

Before the  
FEDERAL COMMUNICATION COMMISSION  
Washington, DC 20554

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In the Matter of	)	
	)	
Cablevision of Raritan Valley, Inc.	)	CSR 6108-E
	)	
Cablevision of New Jersey	)	CSR 6169-E
	)	
Cablevision of Monmouth	)	CSR 6176-E
	)	
Petitions for Determination of	)	
Effective Competition	)	

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**JOINT APPLICATION FOR REVIEW FILED BY THE  
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE AND  
THE NEW JERSEY BOARD OF PUBLIC UTILITIES**

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May14, 2004

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**Introduction**

The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) and the New Jersey Board of Public Utilities (“BPU”) (collectively the “Joint Applicants”) hereby file this Application for Review (“AR”) in accordance with Section 1.115 of the Federal Communications Commission’s (“Commission’s”) rules.<sup>1</sup> The Joint Applicants seek review of the decision of the Policy Division of the Media Bureau (“Bureau”), issued on April 15, 2004, in which the Bureau granted three separate effective competition petitions filed by Cablevision Systems Corporation on behalf of certain subsidiaries (hereinafter

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<sup>1</sup> See 47 C.F.R. § 1.115.

“Cablevision”) covering 49 communities in New Jersey,<sup>2</sup> thereby revoking the BPU’s certification to regulate basic service tier (“BST”) rates in the communities affected.<sup>3</sup> The Bureau’s decision was contained in a Memorandum Opinion and Order (“MO&O”) adopted by the Bureau on April 15, 2004.<sup>4</sup> In the alternative, the Ratepayer Advocate and the BPU ask that the Commission consider this filing as a separate AR filed by each party if the Commission rejects the Joint Application because the BPU did not participate below.

### **Executive Summary**

For the reasons discussed below, the Joint Applications submit that the Bureau’s decision should be reversed, vacated, and remanded to the Bureau due to legal errors committed by the Bureau in (1) applying the pertinent statutory requirements governing effective competition determinations, including the

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<sup>2</sup> See *In the Matter of Cablevision of Raritan Valley, Inc.; Cablevision of New Jersey; and Cablevision of Monmouth Petitions for Determination of Effective Competition*, CSR Docket Nos. 6108E, 6169E, and 6176E, DA 04-1029, Memorandum Opinion and Order, (rel. April 15, 2004). Cablevision filed the Raritan petition on January 31, 2003, filed the New Jersey petition on May 6, 2003 and the Monmouth petition on June 2, 2003.

<sup>3</sup> The BPU did not participate below but is joining in this application. In accordance with Section 1.115(a) of the Commissions’ rules, the BPU includes the following statement which describes with particularity why the BPU is aggrieved by the action below and why it was not possible for the BPU to participate in the earlier stages of this proceeding. See Exhibit B hereto. The BPU respectfully asks that the Commission find that the statement contained in Exhibit B is an adequate showing as to why there is good reason for allowing the BPU to participate in this application for review and why it was not possible to participate in the earlier stages of this proceeding. If the Commission declines to permit the BPU to participate in this Joint Application for review, the Ratepayer Advocate asks that the Commission treat this filing as two separate ARs and address them separately.

<sup>4</sup> The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers and cable consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates in proceedings of the New Jersey Board of Public Utilities (“BPU”), but is not subject to the control or supervision of the BPU, and exercises its litigation and appeal functions accordingly. The Ratepayer Advocate also participates in cable proceedings with the New Jersey Office of Cable Television (“NJ-OCTV”), a division of the BPU. New Jersey is among the few states in which a state agency assumes the role of the local franchising authority. The Ratepayer Advocate also participates in matters before the Commission on behalf of utility and cable consumers. See New Jersey Reorganization Plan 001-1994, codified at *N.J.S.A. 13:1D-1*, et seq.

regulations implementing the statutory requirements, (2) improperly shifting the burden of proof away from the cable television operator and onto the Ratepayer Advocate or other opposing parties, (3) failing to hold further proceedings to resolve material disputed facts as to the actual number of households at the time of filing in each community, (4) ignoring prior precedent, (5) failing to address all issues raised in the oppositions,<sup>5</sup> (6) failing to adopt a “complete when filed” requirement for effective competition petitions, (7) failing to dismiss the petitions for lacking the information necessary to apply the “competitive provider test,” and (8) issuing a decision unsupported by substantial evidence and lacking a reasoned basis such as to be arbitrary and capricious.

