

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

In the Matter of)
Comcast Cable Communications, LLC)
Petition for Determination of Effective)
Competition in Five Washington Franchise Areas) CSR 8859-E, MB Docket No. 13-310

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 2016

Released: February 19, 2016

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC ("Comcast") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Comcast is subject to effective competition in the 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 ("Communications Act"),¹ and the Commission's implementing rules,² and that it 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"). The City of Airway Heights, Washington and the City of Spokane, Washington filed Oppositions to the Petition (the "Cities"). Patricia Crandall also filed a "Customer Ex Parte Opposition" letter to the Petition.

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as competing provider effective competition.³ Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁴ For the reasons set forth below, we grant Comcast's petition.

II. THE COMPETING PROVIDER TEST

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 multichannel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50

¹ 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Report and Order, 30 FCC Rcd 6574 (2015) ("Effective Competition Order").

⁴ See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

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.⁵ This test is referred to as the “competing provider” test. Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met.

A. The First Part

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.⁶ As explained in the *Effective Competition Order*, “we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH, presumptively satisfies the” first part of the test for competing provider effective competition, absent evidence to the contrary.⁷ Neither the Cities nor the Customer Ex Parte Opposition attempted to rebut the first part of the test. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Comcast, we thus find that the first part of the test is satisfied.

B. The Second Part

5. 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 area.⁸ As explained in the *Effective Competition Order*, “[w]ith regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD.”⁹ The Cities argue that Comcast has not satisfied the second part of the competing provider effective competition test for several reasons. First, the Cities argue that the 2010 Census figures used by Comcast are outdated and inaccurate.¹⁰ Comcast responds, and we agree, that its use of Census figures was proper and fully consistent with Commission precedent.¹¹ Second, the Commission has indicated that it will consider more recent household data if it is demonstrated to be reliable, and the City of Spokane argues that Comcast’s 2010 Census data should be adjusted to account for a total of 2,119 new households in Spokane since January 2010.¹² We agree with Comcast that some of these households likely were included in the 2010 Census figure, and that they may be offset by local households eliminated since the 2010 Census.¹³ Third, the City of Spokane claims that

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

⁶ 47 C.F.R. § 76.905(b)(2)(i).

⁷ *Effective Competition Order*, 30 FCC Rcd at 6580-81, ¶ 8.

⁸ 47 C.F.R. § 76.905(b)(2)(ii).

⁹ *Effective Competition Order*, 30 FCC Rcd at 6581-82, ¶ 9.

¹⁰ City of Airway Heights Opposition at 1-2; City of Spokane Opposition at 4.

¹¹ Reply to City of Airway Heights at 2-3; Reply to City of Spokane at 2. The City of Airway Heights also relies on a Commission decision involving the “low penetration” effective competition test to contend that Comcast’s DBS subscriber data is outdated because it is more than two months old. City of Airway Heights Opposition at 2. We agree with Comcast that the two-month limitation applies only to a cable operator’s own subscriber numbers under the low penetration test, and not to DBS subscriber data under the competing provider test. Reply to City of Airway Heights at 2, n.6 (citing *Time Warner Cable, Inc. – Nine Franchise Areas in New Jersey*, 25 FCC Rcd 5457, ¶¶ 19-20 (2010)).

¹² City of Spokane Opposition at 4-5, Exhibit 1.

¹³ Reply to City of Spokane at 3.

there is an estimated 4 percent vacancy rate based on information contained in a local real estate report.¹⁴ We agree with Comcast that the City of Spokane fails to demonstrate that the estimated vacancy rate contained in the report is sufficiently reliable.¹⁵ Fourth, the City of Spokane argues that Comcast erroneously included two zip codes that are located outside of City limits.¹⁶ Comcast resolved this issue by obtaining confirmation from SNL Kagan (“SNL”) that a portion of the contested zip codes fall within the Spokane Franchise Area, and Comcast determined that so few subscribers were at issue in the contested zip codes that they would have no bearing on the outcome of the competing provider test.¹⁷ Fifth, the City of Airway Heights contends that it underwent an annexation in 2012 that added additional residences and properties to the City.¹⁸ Comcast provided maps of the annexation to SNL, and the resulting data persuasively demonstrates that the annexation does not affect the outcome of this proceeding.¹⁹

6. Finally, both the City of Airway Heights and Patricia Crandall argue that the Commission should consider certain issues that are not part of the statutory test for competing provider effective competition, such as the impact of cable price increases on consumers and the inclusion of DBS providers in the definition of MVPDs.²⁰ We agree with Comcast that the Commission must enforce the statutory definition of competing provider effective competition, which does not include the consideration of any of these issues.²¹ In addition, Ms. Crandall argues that DBS installation may not be possible in some apartment buildings.²² We are not persuaded that competing provider effective competition does not exist in a franchise area as a whole where DBS installation may not be possible in some apartment buildings. For the above reasons, the arguments put forth by the Cities and Ms. Crandall fail to rebut the presumption of competing provider effective competition. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Comcast and the other parties to this proceeding, we thus find that the second prong of the test is satisfied.

¹⁴ City of Spokane Opposition at 4-5, Exhibit 1.

¹⁵ Reply to City of Spokane at 3.

¹⁶ City of Spokane Opposition at 5.

¹⁷ Reply to City of Spokane at 4-5 and Exhibits B, C.

¹⁸ City of Airway Heights Opposition at 2.

¹⁹ Reply to City of Airway Heights at 3-4 and Exhibits 1-3.

²⁰ City of Airway Heights Opposition at 4; Customer Ex Parte Opposition at 1.

²¹ Reply to City of Airway Heights at 4-5. As Comcast correctly states, the competing provider test applies to competition from “unaffiliated multichannel video programming distributors.” *See* 47 U.S.C. § 543(l)(1)(B). The statutory definition of MVPDs includes “direct broadcast satellite service.” *Id.* § 522(13).

²² Customer Ex Parte Opposition at 1.

III. ORDERING CLAUSES

7. 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** as to the Communities listed on Attachment A hereto.

8. **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**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²³

FEDERAL COMMUNICATIONS COMMISSION

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²³ 47 C.F.R. § 0.283.

ATTACHMENT A

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COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

| Communities | CUIDs | CPR* | 2010 Census Households | Estimated DBS Subscribers |
|--------------------|--------------|-------------|-------------------------------|----------------------------------|
| Airway Heights | WA0350 | 22.88% | 1,547 | 354 |
| Liberty Lake | WA0836 | 31.80% | 2,893 | 920 |
| Millwood | WA0296 | 18.91% | 751 | 142 |
| Spokane City | WA0231 | 15.82% | 87,271 | 13,808 |
| Spokane Valley | WA0844 | 20.30% | 36,558 | 7,423 |

*CPR = Percent of competitive DBS penetration rate.