

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

In the Matter of:)	
)	CSR 5635-E
Texas Cable Partners, L.P.)	
)	TX 0750 City of Alvin
Petition for Determination of)	TX 0513 City of Dickinson
Effective Competition)	TX 0751 City of Friendswood
)	TX 0509 League City
)	TX 0749 City of Santa Fe
)	TX 0511 City of El Lago
)	TX 0838 Taylor Lake Village
)	TX 00854 Village of Webster

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2001

Released: February 27, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this proceeding, Texas Cable Partners, L.P. ("TCP") filed a petition seeking a determination of effective competition in the eight above-captioned franchise areas. TCP alleges that its cable systems serving these areas are subject to effective competition as defined by Section 623(l) of the Communications Act of 1934, as amended ("Communications Act"),¹ and the Commission's implementing rules,² and are therefore exempt from cable rate regulation. TCP claims it is subject to effective competition under the "competing provider" effective competition test set forth in Section 623(1)(1)(B) of the Communications Act.³ More particularly, TCP claims the presence of effective competition in each franchise area stems from the competing services provided by direct broadcast satellite providers (collectively "direct broadcast service" or "DBS"), and by various competitive wireline multichannel video programming distributors ("MVPDs").⁴ TCP seeks revocation of the certification of each of the local franchising authorities ("LFAs") to regulate TCP's basic cable rates.⁵ An opposition to the petition was filed on behalf of the LFAs, to which TCP replied.

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ 47 U.S.C. § 543(1)(1)(B).

⁴ TCP asserts the following wireline MVPDs offer service to multiple dwelling units within the franchise areas: OpTel, Phonoscope, Southwestern Bell Video Services and People's Choice TV. TCP Petition at 2 n.2.

⁵ On the following dates, each LFA filed a FCC Form 328 to become certified to regulate basic cable service rates.
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II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁶ as that term is defined by Section 623(1) of the Communications Act, and Section 76.905 of the Commission's rules.⁷ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁸ Section 623(1) of the Communications Act provides that a cable operator is subject to effective competition if any one of four tests for effective competition set forth therein is met.⁹ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.¹⁰

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two MVPDs, each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent (15%) of the households in the franchise area.¹¹ Turning to the first prong of this test, TCP asserts that competing MVPD services are offered to at least 50 percent of the households in the franchise areas due to the presence of DBS providers including DirecTV, Inc. and Dish Network.¹² In support of this proposition, TCP provides evidence of the advertising of DBS service in national media serving the franchise areas.¹³ TCP contends that DBS provides programming comparable to the programming it offers, and further, submits that the DBS providers offer over 100 channels including local broadcast channels.¹⁴ In opposition, the LFAs argues that the evidence TCP presents to demonstrate that comparable programming is offered in the franchise area is not sufficient because TCP offers advertising and DBS channel line-ups for Houston, Texas instead of the franchise areas.¹⁵ The LFAs assert that TCP fails to demonstrate that the same programming is offered in the franchise areas. In reply, TCP contends

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The certifications became effective 30 days later:

City of Alvin	Sept. 13, 1993	City of Santa Fe	Nov. 16, 1993
City of Dickinson	Nov. 1, 1993	City of El Lago	Oct. 8, 1993
City of Friendswood	Oct. 12, 1993	Taylor Lake Village	Oct. 13, 1993
League City	Oct. 19, 1993	Village of Webster	Oct. 15, 1993

⁶ 47 C.F.R. § 76.906.

⁷ 47 U.S.C. § 543(1); 47 C.F.R. § 76.905.

⁸ 47 C.F.R. §§ 76.906 & 907.

⁹ 47 U.S.C. § 543(1)(1)(A)-(D).

¹⁰ 47 C.F.R. § 76.905.

¹¹ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

¹² DISH Network is the registered trademark of EchoStar Communications Corporation.

¹³ TCP Petition at Exhibit A.

¹⁴ *Id.* at 5 and Exhibit B.

