

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

In the Matter of:)	
)	
Adelphia Cable Communications)	CSR 6384-E
)	
Petition for Determination of Effective)	
Competition in Boca Raton, Florida)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 2005

Released: December 30, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Adelphia Cable Communications (“Adelphia”) has filed a petition with the Commission for a determination of effective competition in the Boca Raton, Florida franchise area (“Franchise Area”), pursuant to Section 623(a) of the Communications Act¹ and the Commission's implementing rules.² Adelphia alleges that its cable system serving the Franchise Area is subject to effective competition and, therefore, is exempt from cable rate regulation. Specifically, Adelphia claims that the effective competition present in this Franchise Area arises from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and EchoStar Satellite, L.L.C., and from Satellite Master Antenna Television (“SMATV”) service providers. As a result, Adelphia contends that it is subject to effective competition in the Franchise Area under the “competing provider” test set forth in Section 623(1)(1)(B) of the Communications Act. The City of Boca Raton (“City”) has filed an opposition and Adelphia has filed a reply. Finding that Adelphia is subject to effective competition in the Franchise Area, we grant the petition.

II. DISCUSSION

2. Pursuant to Section 623(1) of the Act and Section 76.905 of the Commission's rules,³ it is presumed that cable systems do not face effective competition absent a demonstration to the contrary.⁴ Consequently, the cable operator bears the burden of rebutting the presumption that effective competition does not exist by producing evidence that shows effective competition is present within the relevant

¹47 U.S.C. § 543(a).

²47 C.F.R. § 76.905(b).

³See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁴47 C.F.R. § 76.906.

franchise area.⁵ Section 623(l) of the Act provides that a cable operator is subject to effective competition if any one of the four tests for effective competition set forth therein is met.⁶ A finding of effective competition exempts a cable operator from rate regulation and certain other Commission cable regulations.⁷

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 offer comparable 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.⁸ Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.⁹ As of June 30, 2005, DirecTV's subscriber growth reached 14.67 million, making it the second largest MVPD provider in the United States,¹⁰ while EchoStar, as the fourth largest MVPD, served 11.46 million customers as of June 30, 2005.¹¹ Because the two DBS providers have a nationwide footprint and serve well over 20 percent of all MVPD subscribers nationwide,¹² we believe that those statistics support the presumption that the Franchise Area is within their satellite footprint. Moreover, Adelphia has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Franchise Area.¹³

4. The City argues that the high concentration of rental housing and large multiple dwelling unit ("MDU") properties, as well as the "unique physical limitations" of the City, render Adelphia's evidentiary showing inadequate to prove that DBS service is available to at least 50 percent of the households in the Franchise Area.¹⁴ In particular, the City states that roughly 25 percent of the relevant households are occupied by renters and that "typically persons living in rental properties do not have access to DBS or other competitive services."¹⁵ Further, nearly 35 percent of the City's residential units are MDUs, most of which "were constructed to offer balconies with views of the Atlantic Ocean to the northeast."¹⁶ Accordingly, the City contends, MDU households are unable to orient satellite dishes in

⁵See 47 C.F.R. §§ 76.906 & 76.907.

⁶See 47 U.S.C. § 543(l)(1)(A)-(D).

⁷See 47 C.F.R. §76.905.

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

⁹See *MediaOne of Georgia*, 12 FCC Rcd 19406 (MB 1997).

¹⁰ See *The DirecTV Group Announces Second Quarter 2005 Results*, available at <http://www.directv.com>. (last accessed on August 15, 2005).

¹¹See *Echostar Reports Second Quarter 2005 Financial Results*, available at <http://www.dishnetwork.com> (last accessed on August 15, 2005).

¹² See *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 20 FCC Rcd 2755 (2005).

¹³ See Petition at 4 & Exhibit 1.

¹⁴ Opposition at 6, 12.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at 12.

such a way as to receive an acceptable signal from DBS service providers.

5. Earlier orders in effective competition cases foreclose the City's objection that DBS service is not reasonably available to renters. Quite recently, we rejected a nearly identical argument that the high concentration of renters in certain franchise areas rendered DBS service "unavailable" in those areas. Specifically, we concluded that "[r]ental dwellings constitute households for the purposes of an effective competition determination. In addition, renters are entitled to subscribe to, and install antennas to receive, DBS service in accordance with [47 C.F.R. Section 1.4000]."¹⁷

6. Our past decisions also provide guidance in assessing the City's claim that DBS service is technically unavailable because of the large number of MDUs with northeast-facing balconies. In an earlier *Memorandum Opinion & Order*, we evaluated the City of West Palm Beach's similar assertion "that many households in [MDUs] within this community have balconies facing toward the Atlantic Ocean and away from the southern or southwestern sky where DBS satellites are positioned, thus precluding reception of DBS signals by such households."¹⁸ We rejected that claim because the city failed to support it with specific evidence. Although the city offered a listing of twelve MDUs, we noted that "this listing does not provide the number of households within such buildings or the portion of total households within the community represented by that undefined number of households."¹⁹

