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November 28, 2007

**Via Overnight Delivery**  
**& Electronic Mail**

Marlene H. Dortch, Secretary  
 Federal Communications Commission  
 Office of the Secretary  
 9300 East Hampton Drive  
 Capital Heights, MD 20743

<b>RE:</b>	)	<b>CSR-7606-E</b>
	)	
<b>Petition of Cablevision of New Jersey Inc. For a</b>	)	
<b>Determination of Effective Competition in</b>	)	<b>CUID NJ0145</b>
	)	<b>CUID NJ0293</b>
<b>Bergenfield, NJ</b>	)	<b>CUID NJ0211</b>
<b>Demarest, NJ</b>	)	<b>CUID NJ0375</b>
<b>Dumont, NJ</b>	)	<b>CUID NJ0687</b>
<b>Emerson, NJ</b>	)	<b>CUID NJ0448</b>
<b>Fair Lawn, NJ</b>	)	<b>CUID NJ0451</b>
<b>Harrington Park, NJ</b>	)	<b>CUID NJ0373</b>
<b>Haworth, NJ</b>	)	<b>CUID NJ0207</b>
<b>Hillsdale, NJ</b>	)	<b>CUID NJ0450</b>
<b>New Milford, NJ</b>	)	<b>CUID NJ0449</b>
<b>Northvale, NJ</b>	)	<b>CUID NJ0260</b>
<b>Norwood, NJ</b>	)	<b>CUID NJ0311</b>
<b>Oradell, NJ</b>	)	
<b>Paramus, NJ</b>	)	

Dear Secretary:

Enclosed please find for filing an original and (3) copies of Comments on behalf of the New Jersey Division of Rate Counsel in Opposition to Cablevision of New Jersey Inc.'s Declaration of Effective Competition, referenced above.

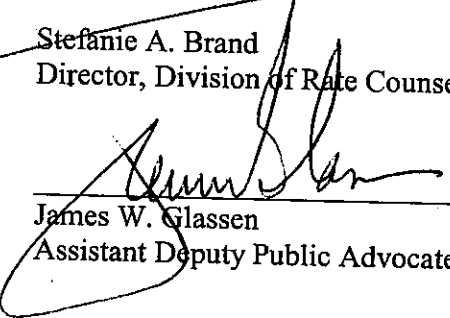
Kindly return one copy marked "filed" in the enclosed self-addressed stamped envelope provided.

Very truly yours,

RONALD K. CHEN.  
PUBLIC ADVOCATE

Stefanie A. Brand  
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James W. Glassen  
Assistant Deputy Public Advocate

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CSR-7606-E  
& CSR-7607

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

<b>Petition of Cablevision of New Jersey Inc. For a Determination of Effective Competition in</b>	)	<b>CSR-7606-E</b>
	)	
<b>Bergenfield, NJ</b>	)	<b>CUID NJ0145</b>
<b>Demarest, NJ</b>	)	<b>CUID NJ0293</b>
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<b>Paramus, NJ</b>	)	<b>CUID NJ0311</b>

**To: Chief, Media Bureau**

**Comments of the New Jersey Division of Rate Counsel  
in Opposition to Cablevision of New Jersey Inc.'s Petition for  
a Declaration of Effective Competition**

The New Jersey Division of Rate Counsel ("Rate Counsel") hereby submits comments in opposition to the above referenced Petition.<sup>1</sup> Rate Counsel opposes the Petition because; a) it is based on unreliable data and fails to rebut the presumption that effective competition does not exist; and, b) fails to satisfy the requirements of the local exchange carrier ("LEC") test. As a result, the Petition should be denied and the local

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<sup>1/</sup> Rate Counsel observes that the Petition 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.

franchising authority should retain the right to regulate Cablevision of New Jersey, Inc.'s ("Cablevision") basic service tier rates and protect ratepayers from unwarranted rate increases.

