

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

In the Matter of)
Comcast Cable Communications, LLC,)
on behalf of its subsidiaries and affiliates) CSR 8161-E
Petition for Determination of Effective)
Competition in Two Communities in Maryland)

MEMORANDUM OPINION AND ORDER

Adopted: September 21, 2010

Released: September 21, 2010

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC ("Comcast" or "the Company"), on behalf of its subsidiaries and affiliates, has filed with the Commission a Petition for Special Relief ("Petition") pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that the Company is subject to effective competition in two franchise areas ("the Communities") in the Maryland part of the Delmarva Peninsula. The Communities are listed in Attachment A hereto. Comcast 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"),¹ and the Commission's implementing rules,² and is therefore exempt from regulation of its rates for basic cable service. The competition that Comcast alleges is the service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc., and Dish Network. The County of Wicomico, Maryland (the "County"), filed an Opposition to the Petition,³ to which Comcast filed a Reply.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) of the Act and Section 76.905 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, despite the County's objections, that Comcast is subject to effective competition in the Communities.

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ Opposition to Petition for Special Relief of Comcast Cable Commun., LLC ("Opposition"), dated June 25, 2009. It is not clear whether the County is acting only on its own behalf or also on that of the other Community involved here, the Town of Sharptown.

⁴ Reply to Opposition ("Reply"), dated July 13, 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(b).

II. PROCEDURE

3. Comcast filed a motion seeking an extension of time for the filing of its Reply.⁸ The motion states plausible grounds and is consented to by the County. Accordingly, we grant the motion and accept Comcast's Reply as timely.

III. COMPETING PROVIDER EFFECTIVE COMPETITION

4. Comcast claims that its cable system serving the Communities is subject to "competing provider" effective competition, which is defined in Section 623(1)(1)(B) of the Act. That Section provides that a cable operator is subject to competing provider effective competition in a franchise area if it 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

A. Part One

5. The first part of the competing provider 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 area "comparable programming."¹⁰

6. It is undisputed that the DBS providers are MVPDs unaffiliated with Comcast 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.¹¹ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part 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.¹² Also undisputed is Comcast's assertion that both DBS providers offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.¹³

7. The County's only objection to Comcast's showings for the first part of the competing provider test concerns "comparable programming." 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 for effective competition purposes if it "offer[s] at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."¹⁴ Comcast's Petition includes copies of channel lineups for both DBS providers, which show their services having more far channels than our rule requires.¹⁵

⁸ Consent Motion for Extension of Time, dated July 6, 2009.

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

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

¹¹ *See* Petition at 3.

¹² *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹³ *See* Petition at 2-3.

¹⁴ 47 C.F.R. § 76.905(g).

¹⁵ *See* Petition at Exh. 1.

8. The County appears to recognize that the DBS providers' services fit within our definition of comparable programming.¹⁶ The County objects, however, that DBS service is not truly comparable to Comcast's because the definition was adopted in 1993, because of studies about the effects of DBS service on rates for cable service, and because of pending DBS complaints about certain programming on cable systems.¹⁷ We reject the County's objections, as we have similar objections in earlier proceedings.¹⁸ Our rule sets forth simple and finite criteria for "comparable programming" that do not include the factors that the County asserts. The County's 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 given 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 Comcast's in the Communities and Comcast has satisfied first part of the competing provider test.

B. Part Two

9. 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. Comcast asserts (without objection by the County) that it is the largest MVPD in the Communities.¹⁹ The second part thus requires Comcast to create a ratio of DBS subscribers to households in each Community that exceeds 15 percent. To create that ratio, Comcast obtained from Media Business Corporation a list of nine-digit Zip Codes²⁰ in each Community and from the Satellite Broadcasting and Communications Association a list showing the numbers of DBS subscribers in each of those Zip Codes in late 2008.²¹ Comcast obtained household numbers for each Community from 2000 Census data.²² The resulting ratios are set forth in Attachment A hereto and show DBS subscribership in excess of 15 percent in each Community.²³

10. The County objects briefly to the several years' difference between Comcast's DBS subscriber and household numbers and asks that the Company be required to submit numbers from 2009.²⁴ We reject this objection for the same reasons we have given in past proceedings. In brief, we accept the most recent household number from the Census Bureau, primarily because it measures "households," the statutory term, precisely. We will accept more recent numbers that are also of households and that are equally accurate. The County has not produced such numbers, however, and therefore we accept Comcast's figures.²⁵ Comcast's numbers show that in each Community, more than 15 percent of the households subscribe to programming services offered by MVPDs other than the largest MVPD. The County acknowledges this.²⁶ Comcast's evidence satisfies the requirements of the second

¹⁶ See Opposition at 4.

¹⁷ *Id.* at 4-6.

