

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

In the Matter of:)	
)	
Kansas City Cable Partners)	CSR-6104-E
)	
Petition for Determination of Effective)	
Competition in Kansas City, MO (MO0199))	
(MO200))	

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 2004

Released: January 29, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Kansas City Cable Partners ("KCCP") has filed with the Commission a petition ("Petition") pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in Kansas City, Missouri ("Kansas City"). KCCP alleges that its cable system serving Kansas City is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),¹ and the Commission's implementing rules,² and seeks revocation of the certification of the local franchising authority in Kansas City to regulate basic cable service rates. KCCP claims the presence of effective competition in Kansas City stems from the competing services provided by Everest Midwest Licensee ("Everest"), a franchised cable operator that also provides local exchange carrier ("LEC") service in Kansas City.³ Everest filed a Response to the Petition and KCCP filed a Reply. For the reasons stated below, we deny KCCP's petition.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist

¹ 47 U.S.C. § 543(a)(2).

² 47 C.F.R. § 76.905.

³ 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

with evidence that effective competition is present within the relevant franchise area.⁶ Based on the record in this proceeding, KCCP has not met this burden.

3. Section 623(l)(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.⁷

4. 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.⁸ 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 services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually 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.⁹

5. KCCP operates a cable television system in Kansas City for which it seeks a determination of effective competition. KCCP has provided information demonstrating that Everest is a telephone company that provides local exchange and other telephone services within Kansas City.¹⁰ Therefore, Everest qualifies as a LEC for purposes of the LEC effective competition test.¹¹ Record evidence also indicates that Everest offers over 200 channels of video programming, including non-broadcast programming services such as ESPN, HBO, CNN, as well as a complement of local television broadcast stations, such as KSHB (NBC), KMBC (ABC), and KCTV (CBS).¹² Everest, therefore, provides comparable programming as required by the LEC effective competition test.

6. Everest was awarded a franchise for the provision of cable service within Kansas City.¹³ KCCP states that Everest is required by its franchise to fully construct its system such that its plant passes 100% of all households, before April 13, 2007. KCCP estimates that Everest already passes approximately 9,700 homes and states that Everest will be able to serve an additional 4,600 homes in the franchise area within the next six months.¹⁴ KCCP also states that Everest's franchise states that Everest

⁶ See 47 C.F.R. §§ 76.906-907.

⁷ 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 632(l) is referred to as the "LEC" effective competition test.

⁸ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁹ *Id.*

¹⁰ KCCP Petition at 2.

¹¹ See 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹² *Id.* at 9, Exhibit G.

¹³ KCCP Petition at 4.

¹⁴ *Id.*

must build out its system by April 13, 2007 or it will face \$1000.00 in liquidated damages per day for not completing construction on time.¹⁵ KCCP asserts that Everest's current level of construction is more than sufficient for the Commission to immediately deem its cable system subject to effective competition.¹⁶

7. Everest claims that it faces technical and financial barriers that impact its ability to provide effective competition. Everest states that it is able to serve 8,718 homes in the franchise area, but that it would soon cease all construction in Kansas City due to lack of funding.¹⁷ Everest argues that its system does not substantially overlap the incumbent's system since it passes only 4% of the homes passed by KCCP, with no plans for future growth. Everest also asserts that it has had difficulty building out its system because of pole attachment disputes with Kansas City Power and Light.¹⁸ Absent the ability to attach to poles, Everest states that it faces technical impediments to offering its service. Additionally, Everest asserts that KCCP has offered no evidence that Everest is promoting itself outside its existing coverage area, or using mass media advertising, to make the entire city of Kansas City reasonably aware of its service.¹⁹

8. KCCP has not demonstrated that LEC effective competition exists in its Kansas City franchise area.²⁰ Specifically, KCCP has failed to show that Everest's service area substantially overlaps KCCP's service area. Everest has had difficulties in building its cable system due to a dispute with Kansas City Power and Light, which has served as an impediment to serving the franchise area. More importantly, Everest states that it cannot build out its system as originally planned because of a lack of funding and that it would cease all construction activity in the franchise area. Although Everest's service may be available to nearly 9,000 households in Kansas City, the record indicates that the vast majority of the franchise area is still only able to choose KCCP as its cable company. Based on the totality of the circumstances, KCCP has not shown that Everest's system has, or will in the foreseeable future be able to, substantially overlap its own. Although we have granted petitions in the past, where the LEC competitor had a small initial service area, those cases relied principally upon continuing buildout and franchise obligations requiring completion by a date certain. Here, Everest candidly admits that it has ceased construction and foresees failing to meet its franchise obligations. Given these facts, we are unable to conclude that KCCP has met its burden of proof. Should the competitive circumstances in the franchise area change, our decision herein is without prejudice to KCCP seeking a future determination of effective competition.²¹

¹⁵ *Id.* at 7, Exhibit C.

¹⁶ KCCP Reply at 2.

¹⁷ Everest Response at 3-4.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

²⁰ KCCP Petition at 5.

²¹ We note that Everest has filed with the Commission a separate complaint against KCCP regarding the incumbent's alleged lack of compliance with the geographic uniformity requirement of Section 76.984. We will address Everest's geographic uniformity complaint in a separate order.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition filed by Kansas City Cable Partners for a determination of effective competition in Kansas City, Missouri **IS DENIED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²²

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²² 47 C.F.R. § 0.283.