As part of the remand, the Joint Applicants respectfully ask that the Commission issue the following directions to the Bureau:

- (1) Vacate its order and dismiss the underlying petitions;
- (2) Direct Cablevision to refile the petitions with reasonably contemporaneous data, i.e., household and DBS penetration data that are within 3 months of one another;
- (3) Direct the issuance of new public notice(s) upon refile and restarting of the pleading cycle;
- (4) Direct the Bureau to implement a “complete when filed” procedural rule applicable to effective competition petitions; and
- (5) Such other directions as the Commission deems appropriate.

## **Background**

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<sup>5</sup> The Bureau did not address all the issues raised in the oppositions filed by the Ratepayer Advocate. The Bureau only discussed the use of 2000 Census data and concluded in summary fashion that the Ratepayer Advocate’s arguments are without merit. The Bureau offered no analysis or discussion of the other issues raised by the Ratepayer Advocate, no discussion of the merits of those other issues, or any discussion of the cases, rules and orders relied upon and cited in the Ratepayer Advocate’s oppositions.

Under the Communications Act of 1934, as amended, (“Communications Act”) a Local Franchise Authority (“LFA”) (in New Jersey, the BPU) regulates the rates for the Basic Service Tier (“BST”) for cable operators. Under 47 U.S.C. § 543 of the Act, there is a rebuttable presumption that effective competition does not exist in the cable operator’s service territory or franchise area, but the statute permits the cable operator to petition the FCC for a determination of effective competition and thereby remove and eliminate rate regulation of the BST by the LFA. Under the Commission’s rules, the cable operator has the burden of proof to show that effective competition exists.<sup>6</sup>

Specifically, Section 623(a)(2) of the Communications Act provides in pertinent part:

If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable services by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section.

Section 623(l) of the Communications Act defines the various tests for determining when effective competition exists. One test is the “competitive provider test” which is set forth in Sections 623(l)(B)(i) and (ii) of the Communications Act. Sections 623(l)(B)(i) and (ii) of the Communications Act provide:

(l) DEFINITIONS.-As used in this section-

(1) The term “effective competition” means that-

(B) the franchise area is-

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming

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<sup>6</sup> 47 C.F.R. § 76.907(b).

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.<sup>7</sup>

Sections 76.905(a) and (b) mirror the provisions of the Communications Act, as codified. In implementing the statutory requirements, the Commission issued regulations establishing a rebuttable presumption that cable systems are not subject to effective competition,<sup>8</sup> as that term is defined by the Commission's rules.<sup>9</sup> Furthermore, the cable operator bears the burden of rebutting this presumption.<sup>10</sup>

In the three petitions consolidated into a single decision, Cablevision used 2000 Census data to establish the number of households for purposes of applying the “competitive provider test” in conjunction with direct broadcast satellite (“DBS”) penetration data from certain reports issued by SkyTrends. The SkyTrends report in each petition reflected various periods prior to the filings, although none of the SkyTrends reports were from within three months of the date of filing of the petitions. In fact, the time difference between the household and DBS data were several years.

In the petitions at issue, Cablevision alleges that its cable systems serving the communities are subject to effective competition pursuant to Section 623(a) of the Communications Act and Section 76.905(b)(2) of the Commission's rules, and seeks revocation of the certifications of the local franchising

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<sup>7</sup> 47 U.S.C. §§ 543(l)(B)(i) and (ii).

<sup>8</sup> 47 C.F.R. § 76.906 provides that in the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.

<sup>9</sup> 47 C.F.R. § 76.905.

<sup>10</sup> 47 C.F.R. § 76.907(b).

authorities (the BPU) in the communities to regulate basic cable service rates.<sup>11</sup> Cablevision claims the presence of effective competition in the Communities stems from the competing services provided by two DBS providers, DirecTV, Inc. and EchoStar Communications Corporation (“EchoStar”) and the service by these entities of more than 15% of the households in these communities (hereinafter referred to as the “competitive provider test”).<sup>12</sup>

The Ratepayer Advocate filed oppositions to each of the petitions in the proceedings below. In general, the Ratepayer Advocate contested whether Cablevision had sustained its burden of proof and whether Cablevision overcame the regulatory presumption that effective competition does not exist.<sup>13</sup> Specifically, the Ratepayer Advocate asserted that the mismatch of household data based upon the 2000 Census and more recent penetration data was insufficient to defeat the regulatory presumption that Cablevision was not subject to effective competition in the communities listed in the petitions. The Ratepayer Advocate offered evidence through affidavits that the number of households in certain communities had increased beyond that indicated by the 2000 Census household data and those increases had a direct impact upon the application of the “competitive provider test.” The proffered evidence showed the inherent weakness attendant in relying on two separate data sets that are not contemporaneous and current. The affidavits offered by the Ratepayer Advocate created material facts in dispute as to the actual number of households in some of the communities which required resolution and adjudication by the Bureau. The Bureau, however, took no action to resolve the facts in dispute and simply rejected the

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<sup>11</sup> 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

<sup>12</sup> See Section 623(l)(1)(B)(i) and (ii) of the Communications Act.

