

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

In the Matter of )
Comcast Cable Communications, LLC ) MB Docket No. 13-134, CSR-8797-E
Petition for Determination of Effective )
Competition in Five Minnesota Franchise Areas )

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2013

Released: November 15, 2013

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC ("Comcast" or "the Petitioner"), filed with the Commission a petition pursuant to Sections 76.7 and 76.907 of the Commission's rules for a determination that Comcast is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as the "Communities." Comcast alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) 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 two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH"). An Opposition to Comcast's petition was filed on behalf of the Communities by the Ramsey/Washington Counties Suburban Cable Communications Commission ("Ramsey/Washington"). Comcast filed a Reply.

II. DISCUSSION

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

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 Opposition of the Ramsey-Washington Counties Suburban Cable Communications Commission to Comcast's Petition for Special Relief ("Opposition"), dated June 10, 2013. Ramsey/Washington is a body created pursuant to Minnesota law to regulate rates for cable service on behalf of its constituent local governments. Those governments include the five communities named in the petition. Id. at 1.

4 Reply to Opposition for Special Relief ("Reply"), dated June 20, 2013.

5 47 C.F.R. § 76.906.

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

within the relevant franchise area.<sup>7</sup> For the reasons set forth below, we grant the petition based on our finding that Comcast is subject to effective competition in the Communities.

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.<sup>8</sup> This test is referred to as the “competing provider” test.

4. The first part 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.<sup>9</sup> It is undisputed that the Communities are “served by” both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Comcast 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.<sup>10</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part 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.<sup>11</sup> 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 programming<sup>12</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.<sup>13</sup> Also undisputed is Comcast’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.<sup>14</sup> Accordingly, we find that the first part of the competing provider test is satisfied.

5. 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 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.<sup>15</sup> Petitioner asserts that it is the largest MVPD in the Attachment A

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<sup>7</sup> See 47 C.F.R. §§ 76.906 & -907(b).

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

<sup>9</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup> See Petition at 3.

<sup>11</sup> See, e.g., *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (MB 2006).

<sup>12</sup> See 47 C.F.R. § 76.905(g). See also Petition at 5.

<sup>13</sup> See Petition at Exhibit 2.

<sup>14</sup> See *id.* at 2-3.

<sup>15</sup> *Id.* at 6-7.

Communities.<sup>16</sup>

6. Ramsey/Washington does not challenge the accuracy of the data submitted by Comcast, which demonstrates that it is subject to effective competition in the Communities, rather Ramsey/Washington challenges the overall concept of relying on data from DBS providers as part of the effective competition showing.<sup>17</sup> Ramsey/Washington contends that DBS providers do not provide comparable programming to wired cable providers nor does DBS competition represent effective competition to cable operators because DBS providers do not provide a meaningful restraint on cable rates.<sup>18</sup> Therefore, according to Ramsey/Washington, the Commission has the authority to act in the public interest and deny the petition or withhold action on the petition.<sup>19</sup>

7. We have rejected similar arguments in the past and do so again here. The Commission is compelled by Sections 602 and 623 of the Communications Act to consider DBS competition when evaluating whether a cable operator is subject to effective competition.<sup>20</sup> As we have said previously, “the statute generally defines the class of cable competitors as MVPDs, and specifically defines DBS operators as an MVPD. We have no authority to alter the statute, and therefore, we may not exclude DBS providers from the class of MVPDs that we consider in the competing provider test.”<sup>21</sup> Ramsey/Washington’s objection that DBS providers do not provide comparable programming because they do not provide PEG access channels is also unavailing and has been previously rejected by the Commission, which has “repeatedly held that the absence of PEG channels from competing service does not disqualify its programming from being ‘comparable to cable operators’ for purposes of determining effective competition.”<sup>22</sup>

8. With respect to Ramsey/Washington’s argument that the public interest demands we no longer use DBS data to establish effective competition, we reiterate that Congress provided the Commission with expressly crafted tests for determining effective competition that do not instruct the Commission to take into account the public interest in determining the existence or non-existence of effective competition. There is no statutory basis to delay basic rate deregulation in a franchise area until the arrival of perfect competition there and the resolution of all issues between a cable operator and a

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<sup>16</sup> See *id.* at 8 and attached Declaration of Warren Fitting, Senior Director of Regulatory Accounting for Comcast Cable Communications, LLC (May 6, 2013).

