

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

In the Matter of:	)	
	)	
Adelphia Cable Communications	)	CSR 6340-E
	)	
Petition for Determination of Effective	)	
Competition in Cullman, Garden City, Hanceyville,	)	
and Holly Pond, Alabama	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 28, 2005**

**Released: March 7, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Adelphia Cable Communications (“Adelphia”) has filed with the Commission a petition pursuant to Sections 76.7 and 76.907 of the Commission's rules for a determination of effective competition in Cullman, Garden City, Hanceville, and Holly Pond, Alabama (the “Communities”). Adelphia alleges that its cable systems serving these communities are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and are therefore exempt from cable rate regulation. More particularly, Adelphia claims the presence of effective competition in the Communities stems from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, Direct TV and DISH Network. Adelphia claims it is subject to effective competition in these Communities under the “competing provider” effective competition test set forth in Section 623(1)(1)(B) of the Communications Act.<sup>3</sup> No opposition to the petition was filed.

**II. DISCUSSION**

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>4</sup> 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.<sup>5</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective

<sup>1</sup> 47 U.S.C. § 543(1).

<sup>2</sup> 47 C.F.R. § 76.905(b)(4).

<sup>3</sup> See 47 U.S.C. § 543(1)(1)(B).

<sup>4</sup> 47 C.F.R. § 76.906.

<sup>5</sup> See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

competition is present within the relevant franchise area.<sup>6</sup> Section 623(l) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.<sup>7</sup> A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations<sup>8</sup>

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.<sup>9</sup> Turning to the first prong of this test, we find that 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.<sup>10</sup> Adelphia has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.<sup>11</sup> Moreover, 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 EchoStar the fourth largest, MVPD provider.<sup>12</sup> 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. 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.<sup>13</sup> We find that Adelphia has demonstrated that these four Alabama 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 franchise area. 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. Adelphia provided information showing that its residential subscribership in the Communities tested under the competing provider test exceeds the aggregate total subscribership of the DBS and other MVPD providers, thus establishing that it is the largest MVPD provider in the Communities.<sup>14</sup>

5. Adelphia provided 2000 Census data and population growth estimates for the four Communities, from which estimated 2000 household numbers for each of the Communities were

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<sup>6</sup> See 47 C.F.R. §§ 76.906 & 907.

<sup>7</sup> See 47 U.S.C. § 543(l)(1)(A)-(D).

<sup>8</sup> See 47 C.F.R. § 76.905.

<sup>9</sup> 47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>10</sup> See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>11</sup> See Petition at 4 and Exhibit 1.

<sup>12</sup> *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶¶ 54-55 (rel. Feb. 5, 2005).

<sup>13</sup> See 47 C.F.R. § 76.905(g). See also Adelphia Petition at 4-6 and Exhibits 2 & 3.

<sup>14</sup> Petition at 5.

developed.<sup>15</sup> Adelphia compared the 2000 Census households for each of the Communities with the households in each of the U.S. Postal Zip Code areas encompassing each Community, and allocated that proportion of the DBS subscribers within each such Zip Code to each Community.<sup>16</sup> The resulting numbers of DBS subscribers were then compared to the household numbers for each Community to demonstrate that the DBS providers collectively have attained subscriber penetration levels of 27.38 percent in Cullman, 34.87 percent in Garden City, 34.79 percent in Hanceville, and 21.60 percent in Holly Pond, Alabama.<sup>17</sup> Based on this information we find that Adelphia has satisfied the second prong of the competing provider test in these four Communities and submitted sufficient evidence demonstrating that its cable systems serving Cullman, Garden City, Hanceville, and Holly Pond, Alabama are subject to effective competition.

### III. ORDERING CLAUSES

6. Accordingly, **IT IS HEREBY ORDERED** that the captioned petition for a determination of effective competition in Cullman, Garden City, Hanceville, and Holly Pond, Alabama, filed by Adelphia **IS GRANTED**.

7. This action is taken pursuant to authority delegated under Section 0.238 of the Commission's rules.<sup>18</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>15</sup> *Id.* and Exhibit 4. 2000 Census data satisfies effective competition decision requirements. *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Cable Service Rates*, 9 FCC Rcd 3656 (1994).

<sup>16</sup> *Id.*

<sup>17</sup> Petition at 7 and Exhibit 5

<sup>18</sup> 47 C.F.R. §0.238.