

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

In the Matter of)
Comcast Cable Communications, LLC) MB Docket No. 13-198, CSR 8821-E
Petition for Determination of Effective)
Competition in Communities in Washington)

MEMORANDUM OPINION AND ORDER

Adopted: February 29, 2016

Released: March 2, 2016

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, (Comcast or Petitioner) has filed with the Commission a petition¹ pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the communities listed on Attachment A (the Attachment A Communities). Petitioner alleges that its cable system serving the Attachment A Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (Communications Act),² and the Commission's implementing rules,³ and that it is therefore exempt from cable rate regulation in the Attachment A Communities because of the competing service provided by two direct broadcast satellite (DBS) providers, DIRECTV, Inc. (DIRECTV) and DISH Network (DISH). The Communities of Everett, Mountlake Terrace, and Mukilteo, Washington (the Three Washington Communities or the Communities) each filed oppositions to the Petition,⁴ to which Petitioner filed a single reply.⁵ The City of Edmonds (Edmonds or the City) also filed an opposition to the Petition,⁶ to which Petitioner filed a separate reply.⁷

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

¹ Comcast Cable Commc'ns, LLC, Petition for Special Relief (Petition).

² See 47 U.S.C. § 543(l)(1)(B).

³ 47 C.F.R. § 76.905(b)(2).

⁴ Opposition to Petition for Special Relief on Behalf of the City of Everett, Washington (Everett's Opposition); Opposition to Petition for Special Relief on Behalf of the City of Mountlake Terrace, Washington (Mountlake Terrace's Opposition); Opposition to Petition for Special Relief on Behalf of the City of Mukilteo, Washington (Mukilteo Opposition). Each opposition is only on behalf of the relevant city filing the opposition. No oppositions were filed on behalf of the Communities of Brier, Lynnwood, Mill Creek, or Woodway.

⁵ Comcast Cable Commc'ns, LLC, Reply to Oppositions to Petition for Special Relief of the Communities of Everett, Mountlake Terrace, and Mukilteo, Washington (Comcast's Reply to the Communities).

⁶ Opposition of the City of Edmonds, Washington to Comcast's Petition for Special Relief (Edmonds's Opposition).

⁷ Comcast Cable Commc'n's, LLC, Reply to Opposition to Petition for Special Relief of the City of Edmonds, Washington (Comcast's Reply to the City).

competition.⁸ 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.⁹ For the reasons set forth below, we grant Comcast’s Petition.

II. THE COMPETING PROVIDER TEST

3. Section 623(l)(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 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.¹⁰ 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.¹¹ 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 competition, absent evidence to the contrary.¹²

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.¹³ The Three Washington Communities argue that neither DBS provider offers comparable programming, and specifically, that neither DISH nor DIRECTV offers public, educational, and government (PEG) access programming by which the local government informs citizens of local events and activities in the community and surrounding communities.¹⁴ The Communities contend that in spite of the definition found in 47 C.F.R. § 76.905(g), the common sense definition of “comparable programming” indicates a comparable channel lineup, not just 12 channels of video programming.¹⁵ For these reasons, the Communities argue the DBS providers do not offer comparable programming.

6. Petitioner responds, and we agree, that the Three Washington Communities’ arguments do not demonstrate that the first part of the test for competing provider effective competition is not met.¹⁶

⁸ 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*).

⁹ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

¹⁰ 47 U.S.C. § 543(l)(B); 47 C.F.R. § 76.905(b)(2).

¹¹ 47 U.S.C. § 543(l)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

¹² *Effective Competition Order*, 30 FCC Rcd at 6580-81, ¶ 8.

¹³ See 47 C.F.R. § 76.905(g); see also Petition at 5.

¹⁴ Everett’s Opposition at 2; Mountlake Terrace’s Opposition at 2; Mukilteo’s Opposition at 2. The City of Edmonds does not raise objections under the first part of the competing provider test. See generally, Edmonds’ Opposition.

¹⁵ Everett’s Opposition at 2; Mountlake Terrace’s Opposition at 2; Mukilteo’s Opposition at 2.

¹⁶ Comcast’s Reply to the Communities at 1-2.

Section 76.905(g) of the Commission’s rules does not grant discretion in determining what constitutes comparable programming for purposes of determining effective competition. Moreover, the Communities’ arguments fail to rebut the new presumption of competing provider effective competition because we now presume that DBS providers, DIRECTV and DISH, provide comparable programming.¹⁷ Furthermore, we have repeatedly held that determining whether competing service is comparable for effective competition purposes does not depend on whether a competing service includes PEG access programming.¹⁸ In accordance with the presumption of competing provider effective competition, and based on the information submitted by Petitioner and the Communities, we thus find that the first part of the test is satisfied.

