

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
Comcast of Potomac, LLC	)	Docket No. 12-308
	)	
For Determination of Effective Competition in:	)	CSR-8733-E
Chevy Chase Village, MD (MD0277)	)	
Chevy Chase Section 3, MD (MD0472)	)	
Laytonsville, MD (MD0235)	)	
Poolesville, MD (MD0228)	)	

**OPPOSITION TO PETITION FOR SPECIAL RELIEF**

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December 10, 2012

## SUMMARY

Comcast's petition for special relief asks the Commission to make a finding that there is "effective competition" under the Competing Provider Test in the Towns of Poolesville and Laytonsville, Maryland solely on the basis of satellite (DBS) penetration numbers. Montgomery County, as the Local Franchising Authority for these towns, opposes the petition.

Modifications to the effective competition rules introduced in the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing orders were attempting to rectify the problem that the Cable Communications Policy Act of 1984 had not resolved for consumers – monopoly cable rates. Although Congress and the Commission expressed a preference for market mechanisms over regulation, the clear policy goal of Congress and the Commission was to ensure that regulatory relief would not be granted *before* competition was present in the market and had actually modified the cable operator's behavior. DBS was included among the types of multichannel video programming distributors (MVPDs) that could be considered under the Competing Provider Test even though there was no actual DBS competition at the time. Thus, the actual competitive impact of DBS on cable monopoly pricing was unknown but the predictive judgment was that it would be an effective curb on cable pricing.

Unfortunately, the overwhelming experience in the intervening years has been that DBS has had a miniscule impact on curbing the market power of the incumbent cable operators. Accordingly, cable competition policy has turned heavily towards fostering wireline competition as the only means of effective competition.

In light of the above, the Commission should no longer make findings of effective competition based on DBS penetration data alone. To do so would go against the Commission's obligation to grant relief only when it would serve the public interest. For these reasons, the

County urges the Commission to deny Comcast's petition and to consider suspending its effective competition rules that permit DBS penetration alone to be considered adequate competition for purposes of the Competing Provider Test until such time as the rules can be modified to better serve the Congressional goal of competition effectively moderating cable operator behavior in the video marketplace.

There is Commission precedent for such action. Recently, the Commission suspended, on its own motion, certain special access competitive showings because they turned out not to be accurate indicators of competitive pressure sufficient to constrain prices. In other words, the Commission suspended its application of its rules because the rules were ineffective. The Commission has also modified its competition policy in the context of denying a petition for regulatory forbearance. The County asks the Commission to exercise the same judgment to deny Comcast's Petition, and to consider suspending the effective competition rule that permits DBS penetration alone to be considered adequate competition.

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**OPPOSITION TO PETITION FOR SPECIAL RELIEF**

Pursuant to 47 C.F.R. § 76.7, Montgomery County, Maryland (“County”), on behalf of the Town of Laytonsville and the Town of Poolesville (the foregoing incorporated municipalities being collectively referred to herein as the “Municipalities”), hereby opposes the petition for special relief (“Petition”) of Comcast of Potomac, LLC (“Comcast”), in the above-captioned proceeding.<sup>1</sup>

**I. INTRODUCTION**

Pursuant to contracts between the County and the Municipalities, the Municipalities have designated the County to administer and manage the Comcast cable franchise on behalf of the Municipalities. As such, the County serves as the Local Franchising Authority (LFA) for the Municipalities and regulates Comcast’s cable rates within the municipalities on behalf of the Municipalities. In its capacity as LFA, the County herein opposes Comcast’s Petition on behalf of the Municipalities. The County does not oppose the Petition with respect to Chevy Chase Village, MD and Chevy Chase Section 3, MD because in those local franchise areas there is

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<sup>1</sup>

adequate wireline competition. The County urges the Commission to find that Comcast is not subject to effective competition in the Town of Laytonsville and the Town of Poolesville, and, that granting the special relief requested by Comcast would not be in the public interest. Further, the County urges the Commission to consider suspending its effective competition rules that permit DBS penetration alone to be considered adequate competition for purposes of the Competing Provider Test until such time as the rules can be modified to better serve the goal of Congress to ensure effective competition in the video marketplace.

**II. COMCAST’S SPECIAL PETITION FOR AN EFFECTIVE COMPETITION FINDING IN POOLESVILLE AND LAYTONSVILLE BASED ON DBS PENETRATION DATA UNDER THE COMPETING PROVIDER TEST SHOULD BE DENIED**

Under rules enacted by the Commission, cable systems are presumed not to be subject to effective competition unless and until the Commission makes an affirmative finding that there is effective competition in response to a petition for special relief.<sup>2</sup> A special relief petition must also meet a public interest criterion. “The petition or complaint shall . . . support a determination that a grant of such relief would serve the public interest.”<sup>3</sup> Thus, here, Comcast must show that it is “subject to effective competition” *and* eliminating rate regulation in Poolesville and Laytonsville would serve the public interest. The evidence does not support such a Commission finding.

