

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

In the Matter of:)
)
Texas Cable Partners, L.P.) CSR 6091-E
)
Petition for Determination of Effective)
Competition in Eleven Texas Communities)

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2004

Released: April 7, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Texas Cable Partners, L.P. d/b/a Time Warner Cable ("Texas Cable") has 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 communities listed on Attachment A (the "Communities"). Texas Cable alleges that its cable systems serving these communities are subject to effective competition pursuant to Section 623(1) of the Communications Act,¹ and the Commission's implementing rules,² and are therefore exempt from cable rate regulation. More particularly, Texas Cable claims the presence of effective competition in the eleven Communities stems from the competing services provided by two unaffiliated direct broadcast satellite ("DBS") providers, DirecTV and EchoStar. Texas Cable claims it is 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.³ An opposition to the petition was filed by the local franchising authority of the City of Baytown (the "City"). Texas Cable filed a reply.

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 623(1) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ See 47 U.S.C. § 543(1)(1)(B).

⁴ 47 C.F.R. § 76.906.

⁵ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ 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.⁷ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations⁸

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.⁹ Turning to the first prong of this test, we find that the programming of DBS providers, such as DirecTV and EchoStar, 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.¹⁰ Texas Cable has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.¹¹ Moreover, the two DBS providers' subscriber growth reached approximately 20.4 million as of June 30, 2003, comprising approximately 20% of all MVPD subscribers nationwide; DirecTV has become the second largest, and EchoStar the fourth largest, MVPD provider as of June 2003.¹²

4. With respect to the first prong of the test, the City asserts that Texas Cable failed to provide evidence of local advertising sufficient to make potential Baytown satellite subscribers reasonably aware that DBS service may be purchased locally. In view of the data discussed above, 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 and reject the contention of the City that Texas Cable has failed to meet its burden of proving reasonable awareness of the availability of DBS service in Baytown under the first prong of the competing provider test.

5. 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 more than 12 channels of video programming, including several non-broadcast channels.¹³ We find that Texas Cable has demonstrated that the eleven Texas 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.

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷See 47 U.S.C. § 543(l)(1)(A)-(D).

⁸See 47 C.F.R. § 76.905.

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

¹⁰See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹¹See Petition at 4; Reply at 9-12 and Exhibit C & D.

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 Texas Cable Petition at 6-7.

6. 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. Texas Cable provided information showing that its residential subscribership in the Communities tested under the competing provider test exceeds the aggregate total subscribership of the DBS providers, thus establishing that it is the largest MVPD provider in the eleven Communities.¹⁴

7. Texas Cable also provided 2000 Census data and population growth estimates for the eleven Communities, from which estimated 2000 household numbers for each of the Counties were developed.¹⁵ Texas Cable then compared the 2000 Census households for each of the Communities 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 MPVD providers collectively have attained subscriber penetration levels ranging from 15.7 percent in Meadows Place, Texas, to 27.52 percent in Jamaica Beach, Texas,¹⁷ establishing that two DBS MPVD providers have attained subscriber penetration levels exceeding the threshold 15 percent penetration level in each of the eleven Communities.¹⁸ Based on this information we find that Texas Cable has satisfied the second prong of the competing provider test in these eleven Communities.

8. The City asserts that the second prong of the test is not met because Texas Cable failed to present evidence of the exact number of MPVD subscribers within Baytown's franchise area. We reject the City's assertion that Texas Cable's penetration figures for Baytown should not be accepted because they were based on flawed data. The City faulted the DBS subscriber allocations for being based on the use of five digit Zip Code data, contending that higher DBS penetration rates exist in the rural portion of the Zip Codes outside of Baytown, which must be accompanied by lower penetration rates within Baytown. The City suggests that such lower penetration rates are not reflected by five digit Zip Code data from the SkyTrends report utilized by Texas Cable in developing its DBS subscriber figures.¹⁹ The City also criticizes Texas Cable's failure to support the Baytown calculations with SkyTrends' Zip Code plus four data, which it contends is available and would more accurately identify the numbers of DBS subscribers within Baytown than the five digit Zip Code data used. The City failed to provide any data that supports this contention. Although it accepts Zip Code plus four data for purposes of demonstrating effective competition, the Commission has not expressed a preference for one form of SkyTrends report over another. Therefore, we cannot accept the City's objections as a credible basis for rejecting the data and DBS subscriber allocations presented by Texas Cable for Baytown.

9. Texas Cable met its initial burden of coming forward with evidence relative to effective competition in Baytown and the other Communities at issue, by presenting DBS subscriber penetration levels developed from subscriber allocation figures based on the five digit Zip Code data discussed

¹⁴ Petition at 7.

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 Petition at 8-9 and Exhibit A.

¹⁸ *See* Attachment A.

¹⁹ Petition at 8 & Exhibit B.

above. The City's argument alone that such data may be flawed failed to rebut Texas Cable's evidentiary showing. Instead, the City presented data which merely confirmed the household and subscriber data Texas Cable used to calculate DBS penetration.²⁰ In failing to present any data shown to be more accurate than that presented by Texas Cable, the City failed in their burden of coming forward to meet the initial evidentiary showing made by Texas Cable.

10. Based on the foregoing, we conclude that Texas Cable has submitted sufficient evidence demonstrating that its cable systems serving the eleven Texas communities listed on Attachment A are subject to effective competition.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the captioned petition for a determination of effective competition in the eleven Texas communities listed on Attachment A **IS GRANTED**.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

²⁰ Compare Opposition at 10-11 with Petition at 8-9 and Exhibits A & B.

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

File No. CSR 6091-E

COMMUNITIES SERVED BY
Texas Cable Partners, L.P. d/b/s Time Warner Cable

Zip Code Allocations*

Texas Communities	2000 Census Households	Zip Code Households	Factor	DBS Subs** Per Zip Code	DBS Subs Allocated	CPR***
Baytown	23,483	32,655	72%	5336/5229	3761	16.0%
Bellaire	6,019	6,114	98%	985/965	950	15.8%
Clear Lake Shores	590	3,365	18%	545/534	94	15.95%
Freeport	4,163	6,768	62%	1409/1381	849	20.4%
Hitchcock	2,434	18,856	13%	3175/3112	402	16.5%
Humble	5,460	15,516	35%	2463/2414	849	15.6%
Jamaica Beach	483	4,548	11%	1277/1251	133	27.5%
Jersey Village	2,840	24,337	12%	4691/4597	536	18.9%
Meadows Place	1,598	10,648	15%	1648/1615	242	15.2%
Morgan's Point	111	12,690	1%	2335/2288	20	18.0%
Sugarland	20,515	39,157	52%	9654/9461	4,957	24.2%

*See Texas Cable Petition at Exhibits B, C, & D.

**Zip Code Subs/Less 2% attributed to commercial or test accounts.

***CPR = Percent DBS penetration rates