

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

In the Matter of)
Cablevision Systems Westchester Corp.)
Petition for Determination of Effective)
Competition in Putnam Valley, New York (CUID)
NY1083) CSR 8095-E

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 2009

Released: February 3, 2009

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

I. INTRODUCTION AND BACKGROUND

1. Cablevision Systems Westchester Corp. ("Petitioner") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the community listed on Attachment A and hereinafter referred to as the "Community." Petitioner alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act"), and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Community because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV"), and Dish Network ("Dish"). The Town of Putnam Valley (the "Town") filed a letter opposing the petition, to which Petitioner filed a reply.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules. The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Community listed on Attachment A.

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 Letter from Maryann V. Arrien of the Community Media Department of the Town of Putnam Valley, to Commission Secretary, dated Dec. 26, 2008 ("Opposition").

4 Reply Comments on Petition for Determination of Effective Competition ("Reply"), dated Jan. 12, 2009.

5 47 C.F.R. § 76.906.

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.

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.⁸ This test is otherwise referred to as the “competing provider” test.

A. The First Prong of 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.⁹

5. Turning to the first prong, it is undisputed that the Community 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.¹⁰ 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.¹¹ We further find that Petitioner has provided sufficient evidence of DBS advertising in media that serve the Community to support their assertion that potential customers in the Community are reasonably aware that they may purchase the service of these MVPD providers.¹² Petitioner also asserts without dispute that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Community because of their national satellite footprint.¹³

1. Comparable Programming

6. The “comparable programming” requirement is satisfied if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.¹⁴ The petition includes copies of channel lineups for DIRECTV and Dish, both of which satisfy the requirement.¹⁵ The Town alleges, however, that it has several disputes with Petitioner about the Public, Educational, and Government (“PEG”) channels that are part of Petitioner’s cable service.¹⁶ The Town appears to be pursuing these disputes at the New York Public Service Commission and in an

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

⁹ 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ See Petition at 3.

¹¹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹² 47 C.F.R. § 76.905(e)(2). See also Petition at Exh. 2.

¹³ See Petition at 3-4.

¹⁴ See 47 C.F.R. § 76.905(g). See also Petition at 6.

¹⁵ See Petition at Exh. 4.

¹⁶ Opposition at 2-5.

informal complaint with this Commission.¹⁷ It also appears that one of these disputes is similar to one between Comcast and the City of Dearborn, Michigan, that is currently under consideration by the Commission in the proceeding titled *Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v. Comcast of Michigan III, Inc., et al.*, filed December 9, 2008. The Town asks that we defer ruling on the Petition until resolution of that proceeding.¹⁸

7. The Town's ongoing disputes with Petitioner about PEG channels are immaterial to this effective competition proceeding. Here, the material issue is whether the DBS providers' service has twelve channels, at least one channel of which is nonbroadcast. There is no dispute that the DBS providers' service exceeds those numerical minimums. We have previously declined to complicate and slow effective competition proceedings with ongoing disputes about PEG channels,¹⁹ and we find that that is the best course of action in this proceeding. Accordingly, we find that the DBS providers offer "comparable programming" for present purposes and that the first prong of the competing provider test is satisfied.

B. The Second Prong of the Competing Provider Test

8. 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, without objection from the Town, that it is the largest MVPD in the Community,²⁰ and we see no reason to doubt that assertion.

1. Petitioner's Evidence

9. The second prong of the competing provider test requires the calculation of a ratio, in this case of the number of DBS subscribers in the Community (the numerator) over the number of households in the Community (the denominator). Petitioner sought to determine the numerator by purchasing a subscriber tracking report from Media Business Corp. ("MBC"). The report was based in part on nine-digit-zip-code or "zip+4" data about DBS subscriber numbers that Petitioner obtained from the Satellite Broadcasting and Communications Association. MBC's report stated that the DBS providers had 555 subscribers in the Community on September 30, 2008.²¹

10. Petitioner determined the denominator of the ratio called for by the competing provider test – the number of households in the Community – by reference to 2000 Census data, which stated that

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 5.