<sup>13</sup> The discussion that follows is a summary of all issues collectively raised in the three oppositions that were filed. The opposition filed in CSR-5847-E did not raise all the issues raised in the other two oppositions.

Ratepayer Advocate's arguments outright with the naked assertion that they are without merit.

As discussed below, this is a substantive error on the Bureau's part. The Bureau should have pursued other options. One option was to supplement the record or dismiss the petitions and require refiling. Another option was to conduct further proceedings, including hearings in accordance with Section 76.7(e) of the Commission's rules.<sup>14</sup> Lastly, the Bureau could have implemented a "complete when filed" procedural rule. The Bureau failed to take any of these options. On the basis of the record below, the Bureau's decision should be reversed and vacated.

In the proceeding below, the Ratepayer Advocate questioned Cablevision's compliance with Section 76.905(c) of the Commission's rules. Section 76.905(c) requires that each "separately billed or billable customer" be counted as a household subscriber. This regulatory requirement likely results in an increase in the number of households over those reported in the 2000 Census and directly impacts the effective competition application in terms of the "competitive provider test."<sup>15</sup> Cablevision offered no evidence or explanation as to why adjustments for multi-customer households were not made as required by the regulation. In the Joint Applicants' opinion, Cablevision's failure to submit evidence or to affirmatively state that there are no separately billed accounts adding to the overall household total precluded a determination on whether the 15 percent test is met. Therefore, Cablevision did not sustain its burden of proof and the presumption of no effective competition remains.

The Ratepayer Advocate also asserted that the failure of the Bureau to require reasonably contemporaneous household and penetration data to determine compliance with the "competitive provider

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<sup>14</sup> 47 C.F.R. § 76.7(e).

<sup>15</sup> 47 C.F.R. § 76.905(c).

test” constituted legal error and is indicative of arbitrary and capricious behavior on the part of the Bureau. If, at the time of filing, there are mismatches in data contained in the petitions, this situation causes the evidence to have little or no probative value as to whether the presumption had been overcome or whether the 15 percent test has been satisfied. The above position is supported by a number of prior Bureau decisions clearly stating that effective competition petitions can not be supported by mismatched, or “stale” data.<sup>16</sup>

As stated in oppositions filed below, the Ratepayer Advocate noted that the FCC has rejected the use of stale data in a cable effective competition petition. In *Charter Communications*, the cable operator relied upon 1990 Census data to support its petition filed in 2001.<sup>17</sup> The FCC only acted on the petition after Charter Communications submitted 2000 Census household data. The supplemental data was submitted only five days after the Public Notice. The local franchising authority, the Regional Cable Commission (“RCC”) opposed the petition arguing, in part, that the 1990 Census data was unreliable as it could not represent population growth rates since the time of the 1990 Census. The RCC did not object to the filing of the 2000 Census data and failed to assert any due process violation. As a result, without a

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<sup>16</sup> See *I/M/O Falcon Cable Systems Company II, A California Limited Partnership, D/B/A Charter Communications, Petition for Determination of Effective Competition in Twelve Oregon Cities*, File Nos. CSR 5678-E Through CSR 5689-E, 17 FCC Rcd. 4648 (March 15, 2002), (“Charter Communications”); See, *I/M/O Mountain Cable Company, D/B/A Adelpia Cable Communications, Petitions for Revocation of the Certification of the Vermont Public Service Board to Regulate Basic Cable Service Rates*, 14 FCC Rcd. 13994 (Sept. 2, 1999), ¶ 16 (“Mountain Cable”); See also, *I/M/O Texas Cable Partners, L.P., Petition for Determination of Effective Competition*, File Nos. CSR 5635-E, 16 FCC Rcd. 4718 (February 27, 2001), ¶ 8 (“Texas Partners”); *I/M/O Texas Cable Partners, L.P. Petition For Determination of Effective Competition in Certain Communities in Texas*, CSR 5634-E, 16 FCC Rcd 4886, ¶ 5 (March 2, 2001)(*Texas Cable*).

