

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

In the Matter of:)	
)	
Bright House Networks, LLC)	CSR 6133-E
)	
Petition for Determination of Effective)	
Competition in Unincorporated Hillsborough)	
County, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 2005

Released: October 28, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC (“Bright House”) has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in unincorporated Hillsborough County, Florida (the “Community”).¹ Bright House alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”)² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and DISH Network (“DISH”). Hillsborough County filed an opposition, to which Bright House replied.

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 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 Based on the record in this proceeding, Bright House has met this burden.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the 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

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2). The franchise area consists of unincorporated Hillsborough County (FL0198), Apollo Beach (FL0681), Ruskin (FL0708), Sun City Center (FL0709), Riverview (FL0710), Gibsonton (FL0711), and Wimauma (FL0844). Unincorporated Hillsborough County is certified to regulate basic cable service rates.

² See 47 U.S.C. § 543(a)(1).

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

households in the franchise area.⁶ Turning to the first prong of the competing provider test, 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.⁷ Bright House has provided evidence of the advertising of DBS service in the news media serving the Community.⁸ 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.⁹ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the community listed on Attachment A are DBS subscribers, we conclude that the population of the community 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.

4. 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.¹⁰ We find that Bright House has demonstrated that the Community is 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 Community. Bright House also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Community, that there exists no regulatory, technical, or other impediments to households within the Community taking the services of the DBS providers, and that potential subscribers in the Community have been made reasonably aware of the MVPD services of DirecTV and DISH. Accordingly, we find that the first prong of the competing provider test is satisfied.

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. Bright House asserts that it is the largest MVPD in the Community.

6. Bright House derived the DBS franchise area subscribership based on an allocation methodology previously approved by the Commission.¹¹ Bright House initially determined the number of households in the franchise area based on data from the 2000 Census.¹² Bright House then derived an allocation ratio by dividing the 2000 Census household figure by the SkyTrends' aggregate household figure for the five digit zip code area covering all or part of the franchise area.¹³ Bright House also obtained the number of DBS subscribers for the franchise area from SkyTrends and that figure was reduced by 2 percent to account for commercial or test accounts.¹⁴ The reduced DBS subscriber count was then multiplied by the allocation ratio to determine the number of DBS subscribers allocable to the

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

⁷*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸*See* Bright House Petition at 4-6 and Exhibit A.

⁹ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, 20 FCC Rcd 2755, 2792 at ¶¶ 54-55 (rel. Feb. 4, 2005).

¹⁰*See* 47 C.F.R. § 76.905(g); *see also* Bright House Petition at 6-7 and Exhibit B.

¹¹Bright House Petition at 8-9 and Exhibit F; *see, e.g., In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

¹² Bright House Petition at 8 and Exhibit D.

¹³ *Id.* at 8-9 and Exhibit F.

¹⁴*Id.* at 9.

Franchise Area, which was then divided by the 2000 Census household total to derive the total DBS subscribership.¹⁵

7. In opposition, Hillsborough alleges that Bright House has not met its burden of demonstrating that the number of households subscribing to DBS providers exceeds 15 percent of the households in the franchise area due to errors in the Petition.¹⁶ Initially, Hillsborough alleges that the petition is deficient because there is no author's affidavit, the accuracy of the SkyTrends Report is not verified by a company representative, and the declarations by Bright House's Vice President of Marketing and Programming and its attorney do not assure that the factual representations are accurate.¹⁷ Hillsborough also questions the SkyTrends' zip code identification methodology.¹⁸ Hillsborough cites the following errors in the Petition: zip code 33811 is not in Hillsborough; zip code 33810 contains less than 140 improved residential parcels in Hillsborough County but the SkyTrends' report indicates that there are 12,863 households; zip code 33540 contains less than 30 improved residential parcels in Hillsborough but the SkyTrends' report lists 3,874 households; the SkyTrends' report for zip code 33620 lists 7 DBS subscribers but 0 households.¹⁹ Hillsborough contends that Bright House could have used County Property Appraiser's records to determine the number of households in the County portion of these zip codes rather than including thousands of unrepresentative households and non-franchise areas.²⁰ Hillsborough also argues that Bright House's use of a 2 percent adjustment factor for commercial subscribers is insufficient because it fails to properly account for dual receivers, cable and DBS homes, and test accounts.²¹ The County claims that the adjustment factor should be 15 percent based on prior Commission decisions until SkyTrends provides sufficient documentation to pass judgment on this new methodology. Finally, Hillsborough notes that no growth factor was applied to the 2000 Census figures and argues that they should be adjusted to reflect growth and make them more timely with the SkyTrends household data received from the Postal Service, which would reduce the 35 percent population differential between the data received from the Postal Service and SkyTrends and would result in a more accurate penetration rate.²²

8. In Reply, Bright House asserts that it has met its burden by satisfying each element of the competing provider test.²³ Bright House argues that the Commission has held in numerous proceedings that SkyTrends' data is a valid and acceptable means for demonstrating DBS penetration for effective competition.²⁴ According to Bright House, the Commission has held that under Section 76.907(c) of its rules, cable operators may request subscriber information from competitors for the purposes of effective competition, however, that information may be limited to numerical totals.²⁵ Bright House asserts that cable operators are not required to verify the information obtained from SkyTrends.²⁶ Bright House notes

¹⁵ *Id.* and Exhibit F.

¹⁶ Opposition at 1-2.

¹⁷ *Id.*

¹⁸ *Id.* at 2-3.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 4.

²¹ *Id.* at 4-5.

²² *Id.* at 5-6 and Exhibit 3.

²³ Reply at 2.

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 3.

