

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

	)	CSR 7118-E
	)	CSR 7119-E
	)	CSR 7197-E
	)	CSR 7198-E
In the Matter of	)	CSR 7597-E
	)	CSR 7598-E
Subsidiaries of Cablevision Systems Corporation	)	CSR 7599-E
	)	CSR 7604-E
Petitions for Determination of Effective	)	CSR 7605-E
Competition in 101 Communities in New Jersey	)	CSR 7606-E
	)	CSR 7607-E
	)	CSR 7608-E
	)	CSR 7609-E
	)	CSR 7979-E
	)	CSR 7980-E
	)	CSR 7981-E

MEMORANDUM OPINION AND ORDER

Adopted: October 1, 2008

Released: October 2, 2008

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

I. INTRODUCTION AND BACKGROUND

1. Subsidiaries of Cablevision Systems Corporation, hereinafter referred to as “Petitioner,” have filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2 and 4) 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 the “Attachment A Communities.” Petitioner alleges that its cable systems serving the Attachment A Communities are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² and are therefore exempt from local cable rate regulation because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”) and Dish Network (“Dish”)’ (collectively, the “DBS providers”) and, in two Attachment A Communities, competing service provided by another provider of video service, US Cable. Petitioner also claims that its cable systems serving the Communities listed on Attachment B, hereinafter referred to as the “Attachment B Communities,” are subject to effective competition because of the competing service provided by Verizon New Jersey, Inc., hereinafter referred to as “Competitor.” All the petitions are opposed in “Comments” filed by the Division of Rate Counsel (the “DRC”) of the New Jersey Board of Public Utilities (the “BPU”); two petitions are also opposed by three local governments; and Petitioner filed a “Reply” to each of the DRC’s Comments and local oppositions.

¹ See 47 U.S.C. § 543(l).

² 47 C.F.R. § 76.905(b)(2, 4).

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁴ 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 or Community.⁵ For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments A and B.

II. DISCUSSION

A. The Competing Provider Test

3. Section 623(l)(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 programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;⁶ 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.⁷

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.⁸ 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.⁹ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ 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 programming¹¹ and is supported in this petition with copies of

³ 47 C.F.R. § 76.906.

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

⁵ See 47 C.F.R. §§ 76.906 & 907.

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

⁷ 47 C.F.R. § 76.905(b)(2)(i).

⁸ See, e.g., Petition in CSR 7118-E & 7119-E at 3-4; Petition in CSR 7597-E at 2; Petition in CSR 7608-E & 7609-E at 3-4.

⁹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175 (2006).

¹⁰ 47 C.F.R. § 76.905(e)(2).

¹¹ See 47 C.F.R. § 76.905(g); see also, e.g., Petition in CSR 7197-E & 7198-E at 4; Petition in CSR 7597-E at 4-5; Petition in CSR 7608-E & 7609-E at 8.

channel lineups for both DIRECTV and Dish.¹² 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.¹³ 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.¹⁴ 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 five-digit zip code basis.¹⁵

7. The aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ as reflected in Attachment A, indicate 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. This evidence, if substantiated, satisfies the second prong of the competing provider test for each of the Communities.

8. The DRC, however, makes many objections to Petitioner's calculations. Some objections apply to how Petitioner calculated the numerators of its ratios, and others to their denominators. Some apply to all the Attachment A Communities, and others only to individual ones.

General Objections of the DRC

9. Timeliness of Data. The DRC objects that Petitioner's calculations use DBS subscribership data from 2006 or 2007 and household data from 2000. The DRC argues that 2000 Census data is stale and requests that we require that subscribership and household data be contemporaneous with each other and the date on which the Petition that contains it is filed.¹⁷

10. The DRC cites several decisions that it mistakenly claims support its position.¹⁸ The DRC refers to our 1994 *Order in Cable Operators' Petitions for Reconsideration & Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*.¹⁹ There, we required relatively recent data about subscribership to competing MVPDs and specifically permitted household

¹² See, e.g., Petition in CSR 7597-E at Exh. 5; Petition in CSR 7606-E & 7607-E at Exh. 5; Petition in CSR 7608-E & 7609-E at Exh. 5.

¹³ See Petition in CSR 6704-E at 4-5.

¹⁴ Petition in CSR 7118-E & 7119-E at 6; Petition in CSR 7197-E & 7198-E at 5; Petition in CSR 7597-E at 5; Petition in CSR 7598-E at 5; Petition in CSR 7599-E at 7; Petition in CSR 7604-E at 7; Petition in CSR 7605-E at 6; Petition in CSR 7606-E & 7607-E at 7; Petition in CSR-E 7608-E & 7609-E at 7.

¹⁵ See, e.g., Petition in CSR 7118-E & 7119-E at 6-8 & nn.24-25; *id.*, Exh. 7; Petition in CSR 7197-E & 7198-E at Exh. 7; Petition in CSR 7608-E & 7609-E at 7-8 & n.30; *id.*, Exhs. 7, 11.

¹⁶ See, e.g., Petition in CSR 7118-E & 7119-E at 6; Petition in CSR 7197-E & 7198-E at 5-6; Petition in CSR 7608-E & 7609-E at 7.

¹⁷ See, e.g., Comments in CSR 7598-E at 5; Comments in CSR 7599-E at 5-6; Comments in CSR 7604-E at 5-6; Comments in CSR 7605-E at 5; Comments in CSR 7606-E at 4-6; Comments in CSR 7607-E at 4; Comments in CSR 7608-E & 7609-E at 6.

¹⁸ See, e.g., Comments in CSR 7118-E & 7119-E at 8-9; Comments in CSR 7197-E & 7198-E at 6-8.

¹⁹ *Cable Operators' Petitions for Reconsideration & Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Red 3656, ¶ 3 (1994).

numbers to be taken from the 1990 Census. We noted that, although the 1990 Census was already several years old, it “represents the most recent data available” about “households,” which is the statutory measure of competing provider effective competition.²⁰ Such data is very similar to the data Petitioner produced in these proceedings. Nothing in our 1994 *Order* prohibits or finds unpersuasive the kinds of data that Petitioner submitted in these proceedings.

11. The DRC characterizes *Falcon Cable Systems Co. II*²¹ as a rejection of stale data that should lead us here to reject Petitioner’s several year old Census data.²² In that case, the petitioner originally submitted 1990 Census data about households. The petitioner submitted 2000 Census data later when it became available. *Falcon Cable Systems Co. II* establishes that, in the absence of more recent and reliable data, data from the most recent Census may be used for the number of households in a community. Petitioner’s household data from the 2000 Census complies with the standard of *Falcon Cable Systems Co. II*.

12. The DRC also characterizes the 1999 decision in *Mountain Cable Co.*²³ as indicating that effective competition decisions should be based on the best available current information, which in that case was Census data with updates.²⁴ *Mountain Cable Co.* is distinguishable from the present proceedings, however, because there the petitioner generally agreed with the updates submitted by the franchise authority. Similarly, in the 2001 decision in *Texas Cable Partners*, the petitioner submitted 1990 Census data and updated it without objection by the franchise authority.²⁵ In those two cases, there was no dispute about the reliability of the post-Census household data. In this case, however, few updates to the most recent Census data have been proposed; those that have been proposed (all by the DRC) are disputed by Petitioner; and, we find them less reliable than Census data.

