

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

In the Matter of)
Comcast Cable Communications, LLC)
Petition for Determination of Effective)
Competition in Georgia and Tennessee Franchise)
Areas)
CSR 8478-E

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 2011

Released: May 24, 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 a petition pursuant to Sections 76.7 and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in certain Georgia and Tennessee Franchise Areas. Petitioner alleges that its cable system serving the community of Chattanooga ("the Attachment A Community") is subject to effective competition pursuant to Section 623(l)(1)(C) 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 Attachment A Community because of the competing cable service provided by the Electric Power Board of Chattanooga, hereinafter referred to as "Competitor" or "EPB." Petitioner also alleges that its cable systems serving the remainder of the Communities, as well as Chattanooga, ("the Attachment B Communities"), are subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act, and the Commission's implementing rules, and therefore exempt from cable rate regulation in the Attachment B Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH"). The petition is unopposed.

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 petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments A and B.

1 See 47 U.S.C. § 543(l)(1)(C).

2 47 C.F.R. § 76.905(b)(3).

3 See 47 U.S.C. § 543(1)(1)(B).

4 47 C.F.R. § 76.905(b)(2).

5 47 C.F.R. § 76.906.

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

7 See 47 C.F.R. §§ 76.906-.907(b).

II. DISCUSSION

A. The Municipal Provider Test

3. Section 623(1)(1)(C) of the Communications Act provides that a cable operator is subject to effective competition if a multichannel video programming distributor (“MVPD”) operated by the franchising authority for that area offers video programming to at least 50 percent of the households in the franchise area.⁸ This is otherwise referred to as the “municipal provider” test.

4. The first prong of the municipal provider test requires that the franchise area be served by an MVPD that is operated by the franchising authority for that area. An MVPD is “a person such as, but not limited to, a cable operator . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming.”⁹ It is undisputed that the Competitor in this case is a public power system that operates as an MVPD offering various cable television packages and services.¹⁰

5. To satisfy the second prong of the test, the Petitioner must show that the Competitor offers service to more than 50 percent of the households in the franchise area. The Commission’s rules state that, for purposes of determining effective competition, an MVPD’s service will be deemed “offered” under the following circumstances: (1) when the MVPD is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and (2) when no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the MVPD.¹¹ The Petitioner has demonstrated that the Competitor is physically able to deliver service to potential subscribers.¹² The Petitioner also has shown that there are no regulatory, technical or other impediments to prevent households from subscribing to the Competitor’s service.¹³ Finally, Petitioner has demonstrated that potential subscribers

⁸ See 47 U.S.C. § 543(1)(1)(C).

⁹ 47 U.S.C. § 522(13); see also 47 C.F.R. § 76.905(d).

¹⁰ Petition at 3-4. In its 2010 Annual Report, EPB describes itself as “a municipal utility and enterprise fund of the City of Chattanooga, Tennessee.” EPB 2010 Annual Report at 22 (attached as Exhibit 1 to the Petition). In addition, on the EPB website, the entity is described as a “non-profit agency of the City of Chattanooga.” EPB website at <http://www.epb.net/about/ou-company-and-history> (attached as Exhibit 2). With regard to cable television packages and services, EPB refers to its offerings as “FI TV,” which it makes available to Chattanooga residents through its EPB Fiber Optics unit. The website also includes a FI TV Channel guide listing over 100 video channels. EPB website at <https://epbfi.com>, <https://epbfi.com/order-now/>, and <https://epbfi.com/tv/> (attached as Exhibit 2). Petitioner further states that it has confirmed that EPB Fiber Optics makes its FI TV service available to Chattanooga residents and surrounding communities. See Letter to Steven Horvitz, Davis, Wright, Tremaine LLP from Frederick L. Hitchcock, Chambliss, Bahner & Stophel, P.C. – August 20, 2010 (“Horvitz Letter”) (attached as Exhibit 3).

¹¹ 47 C.F.R. § 76.905(e)(1)(2).

¹² Petition at 5. Petitioner states that counsel for EPB’s Fiber Optic unit expressly confirmed the availability of EPB’s FI TV cable service to an estimated 58,240 “residential in service premises” in Chattanooga. See Exhibit 3 (Horvitz Letter at 2). When this number is compared with 2010 U.S. Census households for Chattanooga, Petitioner asserts that there is an 82% availability rate for FI TV within Chattanooga ($58,240 \div 70,749 = 82\%$). The 2010 U.S. Census figures for Chattanooga are attached as Exhibit 4. Moreover, Petitioner asserts that articles on www.chattanooga.com and in the *Chattanooga Times Free Press* reflecting recent EPB announcements indicate that EPB’s fiber optic network is now complete and its communications services are available to EPB’s entire service area, which includes Chattanooga (articles attached as Exhibit 5).

