(b)(2)(i), (ii).

¹⁰See Comcast Reply to Opposition to Petition for Reconsideration, CSR No. 8488-R, at 8 (June 12, 2012).

¹¹ *Stay Order* ¶ 10.

prohibition on regulatory activity necessarily governs this proceeding.¹² The City's intervention in a rate regulation proceeding is directly at odds with the FCC's determination that the City does not currently have rate regulation authority. The Department should not permit the City to collaterally attack the FCC's stay of its rate regulation authority by allowing the City to participate in a proceeding addressing Comcast's rate filings for *other* communities – even if those rate filings are similar to what Comcast might have submitted for Boston if that community were subject to rate regulation. If it permits the City to contest Comcast's Form 1205 filing, the Department will have effectively “recommenced” Boston's rate regulation authority in direct violation of the FCC's Stay Order.

As the title of this docket manifests, this proceeding is limited to addressing “rates for the communities in Massachusetts served by Comcast Cable Communications, Inc. that are *currently* subject to rate regulation.”¹³ Consistent with the Stay Order, the Department did not require, and Comcast did not submit, any rate justification for Boston – either a Form 1240 for basic service tier rates or a Form 1205 for associated equipment and installation rates. Yet the City's Petition now seeks to transform this proceeding from one properly limited to Comcast's rate regulated communities to one involving Boston – where rate regulation remains preempted by federal law and the FCC. Indeed, the Petition is expressly predicated on the City's “hope” that the FCC ultimately will deny Comcast's Petition for Reconsideration and reauthorize rate regulation.¹⁴

¹² See 207 C.M.R. § 601 (“The [Department] is the certified ‘franchising authority’ for regulating basic service tier rates and associated equipment costs”); 207 C.M.R. § 6.04 (“The [Department] shall, *consistent with FCC regulations*, regulate the basic service tier and equipment rates”) (emphasis added).

¹³ (Emphasis added).

¹⁴ See, e.g., Petition at 2 (“The City hopes that soon its citizens will have the Department's rate protection”); *Id.* at 4 (“the City hopes that rate regulation will soon return to the Boston system.”)

III. THE CITY HAS NOT SATISFIED THE DEPARTMENT'S STANDARDS FOR GRANTING INTERVENTION

The City acknowledges that it is “well aware that under Massachusetts regulations [801 C.M.R. § 1.01(9)] ... it is not automatically entitled to be a party to a cable rate proceeding.”¹⁵

In fact, the Hearing Officer may permit intervention only to a petitioner “who is *likely to be substantially and specifically affected by the proceeding*.”¹⁶ The City cannot meet that test.

Consistent with federal law, this proceeding addresses only those “communities in Massachusetts served by Comcast Cable Communications, Inc. that are *currently* subject to rate regulation.” It is undisputed that Boston is *not* “currently subject to rate regulation.” If the Department issued a substantive rate decision today, it would have no impact on Comcast’s *unregulated* Boston cable system. The City cannot be “substantially and specifically affected” by this proceeding because Comcast’s Boston system does not fall within the jurisdictional purview of this docket. And the City cannot be granted intervenor status to affect the outcome of this proceeding based on the mere *possibility* that Comcast might someday in the future be eligible for cable rate regulation.¹⁷

The FCC’s Stay Order removes the Department’s discretion to subject Comcast to *any* rate regulatory burden on the basis of Comcast’s Boston operations. Even if the Department were to conclude that it would be administratively efficient to consider the City’s concerns in the

¹⁵Petition at 3.

¹⁶ 801 C.M.R. § 1.01(9)(d) (emphasis added).

¹⁷ The Massachusetts Supreme Judicial Court has “recognized that agencies have broad discretion to grant or deny intervention.” *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346 (2001) (“*Tofias*”). However, that same court has observed, “The discretion to limit intervention was obviously intended to permit the department to control the extent of participation by persons not sufficiently and specifically interested to warrant full participation, which might interfere with complicated regulatory processes.” *Id.* at 347 (quoting *Newton v. Department of Pub. Utils.*, 339 Mass. 535, 543 n.1 (1959)). In *Tofias*, the Supreme Judicial Court upheld an agency’s denial of a motion to intervene based on claims that the agency considered to be “conjectural” and “speculative.” *Id.* at 348.

context of the current proceeding, the Department could not address those concerns (or compel Comcast to respond to those concerns) under the terms of the FCC's Stay Order.¹⁸

Further, there is no compelling need to burden this proceeding with claims the City may raise if it is permitted to intervene, as the City bears no risk of being materially prejudiced by its exclusion. In the unlikely event that the FCC ultimately authorizes the regulation of Comcast's cable rates in Boston, Comcast would be required to formally submit rate justifications for Boston, and the City would have an opportunity to challenge those justifications. Allowing the City's intervention in a proceeding which in no way, let alone "substantially and specifically," affects the City -- based only on the City's unsubstantiated belief that Comcast might be regulated in the future -- would be contrary to the efficient operation of this proceeding and Massachusetts law, and would impose an impermissible regulatory burden on Comcast.

