

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

In the Matter of:)
Comcast Cable Communications, LLC) CSR 6396-E, 6397-E, 6398-E, 6399-E,
) 6400-E, 6401-E
)
Six Petitions for Determination of Effective)
Competition in Forty-Two Local Franchise Areas)
in Texas)

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 2005

Released: December 28, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers six petitions which the cable operator Comcast Cable Communications, LLC ("Comcast"), filed with the Commission pursuant to Sections 76.7 and 76.905 of the Commission's rules for a determination that, in 42 communities in Texas (the "Communities"), it is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"), and is therefore exempt from cable rate regulation. Franchise authorities have filed objections to Comcast's petitions concerning two of the Communities. We find that those objections are without merit and that Comcast is subject to effective competition in all 42 Communities. Accordingly, we grant Comcast's petitions.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l)(1) of the Communications Act and Section 76.905 of the Commission's rules. A cable operator bears the burden of rebutting the

1 47 C.F.R. §§ 76.7, 76.905. Comcast's petitions do not invoke 47 C.F.R. § 76.907 ("Petition for a determination of effective competition"), but we will treat the petitions as if they do.

2 47 U.S.C. § 543(a)(2).

3 Comcast filed one document, titled "Petition for Special Relief," on September 3, 2004. Because it concerns six different cable systems, each with its unique physical system identification number, we treated it as six petitions. Comcast appears to believe that its filing also addresses a seventh system, "PSID#003697 Palestine (East)." Letter from Brian M. Joseph, Esquire, Cole, Raywid & Braverman, L.L.P., counsel for Comcast, to the Commission's Media Bureau, dated Oct. 1, 2004, at 1. Comcast's filing contains nothing about that system, although Comcast has paid the appropriate filing fee. We will entertain a filing about PSID#003697 by Comcast at its convenience.

4 The 42 Communities and data concerning them are listed in Attachment A.

5 47 C.F.R. § 76.906.

6 47 U.S.C. § 543(l)(1).

7 47 C.F.R. § 76.905.

presumption that effective competition does not exist with evidence that it does exist in its franchise area.⁸

II. DISCUSSION

A. Competing Provider Effective Competition in 40 Communities

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPDs") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁹ Turning to the first prong of this test, the direct broadcast satellite ("DBS") service of DirecTV, Inc. ("DirecTV"), and DISH Network ("DISH") is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.¹⁰ The two DBS providers' subscriber growth reached approximately 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth largest, MVPD provider.¹¹ The two DBS providers are physically able to offer MVPD service to subscribers in the 40 Communities listed in Attachment A.I (the "40 Communities"). There exist no regulatory, technical, or other impediments to households within the 40 Communities taking the services of the DBS providers, and potential subscribers in the 40 Communities have been made reasonably aware of the DBS services of DirecTV and DISH. Based on these conclusions and the data discussed below showing that more than 15 percent of the households in the 40 Communities are DBS subscribers,¹² we conclude that the population of the 40 Communities may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.

4. One franchising authority -- the City of Mesquite, Texas ("Mesquite") -- questions whether the programming of the DBS providers is comparable to Comcast's.¹³ Section 76.905(g) of our rules provides that "[i]n order to offer comparable programming as that term is used in this section, a competing [MVPD] must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."¹⁴ Mesquite notes that it regulates only Comcast's basic service tier ("BST"), "which essentially consists of the network channels and public, educational and government access channels."¹⁵ Mesquite appears to argue that the sparsest form of DBS service offers many more channels and therefore does not offer programming that is truly comparable to Comcast's BST.

5. Section 76.905(g) of our rules sets forth a precise standard of comparable programming,

⁸ See 47 C.F.R. §§ 76.906-07(b).

⁹ 47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

¹⁰ See *Bright House Networks, LLC*, DA-05-2511 at ¶ 3 (rel. Sept. 27, 2005).

¹¹ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755, 2792-93 (2005) ¶¶ 54-55.

¹² In the remaining 2 Communities (Cockrell Hill and Hebron), Comcast eschews competing provider effective competition and instead establishes low penetration effective competition. See *infra* ¶ 14.

¹³ Letter from Mark Hindman, Assistant City Manager, City of Mesquite, Texas, to Marlene H. Dortch, Commission Secretary ("Mesquite Letter"), dated Nov. 5, 2004.