13. More important, the Census data that Petitioner submitted herein was more recent than that submitted in all of the cases cited by the DRC. In those cases, the Census data in the petitioners’ original filings was roughly a decade old. All the cases cited by the DRC are, in fact, consistent with our case law holding that the most recent available Census data may be used to show the number of households in a community, but can be improved by more recent data that is shown to be as reliable. Petitioner followed that guidance and did not contradict the decisions that the DRC has cited. In sum, none of the decisions to which the DRC directs our attention cast doubt on the validity of the data in the Petitions.

14. We decline the DRC’s request that we require, starting in this Memorandum Opinion and Order, that household and subscribership data be contemporaneous with each other and the date on which the Petition that contains them is filed. We do not wish, in these adjudicatory proceedings, to adopt a new rule that would be applicable to all future competing provider effective competition filings.²⁶ Nor do we

²⁰ *Id.* (“With respect to household data, we realize that in many cases 1990 census data represents the most recent data available. Accordingly, we believe that 1990 census data is an appropriate measure of households.”).

²¹ *Falcon Cable Systems Co. II*, 17 FCC Rcd 4648, 4650, ¶ 5 (2002).

²² *See, e.g.*, Comments in CSR 7118-E & 7119-E at 8.

²³ *Mountain Cable Co.*, 14 FCC Rcd 13994, 13998-400, ¶¶ 9-11, 14001, ¶ 16 (1999).

²⁴ *See, e.g.*, Comments in CSR 7118-E & 7119-E at 8.

²⁵ *Texas Cable Partners, L.P.*, 16 FCC Rcd 4886, 4888, ¶ 5 (2001). Petitioner also cites *Texas Cable Partners, L.P.*, 16 FCC Rcd 4718, 4720-22, ¶¶ 5-8 (2001). There the cable operator submitted presumptively reliable household data and no better data was offered in opposition; we accepted the cable operator’s data, as we do here.

²⁶ *See, e.g.*, *Cablevision of Rockland/Ramapo, Inc.* (“*Rockland/Ramapo*”), 22 FCC Rcd 11487, 11496-97, ¶ 24 (2007), *application for review pending*; *Comcast Cable Commun. LLC*, 20 FCC Rcd 20438, 20440, ¶ 5 (2005); *Adelphia Commun. Corp.*, 12 FCC Rcd 6344, 6354, ¶ 24 (1997).

see a need for such a requirement in the present proceedings. In many cases, including prior decisions involving the State of New Jersey, we have found competing provider effective competition to exist based on household and DBS subscribership data that are several years apart in time.²⁷ Accordingly, we find that the DRC's general allegations about the timeliness of the data submitted by Petitioner reveal no flaw in the petitions.

15. Cancellations. The DRC objects that Petitioner's estimates of DBS subscribership do not account for cancellations of DBS service after the date on which SBCA estimated subscribership.²⁸ We find no merit in this objection. The DRC has not alleged, much less proved, that an unusual number of such cancellations have occurred in the Attachment A Communities, which might be the factual basis for requiring updated estimates. Nor is it apparent that a post-filing update would help the DRC's position in these proceedings. An update, if it were to reflect all material recent events, would need to include new subscriptions to DBS service as well as cancellations. The available evidence shows that DBS subscribership, as a percentage of subscription to all MVPD services, generally has increased over time (that is, new subscriptions have outnumbered cancellations).²⁹ Indeed, in one recent effective competition decision, we noted that DBS subscribership had risen even after three hurricanes struck the community in question.³⁰ Accordingly, we decline the DRC's request that we fault Petitioner for not making post-filing updates of cancellations of DBS service.

16. Commercial and Test Accounts. In several proceedings, the DRC objects that Petitioner has not shown that SBCA's numbers of DBS subscribers in various zip codes exclude commercial accounts and test accounts.³¹ In fact, however, Petitioner's Replies include SBCA's subscribership reports, which specifically state that they are of "residential subscriber totals" and that "commercial and test accounts are not included."³² We see no reason to doubt these statements. Accordingly, Petitioner's estimates of DBS subscribership are not inflated by commercial and test accounts and there is no justification for the 10 percent reduction in them that the DRC proposes.³³

17. "Dual Subscriber" Households. The DRC appears to object that Petitioner's data may count as two households a single household with more than one subscription to MVPD service, and that

²⁷ *Time Warner Cable Inc.*, Memorandum Opinion & Order DA 08-1917 at ¶ 15 (rel. Aug. 15, 2008) (accepting 2000 Census data and 2007 DBS subscribership data), available at 2008 WL 3823069; *Rockland/Ramapo Inc.*, 22 FCC Rcd at 11493, ¶ 16 ("The Commission has relied upon Census data in effective competition cases where the differential between the dat[e] of the Census information and the date of the petition was greater than five years"); *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968, ¶ 6 (2004) ("We find that the Ratepayer Advocate's arguments are without merit. The Commission has held that 2000 Census data is sufficiently reliable for effective competition determinations"); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-71, ¶ 8 (2003); *Jones Intercable, Inc.*, 15 FCC Rcd 7254, 7256, n.12, ¶ 5 (2000) (using 1990 Census despite the fact that it was nearly a decade old); *Tel-Com, Inc.*, 11 FCC Rcd 9153, 9158-59, n.36, ¶ 11 (1996) (1996 decision using 1990 Census data).

²⁸ See, e.g., Comments in CSR 7197-E & 7198-E at 9; Comments in CSR 7604-E at 8-9; Comments in CSR 7608-E & 7609-E at 9.

²⁹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2617 (2006) (showing annual growth in the percent of MVPD subscribers receiving DBS service, rising to 28% in the most recent reported year).

³⁰ *Bright House Networks, LLC*, 22 FCC Rcd 4378, 4380-81, ¶¶ 5-7 (2007).

³¹ See, e.g., Comments in CSR 7604-E at 7; Comments in CSR 7608-E & 7609-E at 7.

³² See, e.g., Reply in CSR 7604-E at Exh. 2; Reply in CSR 7608-E & 7609-E at Exh. 2.

³³ See, e.g., Comments in CSR 7604-E at 7; Comments in CSR 7608-E & 7609-E at 7.

this artificially inflates DBS subscribership.³⁴ Such a household could subscribe to both DIRECTV and Dish, or to one of them and to cable service. We do not understand how Petitioner's count of households can inflate its estimate of DBS subscribership, because Petitioner's numbers of households come from the Census Bureau, which counts a household as one household without regard to its number of MVPD subscriptions.³⁵ More broadly, in estimating DBS subscribership, we see no error in counting a dual subscriber household twice, as a subscriber to two forms of MVPD service and in some cases two forms of DBS service. Such a household is aware of alternatives to cable service and has subscribed to at least one of them, which goes to "the very essence of MVPD competition that Section [623] of the Communications Act addresses."³⁶ Finally, the DRC has not shown that the number of dual subscriber households in any Attachment A Community is more than *de minimis* or enough to lower competing provider effective competition below the statutory minimum. We find no merit in the DRC's objection to Petitioner's treatment of dual subscriber households.

18. Omitted Dates of DBS Subscriber Numbers. The DRC objects in some proceedings that SBCA's estimates of DBS subscribership³⁷ omit the date of its DBS subscriber numbers.³⁸ Petitioner's reply provides the pertinent dates³⁹ to remedy any original omission by Petitioner. The stated dates raise no doubt about the timeliness or validity of its DBS subscriber numbers.