¹³ Petition at 5-6. Citing EPB’s 2010 Annual Report, Petitioner notes that “the City Council of the City of Chattanooga approved and authorized EPB to provide voice, Internet and video services to residential customers” on September 25, 2007. EPB 2010 Annual Report at 22 (attached as Exhibit 1). Petitioner further states that these

(continued...)

are reasonably aware of the availability of the Competitor's cable television service in Chattanooga.¹⁴

6. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable system serving Chattanooga, the Attachment A Community, has met the municipal provider test and is subject to effective competition.

B. The Competing provider Test

7. 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 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.¹⁵ This test is referred to as the "competing provider" test.

8. 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.¹⁶ It is undisputed that the Attachment B 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.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 We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Attachment B Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁹ 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 programming²⁰ and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.²¹ Further,

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services were made available to residential customers beginning in 2009. EPB website at <http://www.epb.net/about/ou-company-and-history> (attached as Exhibit 2). Petitioner asserts that currently FI TV is available to a vast majority of Chattanooga residents (citing Horvitz letter attached as Exhibit 3).

¹⁴ Petition at 6. The Petitioner states that the Commission previously has looked to an MVPD's existing service to community residents as evidence that they are reasonably aware of the availability of an MVPD's services in the community. *See, e.g., ACC Cable Communications FL-VA, LLC*, 18 FCC Rcd 7110, 7112 at ¶ 7 (2003). Petitioner notes that more than 7,500 Chattanooga residents subscribe to EPB's FI TV service. *See* Horvitz Letter at 3 (attached as Exhibit 3). Therefore, Petitioner asserts that because a large number of Chattanooga residents already subscribe to EPB's cable service, it cannot be credibly argued that consumers in the Chattanooga franchise area are not reasonably aware of EPB's FI TV cable television service.

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

¹⁶ 47 C.F.R. § 76.905(b)(2)(i).

¹⁷ *See* Petition at 7-9.

¹⁸ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁹ 47 C.F.R. § 76.905(e)(2).

²⁰ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 9.

²¹ *See* Petition at 9, Exhibit 6.

Petitioner states that EPB offers similarly comparable programming services.²² 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.²³ Accordingly, we find that the first prong of the competing provider test is satisfied.

9. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Further, as Petitioner asserts, the Commission's rules provide that once the first prong of this test is satisfied, as it is with the DBS offerings in this case, the subscribers of all qualifying MVPDs count toward the 15 percent penetration figure necessary for a determination of effective competition, even if they are not available themselves to more than 50 percent of households.²⁴ Therefore, Petitioner notes that the competing provider penetration figures for each of the Attachment B Communities include subscribers from EPB, as well as from the two DBS providers.²⁵ Petitioner further asserts that it is the largest MVPD in the Communities.²⁶ Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.²⁷ Petitioner also asserts that its subscribership exceeds EPB subscribership in each of the Attachment B Communities.²⁸

10. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,²⁹ as reflected in Attachment B, 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 Attachment B Communities. Therefore, the second prong of the competing provider test is satisfied for each of those Communities. 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 B.

²² See Petition at 9, Exhibit 2.

²³ See Petition at 7.

²⁴ See Petition at 10; see also 47 C.F.R. § 76.905(f); *Time Warner Entertainment Co., L.P. et al. v. FCC*, 56 F.3d 151, 189 (D.C. Cir. 1995).

²⁵ See Petition at 10.

²⁶ See Petition at 11; attached Declaration of Warren Fitting, Director of Rate Regulation for Comcast Cable Communications, LLC (February 11, 2011).

²⁷ Petition at 10-11. 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.

²⁸ See Petition at 11.

²⁹ Petition at 12, Exhibit 4 and Exhibit 10.

III. ORDERING CLAUSES

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

12. **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**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁰

FEDERAL COMMUNICATIONS COMMISSION

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

³⁰ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8478-E

COMMUNITY SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Community CUID

Chattanooga TN0062

ATTACHMENT B

CSR 8478-E

COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers	EPB Fiber Optics Subscribers
Chattanooga	TN0062	22.36%	70,749	8,292	7,527
East Ridge	TN0066	23.68%	9,446	1,184	1,053
Hamilton County	TN0173	26.26%	38,025	8,005	1,981
Red Bank	TN0065	23.09%	5,410	629	620
Ridgeside	TN0124	28.97%	145	11	31
Rossville	GA0192	19.33%	1,650	227	92
Soddy-Daisy	TN0187	20.32%	5,074	946	85

*CPR = Percent of competitive penetration rate of both DBS and EPB.