

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

	)	CSR 7118-E
	)	CSR 7119-E
	)	CSR 7197-E
	)	CSR 7198-E
In the Matter of	)	CSR 7597-E
	)	CSR 7598-E
Subsidiaries of Cablevision Systems Corporation	)	CSR 7599-E
	)	CSR 7604-E
Petitions for Determination of Effective	)	CSR 7605-E
Competition in 103 Communities in New Jersey	)	CSR 7606-E
	)	CSR 7607-E
	)	CSR 7608-E
	)	CSR 7609-E
	)	CSR 7979-E
	)	CSR 7980-E
	)	CSR 7981-E

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 20, 2008**

**Released: November 20, 2008**

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

**I. INTRODUCTION AND BACKGROUND**

1. The Division of Rate Counsel (the “DRC”) of the New Jersey Department of the Public Advocate has moved for a stay<sup>1</sup> of our decision of October 2008, which found that subsidiaries of Cablevision Systems Corporation (“Cablevision”) are subject to effective competition in 103 franchise areas in New Jersey (the “Communities”).<sup>2</sup> Cablevision filed an opposition to the DRC’s motion.<sup>3</sup>

2. The DRC argues that the decision deprived the franchise authority in the State of New Jersey, the New Jersey Board of Public Utilities (the “BPU”), of regulatory authority over the rates that Cablevision charges for its basic cable service in the 103 Communities.<sup>4</sup> The DRC’s Motion asks that we stay our decision until the Commission decides the DRC’s pending Application for Review of our decision.<sup>5</sup> After careful consideration of the DRC’s motion and Cablevision’s opposition, we deny the

<sup>1</sup> Motion to Stay (“Motion”), dated Oct. 31, 2008. The Township of Edison, New Jersey, filed a letter supporting the Motion. Letter from Jeffrey B. Lehrer, Esq., DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C., counsel for the Township of Edison, New Jersey, to Marlene H. Dortch, Commission Secretary, dated Nov. 10, 2008.

<sup>2</sup> *Subsidiaries of Cablevision Systems Corp.*, Memorandum Opinion & Order DA 08-2217 (“MO&O”) (rel. Oct. 2, 2008), Erratum (rel. Oct. 7, 2008), available at 2008 WL 4449658.

<sup>3</sup> Cablevision Systems Corporation Opposition to Stay (“Opposition”), dated Nov. 7, 2008.

<sup>4</sup> The DRC is not the franchise authority in the State of New Jersey. The DRC, instead, is part of the New Jersey Department of the Public Advocate, an independent state agency that represents the interests of New Jersey utility ratepayers before the BPU. Motion at 1 n.1; State of New Jersey, Department of the Public Advocate, DRC, *FAQs*, <http://www.state.nj.us/publicadvocate/utility/information/faq.html> (visited Nov. 17, 2008).

<sup>5</sup> That Application for Review is dated October 30, 2008.

requested stay.

## II. ANALYSIS

3. Standard for Stay. The Commission evaluates motions for stays under well settled principles. To win a stay, the moving party generally must demonstrate that: (1) it is likely to prevail on the merits of its pending appeal (here, the DRC's Application for Review); (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>6</sup>

4. Likelihood of Prevailing on the Merits. Turning to the first criterion for granting a stay, we find that the DRC has not shown that it is likely to prevail on the merits of its pending Application for Review. For the most part, the DRC's motion briefly summarizes arguments that it made and we found inadequate in our decision<sup>7</sup> and in earlier proceedings involving New Jersey.<sup>8</sup> The DRC's motion gives us no reason to reconsider our earlier rulings or to revisit them in detail here.

5. The DRC's motion does raise two new arguments on which it claims likelihood of prevailing on the merits, which we address in turn. The first relates to the Communities in which we found that Cablevision's cable service is subject to "competing provider" effective competition.<sup>9</sup> The DRC argues that, when our decision accepted Cablevision's statistical evidence and rejected the DRC's without requiring Cablevision to rebut it, we impermissibly shifted the burden of proof from Cablevision to the DRC.<sup>10</sup> This argument misreads our decision, which always left the burden of proof on Cablevision. Cablevision presented statistical evidence about the number of "households," meaning residential housing units that are occupied full time, in each of the Communities in question.<sup>11</sup> The DRC countered with evidence that did not measure "households," but measured other kinds of buildings (residential and non-residential). We found the DRC's evidence immaterial and irrelevant.<sup>12</sup> There was no need to require Cablevision to rebut evidence that was thus fundamentally flawed. To find Cablevision's evidence more probative on such a record is merely to find that Cablevision sustained its burden of proof, not to impermissibly relieve it of that burden.

6. The DRC's second new argument relates to the Communities in which we found that Cablevision's service is subject to "local exchange carrier" or "LEC" competition.<sup>13</sup> The DRC attempts

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<sup>6</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Charter Commun. Entertainment I, LLC* ("Charter"), 22 FCC Rcd 13890, 13892, ¶ 4 (2007).

<sup>7</sup> Compare Motion at 6-7, 10-11 with *MO&O* at ¶ 41 (re whether Verizon's cable service, even if it lacks Public, Educational, and Government ("PEG") channels, is "comparable" to Cablevision's); Motion at 7 with *MO&O* at ¶¶ 39-40 (re whether the "LEC" test (*infra* note 13) can (and should in this case) apply to a system-wide franchise); Motion at 9 with *MO&O* at ¶¶ 21-22 (re whether petitions for findings of effective competition should be "complete when filed"); Motion at 9 with *MO&O* at ¶¶ 24-33 (re various alleged "factual disputes").

<sup>8</sup> *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11490, ¶ 5, 11491, ¶ 9, 11496-97, ¶ 24 (2007) ("complete when filed"); *Service Elec. Cable TV of New Jersey, Inc.*, 20 FCC Rcd 20532, 20533, ¶ 4 (2005) ("comparable programming").

