

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

In the Matter of)	
)	CSR 7757-E
Comcast Cable Communications, LLC)	CSR 7856-E
)	CSR 8028-E
Petitions for Determination of Effective)	
Competition in Ten Communities in Washington)	

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 2013

Released: December 2, 2013

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC (“Comcast” or the “Company”), 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 the Company is subject to effective competition in the ten Washington State communities listed on Attachment A (the “Communities”). Comcast alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (the “Act”),¹ and the Commission’s implementing rules,² and are therefore exempt from regulation of the rates for its basic cable service in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). Oppositions to the petitions were filed by the City of Tumwater in CSR 7757-E;³ the Cities of Auburn, Des Moines, and Maple Valley in CSR 7856-E;⁴ and by the City of Auburn in CSR 8028-E (collectively, the “Cities”).⁵ Comcast filed separate replies in each proceeding.⁶ The City of Tumwater filed supplemental comments in CSR 7856-E,⁷ to which Comcast filed no response.

2. Simultaneous with its reply in CSR 7757-E, Comcast moved to withdraw its request therein for Auburn. Comcast stated that it needed to study the impact of recent annexations on DBS subscribership in that Community.⁸ Comcast’s motion is unopposed, we see no reason to deny it, and accordingly we grant it. Months later, having completed its study, Comcast filed the pending petition in CSR 8028-E concerning Auburn alone, thus raising anew the issue of effective competition in that Community.

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ Opposition of the City of Tumwater, Washington to Petition for Special Relief (“Tumwater Opposition”).

⁴ Opposition of the Cities of Auburn, Des Moines, and Maple Valley, Washington to Comcast’s Petition for Special Relief (“Des Moines/Maple Valley Opposition”).

⁵ Opposition of the City of Auburn, Washington to Comcast’s Petition for Special Relief (“Auburn Opposition”).

⁶ Each was titled “Reply to Opposition.”

⁷ Supplemental Comments of the City of Tumwater, Washington in Opposition to Petition for Special Relief (“Tumwater Supplemental Comments”).

⁸ Motion to Withdraw Auburn, Washington from Petition for Special Relief.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁹ as that term is defined by Section 623(l) of the Act and Section 76.905 of the Commission's rules.¹⁰ 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.¹¹ For the reasons set forth below, we grant the petitions based on our finding that Comcast is subject to effective competition in the Communities listed on Attachment A.

II. THE COMPETING PROVIDER TEST

4. Section 623(l)(1)(B) of the 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.¹² This test is referred to as the "competing provider" test.

A. Comcast's Evidence

5. The first part of the competing provider 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.¹³ Comcast states 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.¹⁴ The Commission has held that a party may use evidence of subscribership 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.¹⁵ 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 programming¹⁶ and is supported in the petitions with copies of channel lineups for both DIRECTV and DISH.¹⁷ Comcast also asserts that both DIRECTV and DISH offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.¹⁸ None of the Cities challenges any of the foregoing assertions by Comcast. Accordingly, we find that the first part of the competing provider test is satisfied.

6. The second part 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

⁹ 47 C.F.R. § 76.906.

¹⁰ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

¹¹ See 47 C.F.R. §§ 76.906 -.907(b).

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

¹³ 47 C.F.R. § 76.905(b)(2)(i).

¹⁴ See, e.g., Petition in CSR 7757-E at 3.

¹⁵ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁶ See 47 C.F.R. § 76.905(g). See also Petition in CSR 7856-E at 4.

¹⁷ See, e.g., Petition in CSR 8028-E at Exh. 1.

¹⁸ See, e.g., Petition in CSR 7757-E at 2-3.

area. Comcast asserts that it is the largest MVPD in the Communities.¹⁹ The second part of the competing provider test thus required Comcast to calculate a ratio for each Community, the numerator of which is the number of DBS subscribers in the Community and the denominator of which is the number of households there.