On or about September 20, 2007, Cablevision filed the subject Petition with the Federal Communications Commission ("FCC" or "Commission") Media Bureau ("Bureau") covering thirteen (13) municipal franchises in New Jersey. The Petition seeks a determination of effective competition in the above captioned franchise areas (individually, a "franchise area") on the basis of the "competing provider test" in two of the franchise areas, and/or the "local exchange carrier test" in all of the thirteen franchise areas. The FCC issued a Public Notice on October 12, 2007 in Report No. 0228, which notified the interested public of this filing.<sup>2</sup>

Rate Counsel submits that Cablevision has failed to sustain its burden of proof. The household data and satellite penetration data is not current or contemporaneous to one another as of the filing date. Rate Counsel submits that Cablevision has failed to sustain its burden of proof to show that effective competition exists. Cablevision fails to satisfy the competing provider test.

Rate Counsel also submits that the LEC test has not been satisfied and the LEC test cannot be applied when a statewide franchise is involved. Although Verizon NJ delivers video service in New Jersey under the provisions of a new statewide franchise law, no statewide franchises existed when Congress adopted the LEC test.<sup>3</sup> As a

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<sup>2/</sup> See Public Notice, Report No. 0228, Special Relief and Show Cause Petitions, released October 12, 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 22, 2007, Rate Counsel, with the consent of counsel for Cablevision, requested an extension of time to submit comments until December 3, 2007.

<sup>3/</sup> 47 U.S.C. § 543(l) (1) (D).

consequence, the LEC test cannot be applied absent expressed Congressional action to amend the law so as to permit statewide franchises to be covered. In addition, given that this Petition raises important issues of first impression, it must be reviewed by the full Commission and cannot be decided by the Media Bureau under delegated authority.

Additionally, Cablevision's Petition 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 Cablevision in the respective franchise areas at issue. Accordingly, the Petition fails to satisfy the statutory criteria for a declaration of effective competition, and therefore, the Petition should be dismissed, or alternatively, denied.

## LEGAL ARGUMENT

### **CABLEVISION'S PETITION FAILS TO PROVIDE THE NECESSARY DATA TO PROPERLY SUPPORT THE CLAIM OF EFFECTIVE COMPETITION**

Section 543 of the Communications Act of 1934, as amended by Section 623 of the Telecommunications Act of 1996,<sup>4</sup> provides that subscriber rates of cable television systems are subject to either local or federal regulation where effective competition is absent.<sup>5</sup> The Cablevision 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. 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. Cablevision's Petition seeks relief under the "competing provider" test in two franchise areas and/or under the "LEC test" in the other franchise area listed in this Petition. In all instances, the burden of proof rests exclusively with the cable operator to show that effective competition exists.<sup>6</sup>

**A. Cablevision's data is neither contemporaneous to the date of filing, nor current so as to satisfy the competing provider test.**

The Petition is inadequate to show that Cablevision has satisfied the competing provider test so as to revoke rate regulation of the basic service tier rates in the franchise areas in the Petition. The household and satellite data submitted in support are not

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<sup>4/</sup> Pub. L. No. 104, 100 Stat. 56, approved February 8, 1996, codified at 47 U.S.C. § 151 *et seq.*

<sup>5/</sup> 47 U.S.C. § 543(a)(2).

<sup>6/</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 Petition. *See Cox Southwest Holdings, LP, ten Unopposed Petitions for Determination of Effective Competition in 17 Local Franchise Areas*, CSR 6877-E, etc., DA 07-933 (Released March 2, 2007); *I/M/O Time Warner Entertainment Co. LP*, CSR 5136-E, DA 99-234 (Released January 26, 1999).



contemporaneous; therefore, Cablevision has failed to show that the competing provider test is met at the time of filing.

A cable operator may rebut the presumption that effective competition does not exist by showing that it satisfies the competing provider test. Under this test, a cable operator must provide competent evidence to demonstrate that a specific franchise area within a cable system is subject to effective competition by showing that the franchise area is: (1) served by at least two unaffiliated multichannel video programming distributors (“MVPDs”), each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.<sup>7</sup> A finding of effective competition exempts a cable operator from rate regulation of the basic service tier.<sup>8</sup> Cable operators, such as Cablevision, seeking exemption from rate regulation must meet the burden of proof and affirmatively show at the time of filing that they are subject to effective competition by satisfaction of the competing provider test.<sup>9</sup>

Cablevision claims that it meets the competing provider test because direct broadcast satellite (“DBS”) providers’ (namely DirecTV and Echostar’s DISH Network) penetration rates allegedly exceed fifteen percent of the households in the pertinent franchise areas. Cablevision relies on the 2000 Census as the source for the number of households used in the calculation to determine whether satellite penetration exceeds

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<sup>7/</sup> 47 U.S.C. § 623(l)(1)(B); See also, 47 C.F.R. §76.905(b)(2).

