

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

In the Matter of:)	
)	
Adelphia Cable Communications, on behalf of its)	CSR 6514-E, 6515-E, 6516-E, 6517-E, 6518-
affiliates)	E, 6519-E, 6520-E, 6521-E
)	
)	
Petition for Determination of Effective Competition)	
in Twenty-three Local Franchise Areas)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 2005

Released: December 29, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers a petition that Adelphia Cable Communications (“Adelphia”) filed with the Commission on behalf of its affiliates pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that it is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission's implementing rules,² and is therefore exempt from cable rate regulation in twenty-three franchise areas (the “Franchise Areas”). The Cities of Winchester, Morehead, and Cynthiana (“the Cities”) have filed a joint opposition to Adelphia's petition. We conclude that Adelphia is subject to effective competition under the “competing provider” test set forth in Section 623(1)(1)(B) of the Communications Act in twenty-one of the twenty-three Franchise Areas at issue in its petition. However, Adelphia fails to respond to new evidence put forward in the joint opposition showing that Adelphia fails to meet the competing provider test in the Morehead and Cynthiana franchise areas. Accordingly, we deny Adelphia's petition with respect to those franchise areas.

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 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

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ 47 C.F.R. § 76.906.

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

competition is present within the relevant franchise area.⁵

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.⁶ Turning to the first prong of this test, we find that 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.⁷ 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.⁸ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, 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.

4. In reaching that conclusion, we reject the Cities' contention that the evidence of national and regional advertising attached to Adelphia's petition is insufficient to demonstrate that households in the Cities are "reasonably aware" of the availability of DBS service.⁹ The Cities rest that argument on three basic observations. First, the record supplied by Adelphia does not contain advertisement in the Cities' local papers (the *Cynthiana Democrat*, the *Morehead News*, and the *Winchester Sun*). Second, the DISH Network advertisement from a regional newspaper, the *Lexington Herald-Leader* "failed to show where one could obtain service from Dish Network."¹⁰ Finally, the City attaches considerable significance to the fact that Adelphia provided evidence of web-based advertising for three DBS retailers (Best Buy, Circuit City, and the Satellite Store) that are located outside of the Cities, at distances ranging from 15 miles to 137 miles.¹¹

5. We find the Cities' arguments unpersuasive in view of our 2003 order in *Century-TCI California, LP; Adelphia Cablevision of San Bernardino, LLC*.¹² There, two cities challenged Adelphia's evidentiary showing with respect to local awareness of DBS service on the ground that the record contained no advertisements from the cities' local general circulation newspapers.¹³ One of the cities also argued, mistakenly, that advertisements showing that satellite dishes were available at retail outlets were

⁵ See 47 C.F.R. §§ 76.906 & 907.

⁶ 47 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 *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755, 2793 (2005).

⁹ See Opposition at 4-5.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 5.

¹² *Century-TCI California, LP; Adelphia Cablevision of San Bernardino, LLC*, 18 FCC Rcd 7049 (MB 2003).

¹³ *Id.* at 7050.

irrelevant because the retailers in question were not located in the city.¹⁴ We nonetheless found that *Century-TCI* that Adelphia had made the necessary showing, explaining that “the standard under our rules is advertising that makes potential subscribers reasonably aware, not ubiquitously aware” of the availability of DBS service.¹⁵

6. Applying that standard to the petition now before us, we reach the same conclusion. As in *Century-TCI*, Adelphia included advertising from a regional newspaper. Although the copy of the DISH network advertisement provided by Adelphia does not display a telephone number or address,¹⁶ the advertisement is nonetheless evidence that households in the Cities are aware of the availability of DBS service. We attach little significance to the fact that Adelphia’s Petition includes advertising for some retailers who do not have locations in the Cities, particularly when the Petition also includes advertising from at least one DBS retailer that does have locations in the Cities.¹⁷ Finally, *Century-TCI* makes clear that a cable operator is not required to show local advertising to demonstrate reasonable awareness. In sum, the Cities’ attempt to construe “reasonably aware” as a highly localized and technical requirement founders on the rocks of our 1993 *Report and Order*.¹⁸ There, we saw “no reason to require needlessly fractionalized marketing in order to ensure that a national or regional programming service is available in a particular community,” concluding instead that “potential subscribers may be made reasonably aware of the availability of a competing service, for example, through advertising in regional or local media, direct mail, or *any other* marketing outlet.”¹⁹ Viewed through that lens, the advertising evidence attached to the Petition is adequate.

