

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

In the Matter of)
)
Mediacom Delaware LLC)
) CSR 8019-E
Petition for Determination of Effective)
Competition in the unincorporated unnamed areas)
of Sussex County, DE and the unincorporated area)
of Sussex County known as Clarksville, DE)

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2011

Released: March 9, 2011

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

I. INTRODUCTION AND BACKGROUND

1. Mediacom Delaware LLC, 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 those communities listed on Attachment A and hereinafter referred to as "Communities or the "unincorporated areas." Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(D) of the Communications Act of 1934, as amended ("Communications Act"), and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by Verizon Communications, Inc., hereinafter referred to as "Verizon" or "Competitor." The petition is opposed by the Delaware Public Service Commission ("DEPSC").

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

1 Mediacom states that the unincorporated areas that are the subject of this Petition are treated as one franchise area because the unincorporated unnamed areas of Sussex County and the unincorporated area known as Clarksville are served under a single Franchise Agreement even though these areas are identified by three separate CUID numbers: Clarksville, DE - CUID No. DE0032, Sussex (E), DE - CUID No. DE0025, and Sussex (SE), DE - CUID No. DE0030. Petition at 1.

2 See 47 U.S.C. § 543(l)(1)(D).

3 47 C.F.R. § 76.905(b)(4).

4 Mediacom states in its Petition that "[t]he unincorporated area of Sussex County has filed FCC Form 328 to certify it with the power to regulate basic cable rates [and] . . . requests that the Commission revoke such certification pursuant to Section 76.914(c) of its rules." Petition at 1 n.1. In a later filed Erratum, Mediacom states that the DEPSC correctly noted in its Opposition that the authority to regulate basic rates in the unincorporated areas of Sussex County rests with the DEPSC and not with the unincorporated portions of the County. Mediacom therefore amends its Petition and requests that the Commission revoke the certification of the DEPSC to regulate basic cable rates in the subject unincorporated areas.

5 47 C.F.R. § 76.906.

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

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 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 provided by the competing unaffiliated cable operator.⁸ This test is 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.⁹

5. It is disputed by the DEPSC that Mediacom has met its burden with regard to the sufficiency of local exchange carrier Verizon’s build-out in this case.¹⁰ The DEPSC claims that Mediacom has failed to provide in its filing the extent of the service offered by Verizon in Mediacom’s franchise area or to indicate the area in which Verizon intends to build out in the franchise area.¹¹ The DEPSC states that it granted Verizon a statewide franchise in Delaware on November 21, 2006, to provide video programming services to consumers.¹² The DEPSC states that no specific plan for build out was provided by Verizon.¹³ The DEPSC notes that on Verizon’s January 23, 2006, Cable Franchise Application, Verizon stated that its “Initial Service Area” to be built out in five years would be constructed to serve several unincorporated geographic areas within Delaware, but the DEPSC says only one, Angola, would be located in Mediacom’s franchise area.¹⁴ The DEPSC also notes that beyond the Initial Service Area, Verizon could choose, but not be compelled, to extend its video services to other

⁷ See 47 C.F.R. §§ 76.906-.907.

⁸ See 47 U.S.C. § 543(l)(1)(D).

⁹ 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*”).

¹⁰ DEPSC Opposition at 3-4. Although the DEPSC is challenging the extent of service being provided to the Communities by Verizon, the DEPSC does not challenge that the two MVPD providers are unaffiliated.

¹¹ DEPSC Opposition at 3.

¹² *Id.* and Attachment A (In the Matter of the Application of Verizon Delaware Inc., For a Cable Television Franchise to Serve the Unincorporated Areas of the State of Delaware - Findings, Opinion, and Order No. 7074, PSC Docket No. 06-40, granted November 21, 2006) (“DEPSC Order No. 7074”).

¹³ DEPSC Opposition at 3.

¹⁴ *Id.* and Attachment B (In the Matter of the Notice by Verizon Delaware Inc. of its Intent to Provide Video Services in the Unincorporated Areas of the State of Delaware (opened November 8, 2005), PSC Docket No. 05-389 (received by the DEPSC on January 23, 2006)). “Initial Service Area – Verizon Delaware proposes to offer Cable Service within the following unincorporated geographic areas within the State of Delaware to subscribers in the following wire centers: Angola, Dover, Hockessin, Holly Oak, Middletown, Newark, Talleyville, Penn Rose, and Wrangle Hill” Verizon Delaware Inc.’s Application for a Cable Television Franchise at 1.