<sup>8/</sup> 47 C.F.R. § 76.905.

<sup>9/</sup> See *In re C-Tec Cable Systems of Michigan, Inc.*, 10 F.C.C.R. 1735, 1736 (1995); See also, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 5631, 5669-70 (1993) (“*Report and Order*”).

15%. Satellite subscriber counts are provided as of July 2007. The Petition was filed September 2007. Thus, the household data is stale and the household and satellite data are not contemporaneous to one another at the time of filing.<sup>10</sup>

If the Petition is granted, the revocation of regulatory authority is effective as of the date of the filing. Cablevision's reliance upon DBS penetration data and household data that are not reasonably contemporaneous in time to the filing date is insufficient to show that effective competition is present at the time of filing. This household and satellite data is not current as of the date of filing.<sup>11</sup> Due process requires application of a "complete when filed" rule so that reasonable contemporaneous data is supplied at the time of filing.<sup>12</sup> If a "complete when filed" rule is not required, the resulting decision is arbitrary and capricious. Rate Counsel incorporates by reference the arguments made in the two Applications for Review currently pending before the Commission in support of Rate Counsel's position on the need for a reasonable contemporaneous standard.<sup>13</sup>

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<sup>10</sup>/ Petition at 7.

<sup>11</sup>/ See, *I/M/O Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) ¶ 3. (In opposing LFA certifications, cable operators must rely on subscriber data as of or approximately as of the time of the certification, but no earlier than two months before the request for certification was filed.) Similarly, the data submitted in support of a petition for a determination of effective competition should be supported by data that is contemporaneous to the date the petition is filed.

<sup>12</sup>/ *Id.* See also, Opposition of Rate Counsel, dated December 2, 2004, *I/M/O Petition Service Electric of New Jersey for a Determination of Effective Competition in Morris County, Sussex County, and Warren County*, CSR-6404-E.

<sup>13</sup>/ See *Application for Review in I/M/O Petition of Cablevision of Rockland/Ramapo, Inc. for a Determination of Effective Competition in Montvale, NJ*, CSR-6537-E; *Petition of CSC TKR, Inc. d/b/a Cablevision of Elizabeth for a Determination of Effective Competition in Elizabeth, NJ*, CSR-6670-E; *Petition of Cablevision of Warwick LLC for a Determination of Effective Competition in West Milford, NJ*, CSR-6671-E, filed July 25, 2007; and *Application for Review in I/M/O Cablevision of Raritan Valley, Inc.*, CSR 6108-E; *Cablevision of New Jersey*, CSR 6169-E; *Cablevision of Monmouth*, CSR 6176-E, filed May 14, 2004.

Furthermore, the Petition is deficient due to Cablevision's failure to submit the analysis and work papers that underlie and support satellite penetration data. The absence of such underlying support data deprives Rate Counsel, the Media Bureau, and interested parties of the ability to examine, challenge and verify that the numbers submitted are complete and accurate. Since the FCC will rely upon the data submitted by cablevision to show compliance with the competing provider test, Cablevision must supply all underlying data and analyses, Rate Counsel is prejudiced in opposing this filing.

**B. Cablevision erroneously invokes the LEC test which does not apply, and fails to demonstrate satisfaction thereof even if it did apply**

A cable operator may also rebut the presumption that effective competition does not exist by showing that it satisfies the "LEC test". Under this test, a cable operator must provide competent evidence to demonstrate 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.

Cablevision 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>14</sup> Cablevision asserts that Verizon NJ is a local exchange carrier that offers multichannel video service in the franchise areas, that such service substantially overlaps Cablevision'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>15</sup> Verizon NJ

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<sup>14</sup> / Petitions, at 9-18.

