

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

In the Matter of:	)	CSR 5048-E
	)	
Cablevision of Boston, Inc.	)	Boston, MA
	)	CUID No. MA0182
Petition for Determination of	)	
Effective Competition	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2001

Released: July 20, 2001

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Cablevision of Boston, Inc. ("Cablevision")<sup>1</sup> has filed a petition for determination of effective competition asserting that it is subject to effective competition in Boston, Massachusetts because of the presence of Residential Communications Network of Massachusetts, Incorporated's ("RCN") cable operations in that franchise area. The City of Boston ("Boston") filed comments opposing Cablevision's request to which Cablevision filed a reply. Both Cablevision and Boston filed supplements to update the record.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>2</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>3</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>4</sup> Section 623(1)(1)(D) of the 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>5</sup>

<sup>1</sup> Cablevision recently transferred its Boston cable franchise to AT&T Broadband. Nevertheless, we refer to Cablevision in this Order because it filed the original petition.

<sup>2</sup> 47 C.F.R. § 76.906.

<sup>3</sup> 47 C.F.R. § 76.905.

<sup>4</sup> See 47 C.F.R. §§ 76.906 & 907.

<sup>5</sup> Communications Act, § 623(1)(1)(D), 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(1) is often called the "LEC" effective competition test.

3. 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 cable service that substantially overlaps the incumbent operator's service in the franchise area.<sup>6</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, and that no regulatory, technical or other impediments to household service exist. In addition, the incumbent must demonstrate 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>7</sup>

## II. THE PLEADINGS

4. Cablevision asserts that it is subject to LEC effective competition in its Boston, Massachusetts franchise area. With regard to the LEC affiliation requirement, Cablevision asserts that RCN<sup>8</sup> is a "fast-growing" multichannel video programming distributor ("MVPD")<sup>9</sup> providing video programming, telephony, and internet services to thousands of subscribers in Boston. Cablevision adds that RCN is engaged in the provision of local exchange service.<sup>10</sup> Cablevision additionally asserts that RCN is also affiliated with C-TEC<sup>11</sup> and MFS Communications Company, Inc. ("MFS"),<sup>12</sup> two other local exchange

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<sup>6</sup> See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

<sup>7</sup> *Id.*

<sup>8</sup> RCN is a wholly-owned subsidiary of RCN Telecom Services, Inc., which presently is a wholly-owned subsidiary of C-TEC Corporation ("C-TEC"). RCN currently provides service in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, and Washington, D.C. metropolitan television markets. See RCN's Annual Report for the Year 2000.

<sup>9</sup> The Commission's rules define an MVPD as "an entity such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.905(d). While not formally included in the definition, we consider OVS operators to be MVPDs for the purposes of effective competition.

<sup>10</sup> Cablevision attaches exhibits to demonstrate that RCN meets the LEC affiliation requirement. See C-TEC Corporation SEC Form 10-K, Item 1, Business (filed March 31, 1997), attached as Exhibit 1 to Cablevision's petition; see also Peter Kiewit Sons', Inc. SEC Form 10-K, item 1, business--RCN Telecom Services (filed March 28, 1997) ("in Massachusetts, RCN is registered to offer local exchange carrier services and to resell long distance."), attached as Exhibit 2 to Cablevision's petition.

<sup>11</sup> C-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 10-K at Exhibit 1.

<sup>12</sup> MFS is a holding company with subsidiaries providing "local and long distance switched service" and "local access" service. MFS is now a wholly-owned subsidiary of WorldCom, Inc. ("Worldcom"). See MFS Communications Company, Inc. SEC Form 10-K, item 1, Business (filed May 16, 1997), attached to Cablevision's petition as Exhibit 4.

carriers. Cablevision explains MFS, RCN, and C-TEC were, at one time, all owned by Peter Kiewit Sons, Inc., but that MFS was spun-off from Kiewit in September, 1995. Cablevision, however, states that RCN is still affiliated with MFS, through Kiewit, for purposes of the LEC affiliation requirement.<sup>13</sup>

5. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, Cablevision asserts that RCN is now offering service by means of a fiber optic network in Boston owned by MFS. Cablevision further asserts that RCN has entered into a joint venture with the Boston Energy Technology Group ("BETG"), a wholly-owned subsidiary of Boston Edison Company ("Boston Edison"), to furnish video programming service in Boston and surrounding communities. Cablevision states that the venture will invest \$300 million to upgrade Boston Edison's existing 200-mile ring of fiber optic cable, which will serve as a delivery route for RCN's video and telephony services.<sup>14</sup> Cablevision states that RCN has heavily marketed the availability of its cable service through local media<sup>15</sup> and other means, and news reports indicate that RCN currently furnishes, or has agreements to furnish, video programming service to thousands of customers in multiple dwelling units in the Boston area.<sup>16</sup> Cablevision asserts there are no regulatory, technical, or other impediments to households taking service from RCN.