additional service areas.¹⁵

6. The DEPSC further asserts that the map submitted by Mediacom to show that Verizon's plant covers a substantial portion of its franchise area does not constitute real evidence because it lacks substantiation and is based on staff observations, only covers a portion of the franchise area, and is inconsistent with Verizon's application to the DEPSC.¹⁶ According to the DEPSC, Mediacom has failed to show that Verizon is technically and actually able to provide service that substantially overlaps Mediacom's service within its franchise area.¹⁷

7. Mediacom argues that the DEPSC's claim is overbroad because its petition does not apply to a Delaware state-wide build-out by Verizon, but only involves the establishment of effective competition by Verizon in the Mediacom franchise area at issue.¹⁸ Regarding the sufficiency of Verizon's build-out in that franchise area, Mediacom states that the LEC test does not require any threshold percentage of homes passed or penetration rate to be met.¹⁹ Mediacom asserts that while the maps included in Verizon's Franchise Agreement delineating its Initial Service Area are not clear, nonetheless Verizon has already built out some of its Initial Service Area and shall offer service throughout it in five years.²⁰ Mediacom also claims that the term "Initial Service Area" implies that after this area is completed, Verizon will continue to build out other areas. Mediacom claims that Verizon has built out its system so that it substantially overlaps Mediacom's service area and that Verizon now offers service to over 50 percent of the homes to which Mediacom offers service in the franchise area.²¹

8. Mediacom also defends the sufficiency of the maps that it included in its petition, as prepared by its employees, as proof of the extent of Verizon's build out of its system.²² Mediacom states that it included the declarations of two employees who declared under penalty of perjury in their statements that Verizon's system build out is accurately reflected in the submitted maps.²³ Mediacom argues that this same type of evidence has served as sufficient proof in many other effective competition cases.²⁴ Mediacom asserts that the DEPSC has not countered its submitted Exhibits with any evidence that clearly defines Verizon's service area.²⁵ Mediacom notes that the DEPSC only points to the maps submitted to the DEPSC itself attached to Verizon's Franchise Agreement, but that these maps are poorly

¹⁵ DEPSC Opposition at 3 and Attachment A (DEPSC Order No 7074 at 3).

¹⁶ DEPSC Opposition at 4.

¹⁷ *Id.*

¹⁸ Mediacom Reply at 2.

¹⁹ *Id.*

²⁰ *Id.* at 3. See Petition at Exhibit F (DEPSC Order No. 7074) at Exhibit A (Franchise Agreement, Section 3.2.1, Exhibit D).

²¹ Mediacom Reply at 3-4.

²² *Id.* at 4-5. See Petition at Exhibits C and D.

²³ Mediacom Reply at 4. See Petition at Exhibit C (Declaration of Mitchell Grubbs, Director of Technical Operations for Mediacom, dated May 28, 2008) and general declaration submitted with the Petition (Declaration of David Kane, Mediacom Regional Vice President, who oversees the management of Mediacom's cable system that includes the Franchise area, dated July 3, 2008).

²⁴ Mediacom Reply at 4, citing *MCC Iowa LLC et al.*, 20 FCC Rcd 5383, 5384-85 at ¶ 5 (2005); *MCC Iowa LLC and MCC Georgia LLC*, 20 FCC Rcd 4973, 4974 at ¶ 3 (2005); *MCC Iowa LLC*, 19 FCC Rcd 18844, 18845-46 at ¶ 5 (2004).

²⁵ Mediacom Reply at 4-5.

defined.²⁶ Mediacom therefore contends that it is unclear what the DEPSC is claiming to be Verizon's cable service area.²⁷

9. The DEPSC also filed a "Response to Mediacom's Reply to Opposition" and Mediacom in turn filed a "Reply to Response" in this proceeding. Such additional pleadings are not authorized pursuant to our rules.²⁸ Nonetheless, and despite the parties' failure to file Motions to explain the extraordinary circumstances prompting the necessity of such filings, we will incorporate the pleadings into this proceeding for purposes of having a complete record before us. We note that this has been an unusually complex dispute, in which important information (the extent of Verizon's competing service) could not be known with certainty by either party for a substantial time.

