

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

<b>In the Matter of:</b>	)	<b>CSR-7588-E</b>
	)	
<b>Comcast Cable Communications, LLC on Behalf of its Subsidiaries and Affiliates</b>	)	<b>CSR-7589-E</b>
	)	
<b>Petitions For Determination of Effective Competition in 24 New Jersey Franchise Areas</b>	)	<b>CSR-7590-E</b>
	)	
		<b>CSR-7591-E</b>
		<b>CSR-7592-E</b>

**To: Chief, Media Bureau**

**Comments of the New Jersey Division of Rate Counsel in Opposition  
To Comcast Cable Communications' Petitions for a Declaration of  
Effective Competition in 24 New Jersey Franchise Areas**

The New Jersey Division of Rate Counsel (“Rate Counsel”) hereby submits its comments in opposition to the above referenced Petitions.<sup>1</sup> On or about September 7, 2007, Comcast Cable Communications, LLC (“Comcast”) filed the subject Petitions with the Federal Communications Commission Media Bureau (“Bureau”) covering twenty-four (24) municipal franchises in New Jersey.<sup>2</sup> The FCC issued a Public Notice on

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<sup>1/</sup> Rate Counsel observes that the Petitions make no mention of whether the appropriate applicable fees that pertain to each franchise area have in fact accompanied this filing, as required by FCC Rules. See Public Notice, DA-05-921 Released April 1, 2005. Section 1.104(8) (g) of the rules requires payment of a filing fee for each franchise area. Additionally, the Public Notice reminded carriers of form requirements such as identification of each franchise area associated with the Petitions and that violation of such requirements would make the Petition subject to return without processing.

<sup>2/</sup> Although Comcast filed one Petition, the Public Notice issued by the Commission separated the franchises into five separate dockets, as noted in the caption. Comcast seeks a declaration of effective competition on the basis of the Local Exchange Carrier (“LEC”) test in Audubon Borough, Barrington, Cherry Hill, Cranford, East Rutherford, Eatontown, Fair Haven, Freehold, Garwood, Haddon Heights, Haddonfield, Holmdel, Kenilworth, Lawnside, Little Silver, Middletown, Monroe, Oceanport, Red Bank, Rumson, Sea Bright, Shrewsbury Borough, Tinton Falls, and Wallington.

October 1, 2007 in Report No. 0226, which notified the interested public of this filing.<sup>3</sup> For the reasons set forth below, Rate Counsel contests the Petitions and respectfully submits the within comments. Rate Counsel requests that the Bureau dismiss or, deny the Petitions.

First, Comcast's Petitions fails to satisfy the LEC test due to the failure to demonstrate that the competitive LEC, Verizon NJ, provides the requisite Public, Education, and Government ("PEG") Channels that would qualify its video service as comparable to that provided by Comcast in the respective franchise areas at issue.

Additionally, since Verizon NJ delivers video service in New Jersey under the provisions of a new state wide franchise law, and no statewide franchises existed when Congress adopted Section 623(k),<sup>4</sup> the LEC test cannot be applied absent expressed Congressional action to amend the law so as to permit statewide franchises to be covered.

Lastly, the issues raised here must be decided by the full Commission and cannot be decided by the Media Bureau under delegated authority.

Accordingly, the Petitions fail to satisfy the statutory criteria for a declaration of effective competition and therefore should be dismissed, or alternatively, denied.

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<sup>3/</sup> See Public Notice, Report No. 0226, Special Relief and Show Cause Petitions, released October 1, 2007. In accordance with Section 76.7(b) (1) the FCC's rules, comments/opposition are due twenty (20) days after the issuance of the Public Notice. See 47 *C.F.R.* § 76.7(b) (1). By letter dated October 19, 2007, Rate Counsel, with the consent of Comcast, requested an extension of time to submit comments until November 12, 2007.

<sup>4/</sup> 47 *U.S.C.* § 543(k).

## LEGAL ARGUMENT

### **COMCAST HAS FAILED TO DEMONSTRATE SATISFACTION OF THE LEC TEST**

Section 543 of the Communications Act of 1934, as amended by Section 623 of the Telecommunications Act of 1996,<sup>5</sup> provides that subscriber rates of cable television systems are subject to either local or federal regulation where effective competition is absent.<sup>6</sup> The Comcast franchise areas at issue here are currently subject to the regulatory jurisdiction of the Local Franchise Authority (“LFA”) for the State of New Jersey, the New Jersey Board of Public Utilities (“Board”). Under FCC rules, cable operators, who claim that effective competition exists and thus seek to rebut the statutory presumption against the existence of effective competition, must satisfy one of four tests set forth in Section 76.905(b) of the Commission's rules.<sup>7</sup> Regardless of which test is pursued, the burden of proof rests exclusively with the cable operator to rebut the presumption that effective competition does not exist.<sup>8</sup>

A cable operator may rebut the presumption that effective competition does not exist by showing that it satisfies the LEC test, as Comcast attempts in the matter *sub judice*. Under this test, a cable operator must provide competent evidence to demonstrate

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<sup>5</sup>/ Pub. L. No. 104, 100 Stat. 56, approved February 8, 1996, codified at 47 U.S.C. § 151 *et seq.*

<sup>6</sup>/ 47 U.S.C. § 543(a)(2).