7. Here, the City states that MDUs account for 35 percent of all households. However, the City puts forward no estimate of the number of households in MDUs that are unable to receive an acceptable signal from a DBS service provider. The City offers only the affidavit of its Deputy City Manager, who states that "most of the MDUs were constructed to offer balconies with views of the Atlantic Ocean to the northeast," and that "[m]any of the units in these MDUs . . . would only have a balcony upon which the place a satellite dish facing north or east."²⁰ In view of our earlier *Memorandum Opinion & Order*, this affidavit, standing alone, cannot overcome the presumption of nationwide availability of DBS service. However, we need not reach that issue because, as Adelphia notes, the City stops short of asserting that the alleged technical impediment affects at least 50 percent of the relevant households.²¹ Accordingly, even if we were to conclude that DBS service is technically unavailable in *all* Atlantic-facing MDUs, it would not alter the conclusion that DBS service is available "to at least 50 percent of the households in the franchise area."²² We therefore conclude that DBS service is technically available in the Franchise Area.

8. In view of the substantial evidence of DBS advertising submitted by Adelphia, we also conclude that households in the Franchise Area may be deemed reasonably aware of the availability of DBS services. With respect to the issue of program comparability, we find that the DBS providers'

¹⁷ *Time Warner Entmt. – Advance1 Newhouse Partnership D/B/A Time Warner Cable*, 2005 WL 2444768 at 3 (MB 2005). See also *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution to Direct Broadcast Satellite Services*, 13 FCC Rcd 23874, 23917 (1998) ("*Second Report and Order*") (amending Section 1.4000 to clarify that the rule applies to rental properties).

¹⁸ *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4980-81 (MB 2005).

¹⁹ *Id.* at 4981.

²⁰ Opposition, Exhibit B.

²¹ See Reply at 4.

²² 47 U.S.C. § 543(l)(1)(B)(i).

programming satisfies the Commission's program comparability criterion because DirecTV and EchoStar offer more than 12 channels of video programming, including more than one non-broadcast channel.²³ In sum, we conclude that Adelphia has demonstrated that the Franchise Area is served by at least two unaffiliated MVPDs, DirecTV and EchoStar, each of which offer 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.

9. The second prong of the competing provider test requires that more than fifteen percent of households in a franchise area subscribe to an MVPD other than the largest MVPD. To make that showing, Adelphia's original petition furnished three Satellite Broadcasting and Communications Association ("SBCA") Effective Competition Tracking Reports. Each tracking report corresponds to a Boca Raton "community," identified by a unique Community Unit Identification (CUID) number, to which Adelphia provides service in the Franchise Area.²⁴ By comparing the combined total number of DBS subscribers in those three communities to the total number of occupied households reported in the 2000 U.S. Census, Adelphia determined that the total DBS penetration level in the Franchise Area was 19.6 percent.²⁵ When Satellite Master Antenna Television (SMATV) subscribers are included, the total number of subscribers to an MVPD other than Adelphia jumps to 23.95 percent.²⁶

10. Turning to the City's arguments, we first reject the City's request that we dismiss the Petition as a sanction for Adelphia having submitted inflated subscriber numbers to the City in the past.²⁷ Regardless whether that number was an intentional misrepresentation, as the City implies, or simply an initial estimate, as Adelphia states,²⁸ the matter is entirely unrelated to this proceeding and irrelevant to our analysis. The City does not suggest that Adelphia has engaged in misconduct in the context of this proceeding and does not dispute that Adelphia is indeed the largest MVPD in the Franchise Area.

11. The City presents more focused arguments with respect to the accuracy of the figures that Adelphia submits for the total number of households in the Franchise Area and the number of those households that subscribe to competing MVPDs. With respect to occupied households, the City contends that significant growth within the City and a 2004 annexation of adjacent areas caused the number of households to jump from 31,848 to 41,974. The City derives that figure from utility billing records.²⁹ For its part, Adelphia concedes that the population of Boca Raton has increased, but argues that the City's revised figure, representing an increase of more than thirty percent in the number of occupied households,

²³ See 47 C.F.R. § 76.905(g).

²⁴ See Petition, Exhibit 4. Customarily, a cable system operates under one CUID for each franchise that it serves. However, we have noted instances in which there are more than one CUID associated with a particular franchise area. See, e.g., *Century-TCI California, LP; Adelphia Cablevision of San Bernadino, LLC*, 18 FCC Rcd 7049, 7053 n.a1 (MB 2003) (noting California franchise areas served by more than one CUID). Here, Adelphia operates in the Boca Raton franchise area under three distinct CUIDs.

²⁵ Petition at 6 & Exhibit 4.

²⁶ Petition at 7 & Exhibit 6.

²⁷ See Opposition at 6. Specifically, the City notes that in an email to City officials, Adelphia stated that it had 38,000 subscribers in Boca Raton, a figure larger than the total number of households in the City, according to the 2000 Census.

²⁸ See Reply at 2 n.5 (noting that Adelphia later adjusted that estimate from 38,000 to 32,000, and that the figure includes households in the area that the City annexed in 2004).

²⁹ See Opposition at 5.

is inherently unreliable.³⁰ Adelphia contends that “the maximum supportable figure would be 35,594” occupied households.³¹ As we will explain below, Adelphia can satisfy the competing provider test even using the higher number of occupied households that the City offers. Accordingly, we need not decide whether the figure supplied by Adelphia is more or less reliable than that supplied by the City.