7. For its numerators in CSRs 7757-E and 7856-E, Comcast first made a list of all the five-digit zip codes that lay partly in a Community.²⁰ Second, the Company purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that stated the number of subscribers to DBS service in each of those zip codes.²¹ Then, for each five-digit zip code, Comcast obtained from Media Business Corporation (“MBC”) an allocation stating what percent of the DBS subscribers in the entire zip code was in the part of the zip code that was within a Community.²² Comcast then multiplied SBCA’s gross numbers by MBC’s allocation percentages, producing an estimate of how many DBS subscribers there were in the part of each zip code that was within a Community. By adding those estimates for each Community, Comcast made an estimate of how many DBS subscribers there were there.

8. For its numerator in CSR 8028-E, Comcast made a list of all the nine-digit zip codes that lie within Auburn and obtained from SBCA a list of how many DBS subscribers were in each one.²³ Nine-digit zip codes are so small that the typical one contains no DBS subscribers or only one or two;²⁴ in such small areas, there is no apparent need for allocation percentage to exclude non-residents of a community. Simply by adding the numbers of DBS subscribers in SBCA’s list, Comcast made its estimate of how many DBS subscribers there were in Auburn.

9. For its denominators in these proceedings, Comcast used 2000 Census counts of the number of households in each Community.²⁵ In CSR 8028-E, Comcast also added households to Auburn to reflect annexations by that Community since the 2000 Census.²⁶ Comcast’s post-Census numbers were developed by the State of Washington’s Office of Financial Management (“OFM”).²⁷ The numbers estimated “occupied housing units,” which is a partial but adequate definition of “household.”²⁸ All this data and the resulting ratios (DBS subscribers over households) are displayed in Attachment A.²⁹ If accepted, they show that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Communities – in other words, that the criteria for competing provider effective competition are present in each Community.

¹⁹ See, e.g., Petition in CSR 7856-E at 5.

²⁰ No five-digit zip code lay entirely within any Community involved in CSRs 7757-E and 7856-E.

²¹ See, e.g., Petition in CSR 7856-E at 5 & Exh. 5; Petition in CSR 8028-E at 6 & Exh. 3.

²² See, e.g., Petition in CSR 7757-E at 6.

²³ Petition in CSR 8028-E at 5-6.

²⁴ See *id.* at Exh. 3.

²⁵ See, e.g., Petition in CSR 7757-E at Exh. 6.

²⁶ Petition in CSR 8028-E at 6-7.

²⁷ *Id.* at 6-7 & Exh. 4 at 2-3.

²⁸ U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/meta/long_HSD010200.htm (visited Feb. 8, 2011) (“Census Definition”) (Census Bureau effectively defining “household” as an occupied housing unit).

²⁹ See also Petition in CSR 7856-E at Exh. 6.

B. The Cities' Objections

1. Objections to Comcast's Numerators

10. In CSR 7856-E, the Cities of Des Moines and Maple Valley fault Comcast for using five-digit zip-code-based data and MBC's allocation percentage to calculate the number of DBS subscribers in those Communities. They argue that Comcast should have used nine-digit zip code-based data instead.³⁰ This argument lacks merit. We have repeatedly accepted five-digit zip code data and an allocation percentage in effective competition proceedings, and have declined to require the use of nine-digit zip code-based data.³¹ The Cities of Des Moines and Maple Valley have given us no reason to depart from that longstanding practice here.

11. The same Cities make several general objections to MBC's allocation formula.³² They asked Comcast for detailed information about the facts and procedures by which MBC reached its allocation percentages for five-digit zip codes.³³ Comcast did not respond, apparently choosing to stand on what is in the record, which is a one-page description of MBC's processes that is attached to the petition.³⁴ The Cities of Des Moines and Maple Valley object that Comcast made it "virtually impossible" for them "to recreate the methodology used by MBC."³⁵ It also states that time constraints would have made such an effort impossible even if Comcast had been forthcoming.³⁶

12. We do not fault Comcast for refusing the Cities' request for information from MBC. Recreating MBC's processes is not the only way to reveal flaws in them. The Cities could have, on their own, obtained a nine-digit zip code-based count of DBS subscribers from SBCA. Or, the Cities could have produced their own detailed evidence of DBS subscription in their Communities, with which we presume they are intimately familiar. Substantial extensions of time are available for good cause shown.³⁷ The discovery request of the Cities of Des Moines and Maple Valley for more information from MBC is, in the last analysis, an attempt to complicate this proceeding without any prior indication of a factual error, erroneous assumption, or analytical unsoundness in MBC's processes. Requiring a more detailed description of those processes would add complexity and delay to these proceedings without any likelihood on the present record that an error would be revealed or a sounder result would occur.³⁸

³⁰ Des Moines/Maple Valley Opposition at 5.