<sup>7</sup>/ 47 C.F.R. § 76.905(b).

<sup>8</sup>/ Regardless of whether an effective competition is contested or not, the cable operator's failure to sustain the burden of proof results in denial and dismissal of the Petitions. *See Cox Southwest Holdings, LP, ten Unopposed Petitions for Determination of Effective Competitions in 17 Local Franchise Areas*, CSR 6877-E, etc., DZ 07-933 (Released March 2, 2007); *I/M/O Time Warner Entertainment Co. LP*, CSR 5136-E, DA 99-234 (Released January 26, 1999).

that a specific franchise area within its cable system is subject to effective competition by showing that a local exchange carrier, or its affiliate, offers comparable video programming services directly to subscribers in the same franchise area as the cable operator.

Comcast claims that it meets the LEC test because Verizon New Jersey (“Verizon NJ”) offers FIOS TV service in each of the subject franchise areas.<sup>9</sup> Comcast asserts that Verizon NJ is a local exchange carrier that offers multichannel video service in the franchise areas, that such service substantially overlaps Comcast’s franchise areas involved here, and that potential subscribers in the franchise areas are reasonably aware that they may purchase Verizon’s FIOS TV service.<sup>10</sup> Verizon NJ obtained a statewide system franchise from the Board on the basis of new legislation. Contrary to Comcast’s assertions, the LEC test cannot be relied upon by Comcast, and the LEC standards are not satisfied even if it did apply.

First, the statute does not contemplate application of the LEC test to a statewide system franchise. Comcast’s reliance on the Board’s Order granting Verizon NJ a statewide system franchise<sup>11</sup> as a trigger for the applicability of the LEC test is therefore misplaced. Without question, the FCC is the only regulatory body lawfully authorized to make a declaration of effective competition.<sup>12</sup> The Board is without any authority under

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<sup>9</sup> / Petitions, at 5-10.

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

<sup>11</sup> / Petitions at 6. See, *I/M/O The Application by Verizon New Jersey, Inc. for a Systemwide Cable Television Franchise*, BPU Docket No. CE0611076, 2006 N.J. PUC LEXIS 74 (December 18, 2006). (“*Board Order*”).

<sup>12</sup> / *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order*, Docket No. 96-85, FCC 99-57 (Released March 29, 1999) (“*Report and Order*”); The *Report and Order* established uniform policy for a determination of effective competition in order to eliminate

the statute to render a determination of effective competition or to rule that the LEC test is in any way applicable to Verizon's state-wide system franchise. In fact, the FCC has rejected analysis of effective competition petitions on a system-wide basis and has repeatedly ruled that a franchise per franchise area analysis is required in making determinations of effective competition.<sup>13</sup> A state-wide system franchise was not contemplated by either the Cable Act of 1992 or the 1996 Act, which permit cable operators to seek declarations of effective competition on a local franchise basis only. Any change would require Congressional action. Rate Counsel submits that as a matter of first impression, this issue must be addressed by the full Commission instead of the Media Bureau.<sup>14</sup>

In *Service Electric*,<sup>15</sup> the Media Bureau confirmed that a franchise area to franchise area analysis is required and denied Service Electric's Petition on the grounds that the aggregation of franchise areas is impermissible under the Cable Act and implementing regulations. It reasoned that the statute requires the Commission to determine whether each franchise area is subject to effective competition, consistent with the ruling in the *Rate Regulation Report and Order* which rejected the proposal to allow

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confusion, ¶ 185; and affirmatively states that the FCC is the regulatory body empowered to make a declaration of effective competition, ¶ 30; and to provide guidance on such terms as "offers service in the franchise area", and "comparable video programming".

<sup>13</sup>/ *I/M/O Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 93-177, 8 FCC Rcd 5631, 5672-5673 (Released May 3, 1993) (Effective competition determinations will be made on a franchise area basis). ("*Rate Regulation Report and Order*").

<sup>14</sup>/ 47 C.F.R. § 0.283 provides, in part, for disposition by the Commission *en banc* on matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.

<sup>15</sup>/ *I/M/O Service Electric Cable TV of New Jersey, Inc., etc.*, CSR-6404-E, DA 05-3350 (December 30, 2005) ("*Service Electric*").

cable operators to demonstrate effective competition on a system-wide basis.<sup>16</sup> Because Congress has not addressed statewide system franchises, the LEC test is not one that Comcast can reasonably invoke.