**A. DBS ALONE CANNOT CONTINUE TO BE THE BASIS FOR A FINDING OF EFFECTIVE COMPETITION**

Comcast alleges that effective competition exists in Poolesville and Laytonsville under the Competing Provider Test. Under this test, Comcast must demonstrate that: (a) each of the

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<sup>2</sup> 47 C.F.R. §§ 76.7, 76.906 and 76.907.

<sup>3</sup> 47 C.F.R. § 76.7(a)(4)(i).

local franchise areas for which it seeks relief is served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least fifty percent of the households in the franchise area; and (b) in each such area, the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.<sup>4</sup>

Comcast’s Petition admits that “its Competing Provider subscriber tallies in Laytonsville and Poolesville Franchise Areas rely solely upon data from DirecTV and Dish Network.”<sup>5</sup> For the reasons discussed below, the Commission cannot make credible findings of effective competition based relying on DBS penetration data alone.

**1. Congress’s and the Commission’s Predictive Judgment That DBS Would Be An Effective Competitor Has Turned Out to Be Incorrect**

In establishing several effective competition tests or showings, Congress and the Commission relied on an essential relationship between competition and rates. Congress used the “effective competition” criterion because Congress assumed such competition would hold rates to reasonable levels via market pressures (and for similar reasons protect consumers in other respects), making rate regulation unnecessary.<sup>6</sup>

In 1992, when Congress established the statutory framework for the effective competition tests that included the Competing Provider Test, it directed the Commission to issue implementing regulations.<sup>7</sup> The Commission’s First Order described the tasks as follows:

Our tasks in this proceeding are to: 1) develop a process for identifying those situations where effective competition exists (and rate regulation is thus

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<sup>4</sup> 47 U.S.C. § 543(L)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>5</sup> Petition at 7 (footnote 25).

<sup>6</sup> *See, e.g.*, S. Rep. 102-92 at 11-12, *reprinted at* 1992 U.S.C.C.A.N. 1133, 1144 (1991).

<sup>7</sup> 47 U.S.C. § 543.

precluded), 2) establish the boundaries between local and state, and federal responsibilities, 3) develop procedural and substantive rules to govern the regulation of basic service tier, cable programming service, and leased channel rates, and 4) create a process of gathering information to facilitate the regulation that is being undertaken and periodically review its effectiveness.<sup>8</sup>

In its Order, the Commission recognized that the Cable Television Consumer Protection and Competition Act of 1992 was attempting to rectify a problem that the Cable Communications Policy Act of 1984 had left for consumers – monopoly cable rates.<sup>9</sup> The Commission established a definition of MVPD associated with the tests based (in part) on the definition of MVPD in the statute.<sup>10</sup> The Commission’s MVPD definition – established in 1993 – was broad in scope:

A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.<sup>11</sup>

The definition included DBS (as did the definition of “multichannel video programming distributor” added to the Communications Act in 1992) even though at the time of the

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<sup>8</sup> *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation* 8 FCC Rcd 5631, 5637 (FCC 1993)

<sup>9</sup> *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, 5638-5639 (FCC 1993) (“The 1984 Act, however, generally was not successful in creating a competitive multichannel video distribution marketplace as cable systems continued to develop without direct multichannel video competitors. Thus, consumers were left without the protections with respect to cable rates and customer service that they would have had in a more competitive environment. The challenge presented by this situation was how to preserve and extend the benefits of increased investment, programming diversity, and technical innovation that cable provides while protecting subscribers from noncompetitive rate levels. It is this balance that the 1992 Cable Act seeks to strike.”)

<sup>10</sup> 47 U.S.C. § 522(13).

<sup>11</sup> 47 C.F.R. § 76.905(d).

Commission's order, there was no DBS competition.<sup>12</sup> It was anticipated by Congress and the Commission that DBS would provide effective competition. However, that predictive judgment quickly turned out to be wrong.

