

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

In the Matter of)	
)	
CSC TKR, Inc.)	
)	CSR 8275-E
Petition for Determination of Effective)	
Competition in Highland Park Borough, New)	
Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 2010

Released: May 13, 2010

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

I. INTRODUCTION AND BACKGROUND

1. CSC TKR Inc., an affiliate of Cablevision Systems Corporation and 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 Highland Park Borough, New Jersey, 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)(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 Community 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. A brief letter was also filed by outside counsel for the Community expressing the opinion of its Mayor and Council that Competitor “at this time does not offer a competitive cable service” in the Community and requesting that we deny the Petition as premature.⁵ The letter offers no documentation for that opinion, however. Accordingly, we do not accord it decisive weight. In addition, although we welcome the opinions of local governments in effective competition proceedings, we are required to reach

¹ See 47 U.S.C. § 543(1)(1)(D).

² 47 C.F.R. § 76.905(b)(4).

³ Comments of the New Jersey Division of Rate Counsel in Opposition To Petition for a Declaration of Effective Competition in Highland Park Borough, New Jersey (“Comments”), dated March 15, 2010. 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 March 30, 2010). 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, 2007 ANNUAL REPORT* at 16, available at <http://www.state.nj.us/bpu/pdf/about/annualreports/2007.pdf> (visited March 30, 2010).

⁴ Reply to Comments on Petition for Determination of Effective Competition (“Reply”), dated March 26, 2010.

⁵ Letter from Edwin W. Schmierer, Esq., Mason, Griffin & Pierson, attorneys for the Borough of Highland Park, Middlesex County, New Jersey, to Ms. Marlene H. Dortch, Commission Secretary, dated March 19, 2010.

our decisions based on the detailed evidence before us and the criteria adopted by Congress and the Commission.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁶ as that term is defined by Section 623(l)(1) of the Communications Act and Section 76.905(b) of the Commission's rules.⁷ 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.⁸ For the reasons set forth below, we grant the Petition based on our finding that Petitioner is subject to effective competition in the Community.

II. DISCUSSION

4. 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.⁹ This test is otherwise referred to as the LEC test.

5. 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.¹⁰ It is undisputed that the Community is served by both Petitioner and Competitor, a LEC, and that these two MVPD providers are unaffiliated. Also undisputed is Petitioner's statement that Competitor is offering cable service in the Community pursuant to a "system-wide" franchise¹¹ that was granted by the BPU and that Competitor's franchise covers the Community and much more of the State of New Jersey.

6. 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.¹² Attached to the Petition are copies of channel lineups for Competitor showing that it

⁶ 47 C.F.R. § 76.906.

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

⁸ See 47 C.F.R. §§ 76.906 & 907.

⁹ See 47 U.S.C. § 543(l)(1)(D).

¹⁰ 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").

¹¹ 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.

¹² See 47 C.F.R. § 76.905(g). See also Petition at 9-10.

offers far more than those numbers of channels.¹³ Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Community,¹⁴ has marketed its services in a manner that makes potential subscribers reasonably aware of its services,¹⁵ and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.¹⁶ These showings, if unrebutted, would suffice to show that Petitioner is subject to LEC effective competition in the Community.

7. The DRC challenges the sufficiency of Petitioner's showing of LEC effective competition. The DRC argues that (1) Competitor's cable service lacks Public, Educational, and Government ("PEG") channels and is therefore not truly "comparable" to Petitioner's;¹⁷ (2) Petitioner has not shown that Competitor has actual subscribers to its cable service in the Community;¹⁸ (3) Competitor's system-wide franchise is not a proper basis for a finding of effective competition because such franchises did not exist when Congress created the LEC test;¹⁹ (4) whether the LEC test can be satisfied by a LEC's system-wide franchise is a matter of first impression and therefore must be decided by the full Commission;²⁰ and (5) that Petitioner has not shown that Competitor's service is available throughout the Community.²¹

8. We have addressed and dismissed Petitioner's first four arguments in previous effective competition decisions (including ones involving New Jersey and Petitioner) and we do so here for the reasons stated in those decisions.²² The DRC has given us no new grounds to doubt the validity of those decisions.

9. In its fifth argument, the DRC faults Petitioner for failing to show that Competitor's service is available throughout the Community.²³ Petitioner is required to show this, the DRC argues, by

¹³ See Petition at Exh. 3.

¹⁴ See *id.* at 4.

¹⁵ Petition at 7-9; *id.* at Exh. 4; Reply at Exh. 2.

¹⁶ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petition at 4-9; *id.* at Exh. 1 (Declaration of Paul Jamieson, Cablevision Systems Corp.'s Managing Counsel for Legislative & Regulatory Affairs).

¹⁷ Comments at 2, 5-6.

¹⁸ *Id.* at 2, 7.

¹⁹ *Id.* at 2, 4-5.

²⁰ *Id.* at 2, 5.

²¹ *Id.* at 2, 7-8.

