

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

In the Matter of)	
)	
Comcast of Potomac, LLC)	
)	CSR-7179-E
Petition for Determination of Effective)	
Competition in Franchise Areas in)	
Montgomery County, Maryland)	

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 2009

Released: June 30, 2009

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

I. INTRODUCTION

1. Comcast of Potomac, LLC, hereinafter referred to as “Petitioner,” has filed a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(4), and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the franchise areas of Montgomery County, Maryland (the “County”). Petitioner alleges that its cable systems serving the County¹ are subject to “competing provider” effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)² and the Commission’s implementing rules,³ and are therefore exempt from cable rate regulation in the franchise areas of the County because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”), and by RCN Corporation (“RCN”). Petitioner alternatively claims that its cable systems serving the County are subject to “local exchange carrier” or “LEC” effective competition because of the competing service provided by Verizon and RCN. The petition is opposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁵ The cable operator bears the burden of rebutting the

¹The franchise areas named in the pleadings herein and each one’s Community Unit Identification (“CUID”) number include Barnesville MD0229, Bethesda MD0348, Boyds MD0343, Brookeville MD0230, Burtonsville MD0341, Cabin John MD0347, the Town of Chevy Chase MD0223, Section III of Chevy Chase Village MD0274, Section IV of Chevy Chase Village (apparently annexed by the Town of Chevy Chase) MD0275, Section V of Chevy Chase Village MD0276, Chevy Chase Village (also known as Section VII of Chevy Chase Village) MD0277, Derwood MD0345, Gaithersburg MD0057, Garrett Park MD0231, Germantown MD0340, Glen Echo MD0233, Kensington MD0234, Laytonsville MD0235, Olney MD0346, Poolesville MD0228, Potomac MD0342, Rockville MD0222, Silver Spring MD0224, Somerset MD0227, Takoma Park MD0226, Washington Grove MD0225, West Bethesda MD0349, Wheaton MD0344, and the remainder of Montgomery County MD0236. The pleadings omit mention of three additional municipalities in Montgomery County, which may be franchise areas but do not have CUID numbers: Chevy Chase View, the Village of Martin’s Additions, and the Village of North Chevy Chase.

²See 47 U.S.C. § 543(a)(1).

³47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(4).

⁴47 C.F.R. § 76.906.

⁵See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ For the reasons set forth below, we grant the petition as to the City of Gaithersburg (the “City”), but deny it for the rest of the County.

II. BACKGROUND

3. The Filings. The filings herein indicate that there are approximately 20 franchise areas in the County that consist of many municipalities (cities, towns, and villages), or parts thereof, and one area consisting of the remainder of the County. Eighteen municipalities (apparently all of them except the City of Gaithersburg) filed separate Motions to Dismiss the Petition,⁷ and the County government filed another on behalf of its remaining unincorporated territory.⁸ Only one Opposition was filed to the Petition, by the County government on behalf of eighteen named municipalities and the remainder of the County except for the City of Gaithersburg.⁹ In sum, Motions to Dismiss and an Opposition were filed covering all of Montgomery County except for Gaithersburg.¹⁰

4. The City of Gaithersburg is one of the franchise areas named in the Petition. No Motion to Dismiss or Opposition was filed by the City or on its behalf. Therefore, we assume that the City does not object to a finding that effective competition exists within Gaithersburg. Nevertheless, Petitioner must sustain its statutory burden of proof that effective competition exists there and we have put Petitioner to its proof.¹¹

5. The Motions to Dismiss (the “Motions”) are almost identical and allege a structural evidentiary flaw in the Petition, namely that the Petition treats Montgomery County as having only two franchise areas – the City of Gaithersburg and the remainder of the County.¹² In fact, the Motions allege, there are many more franchise areas in the County and the law requires that the Petition present a separate showing of effective competition for each of them.

