

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

In the Matter of)	CSR 7389-E
)	CSR 7403-E
Comcast Cable Communications, LLC, on Behalf)	CSR 7417-E
of Its Subsidiaries and Affiliates)	CSR 7433-E
)	CSR 7435-E
Petition for Determination of Effective)	CSR 7441-E
Competition in 65 Communities in New England)	CSR 7463-E

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 2008

Released: July 15, 2008

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates, hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) 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 systems serving the Communities are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and are 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”). Petitioner alternatively claims to be exempt from cable rate regulation in the Communities listed on Attachment B because the Petitioner serves fewer than 30 percent of the households in the franchise area. The petition in CSR 7433-E is opposed by the local franchise authority in one Community, the Town of Epping, New Hampshire (the “Town”).³ In all other respects, the petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ For the reasons set forth below, we grant the petitions based on our

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

³ Opposition to Petition for Special Relief for Determination of Effective Competition (“Epping Opposition”) (dated Sept. 25, 2007). The Epping Opposition was filed pursuant to an Assented to Motion for Extension of Time filed by Epping on August 27, 2007.

⁴47 C.F.R. § 76.906.

⁵See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

finding that Petitioner is subject to effective competition in the Communities listed on Attachments (A and B).

II. DISCUSSION

A. 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 multi-channel 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;⁷ this test is otherwise referred to as the “competing provider” test.

4. The first prong 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.⁸

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁹

6. The Town argues that Petitioner has not sustained its burden of showing that households in Epping are reasonably aware that DBS service is available to them.¹⁰ The Town is correct that Petitioner has not produced any specific evidence showing that households in Epping are aware of DBS service. We do not require such market-specific evidence, however. We have held that a cable operator may sustain its burden of showing awareness of DBS service in a franchise area by relying on the evidence cited in the preceding paragraph and on the many decisions about effective competition that the Commission has released over many years.¹¹ That evidence and those decisions show real, widespread awareness among American households that DBS service is available to them. We are confident in relying on those materials in this instance. The Town has produced no evidence, and does not allege, that our presumption is incorrect; that is, the Town does not claim that households in Epping are not reasonably aware that DBS service is available to them.¹² We see no reason to believe that households of Epping are less informed about DBS service than other American households. Accordingly, we find, consistent with our longstanding presumptions and case law and the evidence cited the preceding paragraph, that households in Epping are reasonably aware that DBS service is available there.

7. The “comparable programming” element of the first prong of the competing provider test is met if a competing MVPD provider offers at least 12 channels of video programming, including at least

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

⁸47 C.F.R. § 76.905(b)(2)(i).

⁹*See* Petition in CSR 7389-E at 2-4.

¹⁰Epping Opposition at 2.

¹¹*See, e.g.,* Mediacom Illinois LLC et al., *Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹²Petitioner Reply at 1-3.

one channel of nonbroadcast service programming¹³ and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹⁴ Also undisputed is Petitioner's assertion that both DIRECTV and Dish offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.¹⁵ Accordingly, we find that the first prong of the competing provider test is satisfied.

8. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.¹⁶

9. Petitioner alleges, and there is no reason to doubt, that it is the largest MVPD in 50 of the Communities (the "50 Communities").¹⁷ In twelve of the Communities (collectively the "12 Communities"), it is uncertain which MVPD is the largest. In circumstances where the largest MVPD is unable to be identified, the Commission is able to determine that the second prong is met when it can make dual assumptions. First, we assume that Petitioner is the largest MVPD provider in the Community and determine that the combined DBS subscribership is greater than 15 percent; we then assume that one of the DBS providers is the largest MVPD in the Community and determine that Petitioner's subscribership is greater than 15 percent. When both determinations can be made, then the second prong of the competing provider test is met. Petitioner's data about its subscribership, along with data about DBS subscribership set forth in Attachment A, show that both these determinations can be made for the 12 Communities.¹⁸