IV. THE CITY'S BRIEF FAILS TO JUSTIFY THE REQUESTED INTERVENTION

Because the City chose to file its Brief in Support of Petition to Intervene ("Brief") a day early, Comcast had the opportunity to review the City's Brief. Comcast believes that providing a very succinct response to the four arguments raised in the City's Brief will be helpful to the Department in quickly resolving this matter.

The City first argues that it has satisfied the governing intervention standard because this proceeding will have an impact on Comcast's Boston system that is "neither speculative, remote nor indirect."¹⁹ The facts of this case (even as presented in the City's Brief) require just the opposite conclusion. Consistent with Massachusetts law, federal law, and the FCC Stay Order,

¹⁸ As the FCC explained almost two decades ago in establishing its stay procedures for cable rate regulation, "a cable operator has a statutory right to be free of regulation if effective competition exists. This [stay] procedure prevents the imposition of rate regulation until the issue of the existence of effective competition can be determined." *Cable Rate Regulation*, 8 F.C.C. Rcd. 5631, ¶ 89 (1993).

¹⁹ City Brief at 3.

the jurisdictional scope of the current proceeding does not and cannot include the Boston system, so there can be no direct regulatory impact on the Boston system, and any other impact would at most be speculative, remote and indirect.²⁰

The City next contends that its intervention should be allowed because the Department previously suggested that Comcast had not adequately established the existence of effective competition in Boston.²¹ Contrary to the City's contention, Department "deference" on effective competition is not at issue here -- it is the FCC, not the Department, that adjudicates effective competition status. And the Stay Order expressly prohibits rate regulation of the Boston system while the FCC is considering Comcast's pending effective competition petition.

The City further argues that it meets the automatic standards for a "party" to this proceeding because, under state law, the Department (rather than the City) is the only entity that can administer cable rate regulation.²² This new argument is irreconcilable with the underlying Petition to Intervene, in which the City acknowledges that "it is not automatically entitled to be a party to a cable rate proceeding" and seeks the Department's "leave" to intervene.²³ Moreover, the City clearly fails to qualify under 220 CMR § 1.03(2)(b) as an entity with an automatic right to participate in this proceeding "as a matter of constitutional right or by any provision of the Massachusetts General Laws." The City's attempt to link itself to the Department's regulatory authority over Comcast's Boston rates is fundamentally flawed, as neither the Department nor the City can currently regulate such rates under the Stay Order.

²⁰ The "speculative" and "indirect" nature of the City's claim is manifest in its contention that a Department order setting rates in regulated communities "will establish a floor" for Boston's unregulated rates. City Brief at 3.

²¹ *Id.* at 4. In so arguing, the City ignores Comcast's reply filing in the effective competition proceeding now pending at the FCC, in which Comcast directly addressed the Department's concerns. *See* Comcast Reply to Oppositions to Petition for Reconsideration, CSR No. 8488-R at 6-8 (May 8, 2012).

²² City Brief at 4.

²³ Petition at 3.

Finally, the City contends that the Department has “wide discretion” to grant intervenor status and that Massachusetts law favors the “liberal granting” of intervention petitions.²⁴ Again, the City’s contention ignores the existence of the Stay Order. The issue here is not whether the Department might ordinarily have the discretion to grant the City’s motion, but whether doing so is permissible in this proceeding in light of the FCC’s Stay Order and the fact that the Stay Order leaves no doubt that the City will not be substantially and specifically affected by this proceeding.²⁵

For the foregoing reasons, Comcast respectfully requests that the City’s Petition be denied.

Respectfully submitted,

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September 21, 2012

²⁴ City Brief at 5.

²⁵ The City’s suggestion that the Department should allow Boston to intervene “in an effort to resolve all related disputes in a single action,” City Brief at 6, is in direct conflict with the Stay Order, which currently precludes the Department from addressing, let alone resolving, disputes regarding the rates charged by Comcast’s Boston cable system.