

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

In the Matter of)
Comcast Cable Communications, LLC) CSR 8135-E
Petitions for Determination of Effective) CSR 8136-E
Competition in the Delmarva, Delaware)
Franchise Area)

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2011

Released: February 10, 2011

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, hereinafter referred to as "Petitioner," has filed with the Commission petitions 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 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)(B) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and are 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"). The petitions are opposed by the Delaware Public Service Commission ("DE PSC").

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 petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

1 Comcast states that pursuant to its franchise issued by the Delaware Public Service Commission, the Delmarva franchise (the "Franchise Area") area is defined as "the unincorporated areas below the Chesapeake and Delaware Canal in New Castle County, all of the unincorporated areas of Kent County and all of the unincorporated areas of Sussex County except the unincorporated areas served by [Comcast's] Ocean City head-end" Petition at 1, Exhibit 1 (Cable Television Franchise Renewal, PSC Order No. 6773 (dated Nov. 22, 2005)).

2 See 47 U.S.C. § 543(a)(1).

3 47 C.F.R. § 76.905(b)(2).

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

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 (“MVPD”), 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 disputed by the DE PSC that these Communities are “served by” both DBS providers, DIRECTV and Dish. In its Petitions, Comcast asserts that DIRECTV and EchoStar Communications Corporation offer comparable programming to over 50 percent of the households in the Franchise Area.⁹ The DE PSC questions whether EchoStar Communications Corporation can be considered a valid MVPD for purposes of an effective competition determination.¹⁰ The DE PSC asserts that on January 1, 2008, the Dish Network Corp., concededly an MVPD providing DBS services, spun off its technology and infrastructure assets into “EchoStar Corporation,” a separate, publicly-traded company.¹¹ The DE PSC states that it is unaware of any DBS provider named EchoStar Communications Corporation.¹²

6. Comcast responds that the DE PSC’s argument is hyper-technical and that it is widely known that EchoStar, prior to its separation from Dish, was a recognized MVPD of DBS service.¹³ Comcast contends that while it admittedly did not identify the technical separation of Dish from EchoStar, it was referencing the appropriate MVPD service.¹⁴ Comcast notes that in its Petitions it included Dish’s channel line-up and DBS subscriber data of all subscribers of direct-to-home satellite services in the franchise area, including Dish.¹⁵

7. The DBS data provided by Comcast supports its Petitions and its inadvertent reference to EchoStar rather than Dish has no significant effect on its effective competition analysis. Indeed, the DE PSC concedes that Dish is itself an MVPD even if EchoStar Communications Corporation does not qualify as such.¹⁶ We therefore reject the DE PSC’s claims in this regard.

8. A franchise area is considered “served by” an MVPD if that MVPD’s service is both

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 Petitions at 3.

¹⁰ Comments of DE PSC at 3. DE PSC does not challenge that the MVPD providers are unaffiliated with Petitioner or each other.

¹¹ Comments of DE PSC at 3.

¹² *Id.*

¹³ Comcast Reply at 2.

¹⁴ *Id.*

¹⁵ *Id.* and Petition, Exhibit 3 (Dish Network Channel Line-Up) and Petition, Exhibit 6 (SBCA Effective Competition Tracking Report).

¹⁶ *See* Comments of DE PSC at 3.

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.¹⁷ 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.¹⁸

9. Despite the Commission's findings in this regard, the DE PSC still asserts that Comcast has failed to show that potential subscribers are reasonably aware of the availability of DBS service because it did not provide evidence of DBS advertising in the Franchise Area.¹⁹ We agree with Comcast that such advertising evidence is not necessary in this case.²⁰ It is well settled that, given the Commission's expertise regarding MVPD competition and its resolution of numerous effective competition cases, it is appropriate for the Commission to take notice of the fact that Americans today are more than reasonably aware of the availability of DBS service.²¹ The Commission has reasonably determined that potential subscribers are aware of the availability of DBS service when DBS penetration exceeds 15 percent and this has been determined in this case as discussed below. Additionally, the DE PSC has not supplied any evidence to demonstrate that residents are unaware of the availability of DBS service due to some unique circumstance.²² We find that Petitioner has provided sufficient evidence of DBS service in 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.²³ 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 programming²⁴ and is supported in the petitions with copies of channel lineups for both DIRECTV and Dish.²⁵ Further, we find that both DIRECTV and Dish offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.²⁶ Accordingly, we find that the first prong of the competing provider test is satisfied.