¹⁵ LFA Opposition at 3.

that it is well established Commission precedent that the DBS providers offer comparable programming for effective competition purposes.¹⁶

4. With respect to the first prong of the competing provider test, we find that DBS providers, such as DirecTV and Dish Network, offer video programming to at least 50 percent of the households in the franchise area. The Commission has found DBS service presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.¹⁷ TCP has provided evidence of the advertising of DBS service in the local media that serve each of the franchise areas. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because both DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹⁸ We find, therefore, that TCP has satisfied the first prong of the competing provider test.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area.¹⁹ TCP submits an estimate of the number of households in each franchise area, which it developed based on 1990 Census data and a growth factor calculated by the Texas State Data Center.²⁰ TCP also provided information regarding the number of non-TCP MVPD subscribers in each franchise area using data supplied by SkyTrends for DBS providers, and data supplied by the other MVPDs. TCP maintains that the non-TCP MVPD have collectively achieved at least a 15 percent penetration among households in each franchise area.²¹

6. In its opposition, the LFAs contend that the evidence submitted by TCP to support its claim is incomplete and the methodology used to support its conclusion is not valid.²² The LFAs submit that TCP's MVPD totals include subscribers that are billed to post office boxes, and therefore, some subscribers may be counted in a jurisdictions although they do not receive services there.²³ Further, the LFAs argue that TCP fails to show that there is any correlation between population growth and household growth.²⁴ Also, the LFAs assert that TCP's methodology fails to take into account the number of multifamily dwellings being served by their competitors. Finally, the LFAs argue that TCP fails to use the latest available data.

¹⁶ TCP Reply 3, citing *Time Warner Entertainment-Advance/Newhouse Partnership d/b/a/ Time Warner Communications*, Memorandum Opinion and Order, 15 FCC Rcd 8155 (2000).

¹⁷ See *MediaOne of Georgia*, Memorandum Opinion and Order, 12 FCC Rcd 19406 (1997).

¹⁸ See 47 C.F.R. § 76.905(g); see also TCP Petition at 5 and Exhibits B - D.

¹⁹ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2)(ii). The Commission has stated that for purposes of effective competition, the term "households" has the same meaning as the term was used in the 1990 Census. *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration, 9 FCC Rcd 4316, 4324 (1994).

²⁰ TCP Petition at 6 and Exhibit H. The Texas State Data Center is part of the Department of Rural Sociology at Texas A&M University.

²¹ *Id.* at 7-8.

²² LFA Opposition at 4.

²³ *Id.*

²⁴ *Id.* at 5.

7. In reply, TCP submits new MVDP subscriber numbers for the franchise areas that excludes subscriber addresses attributed to post office boxes, as well as updated household estimates based on population estimates released after TCP filed its petition.²⁵ TCP argues that even using this new information, the competitive penetration rates in all of the franchise areas remains above fifteen percent. Regarding its methodology to update the household counts for the franchise areas, TCP maintains that its approach is reasonable in light of the fact that updated Census household counts are not available, and argues that its methodology results in a more accurate count of the current number of households within each franchise area, than does rote reliance on 1990 Census data.²⁶

8. We find that TCP is the largest service provider in each franchise area, as its number of subscribers in each franchise area is greater than the combined subscriber total of DBS and wireline MVPDs. Regarding TCP's estimation of the number of households in each franchise area, we note that the Commission accepts updated household numbers based on the 1990 Census if the cable operator demonstrates their reliability.²⁷ In prior cases, the Commission has allowed incorporation of a growth factor to establish current household numbers.²⁸ In this particular instance, TCP uses the most recent population estimates available, and no other household calculation is offered to counter TCP's assertions.²⁹ The LFAs do not offer penetration rates to counter TCP's calculations. We have previously accepted TCP's method of updating the number of households in a franchise area as providing a sufficiently reliable basis for an effective competition determination.³⁰ Therefore, we accept TCP's household numbers. Likewise, the Commission previously has accepted DBS subscriber counts from SkyTrends, and given TCP's effort to ensure that no post office boxes are included in the totals submitted, we believe it is reasonable to accept TCP's MVPD subscriber count.³¹ Accordingly, using the updated household numbers and non-TCP MVPD subscribers submitted by TCP, we find that TCP has demonstrated that the number of households subscribing to MVPDs, other than the largest, exceeds the 15 percent threshold of the second prong of the competing provider test for each franchise area.³² Based on the foregoing, we conclude that

