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

In the Matter of	)	
	)	
Comcast Cable Communications, LLC	)	CSR 7391-E
	)	
Petition for Determination of Effective	)	
Competition in Four Communities in Illinois	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 2011 **Released: March 10, 2011**

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

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC ("Comcast"), hereinafter referred to as "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 four communities listed on Attachment A and hereinafter referred to as the "Communities." Comcast alleges that its cable system serving the four 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"), and, in one Community, Wide Open West ("WOW").

2. Franchise authorities in three of the four Communities (the "Franchise Authorities") filed oppositions to the petition. They are the Village of Glenview, the City of Park Ridge, and the Village of Wheeling. Comcast filed replies. The three Franchise Authorities requested an extension of time in which to prepare their oppositions,[3] and Comcast requested extensions of time in which to prepare its replies.[4] Extensions of time are not granted routinely granted.[5] This proceeding, however, required investigations of recent housing trends in several Communities. Understandably, these required more days than are allowed by our rules.[6] Accordingly, we grant the parties' requested extensions of time.

[1] *See* 47 U.S.C. § 543(l)(1)(B).

[2] 47 C.F.R. § 76.905(b)(2).

[3] Motion for Extension of Time, filed by the Village of Wheeling and the City of Park Ridge; Letter from Gerald E. Dempsey, Esq., Klein, Thorpe and Jenkins, Ltd., to Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau; Motion for Extension of Time, filed by the Village of Glenview.

[4] Consent Motions for Extension of Time, filed by Comcast.

[5] 47 C.F.R. § 1.46(a).

[6] 47 C.F.R. § 76.7(b)(1), (c)(3).

II. APPLICABLE STANDARDS

A. Effective Competition

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,[7] as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.[8] 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.[9] For the reasons set forth below, we grant the petition based on our finding that Comcast is subject to effective competition in the Communities listed on Attachment A.

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 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.[10] This test is referred to as the "competing provider" test.

III. ANALYSIS

A. The Competing Provider Test and Comcast's Evidence

5. The first part of the competing provider test has three elements: a franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in it.[11] It is undisputed that the Communities are "served by" both DBS providers, DIRECTV and DISH, and that these MVPDs are unaffiliated with Comcast 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.[12] The Commission has held that a party may use evidence of subscribership in the franchise area (the second part 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.[13] 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[14] and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.[15] Also undisputed is Comcast'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.[16] None of the Franchise Authorities disputes any of the foregoing. Accordingly, we find that the first part

[7] 47 C.F.R. § 76.906.

[8] *See* 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

[9] *See* 47 C.F.R. §§ 76.906-.907(b).

[10] 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

[11] 47 C.F.R. § 76.905(b)(2)(i).

[12] *See* Petition at 3.

[13] *Mediacom Illinois LLC,* 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

[14] *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

[15] *See* Petition at Exh. 1.

[16] *See id.* at 2-3.

of the competing provider test is satisfied.

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. Comcast asserts that it is the largest MVPD in the Communities.[17] The competing provider test therefore required Comcast to calculate a ratio, the numerator of which is number of DBS subscribers in each Community (and WOW subscribers in Glenview) and the denominator of which is the number of households in each Community.

7. To calculate the numerator of the statutory ratio, Comcast purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers in each Community on a five-digit zip code basis.[18] Then Comcast arranged for Media Business Corporation ("MBC") to estimate how many DBS subscribers in each five-digit zip code were with each Community.[19] Comcast also obtained WOW's subscriber number in Glenview directly from that company.[20] With this data, Comcast estimated the number of subscribers to MVPD services (other than that of itself, the largest MVPD) in each of the Communities.[21] To estimate the denominator of the competing provider test's ratio – numbers of households – Comcast took the household count for each Community from the 2000 Census.[22] The resulting ratios show the subscribership to DBS (and, in Glenview, to WOW) exceeding 15 percent of the households in each Community.[23] This evidence, if it is admissible and not disproved or outweighed by contrary evidence, satisfies the second part of the competing provider test in each Community.

B. The Objections of the Franchise Authorities

1. Household Numbers from the 2000 Census

8. The Franchise Authorities object to Comcast using 2007 subscriber numbers and 2000 household numbers in its ratios. They object in particular to Comcast's use of a "stale" household number that fails to include changes since 2000.[24] This is an objection that we have rejected many times,[25] and we do so again here. The Census makes an actual count of the very things that the competing provider test calls on us to measure – households.[26] The fact that it is several years old, without more, does not discourage us from its use.

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[17] *See id.* at 5.

[18] Petition at Exh. 4.

[19] Petition at 6.

[20] *Id.* at Exh. 4.

[21] *Id.* at Exh. 5, col. I.

[22] *Id.* at Exh. 6.