B. The Second Part

7. 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.¹⁹ 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.”²⁰ Petitioner notes that the competing provider penetration figures for the Attachment A Communities include subscribers from Frontier Communications Northwest Inc. (Frontier) as well as from the two DBS providers.²¹ Petitioner first obtained from SNL Kagan a list of zip codes that corresponds with the political boundaries of a particular community.²² Petitioner then purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association (SBCA), which reported the number of DBS subscribers in each of the Attachment A Communities.²³ Petitioner obtained subscriber numbers for Frontier directly from that company.²⁴ Petitioner compared the MVPD subscribership data to the 2010 U.S. Census household numbers for each of the Attachment A Communities. Petitioner asserts that the resulting ratios

¹⁷ *Effective Competition Order*, 30 FCC Rcd at 6580-81, ¶ 8.

¹⁸ See *Charter Commc’ns*, 28 FCC Rcd 13989, 13991, ¶ 7 (2013) (“Our rule does not make PEG channels a necessary element of comparable programming.”); see also *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 3993, 3994-95, ¶ 5 (2011) (“The rule does not mention PEG channels, and we have 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 completion.”); *Cablevision of Oakland, Inc., and CSC TKR, Inc.*, 24 FCC Rcd 1801, 1803, ¶ 6 (2009).

¹⁹ 47 C.F.R. § 76.905(b)(2)(ii).

²⁰ *Effective Competition Order*, 30 FCC Rcd at 6581, ¶ 9.

²¹ See Petition at 6.

²² See Petition at 7 & Exh. 5.

²³ *Id.* at 7-8.

²⁴ See *id.* at 6; Comcast’s Reply to the Communities at 4. Petitioner has requested that we treat as confidential certain data that was supplied by its competitor Frontier and that shows Frontier’s subscribership in the Attachment A Communities. Petition at 6, 8, & Exh. 4. Businesses typically protect such data from disclosure. Accordingly we grant the Petitioner’s request. We believe that by combining Frontier’s subscriber figures in the relevant Communities with the direct broadcast satellite figures provided by the SBCA, we will sufficiently protect the confidentiality of Frontier’s subscriber figures. See, e.g., *Comcast Cable Commc’ns, LLC*, 28 FCC Rcd 9959, 9960 n.15 (MB 2013) (citing *CoxCom, Inc.*, 22 FCC Rcd 4384 (MB 2007)). We reserve the right, if another party requests access to the confidential data, to engage in a more formal process for their evaluation, protection, and limited disclosure. See, e.g., *Adelphia Commun. Corp.*, 20 FCC Rcd 20073 (MB 2005); *Sprint Petition for Pricing Flexibility for Special Access & Dedicated Transp. Servs.*, Protective Order, 20 FCC Rcd 19882 (WCB 2005) (*Sprint Protective Order*).

demonstrate that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Attachment A Communities.²⁵

1. The Communities' Oppositions

8. The Three Washington Communities argue Petitioner has not satisfied the second part of the competing provider effective competition test for several reasons. First, the Communities argue that more accurate census data and more accurate MVPD subscribership data are available and that Petitioner should be required to use more current data sources in its Petition.²⁶ Petitioner responds, and we agree, that its use of census household figures and MVPD subscribership data for each community was proper and fully consistent with Commission precedent.²⁷ Second, the Communities assert that the SBCA subscriber tracking reports referenced in Comcast's Petition do not take into account any cancellations that occurred between the time the reports were purchased and the date the Petition was filed.²⁸ Petitioner responds, and we agree, that the Communities provide no evidence that any cancellations were significant enough in number in the Communities of Everett, Mountlake Terrace, and Mukilteo to undermine the DBS penetration figures provided in the Petition.²⁹ Third, the Communities object to the inclusion of DBS service in effective competition determinations.³⁰ Petitioner responds, and we agree, that this argument is irrelevant because Section 602(13) of the Communications Act defines "multichannel video programming distributors" (MVPDs) specifically to include "direct broadcast satellite service,"³¹ and therefore, Congress did not leave open to Commission discretion whether DBS service should be counted under the statutory competing provider test.³² Finally, we also reject the Communities' objections to the Petition arguing that deregulation of basic service rates would be against consumers' public interest

²⁵ Petition at 8-9.

²⁶ Everett's Opposition at 3-5; Mountlake Terrace's Opposition at 3-5; Mukilteo's Opposition at 3-5.