It has long been recognized that DBS competition is insufficient to curb the market power of a wireline cable operator. For example:

- In 1996, just a few years after the Commission rules were issued, Congress established additional rules to encourage local exchange carriers (LECs) to compete in the video marketplace and established a "LEC Test" for effective competition which explicitly excluded satellite, permitting consideration of video services provided directly to subscribers "by any means (other than direct-to-home satellite services)..."<sup>13</sup>
- The Commission's 1999 order establishing implementing regulations for the LEC Test quoted extensively from the numerous statements in Congress expressing the expectation that wireline telephone companies would offer robust competition to cable companies, and adopted a "substantial overlap" requirement for LEC systems to ensure that cable markets are not deregulated before they are truly competitive.<sup>14</sup>
- In reports issued in 2002, 2003 and 2004, the General Accounting Office ("GAO") found that satellite providers alone have at most a minuscule effect on cable rates.<sup>15</sup>

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<sup>12</sup> *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, 5660 (FCC 1993) ("Currently, no "competitive" DBS system is operational.")

<sup>13</sup> 47 U.S.C. § 543(L)(1)(d) and 47 C.F.R. § 76.905(b)(4).

<sup>14</sup> *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, 14 FCC Rcd 5296, 5302-5304 (F.C.C. Mar. 29, 1999)(The Commission summarized that "[t]he thrust of the 1996 Act is Congress' expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and, as Cablevision points out, their ubiquitous presence in the market.")(citations omitted).

<sup>15</sup> See United States General Accounting Office, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO 04-241 (February 2004); *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, GAO-04-8 (Oct. 24, 2003); *Telecommunications: Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAO-03-130 (Oct. 15, 2002).

- In 2002, the Commission made the same point about DBS as the GAO had made.<sup>16</sup>
- In its 2007 order imposing new federal regulations on the cable franchising process, the Commission took action based on an imperative need for *wireline* competition to incumbent cable operators. The Commission stated that “[t]he record demonstrates that new cable competition reduces rates far more than competition from DBS” and indicated that wireline competitors, not DBS, bring down rates.<sup>17</sup> In particular, statements accompanying the Local Franchising Order indicated the belief that DBS competition is not sufficient to prevent cable operators from charging unreasonable rates.<sup>18</sup>
- The Commission’s cable price reports since 2009 have reported the average prices are **higher** in “effective competition” communities than in communities without effective competition. (\$58.74 in effective competition communities vs. \$56.82 in noncompetitive communities).<sup>19</sup> The Commission itself has recognized that the price difference is now statistically significant.<sup>20</sup> Yet many of these “effective competition” communities have lost their rate regulation authority due to effective competition findings relying solely on DBS.

Recent market trends suggest that DBS will only become *less* effective as a competitor to the incumbent cable operator. The largest DBS MVPD, DirecTV, recently cautioned that due to trends in bundling, and multi-platform video programming delivery, the “video only market” no longer captures competitive challenges, broadband is becoming the “anchor” product of the

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<sup>16</sup> *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 17 FCC Rcd. 6301 at ¶ 45 (2002) (“the presence of effective competition due to DBS overbuild status has no significant effect on cable rates.”).

<sup>17</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, 22 FCC Rcd 5101 at ¶ 50 (March 5, 2007) (“Local Franchising Order”). *See also id.* at ¶ 19 (“Most communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service. . . . In the vast majority of communities, cable competition simply does not exist”); ¶ 35 (analyzing the new entrant as the “*second* provider,” without counting DBS companies as competing providers).

<sup>18</sup> *See, e.g.*, Statement of Commission Chairman Martin on Local Franchising Order, ¶ 3 (“competition is desperately needed” because of excessive increases in cable rates).

<sup>19</sup> *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices (rel. Feb. 14, 2011) at ¶ 3 (Cable Prices Report).

<sup>20</sup> Cable Prices Report at ¶¶ 3-4.

wireline MVPDs, and service bundles that include broadband are difficult for DBS providers to compete with.<sup>21</sup> In summary, the facts demonstrate that the predictive judgment that DBS alone would be an effective competitor for cable systems has proved to be wrong.

**2. Because the Commission's Predictive Judgment Concerning DBS Competition Turned Out to Be Wrong and Because the Commission Has Public Interest Obligations, the Commission Must Deny Comcast's Petition and Should Consider Suspending Its Related Rules**

The Commission has a duty to act in the public interest.<sup>22</sup> There is significant evidence, publicly accepted by the Commission, that DBS is not effective competition and that the 1993 rules in effect adopting DBS as a measure of effective competition are not working as predicted. The results of accepting DBS as effective competition contradict what Congress and the Commission expected. Thus, based on these facts, the Commission has an obligation to cease to apply those rules in a manner that would harm the public interest. The County therefore asks that the Commission deny Comcast's Petition, and consider suspending its effective competition rules that permit an effective competition petition to rely solely on DBS penetration. Commission findings on effective competition petitions cannot remain divorced from the ample evidence of their negative impact on consumers in the real world. Continuing to make effective competition findings based on DBS alone under the Competing Provider Test is demonstrably harmful to consumers as it exposes them to cable companies' market power in instances where

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<sup>21</sup> *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, DirecTV Comments at 2, 13, 15-18.

