

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

In the Matter of:)	
)	
Amzak Cable Midwest, Inc.)	
)	
and)	
)	CSR 6106-E
Minnesota Cable Properties, Inc.)	
)	
Petition for Determination of Effective)	
Competition in Eleven Minnesota Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2004

Released: April 5, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Amzak Cable Midwest, Inc. and Minnesota Cable Properties, Inc. (“Cable Operators”) have filed with the Commission a petition pursuant to Sections 76.7 and 76.907 of the Commission's rules for a determination of effective competition in the eleven Minnesota communities listed below (the “Communities”).¹ The Cable Operators alleges that their cable systems serving these communities are subject to effective competition and are therefore exempt from cable rate regulation. More particularly, the Cable Operators claim the presence of effective competition in the eleven Communities stems from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, Direct TV and DISH Network. The Cable Operators claim they are subject to effective competition in these Communities under the “competing provider” effective competition test set forth in Section 623(1)(1)(B) of the Communications Act.² An opposition to the petition was filed by the local franchising authority of the City of Shakopee (the “City”).

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act of

¹ Amzak Cable Midwest, Inc. seeks finding for Carver, Chaska, Jackson Township, Louisville Township and Shakopee, Minnesota, and Minnesota Cable Properties, Inc. seeks finding for Jordan, Madelia, Madelia Township, Montrose, New Prague, and Waverly, Minnesota.

² See 47 U.S.C. § 543(1)(1)(B).

³ 47 C.F.R. § 76.906.

1934, as amended, and Section 76.905 of the Commission's rules.⁴ 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.⁵ Section 623(l) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.⁶ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations⁷

3. Section 623(l)(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 unaffiliated multi-channel video programming distributors ("MVPD") 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.⁸ Turning to the first prong of this test, we find that the programming of DBS providers, such as Direct TV and DISH Network, satisfy the Commission's programming comparability criterion. DBS service is 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.⁹

4. The Cable Operators provided evidence of the advertising of DBS service in national media serving the franchise areas.¹⁰ Moreover, the two DBS providers undertook an extensive round of national advertising in the Fall of 2002 during such high-profile sporting events as professional baseball playoffs and NFL football games.¹¹ Moreover, the two DBS providers's subscriber growth reached approximately 20.4 million as of June 30, 2003, comprising 20 percent of all MVPD subscribers nationwide; Direct TV has become the second largest, and Echostar the fourth largest, MVPD provider as of June 2003.¹² We conclude that the population of the Communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. 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 the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹³ Based on the foregoing, we find that Cable Operators have demonstrated that the eleven Minnesota Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

⁴See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

⁶See 47 U.S.C. § 543(l)(1)(A)-(D).

⁷See 47 C.F.R. § 76.905.

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

⁹See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹⁰See Petition at 4; Reply at 9-12 and Exhibit C & D.

¹¹ Petition at 3-5 and Exhibit 1; Reply at 5-6.

¹² *Tenth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 04-5, released January 28, 2004, at Par. 65-67.

¹³See 47 C.F.R. § 76.905(g). *See also* Cable Operators Petition at 6-7.

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. The Cable Operators provided information showing that their residential subscribership in six of the Communities tested under the competing provider test exceeds the aggregate total subscribership of the DBS and other MVPD providers, thus establishing that they are the largest MVPD providers in these six Communities.¹⁴

6. The Cable Operators also provided 2000 Census data and population growth estimates for the eleven Communities.¹⁵ The Cable Operators then compared the 2000 Census households for each of the six communities in which the Cable Operators were the largest MVPD with the households in each of the U.S. Postal Zip Code areas encompassing each community, and allocated that proportion of the DBS subscribers within each such Zip Code to each community.¹⁶ The resulting numbers of DBS subscribers were then compared to the household numbers for each community to demonstrate that in each community the DBS MVPD providers collectively have attained subscriber penetration in excess of the competing provider test threshold of 15 percent in each of the six communities.¹⁷ Based on this information we find that the Cable Operators have satisfied the second prong of the competing provider test in these six communities.

7. Neither Cable Operator claimed to be the larger MVPD provider in Jackson Township, Louisville Township, Madelia Township or Waverly. They are able in the case of Waverly to show only that the cable operator's subscribership does not exceed the combined subscribership of the DBS providers.¹⁸ However, the Cable Operators have shown that the combined penetration level of the DBS providers exceeds 15 percent as does that of the cable operator serving Waverly.¹⁹ Therefore, it is unnecessary to determine which MVPD actually has the largest number of subscribers in this community, because such MVPD provider necessarily faces a combined penetration level of at least 15 percent from the other two MVPD providers.

8. For the remaining three communities, the Cable Operators show that combined DBS subscribership exceeds 15 percent in each community, but that of the cable operators serving each community does not,²⁰ as summarized in the following table.

¹⁴ These six communities are Carver, Chaska, Jordan, Montrose, New Prague and Shakopee. Petition at 8.

¹⁵ *Id.* at 7-9 and Exhibit A. 2000 Census data satisfies effective competition decision requirements. *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Cable Service Rates*, 9 FCC Rcd 3656 (1994).

¹⁶ *Id.*

¹⁷ The DBS penetration levels are Carver, 19.84%; Chaska, 18.84%; Jordan, 26.93%; Montrose, 30.18%; New Prague, 28.30%; and Shakopee, 18.07. Petition at 10 and Exhibits A-E.