19. Requests for Greater Supporting Documentation. The DRC makes two general objections that Petitioner's filings were insufficiently supported by appropriate documentation. First, the DRC objects that the petitions did not include Petitioner's supporting analysis and work papers.⁴⁰ In fact, Petitioner filed all the numbers of DBS subscribers and households with which the competing provider competition was estimated, included documentation from the sources of its subscriber numbers – Media Business Corporation ("MBC") and SBCA, and explained in sufficient detail how all the numbers were derived. These showings are the same as others that have been accepted by the Commission in scores of competing provider effective competition decisions. As noted in paragraph 23 below, Petitioner also filed additional information in some proceedings. The DRC reveals no flaw in the numbers and calculations made with them, and gives no indication of what petitioner's additional supporting analysis and work papers, assuming that there are any, would add to the record before us.

20. Second and more specifically, the DRC objects that the petitions do not give a sufficiently detailed explanation of Petitioner's method of estimating DBS subscribership.⁴¹ We disagree. Petitioner has filed a page-long, single-spaced description written by MBC that sets forth in detail the

³⁴ See, e.g., Comments in CSR 7118-E & 7119-E at 10; Comments in CSR 7604-E at 9; Comments at CSR 7608-E & 7609-E at 9.

³⁵ *Mediacom Southeast LLC*, 22 FCC Rcd 13208, 13211 n.35, ¶ 9 (2007); *Atlantic Broadband (Penn) LLC*, 22 FCC Rcd 4668, 4678, ¶ 23 (2007), quoting with approval *Mediacom Minnesota LLC*, 20 FCC Rcd 4984, 4988, ¶ 13 (2005) (adjusting for dual subscribers "would permit an absurd finding of no effective competition where 85 percent of households were dual cable/DBS subscribers, as long as less than 15 percent of households subscribed only to DBS").

³⁶ *Mediacom Minnesota LLC*, 20 FCC Rcd at 4988, ¶ 13.

³⁷ See, e.g., Petition in CSR 7118-E & 7119-E at Exh. 7; Petition in CSR 7197-E & 7198-E at Exh. 7.

³⁸ Comments in CSR 7118-E & 7119-E at 7, 9; Comments in CSR 7197-E & 7198-E at 2, 9.

³⁹ Reply in CSR 7118-E & 7119-E at Exh. 2 (Declaration of Pinna Gallant, MBC Senior Vice President for Product Marketing ("Gallant Declaration"), at ¶ 4, dated May 31, 2007); Reply in CSR 7197-E & 7198-E at Exh. 2 (Declaration of Pinna Gallant, MBC Senior Vice President for Product Marketing, at ¶ 4, dated May 31, 2007).

⁴⁰ See, e.g., Comments in CSR 7597-E at 6; Comments in CSR 7598-E at 6; Comments in CSR 7599-E at 6-7; Comments in CSR 7604-E at 9.

⁴¹ Comments in CSR 7197-E & 7198-E at 12-13.

latter company's method, especially its use of block groups to estimate DBS subscribership in the relevant parts of partial zip codes (zip codes that lie partly inside a franchise area and partly outside it). This is the same description we have accepted in numerous other decisions concerning competing provider effective competition. The DRC has not shown that there is anything suspicious or analytically unsound in MBC's method, that MBC's description of it omits or misstates specific important matters, or that MBC's execution of its method was flawed. The DRC's wish that MBC's description had been more detailed does not mean that the description was erroneous or incomplete. Requiring a more detailed description would add complexity and delay to these proceedings without any likelihood on the present record that an error would be revealed or a sounder result would occur. Accordingly, we find MBC's description of the latter's method for estimating DBS subscribership to be sufficient in these proceedings; and we dismiss the DRC's request that we fault the petitions for not providing additional supporting documentation.

21. "Complete When Filed" Requirement for Petitions. The DRC requests that we require that petitions seeking findings of effective competition be 'complete when filed,' which would require the commencement of new proceedings if we found that any petition has an evidentiary flaw or omission.⁴² We decline this request for several reasons. First, as noted in paragraph 14 above, an adjudicatory proceeding such as the present one is not the proper forum to adopt such a general rule. Second, in paragraphs 23-24 below, we do note that Petitioner filed certain useful information after it filed its petitions. The DRC was not prejudiced by any of the later filings, however. In all instances where Petitioner filed additional information after its petitions, either the DRC had the opportunity to comment on it or the information was of secondary importance. None of the information in question would have changed the outcome of these proceedings.

22. Third, the DRC relies on past instances where we have adopted 'complete when filed' rules that are not similar to effective competition proceedings. The DRC correctly notes that in some proceedings about whether to grant a specific radio license, we may treat a major amendment to an application as effectively beginning a new proceeding.⁴³ Such amendments, however, propose to move a radio transmitter or use new frequencies, which can create major new technical interference. Such amendments alter the applicant's proposed operation in a major way. They have no similarity to the circumstances in these proceedings, where Petitioner simply added background data or filled in minor omissions, and the proposal for deregulation itself remains unchanged. The DRC also points to the 'complete when filed' requirement we imposed in proceedings to allow Bell companies to re-enter certain markets.⁴⁴ Those proceedings were highly complex,⁴⁵ however, and were required by statute to be decided within 90 days.⁴⁶ In these proceedings, there is no need for such an emphasis on initial exhaustive completeness. Accordingly, we decline to adopt the DRC's 'complete when filed' proposal, both in general and in these proceedings. We find no fault with the Petitions to the extent, if any, that they were not complete when filed.

⁴² See, e.g., Comments in CSR 7118-E & 7119-E at 10-11; Comments in CSR 7597-E at 5; Comments in CSR 7598-E at 5; Comments in CSR 7604-E at 10.

⁴³ See, e.g., 47 C.F.R. § 101.45(f). The DRC's Comments cite to identical provisions in the now-repealed 47 C.F.R. § 21.31(e). Comments in CSR 7197-E & 7198-E at 10.

⁴⁴ Comments in CSR 7197-E & 7198-E at 10; *Application of BellSouth Corp. Pursuant to Section 271 to Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd 539, 561, ¶ 38 (1997).

⁴⁵ See 47 U.S.C. § 271(c).

⁴⁶ See 47 U.S.C. § 271(d)(3).

Specific Objections of the DRC

23. Petitioner's Additional Data. On February 23, 2007, the Commission sent a letter to Petitioner directing it to send its franchising authorities – in these proceedings, the BPU – additional data about the zip codes in the communities involved in each petition.⁴⁷ Petitioner furnished that data (for the zip codes involved in CSR 7118-E and 7119-E) to the BPU in time for the DRC to address the data in its Comments.⁴⁸ The DRC objects that Petitioner's filing of the additional data shows that the petitions in those proceedings were not complete when filed.⁴⁹ This objection is without merit. Because the DRC received the data in time to address in its Comments (and did address it, see following paragraph), the DRC was not prejudiced in any way.