6. Petitioner also filed its Reply to Opposition and Motions to Dismiss (“Reply”). The Reply argues that the many Motions and the Opposition are frivolous and duplicative, that they are partly or wholly unauthorized, that they should therefore be stricken, and that their claims are baseless;¹³ that, despite much artful paperwork, Montgomery County consists of two franchise areas; and that Petitioner has shown both “competing provider” and “local exchange carrier” or “LEC” effective competition in both of the County franchise areas alleged by Comcast.

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷These are Barnesville, Brookeville, the Town of Chevy Chase (apparently including Section IV of Chevy Chase Village), Section III of Chevy Chase Village, Section V of Chevy Chase Village, Chevy Chase View, Chevy Chase Village, Garrett Park, Glen Echo, Kensington, Laytonsville, Martin’s Additions, North Chevy Chase, Poolesville, Rockville, Somerset, Tacoma Park, and Washington Grove.

⁸Because the other Motions to Dismiss are almost identical, in the interests of brevity we will refer to only one of them, the Motion to Dismiss Comcast’s Petition for Special Relief, dated May 23, 2007, and filed by the Commissioners of Barnesville, Maryland (“Barnesville Motion to Dismiss”).

⁹Opposition to Comcast’s Petition for Special Relief, filed by Montgomery County on behalf of itself and others (“County Motion to Dismiss”), dated May 31, 2007. The Opposition also incorporates Motions to Dismiss at 3 n.2.

¹⁰We assume that the Motion to Dismiss filed by the Town of Chevy Chase represents Section IV of the Village of Chevy Chase, which the Town appears to have annexed. Barnesville Motion to Dismiss at 3.

¹¹47 C.F.R. §§ 76.906, 79.907(b).

¹²See Petition at 22-23, Exhs. 5-6.

¹³Reply at 4, 35-38.

7. The County and municipalities filed a surreply¹⁴ to respond to several minor points made for the first time in Petitioner's Reply, and a motion asking permission to file the surreply.¹⁵ We grant the motion because, although the surreply does repeat some previously made points, it also illuminates several specific points in response to matters raised for the first time in the Reply. Because we find the surreply to be relevant to resolving this proceeding, we deny Petitioner's motion to strike it.¹⁶

8. Summary. On the fundamental issue of whether there are two or more franchise areas in Montgomery County, we find that there are more than two franchise areas. This finding renders insufficient Petitioner's evidence of effective competition for all of Montgomery County except for the City of Gaithersburg. We find that Petitioner is subject to competing provider effective competition in the City of Gaithersburg. In light of that finding, we need not address Petitioner's claim that it is also subject to LEC effective competition in Gaithersburg. Accordingly, we grant Petitioner's Petition for the City and deny it in all other respects.

III. FRANCHISE AREAS OTHER THAN GAITHERSBURG

9. Statutory Standards. Petitioner claims that it is subject to "competing provider" effective competition throughout Montgomery County.¹⁷ Section 623(l)(1)(B) of the Act provides that a cable operator is subject to that kind of effective competition if its

"franchise area is

(i) served by at least two unaffiliated multichannel video programming distributors ["MVPDs"] each of which offers comparable video programming to at least 50 percent of the households in the *franchise area*; and

(ii) 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*; . . ."¹⁸

Petitioner also claims that it is subject to "LEC" effective competition throughout the County.¹⁹ Section 623(l)(1)(D) of the Act provides that a cable operator is subject to LEC effective competition if

"a [LEC] or its affiliate (or any [MVPD] using the facilities of such carrier 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 so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that *area*."²⁰

¹⁴Surreply of Montgomery County, Maryland, & Participating Municipalities Regarding Comcast's Petition for Special Relief ("Surreply").

¹⁵Motion for Leave to File Surreply.

¹⁶Motion to Strike Surreply of Montgomery County, Maryland; see also Opposition to Comcast's Motion to Strike Surreply.

¹⁷Petition at 8.

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

¹⁹Petition at 22.

²⁰47 U.S.C. § 543(l)(1)(D) (emphasis added); see also 47 C.F.R. § 76.905(b)(4).