¹⁸ SkyTrends does not provide separate data for the two DBS providers. Petition at Exhibit E.

¹⁹ In Waverly, the combined DBS penetration is 40.05 percent; the Cable Operator's penetration in Waverly exceeds 15 percent but is less than the combined DBS penetration. Petition at 11-12.

²⁰ *Id.* at 12-13.

Franchise Area	PENETRATION LEVELS		
	Combined DBS	Cable Operator	Single DBS Required for 15%
Jackson Township	18.07%	13.09%	1.91%
Louisville Township	18.07%	13.09%	1.91%
Medelia City/Township ²¹	20.26%	11.55%	3.45%

The Cable Operators contend that it is again unnecessary to determine which MVPD actually has the largest number of subscribers in these communities. They argue that this data suggests that the aggregate subscribership of any two MVPD providers must surely exceed 15 percent. This data shows that the DBS provider with the least subscribership in either community need have a penetration level of no more than 3.45 percent, which when combined with the appropriate cable operator's penetration level, to meet the competing provider 15 percent threshold penetration level for any such community. In view of the recent DBS subscriber growth to approximately 18.2 million as of June 1, 2002, we believe it reasonable to find that the Cable Operators have met their burden of satisfying the second prong of the competing provider test and of overcoming the statutory presumption that they do not face effective competition in these three communities.

9. The City contends that the Cable Operators have failed to meet their burden of proving the presence of effective competition in Shakopee under both prongs of the competing provider test. With respect to the first prong of the test, the City asserts that Cable Operators failed to provide evidence of local advertising sufficient to make potential Shakopee satellite subscribers reasonably aware that DBS service may be purchased locally. Shakopee asserts that the second prong of the test is not met because Cable Operators failed to present evidence of the exact number of MPVD subscribers within Shakopee's franchise area. For the reasons given below, we reject both of these contentions.

10. We find that the Cable Operators have presented substantial evidence showing that potential Shakopee satellite subscribers should be reasonably aware that DBS service may be purchased locally. As pointed out above, the two DBS provider undertook an extensive round of national advertising in the Fall of 2002 during such high-profile sporting events as professional baseball playoffs and NFL football games.²² In view of that advertising and the fact that DBS subscriber growth reached approximately 18.2 million as of June 1, 2002, and Direct TV had become the third largest MVPD,²³ we conclude that the population of the Communities at issue here may be deemed reasonably aware of the local availability of DBS services for purposes of the first prong of the competing provider test.

11. We also reject the City's assertion that cable operators' penetration figures for Shakopee should not be accepted because they were based on flawed data. The City faulted the DBS subscriber allocation for being based on five digit Zip Code data for the entire city, when in fact the operator has no franchise obligation to serve any portion of the city having a density of less than 40 potential subscribers per cable mile. The City suggests that a higher DBS penetration rates must exist in the low density portions of Shakopee not actually served by the cable operator, resulting in a lower DBS penetration level

²¹ Since these communities operate under the same Franchise Agreement, the petition treats them as a single community.

²² Petition at 3-5 and Exhibit 1; Reply at 5-6.

²³ *Ninth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 02-338, released December 31, 2002, at Par. 58-59.

in the portion of the city actually served by the cable operator. The City argues that DBS subscribers in the un-served portions of the city who are unable to receive the cable operator's services should not be counted in applying the competing provider test, because they are not being offered comparable programming from a competing provider. Shakopee asserts that this demonstrates that the competing provider test has not been satisfied.

12. We reject the City's contentions as a credible basis for rejecting the data and DBS subscriber allocation for Shakopee presented by the Cable Operators. No specific data has been presented by the City to support its contentions. The City did not even provide information showing what portion of Shakopee is not in fact served by the cable operator, or any information regarding the population density in that part of the city. On the other hand, the City conceded that the DBS subscriber penetration in the city overall was 18 percent.²⁴ The statutory test set forth in Section 623(l)(1)(B) of the Act considers whether programming services of an MPVD other than the largest one "exceeds 15 percent of the households of an operator's franchise area,"²⁵ and not merely in some undetermined portion of the franchise area. Moreover, the pertinent issue we must address in applying the competing provider test is whether the cable operator serving Shakopee is subject to effective competition from subscriber penetration that reaches 15 percent from other MVPD providers, not whether the cable operator offers comparable programming to DBS subscribers.

13. The Cable Operators met their initial burden of coming forward with evidence relative to effective competition in Shakopee, by presenting DBS subscriber penetration levels in the franchise area developed from subscriber allocation figures based on the five digit Zip Code data discussed above. The City's argument alone that such data may be flawed failed to rebut the Cable Operators' evidentiary showing. If the City believed other data would provide more accurate DBS subscriber counts, it had the burden of presenting such evidence for the record. In failing to present any data shown to be more accurate than that presented by the Cable Operators, the City failed in its burden of coming forward to meet the initial evidentiary showing made by Cable Operators.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the captioned petition for a determination of effective competition in the eleven Minnesota communities listed above **IS GRANTED**.

15. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

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²⁴ Opposition at 7.

²⁵ 47 U.S.C. § 543(l)(1)(B)(ii).

²⁶ 47 C.F.R. § 0.283.