10. 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 the Communities.²⁷ Petitioner sought to determine

¹⁷ See Petitions at 3.

¹⁸ *Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹⁹ Comments of DE PSC at 4.

²⁰ See Comcast Reply at 3.

²¹ See *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4391 at ¶ 6 (2007); *Bright House Networks, LLC -- Two Local Franchise Areas in Florida*, 22 FCC Rcd 4157, 4158 at ¶ 4 (2007).

²² See *Bright House Networks*, 22 FCC Rcd 4390, 4392 at ¶ 6 (2007) ("Also convincing in this case is the complete absence of any evidence offered by Lake Alfred or Dundee that conditions in either of their franchise areas are different or that, due to some local peculiarity, households in either area are not reasonably aware that they may purchase DBS services.").

²³ 47 C.F.R. § 76.905(e)(2).

²⁴ See 47 C.F.R. § 76.905(g). See also Petitions at 4-5.

²⁵ See Petitions at 5 and Exhibit 3.

²⁶ See Petitions at 3-5.

²⁷ *Id.* at 8. With regard to both CSR 8135-E and CSR 8136-E, we note that the same unincorporated areas reflecting the same DBS penetration rates are listed in both petitions. Two petitions were filed, however, because some of the unincorporated areas with different CUID numbers are on separate Comcast cable systems and required the filing of

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the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.²⁸

11. The DE PSC argues that Comcast’s use of 2000 U.S. Census data is unreliable because the information is outdated.²⁹ The DE PSC contends that Comcast’s comparison of nine year old census data with current DBS subscriber figures understates the number of households in the Franchise Area and skews the DBS penetration rate.³⁰ As support for its argument that Comcast has underestimated the number of households in the Franchise Area, the DE PSC refers to the general population growth in Delaware.³¹

12. The DE PSC further contends that the boundaries of Delaware’s municipalities have frequently shifted due to numerous annexations.³² According to the DE PSC, any household located in annexed territory moves out of the Franchise Area and into the municipality and after such annexations it is likely the number of households in the Franchise Area decreases.³³ The DE PSC argues that by not accounting for these annexations there is a reasonable likelihood that Comcast’s penetration calculation is exaggerated because of the inclusion of DBS households in that calculation that are potentially located inside municipalities and not in the Franchise Area.³⁴ The DE PSC also alleges that Comcast failed to exclude seasonal, occasional and recreational homes from its household figure.³⁵ The DE PSC argues that the Franchise Area includes a great number of seasonal homes and this was not properly factored into Comcast’s efforts to calculate its DBS penetration rate.³⁶

13. The Commission has stated that it would accept more recent household data if it is demonstrated to be reliable.³⁷ In this case, however, the DE PSC does not provide any alternate household data to compare to Comcast’s 2000 Census data. Instead, the DE PSC refers generally to the population growth within the State of Delaware as evidence that Comcast has underestimated the number of households in the Franchise Area. While the DE PSC does claim that the fastest area of population growth in Delaware is in the Franchise Area at issue,³⁸ it provides no specific explanation, calculations, or

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a separate petition with a separate filing fee. CSR 8135-E includes Kent County (DE0034, DE0059, DE0070, DE0088 and DE0091) and New Castle County (DE0093) on PSID #000812. CSR 8136-E includes Kent County (DE0074) and Sussex County (DE0060, DE0076, DE0089, DE0090 and DE0092) on PSID #002027.

²⁸ Petitions at 5-9. 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.

²⁹ Comments of DE PSC at 5.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 6.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* See 47 C.F.R. § 76.905(c).

³⁶ Comments of DE PSC at 6.