7. With respect to the issue of program comparability, the Cities argue that the Petition should be denied because Adelphia carries certain stations that are not carried by one or both of the DBS service providers.²⁰ That argument is unavailing. Because different sets of rules govern which stations cable operators and DBS service providers can or must carry, we have never insisted on absolute parity in station offerings. Instead, an MVPD offers “comparable programming” if it offers “at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.”²¹ Because Adelphia submitted evidence showing that both DirecTV and DISH meet that standard,²² those MVPDs offer comparable programming, regardless of any divergence from Adelphia’s own channel lineups.

8. Accordingly, we conclude that Adelphia has demonstrated that the Franchise Areas are served by at least two unaffiliated MVPDs, DirecTV and DISH, each of which offers comparable video

¹⁴ *Id.*

¹⁵ *Id.* at 7051.

¹⁶ Adelphia concedes that the copy of the advertisement provided in the Petition “could have been of better quality to include such information.” Reply at 3 n.8.

¹⁷ See Petition, Exhibit 1. According to its website, RadioShack has locations in Morehead and Winchester. See http://www.radioshack.com/corp/index.jsp?page=storeLocator&clickid=rsk_header_storeLocator (last visited Nov. 16, 2005).

¹⁸ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, 8 FCC Rcd 5631 (1993) (“*Report and Order*”).

¹⁹ *Id.* at 5657 (emphasis added).

²⁰ See Opposition at 4.

²¹ 47 C.F.R. § 76.905(g).

²² Petition, Exhibit 2.

programming to at least 50 percent of the households in the Franchise Areas. Therefore, the first prong of the competing provider test is satisfied.

9. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each franchise area. Adelphia sought to determine the competing provider penetration in the Franchise Areas by purchasing subscriber tracking reports that identified the number of subscribers attributable to the DBS providers within the Franchise Areas on a zip code basis. Adelphia asserts that it is the largest MVPD in the Franchise Areas and no party disputes that assertion.

10. Adelphia relied on data from the 2000 Census to determine the number of occupied households in the franchise areas. Although the cities of Morehead and Cynthiana appear to have no quarrel with that source, the City of Winchester argues that the Census data are unreliable because they fail to account for Winchester's population growth in the past five years.²³ Winchester urges us to look instead to the number of its current residential water customers in the city. The number of residential water customers exceeds the number of occupied households reported in the 2000 Census by 11.55 percent.²⁴

11. In response, Adelphia argues that the correlation between residential water customers and occupied households is imprecise at best. The Petition notes that a "significant portion of local utility addresses may be vacant or seasonal," which could explain in part why, according to the 2000 Census, only 93.34 percent of households in Winchester are occupied.²⁵ Adelphia also contends that more recent Census data belie Winchester's claim about recent population growth. Data from the 2004 Census data reflect a 2.07 percent decrease in the population of Winchester when compared to the 2000 Census population. Adelphia reasons that the decrease in population between the 2000 Census and the 2004 Census makes it highly unlikely that population growth caused the number of occupied households in Winchester to increase by 11.55 percent during the same period.²⁶

12. We find Adelphia's reasoning persuasive and therefore reject Winchester's alternate figure for occupied households. Winchester has not explained the relationship between the number of residential water customers and the number of occupied households. Nor has Winchester explained how the total number of occupied households could have increased over a period of time during which the city's population decreased. With those explanations wanting, we cannot conclude that the data that Winchester puts forward are more reliable or more probative than those reflected in the 2000 Census. Our conclusion does not mean that, in other circumstances, local franchise authorities may not supplant Census data with more recent or more reliable information. We merely conclude that, in the circumstances of the present case, the most reliable information about the number of occupied households in the City of Winchester found in the record is the data from the 2000 Census.

13. Turning to the number of DBS subscribers, the Cities jointly criticize the DBS tracking reports submitted by Adelphia for their reliance on five-digit zip code information.²⁷ The Cities obtained

²³ Opposition at 6-7

²⁴ Opposition at 7 & Exhibit 1. Petition, Exhibit 5. Specifically, there are 6,907 occupied households reported in the 2000 Census and 7,705 residential water customers.

²⁵ Reply at 7-8.

²⁶ *Id.* at 7 & Exhibit 2.

²⁷ Opposition at 6.

their own Satellite Broadcasting and Communications Association (SBCA) Effective Competition Tracking Reports, each of which yields a number of DBS subscribers that is substantially lower than that reflected in the reports submitted by Adelphia.²⁸ For its part, Adelphia suggests that the information submitted by the Cities to SBCA may have been incomplete, leading to an under-reporting of the number of DBS subscribers. Nonetheless, Adelphia states that it is “prepared” to use the tracking data supplied by the Cities.²⁹

14. Adelphia is less prepared to consent to the Cities’ insistence on a ten percent reduction in the DBS subscriber number to weed out commercial and test accounts or households that subscribe to both cable and satellite services. The Cities base that reduction on *Time Warner-Advance/Newhouse Partnership*,³⁰ where the cable operator reduced DBS subscriber numbers by the same percentage for the same reasons. As Adelphia observes, however, commercial and test accounts are not included in SBCA tracking reports, unlike the SkyTRENDS reports at issue in *Time Warner*.³¹ Moreover, we have concluded recently that the competing provider test does not require the exclusion of households that subscribe to both cable and satellite service from the number of households subscribing to competing MVPDs.³² Because no reduction is required, we will take the Cities’ SBCA tracking reports as we find them.

