

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:) CSR 5395-E
MediaOne of Massachusetts) Arlington, MA MA0115
) Newton, MA MA0117
Petition for Determination of)
Effective Competition)

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1999

Released: August 24, 1999

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. MediaOne of Massachusetts ("MediaOne") filed a petition asserting that it is subject to effective competition in the Cities of Arlington and Newton, Massachusetts (the "Cities") from RCN-BecoCom, L.L.C. ("RCN"), an affiliate of a local exchange carrier ("LEC")¹ that is offering cable service in the Cities. No oppositions to MediaOne's petition were filed.

2. Section 623(a)(4) of the Communications Act of 1934, as amended ("Communications Act") allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.² For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.³ Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.⁴ In Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 ("Cable Reform Final Order"),⁵ the Commission instructed cable operators believing themselves subject to LEC effective competition under Section 623(1)(1)(D) of the Communications Act to file a petition

¹The Communications Act defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

Communications Act § 3(26), 47 U.S.C. § 153(26).

²Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

³47 C.F.R. §§ 76.906, 76.910(b)(4).

⁴47 C.F.R. § 76.910(e); 47 C.F.R. § 76.910(b); see also Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

⁵Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85, FCC 99-57 (rel. March 29, 1999) (1999 WL 169592) ("Cable Reform Final Order").

for determination of effective competition pursuant to Section 76.7 and 76.907 of the Commission's rules.⁶ Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition where:

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.⁷

II. THE PLEADINGS

3. MediaOne argues that it faces LEC effective competition in its Arlington and Newton, Massachusetts franchise areas from RCN, a LEC-affiliated franchised cable operator. With regard to the LEC affiliation requirement, MediaOne contends that RCN currently markets both telephone and cable television service to Arlington and Newton residents.⁸ MediaOne explains that RCN is a joint venture between RCN Telecom Services, Inc. ("RCNTS") and Boston Edison Company. MediaOne states that RCNTS is a wholly-owned subsidiary of C-TEC,⁹ a local exchange carrier, and that RCNTS, itself, is engaged in the provision of local exchange service.¹⁰ MediaOne additionally asserts that RCN is affiliated with MFS Communications Company, Inc. ("MFS"), another local exchange carrier.¹¹

4. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, MediaOne asserts that RCN is physically able to deliver service to potential subscribers in Arlington and Newton.¹² MediaOne states that on February 27, 1997, the Commission granted RCN's application for OVS certification covering 48 service areas in and around Boston, Massachusetts, including Arlington and Newton.¹³ According to MediaOne, RCN entered into individual

⁶47 C.F.R. §§ 76.7 and 76.907.

⁷Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).

⁸MediaOne Petition at 2.

⁹C-TEC is a holding company with wholly and majority-owned subsidiaries engaged in the provision of competitive local exchange services and cable television. C-TEC operates as a local exchange carrier in Pennsylvania, offering service to a 19-county, 5067 square mile service territory in the state. See C-TEC Corporation SEC Form 10-K, filed with the Securities and Exchange Commission on March 31, 1997.

¹⁰MediaOne notes that C-TEC's SEC Form 10-K states that RCNTS is a provider of "local and long distance telephone service, video programming and internet access to households located in New York City and Boston." See MediaOne Petition at 5.

¹¹MediaOne Petition at 6.

¹²*Id.*

¹³*Id.* at 7 citing *RCN-BETG, L.L.C., Memorandum Opinion and Order*, 12 FCC Rcd 2480 (1997).

OVS agreements with the Cities of Arlington and Newton in August and October, 1997, respectively.¹⁴ MediaOne states that these OVS agreements require RCN to make service available to every residential dwelling and business in the Cities of Arlington and Newton, and to complete construction of the OVS system within 10 months of the date of the agreements (specifically, June 25, 1998 in Arlington and August 22, 1998 in Newton.)¹⁵ MediaOne adds that RCN has been competing for cable television customers in Arlington since November, 1998 and began selling service to Newton in February, 1999.¹⁶ MediaOne asserts that there are no regulatory, technical, or other impediments to households taking RCN's service and that RCN has launched an "aggressive" \$10 million mass media advertising campaign (radio, newspaper, and direct mail) to create awareness of its voice, data, and video offerings.¹⁷

5. MediaOne also asserts that RCN offers programming comparable to that offered by MediaOne in Arlington and Newton.¹⁸ MediaOne provides RCN's channel line-ups which demonstrates that RCN offers 100 channels of video programming, several of which are local television broadcast signals.¹⁹ MediaOne also includes its own channel line-ups which indicate that it offers almost 100 channels of video programming in Arlington and Newton.²⁰

6. MediaOne states that RCN's OVS agreements require RCN to provide performance bonds to the Cities (\$350,000 in Newton and \$250,000 in Arlington) and that RCN is also required to provide two PEG access channels.²¹ Furthermore, RCN must pay to the Cities a percentage of its gross annual revenues from the provision of OVS services. According to MediaOne, RCN is clearly making an investment in its OVS operations throughout Arlington and Newton of the type the Commission believes is characteristic of an effective competitor.²²

III. ANALYSIS

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.²³ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of

¹⁴*Id.* Copies of the agreements are attached to MediaOne's Petition at Exhibit B.