¹⁹ See, e.g., *Cablevision Systems Corp.*, Memorandum Opinion & Order DA 08-2217 at ¶ 41 (rel. Oct. 2, 2008), available at 2008 WL 4449658, *stay denied*, Memorandum Opinion & Order DA 08-2545, ¶ 6 (rel. Nov. 20, 2008), available at 2008 WL 4964162, *application for review pending* ("Cablevision"); *Adelphia Cable Commun.*, 22 FCC Rcd 4423, 4424-25, ¶ 4 (2007); *Comcast Cable Commun., LLC*, 22 FCC Rcd 694, 697-98, ¶¶ 8-9 (2007); *CoxCom, Inc.*, 14 FCC Rcd 7134, 7141-42, ¶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).

²⁰ Petition at 7. It appears that Petitioner is not the only cable operator of long-standing in the Community, and that Comcast serves part of the Community. It appears that each operator now serves a separate part of the Community although Petitioner's franchised territory is the entire Community. (It is not clear whether Comcast's franchised territory is the same or less.) Opposition at 2; Reply at 2-3, 6-7.

²¹ Petition at 7-8 & Exhs. 6-7. A zip+4 analysis allocates DBS subscribers to a franchise area using nine-digit zip code information, which generally reflects franchise area boundaries in a more accurate fashion than standard five-digit zip code information.

there were 3,676 households in the Community.²² 555 subscribers in a community of 3,676 households yield a ratio of 15.1% as reflected in Attachment A. This evidence of DBS subscribership in excess of 15 percent, if unrefuted, satisfies the second prong of the competing provider test for the Community.

2. The Town's Objections

11. The Town attempts to refute Petitioner's showing under the second prong of the competing provider test on several grounds.

12. First, the Town appears to object to counting as DBS subscribers "dual households," which are households that subscribe to both cable service and DBS service.²³ This objection is insufficient because the Town does not present any evidence of how many such households there are in the Community.²⁴ Also and more broadly, we have long counted dual households as subscribers to DBS service in competing provider effective competition cases. They are aware of alternatives to the petitioner's cable service and have subscribed to at least one of them. This is strong evidence of the very competition among MVPDs that Section 623(l)(1) of the Communications Act wants to detect.²⁵

13. Second, the Town objects that Petitioner's estimate of DBS subscribership may be inaccurate because a major highway "slices through a portion of" the Community and divides the households that are served by Petitioner from those that are served by another cable operator, Comcast.²⁶ The Town thinks it possible that zip+4 data may not be refined and precise enough to measure DBS subscribership accurately and that, if Petitioner's estimate is even slightly overstated, then competing provider effective competition does not exist in the Community. The Town is mistaken. Zip+4 data such as Petitioner has presented is the most fine-grained and commonly available way of which we are aware to count DBS subscribers in a community.²⁷ It does not create an automatic suspicion of inaccuracy. Nor has the Town identified a single zip+4 area that falls outside the Community or challenged the methodology of MBC's analysis.²⁸ Also, even if a major highway separates the part of the Community that Petitioner serves from the part of the Community that Comcast serves, we do not see how that fact could lead MBC to overstate the number of DBS subscribers in the whole Community, which is the number that is material under Section 623(l)(1)(B)(ii).²⁹ Finally, the facts that Comcast serves part of the Community and that its subscriber numbers are not included in the 555 subscribers asserted by Petitioner (see paragraph 9 above) indicates that Petitioner has understated the degree of competing provider effective competition herein by adding only the subscribers of the DBS providers and not those of Comcast.³⁰

²² Petition at 7-8 & Exh. 5.

²³ Opposition at 2.

²⁴ Reply at 3.

²⁵ See, e.g., *Cablevision* at ¶ 17 & cases cited in n.35.

²⁶ Opposition at 2.

²⁷ See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 08-2632 at ¶ 6 n.15 (rel. Dec. 3, 2008), available at 2008 WL 5084245 ("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").

²⁸ Reply at 6.

²⁹ *County of New Hanover County, North Carolina*, Memorandum Opinion & Order DA 08-2344 at ¶¶ 7-8 (rel. Oct. 24, 2008), available at 2008 WL 4693164; *Florida Cablevision Management, Corp.*, 11 FCC Rcd 6876, 6880-81, ¶ 11 (1996); *Valley Center Cablesystems, L.P.*, 10 FCC Rcd 11940, 11944-45, ¶ 10 (1995).

³⁰ Reply at 3, 8.