²⁵ TCP Reply at Exhibits 4 and 5, *citing* Texas State Data Center January 2000 population estimates.

²⁶ *Id.* at 6.

²⁷ *Mountain Cable, et. al*, Memorandum Opinion and Order, 14 FCC Rcd 13,994, 14,001 (1999). Initially, the Commission allowed cable operators to rely on 1990 Census data to establish the number of households in their franchise area. *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certification to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

²⁸ *Falcon Community Ventures I, L.P.*, Memorandum Opinion and Order, 13 FCC Rcd 21,762, 21,768 (1998); *Falcon Telecable*, Memorandum Opinion and Order, 13 FCC Rcd 17,270 (1998).

²⁹ The Commission has stated that where both the cable operator and the franchising authority submit household numbers more current than the most recent available census data, it is the cable operator's burden to demonstrate that its more current household numbers are more accurate and reliable than the household numbers submitted by the franchising authority. *Falcon Community Ventures I, L.P.*, 13 FCC Rcd at 21,767.

³⁰ *Texas Cable Partners, L.P.*, Memorandum Opinion and Order, FCC 01-313 (rel. Feb. 8, 2001).

³¹ SkyTrends maintains a database of DBS subscriber counts by zip code, as well as provides current economic and subscriber trends in the DBS marketplace. *Falcon Community Ventures I, L.P.*, 13 FCC Rcd at 21,765.

³² Using TCP's lower MVDP subscriber numbers and most recent estimate of households in each franchise, the percentage of penetration of subscribers to MVPDs other than to TCP, the largest, are:

<u>Franchise Area</u>	<u>Subs</u>	<u>H-holds</u>	<u>Percent</u>	<u>Franchise Area</u>	<u>Subs</u>	<u>H-holds</u>	<u>Percent</u>
City of Alvin	2,070	7,843	26.39	City of Santa Fe	851	3,837	22.18
City of Dickinson		1,034	6,751	15.32	City of El Lago	273	1,407

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TCP has submitted sufficient evidence demonstrating that its cable systems serving the franchise areas are subject to effective competition under the “competing provider” test.³³

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Texas Cable Partners **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certifications granted to the cities of Alvin, Dickinson, Friendswood, League City, Santa Fe, El Lago, Taylor Lake Village and the Village of Webster, Texas to regulate basic cable service rates **ARE REVOKED**.

11. This action is taken pursuant to authority delegated under Section 0.321 of the Commission’s rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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19.41							
City of Friendswood	3,798	10,537	36.04	Taylor Lake Village	226	1,384	16.33
League City	851	16,645	15.58	Village of Webster	1,035	2967	34.88

³³ We recognize that in certain instances the aggregate MVPD penetrations, other than the largest provider, is extremely close to the 15% threshold under the second prong of the competing provider test. The statute, however, does not grant the Commission discretion in close cases. If the aggregate MVPD penetration rate is above 15%, effective competition, as defined by the Communications Act, exists. 47 U.S.C. § 543(l)(1)(B). We acknowledge that subscriber penetration will change over time and that the 2000 Census reports will be available in the future. If new data shows our determination of effective competition to be no longer valid in any or all of the affected franchise areas, the LFA may file a petition for recertification pursuant to Section 76.916 of our rules, 47 C.F.R. § 76.916.

³⁴ 47 C.F.R. § 0.321.