These sections of the statute thus make clear that a “franchise area” is the geographic territory within which a petitioning cable operator must show competing provider and LEC effective competition.

10. Evidence and Contentions of the Parties. Petitioner presents its evidence for effective competition in terms of only two areas, the City of Gaithersburg and the remainder of Montgomery County.²¹ The Motions argue that this is fundamentally flawed because Montgomery County actually consists of many more franchise areas. According to the Motions, the County government and each of the municipalities within the County has the legal authority to issue its own franchise(s) – each municipality has authority within its borders and the County government has authority for the remainder of the County, or parts thereof.²² The government of Montgomery County started the franchising process by issuing Petitioner one franchise and signing a franchise agreement, which covered the entire County.²³ The County government also allowed each individual municipality to adopt the County’s franchise (and the agreement) as its own. Each municipality (except Gaithersburg) took up that option, independently deliberated, and many held public hearings. Each municipality passed a resolution adopting the County’s franchise as its own to govern Petitioner’s service within its municipal borders,²⁴ and signed the franchise agreement that Petitioner had signed with the County.²⁵

11. Then, each municipality appointed the County government as its agent to administer its franchise. Each agency was for a discrete fee, was for a fixed term, and was subject to premature termination in certain conditions.²⁶ Of particular interest, each written agreement in which a municipality appointed the County as its agent provided that, “Termination of this Agreement . . . shall not result in the termination of the franchise agreement [between Petitioner and the municipality. Rather,] the Municipality shall become responsible for the administration and enforcement of the franchise agreement within its corporate limits.”²⁷ When transfers affecting Petitioner occurred, the affected municipalities signed individual documents reflecting those transfers.²⁸ More recently, this process was largely followed by the County and different sets of municipalities in granting franchises to RCN and Verizon.²⁹

12. Therefore, the Motions argue, there are many franchise areas in Montgomery County despite the fact that Montgomery County is the only active regulator of Petitioner in all of the

²¹Petition at 2-22 *passim*, Exhs. 5-6.

²²MD. STAT. ANN., art. 23A § 2(b)(13), art. 25A, § 5B.

²³County Motion to Dismiss, Exh. A; Barnesville Motion to Dismiss, Exh. A at 1 (second WHEREAS).

²⁴Barnesville Motion to Dismiss at 4, Exh. C.

²⁵*Id.* at 4, Exh. B, Exh. G (Declaration of Jane E. Lawton, Cable Communications Administrator for the County, dated May 18, 2007, at ¶ 3):

“The County and various of the municipalities have negotiated cable franchises with Comcast, . . . In those negotiations, each of the municipalities in Montgomery County retained the right to grant or deny its own franchise. Moreover, the municipalities were represented by their own legal counsel, and made their own independent determinations as to whether to enter into the agreements negotiated by my office on their behalf.”

See also Surreply at 5. Section 3 of Chevy Chase Village, Glen Echo, Kensington, and Laytonsville appear to have omitted this last step of signing an agreement with the County.

²⁶Barnesville Motion to Dismiss, Exh. A at 2, §§ 1, 6, 8, 13.

²⁷*Id.* at 4, Exh. A, § 13.

²⁸County Motion to Dismiss at 4-5. It appears that this process occurred when the first franchises for cable service were adopted and were repeated at their most recent renewal in 1998. County Motion to Dismiss at 4-6 & n.10.

