

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

In the Matter of:)
ACC Cable Communications FL-VA, LLC)
d/b/a Adelphia Cable Communications)
Petition for Determination of Effective)
Competition in Columbus County, NC (NC0464,)
NC0747, NC0766), Town of Lake Waccamaw,)
NC (NC0746), and Town of Tabor City, NC)
(NC1015))
CSR-5911-E

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2003

Released: April 17, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. ACC Cable Communications FL-VA, LLC, d/b/a Adelphia Cable Communications ("Adelphia") has filed with the Commission a petition, pursuant to Sections 76.7 and 76.905 of the Commission's rules, alleging that Adelphia is subject to effective competition from competing service providers in unincorporated Columbus County, the Town of Lake Waccamaw, and the Town of Tabor City, North Carolina (the "Communities").

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 76.905 of the Commission's rules. 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. Based on the record in this proceeding, Adelphia has met this burden.

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject

1 47 C.F.R. §§ 76.7 and 76.905.

2 47 U.S.C. § 543(1)(1)(B)(i) and (ii); 47 C.F.R. § 76.905(b)(2)(i) and (ii).

3 47 C.F.R. § 76.906.

4 47 C.F.R. § 76.905.

to effective competition if its franchise area is (a) served by at least two unaffiliated multichannel video programming distributors (“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 of the households in the franchise area.⁵

4. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁶ Adelphia provides examples of advertisements used by DBS providers to promote their services in the Communities.⁷ In addition, Adelphia asserts that there are numerous DBS subscribers in the Communities who are obviously aware that they can purchase DBS service because they have done so. Adelphia contends that neighbors of subscribers are then made aware of DBS service given the visibility of mounted satellite dishes throughout the Communities.⁸ Adelphia further asserts that the programming of the DBS providers satisfies the Commission’s program comparability criterion because the DBS providers offer more than 100 video channels, most of which are nonbroadcast services.⁹

5. In opposition, Lake Waccamaw argues that Adelphia fails to satisfy the first prong of the competing provider test because community residents are not “reasonably aware” of the existence of Adelphia’s DBS competitors and these competitors do not offer “comparable” programming.¹⁰ Lake Waccamaw asserts that one of the advertisements submitted by Adelphia is irrelevant because the company is out of business and that Radio Shack advertisements are inadequate because they do not prove that subscribers are aware of DBS service.¹¹ In addition, Lake Waccamaw disputes Adelphia’s contention that DBS subscribers will tell their neighbors about the service and contends that the only way to determine whether potential subscribers are aware of DBS service is through surveys of potential subscribers.¹² Lake Waccamaw also contends that the programming of the Dish Network is not comparable to the programming offered by Adelphia.¹³

6. In reply, Adelphia argues that Lake Waccamaw misunderstands the evidentiary burden required to satisfy the first prong of the competing provider test.¹⁴ In order to demonstrate that potential providers are “reasonably aware” of a competing MVPD’s programming, Adelphia asserts that the Commission has allowed cable operators to rely upon, for example, (1) advertising in national, regional or local media and through direct mail or other marketing materials;¹⁵ and (2) evidence that the competing

⁵ 47 U.S.C. § 543(1)(1)(B)(i) and (ii); 47 C.F.R. § 76.905(b)(2)(i) and (ii).

⁶ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 – Rate Regulation*, 8 FCC Rcd 5631, 5660 (1993) (“Rate Order”).

⁷ Adelphia Petition at 4 and Exhibit A.

⁸ *Id.* at 4.

⁹ *Id.* at 5.

¹⁰ Lake Waccamaw Opposition at 1-2.

¹¹ *Id.* at 1.

¹² *Id.*

¹³ *Id.* at 1-2.

¹⁴ Adelphia Reply at 3.

¹⁵ See, e.g. *Texas Cable Partners, L.P.*, 17 FCC Rcd 6373, 6374 (MB 2002); *Rate Order*, 8 FCC Rcd at 5657.

