

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

In the Matter of)	
)	
Cablevision of New Jersey, LLC)	
)	CSR 8881-E
Petition for Determination of Effective)	
Competition in the System-Wide Franchise Area)	MB 14-94
in Bergen County, New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2015

Released: July 24, 2015

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

I. INTRODUCTION AND BACKGROUND

1. Cablevision of New Jersey, 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.” 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”)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 Verizon New Jersey Inc., hereinafter referred to as “Verizon” or “Competitor.” An opposition to the Petition was filed by the New Jersey Division of Rate Counsel, hereinafter referred to as the “DRC,” which is a part of the government of the State of New Jersey.³ Petitioner filed a Reply to the Opposition.⁴

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(l)(1) of the Communications Act and Section 76.905(b) of the Commission’s rules.⁶ The cable operator bears the burden of rebutting the

¹ See 47 U.S.C. § 543(l)(1)(D).

² 47 C.F.R. § 76.905(b)(4).

³ Comments of the New Jersey Division of Rate Counsel in Opposition To Cablevision of New Jersey, LLC’s Petition for a Determination of Effective Competition in the System-Wide Franchise Area of the Borough of Tenafly, Bergen County, New Jersey (“DRC Comments”), dated August 7, 2014. In addition, the DRC filed a Petition for Leave To Supplement The Comments of the New Jersey Division of Rate Counsel, dated August 15, 2014. (“DRC Supplement to Comments”). The DRC represents the interests of consumers of cable TV service and other utility services whose interests in rate matters would otherwise be inadequately represented. State of New Jersey, Division of The Rate Counsel, *Learn About the Division*, <http://www.state.nj.us/rpa/about/> (visited June 29, 2015).

⁴ Reply to Comments on Petition for Determination of Effective Competition (“Cablevision Reply”), dated August 18, 2014.

⁵ 47 C.F.R. § 76.906.

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

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 otherwise 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 Petitioner states that the test is met here since the Communities are served by both Petitioner and Competitor, a LEC, and that these two MVPD providers are unaffiliated. Also supporting Petitioner’s position is its statement that Competitor is offering cable service in the Communities pursuant to a “system-wide” franchise¹⁰ that was granted by the Board of Public Utilities (“BPU”) and that Competitor’s franchise covers the Communities and much of the State of New Jersey.¹¹

5. 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.¹² Attached to the Petition are copies of channel lineups for Competitor showing that it offers channels of programming far in excess of that required by the Commission’s rules.¹³ Finally,

⁷ See 47 C.F.R. §§ 76.906 & 907. We note that the Commission recently adopted rules amending the presumption set forth in Section 76.906 of the Commission’s rules, 47 C.F.R. § 76.906, that cable operators are not subject to effective competition to a presumption that cable operators are subject to competing provider effective competition. *In the Matter of Amendment to the Commission’s Rules Concerning Effective Competition*, 62 Communications Reg. (P&F), 2015 WL 3533156 (F.C.C.) at ¶ 6 (2015). That rule change is not yet effective. In the interim, the Commission stated that the “Media Bureau has authority to continue processing pending petitions for a determination of Effective Competition . . . in the normal course of business pursuant to existing rules.” *Id.* at ¶ 28, n. 134.

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 See Petition at 5-7 n. 15. See also Exh. 5, New Jersey Board of Public Utilities (“BPU”) Verizon Franchise Order. Under a New Jersey law enacted in 2006, a company may receive from the BPU “a system-wide franchise by constructing or operating a [cable] system at any location within the State in which the company, at the time of issuance of the system-wide franchise, either has plant or equipment in use for the provision of any consumer video, cable or telecommunications service, or has proposed to place such plant or equipment into use to provide such service.” N.J.S.A. 48:5A-2.

¹¹ Petition at 6-7. The New Jersey Board of Public Utilities is the local franchise authority for the State of New Jersey.

¹² See 47 C.F.R. § 76.905(g). See also Petition at 13-14.

¹³ See Petition at Exh. 3.

Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Communities,¹⁴ has marketed its services in a manner that makes potential subscribers reasonably aware of its services,¹⁵ and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.¹⁶ These showings, if unrebutted, would suffice to show that Petitioner is subject to LEC effective competition in the Communities.

6. **The DRC's Objections.** The primary issue raised in DRC's opposition is that it challenges the sufficiency of Petitioner's showing of LEC effective competition with regard to Tenafly, New Jersey.¹⁷ The DRC argues that Cablevision's reliance on the BPU's granting Verizon a state-wide system franchise as a trigger for the applicability of the LEC test is misplaced.¹⁸ The DRC asserts that the Commission has ruled that a franchise per franchise analysis is required in making determinations of effective competition and that a state-wide system franchise was not contemplated.¹⁹ The DRC maintains that when a franchise to franchise analysis is conducted, Cablevision cannot satisfy the LEC test in that Cablevision fails to demonstrate that Verizon's cable service is available to the entire Cablevision franchise area of Tenafly or that Verizon has any subscribers who subscribe to a basic service tier in Tenafly.²⁰ The DRC next argues that fundamental to a finding of competition is the existence of actual subscribers and Cablevision submitted no evidence on this point, as general advertising and channel lineups do not equate to actual subscribership.²¹

7. DRC also asserts that an Effective Competition Tracking Report provided to the DRC by the Satellite Broadcasting and Communications Association dated August 1, 2014, yielded a zero Direct-to-Home ("DTH") satellite subscriber count for the franchise area of Tenafly.²² The DRC argues that given the DTH satellite subscriber count for Tenafly, it is critical that Cablevision make an affirmative showing that Tenafly satisfies the requirements of 47 U.S.C. Section 623(l)(1)(B).²³ It asserts that not only is there no showing that a competitive service overlaps Cablevision's franchise, there is evidence that a potential competitive service does not overlap the incumbent's franchise at all.²⁴ In its Supplement Comments, the DRC submitted further support for its argument that no competitive programming

¹⁴ See Petition at 6-7.

¹⁵ Petition at 11; *id.* at Exh. 4.

¹⁶ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petition at 6-15; *id.* at Exh. 1 (Declaration of Paul Jamieson, Cablevision Systems Corp.'s Vice President Government and Policy).

¹⁷ DRC Comments at 1.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.* at 8. With regard to the DRC's first argument regarding system-wide franchises, the DRC cites *Service Electric Cable TV of New Jersey*, 20 FCC Rcd 20532 ¶¶ 5-6 (2005) for support. *Service Electric* related to the effective competition competing provider test rather than the LEC test and prohibited a cable operator from combining DBS subscribership data from many franchise areas into a single sum. The LEC test is applicable in this Cablevision petition and issues relating to subscribership levels do not arise under the LEC test.

²¹ DRC Comments at 8.

²² *Id.* at 9.

²³ *Id.* The DRC argues that Cablevision should be required to make an affirmative showing that Tenafly satisfies the requirements of 47 U.S.C. Section 623(l)(1)(B). The requirements of 47 U.S.C. Section 623(l)(1)(B) relate to the "competing provider" effective competition test, which includes separate elements and threshold requirements from those in the LEC test. As previously noted, at issue in this Cablevision petition is the LEC effective competition determination.

²⁴ DRC Comments at 9.

services are offered by Competitor in Tenafly. Specifically, the DRC cites an e-mail correspondence from a Verizon official stating that Verizon does not offer FIOS TV in Tenafly.²⁵

8. **Petitioner's Response.** In reply, Petitioner asserts that the BPU ratified a system-wide franchise held by Cablevision of New Jersey and the system-wide franchise granted to Cablevision authorizes Cablevision to serve 20 communities, including Tenafly.²⁶ Cablevision emphasizes that the entirety of that 20-town geographic area, and not Tenafly alone, constitutes the operative franchise area for purposes of its petition.²⁷ Further, Cablevision states that the DRC fails to offer any evidence refuting Cablevision's showings that Verizon is offering competing cable service to a substantial majority of the households in the Bergen System-Wide Franchise Area and that Verizon's cable system substantially overlaps Cablevision's in the 20-community geographic area that comprises the franchise area.²⁸

