

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

In the Matter of)	
)	CSR 7873-E
Cablevision Systems Corporation)	CSR 7874-E
)	CSR 7875-E
Petition for Determination of Effective)	
Competition in 8 Communities in New York State)	

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 2010

Released: May 14, 2010

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

I. INTRODUCTION AND BACKGROUND

1. Cablevision Systems Corporation, through several subsidiaries, hereinafter referred to as “Petitioner,” has filed with the Commission three petitions 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 “Communities.” Petitioner alleges that its cable systems serving the Communities are 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 are therefore exempt from cable rate regulation in the Communities because of the competing service provided by Verizon New York, Inc., hereinafter referred to as “Competitor.” One petition, in CSR 7873-E, is opposed; the petitions in CSR 7874-E and CSR 7875-E are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ 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.⁵ For the reasons set forth below, we grant the Petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

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

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(4).

³47 C.F.R. § 76.906.

⁴See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

provided by the competing unaffiliated cable operator.⁶ 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.⁷ It is undisputed that these Communities are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. 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 programming⁸ and is supported in this petition with copies of channel lineups for Competitor.⁹ 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 *Cable Reform Order*.¹⁰

5. A letter in Opposition to the Petition has been filed, however, by the Great Neck/North Shore Cable Commission, which is the regulator of cable service in the six Communities in CSR 7873-E (the Villages of Great Neck, Great Neck Estates, Great Neck Plaza, Munsey Park, Russell Gardens, and Thomaston, hereinafter the “Villages”).¹¹ The Opposition argues that Competitor’s service is not yet widespread enough to amount to effective competition for Petitioner’s service in the Villages:

“Verizon is only obligated to provide cable service to all Village residents within five years. . . . [I]n the Village of Great Neck Plaza, Verizon’s franchise requires cable service to at most 40% of the households in the Village by June 2008. . . . [O]nly 61% of the households in Russell Gardens and only 71% of the households in Great Neck are . . . currently wired by Verizon. . . . Further, . . . franchise agreements do not require Verizon to provide service to 100% of the homes in these communities until some time in 2013.”¹²

The Opposition asks that we find effective competition to exist in a Village only when Competitor can provide cable service to 90 percent of the households in it.¹³

6. The Opposition challenges whether Competitor’s present service and future plans in the

⁶See 47 U.S.C. § 543(l)(1)(D).

⁷See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) (“*Cable Reform Order*”).

⁸See 47 C.F.R. § 76.905(g). See also Petition in CSR 7873-E at 13.

⁹See Petition in CSR 7874-E at Exh. 8.

¹⁰See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petition in CSR 7875-E at 6-13.

¹¹Letter from Alice Fishman, Chairperson, Great Neck/North Shore Cable Comm’n, to Monica Desai, FCC Media Bureau Chief (dated May 20, 2008) (“*Opposition*”). Petitioner filed a Reply to Opposition to Petition for Determination of Effective Competition (“*Reply*”) on June 4, 2008.

¹²Opposition at 2 (emphasis in original).

¹³*Id.*

Villages amount to effective competition with Petitioner's service. In evaluating such challenges in past proceedings, we have refused to follow any strict numerical test of homes passed or served by a LEC.¹⁴ Congress adopted such numerical tests for other forms of effective competition, but not for LEC effective competition.¹⁵ 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.¹⁶

7. Therefore, we have consistently required that a Petitioner show only that a LEC intends to build-out its cable system within a reasonable period of time, that the LEC is marketing its services so that potential customers are aware of it, and that the LEC has actually begun to provide service.¹⁷ Petitioner has shown that Competitor has done all these things, as noted in paragraph 4 above. It has committed to serve all households in each Village (with certain possible exceptions) within five years of receiving its franchise for the Village.¹⁸ It has begun aggressively marketing its services in the Villages and surrounding areas.¹⁹ It has begun service in competition with Petitioner in each of the Villages.²⁰ Upon such showings being made in other cases, we have found LEC effective competition to exist with fewer homes passed than Competitor has passed in some of the Villages.²¹

¹⁴*Armstrong Commun., Inc.*, 16 FCC Rcd 1039, 1043-44, ¶ 9 (2001) (LEC test does not specify any minimum amount of service to be offered by the LEC or include any penetration standards; it requires only that the offering be substantially more than *de minimis*); *CoxCom, Inc.*, 14 FCC Rcd 7134, 7143, ¶ 24 (1999) ("Congress did not include a pass or penetration test in the LEC effective competition standard and the Commission has not indicated that it would impose such a test"), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000); *Cable Reform Order*, 14 FCC Rcd at 5303, ¶ 10 ("we reject arguments that we should adopt penetration standards").