<sup>17</sup> The Bureau referred to this case as the *Falcon Cable Systems* and cited it as support for the proposition that the use of 2000 Census data is appropriate. See MO & O at 3, ¶ 6. The Ratepayer Advocate cited to this case as *Charter Communications*. This case as discussed below supports the arguments that effective competition petitions must have reasonably contemporaneous data and petitioners can not rely upon stale data.

formal objection, the Mass Media Bureau decided the matter twenty-two (22) months after the Public Notice was issued.

In the oppositions filed below, the Ratepayer Advocate also noted that the FCC has acknowledged the importance of having current and contemporaneous data to consider while reaffirming that the burden of proof remains with the cable operator to provide that data. In *Mountain Cable*, the cable operator acknowledged that the filing of 1990 Census data alone was not as reliable as a filing that included updated data. The FCC accepted the revised data since the parties agreed to its consideration. Similarly in *Texas Partners*, the FCC noted that "...the Commission accepts updated household numbers based on the 1990 Census if the cable operator demonstrates their reliability." The FCC also noted that in prior cases it had allowed incorporation of a growth factor to establish current household numbers in recognition of the fact that Census data does not adequately reflect current population conditions.

In *Texas Partners*, the updated household numbers were submitted with the initial filing and the cable operator accepted the LFA's recommended adjustments as to DBS penetration numbers. In *Texas Cable*, the FCC accepted the 1999 population growth estimates filed along with the 1990 Census data in the initial filing. Based upon these cases, the Ratepayer Advocate argued that the FCC has repeatedly recognized that household data that is contemporaneous to DBS penetration data, and to the date of the filing of the petition, provides the greatest reliability and provides the probative value necessary to grant an application claiming effective competition. As discussed below, the Bureau simply failed to discuss the precedent relied upon by the Ratepayer Advocate or explain why it was departing from that prior precedent. Such failure is legal error sufficient to require remand.

In addition, the Ratepayer Advocate urged the Bureau to apply a "complete when filed" rule to

Cablevision’s petitions and dismiss the petitions. Alternatively, if the Bureau were to permit supplements to the petition, the Ratepayer Advocate recommended that the Bureau order Cablevision to refile the petitions which would trigger new public notices and a new pleading cycle under Section 76.7 of the Commission’s rules.<sup>18</sup>

Nevertheless, despite these arguments raised by the Ratepayer Advocate, the Bureau issued a decision finding that the 49 communities listed in the petitions were subject to effective competition such that the BPU as the LFA no longer had the authority to regulate rates. This AR followed, within the required thirty (30) days set forth in the Commission’s rules.<sup>19</sup>

## Argument

### POINT I

#### **The Bureau’s Use and Acceptance of 2000 Census Data Is Otherwise Inconsistent with Sections 623(a)(2), 623(l)(B)(i), and 623(l)(B)(ii) of the Communications Act, the Commission’s Implementing Regulations and Otherwise Results in a Decision That Is Arbitrary, Capricious and an Abuse of Discretion.**

The “competitive provider test” set forth in the Communications Act is straight forward in that two facts must be shown. First, it requires the number of households to be determined. Once the number of households are determined then the level of DBS penetration must be determined. DBS penetration must be more than 15 percent of the total number of households. Upon this showing, the cable operator can overcome the presumption that effective competition does not exist.<sup>20</sup> The statute and implementing regulations are clear that a filing of a petition is required seeking a determination of effective competition as

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<sup>18</sup> 47 C.F.R. § 76.7.

<sup>19</sup> See 47 C.F.R. § 1.115(d).

<sup>20</sup> See 47 C.F.R. § 76.907.

of the time of filing shall be granted if and only if the “competitive provider test” is satisfied. Accordingly, the statutory scheme and implementing regulations evidence a clear intent that all essential facts be submitted by the cable operator with the petition. This entails submission of both household and DBS penetration data, both of which should reflect the current state of affairs so that the Bureau may determine the state of competition at the time of filing.<sup>21</sup>

The Joint Applicants note that the Commission has no regulation which permits effective competition petitions to contain household and penetration data from different periods of time. Likewise, there is no regulation which designates 2000 Census data as sufficient to satisfy the household data element of the “competitive provider test,” despite the claim to the contrary by the Bureau.<sup>22</sup> Therefore, the Joint Applicants question the Bureau’s reliance on and acquiescence in accepting petitions which lack reasonably contemporaneous data for both households and DBS penetration.<sup>23</sup> Such action by the Bureau was legal error.