9. At the outset, we note that the proper franchise area for determining the existence of LEC effective competition is Cablevision's Bergen System-Wide Franchise Area. The DRC appears to take the position that Cablevision must demonstrate LEC effective competition in each community that comprises the Bergen System-Wide Franchise Area. To do so, however, would contravene the system-wide franchising framework that the New Jersey State Legislature introduced in 2006, in which Cablevision elected to participate and the BPU ratified.²⁹ Under the Act and the Commission's rules, the LEC test is met if a local exchange carrier "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."³⁰ Cablevision maintains that Verizon's FIOS TV service is offered to over 60 percent of the households that make up the entirety of Cablevision's Bergen System-Wide Franchise Area.³¹

10. Cablevision argues that it has demonstrated in previous petitions, as in the instant petition, that Verizon is present and offering service to a substantial number of households in the franchise area, that Verizon is publicizing its service, and that customers are aware of and responding to Verizon's offers.³² In response to the DRC's proposition that it must provide evidence of subscribership, Cablevision again avers that the LEC test does not require that a LEC's service reach a certain level of

²⁵ See DRC Supplement to Comments at 2-3 and Exh. D. E-mail correspondence from Jeff Lahm, Verizon to Maria Nova-Ruiz, Assistant Deputy Rate Counsel, dated August 12, 2014.

²⁶ Cablevision Reply at 2, 4-6. Petition at Exh. 8, Cablevision Notice of Conversion for Tenafly Borough, New Jersey. Cablevision notes that it filed a notice of conversion for Tenafly, New Jersey with the BPU on June 12, 2014, and under New Jersey law that notice automatically converted the Tenafly municipal franchise into the Bergen System-Wide Franchise Area. The BPU ratified the Tenafly conversion, which was effective on June 12, 2014. Cablevision converted 20 of its existing municipal franchises into a single regional, System-Wide Franchise Area consisting of the following communities: Bergenfield, Closter, Demarest, Dumont, Emerson, Fair Lawn, Harrington Park, Haworth, Hillsdale, New Milford, Northvale, Norwood, Old Tappan, Oradell, Paramus, River Vale, Rockleigh, Saddle River, Tenafly, and Woodcliff Lake. In 2009 and 2010, Cablevision converted most of these communities to the Bergen System-Wide Franchise Area. See Petition at 3, Exh. 7, BPU Conversion Orders for Communities in the Bergen System-Wide Franchise Area.

²⁷ Cablevision Reply at 2.

²⁸ *Id.* at 3. As noted, the operative franchise area is the entire geographic area encompassed by all the communities within the Bergen System-Wide Franchise Area.

²⁹ See *supra* nn. 10 & 26.

³⁰ Cablevision Reply at 7.

³¹ See Petition at 11; *id.* at n. 41.

³² Cablevision Reply at 9, citing *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14155 ¶¶ 42-43 (2008); *Cablevision of Oakland*, 24 FCC 1801, 1803, ¶ 6 (2009).

subscribership or show that a competing LEC is providing service in every portion of the franchise area in order for the Commission to find effective competition.³³

11. The objections noted by the DRC overstate the evidence that is required to show LEC effective competition. We find that Cablevision has provided sufficient information indicating that Tenaflly is part of the Bergen System-Wide Franchise Area. Therefore, the effective competition inquiry and finding relates to what is being offered in the entire Bergen System-Wide Franchise Area, not what is or is not offered to a discrete local community that comprises one part of Cablevision's larger system-wide franchise area. Nor is there a requirement that a LEC's service reach a certain level of subscribership. In implementing the LEC effective competition test, the Commission stated several ways that a cable operator might show that a LEC was serving enough territory to pass the test. The Commission discussed "widespread availability"³⁴ and a requirement that "the LEC's service must substantially overlap the incumbent cable operator's service," and even contemplated LEC effective competition existing "[i]f the LEC has not shown its intention to offer service that substantially overlaps the incumbent cable operator's service in the franchise area."³⁵ Nowhere did the Commission require that a LEC's service be available everywhere in the incumbent cable operator's franchise area.³⁶ Finally, with regard to the DRC's contention that the question of whether the LEC test should apply to system-wide franchise systems, we note that the Commission previously has found LEC effective competition based on system-wide/state-wide franchise systems.³⁷