<sup>9</sup> 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 905(b)(2).

<sup>10</sup> Motion at 7-8.

<sup>11</sup> *MO&O* at ¶ 7. That evidence was taken from the U.S. Census, as has been long accepted in competing provider effective competition decisions.

<sup>12</sup> *MO&O* at ¶¶ 27-28, 30-33. The *MO&O* did not, as the Motion (at 8) states, require the DRC to "substantiate the reliability of its data." The *MO&O* rejected the DRC's data as immaterial and irrelevant.

<sup>13</sup> 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4).

to bolster its argument that Verizon's cable service is not "comparable" to Cablevision's for purposes of the LEC test because it may lack so-called Public, Educational, and Government ("PEG") channels. Specifically, the DRC cites recent statements about the importance of PEG channels.<sup>14</sup> These statements, however, do not speak to the issue before us in these proceedings, which is whether Verizon's service fits the criteria for "comparable service" for purposes of resolving claims of effective competition. For those purposes, the decisive definition of "comparable service" is set forth in section 76.905(g) of our rules.<sup>15</sup> That definition requires no PEG channels for a LEC's service to be "comparable" to a cable operator's.<sup>16</sup> The DRC's motion does not mention this rule and does not ask for a waiver of it. Nor would it be proper, in these adjudicatory proceedings, to amend a rule of general applicability.<sup>17</sup> The DRC gives us no reason to doubt the soundness of our decision's analysis of the comparable programming issue, and we cannot say that the DRC is likely to prevail on the merits of it in its pending Application for Review.

7. In sum, the DRC has failed to establish that it is likely to prevail on the merits of its pending Application for Review of our decision.

8. Irreparable Harm to the DRC or Consumers. The second criterion we must consider is whether the DRC will suffer irreparable harm in the absence of a stay. The DRC has not shown that it will suffer such harm. The DRC itself is not a franchising authority that our decision deprived of regulatory authority. The BPU, which is the franchising authority for the Communities in question, neither opposed deregulation earlier in these proceedings nor joined the DRC in the present motion for a stay.

9. Concerning consumers in the Communities, whose interests the DRC is charged with representing, the DRC had not alleged, much less shown, that subscribers to Cablevision's basic service will pay higher rates, receive fewer channels<sup>18</sup> or deteriorated service, or suffer other harm in the absence of a stay.<sup>19</sup> Nor has the DRC shown that any rate increase for Cablevision's basic service would not be justified by increased numbers of channels, higher quality programming, or other improvements necessitating a rate increase.

10. Harm to Third Parties. The third criterion we must consider is whether other interested parties would be harmed if a stay is granted. The other interested party in this case is Cablevision. A stay would harm Cablevision by re-imposing on it the significant burdens of the regulation of its basic rates by

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<sup>14</sup> Motion at 6, citing, e.g., Statement of Monica Shah Desai, Chief, Media Bureau, before the Subcommittee on Financial Services & General Government, Committee on Appropriations, U.S. House of Representatives, Sept. 17, 2008, available at <http://www.ourchannels.org/wp-content/uploads/2008/09/desai/pdf> (visited Nov. 17, 2008).

<sup>15</sup> 47 C.F.R. § 76.905(g).

<sup>16</sup> As Cablevision notes, the decision in which the Commission adopted the definition of "comparable programming" also adopted regulations about PEG channels. Therefore, when the Commission adopted the decisive definition, it was fully aware of the existence and importance of PEG channels. Opposition at 5, citing *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5665-67, ¶¶ 37-38, 5737-38, ¶¶ 158-60 (1993), *reversed in part on other grounds*, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

<sup>17</sup> See *MO&O* at ¶ 14 & n.26; *id.* at ¶ 21.

<sup>18</sup> Cablevision subscribers who switch to Verizon's cable service, if it lacks PEG channels for a time, will make a conscious decision to do without PEG channels. That cannot bar deregulation, because deregulation can also result from "competing provider" effective competition (*supra* note 9) from Direct Broadcast Satellite service, which lacks PEG channels.

<sup>19</sup> The DRC does not allege or show, for example, that the deregulation of rates for basic cable service in other New Jersey communities, *see* authorities cited *supra* note 8, has actually resulted in higher rates or caused any harm to deregulated companies' subscribers.

the BPU. This regulation entails preparing and filing Commission Forms with the BPU for more than 100 New Jersey Communities, responding to “hundreds of interrogatories that are typically issued in a rate regulation proceeding in New Jersey, and participating in the administrative hearing proceedings that are conducted.”<sup>20</sup> We find that Cablevision would likely suffer this harm if we stayed our decision.

11. The Public Interest. The fourth criterion we must consider is whether the public interest favors granting a stay. In light of our finding that Cablevision will likely prevail against the DRC’s Application for Review, continued rate regulation by the BPU, with the above-mentioned harm to Cablevision, would waste the time and energy of the DRC, the PBU, and Cablevision. The cost of such waste would ultimately be borne by the New Jersey taxpayers and Cablevision’s subscribers. The public interest counsels against such waste.<sup>21</sup>

12. Conclusion. The DRC has not satisfied any of the criteria for the grant of a stay. Moreover, two factors (harm to a third party and the public interest) counsel against the grant of a stay. We conclude that a stay is not justified.

### III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the motion to stay filed herein by the Division of Rate Counsel of the New Jersey Department of the Public Advocate **IS DENIED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.<sup>22</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert  
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<sup>20</sup> Opposition at 17.

<sup>21</sup> *Charter*, 22 FCC Rcd at 13893, ¶ 9.

<sup>22</sup> 47 C.F.R. § 0.283.