

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 7753-E
Petition for Determination of Effective)
Competition in Various Illinois and Kentucky)
Communities)

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 2011

Released: February 9, 2011

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, hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(1-2), 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 the "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").³ Additionally, Petitioner asserts that it satisfies the competing provider test in three communities⁴ by aggregating the DBS subscribership with the subscribership of South Central Rural Telephone, a local exchange carrier. 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 by the City of Paducah, one of the Communities listed on Attachment A. Petitioner filed a reply to the City's opposition.

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 Communications 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

¹ See 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(2).

³The Petitioner identified the DBS providers as DirecTV and EchoStar Communications Corporation ("EchoStar"). Dish, however, is a registered trademark of EchoStar.

⁴These are Cave City, Hiseville, and Horse Cave.

⁵ 47 C.F.R. § 76.906.

⁶ See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

within the relevant franchise area.⁷ 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.

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.⁸ This test is 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.⁹

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.¹⁰ 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.¹¹ 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.¹² 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 programming¹³ and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹⁴ 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.¹⁵ 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

⁷ See 47 C.F.R. §§ 76.906 & 907.

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

⁹ 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ See Petition at 3.

¹¹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹² 47 C.F.R. § 76.905(e)(2).

¹³ See 47 C.F.R. § 76.905(g). See also Petition at 4-5 .

¹⁴ See Petition at 5 and Exhibits 2 & 3.

¹⁵ See Petition at 3; Opposition at 3.

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 nineteen of the twenty-four Communities.¹⁶ Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association. The report identified the number of subscribers attributable to the DBS providers in five-digit zip codes. Petitioner then used a formula to allocate the subscribers in each five-digit zip code between those who were in a Community and those who were not.

7. In opposition, the City questions the accuracy of the data and the methodology upon which the Petitioner relies to satisfy the second prong of the competing provider test.¹⁷ Initially, the City asserts that the data relied upon by the Petitioner is insufficiently precise to determine whether the number of DBS subscribers cited actually reside within the designated franchise area.¹⁸ The City maintains that because the SBCA report, which relied upon two five digit zip codes,¹⁹ included household areas which lie outside the jurisdictional boundaries of the City, the Petitioner has not properly demonstrated that 15 percent of the households in the franchise area subscribe to DBS.²⁰ Although the City claims that the use of proportional figures by the Petitioner is “unfounded,” the Commission has previously held that this is an appropriate methodology for determining subscribers within a franchise area.²¹ The City also argues that the Petitioner should use nine-digit “zip+4” data to accurately determine households in the franchise area.²²

8. In reply, the Petitioner argues that the opposition is “entirely unsupported” and it fails to rebut the Petitioner’s effective competition showing.²³ Petitioner initially argues that the Commission has previously rejected similar unsupported uniform penetration arguments to those presented by the City and cite previous Commission decisions approving the use of similar allocation methods to those used in the Petition to determine subscribership penetration rates.²⁴ In addition, the Petitioner cites prior Commission precedent that have held that zip code plus four data is not required for the purpose of determining effective competition calculations.²⁵

9. We reject the City’s arguments. As the Petitioner correctly notes, the methodologies and

¹⁶ Petition at 5. 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 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 Exhibit 6 shows that both these determinations can be made for all five of the Communities not covered under paragraph 6 above. *Time Warner Cable*, 23 FCC Rcd 12069, 12071-72, ¶ 8 (MB 2008).

¹⁷ Opposition at 3.

¹⁸ Petition at 5.

¹⁹ These are 42001 and 42003. Petition at 5..

²⁰ Petition at 3; Opposition at Exhibit A.

²¹ Opposition at 4; Reply to Opposition at 2. See *Charter Commun.*, 21 FCC Rcd 11268, 11269-72, ¶¶ 4-7 (2006).

²² Opposition at 5.

²³ Reply to Opposition at 2.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 3, citing *Charter Commun.*, 22 FCC Rcd 10107 (2007).

data sources relied upon in the Petition have been repeatedly accepted by the Commission,²⁶ and the City has failed to present any information to sufficiently undermine the data and arguments presented by the Petitioner. Furthermore, the Petitioner has taken additional measures to supplement its five digit zip code information through the use of MBC's allocation methodology to gain a more precise figure.²⁷ The Petitioner has also presented accurate data to support its assertion that penetration rates in zip codes 42001 and 42003 are the same on both sides of the City's boundary, contrary to the City's unsupported assertions.²⁸ Finally, the Commission has previously acknowledged that although zip code plus four data is preferred, the use of five digit zip codes is sufficient in most cases to determine allocation.²⁹

10. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,³⁰ 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.

11. 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

12. 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 referred to as the "low penetration" test.³¹ 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.³²

13. 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.

²⁶ *Id.*

²⁷ Reply to Opposition at 2; Petition at 7.

²⁸ Reply at 4.

²⁹ Reply to Opposition at 3, citing *Charter Commun., Inc. et al.*, 19 FCC Rcd 6878, 6880-81, ¶¶ 8-11 (2004).

³⁰ Petition at 8 and Exhibit 7.

³¹ 47 U.S.C. § 543(l)(1)(A).

³² Petition at 8-9.

III. 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 Attachments A and B **IS REVOKED**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³³

FEDERAL COMMUNICATIONS COMMISSION

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

³³ 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
Brookport City	IL0471	59.33	450	267
Campbellsville City	KY0114	42.92	4,432	1,902
Cave City	KY0013	17.06	844	144**
Central City	KY0117	35.88	2,065	741
Clarkson City	KY0643	69.41	353	245
Drakesboro City	KY0333	43.31	247	107
Elizabethtown City	KY0107	18.54	9,306	1,725
Greenville City	KY0116	39.70	1,859	738
Hardin County	KY0640	30.37	4,358	14,348
Hiseville City	KY1208	17.02	94	16**
Hodgenville City	KY0115	37.65	1,235	465
Horse Cave City	KY0112	17.09	977	167**
Kevil City	KY0711	35.10	245	86
LaRue County	KY0750	33.49	1,312	3917
Leitchfield City	KY0110	51.75	2,485	1,286
Livingston Town	TN0060	42.51	1,543	656
McCracken County	KY0203	28.88	315691	3433
Metropolis City	IL0470	39.23	2,896	1,136
Muhlenberg County	KY0731	44.26	7,610	3,368
Paducah City	KY0189	18.12	11,825	2,143
Powderly City	KY0118	25.73	342	88
South Carrollton City	KY0334	37.14	70	26
Taylor County	KY0751	45.16	4,801	2,168
Vine Grove City	KY0642	40.21	1,619	651

*CPR = Percent of competitive DBS penetration rate.

** = Percent of competitive DBS and LEC 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
LaRue	KY0750	3,917	740	18.89%
Massac	IL0483	2,750	222	8.07%
Muhlenberg County	KY0731	7,610	1,691	22.22%
Radcliff	KY0396	8,487	36	0.42%