6. Cablevision also asserts that RCN offers comparable programming to Boston subscribers. Specifically, Cablevision provides RCN's channel line-up demonstrating that RCN offers 84 channels of video programming, 12 of which are local television broadcast signals. Cablevision offers over 100 channels of video programming in Boston.

7. In opposition, the City of Boston argues that "effective competition" is a premature description of the Boston video market. The City states that only two of the fourteen neighborhoods comprising the franchise area may obtain competing video service from RCN. It adds that it will take between three to five years for RCN to build its system throughout the City. A determination of effective competition, the City argues, would also remove the "level-playing field" of uniform rates for most subscribers in Boston.

8. In reply, Cablevision argues that the City does not dispute any of the salient facts necessary to grant the relief requested. The operator asserts that the plain language and legislative history of the 1996 Act dictate that cable rates should be deregulated whenever a LEC affiliate offers comparable multichannel

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<sup>13</sup> Cablevision assumes that Kiewit shareholders retained their MFS stock after the spin-off and that the post-merger portion of WorldCom shares held by Kiewit stockholders would be approximately 315 million, or roughly 35% of all WorldCom shares. It adds that Standard and Poor's had reported that certain directors of MFS and Kiewit received approximately 23% of the common shares received in the distribution following the spin-off. See Standard and Poor's Corporation, *S7P Daily News*, "MFS Communications Co., Inc.", October 3, 1995, attached to Cablevision's petition as Exhibit 7.

<sup>14</sup> See Exhibit 9 attached to Cablevision's petition.

<sup>15</sup> Cablevision states that RCN launched the Boston component of a \$10 million advertising campaign aimed at publicizing its service offerings. See Cablevision petition at Exhibit 17.

<sup>16</sup> Cablevision includes the two following articles, as Exhibit 12, to support this statement: (1) "RCN Takes Off the Gloves," *CableFax Daily*, July 1, 1997 at 1; and (2) Bruce Mohl, "Cablevision Rival Gets OK from FCC," *Boston Globe*, December 11, 1996 at D1.

video programming service in the incumbent's franchise area. Congress could have specified, but did not, a "homes passed" criterion for LEC-affiliated competitors in connection with cable rate deregulation; moreover, Congress did not require that actual penetration reach a specified level although it certainly could have done so. Cablevision also states, contrary to the City's assertion, that RCN-BETG is currently providing video programming service within six of the fourteen neighborhoods in the City of Boston.<sup>17</sup>

9. In its supplement, Cablevision states that RCN has obtained a 15 year cable franchise from the City of Boston on July 27, 1999.<sup>18</sup> According to the operator, RCN's franchise requires it to build a \$250 million network capable of serving over 265,110 homes in Boston by the end of 2002 (approximately 90% of all Boston households) and complete its city-wide system within six years.<sup>19</sup> Cablevision states that RCN's failure to meet these requirements would subject the company to substantial liquidated damages of up to \$400 per day.<sup>20</sup> In addition, the franchise requires RCN to pay 5% of its gross revenues to the city, build and manage a private data network linking all city buildings, and provide free of charge one connection to the cable television system and the basic service to all public institutions in the City.<sup>21</sup> Cablevision adds that RCN now provides more than 100 channels of programming comparable to that it offers in Boston.