<sup>15</sup> / *Id.*

obtained a statewide system franchise from the Board on the basis of new legislation. Contrary to Cablevision's assertions, however, the LEC test cannot be relied upon by Cablevision, and the LEC test is not satisfied even if it did apply.

First, the statute does not contemplate application of the LEC test to a statewide system franchise. Cablevision's reliance on the Board's Order granting Verizon NJ a state-wide system franchise<sup>16</sup> as a trigger for the applicability of the LEC test is misplaced. Without question, the FCC is the only regulatory body lawfully authorized to make a declaration of effective competition.<sup>17</sup> The Board is without any authority under the statute to render a determination of effective competition or to rule that the LEC test is in any way applicable to Verizon's statewide 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>18</sup> A statewide 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

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<sup>16/</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>17/</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 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>18/</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").

first impression, this issue must be addressed by the full Commission instead of the Media Bureau.<sup>19</sup>

In *Service Electric*,<sup>20</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 cable operators to demonstrate effective competition on a system-wide basis.<sup>21</sup> Because Congress has not addressed statewide system franchises, the LEC test is not one that Cablevision can rely upon.

Even if the LEC test were applicable, Verizon NJ's FIOS TV video programming service fails to qualify as comparable service. The LEC's programming service offered in a franchise area must be comparable to the video programming service provided by the incumbent cable operator in the same area.<sup>22</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>23</sup> New Jersey's statewide system franchise law requires the franchisee under the law to provide

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<sup>19/</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>20/</sup> *I/M/O Service Electric Cable TV of New Jersey, Inc., etc.*, CSR-6404-E, DA 05-3350 (December 30, 2005) ("*Service Electric*").

<sup>21/</sup> *Id.* at ¶ 6, citing *Rate Regulation Report and Order*, 8 FCC Rcd at 5672.

<sup>22/</sup> 47 U.S.C. § 543(l)(1)(D).

<sup>23/</sup> 47 U.S.C. § 541(a)(4)(B).

PEG programming.<sup>24</sup> Therefore, Cablevision must provide evidence of Verizon FIOS TV comparability that includes PEG channels as provided by Cablevision in the respective franchise areas under review. No such evidence is in the record. As a result, Cablevision fails to meet its burden of proof.

The fact that Verizon NJ does not yet provide PEG channels to its customers shows that Verizon FIOS TV is not comparable.<sup>25</sup> Indeed, Verizon NJ has elicited the assistance of the LFA in efforts to secure its delivery of PEG channels on the same basis as the incumbent cable providers including Cablevision.<sup>26</sup> That proceeding is still open. Therefore, Cablevision is unable to demonstrate that Verizon NJ's FIOS TV is a comparable video programming service that satisfies the LEC test. Cablevision has failed to meet its burden of proof, and therefore, the Petitions should be denied.

Moreover, Cablevision fails to demonstrate that Verizon FIOS TV has in fact any subscribers in the several Cablevision franchise areas at issue. Direct evidence of subscribership to Verizon's FIOS TV is missing. In *Marcus Cable Associates*,<sup>27</sup> the

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<sup>24/</sup> N.J.S.A. 48:5A-28 (i).

<sup>25/</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.

<sup>26/</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>27/</sup> *I/M/O Marcus Cable Associates, LP*, CSR 5145-E, (Released May 5, 1998).

Bureau required direct evidence of subscribership. 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 is in the record. Instead, Cablevision relies on circumstantial facts, *i.e.* general advertising and channel lineups, which do not demonstrate customer subscribership in the specific communities in question. Therefore, Cablevision has not satisfied the LEC test.

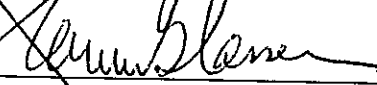
### CONCLUSION

As discussed above, the Petition fails to provide current and contemporaneous data to satisfy the competing provider test. Additionally the LEC test cannot apply to a statewide franchise absent Congressional action. The Petition is also otherwise deficient and fails to satisfy the FCC's criteria under the LEC test as discussed above. 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:   
James W. Glassen  
Assistant Deputy Public Advocate

Dated: November 28, 2007

CC: Service List