24. Specific Alleged Omissions of Data. The DRC claims that there are several omissions in the additional data that Petitioner filed in CSR 7118-E. The first is the absence of any information about zip code 07939 from Petitioner's data about the Community of Bridgewater, New Jersey.⁵⁰ Petitioner answers that 07939 is a "non-spatial" zip code and which is contained entirely within zip code 07920. Petitioner subsequently furnished data about the latter zip code that included the numbers of DBS subscribers in both zip codes.⁵¹ Second, the DRC points to Petitioner's failure to provide data about several zip codes that the DRC believes are in Petitioner's New Brunswick franchise area.⁵² These, too, appear to be non-spatial zip codes. Third, the DRC complains that Petitioner's list of New Brunswick zip codes omits two zip codes (08902 and 08904) that are in it.⁵³ Petitioner answers that those two zip codes border its New Brunswick Franchise area but correspond with other franchise areas.⁵⁴ Petitioner's answers give satisfactory explanations for its treatment of the zip codes in question and the DRC filed no supplemental pleading disputing them. We conclude that the DRC has not proven any error in Petitioner's filings in CSR 7118-E.

25. In CSR 7197-E, the DRC faults Petitioner's zip code data for the City of Paterson, New Jersey for not mentioning four zip codes (07506, 07508, 07510, and 07512) that the U.S. Postal Service includes in the City.⁵⁵ Petitioner answers that one of these zip codes (07510) is included within another zip code that it does address and that the other three correspond to franchise areas other than Paterson.⁵⁶ Again, we find this answer satisfactory.

26. Also, broadly concerning all of Petitioner's alleged omissions of zip codes, if Petitioner erroneously omitted a zip code from its calculation of DBS subscribership in a Community, the result would be to reduce the number of DBS subscribers and would weaken Petitioner's showing of competing

⁴⁷ Letter from Steven A. Broecker, Deputy Chief, Policy Division, Media Bureau, FCC, to Bruce J. Gluckman, Vice President, Legal Regulatory Affairs, Mediacom Commun. Corp., *et al.*, dated Feb. 23, 2007.

⁴⁸ Supplement to Petition for Determination of Effective Competition in CSR 7118-E & 7119-E, dated April 3, 2007.

⁴⁹ Comments in CSR 7118-E & 7119-E at 16.

⁵⁰ *Id.*

⁵¹ Reply in CSR 7118-E & 7119-E at 11-12; *id.*, Gallant Declaration at ¶ 8. A "non-spatial" zip code may be assigned, for example, to a post office box, a large building, or a large organization. It has no significant two-dimensional territory of its own; and is contained within a spatial zip code. Gallant Declaration at ¶ 7.

⁵² Comments in CSR 7118-E & 7119-E at 16-17.

⁵³ *Id.* at 17.

⁵⁴ Reply in CSR 7118-E & 7119-E at 12; *id.*, Gallant Declaration at ¶ 9.

⁵⁵ Comments in CSR 7197-E & 7198-E at 11.

⁵⁶ Reply in CSR 7197-E & 7198-E at 17-18. Zip code 07510 appears to be a non-spatial zip code.

provider effective competition. Petitioner has no incentive to weaken its own case, and it does not appear to have done so with the zip codes in question. If it did, however, the DRC would not be prejudiced; indeed, only Petitioner's showing would suffer. Accordingly, we find no merit in these objections by the DRC.

27. The DRC's Proposed Substitutes for Petitioner's Data. In CSR 7198-E, the DRC alleges that Petitioner understates the number of households in the Attachment A Community of Hamilton Township, New Jersey. Petitioner cites the 2000 Census number of 33,523 households.⁵⁷ The DRC advocates using 35,469,⁵⁸ which it obtained from Claritas, Inc., to lower the DBS subscribership slightly below the statutory minimum of 'in excess of 15 percent.'⁵⁹ It appears that Claritas starts with Census numbers and then makes projections or estimates based on a variety of sources to reflect post-Census changes.⁶⁰ The speculative projections and estimates made by Claritas make its resulting number less useful in this instance than the precise, actual count of households in the 2000 Census data that Petitioner submitted. For this reason, we decline to use Claritas's number of households in Hamilton Township instead of the Census Bureau's.⁶¹

28. The DRC, asserting another argument to raise the number of households in Hamilton Township above the 2000 Census number, mentions unspecified "[r]esidential occupied housing data" from the Township's local government.⁶² It may be that Attachments B, C, and D to the DRC's Comments in CSRs 7197-E and 7198-E are the data to which the DRC refers, but that is not clear. Attachment B is a short list of what appear to be land values, with no title and no explanation of what its numbers mean. Attachments C and D appear to be a list of apartment buildings in Hamilton Township. Nowhere, however, does the DRC explain what the Attachments show relative to the number of households in the Township. We have stated that we would accept household data that is more recent than, and as reliable as, the most recent Census data.⁶³ The DRC has not presented us with such data concerning Hamilton Township. Accordingly, we accept the 2000 Census's number of households in Hamilton Township for purposes of finding competing provider effective competition in Hamilton Township.⁶⁴

29. Finally, the DRC objects that Petitioner counts DBS subscribers in one zip code (08650) in Hamilton Township although it consists only of a Post Office Box. Such boxes, the DRC argues, show

⁵⁷ Petition in CSR 7197-E & 7198-E at 5.

⁵⁸ Comments in CSR 7197-E & 7198-E at 8 & Att. A at 1.

⁵⁹ 47 U.S.C. § 543(l)(1)(B)(ii).

⁶⁰ Comments in CSR 7197-E & 7198-E at Att. A ("Claritas Demographic Update Methodology") *passim*. Petitioner states that Claritas' website indicates that it relies on information supplied by the National Planning Data Corporation, Donnelly Marketing Information Services, and the National Decision Systems, all demographic data firms. Petitioner also states that Claritas's estimates are based on Claritas's own data and on an undefined term called "Market Statistics." Reply in CSR 7197-E & 7198-E at 14. From these statements it appears that Claritas reaches its estimates from other sources, which themselves may make estimates the objectivity of which has not been shown to equal the Census's.

⁶¹ *Accord, Rockland/Ramapo*, 22 FCC Rcd at 11494, ¶ 18.

⁶² Comments in CSR 7197-E & 7198-E at 8.

⁶³ *See, e.g., Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 08-1658 at ¶ 12 (rel. July 15, 2008), available at 2008 WL 2743906; *Comcast Cable Commun., LLC*, 23 FCC Rcd 8564, 8567 ¶ 10 (2008); *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462, ¶ 14 (2007).

⁶⁴ Cablevision notes the Census Bureau's estimate that in 2005 Hamilton Township had 33,810 households. Reply in CSR 7197-E & 7198-E at 15. Using MBC's estimate of 5,110 DBS subscribers in the Township (Petition in CSR 7197-E & 7198-E at Exh. 7), DBS penetration would be 15.11%, above the statutory minimum.

only where people pick up their mail and not necessarily where they reside.⁶⁵ In this instance, we find the DRC's objection to the inclusion of Post Office boxes insignificant. Because the number of P.O. Boxes in communities is generally not significant, we have accepted estimates of DBS subscribership that include subscribers identified by P.O. Boxes.⁶⁶ Equally important, the zip code in question in this instance contains only three DBS subscribers.⁶⁷ Their exclusion would not lower DBS penetration in Hamilton Township below the statutory minimum. In sum, the DRC has failed to undermine the numbers proposed by Petitioner for either DBS subscribers or households in Hamilton Township, New Jersey.