<sup>22</sup> 47 C.F.R. § 76.7(a)(4)(i).

competition is not actually effective at keeping rates reasonable.<sup>23</sup> It also violates the Commission's obligation to engage in reasoned decision making.<sup>24</sup>

### **III. THE COMMISSION HAS PRECEDENT FOR SUCH ACTION**

The evidence discussed above demonstrates the need for the Commission to deny the Petition, and to consider suspending its rules that permit an effective competition petition to rely solely on DBS penetration. There is also recent precedent for taking such actions. The Commission has authority to suspend rules on its own motion.<sup>25</sup> In August of this year, the Commission suspended, on its own motion, certain rules that had permitted price cap LECs to obtain deregulation orders as competition for special access services increased.<sup>26</sup> The Commission suspended the rules for the simple reason that the proxies for competitive showings that the Commission adopted in 1999 turned out, based on extensive experience, "not to be accurate indicator[s] of competitive pressure sufficient to constrain prices throughout that area."<sup>27</sup> Nor is this the only instance in which the Commission has changed its competition policy when real world market developments called into question earlier predictions. The Commission has also modified its competition policy in the context of considering (and denying)

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<sup>23</sup> Cable Prices Report at ¶¶ 3-4.

<sup>24</sup> See *Cellnet Commc'ns v. FCC*, 149 F.3d 429, 442 (6th Cir. 1998) ("If the FCC's predictions about the level of competition do not materialize, then it will of course need to reconsider its sunset provisions in accordance with its continuing obligation to practice reasoned decision making.").

<sup>25</sup> 47 C.F.R. § 1.3.

<sup>26</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services* (WC Docket No. 05-25, RM-10593) Report and Order, (rel. Aug. 22, 2012).

<sup>27</sup> *Id.* at ¶ 4, see also ¶¶ 22-75.

a local exchange carrier's regulatory forbearance application, an application procedure not unlike the effective competition petition procedure in this proceeding.<sup>28</sup>

As DBS penetration has shown itself not to be an accurate indicator of competitive pressure sufficient to constrain prices in cable franchise areas, it would be consistent with the weight of the evidence, Congressional intent, and the public interest for the Commission to adjust its effective competition policy in light of market realities.

#### **IV. CONCLUSIONS**

The County respectfully requests that the Commission act in the public interest to deny Comcast's Petition for the following reasons discussed above:

1. The predictive judgment of Congress and the Commission that DBS would be an effective competitor has turned out to be incorrect.
2. Based on the Commission's public interest obligations, the Comcast Petition must be denied because the Commission's predictive judgment concerning DBS competition has turned out to be wrong.

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<sup>28</sup> See for example, *Qwest Corp. v. F.C.C.*, 689 F.3d 1214 (10th Cir. 2012) where the Court upheld a Commission decision on a forbearance application that involved a change in Commission policy. The Court stated: "Taking these factors together—specifically, the well-documented anti-competitive risks of duopoly, the subsequent developments in Omaha, and the lack of effective competition in the Phoenix market—the Commission could rationally call into question its earlier predictions, perceive the need for a different approach, and proceed cautiously regarding the possibility of granting forbearance in the Phoenix MSA, given the real-world understanding that doing so might result in a Qwest-Cox duopoly similar to the one in Omaha. Based upon the foregoing reasoning, we reject Qwest's contention that the *Phoenix Order* is unreasonable."

The County also respectfully requests the Commission to consider suspending its rules permitting DBS penetration alone to be sufficient to satisfy the Competing Provider Test.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Stephanie Pearson, do hereby certify that on this 10th day of December, 2012, in addition to filing the foregoing **OPPOSITION TO PETITION FOR SPECIAL RELIEF** using the FCC's electronic filing system, a true and correct copy of the foregoing has also been sent via U.S. mail, postage prepaid to the following:

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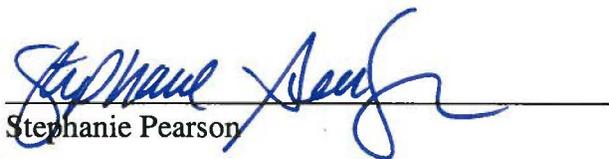
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