

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

In the Matter of)	CSR 7917-E
)	CSR 7918-E
Comcast Cable Communications, LLC)	CSR 7919-E
)	CSR 7920-E
Petitions for Determination of Effective)	CSR 7921-E
Competition in 15 Bedford, MA Franchise Areas)	CSR 7922-E
)	CSR 7923-E
)	CSR 7924-E

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 2010

Released: May 14, 2010

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, hereinafter referred to as “Petitioner,” has filed with the Commission petitions 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”),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”), and Verizon New England, Inc. d/b/a Verizon Massachusetts. The Town of Medfield and the City of Methuen filed oppositions to the petitions affecting their Communities and Comcast filed replies.³ The Town of Topsfield also filed an opposition to the petition affecting its Community and Comcast later filed a Motion to Withdraw the Topsfield petition.⁴

¹See 47 U.S.C. § 543(1)(1)(B).

²47 C.F.R. § 76.905(b)(2).

³ The City of Methuen incorrectly filed its Opposition under CSR 7921-E, which refers to the Town of Topsfield. The correct CSR number for the City of Methuen is CSR 7924-E. The error has no material effect on this proceeding, but is noted for administrative purposes. The City of Methuen also filed a Motion for Leave to File a Late Opposition. According to the City, the Petition was neither served nor received by the designated official of the City and it was unaware of any public notice. Motion for Leave at 1-2. Comcast responds that it did mail a copy of the petition to the Mayor of the City and that the Commission’s public notice constitutes constructive notice of Comcast’s Petition. Accordingly, Comcast argues that the City’s opposition should be dismissed on procedural grounds. Comcast Reply for the City of Methuen at n.1. We will grant the City’s Motion for Leave for good cause and for the benefit of a full record in this proceeding.

⁴Comcast states that it sought to withdraw the Topsfield petition in order to verify certain competing provider subscriber data. Comcast requests that its motion to withdraw the Topsfield petition be granted without prejudice so that it may seek a determination of effective competition in Topsfield in the future. Motion to Withdraw at 1. Comcast’s Motion to Withdraw the Topsfield petition is granted.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁶ 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.⁷ For the reasons set forth below, we grant the petitions based on our 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 ("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 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.⁹

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.¹⁰ 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.¹¹ However, both the Town of Medfield and the City of Methuen argue that Comcast's petitions regarding their Communities should be rejected because of reliance on the presumption that local consumers are reasonably aware of the availability of DBS service.¹² The Town of Medfield specifically argues that because DBS penetration in Medfield is 7.65 percent and therefore less than 15 percent, residents cannot be reasonably aware of DBS service.¹³ The Town of Medfield also submits the affidavit of its Town Administrator attesting to the general lack of information, advertising and awareness of the presence of DBS in Medfield.¹⁴

6. In reply, Comcast argues that the widespread availability of DBS service is well-known

⁵47 C.F.R. § 76.906.

⁶See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁷See 47 C.F.R. §§ 76.906 & 907.

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

⁹47 C.F.R. § 76.905(b)(2)(i).

¹⁰See Petitions at 3.

¹¹*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).

¹²Town of Medfield Opposition at 4-7; City of Methuen Opposition at 6.

¹³Town of Medfield Opposition at 4-7.

¹⁴*Id.* at 7 and Affidavit of Michael J. Sullivan, Town Administrator of the Town of Medfield (July 30, 2008).

throughout the country and both the Town of Medfield and the City of Methuen are no exceptions.¹⁵ Comcast contends that the oppositions do not suggest that either community is uniquely isolated from the ubiquitous local and national marketing efforts of DBS service providers.¹⁶ Comcast argues that the Commission is the “expert agency” with regard to cable television and DBS competition and has studied competition among MVPDs and resolved numerous effective competition cases so that it can appropriately take notice of the fact that Americans today are reasonably aware of DBS competition.¹⁷

7. Moreover, in order to remove any possible doubt regarding this matter, Comcast submits additional information such as lists of DirecTV and Dish Network retailers within approximately 10 miles of both Medfield and Methuen, which include major retail outlets such as Best Buy, Circuit City, and Walmart.¹⁸ Comcast also asserts that DBS service providers advertise extensively in area newspapers such as the Boston Sunday Globe for Medfield and the Sunday Eagle Tribune for Methuen. In addition, Comcast asserts that the local “Yellow Book” in each area includes multiple listings for cable and satellite companies, including DirecTV and Dish Network.¹⁹ Comcast also submits a declaration from a long term Medfield resident affirming that many Medfield residents subscribe to DBS service and that the DBS providers advertise in the community.²⁰