MVPD has customers in that community.¹⁶ Adelphia contends that it has submitted evidence of both and has satisfied its evidentiary burden with respect to this portion of the test.¹⁷ With regard to the issue of whether DBS providers offer “comparable” programming, Adelphia cites Section 76.905(g) of the Commission’s rules which requires that, to provide comparable programming, a competing MVPD must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.¹⁸ Adelphia asserts that the Commission has repeatedly concluded that the programming of DBS providers, such as DIRECTV and Dish, satisfy the Commission’s programming criterion.¹⁹

7. As discussed above, DBS service is presumed to be technically available due to its nationwide footprint, and Adelphia has demonstrated that DBS service is actually available to the households in the Communities. In order to satisfy its burden that DBS service is actually available, Adelphia has submitted local advertisements of the availability of DBS service.²⁰ It is also well settled that because subscribers in the community have signed up for an MVPD’s service, it must be assumed that other residents throughout the area are reasonably aware of that MVPD’s service offerings.²¹ In this regard, we note that DBS subscribership in the Communities ranges from 21 to 54 percent of all households.²² In addition, Adelphia represents that there exists no regulatory, technical or other impediments to households taking DBS service in the franchise area.²³ With regard to the program comparability requirement, the Commission has previously concluded that the programming of DBS providers satisfies the Commission’s programming comparability criterion.²⁴ Therefore, the first prong of the competing provider test is satisfied.

8. The second prong of the competing provider test requires that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Lake Waccamaw contends that the second prong of the competing provider test is not satisfied because the DBS providers themselves did not directly provide Adelphia with subscriber penetration information.²⁵ Adelphia asserts that it has satisfied Section 76.905(b)(2)(ii) of the Commission’s rules and has demonstrated that DBS providers serve more than 15 percent of the franchise area’s households by submitting DBS penetration data using SkyTRENDS’ “zip plus four” methodology.²⁶ Adelphia argues that use of SkyTRENDS data is fully consistent with Commission precedent.²⁷

¹⁶ See, e.g., *Kansas City Cable Partners*, 16 FCC Rcd 18751, 18753 (CSB 2001); *Time Warner Entertainment Company, L.P., d/b/a Time Warner Communications*, 16 FCC Rcd 7537, 7540 (CSB 2001).

¹⁷ Adelphia Reply at 4.

¹⁸ *Id.* at 5, citing 47 C.F.R. § 76.905(g).

¹⁹ See *FrontierVision Operating Partners, L.P. et al.*, 16 FCC Rcd 5228, 5229 (CSB 2001).

²⁰ Adelphia does not dispute Lake Waccamaw’s contention that one of the retailers used as evidence of advertisement is no longer in business. We agree with Adelphia, however, that evidence of DBS service is widely available through national print and television advertising campaigns.

²¹ See *supra* n16.

²² See *infra* nn30, 32 and 36.

²³ Adelphia Petition at 3.

²⁴ See *Falcon Cable Systems Company II d/b/a Charter Communications*, 17 FCC Rcd 4648, 4651 (MB 2002); *Harlingen, Texas et al.*, 17 FCC Rcd 6373, 6374 (MB 2002).

²⁵ Lake Waccamaw Opposition at 2.

²⁶ Adelphia Reply at 6.

²⁷ *Id.*

9. We find that despite Lake Waccamaw's assertion, Adelphia has acted consistently with Commission precedent in using SkyTRENDS to obtain aggregate DBS subscriber information.²⁸ Adelphia contends that it is the largest MVPD in Lake Waccamaw with 268 subscribers out of 529 households.²⁹ There are 113 DBS subscribers in Lake Waccamaw resulting in a 21.4 percent penetration rate.³⁰ Accordingly, we find that Adelphia has submitted sufficient evidence to satisfy the second prong of the competing provider test for its Lake Waccamaw franchise area.

10. Adelphia contends that it is the largest MVPD in Tabor City with 603 subscribers out of 1,020 households.³¹ There are 272 DBS subscribers in Tabor City resulting in a 26.7 percent penetration rate.³² Accordingly, we find that Adelphia has submitted sufficient evidence to satisfy the second prong of the competing provider test for its Tabor City franchise area.

11. Turning to unincorporated Columbus County, Adelphia asserts that the DBS providers serve an aggregate total of 8,539 subscribers.³³ Adelphia states that according to Census 2000 there are 15,754 households in unincorporated Columbus County.³⁴ The number of Adelphia subscribers does not exceed the aggregate number of DBS subscribers in unincorporated Columbus County.³⁵ Adelphia states that, because SkyTRENDS provides only aggregate totals of DBS subscribership for a particular franchise area, it is unable to determine the largest MVPD in the unincorporated Columbus County franchise area. Adelphia argues that, with an overall DBS penetration rate of 54.2 percent, it must be assumed that even the DBS provider with the smaller penetration has a considerable number of subscribers in unincorporated Columbus County.³⁶ Adelphia further asserts that it is logical to assume that when the subscriber numbers from the DBS provider with the smaller presence are combined with Adelphia's 10.14 percent subscriber penetration rate,³⁷ their combined penetration would exceed the 15 percent threshold needed under the second prong of the competing provider test.³⁸

12. We agree that Adelphia is subject to effective competition in unincorporated Columbus County. Applying the national DBS subscriber percentages of DIRECTV and Dish as an approximate breakdown of the subscriber percentage in unincorporated Columbus County leads us to this conclusion.