30. In CSR 7604-E, Petitioner cites from the 2000 Census to find that the City of Clifton, New Jersey contains 30,244 households.⁶⁸ The DRC proposes instead a 35,520 number of households, which was developed by the City's Economic Development Department. The DRC's number appears to be, according to that Department, the number of private and public owned buildings in the City from 2000 through late 2007.⁶⁹ The statutory test for competing provider effective competition, however, requires measurement of "households,"⁷⁰ which means only occupied housing units.⁷¹ There is no indication that the DRC's proposed number excludes non-housing buildings and unoccupied housing units, although it should if we were to use it as evidence of the number of households. The DRC's proposed number may be more recent than the 2000 Census, but is not as reliable a measure of households as Petitioner's number from the 2000 Census. Accordingly, we reject the DRC's proposed number as our measure of households in Clifton.

31. Also in CSR 7604-E, the Petitioner cites from the 2000 Census for the number of households in the Boroughs of North Haledon and Riverdale.⁷² The DRC proposes instead higher household numbers developed by Claritas. For the reasons stated in paragraph 27 above, we decline to use Claritas' numbers.

32. In CSRs 7608-E and 7609-E, the DRC proposes two sets of numbers for households in two Communities (the Boroughs of Seaside Park and Neptune City) and alleges that those numbers are more recent and reliable than the 2000 Census numbers used by Petitioner.⁷³ One set of numbers is from Claritas, which we decline to use for the reasons stated in paragraph 27 above. The second set cites to numbers of households as stated by officials of the local government of each Community.⁷⁴ The Code Enforcement Office of Seaside Park provides a number for "residential units,"⁷⁵ which does not expressly

⁶⁵ Comments in CSR 7197-E & 7198-E at 11.

⁶⁶ *Cable One, Inc.*, 18 FCC Rcd 12792, 12793-95, ¶¶ 6-9 (2003).

⁶⁷ Reply in CSR 7197-E & 7198-E at Exh. 6.

⁶⁸ Petition in CSR 7604-E at Exh. 7 at 2.

⁶⁹ Comments in CSR 7604-E at Att. RC-1 at 2.

⁷⁰ 47 U.S.C. § 543(l)(1)(B)(ii).

⁷¹ *Comcast Cable Commun., LLC*, 23 FCC Rcd 8564, 8567, ¶ 10 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007); *MCC Iowa LLC*, 20 FCC Rcd at 15270 ¶ 7; *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-71 ¶ 8 (2003).

To the extent that the DRC's proposed Clifton number of households reflects the City's number of issued building permits, such a measure is clearly not a measure of households. See, e.g., *CoxCom, Inc.*, 22 FCC Rcd 4533, 4538-39, ¶ 13 & cases cited in n. 47 (2007); see also *Rockland/Ramapo*, 22 FCC Rcd at 11493-94, ¶ 22.

⁷² Petition in CSR 7604-E at Exh. 7 at 3, 5.

⁷³ Comments in CSR 7608-E & 7609-E at 7-8.

⁷⁴ *Id.* at Att. RC-1.

⁷⁵ *Id.* at 3.

exclude *unoccupied* housing units. The statutory test for competing provider effective competition, however, requires measurement of “households,”⁷⁶ which means only occupied housing units.⁷⁷ “Households” for effective competition purposes also excludes seasonal dwellings,⁷⁸ which appear to be atypically numerous in Seaside Park.⁷⁹ They are apparently included in the DRC’s proposed number although they should not be.⁸⁰ Therefore, although the Borough’s number is more recent than the 2000 Census, it is not a more reliable measure of households there, and we reject it.

33. The Deputy Municipal Clerk and Registrar of Vital Statistics for Neptune City cites to the number of “current households, i.e., current occupied housing units,”⁸¹ which is precisely what the statutory test for effective competition requires. We do not, however, accept the Clerk’s asserted number of households. There is no indication from the Clerk’s statement of how that number was calculated — whether, for example, it excluded seasonal and other temporary housing units as the Census does⁸² and, more important, whether it was composed with the thoroughness and reliability of the U.S. Census Bureau’s numbers. Accordingly, we accept Petitioner’s evidence of the number of households in Neptune City.⁸³

34. Use of Five-Digit Zip Codes. In CSR 7604-E, the DRC objects that Petitioner, instead of using the data and calculations from MBC and SBCA and an established method to allocate DBS subscribers in partial five-digit zip codes, should have used nine-digit, “zip+4” data, which obviates the need for allocation.⁸⁴ This objection is unconvincing. Although the Commission accepts showings of DBS subscribership that use zip+4 data, we do not require them in all cases. Five-digit zip code data and a satisfactory allocation method are an acceptable means to calculate DBS subscribership in the Communities in CSR 7604-E.⁸⁵

⁷⁶ 47 U.S.C. § 543(l)(1)(B)(ii).

⁷⁷ See cases cited *supra* note 72.

⁷⁸ 47 C.F.R. § 76.905(c) (“‘households’ shall not include those dwellings that are used solely for seasonal, occasional, or recreational use”). When we adopted this regulation, we addressed “dwelling units that are empty for a significant portion of the year” and observed that

“[p]eople who are not present cannot be presumed to be choosing local competitive alternatives. We believe that the best and most constant indicator of local viewers’ choices is represented by the full-time residents of an area. Moreover, it is the full-time residents who are most affected by the determination whether their cable rates are subject to regulation.”

Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation Buy-Through Prohibition, 9 FCC Rcd 4316, 4324 ¶17 (1994).

⁷⁹ Comments in CSR 7608-E & 7609-E at Exh. RC-1 at 3 (statement by the Zoning/Code Enforcement Officer of the Borough of Seaside Park that “we are a seasonal town”).

⁸⁰ Reply in CSR 7608-E & 7609-E at 16.

⁸¹ Comments in CSR 7608-E & 7609-E at Exh. RC-1 at 2.

⁸² Neptune City is at or near the Atlantic shore of New Jersey, like Seaside Park, and may have a large number of seasonal housing units. See *supra* note 79.

⁸³ Petition in CSR 7608-E & 7609-E at 7.

⁸⁴ Comments in CSR 7604-E at 7.

⁸⁵ *Time Warner Entertainment Co. LP, d/b/a/ Time Warner Cable*, 22 FCC Rcd 805, 807, ¶ 6 (2007); *Alert Cable TV of South Carolina, Inc.*, 21 FCC Rcd 269, 272-73, ¶ 9 (2006); *Charter Commun., Inc.*, 19 FCC Rcd 6878, 6881, ¶ 10 (2004).

(continued....)

Conclusion

35. Based upon the subscription levels for the DBS providers (and, in two Attachment A Communities, another MVPD) that are 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 Attachment A Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Attachment A Communities. Accordingly, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied in the Communities listed on Attachment A and that Petitioner is subject to effective competition there.

B. The LEC Test

36. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition if a local exchange carrier (“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, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator;⁸⁶ this test is otherwise referred to as the “LEC” test.

37. The Commission has stated that the incumbent cable operator must show that the LEC intends to build-out its cable system, in an area that substantially overlaps the incumbent cable operator’s, within a reasonable period of time if it has not completed its build-out; that no regulatory, technical or other impediments to household service exist; 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.⁸⁷ It is undisputed that these Communities are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. 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 programming⁸⁸ and is supported in this petition with copies of channel lineups for Competitor.⁸⁹ Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Communities pursuant to its “system-wide” franchise,⁹⁰ has marketed its services in a

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We note that we are considering limiting the use of five-digit zip code data in some circumstances. *Commission Revises & Suspends Pending OMB Approval New Standards for Showings of Effective Competition for Cable Service*, Public Notice DA 08-2030 (rel. Sept. 2, 2008), available at 2008 WL 4057098; *Commission Announces New Standards for Showings of Effective Competition for Cable Service*, Public Notice DA 08-1892 (rel. Aug. 13, 2008).

