

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

In the Matter of:)
)
MCC Missouri LLC) CSR 6771-E
)
Petition for Determination of Effective Competition)
in Springfield, Missouri)

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 2005

Released: November 7, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers a Petition for Special Relief (“Petition”) that cable operator MCC Missouri LLC (“MCC”) filed with the Commission pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission’s rules¹ for a determination that it is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (“Communications Act”),² and is therefore exempt from cable rate regulation in the Springfield, Missouri, franchise area (“Springfield”). Responding to the Petition, the City of Springfield, Missouri (the “City”), filed an Opposition to Petition for Special Relief (“Opposition”), after which MCC filed a Reply to Opposition (“Reply”). Finding that MCC is subject to effective competition in Springfield, we grant the petition.

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(l)(1) of the Communications Act⁴ and 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 with evidence that effective competition is present within the relevant franchise area.⁶

¹ 47 C.F.R. §§ 76.7, 76.905 (b)(1, 2), 76.907.

² 47 U.S.C. § 543(a)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 U.S.C. § 543(l)(1).

⁵ 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906-07(b).

II. DISCUSSION

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 ("MVPDs") 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.⁷ Turning to the first prong of this test, the direct broadcast satellite ("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.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 Springfield are DBS subscribers, we conclude that the population of Springfield 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 at least one non-broadcast channel.¹⁰ We further find that the MCC has demonstrated that Springfield 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 franchise area. Therefore, the first prong of the competing provider test is satisfied.¹¹

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 the franchise area in question.¹² MCC sought to determine the competing provider penetration in Springfield by purchasing subscriber tracking reports that identified the number of subscribers attributable to the DBS providers within Springfield on a nine-digit zip code ("ZIP+4") basis.¹³ MCC asserts that it is the largest MVPD in Springfield because its subscribership -- 62.7 percent of the households in Springfield -- exceeds the aggregate DBS subscribership there.¹⁴ The ZIP+4 data show that the DBS providers DirecTV and DISH have a combined subscribership of 15.54 percent in Springfield.¹⁵

5. The City objects to MCC's showing on the second element of the competing provider test, namely DBS's penetration of only slightly more than the statutory minimum of "fifteen percent of

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

⁸ *See Bright House Networks, LLC*, DA-05-2511 at ¶ 3 (rel. Sept. 27, 2005).

⁹ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755, 2792-93 (2005) ¶¶ 54-55.

¹⁰ *See* 47 C.F.R. § 76.905(g).

¹¹ *See* Opposition at 3 (accepting, without conceding, that MCC has satisfied the first prong of the competing provider test).

¹² *See supra* n.7.

¹³ Petition at 6-7 & Exhibits E & F.

¹⁴ Petition at 6-7 (MCC has 40,562 residential subscribers in the Springfield franchise area, which has a total of 64,691 occupied households; this makes for an MCC subscribership of 62.7%).

¹⁵ *Id.* at 6-7 (DBS providers have 10,052 subscribers in the Springfield franchise area, which makes for a DBS subscribership of 15.54%).

the households *in the franchise area*.”¹⁶ First, the City notes that MCC “does not provide any corroborating information that verifies the DBS subscriber numbers.”¹⁷ We do not find this objection persuasive. The Commission has routinely accepted, without additional corroborating evidence, the kind of DBS penetration data that MCC has provided (from the Satellite Broadcasting and Communications Association) as reliable evidence for effective competition determinations. Moreover, the City does not present any evidence casting doubt on the showing of DBS subscribership that MCC has made.