10. Boston replies by stating that RCN's activities in the city do not constitute effective competition under the Commission's rules and guidelines. According to Boston, as of December 31, 1998, RCN had a total of 2,500 cable subscribers in the City whereas Cablevision had 150,000.<sup>22</sup> Boston also states that there is no evidence offered by Cablevision of widespread construction by RCN in Boston. It asserts that it has only wired assorted MDUs in the city and is beginning construction in three or four of the city's 22 residential wards.<sup>23</sup>

11. Cablevision counters Boston's factual assertions. According to Cablevision, RCN itself has at least 5000 cable subscribers in Boston.<sup>24</sup> Cablevision also states that RCN's cable service is available in at least 12 Boston neighborhoods.<sup>25</sup> Cablevision adds that RCN has commenced construction in four other

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<sup>17</sup> See Declaration of Kathleen Mayo, Regional Vice President for Cablevision of Boston, attached to Cablevision's Reply.

<sup>18</sup> Cablevision Supplement at 1.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.*

<sup>21</sup> See RCN's franchise agreement with the City of Boston at Sections 8.1, 6.7, and 7.2, respectively (attached as an exhibit to Cablevision's Supplement).

<sup>22</sup> City of Boston Supplement of August 26, 1999.

<sup>23</sup> *Id.*

<sup>24</sup> See Cablevision Supplement of September 9, 1999 citing *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Comments of RCN Corp. (Aug. 6, 1999) at 5.

<sup>25</sup> These neighborhoods include: (1) Charlestown; (2) North End; (3) South Boston; (4) South End; (5) Jamaica Plain; (6) Roxbury; (7) Back Bay; (8) Beacon Hill; (9) Fenway; (10) Financial District; (11) Allston; and (12) Brighton. See *id.*

communities within Boston.<sup>26</sup> Cablevision asserts that RCN does not appear to be providing service or engaging in construction in only the three remaining neighborhoods within the city—East Boston, Mattapan, and Roslindale.<sup>27</sup> Cablevision asserts that the likelihood of impending competition throughout all of Cablevision's Boston franchise area is established as RCN is going forward in serving all of Boston under a 15 year franchise that will provide competition to 90% of the franchise area by the end of 2002.<sup>28</sup>

### III. ANALYSIS

12. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act.<sup>29</sup> The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.<sup>30</sup> Cablevision has met this burden.

13. 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 ("MVPD") using the facilities of such LEC or its affiliate), we find that Cablevision has provided sufficient evidence, through SEC documents and other materials, demonstrating that RCN is a LEC<sup>31</sup> as defined by the Communications Act,<sup>32</sup> and RCN fits the Commission's definition of MVPD.<sup>33</sup> Neither Cablevision nor AT&T Broadband are affiliated with RCN or any of RCN's partners.

14. We also find that Cablevision has submitted sufficient evidence to show that the programming of RCN is comparable to the programming provided by Cablevision. The channel information for RCN submitted by Cablevision establishes that RCN offers more than 100 channels of programming,

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<sup>26</sup> These are: (1) North Dorchester; (2) South Dorchester; (3) Hyde Park; and (4) West Roxbury. *See id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 47 C.F.R. § 76.906.

<sup>30</sup> 47 C.F.R. § 76.911(b)(1).

<sup>31</sup> David McCourt, CEO of RCN, has stated that RCN is a "phone company that offers cable service." *See* Tony Munroe, "Firm Offering One-Stop Shopping for Cable, Phone," *Boston Herald*, August 14, 1996 at p. 24.

<sup>32</sup> The 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).

<sup>33</sup> *See supra* n. 9 (definition of MVPD).

including 12 local broadcast channels.<sup>34</sup> This satisfies the programming comparability criterion.

15. In addition, we find that based on the information before us, RCN is offering service in Cablevision's franchise area sufficient to demonstrate the presence of effective competition. RCN, once operating as an open video system, has obtained a 15 year traditional cable franchise with the City of Boston.<sup>35</sup> This long term franchise requires RCN to serve approximately 90% of Boston within 3 1/2 years of signing the franchise agreement, and complete its buildout to every Boston neighborhood six years after signing the franchise agreement.<sup>36</sup> In partnership with BETG, RCN will invest millions of dollars in infrastructure development to provide video, as well as voice and data service, to residents of Boston and surrounding communities.<sup>37</sup> We find that RCN's sizeable investment in physical plant, its franchise agreement with the City, its recruitment of thousands of subscribers in the franchise area,<sup>38</sup> and its financial backing<sup>39</sup> are indicia that RCN is now offering, and will continue to offer, service in the City of Boston.