10. The DEPSC's Response challenges the accuracy of the declarations submitted by Mediacom, claiming that neither certifies to the accuracy of the maps included in the Petition as Exhibits C and D.²⁹ The DEPSC asserts that the two maps are reflective of two different franchise areas for Mediacom.³⁰ The DEPSC states that "Exhibit C shows Mediacom with a portion of its Franchise Area at the bottom of Sussex County to the right of Whaley's Road and to the left of the Cyprus Swamp with Route 26 going through this piece of the Franchise Area."³¹ The DEPSC further states that "[a]n examination of Exhibit D reveals the exclusion of this portion of the Franchise Area, even though it purports to show the overlapping FiOS service area over the Franchise Area."³² The DEPSC also notes that for the first time in its Reply pleading, Mediacom makes an unsubstantiated claim that Verizon now offers service to over 50 percent of the homes in which Mediacom offers service in the franchise area. But, the DEPSC alleges, Mediacom fails to tie this number to any documents provided in its original Petition.³³ Mediacom's Reply to Response does not specifically respond to these claims, but rather states that it has met its burden of proof and the coverage area maps it has submitted in its Petition have been routinely accepted by the Commission.³⁴

11. Because of the conflicting information in this proceeding regarding the sufficiency of Verizon's build out, a letter of inquiry was sent from the Media Bureau to Mediacom requesting that a supplemental pleading be filed in order to update the record regarding current market conditions for the franchise area in question.³⁵ The Media Bureau inquiry letter requested that "[t]he supplemental pleading to the extent possible, should specifically address Verizon's current build-out of its cable systems pursuant to the franchise agreement, and, if available, the number of Verizon subscribers and the number of homes passed."³⁶

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See* 47 C.F.R. § 76.7(d).

²⁹ DEPSC Response to Mediacom's Reply to Opposition at 2, n.6. We note that this is an argument that could have been made in the DEPSC's Opposition, thus not prompting the filing of an additional pleading.

³⁰ DEPSC Response to Mediacom's Reply to Opposition at n.6.

³¹ *Id.*

³² *Id.*

³³ DEPSC Response to Mediacom's Reply at 3.

³⁴ Mediacom Reply to Response at 1-2.

³⁵ *See* Letter from Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau to James McKnight, Mediacom Communications Corporation (April 17, 2009) ("Media Bureau inquiry letter to Mediacom").

³⁶ Media Bureau inquiry letter to Mediacom at 1. In addition, the letter stated that "[i]f Mediacom is unable to produce information that adequately reflects current market conditions, it should so inform the Commission and we

(continued....)

12. Mediacom filed an Erratum to its Petition in response to the Media Bureau's inquiry letter.³⁷ In a separate letter to Verizon, Mediacom states that it requested from Verizon a map of Sussex County that would indicate the portion of the county where Verizon is currently providing cable service, information regarding the number of Verizon customers serving Sussex County, and the number of homes passed in the county by Verizon.³⁸ Mediacom states that it received a response letter from Verizon declining to provide this information. Verizon's letter argued that the level of subscribership to a LEC's video service is irrelevant for purposes of determining effective competition under the LEC test and that the availability of Verizon's FiOS TV service is a matter of public record in Sussex County.³⁹ Also included in Mediacom's Erratum is a new declaration from a Mediacom employee attesting to the accuracy of the maps already submitted in Mediacom's Petition.⁴⁰

13. The Media Bureau then sent another inquiry letter directly to Verizon stating that it wished to resolve the disputed issue of material fact that had arisen between Mediacom and the DEPSC regarding the geographic scope of Verizon's cable service. The Bureau requested that Verizon directly provide it with a map of sufficient clarity for Sussex County that indicated the portion of the county where Verizon is currently providing cable service.⁴¹ Verizon provided the Bureau with such a map stating that it reflected the initial service area in Sussex County in which Verizon is currently offering cable service pursuant to the terms of its November 22, 2006, franchise.⁴²

14. Based on the record before us, we find that Verizon is "technically and actually able to provide service that substantially overlaps the incumbent cable operator's service in the franchise area."⁴³ Our comparison of the map submitted by Mediacom to identify Verizon's cable service area within the boundaries of Sussex County⁴⁴ with the map submitted by Verizon upon the Bureau's request⁴⁵ demonstrates that Verizon's system covers approximately one third of the territory served by Mediacom. We conclude that Verizon's service area is a substantial portion of Mediacom's franchise area.. We therefore reject DEPSC's claims in this regard.

15. The DEPSC further contends that Mediacom has failed to make an adequate showing for LEC effective competition purposes to demonstrate that Verizon offers video programming that is comparable to Mediacom's because it is lacking some public, educational, and government or "PEG"

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will request such information from Verizon in accordance with Section 76.907(c) of the Commission's rules." Media Bureau inquiry letter to Mediacom at n.1.

³⁷ Mediacom Erratum (July 1, 2009).

³⁸ *Id.* at 1.

³⁹ *Id.*, referencing a letter from Frederick C. Pappalardo, Verizon Area Counsel – Mid-Atlantic to James McKnight, Mediacom Communications Corporation (June 19, 2009).

⁴⁰ Mediacom Erratum at 2 and Declaration of David Rickards, Hybrid Fiber Coax Supervisor for Mediacom (June 23, 2009).