8. We agree with Comcast that the availability of DBS service is well known throughout the country and neither the Town of Medfield nor the City of Methuen has provided sufficient evidence demonstrating that the residents of these Communities are uniquely unaware of their ability to subscribe to DBS service. While actual DBS penetration in these Communities may not exceed 15 percent, this alone does not demonstrate that residents are not reasonably aware of the service. In addition to the fact that Americans are generally aware of the service, Comcast has provided specific information regarding DBS retailers in these areas and has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.²¹

9. 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 programming²² and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.²³ We find that this element of the test has been satisfied.

10. 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.²⁴ The City of Methuen, however, objects to the inclusion of Verizon FiOS TV subscribers in calculating

¹⁵ Comcast Reply for the Town of Medfield at 1; Comcast Reply for the City of Methuen at 7.

¹⁶ *Id.* at 1-2; *id.* at 7.

¹⁷ *Id.* at 2; *id.*

¹⁸ Comcast Reply for the Town of Medfield at 3 and Exhibits 1, 2; Comcast Reply for the City of Methuen at 8 and Exhibit B.

¹⁹ Comcast Reply for the Town of Medfield at 3 and Exhibits 5, 6; Comcast Reply for the City of Methuen at 8 and Exhibits D, E.

²⁰ Comcast Reply for Medfield at 3-4 and Exhibit 7 (Declaration of Medfield resident James White, Senior Manager for Regulatory Affairs for Comcast).

²¹ 47 C.F.R. § 76.905(e)(2).

²² See 47 C.F.R. § 76.905(g). See also Petitions at 4.

²³ See Petitions at Exhibit 2.

²⁴ See Petitions at 2-3.

competing provider penetration in that Community.²⁵ The City of Methuen argues that Comcast has not demonstrated that Verizon is capable of providing service to at least 50 percent of households in the franchise area.²⁶ In its Petition, however, Comcast relies on the competing provider test, and this test does not require that each competing provider offer service to at least 50 percent of households in the franchise area. It has been determined that each prong of the competing provider test may be satisfied independently using separate groups of MVPDs. Therefore, “as long as two MVPDs offer service to at least 50 percent of the households in a franchise area, the subscribership of all MVPDs, other than the largest MVPD, may be aggregated to satisfy the second prong of the competing provider test, regardless of whether they offer service to at least 50 percent of the households in the franchise area.”²⁷ It is undisputed that DirecTV and Dish Network offer service to at least 50 percent of the households in the franchise area. Accordingly, because these two DBS providers satisfy the first prong of the competing provider test, Verizon subscribers may be aggregated with DBS to determine the competing provider penetration in the City of Methuen, without regard as to whether it can be shown that Verizon’s service is available to at least 50 percent of households in the franchise area.²⁸ Accordingly, we find that the first prong of the competing provider test is satisfied.

11. 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.²⁹ 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 five digit zip code basis.³⁰

12. The City of Methuen argues that Comcast’s occupied household figure for Methuen is

²⁵ City of Methuen Opposition at 3-4.

²⁶ *Id.*

²⁷ *Tri-Lakes Cable, Monument Colorado*, 12 FCC Rcd 13170, 13171 at ¶ 3, n.18 (1997) (citing to *Time Warner Entertainment Co., LP et al. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995)).

²⁸ The City of Methuen also disputes the Verizon subscriber figures submitted by Comcast because it claims that the Exhibit “was prepared by Comcast and is not a formal filing of Verizon with any appropriate regulatory agency.” City of Methuen Opposition at 5. As explained by Comcast, the reported Verizon subscribership for Methuen was obtained from the Massachusetts Department of Telecommunications and Cable (“DTC”), Cable Television Report on Cable Subscriber Counts for 2000-2007. Petition at 7 n.30 and Comcast Reply at 5. We acknowledge Comcast’s position when it states that the subscriber counts are reported to the DTC directly by the video service providers and the report is publicly available on the DTC’s website. Comcast Reply at 5-6. Accordingly, we find no merit in the City’s objection.

²⁹*Id.* at 5 and Declaration of Warren Fitting, Director of Rate Regulation for Comcast Cable Communications, LLC. The competing provider penetration figures for all of the Franchise Areas, with the exception of Rochester, include subscribers from local MVPD competitor Verizon New England, Inc. d/b/a Verizon Massachusetts (“Verizon”), as well as from the two major DBS providers. Comcast states that in addition to confirming that its own subscribership exceeds DBS subscribership in the Franchise Areas, Comcast’s subscribership also exceeds that of Verizon in each of the Franchise Areas where Verizon provides service.

