

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

|                                |   |                       |
|--------------------------------|---|-----------------------|
| In the Matter of               | ) | <b>PSID: 003733</b>   |
|                                | ) |                       |
| Atlantic Broadband (Penn), LLC | ) | Borough of Warren, PA |
|                                | ) | CUID: PA0605          |
|                                | ) |                       |
| Petition for Determination of  | ) | MB Docket No. 12-1    |
| Effective Competition          | ) |                       |

To: Secretary's Office  
Attn: Media Bureau

**PETITION FOR DETERMINATION OF EFFECTIVE COMPETITION**

Atlantic Broadband (Penn), LLC (“Atlantic Broadband”), by its attorneys and pursuant to Section 76.7 and 76.907 of the rules and regulations of the Federal Communications Commission (“Commission” or “FCC”), 47 C.F.R. §§ 76.7 and 76.907, respectfully requests that the Media Bureau (“Bureau”) find that the above-captioned franchise area served by Atlantic Broadband’s cable system is subject to effective competition and therefore no longer subject to rate regulation.

In the absence of an FCC finding to the contrary, cable television systems are presumed to lack competition.<sup>1</sup> Under the competing provider test, effective competition, however, is found to exist where:

- (i) the franchise area is served by at least two unaffiliated multichannel video programming distributors (“MVPD”) that each offer comparable

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<sup>1</sup> See 47 C.F.R. §76.906. That presumption, however, is under reconsideration by the FCC in light of significant changes in the multichannel video programming market. See *In the Matter of Amendment of the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Notice of Proposed Rulemaking, FCC 15-30 (March 16, 2015), 80 Fed. Reg. 14894 (“*Effective Competition NPRM*”).

programming to at least 50 percent of the franchise area’s households;  
and

- (ii) more than 15 percent of the franchise area’s households subscribe to multichannel video programming other than from the largest MVPD.<sup>2</sup>

In the above-captioned franchise area, the competing provider test is satisfied, entitling Atlantic Broadband to a finding of effective competition.

**I. THE FRANCHISE AREA IS SERVED BY AT LEAST TWO UNAFFILIATED MVPDS THAT EACH OFFER COMPARABLE VIDEO PROGRAMMING TO AT LEAST 50 PERCENT OF THE FRANCHISE AREA.**

Atlantic Broadband operates in a highly competitive market, served by at least two unaffiliated MVPDs that each offer comparable programming to more than fifty percent of the franchise area’s households. For many years already, DIRECTV and DISH Network (collectively “DBS Providers”) have provided nationally available multichannel video programming service that offers programming comparable to that typically offered by terrestrial MVPDs. The FCC has consistently recognized this in matters relating to findings of effective competition.<sup>3</sup> In fact, the Commission recently noted that it “has held in hundreds of competing provider effective competition decisions that the presence of DIRECTV and DISH Network satisfies the first prong of the [competing provider] test. . . [and] [i]n fact . . . has never determined that the presence of DIRECTV and DISH Network failed to satisfy the first prong of the competing provider test.”<sup>4</sup> While it would be appropriate for the FCC to take official notice of the DBS Providers’ meeting the first prong of the competing provider’s test, Atlantic Broadband nevertheless provides evidence supporting this conclusion.

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

<sup>3</sup> See, e.g., *In the Matter of Time Warner Cable, Inc.; Petition for Determination of Effective Competition in Three Communities in Massachusetts*, Memorandum Opinion and Order, DA 15-164, 2015 FCC LEXIS 565 (Media Bureau, February 5, 2015) (“*TWC Massachusetts Order*”); see also *In the Matter of Six Unopposed Petitions for Determination of Effective Competition*, Memorandum Opinion and Order, DA 15-112, 2015 FCC LEXIS 288 (Media Bureau, January 26, 2015) (“*Six Unopposed Petitions Order*”).

<sup>4</sup> See *Effective Competition NPRM* at ¶ 10.

The franchise area that is the subject of this petition is served by at least two unaffiliated MVPDs. In addition to the petitioning operator, Atlantic Broadband, the franchise area is served by DirecTV and Dish Network, neither of which are affiliated with one another or Atlantic Broadband.

In the context of the competing provider test, the FCC has focused on whether the competing MVPD's service is both technically and actually available in the franchise area. The Commission has concluded that “DBS service is presumed to be technically available due to its nationwide satellite footprint,<sup>5</sup> and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.”<sup>6</sup> Further, 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>7</sup>

The DBS Providers provide coast-to-coast multichannel video programming services and thus are physically able to provide prospective subscribers with service with no additional investment. As the *Effective Competition NPRM* notes, DIRECTV offers local programming in 197 Nielsen Designated Market Areas (“DMA”) and DISH Network provides local

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<sup>5</sup> See *TWC Massachusetts Order* at ¶ 5. Section 76.905(e) of the FCC’s regulations defines service as being “offered”: when the [MVPD] is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and when no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the [MVPD].<sup>5</sup> To Atlantic Broadband’s knowledge, there are no regulatory, technical or other impediments to prospective subscribers in the franchise area purchasing either DBS Provider’s multichannel video programming service.

<sup>6</sup> See *TWC Massachusetts Order* at ¶ 5.