15. Comparing the number of DBS subscribers reflected in those reports to the number of occupied households, it is clear that Adelphia has satisfied the competing provider test for the City of Winchester, where 16.62 percent of occupied households subscribe to DBS service.³³ With respect to the Cities of Cynthiana and Morehead, however, we reach a different conclusion. Comparing the number of DBS subscribers in those Cities to the number of occupied households reflected in the 2000 Census yields penetration levels of 14.12 percent for Cynthiana and 9.98 percent for Morehead.³⁴ Accordingly, Adelphia has failed to demonstrate that DBS penetration has breached the 15 percent threshold in those franchise areas.

16. In reaching that conclusion, we do not suggest that the data provided by Cynthiana and Morehead are unassailable. Rather, Adelphia simply has chosen not to assail them. As made clear by an introductory footnote, Adelphia’s Reply addresses “only the arguments raised in the Opposition as they pertain to the City of Winchester.” By narrowing its focus, the Reply omits any challenge to the DBS tracking data supplied by Cynthiana and Morehead, data that show that DBS penetration in those franchise areas has yet to reach fifteen percent. Accordingly, we deny the Petition with respect to those franchise areas. Our denial with respect to Cynthiana and Morehead is without prejudice to refiling should Adelphia later choose to address the new data reflected in the joint Opposition.

17. Turning to the remaining Franchise Areas, we find that, based upon the aggregate DBS subscriber penetration levels reflected in Attachment A, Adelphia has demonstrated that the number of

²⁸ Opposition at 7 & Exhibit 4.

²⁹ Reply at 6.

³⁰ Opposition at 7, citing *Time Warner-Advance/Newhouse Partnership*, 20 FCC Rcd 5225 (MB 2005).

³¹ Reply at 6.

³² *Mediacom Minnesota LLC*, 20 FCC Rcd 4984, 4988 (MB 2005).

³³ See Attachment A.

³⁴ Specifically, 380 out of 2,692 occupied households in Cynthiana subscribe to DBS service while 2100 out of 2,114 households in Morehead subscribe to a DBS service. See Petition, Exhibit 5; Opposition, Exhibit 4.

households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Adelphia submitted sufficient evidence to demonstrate that its cable systems serving the Franchise Areas set forth in Attachment A are subject to competing provider effective competition.

III. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the petition filed by Adelphia for a determination of effective competition in the Franchise Areas **IS GRANTED IN PART AND DENIED IN PART**.

19. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing the Franchise Areas listed in Attachment A **ARE REVOKED**.

20. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

³⁵47 C.F.R. § 0.283.

Attachment A

Franchise Areas Subject to Competing Provider Effective Competition

Franchise Area	CUIDS	CPR*	2000 Census Households ⁺	DBS Subscribers ⁺
CSR-6514-E				
Harrodsburg	KY0074	26.53%	3,449	915
Lawrenceburg	KY0466	28.69%	3,545	1,017
Springfield	KY0161	35.93%	1,166	419
Stanford	KY0315	38.11%	1,417	540
Versailles	KY0133	38.13%	3,160	1,205
Woodford County	KY1041	25.79%	5,110	1,318
CSR-6516-E				
Corydon	KY0926	36.16%	271	98
Morganfield	KY0560	37.45%	1,434	537
Sturgis	KY0397	40.28%	854	344
Union County	KY0562	38.23%	2851	1,090
CSR-6518-E				
London	KY0057	21.92%	2,400	526
CSR-6519-E				
Paris	KY0121	36.27%	3,857	1,399
Georgetown	KY0143	28.94%	6,703	1,940
Jeffersonville	KY0567	24.63%	682	168
Mount Sterling	KY0066	24.98%	2,478	619
CSR-6520-E				
Beattyville	KY0055	33.40%	509	170
CSR-6521-E				
Berea	KY0009	19.85%	3,693	733

Richmond	KY0111	19.29%	10,795	2,082
Nicholasville	KY0134	22.44%	7,370	1,654
Winchester	KY0079	16.62%	6,907	1,148 ⁺⁺
Wilmore	KY0135	19.90%	1,638	326

* CPR= Percent DBS penetration. ⁺ = See Petition, Exhibits 4 & 5.

⁺⁺ = See Reply, Exhibit 4.