

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

In the Matter of

Comcast of Potomac, LLC

For Determination of Effective Competition in:
Chevy Chase Village, MD (MD0277)
Chevy Chase Section 3, MD (MD0472)
Laytonsville, MD (MD0235)
Poolesville, MD (MD0228)

Docket No. 12-308

CSR-87330E

**SURREPLY OF MONTGOMERY COUNTY, MARYLAND,
REGARDING COMCAST'S PETITION FOR SPECIAL RELIEF**

The County files this limited surreply to address only the new issues raised in Comcast's Reply to Opposition, filed in this proceeding on December 20, 2012.¹ Comcast maintains that "Congress did *not* leave open to discretion whether DBS service should or should not be counted under the Competing Provider Test."² This is a new argument—Comcast's original petition did not discuss the scope of the Commission's discretion. The fact that DBS providers are defined as "multichannel video programming distributors" does not displace the Commission's discretion here. To be sure, the statute "does not *expressly* authorize [the Commission] to make 'market power' determinations when deciding whether a cable operator faces effective competition."³ It does, however, expressly require the Commission to "find[]" not only that 47 U.S.C.

¹ This filing's silence regarding other statements and arguments in the Comcast Reply does not indicate agreement. The County reaffirms, without restating in detail, its opposition to Comcast's petition for a finding of effective competition as stated in its opposition

² Reply at 3.

³ *In re CoxCom, Inc. d/b/a Cox Communications Orange County*, 22 FCC Rcd. 4522 at ¶ 5 (2007) (emphasis added).

§ 543(l)(1)(B)'s "effective competition" definition is satisfied, but also that the cable system is "subject to" it:

If the Commission finds that a cable system is *subject to* effective competition, the rates for the provision of cable service by such system shall not be subject to regulation.

47 U.S.C. § 543(a)(2). "[T]he words 'subject to' leave room for interpretation." *United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 542, 547 (D.C. Cir. 2002); *see also Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 833 (9th Cir. 1996) ("The meaning of 'subject to' includes, among other things, 'governed or affected by.'"); *In re Jackson*, 348 B.R. 487, 497-498 (Bankr. S.D. Iowa 2006) (finding that "the term 'subject to' means 'determined by something else' as in 'dependent' or 'being in a situation where one is likely to meet with harm' as in 'liable.'").

Here, the Commission has discretion to conclude that, based solely on the presence of DBS providers, Comcast is not "subject to" effective competition. Section 543(a)(2) uses "subject to" twice: rates are not "subject to" *regulation* if the regulations do not influence the rates; and a cable system is not "subject to" *effective competition* if the existence of "effective competition" does not influence the system's behavior. The Commission's own data show precisely that—the presence of DBS does not affect incumbent cable operators' pricing behavior.⁴ Instead of requiring the Commission to ignore this reality, the statute expressly directs the Commission to make findings with respect to it. Upon doing so, the Commission should deny Comcast's petition.

⁴ County Opposition at 5-6.

Alternatively, the Commission should defer final action on Comcast's petition until the Commission can re-visit its approach to effective competition petitions. The regime is not working.⁵

Respectfully submitted,

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January 18, 2013

⁵ *Id.*

CERTIFICATE OF SERVICE

I, Willette Hill, do hereby certify that on this 18th day of January, 2013, in addition to filing the foregoing **SURREPLY OF MONTGOMERY COUNTY, MARYLAND, REGARDING COMCAST'S 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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