⁸⁶See 47 U.S.C. § 543(l)(D).

⁸⁷ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) (“*Cable Reform Order*”).

⁸⁸ See 47 C.F.R. § 76.905(g). See also Petition in CSR 7604-E at 17.

⁸⁹ See, e.g., Petition in CSR 7604-E at Exh. 9; Petition in CSR 7606-E & 7607-E at Exh. 9; Petition in CSR 7608-E & 7609-E at Exh. 9.

⁹⁰ Under a New Jersey law enacted in 2006, a company may receive from the BPU “a system-wide franchise by constructing or operating a [cable] system at any location within the State in which the company, at the time of issuance of the system-wide franchise, either has plant or equipment in use for the provision of any consumer video, cable or telecommunications service, or has proposed to place such plant or equipment into use to provide such

(continued...)

manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.⁹¹

38. Based on the foregoing, we conclude that Petitioner has also submitted sufficient evidence demonstrating that its cable system serving the Communities listed on Attachment B has met the LEC test and is subject to effective competition.

Objections of the DRC

39. The DRC makes three main objections to Petitioner's showings of LEC effective competition. The first objections are legal. The DRC objects that system-wide franchises were not contemplated when Congress enacted the statutory provision for LEC effective competition,⁹² and therefore no system-wide franchise may lawfully be the basis for a finding of LEC effective competition.⁹³ The DRC also bases its objection on our decision in *Service Electric Cable TV of New Jersey*,⁹⁴ where the Commission refused to allow a cable operator to aggregate franchise areas, making it inconsistent to allow Petitioner to rely on Verizon's system-wide franchise here.⁹⁵ Finally, the DRC objects that, given the novelty of system-wide franchises, the Bureau may not lawfully rule on them as a basis for LEC effective competition findings until the Commission has ruled on them.⁹⁶

40. Petitioner's objections lack merit. First, even if we assume that the applicable statute was enacted before system-wide franchises, that would not disable the statute from applying to such franchises. The DRC has given us neither legislative history nor reasoning indicating that LEC competition may be found only with reference to types of franchises that existed at the statute's enactment. In fact, we have found LEC effective competition in previous cases based on a statewide franchise.⁹⁷ Our decision in *Service Electric Cable TV of New Jersey*, relied on by the DRC, is not to the contrary. That decision, which ruled on a competing provider test of effective competition rather than a LEC test, prohibited a cable operator from combining DBS subscribership data for many franchise areas in a single sum, attempting to thereby show subscribership in excess of 15 percent in all the franchise areas combined. We required that the cable operator document subscribership counts based on a

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service." Evidently, Verizon's system-wide franchise has the scope of the territory in which it has provided telecommunications service. See The Assembly Telecommunications & Utilities Committee reports favorably Assembly Committee Substitute for Assembly Bill No. 804, No. 804-L.2006, c.83 (May 11, 2006), printed in N.J.S.A. 48:5A-2.

⁹¹ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also, e.g., Petition in CSR 7604-E at 13 & Exh. 8; Petition in CSR 7605-E at 12, 14-15 & Exh. 9; Petition in CSR 7606-E & 7607-E at 16-17 & Exh. 8; Petition in CSR 7608-E & 7609-E at 13; Reply in CSR 7604-E at 24-25.

⁹² The provision, 47 U.S.C. § 543(l)(1)(D) was first enacted in 1996. Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(b)(3), 110 Stat. 56, 115, approved Feb. 8, 1996.

⁹³ See, e.g., Comments in CSR 7118-E & 7119-E at 12; Comments in CSR 7599-E at 3, 8-9; Comments in CSR 7604-E at 11-12.

⁹⁴ *Service Elec. Cable TV of New Jersey, Inc.* ("Service Electric"), 20 FCC Rcd 20532 (2005).

⁹⁵ See, e.g., Comments in CSR 7606-E at 9; Comments in CSR 7608-E & 7609-E at 12; Comments in CSR 7979-E, 7980-E & 7981-E at 5-6.

⁹⁶ See, e.g., Comments in CSR 7605-E at 8; Comments in CSR 7606-E at 8-9; Comments in CSR 7608-E & 7609-E at 12.

⁹⁷ *Cablevision Systems of Connecticut, L.P.*, 14 FCC Rcd 15883, 15884, ¶ 4 (1999); *Cablevision Systems of Connecticut, L.P.*, 14 FCC Rcd 15253, 15254, ¶ 3 (1999).

franchise by franchise basis.⁹⁸ *Service Electric Cable TV of New Jersey* is not applicable in this case since it does not concern the LEC test, which we are addressing here. Furthermore, issues of subscribership data do not even arise under the LEC test. Rather, the elements of LEC effective competition are those stated in paragraphs 36 and 37 above.

41. The DRC's second objection to Petitioner's showing of LEC effective competition is that Competitor does not offer video programming that is "comparable" to Petitioner's because Competitor's programming does not yet include "public, government, and educational" or PEG channels.⁹⁹ The DRC misunderstands our standard for what constitutes comparable programming for purposes of effective competition. 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 programming¹⁰⁰ and is supported in this petition with citations to the channel lineups for Competitor.¹⁰¹ There is no doubt that the petitions satisfy that standard. Whether Competitor's service is comparable for effective competition purposes does not depend on whether it includes PEG channels.¹⁰²

42. The DRC's final objections to Petitioner's showing of LEC effective competition focus on whether Competitor is marketing its service widely and aggressively enough that potential customers in all the Attachment B Communities are aware of it. For example, the DRC objects that Petitioner has not shown that Competitor has any subscribers for its video service.¹⁰³ In the same vein, the DRC objects that Petitioner has not shown advertising by Competitor directed at consumers specifically in each Attachment B Community, or Community-specific evidence of subscribership,¹⁰⁴ and that Competitor is not required to build out within a reasonable period of time.¹⁰⁵ Echoing these objections, local counsel for three Attachment B Communities object to Petitioner's showing of LEC effective competition on the grounds that "there is no discussion or documentation establishing that . . . services have in fact been provided" by Competitor in the Communities in question or that there are "enough actual subscribers" to Competitor's service in each of those Communities.¹⁰⁶

⁹⁸ *Service Electric*, 20 FCC Rcd at 20533, ¶ 6 ("the fact that Service Electric operates the 26 [franchises] as a single contiguous system is immaterial to our analysis. The statute requires Service Electric to demonstrate effective competition in each franchise area.") (internal quotations and footnote omitted).

⁹⁹ See, e.g., Comments in CSR 7118-E & 7119-E at 14; Comments in CSR 7599-E at 10; Comments in CSR 7604-E at 13-14.

¹⁰⁰ 47 C.F.R. § 76.905(g).

¹⁰¹ See, e.g., Petition in CSR 7604-E at Exh. 9; Petition in CSR 7606-E & 7607-E at Exh. 9; Petition in CSR 7608-E & 7609-E at Exh. 9.

¹⁰² *CoxCom, Inc.*, 14 FCC Rcd 7134, 7142, ¶19 (1999) ("PEG programming is not one of the factors the Commission has indicated is germane in determining whether comparable programming is being offered by a competitor."), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000).

¹⁰³ See, e.g., Comments in CSR 7604-E at 14; Comments in CSR 7606-E at 10; Comments in CSR 7608-E & 7609-E at 14.