<sup>7</sup> See *TWC Massachusetts Order* at ¶ 5. Potential subscribers are undoubtedly aware of the DBS Providers’ offerings. See Exhibit B; see, e.g., [www.dish.com](http://www.dish.com) (outlining availability of Dish Network’s various multichannel video programming packages); see also [www.directv.com](http://www.directv.com) (outlining availability of DIRECTV’s multichannel video programming offerings).

programming in all 210 DMAs.<sup>8</sup> And, as evidenced by the penetration rate shown in Exhibit A, potential subscribers are undoubtedly aware of the availability of the DBS Providers' services.

To qualify under the competing provider test, the unaffiliated MVPDs must offer "comparable programming," that is, at least "twelve channels of video programming, including at least one nonbroadcast channel."<sup>9</sup> As evidenced by the channel lineups provided at Exhibit B, the DBS Providers each provide subscribers with comprehensive programming options that vastly exceed the required "twelve channels of video programming."<sup>10</sup>

## **II. AT LEAST FIFTEEN PERCENT OF THE FRANCHISE AREA'S HOUSEHOLDS SUBSCRIBE TO MULTICHANNEL VIDEO PROGRAMMING SERVICES FROM THE DBS PROVIDERS.**

To meet the second prong of the competing provider test, the petitioning cable operator must provide evidence that at least fifteen percent of the franchise area's households subscribe to multichannel video programming services other than from the largest MVPD.<sup>11</sup> Having compared its basic subscriber penetration to that of the DBS Providers, Atlantic Broadband is the largest MVPD in the franchise area.<sup>12</sup>

To determine the DBS Providers' penetration in the franchise area, Atlantic Broadband relied on the Zip+4 methodology long approved by the FCC for purposes of establishing effective competition.<sup>13</sup> For the franchise area, Atlantic Broadband obtained from SNL Kagan a

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<sup>8</sup> See *Effective Competition NPRM* at ¶ 6.

<sup>9</sup> See 47 C.F.R. § 76.905(g).

<sup>10</sup> The Commission has repeatedly accepted that the DBS Providers' video programming offerings meet the "comparable programming" threshold. See, e.g., *TWC Massachusetts Order* at ¶ 8; see generally *Six Unopposed Petitions Order*.

<sup>11</sup> See 47 C.F.R. § 76.905(b)(2)(ii).

<sup>12</sup> For purposes of determining that it is the largest MVPD, Atlantic Broadband counted as basic subscribers all residential single family households and total individual units in bulk-billed multiple dwelling units but excluded any seasonal, recreational or occasional subscribers. See 47 C.F.R. § 76.905(c).

<sup>13</sup> See, e.g., *In the Matter of: Charter Communications Entertainment I LLC; Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 26 FCC Rcd 5975 (Media Bureau, 2011); *In the Matter of Cablevision Systems Westchester Corp; Petition for Determination of Effective Competition in Putnam Valley, New York*, Memorandum Opinion and Order, 24 FCC Rcd 872 (Media Bureau, 2009) ("*Cablevision Putnam*

list of all corresponding Zip+4s; it then obtained from the Satellite and Broadcast Communications Association (“SBCA”) DBS subscriber data for each zip+4 associated with the franchise area.<sup>14</sup> While the FCC has indicated that household information for the franchise area using Census 2010 households would be sufficient,<sup>15</sup> Atlantic Broadband has updated those numbers to reflect the most recently available U.S. Census household estimate information, which is current as of 2013.<sup>16</sup> As demonstrated in Exhibit A, with a combined penetration of 26.5% percent, the DBS Providers serve in excess of fifteen percent of the franchise area’s households. Based on this information, the second prong of the competing provider test has been met and a finding of effective competition with respect to the franchise area is appropriate.

### **III. CONCLUSION**

Atlantic Broadband, having satisfied the requirements of the competing provider test with respect to the franchise area, respectfully requests that the FCC promptly issue its determination of effective competition and decertification of the local franchise authority’s ability to regulate basic cable service, equipment and installation rates.

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*Valley Order*”). Atlantic Broadband provides the list of Zip+4s identified as being associated with the franchise area and SNL Kagan’s report accompanying such list as Exhibit C.

<sup>14</sup> SBCA DBS subscriber numbers are provided as Exhibit D.

<sup>15</sup> *See, e.g., Cablevision Putnam Valley Order* at ¶ 14 (“We accept the most recent decennial Census data for household numbers. . .”).

<sup>16</sup> *See* Exhibit A-1 (Census Household Information).

To the best of my knowledge, information and belief formed after reasonable inquiry, this Petition for Determination of Effective Competition is well grounded in fact, is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and not interposed for any improper purpose.

Respectfully submitted,

**ATLANTIC BROADBAND (PENN), LLC**

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April 23, 2015

## DECLARATION

I, Leslie J. Brown, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief formed after reasonable inquiry:

1. I am Senior Vice President and General Counsel of Atlantic Broadband (Penn), LLC, which operates the cable television system serving the franchise area that is the subject of this Petition for Determination of Effective Competition (“Petition”).
2. I have read the foregoing Petition and am familiar with its contents. The facts contained in the Petition, including to the number of households served in the franchise area by Atlantic Broadband (Penn), LLC, are accurate.
3. The Petition is well grounded in fact, is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any improper purpose.

Executed this 23<sup>rd</sup> day of April, 2015.



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