

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

In the Matter of)
Cablevision Systems East Hampton Corp.)
Petition for Determination of Effective)
Competition in Eight Communities in the State of)
New York) CSR 8170-E

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 2009

Released: August 18, 2009

By the Associate Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Cablevision Systems East Hampton Corp. ("Cablevision" or "the Company"), has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that it is subject to effective competition in eight franchise areas in New York's Long Island. They are listed on Attachment A and hereinafter referred to as "the Communities." Cablevision alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("the Act"), and the Commission's implementing rules, and is therefore exempt from regulation of the rates for its basic service. The alleged effective competition is the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc., and Dish Network. One of the Communities, the Town of Southampton ("Southampton"), filed an Opposition to the Petition, to which Cablevision filed a Reply. Otherwise, the Petition is unopposed.

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

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 Cablevision states that the Town of Southold regulates Cablevision's basic rates on its own, and that the New York State Public Service Commission performs that regulatory function for the other 7 Communities. See Petition at 3 n.3. Accordingly, in paragraph 15 below, we revoke authority to regulate basic cable rates of both the Town of Southold and, on behalf of the other Communities, the New York Commission.

4 Letter from Daniel L. Adams, Esq., Town Attorney of the Town of Southampton, to the Commission, dated July 9, 2009 ("Letter").

5 Reply Comments on Petition for Determination of Effective Competition ("Reply"), dated Aug. 10, 2009. Cablevision's Reply was filed later than usual because Southampton did not serve the Company with the Letter. Commission staff advised Cablevision of the Letter, whereupon it obtained a copy and promptly filed its Reply.

6 47 C.F.R. § 76.906.

7 See 47 U.S.C. § 543(l)(1) and 47 C.F.R. § 76.905(b).

within the relevant franchise area.⁸ For the reasons set forth below, we grant the petition based on our finding that Cablevision is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

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 (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁹ This test is referred to as the “competing provider” test.

A. Part One

4. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer at least “50 percent” of the households in the franchise area “comparable programming.” It is undisputed that the DBS providers are MVPDs and are unaffiliated with Cablevision or with each other, satisfying the second element.

5. Southampton disputes, however, that its franchise area is “served by” the DBS providers. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. Technical availability of DBS service is presumed due to its nationwide satellite footprint.¹⁰ Southampton denies that DBS service is technically available within its franchise area for two reasons. The first is that some households there have no “southern exposure” and therefore cannot receive DBS service. Second, the Town asserts that “[h]ere on the Eastern End of Long Island, where environmental preservation is a way of life and is mandated by state and local rules and regulations, wooded areas are an obvious impediment” to DBS reception.¹¹

6. These objections are meritless. We have previously rejected general claims that unspecified numbers of north-facing high-rise households, or households in wooded or mountainous areas, cannot see the southern sky and therefore cannot receive DBS service.¹² Southampton does not show how many of its households suffer from this disability (especially whether they are more than the 50 percent mentioned in Section 632(l)(1)(B)(i)). As the local government, it should be uniquely informed about such matters. Nor does it explain why some of those households could not use a rooftop antenna for DBS reception. Second, to the extent that “environmental preservation is a way of life” in Southampton and has been enshrined in local law, that is a choice that Southampton has made. Assuming *arguendo* that one consequence of that choice is reduced reception of DBS service, then that is something that the Community has brought on itself, and is not grounds for a claim of hardship or helplessness. Accordingly, we conclude that Cablevision has established that DBS service is technically available to households in the Town of Southampton and the other Communities.

⁸ See 47 C.F.R. §§ 76.906 & 907.

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

¹⁰ See, e.g., *Mediacom Southeast LLC*, 24 FCC Rcd 2398, 2399, ¶ 5 (2009) (“*Mediacom*”); *Comcast Cable Commun., LLC*, 24 FCC Rcd 2237, 2238, ¶ 5 (2009) (“*Comcast I*”); *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1781, ¶ 7 (2009) (“*Comcast II*”), application for review pending.

¹¹ Letter at 2.

