

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

| | | |
|--|---|----------------------------------|
| In the Matter of |) | |
| |) | |
| Comcast of Potomac, LLC |) | MB Docket No. 12-308, CSR 8733-E |
| |) | |
| Petition for Determination of Effective Competition in 4 Maryland Communities |) | |

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2016

Released: April 29, 2016

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

I. INTRODUCTION AND BACKGROUND

1. Comcast of Potomac, LLC (the “Petitioner”) has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(4), 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 “Communities”). Petitioner alleges that its cable system serving the Communities is 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 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”), as well as Verizon. Montgomery County, Maryland (“Montgomery County”) filed an opposition to the petition with regard to two of the Communities, Laytonsville and Poolesville, to which Petitioner filed a reply. Montgomery County then filed a motion for leave to file a surreply as well as a surreply, to which Petitioner filed a response. We deny the request for leave to file the surreply as discussed below.³

2. Petitioner also claims that its cable system serving two of the Communities, Chevy Chase Village and Chevy Chase Section 3, is subject to effective competition pursuant to Section 623(l)(1)(D) of the Communications Act⁴ and Section 76.905(b)(4) of the Commission’s rules,⁵ because of the service provided by a local exchange carrier (“LEC”), Verizon. This claim is unopposed.

3. 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.⁶ 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

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ See *infra* note 15.

⁴ See 47 U.S.C. § 543(l)(1)(D).

⁵ 47 C.F.R. § 76.905(b)(4).

⁶ 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*”).

defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁷ For the reasons set forth below, we grant Petitioner's petition.

II. THE COMPETING PROVIDER TEST

4. 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 households in the franchise area.⁸ 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

5. 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.⁹ 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.¹⁰ Montgomery County has not put forth any information to rebut the first part of the competing provider effective competition test. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Petitioner, we thus find that the first part of the test is satisfied.

B. The Second Part

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 area.¹¹ 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."¹² Montgomery County argues that Petitioner has not satisfied the second part of the competing provider effective competition test in the communities of Laytonsville and Poolesville.¹³ Rather than objecting to Petitioner's application of the second prong of the statutory test for competing provider effective competition, Montgomery County argues that DBS competition should not justify a finding of effective competition.¹⁴ Montgomery County also argues that the Commission's general duty to act in the public interest justifies denying the Petition and suspending our effective competition rules that permit petitions to rely solely on DBS penetration.¹⁵

⁷ See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

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

⁹ 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ *Effective Competition Order*, 30 FCC Rcd at 6580-81, ¶ 8.

¹¹ 47 C.F.R. § 76.905(b)(2)(ii).

¹² *Effective Competition Order*, 30 FCC Rcd at 6581-82, ¶ 9.

¹³ See Opposition at 3-6.

¹⁴ *Id.* at 2-7.

¹⁵ *Id.* at 7. Montgomery County filed a Surreply to address the Commission's discretion regarding whether DBS should be included in the competing provider effective competition test. Surreply at 1-2. Montgomery County

(continued....)

Petitioner responds, and we agree, that this argument lacks merit because Petitioner has satisfied the statutory effective competition test.¹⁶ Where we determine the existence of effective competition as defined by Congress, our inquiry is at an end. In addition, the Commission has recognized that the effective competition provisions of the Communications Act “contain[] a clear and explicit preference for [competition].”¹⁷ Petitioner’s satisfaction of the effective competition test demonstrates that the public interest will be met through Congress’s preference for competition. We also reject Montgomery County’s request to modify our rules in this adjudicatory proceeding.¹⁸ We must implement the statutory effective competition test as directed by Congress. In addition, the appropriate procedural vehicle for a rule change is a petition for rulemaking and not an opposition filed in a proceeding initiated pursuant to Section 76.7 of the Commission’s rules.¹⁹

7. For the above reasons, the arguments put forth by Montgomery County 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 Petitioner and Montgomery County, we thus find that the second prong of the test is satisfied.

III. THE LOCAL EXCHANGE CARRIER TEST

8. Petitioner also seeks a finding of LEC effective competition for two of the Communities, Chevy Chase Village and Chevy Chase Section 3. The statutory test for a finding of LEC effective competition requires that the 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, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.²⁰ The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.²¹ It is

(...continued from previous page)

claimed that the Surreply was needed because Petitioner raised this new issue in its Reply. Surreply at 1 (citing Reply at 3). We find that this was not a new issue Petitioner raised in its Reply, but rather, Petitioner was properly responding to Montgomery County’s arguments in its Opposition that DBS operators alone do not provide effective competition to cable operators. See Opposition at 4, 7. Therefore, we deny the request for leave to file the Surreply. Nonetheless, we reach the merits of this issue as it was properly raised in Montgomery County’s Opposition and Petitioner’s Reply, as discussed herein.

¹⁶ See Reply at 2. See also 47 U.S.C. § 522(13) (defining an MVPD to include a DBS provider).

¹⁷ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5636 at ¶ 2 (1993); see H.R. Rep. No. 102-628, at 30 (1992) (Congress “strongly prefers competition and the development of a competitive marketplace to [rate] regulation.”).

¹⁸ See Opposition at 7-8.

¹⁹ *Comcast Cable Communications, LLC Six Petitions for Determination of Effective Competition in Forty-Two Local Franchise Areas in Texas*, Memorandum Opinion and Order, 20 FCC Rcd 20438, ¶ 5 (2005).

²⁰ 47 U.S.C. § 543(1)(1)(D); see also 47 C.F.R. § 76.905(b)(4).

²¹ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”). The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, 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. *Id.* at 5305.

undisputed that the Communities of Chevy Chase Village and Chevy Chase Section 3 are served by both Comcast and Verizon, a local exchange carrier that these two MVPDs are unaffiliated, and that Verizon provides comparable programming to Comcast.²² Comcast has demonstrated that Verizon otherwise satisfies the LEC effective competition evidentiary requirements set forth in the *Cable Reform Order*.²³ Comcast has satisfied the LEC effective competition test by showing that Verizon holds a franchise to serve the Communities and its video programming services are available throughout the Communities.²⁴ Moreover, Comcast has demonstrated that potential subscribers are reasonably aware of Verizon's FIOS service as a result of local television and radio advertisements.²⁵ Lastly, Verizon offers comparable programming to that offered by Comcast, with an offering of several hundred channels including both nonbroadcast and broadcast channels.²⁶ Accordingly, in addition to our finding of competing provider effective competition in all of the Communities, we find that the Petitioner has satisfied its burden of demonstrating the presence of LEC effective competition in Chevy Chase Village and Chevy Chase Section 3.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast of Potomac, LLC, **IS GRANTED** as to the Communities listed on Attachment A hereto.

10. **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**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

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

²² See Petition at 12-15.

²³ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petition at 12-16.

²⁴ See Petition at 14.

²⁵ *Id.* at 15.

²⁶ *Id.* at 16.

²⁷ 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 12-308, CSR 8733-E

COMMUNITIES SERVED BY COMCAST OF POTOMAC, LLC

| Communities | CUIDs | CPR* | 2010 Census Households | Estimated Subscribers |
|---------------------------|--------------|-------------|-------------------------------|------------------------------|
| Chevy Chase Village, MD | MD0277 | 45.77% | 697 | 319 |
| Chevy Chase Section 3, MD | MD0472 | 58.67% | 271 | 159 |
| Laytonsville, MD | MD0235 | 31.50% | 127 | 40 |
| Poolesville, MD | MD0228 | 42.45% | 1,602 | 680 |

*CPR = Percent of competitive penetration rate.