Additionally, in *AT&T Communications, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402 (7<sup>th</sup> Cir.

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<sup>21</sup> The Ratepayer Advocate recommended that the data used for households and penetration should be within three months of one another to otherwise satisfy the “competing provider test” and to rebut the presumption that effective competition does not exist. Similarly, the Ratepayer Advocate believes that in absence of reasonably contemporaneous data at time of filing, a petition for effective competition is not complete when filed and the three petitions in question should be dismissed.

<sup>22</sup> See MO & O at 3, ¶ 6.

<sup>23</sup> Although the Bureau asserts that the Commission has held that 2000 Census data is sufficiently reliable for effective competition determinations (MO & O at 3, footnote 16), the cases relied upon and cited to are Bureau decisions and not full Commission decisions. As discussed in more detail below, if the Bureau wanted to rely upon 2000 Census data in making effective competition determinations, a rule to that effect would be required. No rule exists and the Commission has undertaken no rulemaking. The Bureau’s unilateral action to permit the use of 2000 Census data is contrary to the Administrative Procedure Act which requires the adoption of prospective requirements to be done by rulemaking. See *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003) (Court concluded that the FCC erred by not following the APA and conducting a rulemaking). Effective competition petitions are contested cases and not rulemaking proceedings.

2003),<sup>24</sup> the Court held that a rate promulgated for unbundled network elements, based upon an Illinois statute that the Illinois Commerce Commission interpreted as requiring the use of 1997 data with otherwise current data on two factors failed to satisfy the requirements of the 1996 Telecommunications Act and TELRIC methodology. As such, the Court found that this mismatch failed to serve as a proper basis for the unbundled network element ratemaking.<sup>25</sup>

Additionally, the Bureau's approval of Cablevision's use of 2000 Census data with penetration data from a later time period is inconsistent with and conflicts with Section 623 of the Communications Act and the Commission's implementing regulations. Specifically, the mismatch in the data resulting from basing a petition on 2000 Census data and DBS penetration data from 2003 is fundamentally inconsistent with the presumption that effective competition does not exist, such that permitting the use of this mismatched data is arbitrary, capricious and otherwise an abuse of discretion on the part of the Bureau. Despite having raised the mismatch issue below, the Bureau simply ignored the arguments advanced by the Ratepayer Advocate and failed to offer any rationale other than the Bureau had previously permitted the use of 2000 Census data with current DBS penetration data. The Bureau's assertion that its position is supported by precedent is not accurate, as the cases relied upon by the Bureau do not support the Bureau's actions. Accordingly, the Bureau's decision lacks a reasoned basis such that the Commission should reverse, vacate, and remand the matter to the Bureau.

## **POINT 2**

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<sup>24</sup> The Ratepayer Advocate notes that the pleading cycle in the three cases had closed by the time the Seventh Circuit case was decided. The Seventh Circuit case supports the mismatch of data arguments made to the Bureau below.

<sup>25</sup> The Board's reliance upon this case in the present petitions does not, of course, foreclose the Board's ability to distinguish this holding in appropriate situations.

**The Bureau Improperly Shifted and Placed the Burden of Proof on the Ratepayer Advocate Which Is Inconsistent with The Commission’s Rules, and Contrary to the Administrative Procedure Act and Case Precedent.**

The Joint Applicants submit that the Bureau improperly shifted and placed the burden of proof onto the Ratepayer Advocate when it held that the Certificate of Occupancy (“CO”) and tax record approach suggested by the Ratepayer Advocate is not demonstrably more reliable than the data submitted by Cablevision.<sup>26</sup> Section 76.907(b) of the Commission’s rules places the burden of rebutting the presumption that effective competition does not exist clearly and entirely upon the cable television operator. This requires Cablevision to demonstrate that it satisfies the “competitive provider test,” including the number of households by a preponderance of the evidence.

Section 556(d) of the Administrative Procedure Act (“APA”), in pertinent part provides: “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”<sup>27</sup> The United States Supreme Court has held that the APA imposes both the burden of production and burden of persuasion on a proponent of a rule or order. See *OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Effective competition petitions are contested cases for purposes of the APA. As a result, under the APA, Cablevision bears the burden of proof to show compliance with the “competitive provider test.” As noted above, the rules of the Commission place the burden of proof on Cablevision and Cablevision must overcome the presumption that effective competition does not exist.

The Ratepayer Advocate offered evidence by affidavit that the number of households increased since the 2000 Census based upon CO and tax records in certain of the communities. That evidence was offered

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<sup>26</sup> See MO & O at 3, ¶ 6.

