

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

In the Matter of)	
)	
Cablevision of Oakland Inc., and CSC TKR Inc.)	CSR 8089-E
)	CSR 8090-E
Petition for Determination of Effective)	
Competition in Four Communities in New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: February 19, 2009

Released: February 20, 2009

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

I. INTRODUCTION AND BACKGROUND

1. Cablevision of Oakland Inc., and CSC TKR Inc., hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(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 “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(D) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by Verizon New Jersey, Inc., hereinafter referred to as “Competitor.” An Opposition to the Petition was filed by the New Jersey Division of Rate Counsel (hereinafter referred to as the “DRC”), which is a part of the government of the State of New Jersey.³ Petitioner filed a Reply to the Opposition.⁴

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(1)(1) of the Communications Act

¹ See 47 U.S.C. § 543(1)(1)(D).

² 47 C.F.R. § 76.905(b)(4).

³ Opposition on Behalf of New Jersey Division of Rate Counsel (“Opposition”), dated Dec. 17, 2008. The DRC is a division within the New Jersey Department of the Public Advocate and represents the interests of consumers of cable TV service and other utility services whose interests in rate matters would otherwise be inadequately unrepresented. State of New Jersey, Department of the Public Advocate, Home, Utility Customers, *Learn About the Division*, <http://www.state.nj.us/publicadvocate/utility/about/> (visited Jan. 14, 2009). The DRC is not the government entity that grants franchises to cable operators, which is the New Jersey Board of Public Utilities (the “BPU”). *New Jersey Board of Public Utilities*, 2006 ANNUAL REPORT at 12, available at <http://www.state.nj.us/bpu/pdf/about/annualreports/2006.pdf> (visited Jan. 14, 2009).

⁴ Reply to Comments on Petition for Determination of Effective Competition (“Reply”), dated Dec. 31, 2008.

The Petition, as originally filed, also requested a determination that Petitioner is subject to effective competition in the additional community of Netcong Borough, which has the Community Unit Identification Number NJ0138. In its Reply, Petitioner requested permission to withdraw that request. Reply at 3, 11-13. We grant that request without prejudice to Petitioner re-submitting it with new evidence. On January 21, 2009, the DRC filed comments on Petitioner’s request to withdraw, raising issues that Petitioner’s withdrawal mooted and that we are addressing in other proceedings involving claims of effective competition in New Jersey.

⁵ 47 C.F.R. § 76.906.

and Section 76.905(b) of the Commission's rules.⁶ 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.⁷ For the reasons set forth below, we grant the Petition based on our finding that Petitioner is subject to effective competition in the Communities

II. DISCUSSION

3. 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.⁸ This test is otherwise referred to as the LEC test.

4. The Commission has stated that the incumbent cable operator must show that the LEC intends to build-out its cable system 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.⁹ It is undisputed that the Communities are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. Also undisputed is Petitioner's statement that Competitor is offering cable service to substantial numbers of households in the Communities pursuant to a "system-wide" franchise¹⁰ that was granted by the BPU, and that Competitor's franchise covers the Communities and much more of the State of New Jersey.

5. The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.¹¹ Attached to the petition are copies of channel lineups for Competitor showing that it offers far more than those numbers of channels.¹² Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Communities, has marketed its services in a 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

⁶ See 47 U.S.C. § 543(l)(1) and 47 C.F.R. § 76.905(b).

⁷ See 47 C.F.R. §§ 76.906 & 907.

⁸ See 47 U.S.C. § 543(l)(1)(D).

⁹ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-15 (1999) ("Cable Reform Order").

¹⁰ 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 service."

Evidently, Competitor'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.

¹¹ See 47 C.F.R. § 76.905(g). See also Petition at 17.

¹² See Petition at 8.

Cable Reform Order.¹³ These showings, if unrebutted, would suffice to show that Petitioner is subject to LEC effective competition in the Communities.

6. The DRC, however, challenges the sufficiency of Petitioner's showing of LEC effective competition. The DRC does so by incorporating by reference objections it made against other showings of LEC effective competition by Petitioner. These objections are, in brief, that (1) Competitor's system-wide franchise is not a proper basis for a finding of effective competition and the issue of whether it is should be decided by the full Commission, (2) Petitioner has not shown that Competitor has actual subscribers to its cable service in the Communities, and (3) Competitor's cable service lacks Public, Educational, and Government ("PEG") channels and is therefore not truly "comparable" to Petitioner's.¹⁴ We have addressed and dismissed these same challenges in previous effective competition decisions (including ones involving New Jersey and Petitioner) and we do so here for the reasons stated in those decisions.¹⁵ The DRC's Opposition has given us no new, much less sufficient, grounds to doubt the validity of those decisions.

7. In addition, we note two reasons, not stated in our previous decisions, to reject the DRC's challenge that Competitor's cable service must contain PEG channels for it to be "comparable" to Petitioner's. First, nothing in our rule's definition of comparable service¹⁶ requires, or implies a requirement of, PEG channels. Nothing in the definition implies that its requirements (12 channels of video programming, including at least one channel of nonbroadcast service programming) are a baseline, to which new requirements may be added by the DRC or any other body. The full Commission, when it adopted the definition of "comparable programming," was fully aware of PEG channels – it discussed both in the same decisions.¹⁷ If the full Commission had wanted PEG channels to be part of "comparable programming," it would have stated so. It did not.