¹² *Cablevision Systems Westchester Corp.*, 24 FCC Rcd 872, 876, ¶ 15 (2009) (“*Cablevision Westchester*”); *Comcast Cable Communications, LLC*, 22 FCC Rcd 694, 697-98, ¶¶ 8-9 (2007) (“*Comcast III*”); *Adelphia Cable Commun.*, 20 FCC Rcd 20536, 20538, ¶¶ 5-7 (2005), application for review pending; *Adelphia Cable Commun.*, 20 FCC Rcd 4979, 4980-81, ¶ 4 (2005); *Cablevision of Paterson*, 17 FCC Rcd 17239, 17242, ¶ 6, n.22 (2002).

7. DBS service is presumed to be actually available if households in the franchise area are made reasonably aware of its availability.¹³ Cablevision has also provided significant evidence of DBS advertising in print and electronic media that serve the Communities.¹⁴ In addition, the Commission has held that a cable operator may use evidence of subscribership in franchise areas (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS service to show that consumers are reasonably aware of its availability.¹⁵ Based on the foregoing, we accept Cablevision's assertion that potential customers in the Communities are reasonably aware that they may purchase DBS service.

8. The final element of the first part of the competing provider test in these proceedings is that DBS services offer "comparable programming" to Cablevision's. That term is defined in Section 76.905(g) of our rules, which provides that another MVPD's programming is comparable to a cable operator's if it "offer[s] at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."¹⁶ Cablevision's Petition includes copies of channel lineups for both DBS providers, which show their services having more far channels than our rule requires.¹⁷

9. Southampton objects that the DBS providers' service is not truly comparable to Cablevision's because it does not contain Public, Educational, and Government or "PEG" channels or "local news channels."¹⁸ We reject Southampton's objections, as we have similar objections in earlier proceedings.¹⁹ First, Cablevision claims that the DBS providers do, in fact, transmit the local news channels for Long Island, and the Company produces some documentation supporting that claim.²⁰ More important, however, our rule sets forth simple and finite criteria for "comparable programming" that do not include the factors that Southampton asserts. Any objection to the scope of our definition is more suited to a rulemaking proceeding where a rule can be modified than an adjudicatory proceeding where it is merely applied to a set of facts. The DBS providers' programming satisfies all the criteria stated in our rule's definition. Accordingly, the DBS providers offer "comparable programming" to Cablevision's in the Communities and the Company has satisfied the first part of the competing provider test.

¹³ See Petition at 4.

¹⁴ Petition at 5-6 & Exh. 1 (Declaration of Paul Jamieson, Cablevision Managing Counsel for Legislative & Regulatory Affairs ("Jamieson Declaration")) at ¶ 4 & Exh. 6; Reply at Exh. 2. Southampton characterizes this advertising as "generic," Letter at 2, but does not deny that households in the Community are aware that they may purchase DBS service. We have accepted such generic advertising in hundreds of proceedings (see, e.g., *Mediacom*, 24 FCC Rcd at 2399, ¶ 5) and Southampton has given us no reason to do otherwise here.

¹⁵ *Mediacom*, 24 FCC Rcd at 2399, ¶ 5; *Comcast I*, 24 FCC Rcd at 2238, ¶ 5; *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁶ 47 C.F.R. § 76.905(g).

¹⁷ See Petition at Exh. 4.

¹⁸ Letter at 1-2.

¹⁹ See, e.g., *Comcast II*, 24 FCC Rcd at 1782, ¶¶ 8-9 (popular local sports channels allegedly available only on cable system); *Cablevision Westchester*, 24 FCC Rcd at 873-74, ¶¶ 6-7 (PEG channels); *Comcast III*, 22 FCC Rcd at 697-98, ¶¶ 8-9 (PEG channels); *Falcon Telecable*, 17 FCC Rcd 22842, 22843, ¶ 4 (2002) (local channels); *Falcon Cable Systems Co. II*, 17 FCC Rcd 4648, 4651-52, ¶¶ 8-9 (2002) (local channels); *CoxCom, Inc.*, 14 FCC Rcd 7134, 7138, ¶ 10, 7141-42, ¶ 19 (1999) ("Cox") (PEG channels), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000).

²⁰ Petition, Exh. 4; Reply at 5 & Exh. 1 at 2.