²⁹County Motion to Dismiss at 6-7 & Exhs. C, G; Opposition at 14-15, 20-22.

communities (except for Gaithersburg). The Motions argue that the Petitioner's lack of data specific to any franchise area in the County (except for Gaithersburg) to satisfy any test for effective competition makes the Petition fundamentally insufficient to satisfy Petitioner's burden of proof.³⁰

13. In Reply, Petitioner claims that the franchising process described above is a virtual sham, that in reality there has always been only one franchise area and franchise authority in the County (other than the City of Gaithersburg).³¹ Petitioner maintains that the County government has represented itself to the Commission and others as the only franchise authority and has always acted as such,³² and that the County government is therefore estopped to claim otherwise in this case.³³

14. Precedent. When the Commission implemented the effective competition provisions of the statute, it interpreted the term "franchise area." First, the Commission observed that determinations about effective competition would be made "on a franchise-area basis. Thus, if a cable system serves more than one franchise area in a geographic region, then a separate effective competition determination would have to be made for each distinct franchise area."³⁴ The Commission defined "franchise area" as "the area a system operator is granted authority to serve in its franchise."³⁵ The Commission also recognized that measuring competing provider effective competition in an unduly wide area might merge competitive and noncompetitive franchise areas and prematurely end rate regulation in the latter.³⁶

15. Several effective competition decisions have hinged on whether a given area is covered by one or more franchises. In *Mediacom Minnesota*, several separate municipalities had created a new entity, a single regulatory commission to regulate cable service. The new commission issued one franchise to a cable operator for all the municipalities' territories. The Commission concluded in *Mediacom Minnesota* that there was one franchise area.³⁷ In *TKR Cable of Northern Kentucky*, despite several kinds of activity by a county on behalf of itself and a municipality, the Commission concluded that the county and municipality remained separate franchise areas, chiefly because the municipality performed some activities alone and retained the authority and autonomy to grant and administer a franchise on its own.³⁸ In *TKR Cable of Northern Kentucky* and the later *CoxCom, Inc.*, the Commission stated that it wanted to allow local governments to engage in efficiency-maximizing joint activities

³⁰The Motions also state that Petitioner failed to serve each franchising authority with a copy of the Petition, in violation of 47 C.F.R. § 76.7(a)(3). Barnesville Motion to Dismiss at 2 n.1.

³¹Reply at 2 n.1 (accusing the Motions and Opposition of "false representations"), 3 (characterizing the same as "nothing less than astounding").

³²*Id.* at 3-5, 8 & n.25, 15-16.

³³*Id.* at 5, 16-20.

³⁴*Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 510, 515, ¶ 18 (1992); see also *Service Electric Cable TV of New Jersey, Inc.*, 20 FCC Rcd 20532, 20534, ¶ 6 (2005) ("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.") (footnote, internal quotations and brackets omitted); *Century M.L. Cable Corp.*, 16 FCC Rcd 14102, 14104, ¶ 5 (2001).

³⁵*Implementation of Sections of the Cable Television & Consumer Protection Act of 1992: Rate Regulation*, 9 FCC Rcd 1164, 1180, ¶ 24 (1993).

³⁶*Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5672-73, ¶ 49 (1993), *reversed 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).

³⁷*Mediacom Minnesota LLC*, 20 FCC Rcd 4984, 4985, ¶¶ 3-4 (2005).

³⁸*TKR Cable of Northern Kentucky* ("TKR"), 11 FCC Rcd 9973, 9982-83, ¶¶ 20-22 (1996).

without losing the autonomy to act independently should they wish to regain and exercise it.³⁹

16. Analysis. There is no doubt that the numerous incorporated municipalities of Montgomery County are real, functioning legal entities and not shams created to magnify Petitioner's evidentiary burden and slow deregulation. The franchising process described above reflected those separate identities and that of the County. It preserved the separate autonomous municipalities as franchising authorities, each with a franchise area identical to its historic boundaries. The process that the County and municipalities followed was painstaking and undeniably complicated, but it was not a sham. It would have been more painstaking and complicated for each municipality as well as Petitioner to negotiate alone with Petitioner, grant it a slightly different franchise, and then regulate Petitioner independent of all the other municipalities. What the County and municipalities engaged in was a prudent means of achieving efficiencies by centralizing a common regulatory function, while each municipality preserved its right to restore its independence. We, by accepting what they did as valid, continue our policy of allowing local governments to engage in efficiency-maximizing joint activities without losing the autonomy to act independently later should they wish to do so. We conclude that the Motions and Opposition are correct that the borders of each municipality in Montgomery County mark a different franchise area for purposes of demonstrating competing provider and LEC effective competition.

