

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Revisions to Cable Television Rate Regulations)	MB Docket No. 02-144
)	
Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation)	MM Dockets No. 92-266
)	
Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation)	MM Docket No. 93-215
)	
Adoption of a Uniform Accounting System for the Provision of Regulated Cable Television Service)	CS Docket No. 94-28
)	
Cable Pricing Flexibility)	CS Docket No. 96-157

**REPLY COMMENTS OF THE NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE**

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To the Commission:

The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) hereby files these Reply Comments in the above-captioned proceeding. In these Reply Comments, the Ratepayer Advocate responds to issues raised by other parties concerning the imputation of direct broadcast satellite (“DBS”) penetration rates as a measure of effective competition.

In its initial Comments, the Ratepayer Advocate recommended that the presence of competition could be imputed from the presence of alternative video programming providers.¹ Other parties to this proceeding have urged the imputation of direct broadcast satellite (“DBS”) penetration rates as evidence of effective competition, but in a way that does not provide for an effective evaluation of competition in local markets.

Comcast Cable Communications, Inc. (“Comcast”), urges a presumption of competition in any state where statewide DBS penetration is 15 percent or more; Cox Communications, Inc. (“Cox”) urges a similar presumption.² These parties, however, recommend that a 15 percent penetration rate statewide should create a presumption of effective competition in each local franchise area. This approach is inconsistent with Commission regulations and could also lead to highly inequitable results.

In the first instance, the policy proposed by Comcast and Cox is contradicted by current Commission regulations. Section 76.905(b) of the Commission Rules establishes clear criteria for the determination of whether a cable system is subject to effective competition. The rule includes that a cable system is subject to effective competition if

(2) The franchise area is:

Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and

^{1/} Comments of the Ratepayer Advocate at 7.

the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the service area.³

For purposes of this subsection, a multichannel video program distributor includes a DBS service.⁴

Unlike the Comments of Comcast and Cox, the Rules state clearly that the effective area of measurement is the “franchise area,” rather than the entire state that Comcast and Cox recommend.

A state that enjoys 15 percent DBS penetration might yield a disaggregated result showing a higher penetration rate in high-population urban areas and a lower penetration rate in lower-populated rural areas. Accordingly, while a large metropolitan area would enjoy healthy competition among cable and satellite providers, a rural area may be served only by the locally franchised cable operator. This possibility is recognized by the National Cable and Telecommunications Association (“NCTA”), which states “[i]t does not, of course, follow from the fact that statewide DBS penetration exceeds 15 percent that penetration exceeds 15 percent in every community . . . and there would be no reason for a cable operator to seek to be deregulated in a community where penetration of DBS and other competing MVPDs is obviously below 15 percent.”⁵

³/ 47 C.F.R. § 76.905(b)(2).

⁴/ 47 C.F.R. § 76.905(d).

The application of a statewide average to a non-competitive franchise area would force the local franchising authority (“LFA”) to bear the burden of rebutting that presumption, contrary to the current regulatory scheme.⁶ Indeed, Cox proposes outright that a petition for a determination of effective competition be granted automatically where a franchising authority does not object to the petition.⁷ Similarly, NCTA proposes that uncontested petitions should be granted automatically once the time for filing opposition passes.⁸ This proposed shift of the burden of proof to the LFA is unfounded. Section 76.906 states that “[i]n the absence of a demonstration to the contrary, cable systems are presumed not to be the subject of effective competition.”⁹ The burden of proof to rebut that presumption rests with the cable company, as evidenced by § 76.907, which sets forth the procedure for a cable operator’s petition for a determination of effective competition. A shift would also have the ironic effect of forcing upon the smaller municipalities, which have fewer resources, the task of rebutting the presumption. By contrast, larger, better-endowed LFAs might not contest the presumption as readily because available data may demonstrate clearly the presence of DBS usage throughout the franchise area. The Ratepayer Advocate submits that where an LFA is silent, the Commission is not relieved of its duty to undertake a sufficient review of the petition, which may include requests for verifiable data from competing providers, consistent with Rule 76.907(c).¹⁰

^{6/} See 47 C.F.R. § 76.906 (“In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.”)

^{7/} Comments of Cox at 20.

^{8/} Comments of NCTA at 31.

^{9/} 47 C.F.R. § 76.906.

^{10/} 47 C.F.R. § 76.907(c) permits a cable operator to request information regarding a competitor’s reach and number of subscribers; the competitor is required to respond to such a request within 15 days. The Ratepayer Advocate maintains its position that the burden of proof, and therefore responsibility to provide such information, lies with the cable operator, but nevertheless notes that the Commission may utilize this mechanism to

Use of statewide averages in lieu of local franchise area penetration levels would create inequitable and harmful results among ratepayers. Cable subscribers in non-competitive markets would be forced to pay unregulated BST rates based on the existence of a statewide DBS penetration rate. Systems in non-competitive areas would be declared competitive solely on the basis of activity in other entirely different and distinct cable service areas. Consumers would bear the brunt of the burden without enjoying any of the alleged benefits. Moreover, this result would extend to all cable systems in the state, regardless of the actual presence of any DBS foothold in a particular local franchise area. The result is illogical, inequitable, and in direct conflict with existing regulations.

The Ratepayer Advocate, by its Comments in this proceeding and its activities at the State level, is highly appreciative of the benefits that competition can introduce to the marketplace. At the same time, the Ratepayer Advocate is mindful of the hazards that can be brought to bear when competition is an illusion created by an incumbent entity. Therefore, the Ratepayer Advocate recommends that in effective competition determinations, the presumption of insufficient competition remain unchanged. The cable provider that seeks effective competition status must petition affirmatively for that decision, in accordance with existing regulations.¹¹ This requires that the burden of proof to change a local franchise area from non-competitive to competitive should continue to rest with the cable operator. At no time should statewide averages be used as support for assertions of effective competition in local franchise areas.

^{11/} 47 C.F.R. § 76.906.

The Ratepayer Advocate recognizes that valuable data necessary to ascertain local subscribership to DBS or other providers may be unavailable to the LFA. Since DBS providers do not release proprietary or competitively sensitive data, use of publicly available documentation is used as a matter of necessity. While publicly available industry data exists and is used routinely, as noted by Comcast and Cox in their Comments,¹² the Ratepayer Advocate acknowledges the concerns of the National Association of Telecommunications Officers and Advisors, the National League of Cities, and the Miami Valley Cable Council (collectively, “NATOA/NLC/MVCC”) that certain industry reporting data may be unreliable; those parties argue that both cable and DBS providers may have an incentive to inflate subscribership levels, thereby skewing a showing of effective competition.¹³ However, as noted above, Commission Rules provide that “cable operators may request from a competitor information regarding the competitor’s reach and number of subscribers[,]” and that “[a] competitor must respond to such request within 15 days.”¹⁴ Accordingly market penetration data is available to the cable provider for use in support of a petition for a determination of effective competition. Therefore, the FCC should require all petitioners to file such third-party data with their petitions. This eliminates the concerns with regard the reliability of trade study data.

^{12/} See, i.e., www.skytrends.com, a commercial website dedicated to satellite industry information. SkyTrend reports are cited by Comcast and Cox in their comments at pages 39 and 20, respectively.

^{13/} See Comments of NATOA/NLC/MVCC at n.60, p.32.

Accordingly, and for the reasons stated herein, the Ratepayer Advocate recommends that the proposed use of statewide DBS penetration rates as a measure of effective competition in local franchise areas be rejected as not being in the public interest.

Respectfully submitted,

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Acting Director and Ratepayer Advocate