<sup>27</sup> 5 U.S.C. § 556(d).

as support for why a petition for effective competition must be based upon reasonably contemporaneous household and penetration data.<sup>28</sup> An increase in the number of households may well affect whether the 15 percent standard is met and the Ratepayer Advocate showed that effect in its oppositions filed below.<sup>29</sup> As a result, the Joint Applicants submit that Cablevision failed to carry the burden of proof and overcome the presumption against effective competition.

The Bureau's characterization that the issue is one of "reliability" improperly shifts and places the burden of proof away from the cable television operator. The Bureau simply ignores the element of the "competitive provider test" that requires the number of households to be proven by the petitioner in the first instance as a material fact. The affidavits offered by Cablevision in its replies below simply fail to address and resolve the ultimate question of fact: what is the number of households as of the time of filing of the petition.

The Cablevision affidavits merely confirm that a material fact is in dispute. Cablevision's affidavits contain no probative evidence as to what portion of the COs may not reflect new households.<sup>30</sup> In fact, the

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<sup>28</sup> An additional basis for the need for contemporary data can be seen in recent news articles. As recently as May 11, 2004, Cablevision has publically announced that it has recovered households from DBS in the State. Michael Learmonth, *Cablevision investors worried despite narrower loss*, The Star-Ledger, May 11, 2004, at 27. This change in circumstances may be more than sufficient to impact the penetration percentage in a municipality, and only serves to highlight the need for a "complete when filed" rule.

<sup>29</sup> This element can be seen most clearly in an examination of one of the 49 communities involved in this matter. In Interlaken, the Commission accepted the presentation by Cablevision that there are 386 households and 58 DBS subscribers, resulting in a penetration value of 15.03%. The addition of a single household, to 387 households, would reduce that penetration to 14.99%, thereby failing to satisfy the 15% minimum required for a determination of effective competition. As such, and in light of the refusal of SkyTrends or other companies providing penetration data to disclose the information and methodology to the BPU or the Ratepayer Advocate on an ongoing basis, the need for updated household information, contemporaneous with DBS information, should be a minimum requirement for petitions of this nature.

<sup>30</sup> By way of example, in SCR No. 6169-E, the affidavit of Elizabeth Losinski provides that "I have read the foregoing Reply Comments. With respect to the statements made in the Reply comments, other than those of which notice can be taken, the facts contained therein are true and correct to the best of my personal knowledge,

affidavits are devoid of any facts.

Cablevision argues below that COs are not a reliable indicator of any increase in households because (1) COs do not automatically indicate that a residence is occupied, (2) a CO may actually be a re-issuance of a lost certificate, and (3) the issuance of a CO may indicate a diminution of the number of households in a franchise area – such as when a small apartment building is demolished and replaced with a single family home. Cablevision’s arguments in its reply comments are not evidence but mere speculation and conjecture, Cablevision can not assume that all COs fall within the three categories without providing concrete evidence to support its assertions. In the absence of an offer of probative evidence as to which of the COs fall into these possible scenarios, Cablevision has failed to satisfy its burden of proof.

As a result, the Bureau improperly ignored Cablevision’s failure to carry its burden of proof and improperly imposed upon the Ratepayer Advocate the burden of showing that its method is reliable. The Bureau’s action turns the effective competition process upside down. The Bureau’s action in granting the petitions is reversible error because the record lacks substantial evidence to support the number of households for application of the “competitive provider test,” such that the Commission should reverse, vacate, and remand the matter.

### **POINT 3**

#### **The Bureau Erred by Not Conducting Further Proceedings to Resolve a Factual Dispute.**

In a contested proceeding such as occurred below, the Bureau simply cannot blind itself to the fact that a material factual issue exists as to what the actual numbers of households are in the various communities

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information, and belief.” The other affidavits offered by Cablevision in Reply Comments in the other two proceedings contain the same statements without identification of what the facts are. They offer no facts regarding how many COs fall within the three alleged categories that would preclude their consideration.

in 2000 and as of the time of the filing of the petitions.<sup>31</sup> This is what the Bureau did when it failed to address this issue and other issues raised by the Ratepayer Advocate. The household numbers are in dispute and this is an adjudicative fact(s) which requires further proceedings to resolve. Sections 76.7(e) and (f) of the Commission's rules provide for the ordering of additional procedures and submissions, including discovery. The Bureau simply avoided resolution of this factual dispute by arguing about reliability as opposed to determining what the actual number of households are. The factual dispute about households impacts directly upon the "competitive provider test" and upon the need for a reasonably contemporaneous standard for submission of household and penetration data, a "complete when filed" requirement and whether the presumption of no effective competition can be overcome by the submission of mismatched data from different periods.<sup>32</sup>