17. The facts of *Mediacom Minnesota* closely resemble those of the present case. We find, however, that there are enough distinguishing facts between that case and this to warrant concluding that there was one franchise area in *Mediacom Minnesota* and many more in this case. First, the arguments that there are many franchise areas were stated with much more detail and analysis in this case. Second, each municipality in this case took more steps than the ones in *Mediacom Minnesota* did to preserve its independent authority and its franchise area as a stand-alone entity. The most important of those steps occurred when, after the County had granted one franchise for the entire County, each municipality deliberately carved its own franchise area out of the County-wide one. No such steps were taken in *Mediacom Minnesota*.⁴⁰ We conclude that those factors distinguish this case from *Mediacom Minnesota*, and that its conclusion that that case involved one franchise area does not bind us in this case.

18. Petitioner invokes the doctrine of equitable estoppel, which has been described as arising when a party made a definite misrepresentation of fact and had reason to believe that another party would rely on it, and the other party reasonably relied on that misrepresentation to its detriment.⁴¹ Petitioner argues that the County government has so often represented itself as the County's sole franchising authority to this Commission and others (such as Petitioner's subscribers) that we should not allow the County government to deny that here.⁴² Equitable estoppel is a doctrine that we may apply in our

³⁹*CoxCom, Inc.*, 22 FCC Rcd 4041, 4046, ¶ 14 (2007); *TKR*, 11 FCC Rcd at 9982-83 ¶ 22; see also 47 C.F.R. § 76.912 (authorizing franchise authorities to apply for "joint certification" with the Commission).

⁴⁰See CSR 6241-E, Opposition to Petition for Special Relief, filed by the Lake Minnetonka Cable Commission, dated Nov. 6, 2003, at 11 ("The LMCC franchise does not and could not limit the ability of the member cities to immediately establish 16 discrete franchises by simply adopting the franchise [granted by the LMCC] by reference."); Reply to Opposition ("Minnesota Reply"), filed by Mediacom Minnesota LLC, dated Nov. 19, 2003, at 5 ("Nor is there any evidence that any of the founding municipalities executed or individually adopted the single LMCC franchise agreement."). The Agreement creating the LMCC stated that its purpose was to "enforce a single . . . cable communications franchise," not to have one body (Montgomery County in the present case) be agent for municipalities and administer many franchises. Minnesota Reply, Exh. 2 at 1, § 1.

⁴¹*Kavowras v. New York Times Co.*, 328 F.3d 50, 56 (2d Cir. 2003). Another statement of the doctrine is that "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

⁴²Reply at 20.

discretion,⁴³ and we choose not to do so here for several reasons. The County represented itself to this Commission as “the franchising authority for all of the community unit identifier numbers listed below” on its Form 328⁴⁴ and made similar statements to subscribers (telling them to contact the County with inquiries or complaints). Those statements, even if technically inaccurate, did accurately describe the day-to-day realities in the County, namely that the County was the actual regulator of Petitioner and that the Commission and subscribers should contact the County if they had inquiries. There is no indication that these statements were intended to deceive the Commission, Petitioner, or subscribers, or to make a mockery of the regulatory system.⁴⁵ No Petitioner subscriber seeking redress from government would have been helped by a technically accurate description of the complex process described in the preceding paragraphs, at the end of which the subscriber would still need to contact the County government to seek redress.