16. We note that RCN's extensive marketing efforts and the wide press coverage of RCN's construction activity in the local media ensure that potential subscribers are reasonably aware of the availability of RCN's service. Generally, subscribers in wired areas are able to receive RCN's cable service for only a minimal additional investment and without encountering regulatory or technical obstacles. Consistent with Congressional intent in adopting Section 623(l)(1)(D) of the Communications Act, under the circumstances we find "effective competition" to be present.

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<sup>34</sup> We note that RCN's bundled products run from a \$65 package that includes a cable modem, phone service with four features and unlimited regional calling time, to a \$160 package with analog and digital cable, two set top boxes, multiplexed HBO, Cinemax, Starz and Encore premium channels, two phone lines with 16 features and a cable modem. See Joe Estrella, RCN Tests Home Fiber, Awaits Financial Model, *Multichannel News*, June 18, 2001.

<sup>35</sup> RCN has signed a contract with the Boston Housing Authority ("BHA") to provide BHA residents bundled telecommunications services. The contract agreement gives RCN access to all 14,000 units in BHA's 64 developments throughout Boston. The properties should all be connected to RCN's network by 2004. RCN is also providing communication services to offices and youth centers in the BHA developments. See "RCN to provide Boston Housing Authority residents with bundled communications services," *RCN Press Release*, March 26, 2001.

<sup>36</sup> RCN has begun offering its bundled services to residents of West Roxbury and Roslindale, Massachusetts, two communities in or around Boston. These communities join over a dozen other Massachusetts communities that receive RCN services in the state, including, Arlington, Brookline, Burlington, Dedham, Framingham, Lexington, Needham, Newton, Somerville, Wakefield, Waltham, and Watertown. See "RCN launches Resilink bundled phone, cable and high speed internet services to residents of West Roxbury and Roslindale," *RCN Press Release*, April 17, 2001.

<sup>37</sup> RCN plans to build a \$250 million network capable of serving all residents of the city by the end of 2002. See Bruce Mohl, City Hopes Cable Pact Means Rate War, *Boston Globe*, July 28, 1999 at 1.

<sup>38</sup> Last year, trade reports stated that RCN's systems in Boston and its suburbs are about 50% completed. See John Higgins, RCN's High Wire Act, *Broadcasting & Cable*, May 8, 2000, at 22.

<sup>39</sup> Paul Allen reportedly has invested \$1.65 Billion in RCN and the company has raised over \$5 Billion more, to roll out its network and acquire new firms. See Kara Swisher, Paul Allen is Investing \$1.65 Billion in Telecommunications Firm RCN Corp., *Wall Street Journal*, October 4, 1999 at A-3.

17. Insofar as the City of Boston's belief that a finding of effective competition would be "premature," we disagree. As discussed above, Cablevision has provided evidence sufficient to satisfy all parts of the LEC effective competition test. In particular, we note the aggressive buildout requirement and liquidated damage provisions of the franchise indicating that our finding is not premature.<sup>40</sup> We also note that the Mayor of Boston, Thomas Menino, has recognized RCN as a viable competitor to Cablevision when RCN's franchise agreement was signed: "Today, Boston residents, as customers, will reap the benefits of the real choice that comes from deregulation of the cable industry. . . .We have a new company that gives subscribers the right to choose based on product, costs, and consumer service."<sup>41</sup> As Cablevision has submitted sufficient evidence demonstrating that its cable system serving Boston, Massachusetts is subject to LEC effective competition from RCN, its petition is granted, and the certification of the City of Boston is revoked.

#### IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Cablevision of Boston, Inc. challenging the certification of the City of Boston, in Boston, Massachusetts **IS GRANTED**.

19. **IT IS FURTHER ORDERED** that the certification of the City of Boston, Massachusetts to regulate the basic cable rates of Cablevision in Boston, Massachusetts **IS REVOKED**.

20. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.<sup>42</sup>

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree  
Chief, Cable Services Bureau

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<sup>40</sup> See *Time Warner-St. Petersburg*, 12 FCC Rcd 20964 (1997); *Time Warner-Pinellas County*, 12 FCC 3143 (1997); and *Time Warner-Clearwater*, 11 FCC Rcd 20909 (1996) (all finding LEC effective competition when only a portion of the franchise area was built out by the competitor at the time when the Cable Services Bureau rendered its decisions.)

<sup>41</sup> See RCN's press release, July 27, 1999.

<sup>42</sup> 47 C.F.R § 0.321.