

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

In the Matter of:)	
)	
Adelphia Cable Communications)	CSR 6329-E
)	
Petition for Determination of Effective)	
Competition in Greenacres, Hypoluxo, Lake)	
Charles Shores, Lantana, Palm Springs, Royal Palm)	
Beach, and West Palm Beach, Florida)	

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 Greenacres, Hypoluxo, Lake Charles Shores, Lantana, Palm Springs, Royal Palm Beach, and West Palm Beach, Florida (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 1934,¹ and the Commission's implementing rules,² 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.³ The petition is opposed by the cities of Greenacres and West Palm Beach, and the Village of Royal Palm Beach (the “Cities”).

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ See 47 U.S.C. § 543(1)(1)(B).

⁴ 47 C.F.R. § 76.906.

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 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.⁷ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.⁸

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.⁹ 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.¹⁰ Adelphia has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.¹¹ 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.¹² 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 more than 12 channels of video programming and more than one non-broadcast channel.¹³ We find that Adelphia has demonstrated that these seven Florida 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 Cities argue that DBS may not be technically available to 50 percent of the households in these communities. The Cities suggest that physical limitations, homeowner and condominium association restrictions, and contractual restrictions may exist that preclude the ability of DBS signals to reach the 50 percent of households within the communities as required by this prong of the competing provider effective competition test. We reject each of these arguments as not supported by sufficient factual data, the Communications Act, or our regulations. The City of West Palm Beach's

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

⁶ See 47 C.F.R. §§ 76.906 & 907.

⁷ See 47 U.S.C. § 543(l)(1)(A)-(D).

⁸ See 47 C.F.R. § 76.905.

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

¹⁰ See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹¹ See Petition at 4 and Exhibit 1.

¹² *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶¶ 54-55 (rel. Feb.4, 2005).

¹³ See 47 C.F.R. § 76.905(g). See also Adelphia Petition at 3-5 and Exhibits 2 & 3.

physical limitations argument rests on an assertion that many households in multiple dwelling units “MDUs” within this community have balconies that face 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. The only support for this argument consists of a listing of twelve MDUs. However, 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. With this absence of specificity, we find the City’s MDU listing insufficient to rebut the presumption that DBS service is technically available due to its nationwide satellite footprint.

5. The City of West Palm Beach also fails to provide any factual data that supports its argument that restrictions imposed by homeowner and condominium associations may preclude reception of DBS signals to a sufficient number of households to rebut the presumption of the technical availability of DBS signals. The City offered no data of the number of households that may be subject to such restrictions nor did the city provide any data showing that such restrictions are actually being enforced within this community. The City shows only that 47 percent of the households within the community are in MDUs. Accordingly, we reject this argument for insufficient factual support.

6. The three Cities similarly argue further that exclusivity provisions in Adelphia’s contracts with MDUs may sufficiently preclude a finding that DBS signals are available to 50 percent of the households within the communities. The Cities assert that Adelphia should be required to provide the number of households impacted by such provisions. However, as Adelphia points out, enforcement of restrictions against use of facilities for reception of DBS signals is prohibited by Section 1.4000(a)(1) of the Commission’s regulations.¹⁴ Adelphia further states that it does not enforce any exclusivity provision against reception of DBS service.¹⁵

7. 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 seven 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 these seven Communities.¹⁶

8. Adelphia provided DBS subscriber calculations developed by Media Business Corp. (“MBC”), which show that 15 percent of Franchise Area households in these seven Florida communities subscribe to MVPD services of the two DBS providers. MBC utilized 2000 Census data for the Communities, from which estimated 2000 household numbers for each of the Communities were taken.¹⁷ MBC 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.¹⁸ The resulting numbers of DBS subscribers were then compared to the household numbers for each Community to demonstrate that the DBS

¹⁴ See 47 C.F.R. § 1.4000 (the “OTARD” regulations).

¹⁵ Adelphia Reply at 5.

¹⁶ Petition at 5 and Exhibit 4.

¹⁷ *Id.* 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).