³⁰Petitions at 5-7. Comcast states that because five digit zip codes do not perfectly align with franchise boundaries, it has reduced the reported number of DBS subscribers in each zip code by an allocation ratio (the number of households in the franchise area over the number of households in the zip area). *See, e.g.* Comcast of Dallas, L.P., 20 FCC Rcd 17968, 17969-70 (MB 2005) (approving of a cable operator’s use of a Media Business Corporation “allocation factor, which reflects the portion of a five digit postal zip code that lies within the border of the City,” to determine DBS subscribership for that franchise area).

inaccurate.³¹ According to Methuen, Comcast's information is flawed because it included two zip codes for the City and only zip code 01844 covers the City.³² Methuen also argues generally that the 2000 Census data figure of 16,532 for Methuen is outdated and therefore unreliable.³³

13. Comcast responds that the occupied household figure used for calculating MVPD penetration is derived directly from the U.S. Census Bureau and is not related to the zip codes reported for Methuen.³⁴ Comcast asserts that zip code reporting is only relevant to the allocation of DBS subscribers in Methuen.³⁵ Comcast argues that it is immaterial to the occupied household determination whether Comcast erred by including the zip code 01841.³⁶ As it stands, Comcast states that the 2000 Census independently reports that there are 16,532 households in Methuen.³⁷ Comcast further argues that the City of Methuen failed to rebut the reliability of the 2000 Census data with evidence of other household data for the City.³⁸

14. We agree with Comcast that zip codes are irrelevant to determining the occupied household data because this information is derived directly from the U.S. Census Bureau. In addition, while the City criticizes this data as outdated and irrelevant, it does not provide any alternative household data for the Commission to consider. Absent the submission of more recent data that is demonstrated to be reliable, the Commission consistently has approved the use of decennial Census data in effective competition cases even if the data was challenged as being outdated.³⁹

15. The City of Methuen also contends that the use of two zip codes results in "14,312 more Video Households than there are actual households in the City" and Comcast provides "no explanation for this discrepancy."⁴⁰ Comcast states that there is no discrepancy here and explains that it believes that the City's reference to "14,312 more Video households" stems from an apparent misreading of the Petition.⁴¹ Comcast asserts that the City appears to interpret Column D of Exhibit 6 to represent the total households in Methuen.⁴² Comcast further explains that figures in that column represent Media Business Corp.'s ("MBC") estimate of total households in the zip codes that overlap with the City.⁴³ Comcast states that it does not associate all of the households in each of these zip codes to Methuen.⁴⁴ Interpreting that information, Comcast states that only 1.80 percent of the 14,312 households in zip code 01841 (the zip code that the City disputes should be included in this case) would be associated with Methuen.⁴⁵

³¹ City of Methuen Opposition at 3.

³² *Id.*

³³ *Id.*

³⁴ Comcast Reply at 2; *see also* Petition at 7 n.29.

³⁵ Comcast Reply at 2.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See e.g., Mediacom Minnesota*, 18 FCC Rcd 12768 (2003); *Texas Cable Partners, LP*, 16 FCC Rcd 4718 (2001).

⁴⁰ City of Methuen Opposition at 6.

⁴¹ Comcast Reply at 3.

⁴² *Id.* referencing Exhibit 6 in the Petition.

⁴³ Comcast Reply at 3.

⁴⁴ *Id.*

⁴⁵ *Id.* referencing Exhibit 6 in the Petition.

Regardless, Comcast states that it relied on the U.S. Census occupied household figure for calculating the competing provider penetration in Methuen.⁴⁶ Comcast notes that the 1.80 percent factor is relevant only to the allocation of DBS subscribers in the City.⁴⁷ In light of Comcast's explanation regarding the City's concerns about the correct occupied household figure in this matter, we find no merit in the City's allegation.