¹⁸ See, e.g., *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1782, ¶¶ 8-9 (2009) ("*Comcast*"), *application for review pending*; *CoxCom, Inc.*, 22 FCC Rcd 4522, 4524, ¶ 5 (2007); *Comcast Cable Commun., LLC*, 22 FCC Rcd 694, 697-98, ¶¶ 8-9 (2007).

¹⁹ Petition at 6.

²⁰ *Id.* at 5 & Exh. 3. Nine-digit Zip Codes are much smaller than five-digit ones and generally reflect franchise area boundaries in a more accurate fashion.

²¹ *Id.* at 6 & Exh. 4.

²² *Id.* at Exh. 5.

²³ See also *id.* at Exh. 6.

²⁴ Opposition at 4 n.4.

²⁵ See, e.g., *Comcast*, 24 FCC Rcd at 1783-84, ¶ 13 & authorities cited in nn.26-28.

²⁶ Opposition at 4.

part of the competing provider test.²⁷

IV. PROPOSED ADDITIONAL REQUIREMENTS

11. The County argues that 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,²⁸ requires that we expand the issues in effective competition proceedings to include anything that can be fitted within the term “the public interest.” The County advances four specific “public interest” issues it argues we must consider in these proceedings: Comcast’s possible future conduct about the buy-through prohibition, the Company’s placement of public, educational, and government or “PEG” channels, its continuation of uniform rates, and the possibility of the Company engaging in negative option billing.²⁹ The County warns that, although it does not regulate Comcast’s rates at present,³⁰ deregulation should await resolution of all the foregoing issues and the arrival in the Communities of “a robust, fully competitive market that prevents cable operators from using their market power to charge excessive rates and from engaging in other anticompetitive practices.”³¹ The County also objects generally to deregulating basic cable rates based on the presence of DBS service.³²

12. We reject these suggestions for reasons similar to those stated above about comparable programming. The “public interest” words in Section 76.7(a)(4)(i) of our rules do not open the door to all the extraneous and hypothetical issues that may arise between a cable operator and a franchise authority. The general words “public interest” are qualified by the Congress’s narrowly drafted provisions for determining effective competition and by the rules and decisions we have adopted implementing Congress’s intent.³³ None of the County’s suggested public interest issues are mentioned in the pertinent statutes, rules, or decisions. There is no statutory basis to delay basic rate deregulation in a franchise area until the arrival of perfect competition there and the resolution of all issues between a cable operator and a franchise authority to the latter’s satisfaction.³⁴ Indeed, Section 623(b)(1) of the Act, which the County invokes,³⁵ sets the standard for basic cable rates not at perfect competition, but at the level that would be charged if there were effective competition.³⁶

13. Finally, concerning the County’s general objection that DBS should not provoke deregulation of rates for basic cable service, the statute generally defines the class of cable’s competitors

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

²⁸ 47 C.F.R. § 76.7(a)(4)(i).

²⁹ Opposition at 2-3, citing 47 U.S.C. §§ 531 (PEG channels), 543(b)(8) (buy-through prohibition), (d) (rate uniformity), (f)(negative billing).

³⁰ Opposition at 2-3.

³¹ *Id.* at 1.

³² *Id.* at 6-7.

³³ Reply at 3.

³⁴ 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*, 24 FCC Rcd at 1782, ¶¶ 8-9, 1790-91, ¶¶ 35-36; *Cablevision Systems Westchester Corp.*, 24 FCC Rcd 872, 873-74, ¶¶ 6-7 & n.19 (2009); *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14154], ¶ 41 (2008); *Falcon Telecable*, 17 FCC Rcd 22842, 22843, ¶ 4 (2002); *CoxCom, Inc.*, 14 FCC Rcd 7134, 7142, ¶19 (1999), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000); *see also* authorities cited *supra* note 21.

³⁵ Opposition at 2 n.1.

³⁶ 47 U.S.C. § 543(b)(1).

as MVPDs³⁷ and specifically defines DBS operators as an MVPD.³⁸ We have no authority to alter the statute and, therefore, we may not exclude DBS providers from the class of MVPDs that we consider in the competing provider test.³⁹ In sum, none of the County's objections give cause for delaying our conclusion that Comcast has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and that Comcast is subject to effective competition in the Communities listed on Attachment A.

V. ORDERING CLAUSES

14. 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**.

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 **IS REVOKED**.

16. 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

³⁷ 47 U.S.C. § 543(1)(1)(B).

³⁸ 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); authorities cited *supra* notes 21 & 37; Reply at 2.

³⁹ *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."

⁴⁰ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8161-E

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

Communities	CUID(s)	CPR*	2000 Census Households	Estimated DBS Subscribers
Town of Sharptown	MD0306	18.99%	258	49
County of Wicomico	MD0367	18.05%	19419	3505

*CPR = Percent of competitive DBS penetration rate.