B. Part Two

10. The second part 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. Cablevision asserts that it is the largest MVPD in the Communities.²¹ The second part thus requires Cablevision to create a ratio of DBS subscribers to households in each Community that exceeds 15 percent. To create that ratio, Cablevision purchased lists of nine-digit Zip Codes in each of the Communities from Media Business Corporation and reports from the Satellite Broadcasting and Communications Association that state the number of DBS subscribers in each such Zip Code.²² Cablevision obtained household numbers for each Community from 2000 Census data.²³ The resulting ratios are set forth in Attachment A hereto and show that the ratio of DBS subscribership to households is in excess of 15 percent in each Community.²⁴

11. Southampton objects that Cablevision has “an inordinate amount of subscribers within the Town of Southampton.”²⁵ This objection is too general to be significant. Cablevision made a statistically precise showing, using the same methodology we have accepted in hundreds of past decisions.²⁶ Southampton presented no data of its own. Moreover, the issue in these proceedings is not how many subscribers Cablevision has, but how many subscribers the DBS providers have. Southampton has given us no reason to doubt that the latter’s subscribership exceeds the statutory minimum. Accordingly, we conclude that the second part of the competing provider test is satisfied for each of the Communities

C. Proposed Other Requirements

12. Southampton also refers to pending matters between it and Cablevision concerning the Company’s carriage of PEG channels.²⁷ As we stated in dismissing a similar challenge in *Cablevision Westchester*, “The Town’s ongoing disputes with Petitioner about PEG channels are immaterial to this effective competition proceeding. . . . We have previously declined to complicate and slow effective competition proceedings with ongoing disputes about PEG channels.”²⁸ We find that is the best course of action in these proceedings. Nothing in the applicable statutes, rules, or decisions makes the carriage of PEG channels a material issue in competing provider effective competition proceedings. Nor are we willing to delay basic rate deregulation in a franchise area until all issues between the cable operator and the franchise authority have been resolved to the latter’s satisfaction.²⁹

13. Finally, Southampton objects generally to DBS service provoking the deregulation of

²¹ Petition at 8; Jamieson Declaration at ¶ 5.

²² Petition at 8-9 & nn.29, 31. Nine-digit Zip Code data allocates DBS subscribers to a franchise area more precisely than standard five-digit Zip Code information.

²³ *Id.* at 8 n. 28 & Exh. 5.

²⁴ *Id.* at Exh. 2.

²⁵ Letter at 2.

²⁶ See authorities cited *supra* notes 10, 12, 19.

²⁷ Letter at 2-3.

²⁸ *Cablevision Westchester*, 24 FCC Rcd at 873-74, ¶¶ 6-7 & n.19.

²⁹ In many decisions we have refused to require that a cable operator’s service be identical to its competitor’s before the latter may provoke deregulation of the former’s basic rates. *Comcast II*, 24 FCC Rcd at 1782, ¶¶ 8-9, 1790-91, ¶¶ 35-36; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14154, ¶ 41 (2008), *application for review pending*; see also authorities cited *supra* note 19.

rates for basic cable service. The Act, however, defines the class of competing providers as MVPDs³⁰ and specifically defines DBS operators as one kind of MVPD.³¹ We have no authority to alter the statute³² and, therefore, we may not exclude DBS providers from the class of MVPDs that we consider in the competing provider test. In sum, none of Southampton's objections give cause for delaying our conclusion that Cablevision has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and that Cablevision is subject to effective competition in the Communities listed on Attachment A.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Cablevision Systems East Hampton Corp. **IS GRANTED**.

15. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A or, on their behalf, to the New York State Public Service Commission, **IS REVOKED**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³³

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy
Associate Chief, Media Bureau

³⁰ 47 U.S.C. § 543(1)(1)(B).

³¹ 47 U.S.C. § 522(13) ("multichannel video programming distributor" means a person such as, but not limited to, . . . a direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming"); *see also* 47 C.F.R. § 76.905(d).

³² *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984):

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

³³ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8170-E

COMMUNITIES SERVED BY CABLEVISION SYSTEMS EAST HAMPTON CORP.

Communities	CUID(s)	CPR*	2000 Census Households	Estimated DBS Subscribers
East Hampton Town	NY0149	22.33%	7035	1571
East Hampton Village	NY0150	32.76%	635	208
Quogue Village	NY0183	29.80%	453	135
Sagaponack Village	NY1819	28.92%	249	72
Southampton Town	NY0190	20.33%	17562	3571
Southampton Village	NY0192	20.71%	1651	342
Southold Town	NY0188	23.44%	7685	1801
Westhampton Beach Village	NY0197	19.13%	805	154

*CPR = Percent of competitive DBS subscribership rate.