12. Cablevision has shown that Verizon is offering service to "[a] substantial number of households" in the Bergen System-Wide Franchise Area.³⁸ Competitor has publicly announced that its service is available in the franchise area.³⁹ It is in compliance with substantial build-out obligations.⁴⁰ These showings suffice to show that Competitor is offering service to the extent required by the LEC test.⁴¹ Based on the foregoing, we conclude that Cablevision has submitted sufficient evidence overcoming the presumption of no effective competition by demonstrating that its cable system serving the Bergen System-Wide Franchise Area has met the LEC test and is subject to effective competition.

³³ *Id.*, citing *Armstrong Communications, Inc., Mount Pleasant Township*, 16 FCC Rcd 1039, 1043-44, ¶ 9 (2001).

³⁴ *Cable Reform Order*, 14 FCC Rcd at 5302, ¶¶ 10, 13.

³⁵ *Id.* at 5305, ¶ 13. The Commission concluded that if the LEC has not shown its intention to offer service that substantially overlaps the incumbent cable operator's service in the franchise area, it will entertain petitions for waiver showing that the extent of the LEC's presence is sufficient to have a direct impact on the cable operator's services throughout its service area, and particularly on the price. *Id.*

³⁶ See *CSR TKR, Inc.*, 25 FCC Rcd 4948, 4951 ¶ 10 (2010).

³⁷ See *Comcast Cable Communications, on behalf of Subsidiaries*, 24 FCC Rcd 1780, 1790 ¶ 34 (2009); *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd at 14153, ¶ 40 (relating to the video programming service offered by Verizon New Jersey, Inc.); *Cablevision Systems of Connecticut, L.P.*, 14 FCC Rcd 15883, 15891 ¶ 20 (1999) (relating to statewide franchise granted in Connecticut).

³⁸ Petition at 4-5, 8.

³⁹ *Id.* at 9-14.

⁴⁰ *Id.* at 9.

⁴¹ See *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd at 14155, ¶ 43;

"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. Therefore, we have consistently required that a petitioner show only that a LEC has actually begun to provide service in areas that substantially overlap [petitioner's], that the LEC is marketing its services so that potential customers are aware of it, and that it intends to build out its cable system within a reasonable period of time." [Footnote omitted.]

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Petition for a determination of effective competition filed in the captioned proceeding by Cablevision of New Jersey, LLC, **IS GRANTED**.

14. **IT IS FURTHER ORDERED** that any certification to regulate basic cable service rates granted to the New Jersey Board of Public Utilities **IS REVOKED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴²

FEDERAL COMMUNICATIONS COMMISSION

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

⁴² 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 14-94, CSR 8881-E

COMMUNITIES SERVED BY CABLEVISION OF NEW JERSEY, LLC

Communities	CUIDs
Bergenfield Borough, NJ	NJ0145
Closter Borough, NJ	NJ0374
Demarest Borough, NJ	NJ0293
Dumont Borough, NJ	NJ0211
Emerson Borough, NJ	NJ0375
Fair Lawn Borough, NJ	NJ0259
Harrington Park Borough, NJ	NJ0448
Haworth Borough, NJ	NJ0451
Hillsdale Borough, NJ	NJ0373
New Milford Borough, NJ	NJ0207
Northvale Borough, NJ	NJ0450
Norwood Borough, NJ	NJ0449
Old Tappan Borough, NJ	NJ0425
Oradell Borough, NJ	NJ0260
Paramus Borough, NJ	NJ0311
River Vale Township, NJ	NJ0420
Rockleigh Borough, NJ	NJ0585
Saddle River Borough, NJ	NJ0584
Tenafly Borough, NJ	NJ 0217
Woodcliff Lake Borough, NJ	NJ 0426