19. Third, Petitioner has pointed us to no affirmative misstatement by the County to the Commission about the geographic scope of any “franchise area,” which is the material issue in this proceeding. Finally, we cannot accept Petitioner’s claim of detrimental reliance on the County government’s statements. Petitioner itself was aware of the complex process employed by the County government and the municipalities and of their belief that it was valid.⁴⁶ For example, the County’s franchise agreement bears the words, on its signature page, “Add signature pages for each participating municipality”; the words “Participating Municipalities” appear throughout the agreement;⁴⁷ and page 3 of the agreement spells out in detail the possibility that municipalities would appoint the County their agent.⁴⁸ The agreement itself was signed by Petitioner’s predecessor and the record herein does not contain any signed acceptance of it by Petitioner. Nevertheless, we feel safe in assuming that Petitioner (a seasoned cable operator) read the franchise agreement before taking on its rights and obligations and was therefore aware of its provisions. Certainly, Petitioner nowhere claims that it was unaware of the possibility of municipalities becoming “Participating Municipalities” as explicitly provided for in the agreement. Nor does Petitioner claim that it had no idea that any municipality had actually appointed the County government as its agent to administer its franchise before Petitioner assumed the franchise agreement. Accordingly, we cannot let Petitioner claim surprise that the County and municipalities now

⁴³*New Hampshire v. Maine*, 532 U.S. at 750; see also *Ajaka v. Brooksameric Mortgage Corp.*, 453 F.3d 1339, 1343-44 (11th Cir. 2006) (judicial or equitable estoppel “is an equitable doctrine invoked at a court’s discretion. . . . Judicial estoppel is intended to be a flexible rule in which courts must take into account all of the circumstances of each case in making our determination.”) (internal quotations and citations omitted).

⁴⁴FCC Form 328 (Certification of Franchising Authority to Regulate Basic Cable Service Rates & Initial Finding of Lack of Effective Competition) filed by Montgomery County, signed Aug. 31, 1993.

⁴⁵*Ajaka v. Brooksameric Mortgage Corp.*, 453 F.3d at 1344 (judicial or equitable estoppel “is an equitable concept intended to prevent the perversion of the judicial process.”). If the County inaccurately described itself to the Commission in a 1994 rate appeal (*SBC Media Ventures, Inc.*, 9 FCC Rcd 7175 (1994)) as the franchising authority throughout Montgomery County, there is no indication that it intended to deceive or injure the Commission or wrongfully alter the outcome of the appeal. Petitioner implies that that case involved geographic rate discrimination and potentially uniform County-wide rates. Reply at 13-14. The issue in that case, however, is better described as temporal discrimination – existing customers paying one rate and new customers paying another. *SBC Media Ventures, Inc.*, 9 FCC Rcd at 7176, ¶ 5. Even if, however, the County had imposed geographically uniform rates for Petitioner in every decision under the agreements that are before us, that would be a predictable efficiency achieved by the municipalities all appointing the County as their agent, and not evidence that there was only one franchise area. See Surreply at 3.

⁴⁶Surreply at 6.

⁴⁷Reply at Exh. 1 (“Comcast Cable Franchise Agreement (Excerpts)”) at 3, 6, 10, 12, 26, 57-58, 69, 101, 107. Comcast’s Reply at 7 n.21 quotes the words “Add signature pages for each participating municipality.”

⁴⁸*Id.* at 3 (“certain municipalities . . . have requested that the County administer and enforce the terms of their cable television franchises”).

claim to be separate franchising authorities, each with a unique franchise area. Nor is there any indication that the Commission or any consumer was misled into relying on the County's statements and suffered harm as a result.

20. Two other matters merit mention. First, we considered studying Petitioner's evidence about all of Montgomery County other than Gaithersburg and attempting to compose from its pieces a showing of effective competition in individual municipalities or the franchise areas in the unincorporated remainder of the County. We decline to do so, however. There is no evidence in the record that the second element of competing provider effective competition – 15 percent penetration by MVPDs other than the largest one⁴⁹ – is satisfied in any of those individual areas. Also, Petitioner has not submitted evidence of LEC competition on a franchise-area-by-franchise-area basis. Although it may be that evidence of the conduct of Verizon and/or RCN in one or more areas would establish the elements of LEC competition there, that evidence is not stated clearly in the record before us and the parties have not discussed its strengths and weaknesses thoroughly.