²⁸ See e.g., *Falcon Cable Systems Company, II d/b/a Charter Communications*, 17 FCC Red at 4650; *Vicksburg Video, Inc. d/b/a WECHCO Video, Inc.*, DA 02-2167 (MB rel. Sept. 6, 2002).

²⁹ Adelphia Petition at Exhibit E, Adelphia Subscribership Summary and Exhibit G, Census 2000 Household Numbers.

³⁰ *Id.* at 8 and Exhibit G, Census 2000 Household Numbers and Exhibit I, Summary of DBS Penetration. 113 DBS subscribers ÷ 529 Waccamaw households = 21.4%.

³¹ *Id.* at Exhibit E, Adelphia Subscribership Summary and Exhibit G, Census 2000 Household Numbers.

³² *Id.* at 8 and Exhibit G, Census 2000 Household Numbers and Exhibit I, Summary of DBS Penetration. 272 DBS subscribers ÷ 1,020 Tabor City households = 26.7%.

³³ *Id.* at 7 and Exhibit F, SkyTRENDS DBS Subscribership Summary.

³⁴ *Id.* at 7 and Exhibit H, SkyTRENDS North Carolina County Household Statistics.

³⁵ *Id.* at 7. Adelphia has 1,598 subscribers and the aggregate number of DBS subscribers is 8,539. See Exhibit E and Exhibit F.

³⁶ *Id.* at 7-8 and Exhibit I, Summary of DBS Penetration. 8,539 DBS subscribers ÷ 15,754 unincorporated Columbus County households = 54.2%.

³⁷ *Id.* and Exhibit E, Adelphia Subscribership Summary.

³⁸ *Id.* at 8. Adelphia asserts that regardless of this determination, its systems in unincorporated Columbus County are still subject to effective competition pursuant 47 C.F.R. § 76.905(b)(i) because Adelphia serves fewer than 30 percent of the households in the unincorporated Columbus County franchise area. See *id.*, n27.

DIRECTV is the largest DBS provider in the nation serving 58.5 percent of DBS subscribers.³⁹ Dish serves a slightly smaller number of subscribers with a 41.5 percent share of DBS subscribers.⁴⁰ Using these percentages, we are able to calculate that DIRECTV serves approximately 4,995 subscribers in unincorporated Columbus County and that Dish serves approximately 3,544 subscribers.⁴¹ Thus, DIRECTV is the largest MVPD in unincorporated Columbus County because it has more subscribers than Dish and Adelphia, which has 1,598 subscribers. Combining the subscribership of Dish and Adelphia, we find that approximately 32.6 percent of subscribers in unincorporated Columbus County subscribe to MVPD services other than those of the largest MVPD.⁴² A figure far in excess of the 15 percent required by the statute. Accordingly, the second prong of the competing provider test is satisfied in unincorporated Columbus County. We note that, because Adelphia serves only 10.1 percent of its unincorporated Columbus County franchise area, it is also subject to low penetration effective competition.⁴³

13. We find that Adelphia has submitted sufficient evidence for us to conclude that it is subject to competing provider effective competition in its Lake Waccamaw, Tabor City and unincorporated Columbus County, North Carolina franchise areas.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by ACC Cable Communications FL-VA, LLC, d/b/a Adelphia Cable Communications **IS GRANTED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁴

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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³⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd 26901, 26930 (2002) ("*Ninth Annual Report*") (10,700,000 DIRECTV subscribers ÷ 18,300,000 total DBS subscribers = 58.5%).

⁴⁰ *Id.* (7,600,000 Dish subscribers ÷ 18,300,000 total DBS subscribers = 41.5%).

⁴¹ 8,539 total DBS subscribers * 0.585 = 4,995 DIRECTV subscribers. 8,539 total DBS subscribers * 0.415 = 3,544 Dish subscribers.

⁴² 5,142 Adelphia/Dish subscribers ÷ 15,754 households in unincorporated Columbus County = 32.6%.

⁴³ See 47 U.S.C. § 543(l)(1)(A). 1,598 Adelphia subscribers ÷ 15,754 households in unincorporated Columbus County = 10.1%.

⁴⁴ 47 C.F.R. § 0.283.