

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

In the Matter of:
Kansas City Cable Partners
Petition for Determination
of Effective Competition
File No. CSR-5650-E
Kearney, Missouri
CUID No. MO0442

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 2001

Released: August 16, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Kansas City Cable Partners ("KCCP") has filed a Petition for Special Relief seeking a determination of effective competition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules. KCCP asserts that its cable television system serving the City of Kearney, Missouri is subject to local exchange carrier ("LEC") effective competition because of the presence of ExOp Missouri, Inc.'s ("ExOp") cable services in Kearney. The petition is unopposed. For the reasons discussed below, the petition is granted.

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act of 1934, as amended ("Communications Act") allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the

1 47 C.F.R. §§ 76.7, 76.905(b)(4) and 76.907.

2 The Communications Act of 1934, as amended, defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.S.C. § 153(26).

3 47 U.S.C. § 543(a)(4).

Communications Act.⁴ The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.⁵ Section 623(1)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁶

3. The Commission has stated that an incumbent cable operator could satisfy the "LEC" effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁷ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its service so that potential customers are aware that the LEC's services may be purchased, that the LEC actually has begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁸

III. DISCUSSION

4. KCCP states that it operates a cable television system serving the City of Kearney, Missouri. KCCP also states that ExOp is franchised by the City of Kearney to provide cable services to Kearney residents. The first prong of the LEC test requires a showing that ExOp is a local exchange carrier or is affiliated with one.⁹ With regard to this portion of the test, KCCP submits ExOp's marketing materials that indicate that ExOp provides local and long distance telephone service as well as high-speed, DSL internet service to the residents of Kearney.¹⁰ KCCP also provides evidence of certification by the State of Missouri that ExOp qualifies as a local exchange carrier authorized to provide local exchange service.¹¹ Because KCCP has sufficiently established that ExOp provides local exchange service and is certified as a local exchange carrier, we find that the first prong of the LEC effective competition test has been met. We also find that KCCP is unaffiliated with ExOp.

5. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, KCCP asserts that ExOp is "technically and actually

⁴ 47 U.S.C. § 543(1); *see also* 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905; *see also* 47 C.F.R. § 76.906 & 76.907.

⁶ Communications Act, § 623(1)(1)(D), 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 623(1) is referred to as the "LEC" effective competition test.

⁷ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁸ *Id.*

⁹ 47 U.S.C. § 543(1)(1)(D); 47 C.F.R. § 76.905(b)(4).

¹⁰ KCCP Petition at 2, Exhibit A.

¹¹ *Id.* at 2-3, Exhibit B.

able” to offer multichannel video service to subscribers in Kearney.¹² KCCP notes that the Commission has determined that a LEC’s presence can have a competitive impact upon a cable operator before the LEC finishes installing its plant or rolling out its services.¹³ KCCP states that its cable system passes all of the households in Kearney,¹⁴ and ExOp is required by the terms of its franchise agreement to extend its system to serve all Kearney households.¹⁵ According to KCCP, ExOp has publicly stated that its cable system passes at least 80% of an estimated 1,910 households in Kearney and that ExOp personnel have represented to KCCP that ExOp was scheduled to pass 100% of all households in Kearney by the end of January 2001.¹⁶

6. KCCP notes that the effective competition test applicable to LEC-affiliated MVPDs does not include a percentage or penetration rate.¹⁷ KCCP asserts that it is only necessary that ExOp provide multichannel video service within the franchise area. KCCP states that ExOp has begun to serve at least 120 Kearney residents even though it has not completed construction of its plant.¹⁸ KCCP also notes that ExOp is also engaged in a direct marketing campaign.¹⁹

7. In addition, KCCP states that there are no regulatory, technical or other impediments to the receipt of ExOp’s service by residents of Kearney.²⁰ In support, KCCP notes that ExOp was awarded a cable franchise on February 22, 2000 and that ExOp has registered its operations with the Commission and with the Missouri Public Service Commission.²¹ Moreover, KCCP states that ExOp’s marketing materials demonstrate that Kearney residents need only contact ExOp to activate service and that dozens of Kearney residents already subscribe to ExOp’s service.²² KCCP also asserts that subscribers in the franchise area are reasonably aware that they may purchase ExOp’s service because of the advertising and

¹² KCCP Petition at 4.

¹³ *See Cable Reform Order*, 14 FCC Rcd at 5303.

¹⁴ KCCP Petition at 4, Declaration of Kent Hoffman, Customer Retention Manager of Time Warner Cable, Kansas City Division.

¹⁵ *Id.*, Exhibit C, ExOp Franchise Agreement at § 2.

¹⁶ KCCP Petition at 5; KCCP Amendment, July 11, 2001. In support of this statement, KCCP refers to Exhibit A which contains marketing materials and two newspaper articles. One attached newspaper article states that “ExOp has wired the town of 4,700 residents to offer telephone, digital cable TV and high-speed Internet service.” *Competing Providers to Give Consumers a Choice*, Kansas City Star, June 13, 2000. KCCP provides no specific support for its statement that ExOp personnel have confirmed to KCCP that ExOp planned to pass 100% of all Kearney households by the end of January 2001. However, we will rely on the Declaration of Marc Farrar, Director of Public Affairs of Time Warner Cable, Kansas City Division, attesting that the statements made in the petition are true and correct.

¹⁷ *Cable Reform Order* 14 FCC Rcd at 5303.

¹⁸ KCCP Petition at 5, Exhibit A. KCCP also states that 47 of its former subscribers have discontinued KCCP’s service in favor of ExOp’s service. *See* Declaration of Kent Hoffman, Customer Retention Manager of Time Warner Cable, Kansas City Division.

¹⁹ *Id.*

²⁰ KCCP Petition at 6.

²¹ *Id.*, Exhibits B and C. KCCP states that Commission records reflect that ExOp’s community unit identification number for the City of Kearney is MO1109.

²² KCCP Petition at 6.

marketing materials available to them.²³ Based on all of the information before us, we find that ExOp is offering service in Kearney sufficient to demonstrate the presence of effective competition.

8. We also find that KCCP has submitted sufficient evidence to demonstrate that the programming of ExOp is comparable to that which KCCP provides. The channel lineup for ExOP submitted by KCCP establishes that ExOP offers over 100 channels of programming, including numerous nonbroadcast programming services such as ESPN, Home Box Office (“HBO”) and CNN, as well as several local broadcast channels.²⁴ This channel lineup compares closely with the programming available on KCCP’s systems serving Kearney.²⁵ Accordingly, we find that KCCP has satisfied the Commission’s programming comparability criterion.

9. Finally, KCCP asserts that the residents of Kearney have benefited from its competitive response to competition presented from ExOp. Specifically, KCCP states that as a result of ExOp’s presence in Kearney, it has increased the number of channels offered and is offering loyalty coupons which give discounts to Kearney residents which retain KCCP’s service.²⁶ In conclusion, as KCCP has submitted evidence sufficient to demonstrate that its cable system serving Kearney is subject to LEC effective competition from ExOp, its petition is granted.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the Petition for Special Relief filed by Kansas City Cable Partners seeking a determination that its cable television system serving Kearney, Missouri is subject to effective competition **IS GRANTED**.

11. This action is taken pursuant to delegated authority under Section 0.321 of the Commission’s rules, as amended.²⁷

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²³ *Id.* at 7, Exhibit A.

²⁴ *Id.*

²⁵ *Id.* at 8, Exhibit E.

²⁶ *Id.* at 9, Exhibit F (KCCP Discount Coupons).

²⁷ 47 C.F.R. § 0.321.