³⁷ See *Bright House Networks, LLC*, 20 FCC Rcd 16823, 16827 at ¶ 10 (2005), citing *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁸ Comments of DE PSC at 5.

analysis as to how this precisely impacts the number of households in the Franchise Area and how this alters Comcast's DBS penetration figures. We agree with Comcast that the DE PSC speculates, but does not demonstrate with any specificity, that Comcast's household data should be higher based on Delaware's population growth.³⁹

14. The DE PSC's allegation that statewide annexations may cause an inflated number of DBS subscribers in the Franchise Area is equally without merit. Again, the DE PSC's allegations lack specificity and do not identify any particular annexations that may affect the situation or explain how such annexations would impact Comcast's DBS penetration calculation in this case. Moreover, even if an annexation required households to be subtracted, it would also require DBS subscribers in those households to be subtracted.

15. Similarly, with regard to the DE PSC's allegation of the inclusion of seasonal, occasional or recreational homes in Comcast's household figure, the DE PSC supplies only conjecture to support its belief that Comcast has failed to account for these homes and that this must mean that Comcast's penetration rate therefore must include these homes. As Comcast notes, although the DE PSC argues that approximately one-third of Sussex County's population is classified as seasonal residents,⁴⁰ it does not identify any evidence of seasonal homes associated with the Franchise Area at issue, which according to Comcast actually excludes incorporated communities and other portions of Sussex County.⁴¹ Comcast asserts that beach communities such as Bethany Beach, Ocean View, South Bethany, and other surrounding shore communities located in the southeastern portion of Sussex County, where seasonal homes would most likely be associated, are not part of the Franchise Area.⁴² Comcast states that the homes associated with these areas were omitted from Comcast's DBS penetration analysis.⁴³ On balance, we do not believe that the DE PSC has provided sufficient evidence on this issue to cast doubt upon Comcast's DBS penetration calculation.

16. The DE PSC has failed to refute the reliability of Comcast's 2000 Census household data. While the DE PSC alleges that the population growth in Delaware, the inclusion of seasonal households, and annexations within the State affect the household figure in the Franchise Area, it fails to provide any substantive evidence, such as more recent reliable household data for the Franchise Area to support its claims. In the absence of the submission of more reliable data, the Commission has upheld the reliance of cable operators on U.S. Census data in effective competition cases, even despite concerns that the data

³⁹ Comcast Reply at 5-6. In its Reply Comments in this proceeding, Comcast does state that it has overstated the households in Sussex County in its petition by inadvertently including incorporated municipalities in its calculation (referencing the Petition, Exhibit 7). Comcast states that instead of subtracting the households associated with the 25 incorporated municipalities in Sussex County from the total household figure in the county, it only subtracted the unincorporated community of Long Neck. As a result, the households for Sussex should be 46,851 (62,577 [total occupied housing units] – 15,726 [25 incorporated communities] = 46,851) and not 61,760 (62,577 [total occupied housing units] – 817 [Long Neck] = 61,760) as originally reported in the Petition. Comcast reports that although this adjustment has the effect of decreasing the denominator of the DBS penetration calculation, the numerator remains the same because the DBS figure was properly reported in Exhibit 6 to the Petition. Comcast asserts that the resulting DBS penetration rate in the Franchise Area should be 27.54%, instead of the 23.25% figure reported in Exhibit 8 to the Petition. In its Reply, Comcast submits a revised Exhibit 7 as Exhibit B showing the recalculated household figure for Sussex County. Exhibit C in the Reply contains a revised Exhibit 8 to the Petition demonstrating that the DBS penetration rate for the Franchise Area should be 27.54%. See Comcast Reply, n.18.

⁴⁰ See Comments of DE PSC at 6-7.

⁴¹ Comcast Reply at 6.

⁴² *Id.* at 6-7.

⁴³ *Id.* at 7. For a description of the Delmarva Franchise Area, see *supra* n.1.

might be considered outdated.⁴⁴ We therefore find that Comcast has met its burden in this regard.⁴⁵ We also note that if the DE PSC did submit alternative data in this case, the data would have to be substantial in order to reduce Comcast's 27.54 percent penetration figure to 15 percent.