¹⁴ See 47 C.F.R. § 76.905(g).

¹⁵ Mesquite Letter, *supra* n.13.

and we decline to modify it here. We may not substantively modify rules in adjudicatory proceedings such as this one. The appropriate vehicle for such a modification is a petition for rulemaking, not an opposition filed in a proceeding initiated pursuant to Section 76.7 of the rules.¹⁶ Nor should we waive our rule for Mesquite, which appears to question the wisdom of our rule rather than claim that special circumstances make the rule unjust in application to Mesquite in particular.¹⁷ Furthermore, on the merits, when the Commission adopted the present rule it decided to measure competing provider competition by a minimum number of channels rather than engage in detailed comparisons of various MVPDs' offerings.¹⁸ We are bound by that decision. Accordingly, we respectfully disagree with Mesquite.

6. No other franchising authority questioned that the programming of the DBS providers is comparable to Comcast's. We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because they offer substantially more than 12 channels of video programming, including at least one non-broadcast channel.¹⁹ In sum, we conclude that the 40 Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

7. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area.²⁰ Comcast asserts that it is the largest MVPD in the 40 Communities.²¹ No party has raised any doubt about this assertion, and we accept it.

8. To prove that the penetration of the other MVPDs (the DBS service providers, DirecTV and DISH) exceeds 15 percent of the households in each of the 40 Communities, Comcast obtained reports of the number of households and subscribers to DBS service in each five-digit zip code.²² To account for "partial" or "overlapping" zip codes -- ones that include some territory that is in one of the 40 Communities and some territory that is outside it -- a reasonable method by which to allocate some of the DBS subscribers in each partial zip code to a Community was needed. For this purpose, Comcast used the "geocoding" process of Media Business Corp. ("MBC"), formerly known as SkyTrends. MBC's geocoding makes measurements by the "block group level households" used by the Census Bureau, which are far smaller than zip codes.²³ This yielded an estimated numerical DBS penetration in each of the 40 Communities. Comcast then compared that penetration data to the 2000 Census population data

¹⁶ *Falcon Cable Systems Co. II*, 17 F.C.C.R. 4648, 4651-52 (2002) ¶ 9.

¹⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969) ("The very essence of waiver is the assumed validity of the general rule").

¹⁸ *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5665-57 (1993) ¶¶ 37-38, *review granted in part on other grounds*, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D. C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

¹⁹ See 47 C.F.R. § 76.905(g).

²⁰ See *supra* n.9.

²¹ Comcast Petitions CSR 6396-E to 6401-E, attached Declaration of Peter H. Feinberg, Associate General Counsel for Comcast at ¶ 2 ("Comcast is the largest multichannel video program provider in each of the 40 Franchise Areas that satisfy the Competing Provider Test").

²² Comcast Petitions CSR 6396-E to 6401-E at 6-8 & Exhibits 4 ("September 2, 2004 Media Business Corp. Letter") 5 ("Competitive Penetration Calculation & Supporting SBCA Data"). We have found five-digit zip code data to be a reliable basis for determining the presence of competing provider effective competition. *Bright House Networks, LLC*, Memorandum Opinion & Order DA 05-2850 at ¶ 6 (rel. Oct. 28, 2005); *Time Warner Entertainment*, Memorandum Opinion & Order DA 05-2642 at ¶¶ 8-10 (rel. Oct. 4, 2005).

²³ Comcast Petitions CSR 6396-E to 6401-E at 7-8.

for each of the 40 Communities.²⁴ This produced a percentage estimate of DBS penetration that, in each of the 40 Communities, was above the 15 percent required by the second prong of our competing provider test.

9. One franchising authority -- the City of McKinney, Texas ("McKinney") -- challenges Comcast's evidence of DBS penetration.²⁵ Comcast claims that McKinney has 9,757 DBS subscribers among 18,186 households, for a DBS penetration of 53.65% percent.²⁶ McKinney disputes this claim on several grounds. McKinney asserts that when MBC and Comcast allocate households in partial zip codes, they assume that the households are spread evenly throughout it. This assumption is inaccurate, McKinney states, if the part of a partial zip code that is in the City consists of a park or a commercial area that contains few residences and, therefore, has relatively few DBS subscribers.²⁷