⁴¹ See Letter from Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau to Frederick C. Pappalardo, Area Counsel – Mid-Atlantic, Verizon (January 6, 2011) (Media Bureau inquiry letter to Verizon).

⁴² See Letter from M. Eric Edgington, Associate General Counsel, Legal Department, Verizon to Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau (January 26, 2011).

⁴³ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 at ¶ 13.

⁴⁴ Petition, Exhibit D.

⁴⁵ See *supra* n. 42.

channels in its lineup.⁴⁶ The DEPSC asserts that while Mediacom offers a Channel 78 Government Access channel, Verizon does not provide the channel.⁴⁷ In addition, the DEPSC notes that WHYI, a Wilmington PBS station, is offered by Mediacom but not Verizon's FiOS.⁴⁸ Mediacom responds that for purposes of the LEC test, the statute requires that the video programming services offered by the two providers must be comparable, but it does not require that the channel lineups be identical.⁴⁹ Mediacom notes that while Verizon may not carry the Government Access Channel or the PBS station cited by the DEPSC, Verizon does offer two PBS stations that are comparable to the PBS station offered by Mediacom.⁵⁰

16. The DEPSC misunderstands our standard for what constitutes comparable programming for purposes of effective competition. 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 programming⁵¹ and is supported in this petition with copies of channel lineups for the Competitor.⁵² Mediacom has met its burden in this regard and the Commission's standard for comparable programming for LEC effective competition purposes has been satisfied.

17. The DEPSC's final objection focuses on whether Mediacom has made a proper showing with regard to whether Verizon is marketing its cable service in such a manner that potential customers are reasonably aware that they may purchase the service from Verizon.⁵³ The DEPSC argues that Mediacom only provides one piece of direct mail received by one of its customers from Verizon FiOS as proof that Verizon is marketing its service in the franchise area.⁵⁴ Mediacom counters that it submitted five mail pieces to serve as advertisements for Verizon's service and not merely one piece of direct mail.⁵⁵ In addition, Mediacom notes that the Commission previously has recognized as evidence that residents are reasonably aware of a competitor's cable service when that competitor has cable service customers in the franchise area.⁵⁶ In this case, Mediacom asserts that there are many Verizon customers in the franchise area.⁵⁷

18. In order to show LEC effective competition, there is no requirement that a LEC's service

⁴⁶ DEPSC Opposition at 5.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Mediacom Reply at 7; *see also* 47 C.F.R. § 76.905(b)(4).

⁵⁰ Mediacom Reply at 7.

⁵¹ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 7.

⁵² *See* Petition at 7 and Exhibit H.

⁵³ DEPSC Opposition at 4.

⁵⁴ *Id.* at 4-5, citing Mediacom Petition at Exhibit B.

⁵⁵ Mediacom Reply at 6, citing Mediacom Petition at Exhibits B and E.

⁵⁶ Petition at 5-6; Mediacom Reply at 6. *See, e.g., ACC Cable Communications FL-VA, LLC*, 18 FCC Rcd 7110, 7112 at ¶ 7 (2003) ("It is also well settled that because subscribers in the community have signed up for an MVPD's service, it must be assumed that other residents throughout the area are reasonably aware of that MVPD's service offerings."); *Kansas City Cable Partners*, 16 FCC Rcd 18751, 18753 at ¶ 6 (2001) ("As noted by KCCP, because subscribers in the community already have signed up for ECC's service, it must be assumed that other residents throughout the area are reasonably aware of ECC's cable service offerings.").

⁵⁷ Petition at 5-6.

reach a certain level of subscribership.⁵⁸ Additionally, the Commission does not require community-specific advertising as some small franchise areas may have no media outlet specifically focused on them.⁵⁹ 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.⁶⁰ In this case, we find that 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*.⁶¹

19. 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.

⁵⁸ See *Armstrong Communications, Inc.*, 16 FCC Rcd 1039, 1043-44 at ¶ 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 at ¶ 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”).

⁵⁹ *Subsidiaries of Cablevision Systems Corporation*, 23 FCC Rcd 14141, 14155 at ¶ 43 (2008).

⁶⁰ *Id.*; see also *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 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.”).

⁶¹ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15.

III. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Mediacom Delaware LLC **IS GRANTED**.

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

22. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁶²

FEDERAL COMMUNICATIONS COMMISSION

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

⁶² 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8019-E

COMMUNITIES SERVED BY MEDIACOM DELAWARE LLC

Communities	CUIDs
Unincorporated unnamed Area of Sussex County (E)	DE0025
Unincorporated unnamed area of Sussex County (SE)	DE0030
Unincorporated area of Sussex County known as Clarksville	DE0032