#### **POINT 4**

#### **The Bureau Failed to Address All Issues Raised in the Ratepayer Advocate's Oppositions and Failed to Discuss, Distinguish, and Analyze the Case Precedent Relied upon by the Ratepayer Advocate for its Recommendations of a Reasonably Contemporaneous Requirement in Effective Competition Filings and a Complete When Filed Requirement.**

As discussed above, the Bureau simply failed to address the issues raised by the Ratepayer Advocate. Instead, the Bureau summarily concluded that the Ratepayer Advocate's argument are without merit and limited their analysis to the fact that 2000 Census data is sufficiently reliable. The Bureau did not address the other issues raised by the Ratepayer Advocate or articulate a reasoned basis for rejecting those

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<sup>31</sup> Since under the Commission's rules, no ex parte communications are permitted, these proceedings are formal adjudications. Section 557(d)(1) of the APA prohibits ex parte communications in formal adjudications.

<sup>32</sup> When disputed questions of material facts are present, an agency should conduct evidentiary hearings. See *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir. 1995); *Gencom Incorporated v. FCC*, 832 F.2d 171, 180, 181 (D.C. Cir. 1987); *Bell Telephone Company of Pennsylvania v. FCC*, 503 F.2d 1250, 1267, 1268 (3<sup>rd</sup> Cir. 1974); *State of Wisconsin v. FERC*, 104 F.3d 462, 424, 425 (D.C. Cir. 1997)

issues. Although the Bureau asserts that “use of 2000 Census data is permissible under our rules,” there is simply no Commission rule which permits the use of 2000 Census data.<sup>33</sup> The Ratepayer Advocate did present case precedent which supports a reasonable contemporaneous standard for household and DBS data. Based upon various prior Bureau decisions, the Ratepayer Advocate noted that the Commission acknowledged the importance of having current and contemporaneous data while affirming that the cable operator retains the burden of proof and updated data is appropriate. See footnote 16 above, for the cases relied upon by the Ratepayer Advocate.

The cases cited by the Bureau in the MO & O actually undermine the Bureau’s decision. The *Falcon Cable Systems* case (referred to as “*Falcon II*”) is the same case the Ratepayer Advocate referred to as *Charter Communications* and which the Ratepayer Advocate relied upon as support for the arguments raised in its oppositions. *Falcon II* involved the situation where the initial filing was made using 1990 Census data on households and the cable operator supplemented the filing with 2000 Census data.<sup>34</sup> Only after the household data was supplemented did the Bureau conclude that the second prong of the test was satisfied. The Joint Applicants note that 2000 Census data reports SF 1 were not available until after June 2001 and the supplement was filed several months after the initial filing. See Exhibit A attached hereto which contains the release date for Summary File 1 (“SF 1”) reports.<sup>35</sup> Therefore, the *Falcon II* case supports the Ratepayer Advocate’s arguments.

In *Texas Cable Partners* (referred to as “*Texas II*”), the petitions were filed in October and

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<sup>33</sup> See MO & O at 3, ¶ 6.

<sup>34</sup> MO & O at 3, footnote 16.

<sup>35</sup> Cablevision’s petitions relied upon SF 1 reports.

November 2001 and relied upon 2000 Census data. These petitions were unopposed and the issue of contemporaneous data was not even addressed. The *Texas II* case cited by the Bureau did not involve a dispute over the timeliness of the Census data. Based upon the facts of *Texas II*, the Census data was within three to six months of the filing. There was no multi-year lag as in the Cablevision petitions at issue here.<sup>36</sup> The *Texas II* case cited by and relied upon by the Bureau therefore actually supports the Ratepayer Advocate's argument. There was no two to three year mismatch in the data.

#### **POINT 5**

**The Bureau Erred in Failing to Adopt a “Complete When Filed” Requirement for Effective Competition Petitions, in Failing to Dismiss the Three Petitions for Containing Insufficient Information to Apply the “Competitive Provider Test,” and in Failing to Issue a Reasoned Decision Addressing All the Issues Raised by the Ratepayer Advocate.**

As discussed above, the Bureau simply failed to address the issues presented and articulate a reasoned decision responding to the issues raised. As a result, the Bureau did not engage in reasoned decision making. The Bureau simply failed to explain why it acted as it did. The Bureau ignored that a material component of the “competitive provider test” was in dispute, as to the number of households at the time of the filing of the petitions. Therefore, additional proceedings were appropriate and were required under Sections 76.7(e) and (f) of the Commission's rules, including evidentiary hearings to resolve the adjudicative facts in dispute. That is, what is the actual number of households at the time the petitions were filed.

