

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

In the Matter of:)
)
North Dakota Network Company)
)
Petition for Special Relief Requesting a Finding)
Of Effective Competition in Various North)
Dakota Communities)

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 2001

Released: June 5, 2001

By the Deputy Chief, Cable Services Bureau:

1. North Dakota Network Company (“NDNC”) filed a Petition for Special Relief¹ requesting a finding of effective competition in various North Dakota communities (the “Communities”)² in conjunction with its showing of compliance with Section 21.912 of the Commission’s rules.³ NDNC’s petition is unopposed.

2. The Communications Act and the Commission’s rules provide that only the rates of cable systems that are not subject to effective competition may be regulated.⁴ One of the bases by which a cable system will be deemed subject to effective competition is where a franchise area is: (i) 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 (ii) 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 franchise area.⁵ In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist

¹See 47 C.F.R. § 76.7; Application of Phillip C Merrill to Transfer Control of MMDS Station Licenses to North Dakota Network Company. NDNC filed an addendum to its Application on May 22, 2001.

²The Communities are: Berthold, Carpio, Donnybrook, Granville, Lake Metigoshe, Sherwood, and Westhope, North Dakota.

³47 C.F.R. § 21.912. Petitioners must file for special relief pursuant to Section 76.7 when demonstrating compliance with Section 21.912 based on the effective competition exception to Section 21.912. See *Letter dated January 21, 1998 from Roy J. Stewart, Chief, Mass Media Bureau to Charles G. Cline, Kenneth W. Garrard, BellSouth Wireless Cable, Inc. and BellSouth Corporation* (File Nos. 50849-CM-AL(1)-97 and 50851-CM-AL(2)-97).

⁴47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(a).

⁵47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.906(b)(2).

⁶47 C.F.R. § 76.906.

with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.⁷ NDNC has met this burden.

3. NDNC has submitted reliable evidence demonstrating that the Communities are served by at least two unaffiliated multichannel video programming distributors ("MVPDs") offering comparable service to more than 50% of the households therein. NDNC asserts that the service of direct broadcast satellite providers satisfy this requirement.⁸ In addition NDNC asserts that its own facilities serving the Communities pass nearly 100% of the households therein.⁹ We therefore find that NDNC has submitted sufficient evidence to satisfy the first prong of the competing provider test.

4. NDNC has also submitted sufficient evidence demonstrating that the number of households subscribing to MVPDs other than the largest MVPD exceeds 15% of the households in all of the franchise areas. Relying on its own subscribership information and DBS subscribership reports obtained from SKYTrends, a media research reporting and consulting firm, NDNC submits evidence that the aggregate subscribership to DBS service in the Communities exceeds 15% of the households in each franchise area.¹⁰ Although, NDNC does not indicate which MVPD in each franchise area is the largest MVPD; we are, nevertheless, able to conclude that competing provider effective competition exists in each of the Communities. Assuming that NDNC is the largest MVPD in each community, the aggregate DBS subscribership in each community easily surpasses the 15% threshold.¹¹ Conversely, assuming that a DBS provider is the largest MVPD in each of the Communities, NDNC's subscribership in each community by itself surpasses the 15% threshold of the second prong of the competing provider test.¹² We find that NDNC has submitted sufficient evidence to satisfy the second prong of the competing provider test, thereby establishing the presence of effective competition in the Communities.

5. Accordingly, **IT IS ORDERED** that the petition for special relief requesting a finding of effective competition in the Communities filed by North Dakota Network Company **IS GRANTED**.

6. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules.¹³

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

⁷47 C.F.R. § 76.911(b)(1).

⁸Petition at 1. See *Time Warner Entertainment – Advance/Newhouse Partnership d/b/a Time Warner Communications*, 15 FCC Rcd 8852, 8854 (CSB 2000); *Jones Intercable, Inc.*, 15 FCC Rcd 7257, 7258 (CSB 2000).

⁹Petition at 1.

¹⁰*Id.* at 5. The precise DBS penetration rate for each franchise area is set forth on Attachment A.

¹¹ See Attachment A.

¹² *Id.*

¹³47 C.F.R. § 0.321.

Attachment A

**Percentage of Households in the Communities
Subscribing to MVPDs Other than the Largest MVPD**

<u>Community</u>	<u>NDNC % of Households</u>	<u>DTH % of Households</u>
1. Berthold	28%	70%
2. Carpio	30%	81% ¹
3. Donnybrook	20%	79%
4. Granville	19%	64%
5. Lake Metigoshe	25% ¹	37%
6. Sherwood	35%	57%
7. Westhope	50%	50%

¹ While the aggregate subscribership information for this franchise area totals more than 100%, we believe that this result most likely arises due to individuals subscribing to more than one programming service.

¹ Lake Metigoshe shares a zip code with Bottineau City. The household number for Lake Metigoshe was derived by subtracting the Bottineau City 2000 Census household data from the aggregated Metigoshe/Bottineau City data supplied by SKYTrends.