¹⁵*Compare* 47 U.S.C. § 543(l)(1)(A) (less than 30% subscribership test for "low penetration" effective competition) and (B) (for "competing provider" effective competition, at least one competitor serving at least 50% of households and certain competitors having in excess of 15% subscribership) *with* 47 U.S.C. § 543(l)(1)(D) (LEC competition).

¹⁶*Cable Reform Order*, 14 FCC Rcd at 5302, ¶ 9 ("The thrust of the 1996 Act is Congress' expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and . . . their ubiquitous presence in the market") (footnote omitted); *id.* at 5303, ¶ 11 (noting with approval that "the Cable Services Bureau has found that a LEC's presence can have a competitive impact on a cable operator before the LEC finishes installing its plant or rolling out its service"); *id.* at 5304, ¶ 11 (noting "Congress' intent that the Commission have the discretion to consider the likelihood and extent of impending competition when considering whether effective competition exists under the LEC test. Congress sought to restrain cable rates and stimulate quality cable services. Once the LEC's competitive presence is sufficient to achieve these goals, even if the LEC's buildout or roll out is not complete, the intent of the effective competition test has been met").

¹⁷*See supra* ¶ 4.

¹⁸*See* Petition in CSR 7873-E, Exh. 4 (Cable Franchise Agreements between Competitor and each Village, in § 3.1.1 of each of which Competitor commits to "offer Cable Service to all residential areas of the Service Area within five (5) years, of the Effective Date of this Franchise," with certain possible exceptions).

¹⁹*Id.* at Exhs. 5-6.

²⁰*Id.* at 3.

²¹Competitor's cable service has been deployed to 23% of households in one Village and to over 60% in the others. Petition in CSR 7873-E at 7-8. In comparison, *see Comcast Cable Commun., LLC*, 23 FCC Rcd 10073, 10076-77, ¶¶ 9, 11 (2008) (LEC competition exists where Competitor makes service available to substantially all residents in a majority of one franchise area, to significant numbers of residents in another area, and to significant numbers of residents in 2/3 to 3/4 of another franchise area); *Bright House Networks, LLC*, 22 FCC Rcd 12905, 12906, ¶ 7 (2007) (LEC competition exists where LEC has passed over 25% of potential subscribers and is obligated to serve the whole community within a few years); *Paragon Commun., Inc.*, 22 FCC Rcd 4899, 4901-02, ¶ 6 (2007) (LEC competition exists, despite allegations of a small actual build-out, where marketing and service have begun and a phased build-out 100% is required over 5 years); *Texas Cable Partners, L.P.*, 17 FCC Rcd 4377, 4379-80 ¶ 8 (2002)

(continued....)

8. Finally, for purposes of cable service rate regulation, we believe that our finding of “effective competition” under the LEC effective competition test also applies to the LEC that is providing “cable service” in the same franchise area as the incumbent cable operator. Section 623(l)(1)(D) of the Communications Act provides that effective competition in a franchise area exists if “a local exchange carrier 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 so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.” We note that this provision does not limit the “effective competition” determination to the incumbent cable operator. Further, Section 623(a)(2) of the Act provides that if a cable system is subject to effective competition, the rates for cable service by such system shall not be subject to regulation. The LEC must demonstrate that it is providing “cable service” and is a “cable system” within the meaning of the statute. In circumstances where the LEC is providing cable service to a franchise area where there is an incumbent cable operator also providing service, we find that both would be cable systems subject to effective competition and thus exempt from rate regulation under Section 623(a)(2). In other words, we conclude that a local exchange carrier that offers comparable cable service in an area served by a cable operator, also faces “effective competition” and is therefore not subject to cable rate regulation. Here the record demonstrates that Competitor Verizon is providing “cable service” and is a “cable system” in the franchise areas identified above where Petitioner Cablevision is also providing cable service. We therefore find that Verizon is concomitantly subject to effective competition in the Communities.

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 petitions for a determination of effective competition filed in the captioned proceeding by the subsidiaries of Cablevision Systems Corporation **ARE 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.²²

FEDERAL COMMUNICATIONS COMMISSION

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(LEC effective competition found where competitor passes only 20% of households and has built only 18% of its planned system).

²²47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7873-E, 7874-E, 7875-E

COMMUNITIES SERVED BY SUBSIDIARIES OF CABLEVISION SYSTEMS CORPORATION

Communities	CUID(s)
CSR 7873-E	
Great Neck	NY1033
Great Neck Estates	NY1035
Great Neck Plaza	NY1034
Munsey Park	NY1045
Russell Gardens	NY1038
Thomaston	NY1040
CSR 7874-E	
East Hills	NY1032
CSR 7873-E	
Lloyd Harbor	NY1036