

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

In the Matter of )
Comcast Cable Communications, LLC ) CSR 7134-E
Petition for Determination of Effective )
Competition in 12 Illinois Communities )

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 2008

Released: August 14, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). The petition is opposed by the Village of Deer Park (the "Village" or "Deer Park"). Comcast filed a reply to Deer Park's opposition.

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) of the Communications Act and Section 76.905 of the Commission's rules. 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. For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), 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

1See 47 U.S.C. § 543(a)(1).

247 C.F.R. § 76.905(b)(2).

347 C.F.R. § 76.906.

4See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

5See 47 C.F.R. §§ 76.906 & 907.

programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>6</sup> This test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>7</sup>

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>8</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>9</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>10</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>11</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.<sup>12</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.<sup>13</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. 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. Petitioner asserts that it is the largest MVPD in the Communities.<sup>14</sup> Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code and zip code plus four basis where necessary.<sup>15</sup>

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<sup>6</sup>47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup>*See* Petition at 3.

<sup>9</sup>*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>10</sup>47 C.F.R. § 76.905(e)(2).

<sup>11</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

<sup>12</sup>*See* Petition at 4 and Exhibit 2.

<sup>13</sup>*See* Petition at 3.

<sup>14</sup>*Id* at 5.

<sup>15</sup>Petition at 5-6. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

7. In opposition, Deer Park argues that Comcast failed to meet its burden of proof under the second prong of the competing provider test because no data regarding the number of Comcast subscribers is given.<sup>16</sup> According to the Village, the second prong of the competing provider test requires Comcast to provide their subscriber numbers, in addition to the subscriber counts of the competing MVPDs in order to measure the proportionate penetration of each multichannel video programming distributor.<sup>17</sup> Deer Park argues that Section 76.905(f) directs that in order to measure the proportionate penetration of a multichannel video of a multichannel video programming distributor one must first aggregate the number of subscribers of all multichannel video programming distributors which serve the area.<sup>18</sup> In reply, Comcast argues that there is no such requirement and Deer Park's suggestion that the petitioner's own subscriber numbers must be included in the calculation of competing MVPDs is incorrect.<sup>19</sup> Moreover, Comcast asserts that although Section 76.905(f) states that the number of all multichannel video programming distributors that offer service in the franchise area will be aggregated, that aggregation clearly is prefaced by and refers to those MVPD households subscribing to entities, other than the largest multichannel video programming distributor.<sup>20</sup>

8. We find that Deer Park's arguments lack merit. Under the second prong of the competing provider test, a cable operator is not subject to rate regulation if a competing multichannel distributor serves at least 50 percent of the households in the subject system's franchise area and more than 15 percent of the subscribers in the franchise area subscribe to the competitive services.<sup>21</sup> In calculating whether 15 percent or more of the households in a franchise area subscribe to all but the largest multichannel video programming distributor, the Commission concluded that the subscribership of competing multichannel distributors on a cumulative basis shall be considered.<sup>22</sup> Therefore, compliance with Section 76.905(f) requires the filing of data regarding competing service providers, not the filing of data regarding Comcast's own subscriber numbers, unless one of the DBS providers is the largest MVPD in the franchise, which is not the case in this proceeding.<sup>23</sup> Accordingly, we will accept the DBS penetration figures for the franchise areas filed in this petition.

9. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>24</sup> as reflected in Attachment A, we find that Petitioner 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 Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

10. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

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<sup>16</sup>Opposition at 2.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>Reply at 2.

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

<sup>21</sup>*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, MM Docket No. 92-266, MM Docket No. 92-262, Third Order on Reconsideration, 9 FCC Rcd 4316, 4320 paras. 5, 7 (1994).*

<sup>22</sup>*Id.*

<sup>23</sup>Moreover, were we to include Comcast's subscribership in the calculation of the second prong of the competing provider test that would only serve to inflate the figure above its current 27 percent level.

<sup>24</sup>Petition at 7.

**III. ORDERING CLAUSES**

11. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>25</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>25</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 7134-E

## COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUID(s)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7134-E</u> Barrington	IL0489 IL0490	27.02%	3,767	1,018
Deer Park	IL1435	27.00%	989	267
Hawthorn Woods	IL0517	30.58%	1,831	560
Indian Creek	IL0986	35.38%	65	23
Inverness	IL1304	19.94%	2,312	461
Kildeer	IL0622	32.68%	1,077	352
Lake Barrington	IL1436	27.02%	2,039	551
Lake Zurich	IL0451	31.13%	5,746	1,789
Long Grove	IL1542	29.71%	1,962	583
North Barrington	IL1303	28.02%	1,003	281
Tower Lakes	IL1522	27.17%	449	122
Vernon Hills	IL0475	23.06%	7,568	1,745

\*CPR = Percent of competitive DBS penetration rate.