Even if the LEC test were applicable, Verizon NJ's FIOS TV video programming service fails to meet the statutory criteria. The LEC's programming service offered in a franchise area must be comparable to the video programming service provided by the cable operator in the same area.<sup>17</sup> The Act gives franchising authorities the discretion when awarding a franchise to require assurance that a cable operator will provide adequate PEG access channel capacity, facilities, or financial support.<sup>18</sup> New Jersey's statewide system franchise law requires the franchisee under the law to provide PEG programming.<sup>19</sup> Therefore, Comcast must provide evidence of Verizon FIOS TV comparability that includes PEG channels as provided by Comcast in the respective franchise areas under review. Comcast did not meet its burden of proof.

The fact that Verizon NJ does not yet provide PEG channels to its customers as is provided by Comcast shows that Verizon FIOS TV is not comparable.<sup>20</sup> Indeed, Verizon NJ has elicited the assistance of the LFA in efforts to secure its delivery of PEG channels

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<sup>16</sup>/ Id. at ¶ 6, citing *Rate Regulation Report and Order*, 8 FCC Rcd at 5672.

<sup>17</sup>/ 47 U.S.C. § 543(l)(1)(D).

<sup>18</sup>/ 47 U.S.C. § 541(a)(4)(B).

<sup>19</sup>/ N.J.S.A. 48:5A-28 (i).

<sup>20</sup>/ See, *I/M/O The Application by Verizon New Jersey, Inc. for a Systemwide Cable Television Franchise*, BPU Docket No. CE0611076, 2006 N.J. PUC LEXIS 74 (December 18, 2006). (“*Board Order*”). The Board Order was granted subject to several terms and conditions. These include the requirement that Verizon provide PEG channels, as well as interconnection with the incumbent cable television provider, and service requirements consistent with the federal channel use restrictions.

on the same basis as the incumbent cable providers including Comcast.<sup>21</sup> That proceeding is still open. Therefore, Comcast is unable to demonstrate that Verizon NJ's FIOS TV is a comparable video programming service that satisfies the LEC test. Comcast has failed to meet its burden of proof, and therefore, the Petitions should be denied.

Moreover, Comcast fails to demonstrate that Verizon FIOS TV has in fact any subscribers in the several Comcast franchise areas at issue. Direct evidence of subscribership to Verizon's FIOS TV is missing. In *Marcus Cable Associates*,<sup>22</sup> the value of direct evidence of subscribership was recognized. Therein, the Cable Service Bureau noted that evidence regarding the number and location of subscribers to the competing service shows that the competitor is physically able to deliver service and reflects the degree to which subscribers are reasonably aware of the competing service since they are in fact receiving it. However, no such evidence was submitted by Comcast. Instead, Comcast relies on the illusory effect of circumstantial facts, i.e. general advertising and channel lineups, which do not demonstrate customer awareness in the specific communities in question. Therefore, Comcast has not satisfied the LEC test, even if it applied.

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<sup>21</sup>/ See *Verizon New Jersey Inc. Request for Assistance Resolving Interconnection Negotiations with Comcast*, BPU Docket No. CO07070525; *Verizon New Jersey Inc. Request for Assistance Resolving Interconnection Negotiations with Cablevision*, BPU Docket No. CO07070524; *Verizon New Jersey Inc. Request for Assistance Resolving Interconnection Negotiations with Patriot Media*, BPU Docket No. CO07070523 (Patriot Media has since merged with Comcast); *Verizon New Jersey Inc. Request for Assistance Resolving Interconnection Negotiations with Time Warner Cable*, BPU Docket No. CO07070522; *Verizon New Jersey Inc. Request for Assistance Resolving Interconnection Negotiations with U.S. Cable*, BPU Docket No. CO07070521. The current failure to provide PEG channels creates a public safety issue as recently experienced in Cranford, NJ (a franchise area cited in the Petitions). Storm flooding and emergency notification available via PEG channels to Comcast customers was not available to Verizon FIOS TV customers.

<sup>22</sup>/ *I/M/O Marcus Cable Associates, LP*, CSR 5145-E, (Released May 5, 1998).

## CONCLUSION

As discussed above, the LEC test does not apply to a statewide franchise absent Congressional action, and Comcast's Petitions for effective competition are otherwise deficient and fail to satisfy the FCC's criteria under the LEC test. Accordingly, the Petitions should be dismissed, or alternatively, denied.

Respectfully submitted,

RONALD K, CHEN  
PUBLIC ADVOCATE

Stefanie A. Brand  
Director, Division of Rate Counsel

By: \_\_\_\_\_  
Jose Rivera-Benitez  
Assistant Deputy Public Advocate

Dated:  
CC: Service List