17. The DE PSC further challenges Comcast's penetration methodology because of the inclusion of courtesy or complimentary DBS accounts.⁴⁶ Comcast responds that it is of no significance whether DBS service is available on a free or paid basis.⁴⁷ From its perspective, Comcast asserts that the offering of free DBS service presents more of a competitive challenge.⁴⁸ As Comcast correctly notes, the Commission previously has rejected arguments that complimentary accounts must be excluded from the DBS penetration analysis.⁴⁹ We also agree with Comcast that the DE PSC has provided no evidence in this case to suggest that there is anything more than a *de minimis* number of complimentary accounts in the Franchise Area. We therefore find no merit in the DE PSC's allegation.⁵⁰

18. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,⁵¹ 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.

19. 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.

⁴⁴ See, e.g., *Coxcom, Inc. d/b/a Cox Communications Northern Virginia*, 23 FCC Rcd 12130, 12134 at ¶ 10 (2008); *Bright House Networks, LLC*, 20 FCC Rcd 16823, 16827 at ¶ 10 (2005); *Mediacom Minnesota*, 18 FCC Rcd 12768, 12771 at ¶ 8 (2003).

⁴⁵ The DE PSC also filed "Sur-Reply Comments" in this proceeding. Such additional pleadings are not authorized pursuant to our rules. See 47 C.F.R. § 76.7(d). Nonetheless, even despite the DE PSC's failure to file a Motion to explain the extraordinary circumstances prompting the necessity for such filing, we will consider the pleading for purposes of having a complete record before us. In its Sur-Reply Comments, the DE PSC argues that Comcast has failed to meet its burden under the competing provider test. Specifically, the DE PSC argues that Comcast has failed to conform to 47 C.F.R. 76.905(c) because it only speculates that Bethany Beach and surrounding shore communities with which seasonal households would most likely be associated are not part of the Franchise Area. DE PSC Sur-Reply Comments at 2. We disagree. Comcast affirmatively states that the household data associated with the beach communities are omitted from Comcast's DBS analysis. Comcast Reply at 6-7. By any definition, beach or shore communities are more likely to contain seasonal housing and Comcast states that these homes are not part of the Franchise Area. The DE PSC has provided no data to contradict Comcast's submissions.

⁴⁶ Comments of DE PSC at 7.

⁴⁷ Comcast Reply at 7.

⁴⁸ *Id.*

⁴⁹ *Id.* at 8; see e.g., *Adelphia Cable Communications*, 20 FCC Rcd 20536, 20540 at ¶ 13 (2005) ("We do not believe the inclusion of complimentary accounts in the DBS subscriber report precludes a determination of effective competition. In the first place, we presume that the number of complimentary accounts is *de minimis* in number. Additionally, the fact that this *de minimis* number of DBS subscribers receives complimentary service enhances, rather than reduces, the cable operator's need to compete for these subscribers. A subscriber receiving free DBS service arguably would have to perceive significant choice in favor of cable service.").

⁵⁰ We also agree with Comcast that the DE PSC errs when it asserts that the competing provider test requires that "only billed customers" be counted for purposes of counting the number of DBS subscribers. See Comments of DE PSC at 7. The Commission's rules state that "each separately billed or billable customer" will count as a household subscribing to or being offered video programming services. 47 C.F.R. § 76.905(c).

⁵¹ Petitions at 5-9 and Exhibit 8; see also Comcast Reply at n.18 and Exhibit C.

III. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, **ARE GRANTED**.

21. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **ARE REVOKED**.

22. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵²

FEDERAL COMMUNICATIONS COMMISSION

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

⁵²47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8135-E and CSR 8136-E

COMMUNITIES SERVED BY COMCAST COMMUNICATIONS, LLC

Communities	CUID(s)	CPR*	2000 Census Households	Estimated DBS Subscribers
Kent County (CSR 8135-E)	DE0034 DE0059 DE0070 DE0088 DE0091	-----	27,068	12,455
(CSR 8136-E)	DE0074			
New Castle County (CSR 8135-E)	DE0093	-----	7,010**	0
Sussex County (CSR 8136-E)	DE0060 DE0076 DE0089 DE0090 DE0092		46,851***	9,831****
Total		27.54%	80,929	22,286

*CPR = Percent of competitive DBS penetration rate.