¹⁵*Id.*

¹⁶*Id.* at 8.

¹⁷*Id.* at 10.

¹⁸*Id.*

¹⁹*Id.* at 12.

²⁰*Id.* at Exhibit F.

²¹*Id.* at 9.

²²*Id.*

²³47 C.F.R. § 76.906.

the Commission's rules, is present within the franchise area.²⁴ MediaOne has met this burden.

8. With regard to the first part of the LEC effective competition test, which requires that the alleged competitive service be provided by a LEC or its affiliate (or any multi-channel video programming distributor using the facilities of such LEC or its affiliate), we find that MediaOne has provided sufficient evidence, through SEC documents and other material, demonstrating that RCN is LEC-affiliated under the Commission's rules.²⁵ Therefore, we find that MediaOne satisfies the affiliation prong of the LEC effective competition test. In addition, we note that MediaOne is unaffiliated with RCN or any of RCN's partners.

9. We also find that MediaOne has submitted sufficient evidence showing that RCN's program service offering is comparable to MediaOne's channel line-ups in Arlington and Newton. Under the Commission's rules, in order to offer comparable programming as that term is used, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.²⁶ The channel information for RCN submitted by MediaOne establishes that RCN offers 100 channels of programming, including 15 local broadcast channels and numerous nonbroadcast channels, in satisfaction of the programming comparability criterion.

10. The LEC effective competition test requires that competitive service be offered directly to subscribers in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area. In enacting the LEC effective competition test, Congress indicated that the Commission should apply its preexisting definition of the term "offer" to the LEC effective competition test.²⁷ This definition provides that service is offered:

(1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and (2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.²⁸

11. We conclude that, based on the information before us, RCN is offering service in Arlington and Newton sufficient to demonstrate the presence of effective competition. In order to support a finding of effective competition under the LEC test, the LEC's service must substantially overlap the incumbent cable operator's service in the franchise area.²⁹ RCN has constructed its video distribution facilities throughout

²⁴47 C.F.R. § 76.905 and § 76.907. The note to Section 76.907 states that the criteria for determining effective competition pursuant to Section 76.905(b)(4) are described in the *Cable Reform Final Order*.

²⁵47 C.F.R. §76.905(b)(4).

²⁶47 C.F.R. §76.905(g).

²⁷*Cable Reform Final Order*, at ¶ 7, citing H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996) ("Conference Report").

²⁸47 C.F.R. §76.905(e); see *Cable Reform Final Order*, at ¶ 7.

²⁹See *Cable Reform Final Order* at ¶ 10.

Arlington and Newton and is actively signing up and serving customers. We further find it relevant that RCN's posting of performance bonds, establishment of PEG channels, and payment of a percentage fee of gross revenues, demonstrates RCN's commitment to provide video programming service to Arlington and Newton residents now and in the future.³⁰

12. We note that RCN's extensive marketing efforts throughout the Cities and the wide press coverage of RCN's construction activities in the local media ensure that potential subscribers are reasonably aware of the availability of RCN's service. In addition, we find that subscribers are able to receive RCN's cable service for only a minimal additional investment and without encountering regulatory or technical obstacles.

13. We find that MediaOne has submitted sufficient evidence demonstrating that its cable systems serving Arlington and Newton, Massachusetts are subject to LEC effective competition from RCN. MediaOne's petition is hereby granted and the certifications of the Cities of Arlington and Newton are revoked.

IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by MediaOne challenging the certifications of the Cities of Arlington and Newton, Massachusetts **IS GRANTED**.

15. **IT IS FURTHER ORDERED** that the certifications of the Cities of Arlington and Newton, Massachusetts to regulate the basic cable rates of MediaOne in Arlington and Newton, Massachusetts **IS REVOKED**.

16. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.³¹

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³⁰See *Cable Reform Final Order* at ¶ 13 ("If the LEC plans an open video system, the showing must establish the LEC's intent regarding the proposed area.")

³¹47 C.F.R § 0.321.

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