

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

In the Matter of
Comcast Cable Communications, LLC
Petition for Determination of Effective
Competition in Lacey, Washington
MB Docket No. 13-313, CSR 8862-E

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2016

Released: March 10, 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 community listed on Attachment A (the Community). Comcast alleges that its cable system serving the Community 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 that it is therefore exempt from cable rate regulation in the Community because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV") and DISH Network ("DISH"). The petition is opposed by the City of Lacey (the "City" or "Lacey"). Comcast filed a reply.

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. 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. 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 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

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.

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 The City has not put forth any information to rebut the first part of the competing provider 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 City argues that Comcast has not demonstrated that Lacey is subject to effective competition because it relied upon outdated household data from the 2010 Census.¹⁰ While the City does not contend that the Census figure for occupied households in Lacey is wrong, it does argue that Comcast did not consider more recent information that reflected: (i) an increase of 787 new housing units in Lacey between 2010 and 2013, (ii) a decrease in the number of homes for sale in Thurston County (where Lacey is located), and (iii) a decrease in the City’s apartment vacancy rate to 4.8 percent in 2013.¹¹

6. Comcast responds that the Washington State Office of Financial Management’s (“OFM”) “Postcensal Estimates of Housing Units” data referenced by the City to demonstrate an increase of 787 new housing units is expressed in terms of “total” housing units, rather than “occupied” housing units which is the relevant standard for effective competition purposes.¹² Comcast explains, and we agree, that even if the Commission were inclined to do so, it could not accept the OFM data for effective competition purposes because the 787 housing unit figure would necessarily include unoccupied housing units.¹³ Regarding the City’s claims about a lower real estate inventory rate for Thurston County and a 4.8 percent apartment vacancy rate for Lacey in 2013, Comcast responds that the City provides no details supporting the accuracy of those figures.¹⁴ Comcast also notes that Thurston county-wide real estate

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 Lacey Opposition at 2.

¹¹ *Id.* at 2-3.

¹² Comcast Reply at 3.

¹³ *Id.*

¹⁴ *Id.*

inventory rates are not indicative of the inventory rate in the community of Lacey itself, and the City apartment vacancy rates do not necessarily reflect vacancy rates for overall housing units in Lacey.¹⁵ Comcast contends that ultimately the City fails to present a specific alternative to the vacancy rate reported in the 2010 Census.¹⁶ Comcast asserts, and we agree, that the City is asking the Commission to rely on speculation that general changes in the Lacey housing market might result in a lower DBS penetration rate in the City.¹⁷

7. Comcast's use of Census figures in this case was proper and fully consistent with Commission precedent. While the Commission has stated that it will consider more recent household data, it will only consider such a submission if the local franchising authority demonstrates that it is reliable. While the City attempts to identify changes in the local housing market, it does not reconcile these alleged differences with the original 2010 Census data submitted by Comcast. In addition, the City makes no attempt to demonstrate that the DBS penetration rate in Lacey is below the required 15 percent threshold. Accordingly, we do not consider the alternative data submitted by the City to be reliable data that should be used in place of the U.S. Census data submitted by Comcast. For the above reasons, the arguments put forth by the City 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 City, we find that the second prong of the test is satisfied.

III. ORDERING CLAUSES

8. 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 Community listed on Attachment A hereto.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of the Community set forth on Attachment A **IS REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

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¹⁵ *Id.*

¹⁶ *Id.*, see also Petition at Exhibit 5 (2010 Census data for occupied and vacant housing units in Lacey).

¹⁷ Comcast Reply at 3.

¹⁸ 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
Lacey	WA0166	16.90%	16,949	2,864

*CPR = Percent of competitive DBS penetration rate.