²⁶ *Id.*

that the Commission has never required SkyTrends data to be verified, nevertheless, Bright House's Reply contains a letter from a SkyTrends' project manager vouching for the accuracy of the data and explaining that the data comes directly from the DBS providers and SkyTrends just aggregates the data.²⁷ Bright House also argues that the zip codes used in the Petition demonstrate the existence of effective competition in unincorporated Hillsborough County.²⁸ Bright House asserts that SkyTrends identified the zip codes contained in the report as covering all or part of the Franchise Area using sophisticated mapping software based on data derived from the U.S. Census Bureau and U.S. Postal Service to identify all of the 5-digit zip codes that encompass the Franchise Area and the process is detailed in Exhibit E to Bright House's Petition.²⁹ There is therefore no reason to exclude this data from the penetration calculation, but Bright House further argues that even if all of the zip codes (33811, 33810, 33540, and 33620) challenged by Hillsborough County are excluded, DBS penetration in unincorporated Hillsborough County still exceeds 15 percent and the system is therefore subject to effective competition.³⁰ Bright House further argues that the two percent adjustment used to account for commercial accounts, dual receiver households, and test accounts is sufficient because SkyTrends has refined its procedure for collecting and reporting of subscribership data.³¹ Finally, Bright House argues that there is no basis for adding a growth factor to the 2000 U.S. Census Bureau household data since the Commission has stated that the 2000 Census household figure is the only relevant factor, but even if the 3.8 percent growth factor proposed by Hillsborough is factored in, DBS penetration would still exceed 15 percent.³²

9. We reject the City's challenge to the methodology of the SkyTrends Report. The Commission has repeatedly accepted SkyTrends' subscriber reports on behalf of the DBS providers in satisfaction of Section 76.907(c) of the Commission's rules.³³ Pursuant to this provision, cable operators may request subscriber information from competitors for effective competition purposes, however, this information may be limited to numerical totals.³⁴ Bright House provided Hillsborough County with the SkyTrends report identifying the total number of DBS subscribers allocated to the franchise areas, as well as a copy of the methodology detailing how SkyTrends reached this result, and a letter from SkyTrends verifying the information in the Report.³⁵ We acknowledge that the City has pointed out some errors in the compilation of information for the SkyTrends' Report for four zip codes. Thus, if we take the most conservative approach in reviewing the SkyTrends' Report and exclude the DBS subscribership for the four disputed zip codes (33811, 33810, 33540, and 33620) contested by the County, the DBS provider penetration will still exceed the required 15 percent penetration.³⁶ We otherwise find no basis to question the overall reliability of the SkyTrends' Report. We further reject the City's challenge to the 2 percent adjustment factor for commercial subscribers. While the City is correct in arguing that SkyTrends has previously adjusted subscriber counts by as much as 15 percent in DBS subscribership reports, that adjustment factor has since been reduced due to refinements by SkyTrends in its reporting and the

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 5-6.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 7-8.

³² *Id.* at 8-9 and Exhibit B.

³³ See *In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁴ 47 C.F.R. § 907(c).

³⁵ Petition at 8-9 and Exhibit E; Reply 1-7 and Exhibit A.

³⁶ See Attachment A.

recommended reduction is now 2 percent.³⁷ Accordingly, we will accept the revised number of Hillsborough County DBS subscribers as reflected in Attachment A as revised by the Commission.

10. Finally, we reject the City's challenge to the use of the 2000 Census data figures as outdated. We have consistently held that the 2000 Census data is sufficiently reliable for effective competition determinations in numerous proceedings.³⁸ Nevertheless, the Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."³⁹ The County offers a more recent figure that comprises the number of housing units in unincorporated Hillsborough County. We are unable to accept the County's revised figure, however, because it presents the number of total housing units in the unincorporated county area, rather than the number of households, *i.e.*, occupied housing units.⁴⁰ The competing provider test for effective competition set forth in Section 623(l)(1)(B) of the Communications Act expressly instructs the Commission to evaluate effective competition on the basis of "households."⁴¹ Accordingly, the County's figure is an inappropriate measure for effective competition purposes, and we rely instead on the Census 2000 data.

11. Bright House asserts that it is the largest MVPD in the Community because Bright House's subscribership exceeds the aggregate DBS subscribership for those franchise areas.⁴² Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,⁴³ we find that Bright House 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 Community. Therefore, the second prong of the competing provider test is satisfied as to the Community. Based on the foregoing, we conclude that Bright House has submitted sufficient evidence demonstrating that its cable system serving the Community is subject to effective competition.

³⁷ Reply at 7 and Exhibit A.

³⁸ *In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³⁹ *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁴⁰ *See In the Matter of Marcus Cable Associates, LLC d/b/a Charter Communications, Inc.*, 17 FCC Rcd 16652, n. 19 (2002) (The term households means occupied housing units).

⁴¹ 47 C.F.R. § 543(l)(1)(B).

⁴² Bright House Petition at 8 and Exhibit C.

⁴³ *Id.* at 8-9 and Exhibit D.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bright House Networks, LLC **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certification of Hillsborough County to regulate basic cable service rates **IS REVOKED**.

14. 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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⁴⁴47 C.F.R. § 0.283.

CSR 6133-E

COMMUNITY SERVED BY BRIGHT HOUSE NETWORKS, LLC

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS Subscribers⁺
Uninc. Hillsborough County	FL0198 FL0681 FL0708 FL0709 FL0710 FL0711 FL0844	15.2%	247079	37542

*CPR = Percent of competitive DBS penetration rate.

⁺See Bright House Petition at 8-10 and Exhibits D, E, and F; Bright House Reply at 4-8 and Exhibit B.