10. McKinney's hypothetical argument has not discredited Comcast's showing of DBS penetration. McKinney does not claim or show that any such partial zip code actually exists in McKinney, although we presume the City is familiar with its environs.²⁸ Moreover, we note that McKinney is a city of substantial population in suburban Dallas. We expect that McKinney has several partial zip codes, and that for every one in which the Comcast over-estimates DBS penetration in McKinney, there is another partial zip code in which Comcast under-estimates it. Thus, this flaw in Comcast's estimates, if it be a flaw, will likely not over-estimate DBS penetration in McKinney on the whole. In addition, Comcast's estimates are derived using not only relatively large five-digit zip codes, but also smaller block group level households.²⁹ Finally, we have repeatedly accepted five-digit zip codes as sufficiently reliable for showings of competing provider effective competition.³⁰

11. Second, McKinney criticizes Comcast's use of 2000 Census data, noting that according to reputable sources, McKinney's population has grown by approximately 52 percent since 2000.³¹ Comcast correctly responds that the Commission has allowed the use of decennial Census data years after its issuance³² and that, even assuming that the number of households in McKinney is 52 percent higher than Comcast's estimate, DBS penetration in McKinney is still approximately 35 percent,³³ more than

²⁴ *Id.* at 8.

²⁵ City of McKinney, Texas Responsive Pleading to Comcast Cable Communications, LLC, Petition for Special Relief ("Opposition"), filed Nov. 3, 2004.

²⁶ Comcast Petition CSR 6400-E, Exhibit 5, *supra* n.22, at 5.

²⁷ Opposition at 2.

²⁸ We have rejected franchising authorities' similar claims about the distribution of penetration in their own communities when they rest on generalities and offer no specific evidence. *Charter Communications, Inc.* ("Charter"), 19 FCC Rcd 6878, 6880-81 (2004) ¶¶ 8-10; *Texas Cable Partners, L.P.* ("Texas Cable"), 19 FCC Rcd 6213, 6215-16 (2004) ¶¶ 7-9; *Amzak Cable Midwest, Inc.*, 19 FCC Rcd 6208, 6211-12 (2004) ¶¶ 11-12.

²⁹ See *supra* n.23; see also Comcast's Reply to Responsive Pleading to Petition for Special Relief ("Reply") at 2, filed on Nov. 15, 2004.

³⁰ *Charter*, 19 FCC Rcd at 6681 ¶¶ 10-11; *Texas Cable*, 19 FCC Rcd at 6215 ¶ 8.

³¹ Opposition at 3 (comparing 2000 Census data to an estimate by the North Central Texas Council of Governments that in early 2004 McKinney's population was 82,800; similar estimate of households by McKinney's City Planning Department).

³² See, e.g., *Comcast of Dallas, L.P.* ("Dallas"), DA-05-2950 at ¶ 9 & n.31 (rel. Nov. 14, 2005); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-71 (2003) ¶ 8.

³³ 18,186 Census 2000 McKinney households times 1.52 equals 27,643 estimated 2005 McKinney households. 9,757 McKinney DBS subscribers divided by 27,643 estimated McKinney households equals 35.3%.

twice the statutory minimum for competing provider effective competition.³⁴

12. Third, McKinney faults Comcast's claim of DBS penetration because it includes courtesy or complimentary accounts.³⁵ We do not believe the inclusion of complimentary accounts in the DBS subscriber report precludes a determination of effective competition. In the first place we presume that the number of complimentary accounts is *de minimis* in number. Additionally, the fact that this *de minimis* number of DBS subscribers receives complimentary service enhances, rather than reduces, the cable operator's need to compete for these subscribers. A subscriber receiving free DBS service arguably would have to perceive significant choice and service advantages available through the local cable operator to abandon DBS service in favor of cable service

13. Based upon the aggregate DBS subscriber penetration levels and 2000 Census household data reflected in Attachment A.I, we find that Comcast has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the 40 Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Comcast has submitted sufficient evidence demonstrating that its cable systems serving the 40 Communities set forth in Attachment A.I are subject to competing provider effective competition.

B. Low Penetration Effective Competition in Two Communities

14. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system."³⁶ Comcast has provided data showing that less than 30 percent of the households in two of the Communities -- Cockrell Hill and Hebron, Texas -- subscribe to its cable services.³⁷ No filing has been made opposing these showings. Accordingly, we conclude that Comcast has demonstrated the existence of low penetration effective competition under our rules for Cockrell Hill and Hebron, Texas. Data underlying our conclusions under the low penetration test is set forth in Attachment A.II.