8. Second, our definition of "comparable programming" applies alike to both LEC effective competition and so-called "competing provider" effective competition.¹⁸ Legislative history and rulemaking decisions by the full Commission indicate that competing provider effective competition can be based on subscribership to Direct Broadcast Satellite ("DBS") service.¹⁹ Consistent with these

¹³ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petition at 10-17.

¹⁴ Opposition at 9-10 & Exh. B (the DRC's Application for Review in *Cablevision Systems Corp.*, Memorandum Opinion & Order DA 08-2217 (rel. Oct. 2, 2008), available at 2008 WL 4449658, *stay denied*, Memorandum Opinion & Order 08-2545 (rel. Nov. 20, 2008), available at 2008 WL 4964162, *application for review pending* ("*Cablevision*")).

¹⁵ *Comcast Cable Commun., LLC* ("*Comcast*"), Memorandum Opinion & Order DA 09-285 at ¶¶ 32-35 (rel. Feb. 19, 2009); *Cablevision*, *supra* note 14, at ¶¶ 39-43.

¹⁶ See *supra* note 11.

¹⁷ *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5665-67, ¶¶ 37-38 (discussing comparable programming), 5737-38, ¶¶ 158-60 (discussing PEG channels) (1993), *on reconsideration*, 9 FCC Rcd 4316, 4322-23, ¶¶ 11-14 (discussing comparable programming), 4367, ¶ 139 (discussing PEG channels), 4368-69, ¶ 144 (discussing PEG channels) (1994) ("*Reconsideration Order*"), *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).

¹⁸ Re competing provider effective competition, see 47 U.S.C. § 543(l)(1)(b); 47 C.F.R. § 76.905(b)(2).

¹⁹ See, e.g., 138 Cong. Rec. H6487-01, H6493 (remarks of Rep. Cooper: "People on both sides of the aisle have said what they really want in cable TV is competition. . . . Sometimes they are going to be satellite dish companies."), available at 1992 WL 172319 (Cong. Rec.); H.R. REP. 102-628, H.R. Rep. No. 628, 102nd Cong., 2nd Sess. 1992, 1992 WL 166238 (Leg. Hist.) at 46 ("The Committee agrees that DBS system operators potentially could provide competition to the cable industry."); S. REP. 102-92, S. Rep. No. 92, 102nd Cong., 1st Sess. 1991, 1992 U.S.C.C.A.N. 1133, 1140-41 ("Few cable systems would face competition under the second prong of the FCC's test

(continued....)

guideposts, many individual decisions have found competing provider effective competition based on DBS subscribership.²⁰ DBS providers, however, do not offer PEG channels. If PEG channels were a necessary component of effective competition, no finding of effective competition could be based on DBS subscribership. All the just-stated history indicates that effective competition may be based on DBS subscribership and strengthens our conclusion that PEG channels are not a necessary element of “comparable programming” for any form of effective competition, including LEC effective competition.

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

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Cablevision of Oakland Inc., and CSC TKR Inc., **IS GRANTED**.

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

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

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– the existence of a second multichannel video provider. To date, there are only . . . and approximately 2 million home satellite dish owners”), 1148-50 (under the title “Effective Competition,” discussion of “Broadcasting via Satellite”), 1196, (“Effective competition is achieved when there is competition from . . . another ‘multichannel provider’ (such as a . . . satellite system)”), available at 1991 WL 125145 (Leg. Hist.); *Revision of Rules & Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712, 9720, ¶ 23 (1995) (“we have consistently sought to promote effective competition to the services provided by cable systems, and we have encouraged the development of the DBS spectrum in precisely that context.”); *Reconsideration Order*, 9 FCC Rcd at 4316, 4319-22, ¶¶ 3-10 (1994) (in discussion of definition of effective competition, several paragraphs about satellite-delivered service).

²⁰ See, e.g., *Comcast*, supra note 15, at ¶¶ 5-22; *Cablevision*, supra note 14, at ¶¶ 3-35; *Time Warner Cable Inc.*, 23 FCC Rcd 12210, 12211-15, ¶¶ 3-18, *reconsideration denied*, Memorandum Opinion & Order DA 08-2465 (rel. Nov., 7, 2008), available at 2008 WL 4826041, *application for review pending*; see also Reply at 5. Also, the statutory definition of “multichannel video programming distributor,” which describes the universe of potential providers of competing provider effective competition, explicitly includes “a direct broadcast satellite service.” 47 U.S.C. §522(13).

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8089-E, 8090-E

COMMUNITIES SERVED BY CABLEVISION OF OAKLAND INC. AND CSC TKR INC.

Communities	CUID(s)
CSR 8089-E	
Hawthorne Borough	NJ0196
Montville Township	NJ0407
CSR 8090-E	
Watchung Borough	NJ0485