21. Second, Petitioner objects that some of the franchise areas asserted in the Motions are small in population and that establishing effective competition in them would burden it unreasonably.⁵⁰ This objection is meritless because, as a matter of law, the Communications Act makes the “franchise area,” large or small, the unit of measurement of competing provider and LEC effective competition.⁵¹ Other cable operators have attempted to bear the burden of showing effective competition in small franchise areas.⁵² It is not unreasonable to require the same of Petitioner.

22. After considering the voluminous record on the franchise area issue, we conclude that Petitioner's failure to produce separate evidence of effective competition for each of the County's municipalities (other than the City of Gaithersburg) is fatal to the majority of its Petition. We are guided to this conclusion not only by the steps taken by the municipalities, but especially also by our caution at the prospect of measuring competing provider effective competition in an unduly wide area, merging competitive and noncompetitive franchise areas, and prematurely end rate regulation in the latter.⁵³ Accordingly, we conclude that Petitioner has failed to show competing provider or LEC effective competition in the franchise areas of Montgomery County, Maryland, other than the City of Gaithersburg. Petitioner is free to re-file a Petition for determination of effective competition for the various franchise areas of Montgomery County consistent with the findings set forth herein.⁵⁴

⁴⁹See *supra* ¶ 9.

⁵⁰Reply at 11 n.41.

⁵¹See *supra* ¶ 9.

⁵²See, e.g., *Time Warner Cable Inc.*, 23 FCC Rcd 12210, 12212, ¶ 7, 12219, *reconsideration denied*, 23 FCC Rcd 16483 (2008) (Teterboro, New Jersey, 7 households), *application for review pending on other grounds*; *MCC Missouri LLC*, 20 FCC Rcd 17031, 17035 (2005) (Excelsior Estates and Homestead, Missouri, 95 and 72 households, respectively); *MCC Missouri LLC*, 20 FCC Rcd 17025, 17029 (2005) (Newtonia, Missouri, 89 households).

⁵³*Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992; Rate Regulation*, 8 FCC Rcd 5631, 5672-73, ¶ 49 (1993), *reversed 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).

⁵⁴See *infra* ¶ 32.

IV. THE CITY OF GAITHERSBURG

23. In Montgomery County, Gaithersburg is a franchise territory. The City granted Petitioner its own franchise⁵⁵ and administers it itself.⁵⁶ The Petition submits evidence for Gaithersburg alone, purporting to show that Petitioner faces competing provider effective competition there.

A. Competing Provider Effective Competition

24. The competing provider test in 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.⁵⁷

25. 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.⁵⁸

26. Turning to the first prong of this test, it is undisputed that Gaithersburg is “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.⁵⁹ 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.⁶⁰ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve Gaithersburg to support its assertion that potential customers in Gaithersburg are reasonably aware that they may purchase the service of these MVPD providers.⁶¹ 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 programming⁶² and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.⁶³ Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in Gaithersburg because of their national satellite footprint.⁶⁴ Accordingly, we find that the first prong of the competing provider test is satisfied.

⁵⁵Petition at 13.

⁵⁶Barnesville Motion to Dismiss at 5.

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

⁵⁸47 C.F.R. § 76.905(b)(2)(i).

⁵⁹*See* Petition at 10.

⁶⁰*Mediacom Illinois LLC*, 21 FCC Rcd 1175 (2006).

⁶¹47 C.F.R. § 76.905(e)(2).

⁶²*See* 47 C.F.R. § 76.905(g). *See also* Petition at 9.

⁶³*See* Petition at Exh. 7.

⁶⁴*See id.* at 10-11.

27. 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 Gaithersburg.⁶⁵ Petitioner sought to determine the competing provider penetration in Gaithersburg by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within Gaithersburg on a zip code plus four basis.⁶⁶

28. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,⁶⁷ 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 Gaithersburg. Therefore, the second prong of the competing provider test is satisfied for Gaithersburg.