III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petitions filed by Comcast Cable Communications, LLC, for a determination of effective competition in the Communities listed on Attachment A **ARE GRANTED**.

16. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Comcast in the Communities listed on Attachment A **ARE REVOKED**.

³⁴ 47 U.S.C. § 543(l)(1)(b)(ii); *see also* Reply at 2.

³⁵ Opposition at 4.

³⁶ 47 U.S.C. § 543(l)(1)(A).

³⁷ Comcast Petition CSR 6398-E at 9-10 (16.26% cable penetration in Cockrell Hill); Comcast Petition CSR 6401-E at 9-10 (1.11% cable penetration in Hebron).

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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³⁸ 47 C.F.R. § 0.283.

Attachment A

I. Competing Provider Effective Competition

Comcast Cable Communications, LLC: CSR 6396-E

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Commerce	TX0157	30.34%**	2881	874
Greenville	TX0068	21.69%	9156	1986

Comcast Cable Communications, LLC: CSR 6397-E

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Coppell	TX0604	39.07%	12211	4771
Double Oak	TX1276	41.06%**	682	280
Flower Mound	TX0840	40.46%	16179	6546
Grapevine	TX0775	34.88%	15712	5481
Highland Village	TX0658	41.25%**	3874	1598
Irving	TX0783	21.19%	76241	16159
Lewisville	TX1010	28.22	30043	8477

Comcast Cable Communications, LLC: CSR 6398-E

Communities	CUIDS	CPR*	2000 Census Households+	DBS Subscribers+
Arlington	TX0826	23.74%	124686	29599
Bedford	TX 0648	20.77%	20251	4207
Colleyville	TX0712	40.00%	6406	2563
Dalworthington Gardens	TX0825	29.59%	747	221
Euless	TX0649	26.27%	19218	5049

Comcast Cable Communications, LLC: CSR 6398-E (continued)

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Grand Prairie	TX0553	25.27%	43791	11068
Pantego	TX0824	16.74%**	154	920

Comcast Cable Communications, LLC: CSR 6399-E

Community	CUID	CPR*	200 Census Households+	DBS Subscribers+
Graham	TX0243	33.12%**	3391	1123

Comcast Cable Communications, LLC: CSR 6400-E

Communities	CUIDS	CPR*	2000 Census Households+	DBS Subscribers+
Allen	TX0642	59.09%	14205	8394
Farmersville	TX0643	50.13%**	1115	559
Frisco	TX0657	84.59%	12065	10206
McKinney	TX0641 TX1468	53.65%	18186	9757
Parker	TX1483	58.97%	485	286
Plano	TX 1255	33.44%	80875	27047
Princeton	TX0644	47.74%**	1238	591
Richardson	TX1228	26.23%	35191	9230
Sachse	TX0645	81.05%	3224	2613
St. Paul	TX1605	72.20%	223	161
The Colony	TX0774	51.26%	8462	4338
Wylie	TX0640	75.30%	5085	3829

Comcast Cable Communications, LLC: CSR 6401-E

Community	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Addison	TX0543	21.06%	7621	1605
Carrollton	TX0006	26.63%	39136	10424
Cedar Hill	TX0651	41.45%	10748	4455
DeSoto	TX0652	30.72%**	13709	4212
Farmers Branch	TX0624	19.02%	9766	1858
Garland	TX0554	18.84%	73241	13802
Hutchins	TX0663	29.34%	927	272
Lancaster	TX0590	26.95%**	9182	2475
Mesquite	TX0682	22.96%	43926	10087
Rowlett	TX0653	39.81%	14266	5679
Sunnyvale	TX0720	39.39%*	891	351

II. Low Penetration Effective Competition**Comcast Cable Communications, LLC: CSR 6398-E**

Community	CUID	Cable Subscribership	2000 Census Households+	Cable Subscribers+
Cockrell Hill	TX0715	16.26%**	1150	187

Comcast Cable Communications, LLC: CSR 6401-E

Community	CUID	Cable Subscribership	2000 Census Households+	Cable Subscribers+
Hebron	TX0839	1.11%**	271	3

* CPR = Percent DBS penetration

**= mathematical errors by Petitioner corrected

+ = See Cable Operator Petitions