

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

In the Matter of )
Comcast Cable Communications, LLC, on behalf ) CSR 7437-E & CSR 7439-E
of its subsidiaries and affiliates )
Petition for Determination of Effective )
Competition in Five Massachusetts Communities )

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 2008

Released: June 6, 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) 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 system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, 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"). One petition (CSR 7439-E) is opposed by the Town of Truro, Massachusetts (the "City" or "Truro").

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules. 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. For the reasons set forth below, we grant the petitions based on our

1 On September 20, 2007, Comcast filed a motion to withdraw Templeton, Massachusetts from its petition (CSR 7437-E).

2 See 47 U.S.C. § 543(a)(1).

3 47 C.F.R. § 76.905(b)(2).

4 Dish is a registered trademark of EchoStar Communications Corporation.

5 The City submitted a letter of opposition after the deadline for submitting comments. We will accept and consider the City's opposition in the interest of basing our determination herein upon the fullest possible record, especially given the ramifications of a determination of effective competition upon the City's ability to regulate the basic cable service tier.

6 47 C.F.R. § 76.906.

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

8 See 47 C.F.R. §§ 76.906 & 907.

finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

## II. DISCUSSION

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 (“MVPD”), 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>12</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>13</sup> 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<sup>14</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.<sup>15</sup> 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.<sup>16</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. 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 asserts that it is the largest MVPD in the Communities.<sup>17</sup> Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from

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<sup>9</sup>47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>10</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>11</sup>*See* Petition CSR 7437-E at 3; Petition CSR 7439-E at 3.

<sup>12</sup>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).

<sup>13</sup>47 C.F.R. § 76.905(e)(2).

<sup>14</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition CSR 7437-E at 4; Petition CSR 7439-E at 4.

<sup>15</sup>*See* Petition CSR 7437-E at 4 and Exhibits 1 and 2; Petition CSR 7439-E at 4 and Exhibits 1 and 2.

<sup>16</sup>*See* Petition CSR 7437-E at 3; Petition CSR 7439-E at 3.

<sup>17</sup>Petition CSR 7437-E at 5; Petition CSR 7439-E at 5.

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.<sup>18</sup>

7. In opposition, Truro argues that Comcast’s method for calculating effective competition is “deeply flawed.”<sup>19</sup> Truro asserts that although Comcast is obligated by its contract to extend cable service to every residence and business in the City, Comcast has failed to do so.<sup>20</sup> Truro claims that large portions of the City are not served by Comcast or any cable service and residents have satellite because Comcast will not run cable to their home or business.<sup>21</sup> Thus, counting the DBS subscribers in the zip codes within the franchise area does not measure competition.<sup>22</sup> Truro also argues that Comcast should establish effective competition by only counting the percentage of DBS subscribers in those areas of the City that Comcast competes with DBS, and since they have not limited their DBS subscribership count to the franchise area where there is both cable and DBS service, Comcast has not established effective competition.<sup>23</sup>

8. We find that the City’s arguments lack merit. We reject the City’s argument that Comcast has not established effective competition because the City is not completely built-out. As we have stated previously, Comcast’s failure to build out the entire franchise area does not, on its own, constitute an affirmative decision to restrict service.<sup>24</sup> Truro has not proven with other evidence that Comcast has made an affirmative decision to restrict service. Nor has Truro submitted evidence that Comcast has made an affirmative decision not to comply with the terms of service in its franchise agreement.<sup>25</sup> Finally, we reject the City’s argument that there is only effective competition where the cable provider and DBS provider compete head-to-head. The effective competition measurement is the franchise area and Truro has not presented any evidence that Comcast has redefined its franchise area to serve less than the whole area specified in its franchise. Accordingly, we will accept Comcast’s DBS penetration figures for the franchise area.

9. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>26</sup> 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.

10. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence

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<sup>18</sup>Petition CSR 7437-E at 5-7; Petition CSR 7439-E at 5-7. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

<sup>19</sup>Opposition at 1.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 1-2.

<sup>24</sup>*In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, First Order on Reconsideration, Second Report and Order, Third Notice of Proposed Rulemaking, MM Docket 92-266, 9 FCC Rcd 1164, 1180 ¶¶ 24-25 (Aug. 27, 1993).*

<sup>25</sup>If Comcast is indeed in breach of the terms of its franchise agreement with the City, that is a matter for the City to pursue in a court of appropriate jurisdiction.

<sup>26</sup>Petition CSR 7437-E at 7 and Exhibit 6; Petition CSR 7439-E at 7 and Exhibit 6..

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.

### III. ORDERING CLAUSES

11. 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**.

12. **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**.

13. **IT IS FURTHER ORDERED** that Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates' motion to withdraw the community of Templeton, Massachusetts from its petition **IS GRANTED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>27</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>27</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

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

## CSR 7437-E

<b>Communities</b>	<b>CUID(s)</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
Fitchburg	MA0015	16.71%	14943	2497
Lunenburg	MA0077	21.50%	3535	760
Westminister	MA0230	21.63%	2529	547

## CSR 7439-E

<b>Communities</b>	<b>CUID(s)</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
Nantucket Island	MA0045	28.74%	3699	1063
Truro	MA0284	49.39%	907	448

\*CPR = Percent of competitive DBS penetration rate.