²⁷ Comcast's Reply to the Communities at 2-3. See also *Time Warner Cable Inc., Petition for Determination of Effective Competition in Nine Franchise Areas in New Jersey*, 25 FCC Rcd 5457, 5460-61, ¶ 11 (2010) (The Commission upheld cable operator's use of 2000 census household data in determining DBS penetration for the communities at issue); *Comcast Cable Commc'nns, LLC, Petitions for Determination of Effective Competition in 107 Franchise Areas in New Jersey*, 24 FCC Rcd 1780, 1783-84, ¶ 13 (2009) ("[W]e have found competing provider effective competition to exist based on household and DBS subscribership data that are several years apart in time."); *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Cable Service Rates*, 9 FCC Rcd 3656, 3656, ¶ 2(3) (1994) ("With respect to household data, we realize that in many cases 1990 census data represents the most recent data available. Accordingly, we believe that 1990 census data is an appropriate measure of households. Operators that have access to more recent data may submit such information if they so choose.").

²⁸ Everett's Opposition at 4-5; Mountlake Terrace's Opposition at 4-5; Mukilteo's Opposition at 4-5. Attached to the Communities' oppositions are documents that, the Communities state, show that DBS "subscribers have declined in the second quarter of 2013 as compared to the same time period in 2012." Everett's Opposition at 4 & Exh. 1; Mountlake Terrace's Opposition at 4 & Exh. 1; Mukilteo's Opposition at 4 & Exh. 1.

²⁹ Comcast's Reply to the Communities at 4. See also *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14145, ¶ 15 (2008), stay denied, 23 FCC Rcd 17012 (2008) (dismissing objection that the cable operator's estimate of DBS subscribers did not include cancellations after the date that SBCA estimated DBS subscriber numbers).

³⁰ Everett's Opposition at 5-6; Mountlake Terrace's Opposition at 5-6; Mukilteo's Opposition at 5-6.

³¹ Comcast's Reply to the Communities at 7 (citing 47 U.S.C. § 522(13)).

³² Comcast's Reply to the Communities at 7; see also *Cablevision Sys. E. Hampton Corp.*, 24 FCC Rcd 10846, 10849-50, ¶ 13 (2009) (concerning the general objection that DBS should not provoke deregulation of rates for basic cable service, the statute generally defines the class of cable competitors as MVPDs, and specifically defines DBS operators as an MVPD).

because it might lead to an increase in cable prices.³³ Indeed, Section 623(b)(1) of the Act sets the standard for basic cable rates not at perfect competition, but at the level no higher than would be charged if there were effective competition.³⁴

2. The City of Edmonds' Opposition

9. The City of Edmonds argues Petitioner has not satisfied the second part of the competing provider effective competition test because Petitioner relies on data from SNL Kagan and Frontier but does not provide the methodology used by SNL Kagan or Frontier, and, without the underlying methodology, the City argues it cannot confirm the accuracy of the data used to support the Petition.³⁵ Petitioner responds, and we agree, that the Commission has relied upon SNL Kagan's zip plus four methodology and SBCA's subscriber numbers as sufficiently accurate to calculate effective competition percentages in numerous previous decisions.³⁶ The City did not submit other data that would provide more accurate MVPD subscriber counts.³⁷

3. Objections to Use of Confidential Data

10. The Three Washington Communities and the City of Edmonds object to Petitioner's use of confidential subscriber data from Frontier.³⁸ Petitioner responds, and we agree, that the Three Washington Communities and the City of Edmonds have failed to pursue existing Commission processes designed to allow access to confidential information.³⁹ In past proceedings, we have accepted effective competition filings containing confidential subscriber information.⁴⁰ As a party to this proceeding, the Three Washington Communities and the City of Edmonds may gain access to confidential data under a

³³ Everett's Opposition at 5-6; Mountlake Terrace's Opposition at 5-6; Mukilteo's Opposition at 5-6.

³⁴ See 47 § U.S.C. 543(b)(1); see, e.g., *Comcast Cable Commc'ns, LLC*, 26 FCC Rcd 2471, 2475, ¶ 14 (2011); *Comcast Cable Commc'ns, LLC*, 25 FCC Rcd 13340, 13343, ¶ 12 (2010), *erratum on other grounds* (rel. Sept. 27, 2010); *Comcast Cable Commc'ns, LLC*, 25 FCC Rcd 12819, 12821-22, ¶ 11 (2010).

³⁵ Edmonds's Opposition at 13-17 & Attach. A at 5-6.