[23] *Id.* at Exh. 5, col. K.

[24] Response to Petition for Special Relief, filed by the Village of Wheeling and the City of Park Ridge ("Wheeling/Park Ridge Opposition") at 2-4 (using "stale" at 3); Village of Glenview's Response to Comcast's Petition for Special Relief ("Glenview Opposition") at 3-5.

[25] *See, e.g., Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14143-45, ¶¶ 10-14 (2008); *Comcast Cable Commun., LLC,* 23 FCC Rcd 10939, 10942-43 n.30, ¶ 13 (2008) & authorities cited therein.

[26] 47 U.S.C. § 543(l)(1)(b)(ii). The Census Bureau's detailed definition of "household" is at U.S. Census Bureau, State & County QuickFacts ("A household includes all the persons who occupy a housing unit") http://quickfacts.census.gov/qfd/meta/long_HSD010200.htm (visited Jan. 24, 2011); *see* also 47 C.F.R. § 76.905(c) ("household" does "not include those dwellings that are used solely for seasonal, occasional, or recreational use").

9. We will accept more recent counts that are of households as defined by the Census and that are at least as reliable as the Census's most recent count.[27] The Village of Wheeling presents a 2005 Census estimate of households in "part" of Wheeling[28] and a statement (of uncertain origin) that by the end of 2005, there had been a "778" increase in "housing" in Wheeling or Cook County.[29] Neither of these is a statement of an actual count of households, as defined by the Census, in Wheeling.[30] Accordingly, we reject the evidence presented by the Village.

10. The Village acknowledges that, even if we added 778 to the denominator of Comcast's ratio, DBS subscribership in Wheeling would still exceed 15 percent, thus showing competing provider effective competition.[31] The Village asks us to assume that household growth would continue and would, even more, accelerate enough to lower DBS subscribership to 15 percent or less. The City of Park Ridge asks, without any documentation whatsoever, that we assume the same kind of growth.[32] Speculative projection, however, does not comply with our standard for departing from decennial Census counts of households. Even if growth in Wheeling (the only Community in which we have any numerical evidence of growth) continued through 2007 (the year of the DBS subscriber numbers submitted by Comcast) at the rate of 778 households per five years, DBS subscribership there would still be above the statutory minimum.[33]

11. The Village and the City invoke *Jones Intercable*, in which we used a Census household number that was "nearly a decade old," in part because the DBS subscribership was significantly above the statutory minimum.[34] They seek to distinguish this case because the DBS subscribships that Comcast asserts in Wheeling and Park Ridge are comparatively close to the statutory minimum.[35] *Jones Intercable*, however, did hold that we would use years-old Census numbers only in certain kinds of cases. Nor did it open the door to one-sided speculation in the absence of adequate supporting evidence. *Jones Intercable* is consistent with our decision here.

12. The Village of Glenview notes "the development of the former Glenview Naval Air Station" and proposes that we therefore conclude that household growth in Glenview lowered DBS subscribership below the statutory minimum.[36] We reject this proposal for the same reasons we rejected the similar proposals about Wheeling and Park Ridge; it is speculative and contains no reliable numerical evidence of household numbers.[37] Accordingly, the Franchise Authorities have given us no reason not to use the household numbers stated in the 2000 Census.

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[27] *Time Warner Cable Inc.,* 25 FCC Rcd 5457, 5463, ¶ 21 (2010); *Comcast Cable Commun., LLC,* 24 FCC Rcd 1780, 1783-84, ¶ 13 (2009); *Time Warner Cable Inc.,* 23 FCC Rcd 12210, 12214, ¶ 15 (2008).

[28] Wheeling/Park Ridge Opposition, Exh. 1 at 1.

[29] *Id.,* Exh. 1 at 2.

[30] Reply to Response to Petition for Special Relief [for Wheeling and Park Ridge] at 2.

[31] *See* Wheeling/Park Ridge Opposition at 4.

[32] *Id.*

[33] 13280 (the 2000 Census count of households) + 778 + 311 (that is, 2/5 of 778) = 14369 households. 2525 DBS subscribers and 14369 households yield a subscribership of 17.57%.

[34] *Jones Intercable, Inc.,* 15 FCC Rcd 7254, 7256 n.12 (2000) (containing the words quoted in the text above).

[35] Wheeling/Park Ridge Opposition at 3.

[36] Glenview Opposition at 4-5.

[37] Reply to Response to Petition for Special Relief [for Glenview] at 2.