14. Third, the Town objects that the basis for Petitioner’s estimate of the number of households in the Community – the 2000 Census – is out of date because in 2000 “much of the Town wasn’t even wired for Cablevision.”³¹ This objection is without merit. We accept the most recent decennial Census data for household numbers unless a specific flaw in it is shown and/or more recent data is proffered that is at least as accurate as Census data.³² The City has made no such showing or proffer.³³ Also, we do not understand how the degree to which Cablevision had wired the Community on any given date would affect the material fact, which is the number of households in the Community.

15. Fourth, the Town objects that because the Community is “unusually hilly . . . with very tall trees,” DBS service may not be available to many residents.³⁴ This objection is invalid. The statutory standards for competing provider effective competition are percentages of “households” with no qualification for households that may have special difficulties in receiving DBS service. Also, the Town has given us only generalities about its hilliness and foliage, despite its presumably intimate knowledge of these matters. The Town has presented no evidence of how many households are effectively blocked from receiving DBS service and has not shown that whatever blockage exists is so great that DBS service cannot be an effective discipline on the behavior of Petitioner in the Community as a whole.³⁵

16. Fifth, the Town objects that Petitioner’s showing of competing providers having only 15.1% is so close to the statutory minimum (“exceeds 15 percent”) that it is unreliable.³⁶ This is an objection we have rejected in the past.³⁷ The statutory standard is DBS household penetration that “exceeds 15 percent,” no matter how slightly.³⁸ In the same vein, we have granted or denied findings of effective competition when the evidence has showed subscribership even slightly above or below the statutory minimum.³⁹

17. Therefore, despite the Town’s several objections, the second prong of the competing provider test is satisfied for the Community.

³¹ Opposition at 1.

³² See, e.g., *Cablevision* at ¶¶ 9-14; *Time Warner Cable, Inc.*, 23 FCC Rcd 12210, 12214, ¶ 15 (2008); *Comcast Cable Commun., LLC* (“Comcast”), 23 FCC Rcd 10939, 10942-43, ¶¶ 11-13.

³³ Reply at 4-5.

³⁴ Opposition at 2. The Town does not claim that DBS service is not offered to at least 50% of the households in the Community, which claim would be relevant under the first prong of the competing provider test.

³⁵ See *Adelphia Cable Commun.*, 20 FCC Rcd 20536, 20537-38, ¶¶ 4-8 (2005) (including in “at least 50 percent” of households those that faced directions that might make placement of DBS receiving dishes difficult or had similar difficulties), *application for review pending*; *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4980-81, ¶¶ 4-6 (2005) (same); *Cablevision of Paterson, d/b/a/ Cablevision of Allamuchy*, 17 FCC Rcd 17239, 17242, ¶ 6, nn.22, 25 (2002) (dismissing, in n.22, franchise authority’s general and undocumented claims that some areas are “hilly, heavily wooded, and mountainous” and, in n.25, “the possible existence of local rules restricting the placement of DBS antennas”).

³⁶ Opposition at 1.

³⁷ *MCC Missouri LLC*, 20 FCC Rcd 17909, 17910-11, ¶ 5 (2005).

³⁸ 47 U.S.C. § 543(l)(1)(B)(ii).

³⁹ *Time Warner Cable Inc., & Time Warner Entertainment-Advance/Newhouse Partnership*, 23 FCC Rcd 12069, 12073, ¶ 15 (2008) (DBS subscribership of exactly 15%, or 14.94%, inadequate); *Comcast*, 23 FCC Rcd at 10942, ¶ 11 (dictum that 15.48% would be adequate and 13.48% would be inadequate); *Texas Cable Partners, L.P.*, 16 FCC Rcd 4718, 4722, ¶ 8, n.33 (2001) (“The statute . . . does not grant the Commission discretion in close cases. If the aggregate MVPD penetration rate is above 15%, effective competition, as defined by the Communications Act, exists”).

C. Conclusion

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

III. ORDERING CLAUSES

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

20. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the Community set forth on Attachment A **IS REVOKED**.

21. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

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

⁴⁰ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8095-E

COMMUNITY SERVED BY CABLEVISION SYSTEMS WESTCHESTER CORP.

Community	CUID	CPR*	2000 Census Households	Estimated DBS Subscribers
Putnam Valley	NY1083	15.10%	3676	555

*CPR = Percent of competitive DBS penetration rate.