³⁶ Comcast's Reply to the City at 4; *see also Comcast Cable Commc'ns, LLC, Petition for Determination of Effective Competition in Six Blaine, Minnesota Franchise Areas*, 28 FCC Rcd 5508, 5511, ¶ 9 (2013); *Comcast Cable Commc'ns, LLC, Petition for Determination of Effective Competition in 7 Washington Franchise Areas*, 26 FCC Rcd 2471, 2475, ¶ 13 (2011); *Cablevision Systems Westchester Corp., Petition for Determination of Effective Competition in Putnam Valley, New York*, 24 FCC Rcd 872, 875, ¶ 13 (2009) ("ZIP+4 data such as Petitioner has presented is the most fine-grained and commonly available way of which we are aware to count DBS subscribers in a community. It does not create an automatic suspicion of inaccuracy."); *Cablevision of Litchfield, Inc., Petition for Determination of Effective Competition in Eight Conn. Cmty's*, 23 FCC Rcd 16614, 16616, ¶ 6 (2008).

³⁷ We also find irrelevant the City's assertion that Comcast effectively shifted the burden of proof to the City. Edmonds's Opposition at 17-19 & Attach. A at 5-6. Pursuant to the *Effective Competition Order*, there is a rebuttable presumption that cable operators are subject competing provider effective competition. *See generally Effective Competition Order*, 30 FCC Rcd 6574.

³⁸ Everett's Opposition at 4; Mountlake Terrace's Opposition at 4; Mukilteo's Opposition at 4; Edmonds's Opposition at 8. The City of Edmonds requested an un-redacted copy of the Petition, but Petitioner denied its request because of Petitioner's confidential agreement with Frontier. Edmonds's Opposition at 9, 12.

³⁹ Comcast's Reply to the Communities at 4-5; Comcast's Reply to the City at 2-3. Petitioner notes that in order to obtain subscribership data from Frontier, Petitioner had to agree to a confidentiality agreement with Frontier. Comcast's Reply to the Communities at 4, Exhs. 1-2.

⁴⁰ *See Comcast Cable Commc'ns, LLC*, 27 FCC Rcd 15940, 15941, ¶ 5 (2012) (the Commission accepted Comcast's effective competition filing containing confidential Verizon subscriber information, and subsequently facilitated a protective order between Verizon and the Division of Rate Counsel of the State of New Jersey (the DRC) that allowed the DRC to review Verizon's confidential data).

protective order. The Communities and the City of Edmonds failed to pursue such access in accordance with the Commission’s confidentiality procedures. Accordingly, we reject the Communities’ and City’s objections that the Petition should be denied because they could not validate the data submitted by Petitioner.⁴¹

4. Conclusion

11. Despite the specific and general objections of the Three Washington Communities and the City of Edmonds, the second part of the competing provider test is satisfied for the Communities of Edmonds, Everett, Mountlake Terrace, and Mukilteo. Based on the foregoing reasons, and in accordance with the presumption of competing provider effective competition, we conclude that both parts of the competing provider test are satisfied and Petitioner is subject to effective competition in all of the Attachment A Communities.

III. ORDERING CLAUSES

12. 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.

13. **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**.

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

FEDERAL COMMUNICATIONS COMMISSION

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⁴¹ As noted above, we reserve the right, if a party requests access to the confidential data, to engage in a more formal process for their evaluation, protection, and limited disclosure. *See, e.g., Adelphia Commun. Corp.*, 20 FCC Rcd 20073; *Sprint Protective Order*, 20 FCC Rcd 19882. *See also supra* note 24.

⁴² 47 C.F.R. § 0.283.

ATTACHMENT A**MB Docket No. 13-198, CSR 8821-E****COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC**

| Communities | CUID | CPR* | 2010 Census Households | Estimated Non-Comcast MVPD Subscribers |
|--------------------|-------------|-------------|-------------------------------|---|
| Brier | WA0325 | 22.86% | 2,165 | 495 |
| Edmonds | WA0099 | 16.21% | 17,381 | 2,818 |
| Everett | WA0091 | 15.98% | 41,312 | 6,601 |
| Lynnwood | WA0204 | 17.88% | 14,107 | 2,523 |
| Mill Creek | WA0396 | 16.81% | 7,551 | 1,269 |
| Mountlake Terrace | WA0228 | 17.88% | 8,192 | 1,465 |
| Mukilteo | WA0013 | 15.24% | 8,057 | 1,228 |
| Woodway | WA0550 | 19.87% | 448 | 89 |

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