³¹ See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-496 at ¶ 18 (rel. March 18, 2011), available at 2011 WL 933540; *Time Warner Cable Inc.*, 25 FCC Rcd 5457, 5461-62, ¶¶ 14-16 (2010) ("*Time Warner*"), application for review pending; Public Notice, *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, 24 FCC Rcd 8198 (2009); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4394, ¶ 11 (2007).

³² Des Moines/Maple Valley Opposition at 5; *id.* at Exhs. 1 & 2 (Declaration of Richard T. Treich, CEO of Front Range Consulting, Inc., "Treich Declaration") at ¶¶ 5-10.

³³ Des Moines/Maple Valley Opposition at 5.

³⁴ See Petition in CSR 7757-E at Exh. 3.

³⁵ Treich Declaration at ¶ 8.

³⁶ *Id.* at ¶¶ 8-9.

³⁷ 47 C.F.R. § 1.46.

³⁸ See, e.g., *Marcus Cable Assocs, LLC*, 25 FCC Rcd 4369, 4373, ¶ 10 (2010) ("*Marcus*"), denying review to 18 FCC Rcd 9649 (2003) & 17 FCC Rcd 16652 (2002); *Time Warner*, 25 FCC Rcd at 5461, ¶ 13; *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1785-86, ¶¶ 16-19 (2009), application for review pending; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14146-47, ¶¶ 19-20 (2008) ("*Cablevision*"), application for review pending; *Time Warner Cable Inc.*, 23 FCC Rcd 12210, 12215, ¶ 16 (2008), application for review pending.

Accordingly, we reject the objections of the Cities of Des Moines and Maple Valley to the lack of additional information about the facts and procedures by which MBC reached its allocation percentages for five-digit zip codes.

13. Finally, the Cities of Des Moines and Maple Valley object that “Comcast had . . . more up to date [DBS] subscriber numbers, yet did not avail itself of that information.”³⁹ Nowhere, however, do those Cities indicate what those numbers are. Accordingly, we give no weight to this objection.

2. Objections to Comcast’s Denominators

14. The City of Tumwater in CSR 7757-E and the Cities of Des Moines and Maple Valley in CSR 7856-E criticize Comcast for calculating its ratios with DBS subscriber numbers and household counts that are several years apart. They argue that “Census data from 2000 is simply too old to provide meaningful analysis.”⁴⁰ This argument has no merit. We have repeatedly held that the use of a recent DBS subscriber number and a Census-derived household number from several years before, without more, will not cause us to disbelieve a showing of effective competition.⁴¹

15. We may reject a household number taken from the Census when we are presented with a more recent household number that is as reliable as the Census.⁴² Only the City of Tumwater in CSR 7757-E attempted to procure such a number. It proposed a number of housing units (occupied and unoccupied) estimated for Tumwater by the State of Washington’s OFM.⁴³ We do not accept this proposed number, for several reasons. First, it is merely an estimate,⁴⁴ not an actual count such as the 2000 Census. Second, the City’s proposed number includes unoccupied household units, which are excluded from the definition of “households.”⁴⁵ Third, contrary to the City’s allegation, Comcast did not withdraw its initial request for Auburn because the Company thought OFM numbers might have merit. Comcast’s motion to withdraw mentions only the need to study annexations there.⁴⁶ Fourth, there is no inconsistency in our acceptance of OFM’s number for Auburn in paragraph 9 above and our rejection of OFM numbers here. In the case of Auburn, no Census number was available (to reflect recent annexations). Also, the OFM number for Auburn was precisely what Section 623(l)(1)(B)(ii) of the Act requires (households, or occupied housing units), not a broader category all housing units, occupied and unoccupied. In sum, the City of Tumwater has not shown that its proposed estimates are as reliable as the 2000 Census count of households in Tumwater that Comcast uses. Accordingly, we accept the number of households in Tumwater proposed by Comcast.