10. The Town of Epping challenges some of the evidence by which Petitioner attempts to show that more than 15 percent of the households in Epping subscribe to DBS service. The Town accepts Petitioner's showing of 343 DBS subscribers in Epping as of April 30, 2007.¹⁹ Petitioner reaches the number 343 by starting with there being, as reported by SBCA, 350 households in all of Zip Code 03042. Part of that Zip Code contains all of Epping, and Petitioner reduced 350 by the allocation factor of 1.87 percent to reflect the fact that Epping is only part of that Zip Code.²⁰ In addition, the Town obtained its own, more recent report from SBCA showing 356 DBS subscribers in the Zip Code as of July 31, 2007.²¹ If that number were reduced by the 1.87 percent allocation factor, there would be 349 DBS subscribers in Epping. Consistent with our past decisions, we choose 349 as the relevant number of DBS subscribers in Epping and the numerator in the ratio called for by the second part of the competing provider test. We

¹³See 47 C.F.R. § 76.905(g). See also Petition in CSR 7403-E at 4.

¹⁴See Petition in CSR 7417-E at Exh. 2.

¹⁵See Petition in CSR 7441-E at 2-3.

¹⁶Petition in CSR 7463-E at 5.

¹⁷See, e.g., Petition in CSR 7441-E at 5-6 & attached Declaration of Peter H. Feinberg, Associate General Counsel, Comcast, dated July 18, 2007, at ¶ 3. The 50 Communities are all of the 62 Communities except for Alstead, Antrim, Canaan, Cornish, Danbury, Deering, Gilsum, Hancock, Hill, Langdon, Plainfield, and Temple, all in New Hampshire.

¹⁸Petition in CSR 7417-E at 5; Petition in CSR 7435-E at 6; Petition in 7441-E at 6; Petition in CSR 7463-E at 6; and attached Affidavits of Mr. Feinberg, dated July 17 or 18, 2007, at ¶ 3.

¹⁹Epping Opposition at 4; Petition in CSR 7433-E, Exhs. 4-5.

²⁰Petition in CSR 7433-E, Exh. 5.

²¹Epping Opposition, Exh. D.

choose 349 because it is the most recent available data from SBCA, reduced by an appropriate allocation factor.²²

11. Concerning the denominator in the ratio called for by the competing provider test, the Town challenges the 2000 Census data that Petitioner uses and that shows 2,047 households in Epping.²³ The Town argues that data from 2000 is too old to be used seven or more years later.²⁴ The Town presents instead, two other numbers. The first is from a report titled “2005 Household Estimates for New Hampshire Cities and Towns,” published in late 2006 by the New Hampshire Office of Energy & Planning (“NHOE&P”). The Report estimates that Epping grew between 2000 and 2005 from 2,047 households to an estimated 2,254.²⁵ Second, the Town presents its own 2006 Annual Report, which states that (evidently in that year) there were 2,499 housing units in Epping.²⁶ If we used the first estimate presented by the Town, we would conclude that DBS subscribership (2,254 divided by 349) was 15.48 percent, more than the minimum “in excess of 15 percent” required by the second part of the competing provider test. If we used the Town’s second estimate, we would conclude that DBS subscribership (2,499 divided by 349) is 13.97 percent, which is less than the statutory minimum.

12. Petitioner responds, and is correct, that the Commission has long been willing to accept data more recent than Census data, but only if it is also a reliable statement of the actual number of households in the franchise area.²⁷ The first number presented by Epping, from NHOE&P, is an estimate, not an actual number such as can be drawn from the 2000 Census. The Town’s estimate does not satisfy our requirements. (Also, even if we used it, Petitioner would show DBS subscribership in excess of 15 percent.) The second number presented by the City, assuming it is a precise count like the 2000 Census, shows the number of housing units in Epping, both those that are occupied and those that are unoccupied. A “household,” however, which the plain language of Section 623(l)(1)(B)(ii)²⁸ requires us to use, is an *occupied* housing unit.²⁹ A count of all housing units does not satisfy the statutory requirement because it includes unoccupied housing units as well as occupied ones. Therefore, we reject the second number presented by the Town. An additional, although relatively minor, reason we will not use either of the numbers presented by the Town – 2,254 households estimated in 2005 and 2,499 housing units in 2006 – is that, although they differ by only a year in time, they show an increase from one year to another of more than 10 percent. This is far above usual annual growth, and makes both numbers open to doubt.