12. With respect to the number of subscribers to competing MVPDs, the City challenges specific aspects of the methodology used in determining the number of DBS subscribers as well as the propriety of adding any SMATV subscribers to the total number of competing MVPD subscribers. Taking aim at the DBS subscriber data, the City first charges that that data improperly include households that subscribe to both satellite service and Adelphia’s cable service. Adelphia argues that nothing in the relevant statute or rules requires the exclusion of “dual subscribers” and we have reached the same conclusion in a recent order.³² Accordingly, the City’s argument to the contrary is foreclosed.

13. We also reject the City’s argument that “courtesy” and “complimentary” accounts must be excluded from this analysis. We do not believe the inclusion of complimentary accounts in the DBS subscriber report precludes a determination of effective competition. In the first place, we presume that the number of complimentary accounts is de minimis in number. Additionally, the fact that this de minimis number of DBS subscribers receives complimentary service enhances, rather than reduces, the cable operator’s need to compete for these subscribers. A subscriber receiving free DBS service arguably would have to perceive significant choice and service advantages available through the local cable operator to abandon DBS service in favor of cable service.

14. Next, the City expresses some understandable confusion with respect to Adelphia’s submission of three separate tracking reports for the same Franchise Area. The City argues that it is likely that some households subscribing to DBS service were counted more than once, particularly when it is unclear whether the tracking reports used five-digit or nine-digit zip codes.³³ Adelphia’s Reply appears to obviate those concerns by submitting a single, updated SBCA tracking report that relies on nine-digit zip codes. That report, which includes the area annexed by the City in 2004, states that there are 7,021 DBS subscribers in the Franchise Area.³⁴

15. The updated report also answers the City’s argument that the data relied on originally by Adelphia are no longer accurate in view of the disruption to DBS service caused by Hurricanes Frances and Jeanine, which struck Boca Raton in September 2004.³⁵ Adelphia disputes the City’s contention that it is “appropriate to require cable operators to rerun their effective competition analysis after” a hurricane or similar “service disruption.”³⁶ Nonetheless, in an abundance of caution, Adelphia submitted a more recent tracking report. We express no opinion here whether, as a general matter, a new DBS tracking report is *required* after a “service disruption” of the same magnitude as that experienced in Boca Raton. We merely note that, by submitting an updated report that is current through October 2004,³⁷ Adelphia

³⁰ See Reply at 2-3.

³¹ *Id.* at 3.

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

³³ Opposition at 10.

³⁴ See Reply, Attachments C and D.

³⁵ Opposition, at 15-16.

³⁶ Reply at 8.

³⁷ The report itself was generated on December 13, 2004. Reply, Attachment D.

responded adequately to the City's concerns.

16. Finally, the City takes aim at the inclusion of SMATV subscribers in the total number of households subscribing to competing MVPDs. The City notes that Adelphia supplied no evidence with respect to program comparability or whether SMATV service is technically available to at least 50 percent of Franchise Area households.³⁸ The City also notes that Adelphia's petition erroneously included 570 households that are not within the boundaries of the Franchise Area.³⁹ Adelphia concedes that error but otherwise contends that the inclusion SMATV subscribers has been a matter of settled policy since, at the latest, our *Rate Regulation Third Order on Reconsideration* in 1994.⁴⁰ As a general matter, Adelphia is correct that SMATV subscribers are relevant to an effective competition determination even if it cannot be shown that SMATV service is available to at least fifty percent of households in a franchise area.⁴¹

17. In sum, we reject the City's arguments that "dual subscribers" and complimentary accounts must be excluded from the total number of subscribers to competing MVPDs. We express no opinion with respect to the City's contentions that (1) its own determination of the number of Franchise Area households is the most reliable; (2) Adelphia was required to submit updated data on the number of households subscribing to DBS service; or (3) Adelphia's inclusion of households subscribing to SMATV service was improper. However, even were we to credit all those arguments, we would arrive at 7,021 households subscribing to competing MVPDs (DBS only) out of a total of 41,974 households in the Franchise Area. Those figures yield a DBS penetration rate of 16.73 percent. Thus, even using the most extreme figures posited by the City, we conclude that Adelphia has submitted sufficient evidence to demonstrate that its cable system serving the Franchise Area is subject to effective competition.

³⁸ Opposition at 6-8.

³⁹ *Id.* at 9.

⁴⁰ See Reply at 5, quoting *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd 4316, 4322 (1994) ("*Rate Regulation Third Order on Reconsideration*").

⁴¹ *Rate Regulation Third Order on Reconsideration*, 9 FCC Rcd at 4322.

III. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the Petition for determination of effective competition filed in the captioned proceeding by Adelphia Cable Communications **IS GRANTED**.

19. **IT IS FURTHER ORDERED** that the certification of the City of Boca Raton, Florida to regulate basic cable service rates **IS REVOKED**.

20. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴²

FEDERAL COMMUNICATIONS COMMISSION

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⁴²47 C.F.R. § 0.283.