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<sup>36</sup> The Joint Applicants ask that the Commission note that the 2000 Census data was collected in 2000 so by the time the SF 1 reports are issued in 2001, the household data is already outdated by up to one year.

The resolution of the various issues raised by the Ratepayer Advocate cannot be adequately addressed and reviewed unless the number of households is adequately supported by the preponderance of the evidence. The record must contain substantial evidence on this issue. The record does not. If there has been a substantial increase in households since the 2000 Census, the second prong of the “competitive provider test” will yield a different result. The Joint Applicants submit that if the household data is not contemporaneous and current, Cablevision has not sustained its burden of proof and has not refuted the presumption that effective competition does not exist. The Bureau failed to address why a “complete when filed” rule would not be appropriate in light of the statute and the Commission’s rules implementing the statute. The Ratepayer Advocate in its oppositions pointed to other instances where a “complete when filed” rule had been adopted by the Commission.

More importantly, the Bureau’s precedent cited in the MO & O does not support the decision of the Bureau. In fact, the Joint Applicants submit that the Bureau decision is an unexplained departure from the case precedent cited by the Ratepayer Advocate. The Bureau’s decision is also inconsistent with the statute and the Commission’s rules implementing the statute for the reasons discussed above. The Joint Applicants submit that the Bureau must have reasonably contemporaneous household and DBS penetration data at the time of the filing in order to properly apply the “competitive provider test.” Cablevision’s failure to provide reasonably contemporaneous data should result in denial or dismissal of the subject petitions with directions to refile.

The Joint Applicants submit that the Commission should not permit the supplementation of petitions after filing unless new public notices are issued and the pleading cycle is restarted from the date of the new public notice. Any other procedure lacks appropriate due process. The Bureau should be representing the

public interest and not, merely, superficially reviewing these petitions (as the record in this case demonstrates). The Bureau should not abdicate its obligation to protect the public interest and should faithfully apply the Communications Act and the Commission's rules implementing the Communications Act. The LFA loss of the authority to regulate BST rates has serious consequences for ratepayers and ratepayers are entitled to a thorough review by the Bureau which is otherwise consistent with the statute and the implementing regulations. Ignoring the mismatch in household and penetration data is simply arbitrary, capricious and an abuse of discretion. **Conclusion**

For the reasons discussed below, the Joint Applicants submit that the Bureau's decision should be reversed, vacated, and remanded to the Bureau due to legal errors committed by the Bureau. On remand, the Joint Applicants respectfully request that the Commission direct the Bureau to:

- (1) Vacate its order and dismiss the underlying petitions;
- (2) Direct Cablevision to refile the petitions with reasonably contemporaneous data, i.e., household and DBS penetration data that are within 3 months of one another;
- (3) Direct the issuance of new public notice(s) upon refiling and restarting of the pleading cycle;
- (4) Direct the Bureau to implement a "complete when filed" procedural rule applicable to effective competition petitions; and
- (5) Such other directions as the Commission deems appropriate.

Respectfully submitted

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Respectfully submitted

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Deputy Attorney General

Dated: May 14, 2004

CC: Service List

Besides the fact that the Bureau decision is facially inconsistent with the statute and implementing regulations, the Bureau's decision to rely upon a mismatch in household data and penetration data suffers from infirmities similar to those recently found by the 7<sup>th</sup> Circuit Court of Appeals.<sup>37</sup> In *AT&T Communications, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402 (7<sup>th</sup> Cir. 2003), the Court affirmed the District Court determination that an Illinois statute that limited consideration to two factors (fill factors and depreciation) using current data, coupled with other data from 1997, conflicts with the 1996 Act and TELRIC methodology. In setting rates by using mismatched data, the Court found that such a process is not forward-looking for purposes of TELRIC methodology. The Court found objectionable the legislative initiative to permit use of 1997 data with later data that otherwise conflicts with the Commission's TELRIC rules (noting that one can not consider factors in isolation which subvert the underlying rules).

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<sup>37</sup> The Ratepayer Advocate notes that the pleading cycle in the three cases had closed by the time the Seventh Circuit case was decided. The Seventh Circuit case supports the mismatch of data arguments made to the Bureau below.