13. Accordingly, we will use the number 2,047 that Petitioner drew from the 2000 Census for the number of households in Epping.³⁰ Therefore, the ratio called for by the second part of the competing

²²For cases in which we have approved the use of reliable allocation factors to account for partial Zip Codes, see *Adelphia Cable Commun.*, 22 FCC Rcd 4423, 4425, ¶ 7 (2007); *Service Electric Cable TV of New Jersey, Inc.*, 20 FCC Rcd 20532, 20534, ¶ 8 & n.23 (2005); *Comcast of Dallas, L.P.*, 20 FCC Rcd 17968, 17969-70, ¶ 5 (2005).

²³Petition in CSR 7433-E, Exh. 6 at 2.

²⁴Epping Opposition at 2-3.

²⁵*Id.*, Exh. A at 6.

²⁶*Id.*, Exh. B at 3.

²⁷*Adelphia Cable Commun.*, Memorandum Opinion & Order, 22 FCC Rcd 4458, 4462-63, ¶ 14 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4393-94, ¶ 11; *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007).

²⁸47 U.S.C. § 543(l)(1)(B)(ii).

²⁹*Cablevision of Rockland/Ramapo Inc.*, Memorandum Opinion & Order, 22 FCC Rcd 11487, 11491, ¶ 11 & n.43, 11493, ¶ 15, 11494, ¶ 17 (2007) *application for review pending*; *Bright House Networks, LLC*, 22 FCC Rcd at 4165, ¶ 11 (2007); *CoxCom, Inc.*, Memorandum Opinion & Order, 22 FCC Rcd 4533, 4539, ¶ 13, 4540, ¶ 16 (2007).

³⁰The Commission has long accepted showings of competing provider effective competition using Census data that is several years old. See, e.g., *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd at 11493, ¶ 16 (2007);

(continued....)

provider test for Epping is 349 over 2,047, which is 17.05 percent. That is higher than the statutory minimum of ‘in excess of 15 percent.’³¹

14. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,³² as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

B. The Low Penetration Test

15. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.³³ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.

16. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Communities listed on Attachment B. Therefore, the low penetration test is also satisfied as to the Communities.

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Cablevision of Raritan Valley, Inc., 19 FCC Rcd 6966, 6968, ¶ 6 (2004) (“We find that the Ratepayer Advocate's arguments are without merit. The Commission has held that 2000 Census data is sufficiently reliable for effective competition determinations.”); *Jones Intercable, Inc.*, 15 FCC Rcd 7254, 7256, n.12, ¶ 5 (2000) (using 1990 Census despite the fact that it was nearly a decade old); *Tel-Com, Inc.*, 11 FCC Rcd 9153, 9158-59, n.36, ¶ 11 (1996) (1996 decision using 1990 Census data).

³¹If we used Petitioner’s original number of DBS subscribers, 343, DBS subscribership (2,047 divided by 343) would be 16.76%, also above the statutory minimum.

³²Petition in CSR 7389-E at 7.

³³47 U.S.C. § 543(l)(1)(A).

III. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates, **ARE GRANTED**.

18. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

19. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

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

³⁴47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7389-E, CSR 7403-E, CSR 7417-E, CSR 7433-E, CSR 7435-E, CSR 7441-E, CSR 7463-E

COMMUNITIES SERVED BY SUBSIDIARIES AND AFFILIATES OF COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
CSR 7389-E				
Colchester	VT0149	18.49%	6144	1136
Georgia	VT0194	20.34%	1484	625
Milton	VT0148	30.10%	3333	1003
CSR 7403-E				
Ansonia	CT0002	29.05%	7507	2181
Beacon Falls	CT0063	36.63%	2032	744
Bethany	CT0096	27.65%	1755	485
Derby	CT0001	27.07%	5252	1422
Middlebury	CT0010	22.64%	2398	543
Naugatuck	CT0061	22.91%	11829	2710
Oxford	CT0062	36.13%	3343	1208
Plymouth	CT0011	28.19%	4453	1255
Prospect	CT0005	28.31%	3020	855
Seymour	CT0003	29.48%	6155	1815
Shelton	CT0060	26.14%	14190	3709
Waterbury	CT0009	35.62%	42622	15182
Wolcott	CT0007	28.08%	5414	1520
CSR 7417-E				
Amherst	NH0198	21.55%	3590	774
Bennington	NH0133	41.85%	552	231
Danville	NH0080	24.00%	1428	343
Fracestown	NH0199	35.26%	552	195
Hancock	NH0139	47.63%	706	336
Jaffrey	NH0032	42.88%	2120	909
Kingston	NH0130	19.74%	2122	419
Milford	NH0025	20.78%	5201	1081
Mont Vernon	NH0140	29.15%	693	202
New Boston	NH0078	36.37%	1434	522
New Ipswich	NH0033	46.24%	1350	624
Newton	NH0230	27.44%	1518	417
Peterborough	NH0147	31.73%	2346	744
Temple	NH0027	47.31%	440	208
Wilton	NH0004	26.88%	1410	379

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
CSR 7433-E				
Epping	NH0113	17.05%	2047	349
Hampton Falls	NH0095	16.19%	704	114
CSR 7435-E				
Andover	NH0222	28.20%	823	232
Canaan	NH0052	56.52%	1279	723
Charlestown	NH0111	38.41%	1920	737
Claremont	NH0065	19.52%	5685	1109
Cornish	NH0229	48.81%	645	315
Danbury	NH0208	75.19%	435	327
Enfield	NH0089	28.16%	1975	556
Grantham	NH0242	31.75%	924	293
Hanover	NH0114	20.85%	2832	591
Hill	NH0077	59.03%	382	225
Lebanon	NH0137	17.71%	5500	974
New London	NH0228	23.63%	1574	372
Newport	NH0165	38.89%	2473	962
Plainfield	NH0113	43.48%	844	367
Sunapee	NH 0095	31.25%	1294	404
Wilmot	NH0168	40.21%	459	185
CSR 7441-E				
Antrim	NH0111	51.08%	932	476
Boscawen	NH0065	22.08%	1260	278
Canterbury	NH0229	36.65%	749	274
Chichester	NH0208	16.28%	823	134
Deering	NH0089	43.71%	713	312
Henniker	NH0114	29.59%	1585	469
Hillsborough	NH0077	43.32%	1922	833
Loudon	NH0228	28.25%	1611	455
CSR 7463-E				
Alstead	NH0079	48.98%	771	378
	NH0198			
	NH0199			
Hinsdale	NH0032	28.88%	1622	468
Langdon	NH0081	49.17%	237	117
Walpole	NH0025	40.80%	1490	608
	NH0078			
Winchester	NH0033	42.65%	1557	664

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 7435-E, 7441-E, 7463-E

COMMUNITIES SERVED BY SUBSIDIARIES AND AFFILIATES OF COMPCAST CABLE COMMUNICATIONS, LLC

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
CSR 7435-E				
Cornish	NH0229	645	172	26.67%
Danbury	NH0028	435	127	29.90%
CSR 7441-E				
Epsom	NH0242	1491	60	4.02%
CSR 7463-E				
Chesterfield	NH0133	1366	32	2.34%
Gilsum	NH0139	310	85	27.42%