

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

In the Matter of:)	
)	
	)	CSR-6612-E
TCA Cable Partners	)	CSR-6613-E
	)	CSR-6614-E
	)	CSR-6615-E
Twelve Petitions for Determination of Effective	)	CSR-6616-E
Competition in Twenty Local Franchise Areas in	)	CSR-6617-E
Arkansas, Oklahoma and Texas	)	CSR-6618-E
	)	CSR-6619-E
	)	CSR-6620-E
	)	CSR-6621-E
	)	CSR-6622-E
	)	CSR-6623-E

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2005

Released: June 2, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers twelve petitions filed with the Commission by TCA Cable Partners (“Cox”) pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission’s rules for a determination that Cox’s cable systems serving eighteen Arkansas communities and one Oklahoma and one Texas community (the “Communities”) are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”) and are therefore exempt from cable rate regulation.¹ The Communities are listed in Attachment A. No opposition to any petition was filed. We grant the petitions finding that the Cox cable systems are subject to effective competition in the listed Communities.

II. DISCUSSION

A. Competing Provider Effective Competition

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,² as that term is defined by Section 76.905 of the Commission’s rules.³ 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.⁴

¹ 47 C.F.R. §§ 76.7, 76.905(b)(1) & (2), 76.907; 47 U.S.C. § 543(a)(1).

² 47 C.F.R. § 76.906.

³ 47 C.F.R. § 76.905.

⁴ See 47 C.F.R. §§ 76.906 & 907.

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.⁵ Turning to the first prong of this test, the DBS service of DirecTV, Inc. ("DirecTV") and DISH Network ("DISH") 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.⁶ The two DBS providers' subscriber growth reached approximately 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth largest MVPD provider.⁷ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the communities listed on Attachment A are DBS subscribers, we conclude that the population of those communities 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 substantially more than 12 channels of video programming, including more than one non-broadcast channel.⁸ We further find that the Cox cable systems have demonstrated that the 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 Communities.⁹ Cox has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and DISH.¹⁰ Therefore, the first prong of the competing provider test is satisfied.

4. 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. Cox sought to determine the competing provider penetration in the Communities by purchasing an effective competition tracking report ("ECTR") pursuant to an agreement with the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code basis.¹¹ Cox asserts that it is the largest MVPD in each of the Communities, except for Lufkin, Texas, because its subscribership exceeds the aggregate DBS subscribership in those Communities.¹² Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, we find that Cox has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. As for the

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

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶¶ 54-55 (rel. Feb. 4, 2005).

⁸ *See* 47 C.F.R. § 76.905(g).

⁹ Cox Petition at 4 and Exhibit 4.

¹⁰ *Id.* at 5 and Exhibit 5.

¹¹ *Id.* at 6 and Exhibit 2. Cox states that it allocated the DBS subscribers reported in the ECTR to Cox's franchise areas using a Commission-approved allocation methodology. *See, e.g., Amzak Cable Midwest, Inc.*, 19 FCC Rcd 6208 (2004); *Charter Communications*, 19 FCC Rcd 6204 (2004).

¹² *See* Addendum to Cox's Petition for Determination of Effective Competition at 1 (May 4, 2005).

Community of Lufkin, Texas, Cox asserts that although DBS providers serve 31.4 percent of occupied households in that Community in the aggregate, Cox is unable to determine which MVPD is the largest because SBCA does not provide data for individual DBS providers.¹³ Cox, however, asserts that it is subject to effective competition in Lufkin based on the low penetration effective competition test.¹⁴ Therefore, the second prong of the competing provider test is satisfied for all of the remaining communities, excluding Lufkin.¹⁵ Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that their cable systems serving the Communities set forth on Attachment A are subject to competing provider effective competition.

B. Low Penetration Effective Competition

5. Section 623(1)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if “fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system.”¹⁶ Cox asserts that it is subject to effective competition in Lufkin, Texas under the low penetration effective competition test. Cox submitted information listed on Attachment A showing that its penetration rate in Lufkin, Texas is 10.2 percent. Accordingly, we conclude that that Cox has demonstrated the existence of low penetration effective competition under our rules in Lufkin, Texas.

III. ORDERING CLAUSE

7. Accordingly, **IT IS ORDERED** that the petitions filed by TCA Cable Partners for a determination of effective competition in the Communities listed on Attachment A **ARE GRANTED**.

8. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing TCA Cable Partners in the affected named Communities **ARE REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

¹³ *Id.* at 1-2.

¹⁴ *Id.* at 2.

¹⁵ With regard to the Community of Lufkin, the Commission cannot conclude that the second prong of the competing provider test is satisfied by analyzing other relevant data. The Commission has stated that if the subscriber penetration of both the cable operator and the aggregate DBS information each exceeds 15 percent in the franchise area, the second prong of competing provider test is satisfied. *See Time Warner Entertainment Advance/Newhouse Partnership, et al.*, 17 FCC Rcd 23587, 23589 (MB 2002). 3,846 DBS subscribers ÷ 12,247 Lufkin 2000 Census Households = 31.40%; 1,246 Cox subscribers ÷ 12,247 Lufkin 2000 Census Households = 10.2%. The subscriber penetration of Cox does not exceed 15% in Lufkin.

¹⁶ 47 U.S.C. § 543(1)(1)(A).

¹⁷ 47 C.F.R. § 0.283.

Attachment A

TCA Cable Partners (“Cox”) Cable Systems Subject to Competing Provider Effective Competition

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Communities	CUIDS	CPR*	2000 Census Households+	DBS Subscribers+
Altus, City	AR0696	34.51%	339	117
Arkadelphia, City	AR0108	25.98%	3,865	1,004
Bull Shoals, City	AR0283	17.36%	1,014	176
Clarksville, City	AR0011	42.90%	2,960	1,270
Cotter, City	AR0363	39.50%	443	175
El Dorado, City	AR0047	16.23%	8,686	1,410
Fayetteville, City	AR0037	16.44%	23,798	3,913
Flippin, City	AR0284	49.06%	583	286
Gassville, City	AR0362	40.27%	653	263
Mountain Home, City	AR0051	33.29%	5,175	1,723
Newport, City	AR0022	19.00%	2,690	511
Ozark, City	AR0024	39.85%	1,453	579
Paris, City	AR0012	38.31%	1,553	595
Russellville, City	AR0013	24.37%	9,241	2,252
Siloam Springs, City	AR0017	24.83%	3,894	967
Springdale, City	AR0058	27.08%	16,149	4,373
Waldo, City	AR0123	44.19%	645	285
Walnut Ridge, City	AR0009	23.92%	2,065	494
West Siloam Springs, City	OK0686	51.31%	306	157

TCA Cable Partners (“Cox”) Cable Systems Subject to Low Penetration Effective Competition**CSR-6623-E**

Communities	Franchise Area Households+	Cable Subscribers+	Penetration Level
Lufkin	12,247	1,246	10.2%

CPR = Percent DBS penetration

+ = See Cox Petitions and Addendum

Note: Lufkin, TX and Ozark, AR both share file # CSR-6623-E.