

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

In the Matter of)
Comcast Cable Communications, LLC, on behalf) CSR 7773-E
of its subsidiaries and affiliates)
Petition for Determination of Effective)
Competition in Various New Mexico)
Communities)

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 2010

Released: September 10, 2010

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates ("Comcast"), hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(1), 76.905(b)(2) 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 "Communities." Petitioner alleges that its cable system serving the Communities is 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 is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). Petitioner alternatively claims to be exempt from cable rate regulation in the Communities listed on Attachment B because the Petitioner serves fewer than 30 percent of the households in those franchise areas. The petition is opposed.³

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 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 based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments A and B.

¹ See 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(2).

³ An opposition was filed by the City of Albuquerque. The County of Bernalillo filed an untimely letter in support of the City of Albuquerque's opposition.

⁴ 47 C.F.R. § 76.906.

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

⁶ See 47 C.F.R. §§ 76.906 & 907.

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 (“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;⁷ 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.⁸

5. Turning to the first prong of this test, it is undisputed that the 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.⁹ 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.¹⁰ 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.¹¹ 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 programming¹² and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹³ 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.¹⁴ 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 five of the eleven Communities.¹⁵ Petitioner sought

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

⁸ 47 C.F.R. § 76.905(b)(2)(i).

⁹ *See* Petition at 4.

¹⁰ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹¹ 47 C.F.R. § 76.905(e)(2).

¹² *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

¹³ *See* Petition at 4-5 and Exhibits 2 and 3.

¹⁴ *See* Petition at 3.

¹⁵ *Id.* at 6. In circumstances where the largest MVPD is unable to be identified, the Commission can determine that the second prong is met when it finds that the number of households subscribing to the DBS providers and the petitioning cable operator each exceeds 15 percent of the households in the franchise area. First, we assume that Petitioner is the largest MVPD provider in the Community and determine that the combined DBS subscribership is

(continued....)

to determine the competing provider penetration in the Communities 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 the Communities on a zip code plus four basis.¹⁶

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁷ 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 the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

8. 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 the Communities listed on Attachment A.

B. The Low Penetration Test

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.¹⁸ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise areas listed on Attachment B.

10. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Communities listed on Attachment B. Therefore, the low penetration test is also satisfied as to those Communities.

III. PROPOSED ADDITIONAL REQUIREMENTS

11. The City of Albuquerque filed an opposition, however, it does not dispute that the data submitted by Comcast establishes that DBS penetration exceeds 15 percent in the franchise area in which it has asserted competing provider penetration.¹⁹ Rather, the City challenges the Commission’s process for reviewing and evaluating effective competition petitions. Initially, the City argues that there is a fundamental flaw in the standards applied by the Commission’s in analyzing effective competition petitions because the Commission has found that DBS competition alone does not protect subscribers from unreasonable rates.²⁰ The City’s second argument is a procedural one. The City argues that, under Section 76.7(a)(4)(i) of our rules, which requires that petitions support a determination that a grant of the relief requested would serve the public interest,²¹ requires that we expand the issues in effective

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greater than 15 percent; we then assume that one of the DBS providers is the largest MVPD in the Community and determine whether Petitioner’s subscribership is greater than 15 percent. When both exceed 15 percent, then the second prong of the competing provider test is met. Petitioner’s data in Attachment A shows that both these determinations can be made for all six of the Communities not covered under paragraph 6 above. 23 FCC Rcd 12069, ¶ 8 (MB 2008).

¹⁶ Petition at 6-8.

¹⁷ Petition at 8 and Exhibit 7.

¹⁸ 47 U.S.C. § 543(l)(1)(A).

¹⁹ Opposition at 2.

²⁰ *Id.*

²¹ *Id.* at 3-4.

competition proceedings to include anything that can be fitted within the term “the public interest.” Thus, Comcast would be required to show that the public interest would be served by a finding of effective competition in the franchise area irrespective of its ability to satisfy the statutory effective competition tests.²² The Bureau would then have to find that exempting Comcast from the rate regulation rules would also be in the public interest.²³ In reply, Comcast argues that the City’s opposition is “frivolous” because the effective competition standard was created by Congress and the Commission is obligated to follow the law.²⁴ Furthermore, the statutory definition for a MVPD explicitly included DBS providers for the purpose of satisfying the effective competition test.²⁵ We reject the City’s arguments. In reviewing effective competition petitions, the Commission reviews the petition to determine if the petitioner has satisfied the standards as established by Congress as promulgated in the statute. In this case, the City admits that Comcast has satisfied the specific statutory criteria of the competing provider and low penetration effective competition tests. Having reached a determination that effective competition exists, no additional, free-ranging inquiry into whether Comcast’s requested relief is in the public interest is necessary or contemplated by the statute.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates **IS GRANTED**.

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

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

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

²² *Id.*

²³ *Id.*

Comcast Reply at

²⁵ *Id.* at 3-4.

²⁶ 47 C.F.R. § 0.283.

ATTACHMENT A

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COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC, ON BEHALF
OF ITS SUBSIDIARIES AND AFFILIATES

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Albuquerque	NM0036	25.62	183236	46946
Belen	NM0092	47.18	2596	1225
Bernalillo County	NM0015 NM0096 NM0159 NM0190	41.70	35245	14697
Bernalillo Town	NM0131	37.20	2309	859
Bosque Farms	NM0138	40.58	1422	577
Los Lunas	NM0156	50.76	3601	1828
Los Ranchos de Albuquerque	NM0162	30.24	1997	604
Moriarty	NM0149	45.81	668	306
Sandoval County	NM0116 NM0184 NM0185	52.14	7134	3720
Tijeras	NM0169	75.92	191	145
Valencia County	NM0158 NM0175 NM0213	48.19	15062	7259

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

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COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC, ON BEHALF
OF ITS SUBSIDIARIES AND AFFILIATES

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Belen	NM0092	2596	757	29.16
Valencia County	NM0158 NM0175 NM0213	15062	2414	16.03