2. Foundation for Comcast's Evidence

13. Comcast's factual evidence consists of photocopies of many documents: the channel line-ups of the DBS providers and WOW, the SBCA reports of DBS subscribers and e-mail between WOW and Comcast's outside counsel, an explanation of MBC's estimation methodology by an MBC employee, Census web pages stating household numbers, and Comcast's resulting calculations of DBS and WOW subscribership.[38] Comcast's petition also included a signed statement by its outside counsel to the effect that the Petition is well grounded in fact to the best of his knowledge, information and belief; and a signed declaration to the same effect by Comcast's in house counsel.[39] This is the supporting documentation that we have accepted in many hundreds of effective competition proceedings. No opposing party has disproved their authenticity.

14. The Franchise Authorities object that the foregoing evidence "does not meet the foundational requirements for admissibility" under the Federal Rules of Evidence because they are not sworn statements and do not contain certifications of accuracy;[40] they are hearsay and do not fit within any exception to the general prohibition of hearsay testimony;[41] and their sources are either unknown or biased and therefore untrustworthy.[42]

15. We reject the Franchise Authorities' objections to Comcast's evidence for several reasons. Only "formal hearings" before the Commission, such as occur before an Administrative Law Judge, are governed by the Federal Rules of Evidence, and even then only if the ends of justice would be served by their application.[43] Effective competition proceedings, however, are not "formal hearings."[44] The Franchise Authorities have given us no basis to believe that the formalities of a trial-type hearing – with live testimony, detailed authentication of data, cross-examination on the record, and rigorous application of the hearsay rule and its many exceptions – are necessary to a rational resolution of the issues in this proceeding. Comcast's evidence is supported by the kind of verifications that our applicable rules require.[45] The Franchise Authorities have not alleged, much less shown, that any material fact alleged by Comcast is not true – for example, that what Comcast claims is DIRECTV's channel lineup is

[38] Petition, Exhs. 1, 3-6.

[39] Petition at 9; Declaration of Peter H. Feinberg, Comcast's Associate General Counsel.

[40] Glenview Opposition at 5-6.

[41] Wheeling/Park Ridge Opposition at 6-8.

[42] Glenview Opposition at 9-11.

[43] 47 C.F.R. § 1.351 (with certain exceptions, "the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings. Such rules may be relaxed if the ends of justice will be better served by so doing."). *See also Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation,* 8 FCC Rcd 510, 529, ¶ 85 (1992) ("Given the statutory emphasis on expedition, we do not propose to provide for formal hearings on proposed rate increases or rate-related disputes"); *Application of the Federal Rules of Evidence to Commission Adjudicatory Proceedings,* 57 FCC2d 411 (1975) ("The possibility of variation from the Federal Rules of Evidence, by rule or by ruling of the presiding officer, provides a desirable degree of flexibility in the conduct of administrative hearings. Nor does it follow that an administrative hearing should be conducted in precisely the same manner as a judicial trial.").

[44] Very similar to the present case were paper proceedings in which state regulators and wireless carriers disputed the continuation of rate regulation for wireless service. In rejecting the regulators' position that the Federal Rules of Evidence concerning discovery, the Wireless Bureau stated: "Nor are the Federal Rules of Evidence, which govern presentation of testimony in trial proceedings, at issue in an administrative context that . . . has not been designated for formal adjudicative hearing." *Public Utilities Commission, State of Hawaii,* 10 FCC Rcd 2359, 2368, ¶ 37 (1995), *affirmed on other grounds, Connecticut Dep't of Pub. Util. Control v. FCC,* 78 F.3d 842 (2d Cir. 1996).

[45] 47 C.F.R. §§ 1.16, 76(a)(4).

a forgery and that DIRECTV does not offer 12 channels of video programming. Moreover, if we applied the strict foundational rules advocated by the Franchise Authorities, we would reject for lack of foundation all the evidence that they have presented and that we discussed in the preceding section, none of which is formally authenticated. Previous decisions have dismissed evidentiary objections similar to the ones made here,[46] and the Franchise Authorities have given us no reason to rule otherwise.

C. Conclusion

16. Based upon the aggregate DBS subscribership levels that were calculated using Census 2000 household data, as reflected in Attachment A, we find that Comcast 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 part of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Comcast has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Comcast is subject to effective competition in the Communities listed on Attachment A.

IV. ORDERING CLAUSES

17. 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**.

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.[47]

FEDERAL COMMUNICATIONS COMMISSION

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

[46] *Bright House Networks, LLC*, 22 FCC Rcd 4169, 4172, ¶ 7 (2007); *Comcast of Dallas, L.P.*, 20 FCC Rcd 17968, 17970-71, ¶¶ 6-7 (2005).

[47] 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7391-E

COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2000 Census Households	Estimated Competing MVPD Subscribers
Glenview	IL0840	18.51%	15464	2863
Northbrook	IL0841	16.95%	12203	2069
Park Ridge	IL0559	16.47%	14219	2342
Wheeling	IL0563	19.01%	13280	2525

*CPR = Percent of competitive DBS subscribership rate.