¹⁸ *Id.*

providers collectively have attained subscriber penetration levels of 18.95 percent in Greene Acres, 22.41 percent in Hypoluxo, 24.22 percent in Lake Charles Shores, 19.83 percent in Lantana, 21.57 percent in Palm Springs, 20.87 percent in Royal Palm Beach, and 16.95 percent in West Palm Beach.¹⁹ Based on this information we find that Adelphia has satisfied the second prong of the competing provider test in these Communities by submitting sufficient evidence to demonstrate that its cable systems serving these Communities are subject to effective competition.

9. The Cities assert that Adelphia's attempt to demonstrate that DBS has achieved a 15 percent penetration level is flawed for two reasons. The first contention is that Adelphia relied on outdated 2000 U.S. Census household data, and that more recent data would better reflect DBS penetration when compared with the 2003 DBS subscriber count used by Adelphia. The Cities thus argue that 2000 US Census data fails to account for household growth occurring after the 2000 Census. In its place, the Cities offered data based on city records for Residential Certificates of Occupancy²⁰ and undefined records of the Utilities Department.²¹ Although the Commission will accept more recent household data that is demonstrated to be reliable, no definition of resulting "household" data was provided by the cities that would support a finding that this data equated to occupied households, as does the 2000 US Census occupied household data used by MBC. The credibility of the data as representing only occupied households is undermined by the Cities penetration computations, which indicate that occupied households have increased by more than 40 percent in West Palm Beach,²² 46 percent in Royal Palm Beach,²³ and 31 percent in Greenacres²⁴ since 2000. The hefty growth figures strongly suggest that the Cities' "household" data include more than occupied households, which we have used consistently in applying this second prong of the competing provider effective competition test.

10. The Cities' other contention is that the DBS subscriber count produced by MBC is inaccurate, because it fails to remove from reported Zip Codes those DBS subscribers located outside of the Franchise Areas, and fails to exclude commercial DBS subscribers and seasonal residents. 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, as well as commercial account subscribers.²⁵ While the level of accuracy using this methodology may vary with the shape and size of 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. We believe the number of seasonal residents within the Communities not to be of decisional significance. MBC's DBS subscriber count does not include seasonal residents that are not DBS subscribers. Therefore, the number of non-DBS subscribing seasonal residents doesn't affect the DBS subscriber penetration rate. Moreover, even if five percent of the Cities' residents represent seasonal use households²⁶ and are not counted as DBS subscribers for that reason,²⁷ Adelphia non-the-less

¹⁹ Petition at 7 and Exhibit 5

²⁰ Opposition of Greenacres at 3; Opposition of West Palm Beach at 4.

²¹ Opposition of Royal Palm Beach at 4.

²² Reply to West Palm Beach at 6.

²³ Reply to Royal Palm Beach at 6.

²⁴ Reply to Greenacres at 6.

²⁵ Petition at 6-7 & Exhibit 4.

²⁶ No data to support the 5 percent figure was provided by the Cities.

demonstrated the DBS penetration exceeds 15 percent in Greenacres, Royal Palm Beach and West Palm Beach.²⁸ In summary, we find that the cities failed to offer better alternative household data than that provided by Adelphia and conclude that Adelphia demonstrated that its cable systems serving the seven Florida Communities identified herein are subject to effective competition.

III. ORDERING CLAUSES

11. Accordingly, **IT IS HEREBY ORDERED** that the captioned petition for a determination of effective competition in Greenacres, Hypoluxo, Lake Charles Shores, Lantana, Palm Springs, Royal Palm Beach, and West Palm Beach, Florida, filed by Adelphia **IS GRANTED**.

12. This action is taken pursuant to authority delegated under Section 0.238 of the Commission's rules.²⁹

FEDERAL COMMUNICATIONS COMMISSION

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

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²⁷ The Cities offered no valid reason why such DBS subscribers should be disregarded for purposes of this test.

²⁸ $(2,286 \text{ DBS subscribers} - (2,286 \times .05)) = 2,172$, or 18 percent of 12,059 2000 Census Greenacre households; $(1,587 \text{ DBS subscribers} - (1,587 \times .05)) = 1,508$, or 20 percent of 7,604 2000 Census Royal Palm Beach households; $(5,858 \text{ DBS subscribers} - (5,858 \times .05)) = 5,565$, or 16 percent of 34,769 2000 Census West Palm Beach households; *See Reply at 6.*

²⁹ 47 C.F.R. §0.238.