¹⁰⁴ See, e.g., Comments in CSR 7118-E & 7119-E at 15-16; Comments in CSR 7599-E at 10-11; Comments in CSR 7608-E & 7609-E at 14.

¹⁰⁵ Comments in CSR 7118-E & 7119-E at 14.

¹⁰⁶ Letter from Joseph J. Bell, Esq., Bell & Gage, counsel for the Township of East Hanover and the Borough of Florham Park, both in CSR 7599-E, at 1 (dated Nov. 24, 2007); Letter from Joseph J. Bell, Esq., Bell & Hassing, counsel for the Borough of Chatham in CSR 7979-E ("Chatham Letter") at 1 (dated July 23, 2008).

These letters also object to our finding that LEC effective competition exists without the prior consent of municipal governments. *Id.* at 2. The DRC, in contrast, objects to our relying on the BPU in our decisions herein. Comments in CSR 7599-E at 8; Comments in CSR 7605-E at 7-8. Both positions misunderstand our standards in

(continued....)

43. The objections overstate the evidence that is required to show LEC effective competition. The statutory description of LEC effective competition¹⁰⁷ contains no requirement that a LEC's service reach a certain level of subscribership.¹⁰⁸ Nor do we require community-specific advertising; indeed, some small franchise areas may have no media specifically focused on them.¹⁰⁹ In adopting the LEC competition test, Congress believed that a LEC would be a formidable competitor to an incumbent cable operator from its commencement of service in part of a community.¹¹⁰ Therefore, we have consistently required that a petitioner show only that a LEC has actually begun to provide service in areas that substantially overlap Cablevision's (which none of the objecting parties denies), that the LEC is marketing its services so that potential customers are aware of it, and that it intends to build out its cable system within a reasonable period of time.¹¹¹ Petitioner has shown that Competitor has done all these things, thus sustaining its burden of proof. The DRC has not successfully rebutted any of Petitioner's evidence.

44. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable systems serving the Communities listed on Attachment B have met the LEC test and are subject to effective competition.

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LEC effective competition decisions. Our actions neither require the prior consent of local authorities nor blindly rely on their judgments. Rather, we apply the criteria of 47 U.S.C. § 543(l)(1)(B).

¹⁰⁷ See 47 U.S.C. § 543(l)(1)(D).

¹⁰⁸ See *Armstrong Commun., Inc.*, 16 FCC Rcd 1039, 1043-44, ¶ 9 (2001) (LEC test does not specify any minimum amount of service to be offered by the LEC or include any penetration standards; it requires only that the offering be substantially more than *de minimis*); *CoxCom, Inc.*, 14 FCC Rcd 7134, 7143, ¶ 24 (1999) ("Congress did not include a pass or penetration test in the LEC effective competition standard and the Commission has not indicated that it would impose such a test"), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000); *Cable Reform Order*, 14 FCC Rcd at 5303, ¶ 10 ("we reject arguments that we should adopt penetration standards").

The DRC misstates our decision in *Marcus Cable Assocs., L.P.*, 13 FCC Rcd 9326 (1998), *review denied*, 16 FCC Rcd 15612 (2001), as holding that LEC effective competition requires "direct evidence of subscribership." Comments in CSR 7599-E at 10-11; Comments in CSR 7604-E at 14; Comments in CSR 7605-E at 10-11. Our *Marcus Cable* decision noted that the cable operator indeed showed that the LEC had 50 subscribers for its service, but that that and other evidence failed to show that most consumers were "reasonably aware" of its availability. *Marcus Cable Assocs., L.P.*, 13 FCC Rcd at 9331, ¶ 14.

¹⁰⁹ One franchise area involved in CSR 7599-E, for example, has fewer than 600 households in it. Petition in CSR 7599-E at 8.

¹¹⁰ *Cable Reform Order*, 14 FCC Rcd at 5302, ¶ 9 ("The thrust of the 1996 Act is Congress' expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and . . . their ubiquitous presence in the market") (footnote omitted); *id.* at 5303, ¶ 11 (noting with approval that "the Cable Services Bureau has found that a LEC's presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out its service"); *id.* at 5304, ¶ 11 (noting "Congress' intent that the Commission have the discretion to consider the likelihood and extent of impending competition when considering whether effective competition exists under the LEC test. Congress sought to restrain cable rates and stimulate quality cable services. Once the LEC's competitive presence is sufficient to achieve these goals, even if the LEC's buildout or roll out is not complete, the intent of the effective competition test has been met").

¹¹¹ *Cable Reform Order*, 14 FCC Rcd at 5303, ¶ 11, 5305, ¶ 13.

III. MISCELLANEOUS MATTERS

45. In its Comments in several proceedings, the DRC observes that the Commission has rules requiring the payment of fees in connection with the petition and the listing of franchise areas in the petition.¹¹² Because the DRC does not allege, much less substantiate, any specific violation of those rules by Petitioner, we find no significance in its observations.

46. The DRC's one specific allegation about fees is that Petitioner erred in paying only three filing fees with its Petition in CSR 7979-E, 7980-E, and 7981-E.¹¹³ That Petition involved three cable systems that serve a total of five Communities. In support of its allegation, the DRC cites a Commission rule that does not exist.¹¹⁴ The DRC does not state the amount of fees Cablevision should have paid, although apparently it believes that one fee was due for each of five Communities. Petitioner filed the correct amount of fees, which is one per cable system regardless of how many Communities are involved. The DRC's allegation is without merit.¹¹⁵

47. In CSR 7979-E, the Borough of Chatham claims that, because Petitioner and the Borough made their franchise agreement when Petitioner's rates were regulated, granting deregulation to Petitioner would "materially affect" the terms of that agreement.¹¹⁶ The Borough of Chatham does not state why this claim, if valid, should affect our decision in these proceedings. We also note that the possibility that federal government action will affect local regulation of rates for cable service has been known since the Cable Communications Policy Act of 1984¹¹⁷ at least, and should come as no surprise to any municipal government. Accordingly, we find the Borough's claim to have no relevance in these proceedings.

48. Finally, Petitioner notes that the DRC's Comments are not accompanied by affidavits.¹¹⁸ Our rules provide that "Comments . . . shall contain a detailed full showing, supported by affidavit, of any facts and considerations relied on."¹¹⁹ Although most of the DRC's Comments consisted of legal and policy arguments, the Comments also made factual allegations (for example, about the number of households in several municipalities). The absence of affidavits weakens the DRC's claims.

¹¹² See, e.g., Comments in CSR 7599-E at 2 n.1; Comments in CSR 7604-E at 2 n.1; Comments in CSR 7605-E at 1 n.1; Comments in CSR 7606-E at 1 n.1; Comments in CSR 6708-E & 7609-E at 1 n.1.

¹¹³ Comments in CSR 7979-E, 7980-E, & 7981-E at 2 n.4.

¹¹⁴ *Id.*, citing "Section 1.104(8)(g) of the FCC rules." 47 C.F.R. § 1.104 of the Commission's rules concerns "Preserving the right of review; deferred consideration of application for review" and has no subsection numbered 8 or g.