²² Concerning PEG channels, see *Cablevision of Oakland, Inc.*, 24 FCC Rcd 1801, 1803-04, ¶¶ 6-8 (2009) ("*Cablevision of Oakland*"), *application for review pending*; *Comcast Cable Communs., LLC*, 24 FCC Rcd 1780, 1790-91, ¶ 35 (2009) ("*Comcast I*"), *application for review pending*; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14154, ¶ 41 ("*Subsidiaries of Cablevision*"), *stay denied*, 23 FCC Rcd 17012, 17013-14, ¶ 6 (2008), *application for review pending*; *CoxCom, Inc.*, 14 FCC Rcd 7134, 7141-42, ¶ 19 (1999), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000). Concerning actual subscribers, see *Cablevision of Oakland*, 24 FCC Rcd at 1803, ¶ 6; *Comcast I*, 24 FCC Rcd at 1791, ¶ 36; *Subsidiaries of Cablevision*, 23 FCC Rcd at 14154-55, ¶¶ 42-43. Concerning system-wide franchises, see *Cablevision of Oakland*, 24 FCC Rcd at 1803, ¶ 6; *Comcast I*, 24 FCC Rcd at 1790, ¶ 34; *Subsidiaries of Cablevision*, 23 FCC Rcd at 5153-54, ¶ 40. Concerning system-wide franchises being an issue of first impression, see *Cablevision of Oakland*, 24 FCC Rcd at 1803, ¶ 6.

²³ Comments at 7-8.

the earlier effective competition decision in *Comcast of Greater Florida/Georgia, Inc.*²⁴ The DRC is incorrect. The earlier decision concerned a form of effective competition not involved here, “low penetration” effective competition,²⁵ and the rare circumstance of an incumbent cable operator (not a LEC) deciding to serve a smaller area than its entire franchised territory.²⁶ If a franchise authority can show that the petitioning cable operator has made such a decision, we measure effective competition in the smaller area.²⁷ In this proceeding, the DRC has made no such showing and there is no indication in the record that Competitor has made an affirmative decision to serve a smaller area than its franchised territory.²⁸ Accordingly, the DRC’s fifth argument has no basis in precedent.

10. On the contrary, precedent makes clear that a cable operator claiming LEC effective competition need not show that the LEC is offering service throughout the cable operator’s territory. When the Commission first implemented the LEC test, it stated several ways that a cable operator might show that a LEC was serving enough territory to pass the test. The Commission mentioned “widespread availability”²⁹ and a requirement that “the LEC’s service must substantially overlap the incumbent cable operator’s service,”³⁰ and even contemplated LEC effective competition existing “[i]f the LEC has not shown its intention to offer service that substantially overlaps the incumbent cable operator’s service in the franchise area.”³¹ Nowhere did the Commission require that a LEC’s service be available everywhere in the incumbent cable operator’s franchise area.

11. In this proceeding, Petitioner has shown that Competitor is offering service to “[a] substantial number of households” in the Community.³² Competitor has publicly announced that its service is available in the Community.³³ It is in compliance with substantial build-out obligations, including reaching every home in the Community in a few years.³⁴ These showings are uncontradicted by the DRC, which as the local regulator is in a position to know if any of them are disputable. These showings suffice to show that Competitor is offering service to the extent required by the LEC test.³⁵

²⁴ *Comcast of Greater Florida/Georgia, Inc.*, 22 FCC Rcd 4588, 4589-90, ¶ 6 (2007) (“*Comcast II*”); see also *County of New Hanover, North Carolina*, Memorandum Opinion & Order DA 08-2344 at ¶ 12 (rel. Oct. 24, 2008), available at 2008 WL 4693164.

²⁵ See 47 U.S.C. § 543(1)(1)(A); 47 C.F.R. § 76.905(b)(1).

²⁶ *Comcast II*, 22 FCC Rcd at 4590-91, ¶ 6.

²⁷ *Comcast I*, 24 FCC Rcd at 1788, ¶ 27 n.66.

²⁸ *Accord, id.*

²⁹ *Cable Reform Order*, 14 FCC Rcd at 5302, ¶ 10.

³⁰ *Id.*

³¹ *Id.*, 14 FCC Rcd at 5305, ¶ 13.

³² Petition at 4; see also *id.* at 5-7 *passim*.

³³ Reply at 11, citing FiOS Tv Availability – As of 11/05/09, http://www22.verizon.com/about/community/nj/nj_pdfs/njtvmunis_110509.pdf (visited March 30, 2010).

³⁴ Petition at 6-7.

³⁵ See *supra* ¶ [5]; see also *Subsidiaries of Cablevision*, 23 FCC Rcd at 14155, ¶ 43;

“In adopting the LEC competition test, Congress believed that a LEC would be a formidable competitor to an incumbent cable operator from its commencement of service in part of a community. Therefore, we have consistently required that a petitioner show only that a LEC has actually begun to provide service in areas that substantially overlap [petitioner’s], that the LEC is marketing its services so that potential customers are aware of it, and that it intends to build out its cable system within a reasonable period of time.” [Footnote omitted.]

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

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Petition for a determination of effective competition filed in the captioned proceeding by CSC TKR, Inc., **IS GRANTED**.

14. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to Highland Park Borough, New Jersey, **IS REVOKED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

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³⁶ 47 C.F.R. § 0.283.