<sup>17</sup> See Opposition at 2-9.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.* at 9-11.

<sup>20</sup> See 47 U.S.C. § 543(l)(1)(B) (specifying that effective competition exists when two unaffiliated multichannel video programming distributors offer comparable video programming to at least 50 percent of the households in a franchise area and the number of households in the franchise area subscribing to other multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area); 47 U.S.C. § 522(13) (defining a multichannel video programming distributor to include “a direct broadcast satellite service.”).

<sup>21</sup> *Comcast Cable Communications, LLC*, 25 FCC Rcd 13340, 13344-45 (MB 2010); see also *Comcast Cable Communications, LLC*, 25 FCC Rcd 12783, 12784-85 (MB 2010) (“This challenge to counting DBS providers as MVPDs competing with cable operators disregards the fact the definition of ‘MVPD’ is in a statute, which we have no authority to alter. DBS providers are explicitly included in the statutory definition and, therefore, we may not exclude them from the class of MVPDs that we consider in the competing provider test.”) (internal citations omitted).

<sup>22</sup> *Comcast Cable Communications, LLC*, 26 FCC Rcd 3993, 3994 (MB 2011).

franchise authority to the latter's satisfaction.<sup>23</sup> Accordingly, we reject Ramsey/Washington's policy-based objections to Comcast's evidence concerning the second part of the competing provider test.

9. We also disagree with Ramsey/Washington that we have authority to suspend our rules that permit a cable operator to rely on DBS data to establish effective competition. Our rules allowing for the use of DBS data to establish effective competition are directly drawn from Sections 602 and 623 of the Communications Act, and the decisions upon which Ramsey/Washington rely do not establish that the Commission may suspend its rules that implement a specific statutory test.<sup>24</sup>

10. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,<sup>25</sup> 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. Based on the foregoing, we conclude that Comcast has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Comcast is subject to effective competition in the Communities listed on Attachment A.

### 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 Attachment A **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>26</sup>

#### FEDERAL COMMUNICATIONS COMMISSION

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<sup>23</sup> See, e.g., *Comcast Cable Communications, LLC*, 25 FCC Rcd 12819, 12822 (MB 2010) ("Having reached a determination that effective competition exists, no additional, free-ranging inquiry into whether Comcast's requested relief is in the public interest is necessary or contemplated by the statute.").

<sup>24</sup> Ramsey/Washington's citation of the *Special Access for Price Cap Local Exchange Carriers* 2012 order for the proposition that the Commission can suspend its own rules as necessary is not applicable to this situation. See 27 FCC Rcd 10557 (2012). As Comcast points out in its Reply, special access rates are regulated pursuant to a general statutory obligation under 47 U.S.C. §§ 201 and 202, not a specific statutory test to determine effective competition as provided in 47 U.S.C. § 543. See Reply at 5-6. Similarly, Ramsey/Washington's citation of *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) is readily distinguishable. At issue in that case was the legitimacy of a change in the Commission's forbearance policies for incumbent local exchange carriers, but that statutory provision, 47 U.S.C. § 160, expressly authorizes forbearance, whereas Section 623 permits no such flexibility.

<sup>25</sup> CSR-8718-E Petition at 6-8, Exhibits 4-6.

<sup>26</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## MB Docket No. 13-134, CSR-8797-E

## COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated DBS Subscribers</b>
Dellwood	MN0314	19.89%	372	74
Mahtomedi	MN0316	18.29%	2,827	517
Maplewood	MN0317	20.29%	14,882	3,020
White Bear	MN0324	22.27%	4,261	949
White Bear Lake	MN0321	20.11%	9,945	2,000

\*CPR = Percent of competitive DBS penetration rate.