29. 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 Gaithersburg, as shown on Attachment A.

V. PROCEDURAL MATTERS

30. Request to Strike. Petitioner requests that we strike the Motions and the Opposition for violating the Commission's pleading rules and for being frivolous.⁶⁸ We decline to do so. Typically, a franchise authority is entitled to file only one pleading opposing a petition for special relief. Additional pleadings are allowed only "upon a showing of extraordinary circumstances."⁶⁹ The County and the municipalities did ask for permission to file their Motions to Dismiss, launching their fundamental attack on the structure of Petitioner's evidence and characterizing it as a flaw requiring immediate dismissal, even before the normal filing of Oppositions.⁷⁰ The Motions plausibly alleged "extraordinary circumstances" and, therefore, did not violate the Commission's pleading rules.

31. Because we conclude above that the County and the municipalities revealed a real structural flaw in Petitioner's evidence, the pleadings in which they did so are not, to that extent, frivolous. Nor was it frivolous for many separate entities to file many separate Motions to Dismiss. The bulk of those filings included copies of various agreements and franchises, which would have been submitted to us even had only one Joint Motion been filed. The remainder of the frivolities alleged by Petitioner are either matters of interpretation, or arguments that we do not analyze in this decision because of our conclusion on the number of franchise areas in Montgomery County. Accordingly, we deny Petitioner's motion to strike and we allow the County's and municipalities' Motions to Dismiss in addition to its Opposition.

32. Possible Subsequent Proceedings. If Petitioner files another petition for special relief for the various franchise areas in Montgomery County, we request that it and any other parties clarify one important subject that is less than clear in the present record. This is, in general, what are the many

⁶⁵*Id.* at 8, 12.

⁶⁶Petition at 15. 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.

⁶⁷Petition at 17.

⁶⁸Reply at 35-38.

⁶⁹47 C.F.R. § 76.7(d).

⁷⁰Barnesville Motion to Dismiss at iv, 12.

separate “franchise areas” in Montgomery County for purposes of determining the presence of effective competition under the standards set by our decisions.⁷¹ Specifically, we wish the parties to address (1) whether Chevy Chase Village and Section VII of Chevy Chase Village (MD 0277) are the same entity; (2) whether Section IV of Chevy Chase Village and the Town of Chevy Chase (MD0275), which has apparently annexed Section IV, are one franchise area; (3) whether Chevy Chase View, the Village of Martin’s Additions, and the Village of North Chevy Chase are franchise areas separate and apart from unincorporated Montgomery County; and (4) whether what appear to be eleven unincorporated areas that the County may have designated as separate franchise areas should be treated as such or as part of unincorporated Montgomery County.⁷²

VI. ORDERING CLAUSES

33. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast of Potomac, LLC, **IS GRANTED** for the City of Gaithersburg, and **IS DENIED** for all other franchise areas in Montgomery County, Maryland.

34. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to the City of Gaithersburg, Maryland, **IS REVOKED**.

35. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.⁷³

FEDERAL COMMUNICATIONS COMMISSION

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

⁷¹See *supra* ¶¶ 14-15.

⁷²The eleven areas are Bethesda, Boyds, Burtonsville, Cabin John, Derwood, Germantown, Olney, Potomac, Silver Spring, West Bethesda, and Wheaton. Although they are mentioned in pleadings opposing the Petition (County Motion to Dismiss at 1 n.1, 2, 3 n.4), it appears that no party asserts any of them is a franchise area separate and apart from unincorporated Montgomery County.

⁷³47 C.F.R. § 0.283.

ATTCAHMENT A

CSR 7179-E

COMMUNITY SERVED BY COMCAST OF POTOMAC, LLC

Community	CUID	CPR*	2000 Census Households	Estimated DBS Subscribers
Gaithersburg	MD0057	15.28%	19621	2999

CPR = Percent of competitive DBS penetration rate