

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

In the Matter of:	)	
	)	
AT&T CSC, Inc.	)	CSR-6015-E
	)	
Petition for Determination of Effective	)	
Competition in Lexington, Massachusetts	)	
(MA0140)	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 4, 2002**

**Released: December 9, 2002**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. AT&T CSC, Inc. ("AT&T") has filed with the Commission a petition (the "Petition") pursuant to Sections 76.7 and 76.907 of the Commission's rules seeking a finding of effective competition in Lexington, Massachusetts ("Lexington"). AT&T alleges that its cable system serving Lexington is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and seeks revocation of the certification of the local franchising authority in Lexington to regulate basic cable service rates. AT&T claims the presence of effective competition in Lexington stems from the competing services provided by RCN-BecoCom, L.L.C. ("RCN"), a franchised cable operator that also provides local exchange carrier ("LEC") service in Lexington.<sup>3</sup> In the alternative, AT&T also claims that it is subject to effective competition in Lexington pursuant to the competing provider test.<sup>4</sup> No opposition to the Petition was filed.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>5</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>6</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist

<sup>1</sup> 47 U.S.C. § 543(a)(2).

<sup>2</sup> 47 C.F.R. § 76.905.

<sup>3</sup> 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

<sup>4</sup> 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

<sup>5</sup> 47 C.F.R. § 76.906.

<sup>6</sup> 47 C.F.R. § 76.905.

with evidence that effective competition is present within the relevant franchise area.<sup>7</sup> Based on the record in this proceeding, AT&T has met this burden.

#### A. The LEC Test

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC 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, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.<sup>8</sup>

4. The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.<sup>9</sup> The incumbent also must show that the LEC intends to build out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.<sup>10</sup>

5. AT&T operates a cable television system in Lexington for which it seeks a determination of effective competition. AT&T has provided information demonstrating that RCN is a telephone company that provides local exchange and other telephone services within Lexington.<sup>11</sup> Therefore, RCN qualifies as a LEC for purposes of the LEC effective competition test.<sup>12</sup>

6. In addition to qualifying as a LEC, RCN was awarded a franchise for the provision of cable service within Lexington.<sup>13</sup> AT&T demonstrates that there are no regulatory, technical or other impediments to RCN's provision of cable service within Lexington.<sup>14</sup> As to whether RCN provides cable service that substantially overlaps that of AT&T, RCN's franchise contains a requirement to provide cable service throughout Lexington within eighteen months of the franchise's effective date.<sup>15</sup> Due to delays,

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<sup>7</sup> See 47 C.F.R. §§ 76.906-907.

<sup>8</sup> 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) is referred to as the "LEC" effective competition test.

<sup>9</sup> See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

<sup>10</sup> *Id.*

<sup>11</sup> Petition at 4 and Exhibit C.

<sup>12</sup> See 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

<sup>13</sup> Petition at 2 and Exhibit A.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 5-6 and Exhibit A. The effective date of the franchise was May 24, 1999. *Id.* at 5. The franchise also contains insurance, performance bond and liquidated damages provisions designed to ensure timely performance of RCN's buildout commitments. See *id.* at Exhibit A.

this construction deadline was extended until November, 2002.<sup>16</sup> This requirement, combined with RCN's existing service to nearly 3,200 subscribers, evinces its offering of service in Lexington.<sup>17</sup> We find that AT&T has demonstrated that RCN's operations in Lexington substantially overlap those of AT&T.

7. RCN has widely distributed marketing materials throughout the greater Boston area, including Lexington, pointing out that residents need only call RCN for installation of its cable services.<sup>18</sup> These marketing materials and RCN's website demonstrate that its cable service offers 80 channels of video programming that includes non-broadcast programming services such as ESPN, HBO CNN, as well as a complement of local television broadcast stations, such as WHDH-TV (NBC), WCVB-TV (ABC), and WBZ-TV (CBS).<sup>19</sup> Therefore, RCN provides comparable programming as required by the LEC effective competition test.

8. AT&T has demonstrated that RCN has commenced providing cable service within Lexington, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.<sup>20</sup> Based on the foregoing, we conclude that AT&T has submitted sufficient evidence demonstrating that its cable system serving Lexington is subject to LEC effective competition.

#### **B. The Competing Provider Test**

9. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent 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 fifteen percent of the households in the franchise area.<sup>21</sup>

10. AT&T claims that it meets the first prong of the competing provider test due to the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Communications Corporation. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.<sup>22</sup> Reasonable awareness may be demonstrated by "advertising in regional or local media, direct mail, or any other marketing outlet."<sup>23</sup> AT&T has submitted no evidence demonstrating that households in Lexington are reasonably aware that DBS service is available.

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<sup>16</sup> *Id.* at n.15 and Exhibit D.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 6-8 and Exhibits G-P (consisting of news releases, direct marketing materials, newspaper advertisements, and web site materials (*see* <<http://rcn.com/cabletv/index.php>>)).

<sup>19</sup> *Id.* at 8-9 and Exhibit Q.

<sup>20</sup> *See Cable Reform Order*, 14 FCC Rcd at 5305.

<sup>21</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>22</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>23</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5657 (1993).

While we have previously found that households in other communities are reasonably aware of the availability of DBS service, each such finding was predicated upon an evidentiary showing specific to those communities.<sup>24</sup> We find that AT&T has not met the first prong of the competing provider test. As such, it is unnecessary to evaluate its showing under the second prong.

### III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition filed by AT&T CSC, Inc. for a determination of effective competition in Lexington, Massachusetts **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates of Lexington, Massachusetts **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>25</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>24</sup> See, e.g., *CC of Michigan L.L.C., Memorandum Opinion and Order*, DA 02-2323 at ¶ 4 (MB Sept. 20, 2002) (“Charter has provided evidence of the advertising of DBS service in news media serving the Communities.”).

<sup>25</sup> 47 C.F.R. § 0.283.