³⁹ Des Moines/Maple Valley Opposition at 5 (bracketed letters added).

⁴⁰ Des Moines/Maple Valley Opposition at 4; Tumwater Opposition at 2-4.

⁴¹ See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-496 at ¶ 39 (rel. March 18, 2011), available at 2011 WL 933540; *Cablevision*, 23 FCC Rcd at 14143-45, ¶¶ 9-14; *Time Warner Cable Inc.*, 23 FCC Rcd 12210, 12214, ¶ 15 (2008), application for review pending.

⁴² *Comcast Cable Commun., LLC*, 25 FCC Rcd 13340, 13342-43, ¶ 11 (2010); *Time Warner*, 25 FCC Rcd at 5463-64, ¶ 21; *Comcast Cable Commun., LLC*, 25 FCC Rcd 4967, 4971, ¶ 14 (2010).

⁴³ Tumwater Opposition at 4-5; *id.* at Exhs. A & B.

⁴⁴ Tumwater Opposition at Exh. A (State of Washington, Office of Financial Management, 2007 *Population Trends*, Sept. 2007) at 38 (“Housing unit *estimates*”) (italics added).

⁴⁵ Census Definition, *supra* note 28; *Marcus*, 25 FCC Rcd at 4372, ¶ 9; *CoxCom, Inc.*, 22 FCC Rcd 4533, 4539, ¶ 13 (2007).

⁴⁶ *Compare* Motion to Withdraw Auburn, Washington from Petition for Special Relief, with Tumwater Supplemental Comments.

3. Policy Objections

16. The Cities of Des Moines and Maple Valley in CSR 7856-E and the City of Auburn in CSR 8028-E raise several policy objections to the petitions for those Communities. In brief, they object that Comcast has not made a showing that deregulation of its rates for basic service would be in the public interest (other than by satisfying the specific criteria set forth in Section 623(I)(1)(B) of the Act). They also object that deregulation of Comcast's basic rates would be contrary to the public interest for several reasons.⁴⁷ We have addressed and rejected these same objections several times in detail in previous decisions,⁴⁸ and we incorporate those analyses herein as if set forth *verbatim*. The Cities have stated nothing new concerning these subjects, and we find nothing lacking in the showings made herein by Comcast.

C. Conclusions

17. As reflected in Attachment A, we find that Comcast 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 part 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

18. 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**.

19. **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**.

20. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁹

FEDERAL COMMUNICATIONS COMMISSION

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⁴⁷ Des Moines/Maple Valley Opposition at 5-8; Auburn Opposition at 2-4.

⁴⁸ See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion Order DA 11-429 at ¶ 14 (rel. March 4, 2011), available at 2011 WL 765080; *Comcast Cable Commun., LLC*, 25 FCC Rcd at 13343-44, ¶¶ 12-14 (2010); *Cablevision Systems East Hampton Corp.*, 24 FCC Rcd 10846, 10849-50, ¶¶ 12-13 (2009).

⁴⁹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSRs 7757-E, 7856-E, 8028-E

COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
CSR 7757-E				
Tumwater City	WA0011	15.42%	5659	872
CSR 7856-E				
Algona City	WA0054	22.87%	845	193
Black Diamond City	WA0055	26.34%	1456	384
Covington City	WA0852	23.44%	4398	1031
Des Moines	WA0121	15.91%	11337	1804
Enumclaw City	WA0057	36.03%	4317	1556
Maple Valley City	WA0170	31.49%	4809	1514
Pacific City	WA0061, WA0597	22.88%	1992	456
Tukwila City	WA0205	15.99%	7186	1149
CSR 8028-E				
Auburn City	WA0096, WA0829	18.42%	21395	3942

*CPR = Percent of competitive DBS subscribership rate. CPRs may not be precise due to fractional DBS subscribers not stated above.