¹¹⁵ *Reminder as to Procedures for Filing Cable Television Effective Competition Petitions*, Public Notice DA 05-921, 20 FCC Rcd 7294 ("Although for the convenience of the filing parties multiple communities and multiple cable physical systems ('PSIDs') may be combined in a single filing, each PSID must be separately identified and a separate fee must be paid for each PSID") (italics added); see also *Comcast Cable Commun., LLC, Memorandum Opinion & Order* DA 08-1908 at ¶ 6 n.14 (rel. Aug. 14, 2008) ("Two petitions were filed because some of the Communities with different CUIDs numbers are on a separate Comcast cable system and required the filing of a separate filing fee"); *CoxCom, Inc.*, 22 FC Rcd 4522, ¶ 1 n.1 ("regulatory filing fees are assessed by cable system").

¹¹⁶ Chatham Letter at 2.

¹¹⁷ *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 510, 522, ¶ 44 (1992) ("the Cable Communications Policy Act of 1984 effectively prohibited local rate regulation of most cable systems").

¹¹⁸ See, e.g., Reply in CSR 7118-E & 7119-E at 3 n.5; Reply in CSR 7197-E & 7198-E at 2 n.3; Reply in CSR 7604-E at 4 n.8; Reply in CSR 7608-E & 7609-E at 4 n.8.

¹¹⁹ 47 C.F.R. § 76.7(b)(1).

IV. ORDERING CLAUSES

49. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceedings by subsidiaries of Cablevision Systems Corporation **ARE GRANTED**.

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

51. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹²⁰

FEDERAL COMMUNICATIONS COMMISSION

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

¹²⁰ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7118-E, CSR 7197-E, CSR 7198-E, CSR 7597-E, CSR 7598-E, CSR 7599-E, CSR 7604-E, CSR 7605-E, CSR 7606-E, CSR 7607-E, CSR 7608-E, CSR 7609-E

COMMUNITIES SERVED BY SUBSIDIARIES OF CABLEVISION SYSTEMS CORPORATION

Communities	CUID(S)	CPR*	2000 Census Households	Estimated DBS Subscribers
CSR 7118-E				
Bridgewater	NJ0330	17.03%	15561	2650
Dunellen	NJ0237	20.52%	2451	503
Edison	NJ0239	18.00%	35136	6324
Keansburg	NJ0399	21.13%	3872	818
Keyport	NJ0408	19.88%	3264	649
Matawan	NJ0731	17.36%	3531	613
Middlesex	NJ0233	16.70%	5048	843
Milltown	NJ0377	16.48%	2627	433
New Brunswick	NJ0348	23.40%	13057	3055
North Brunswick	NJ0376	17.76%	13635	2422
Piscataway	NJ0289	19.26%	16500	3178
Somerville	NJ0292	17.94%	4743	851
South Amboy	NJ0370	18.00%	2967	534
CSR 7197-E				
Paterson	NJ0566	23.06%	44710	10311
CSR 7198-E				
Hamilton	NJ0459	15.24%	33523	5110
CSR 7597-E				
Allentown	NJ0561	24.29%	708	172
CSR 7598-E				
Newark	NJ0476	19.30%	91382	17634
CSR 7599-E				
Dover	NJ0133	20.29%	5436	1103
Stanhope	NJ0137	18.86%	1384	261
Victory Gardens	NJ0154	19.50%	564	110
CSR 7604-E				
Alpine	NJ0529	22.88%	708	162
Clifton	NJ0219	16.64%	30244	5034
North Haledon	NJ0215	15.88%	2626	417
Passaic	NJ0359	20.55%	19458	3999
Riverdale	NJ0184	15.13%	919	139
Totowa	NJ0197	15.29%	3539	541

*CPR = Percent of competitive DBS penetration rate.

Communities	CUID(S)	CPR*	2000 Census Households	Estimated DBS Subscribers
CSR 7605-E				
North Bergen	NJ0083	17.03%	21236	3617
West New York	NJ0365	22.06%	16719	3688
CSR 7606-E				
Hillsdale	NJ0373	37.89%(1)	3502	322
Paramus	NJ0311	53.39%(2)	8082	1732
(1) includes 1005 US Cable subscribers				
(2) includes 2583 US Cable subscribers				
CSR 7607-E				
Bayonne	NJ0381	16.88%	25545	4313
CSR 7608-E				
Farmingdale	NJ0483	16.96%	625	106
Neptune City	NJ0282	15.40%	2221	342
CSR 7609-E				
Lavalette	NJ0128	22.10%	1208	267
Seaside Heights	NJ0127	17.83%	1408	251
Seaside Park	NJ0129	17.21%	1127	194

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 7118-E, CSR 7119-E, CSR 7599-E, CSR 7604-E, CSR 7605-E, CSR 7606-E, CSR 7608-E,
CSR 7979-E, CSR 7980-E, CSR 7981-E

COMMUNITIES SERVED BY SUBSIDIARIES OF CABLEVISION SYSTEMS CORPORATION

Communities	CUID(S)
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CSR 7118-E

Bernards	NJ0486
Bridgewater	NJ0330
Middlesex	NJ0233
North Brunswick	NJ0376
Piscataway	NJ0289
Somerville	NJ0292

CSR 7119-E

Mahwah	NJ0421
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CSR 7599-E

Boonton (Town)	NJ0242
Denville	NJ0159
Dover	NJ0133
East Hanover	NJ0148
Florham Park	NJ0151
Hanover	NJ0170
Jefferson	NJ0243
Mine Hill	NJ0134
Montville	NJ0317
Morris	NJ0150
Morris Plains	NJ0149
Morristown	NJ0125
Mount Olive	NJ0123
Mountain Lakes	NJ0121
Parsippany Troy Hills	NJ0120
Randolph	NJ0270
Rockaway (Borough)	NJ0175
Rockaway (Town)	NJ0135
Roxbury	NJ0136
Wharton	NJ0139

CSR 7604-E

Allendale	NJ0409
Cedar Grove	NJ0176
Clifton	NJ0219
Elmwood Park	NJ0341
Glen Rock	NJ0227
Hackensack	NJ0228
Hasbrouck Heights	NJ0331
Ho-ho-kus	NJ0406
Little Falls	NJ0183
Lodi	NJ0342
Maywood	NJ0244
Midland Park	NJ0477

Communities CUID(S)**CSR 7604-E (continued)**

Nutley	NJ0224
Oakland	NJ0034
Park Ridge	NJ0432
Passaic	NJ0359
Ramsey	NJ0313
Ridgewood	NJ0195
River Edge	NJ0264
Saddle Brook	NJ0265
Teaneck	NJ0204
Waldwick	NJ0349
Washington	NJ0271
Wayne	NJ0036
Westwood	NJ0266
Wyckoff	NJ0403

CSR 7605-E

Hoboken	NJ0111
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CSR 7606-E

Bergenfield	NJ0145
Demarest	NJ0293
Dumont	NJ0211
Emerson	NJ0375
Fair Lawn	NJ0687
Harrington Park	NJ0448
Haworth	NJ0451
Hillsdale	NJ0373
New Milford	NJ0207
Northvale	NJ0450
Norwood	NJ0449
Oradell	NJ0260
Paramus	NJ0311

CSR 7608-E

Asbury Park	NJ0069
Belmar	NJ0278
Bradley Beach	NJ0279
Farmingdale	NJ0483
Lake Como	NJ0286
Neptune City	NJ0282
Spring Lake Heights	NJ0287

CSR 7979-E

Chatham	NJ0147
Madison	NJ0169

CSR 7980-E

Union City	NJ0366
Weehawken	NJ0345

CSR 7981-E

Lakewood	NJ05073
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