16. The City of Methuen also contends that Comcast's allocation of DBS subscribers to the City is incorrect because Comcast included zip code 01841 along with zip code 01844.⁴⁸ Comcast responds that the City's argument fails because a very small portion of zip code 01841 (1.80 percent) is actually in Methuen.⁴⁹ Therefore, Comcast asserts that it would have been inappropriate for it not to include this small portion of the zip code in its analysis.⁵⁰ However, Comcast explains that even though the 1.80 percent overlap of zip code 01841 with Methuen is not significant, the exclusion of the zip code with its 44 DBS subscribers from its analysis would still result in a situation where the competing provider penetration rate exceeds the 15 percent threshold.⁵¹

17. Finally, Methuen also argues that the Commission should not accept the DBS subscriber report provided by SBCA because it includes "courtesy or complimentary" DBS accounts.⁵² Comcast argues that a "free" account is formidable competition and the Commission has previously rejected arguments that complimentary accounts must be excluded from the DBS penetration analysis.⁵³ We agree with Comcast. The Commission has stated that the inclusion of complimentary accounts in the DBS subscriber report does not preclude a determination of effective competition.⁵⁴

18. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,⁵⁵ as reflected in Attachment A, we find that Petitioner has demonstrated that

⁴⁶ Comcast Reply at 3.

⁴⁷ *Id.*

⁴⁸ City of Methuen Opposition at 3, 5.

⁴⁹ Comcast Reply at 4; *see also* Declaration of K. Pina Gallant, Senior Vice President, Product Marketing for MBC, November 5, 2008.

⁵⁰ Comcast Reply at 4.

⁵¹ *Id.* and n.11. Comcast explains that even if it only considered the 1,866 DBS subscribers in zip code 01844 allocated to Methuen, the resulting penetration rate would be 11.09% (1,866 DBS subscribers in zip code 01844 ÷ 16,532 households). *Id.* at n.11. Comcast's reported percentage calculation, however, is incorrect as the resulting penetration rate is actually 11.29%. Regardless, when the DBS subscribers are coupled with Verizon's subscribership (950 Verizon subscribers + 1,866 DBS subscribers in zip code 01844 ÷ 16,532 households), the competing provider penetration rate in Methuen (excluding DBS subscribers from zip code 01841) is still above the 15% threshold at 17.03%

⁵² City of Methuen Opposition at 5.

⁵³ Comcast Reply at 6.

⁵⁴ *See Adelpia Cable Communications*, 20 FCC Rcd 20536, ¶13 (2005). ("We do not believe that the inclusion of complimentary accounts in the DBS subscriber report precludes a determination of effective competition. In the first place, we presume that the number of complimentary accounts is de minimis in number. Additionally, the fact that this de minimis number of DBS subscribers receives complimentary service enhances, rather than reduces, the cable operator's need to compete for these subscribers. A subscriber receiving free DBS service arguably would have to perceive significant choice and service advantages available through the local cable operator to abandon DBS service in favor of cable service." *Id.* The City of Methuen has presented no evidence to contradict the Commission's holding in this regard.

⁵⁵ Petition at 5-7.

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.

19. 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.

III. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC **ARE GRANTED**.

21. **IT IS FURTHER ORDERED** that Comcast Cable Communications, LLC's Motion to Withdraw the Topsfield petition **IS GRANTED** without prejudice.

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

23. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵⁶

FEDERAL COMMUNICATIONS COMMISSION

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

⁵⁶47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7917-E, 7918-E, 7919-E, 7920-E, 7922-E, 7923-E and CSR 7924-E

COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
CSR 7917-E				
Canton	MA0173	26.86%	7,952	668
				Verizon Total
Medfield	MA0258	29.21%	4,002	306
				Verizon Total
Norwood	MA0148	17.03%	11,623	1,060
				Verizon Total
CSR 7918-E				
Bedford	MA0210	27.64%	4,621	374
				Verizon Total
CSR 7919-E				
Tyngsborough	MA0232	33.05%	3,731	523
				Verizon Total
CSR 7920-E				
Lynnfield	MA0167	35.93%	4,186	277
				Verizon Total
Wilmington	MA0078	30.14%	7,027	573
				Verizon Total

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
CSR 7922-E				
Marion	MA0104	23.95%	1,996	189
				Verizon Total
Mattapoisett	MA0105	25.63%	2,532	218
				Verizon Total
Middleborough	MA0254	37.86%	6,981	937
				Verizon Total
Rochester	MA0283	15.17%	1,575	239
CSR 7923-E				
Melrose	MA0097	18.73%	10,982	574
				Verizon Total
CSR 7924-E				
Lawrence	MA0056	19.73%	24,879	3,700
				Verizon Total
Methuen	MA0093	17.30%	16,532	1,910
				Verizon Total

*CPR = Percent of competitive DBS penetration rate.