6. More substantively, the City objects that the zip codes in which MCC’s data counts DBS subscribers include zip codes that are partly outside MCC’s Springfield franchise area.¹⁸ The City asserts that MCC’s franchise area is limited to the municipal corporate limits of the City of Springfield¹⁹ and that “there is a greater probability that individuals may subscribe to DBS outside of the City limits.”²⁰ There is substantial doubt, in the City’s view, that MCC, whose data show subscription barely more than the statutory minimum of 15 percent, has actually satisfied the second prong of the competing provider test. The City recalls the statutory presumption that there is no effective competition for cable operators and warns that deregulating BST rates may have an adverse impact on “senior citizens and other individuals living on fixed-incomes.”²¹

7. MCC, in its Reply, points out that its evidence of DBS subscribers is not drawn from relatively large five-digit zip codes, but from smaller nine-digit, ZIP+4 areas. MCC states, furthermore, that it has counted only ZIP+4 areas “that can be determined with the strongest certainty to be within the city boundaries”²² or, more precisely, “only subscribers whose ZIP+4 was a ZIP+4 centroid match with a ZIP+4 located in the City.”²³ If its data errs, MCC states, it is more likely to understate the number and percentage of DBS subscribers in the City.²⁴

8. In numerous previous decisions, we have found the ZIP+4 means of determining DBS subscribers within a franchise area to be reasonable and sufficiently reliable for purposes of determining the presence of effective competition. We have accepted its method of excluding from its count of DBS subscribers those who are outside the franchise areas in question.²⁵ In this case, the City has raised only

¹⁶ 47 U.S.C. § 543(1)(1)(B)(ii) (emphasis added).

¹⁷ Opposition at 3.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 4.

²¹ *Id.* at 2.

²² Reply at 2; *see also id.* at 3.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ *See, e.g., Mediacom Minnesota LLC*, 20 FCC Rcd 4984, 4986-87 (2005) ¶ 7 (“Zip Code+4 data permits mapping by means of address dictionaries of the geographic coordinates of DBS subscribers, and thus the determination of whether DBS customers are located within the incorporated or the unincorporated portion of the Zip Codes that encompass the franchise area studied. Using this information, SkyTrends removed from each Zip Code identified by Mediacom as encompassing the Franchise Area those DBS subscribers not located within that Area. . . . We are satisfied that this information provided by Mediacom established a reasonable basis for finding that the second prong of the competing provider test is met in the Franchise Area.”); *Adelphia Cable Commun.*, 20 FCC Rcd 4979, 4982 (2005) ¶ 10 (“The Cities’ other contention is that the DBS subscriber count . . . fails to remove from reported Zip Codes those DBS subscribers located outside of the Franchise Areas . . . The MBC Zip+4 Effective Competition Tracking Report specifically describes the methodology used to remove from franchise areas being studied those DBS subscribers located within zip codes provided by a cable operator but not located within the franchise area at issue, . . . While the level of accuracy using this methodology may vary with the shape and size of

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general doubts about the cogency of MCC's evidence, the very kind of doubts that we have rejected in our past decisions. The City has not shown in any detail that MCC's evidence about Springfield in particular is not probative. In sum, the City has not created a substantial doubt that MCC's evidence accurately shows the competitive realities in Springfield.

9. Based on this record, we find that MCC has demonstrated that in Springfield, Missouri, the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households there. Therefore, the second prong of the competing provider test is satisfied in Springfield. Accordingly, we conclude that MCC has submitted sufficient evidence demonstrating that its cable system serving Springfield, Missouri is subject to competing provider effective competition. Data underlying this conclusion is set forth in Attachment A.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition filed by MCC Missouri LLC for a determination of effective competition in Springfield, Missouri, **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the local franchising authority overseeing MCC Missouri LLC in Springfield, Missouri, **IS REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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the zip code area being studied, we find this method of determining DBS subscribers within a franchise area to be reasonable and sufficiently reliable for purposes of determining the presence of effective competition.”); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770 (2003) ¶ 8 (the franchising authority “argues that our analysis should consider that DBS service is higher in outlying areas of the City that Mediacom does not serve. We have previously rejected such assertions since ‘actual head-to-head competition is not a requirement of the competing provider test, nor, standing alone, indicative of franchise area redefinition.’”).

²⁶ 47 C.F.R. § 0.283.

Attachment A

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Community	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Springfield	MO0160	15.54%	64,691	10,052

CPR = Percent DBS penetration or subscribership

+ = See Petition