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

In the Matter of:	)	
	)	
Mediacom Minnesota LLC	)	
	)	CSR 6241-E
Petition for Determination of Effective	)	
Competition and Revocation of Certification in	)	
Sixteen Minnesota Communities	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2005 **Released: March 7, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTIONS

1. Mediacom Minnesota LLC ("Mediacom") has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for revocation of the certification of the Lake Minnesota Cable Commission ("LMCC") to regulate basic cable rates due to the presence of effective competition in the sixteen communities ("the Franchise Area") listed on Attachment A. Mediacom alleges that its cable system serving the Franchise Area is subject to effective competition and is therefore exempt from cable rate regulation. Mediacom claims the presence of effective competition in the Franchise Area stems from the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar. Mediacom claims it is thus subject to effective competition in the Franchise Area under the "competing provider" test.[1] The LMCC filed an opposition to the petition, and Mediacom filed a reply.[2]

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 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 competition is present within the relevant franchise area.[5] Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the 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

[1] 47 U.S.C. § 543(i)(1)(B).

[2] The LMCC also filed an unauthorized response to the reply. The response is accepted for purposes of a more complete record, and Medicom's motion to dismiss the response is denied.

[3] 47 C.F.R. § 76.906.

[4] 47 C.F.R. § 76.905.

[5] *See* 47 C.F.R. §§ 76.906 & 907.

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 in the franchise area.[6]

II. DISCUSSION

A. The Franchise Issue

3. Mediacom's petition asks the Commission to find the presence of effective competition in the Franchise Area. The LMCC disputes the position taken by Mediacom that the sixteen communities that are the subject of this petition[7] are encompassed by a single franchise issued by the LMCC. We reject the LMCC's argument as contrary to clear and explicit language of the applicable legal documents in evidence and conclude that the sixteen communities are a single Franchise Area and that a single franchise was granted by the LMCC to Mediacom.

4. The LMCC itself concedes that it was formed pursuant to Minnesota Statutes Sections 238.08 and 471.59.[8] It further concedes that the sixteen communities at issue delegated their regulatory powers to the LMCC pursuant to that statutory provision through their adoption and execution of a Joint Powers Agreement.[9] The Joint Powers Agreement, which the LMCC entered into in September 2000, authorizes the LMCC to "prepare, adopt and grant a cable communications franchise" pursuant to the cited statutory provisions,[10] and pursuant to that Agreement the LMCC granted to Mediacom a single franchise, which defines the LMCC Franchise Area as "within the municipal boundaries of the Cities of," and then lists each of the communities that are the subject of this petition.[11] On the basis of this information, we conclude that the sixteen communities at issue are encompassed by a single Franchise Area and that the LMCC has granted Mediacom a single franchise. In view of our conclusion that the LMCC granted Mediacom a single franchise for the Franchise Area, that portion of the LMCC's evidence addressed to the separate communities has no relevance and need not be addressed.[12] Accordingly, we now address Mediacom's request for a determination of effective competition in that single Franchise Area.

B. The Effective Competition Issue

5. Mediacom submitted information showing that both prongs of the effective competition test are met by the two DBS providers.[13] Turning to the first prong of the competing provider 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

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[6] Communications Act, Section 623(1)(1)(B), 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

[7] *See* Attachment A.

[8] Opposition at 9.

[9] *Id.*.

[10] Reply at 3 & Exhibit 2 at 4.

[11] Reply at 3 and Exhibit 1 at 4. The LMCC conceded that the sixteen communities "collectively represent one franchise area," for purposes of the matters presented. *See* Response to Reply at n. 5.

[12] *See* Opposition at 21-25.

[13] Petition at 1-7.

service is available.[14] Mediacom has provided evidence of the advertising of DBS service in local and national media serving the franchise areas. This evidence consists of 13 examples of Minneapolis Star Tribune DBS ads from June 9 through August 13, 2003, and of DBS ads on six different nationally distributed cable channels.[15] 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.[16] In view of these data, we conclude that the population of the Franchise Area at issue 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 many more than 12 channels of video programming and more than one non-broadcast channel.[17] Mediacom has thus demonstrated that the Franchise Area 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. Accordingly, we conclude that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPD services other than that of the largest MVPD exceed 15 percent of the households in the franchise area served by that MVPD. Mediacom showed that it provides cable service to 8,905 of the 17,015 households in the Franchise Area, while the two DBS providers provide service to 4,190 subscribers within the Franchise Area.[18] Mediacom has thus demonstrated that it is the largest provider of MVPD services in the Franchise Area. Mediacom also provided information showing that the 4,190 Franchise Area subscribers of the two DBS providers represent 24.63 percent of the 17,015 households in the Franchise 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 and demonstrates that the DBS providers provide comparable MVPD programming service to more than 15 percent of the households in the Franchise Area.

7. In support of its effective competition showing, Mediacom provided information developed by SkyTrends utilizing U.S Postal Zip Code Zip+4 data. SkyTrends developed the total number of DBS subscribers within the Franchise Area.[19] The numbers of DBS subscribers thus determined within the Franchise Area were compared with the Area's 2000 Census households to demonstrate that the DBS providers collectively have attained a MVPD subscriber penetration level of 24.63 percent. 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. Those DBS

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[14]*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

[15]Petition at 4 & Exhibit A.

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

[17]*See* 47 C.F.R. § 76.905(g). *See also* Petition at 4-5 and Exhibits 3 & 4.

[18]Petition at 6-7 & Exhibits E, F, & G.

[19]*Id.*

subscribers thus determined as being located within the Franchise Area were then compared with the number of U.S Census households. These data were supplied to Mediacom in spreadsheet format.[20] 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.

8. Turning to the information the LMCC provided with respect to the entire Franchise Area, we find it unpersuasive. First, the LMCC suggested that Mediacom's use of 2000 US Census household data showing 17,015 Franchise Area households resulted in an understatement of Franchise Area households. The LMCC argues that 2000 US Census data failed to account for household growth occurring after that census. The LMCC offered a household count of 18,576 as reflecting growth since the 2000 Census, based on counting done by various officials of each of the communities at issue.[21] However, those officials provided data in disparate formats, *i.e.*, for housing units, family units, apartments, homes, residencies, those paying sewer and water bills, and various other descriptions which make any comparison with US Census occupied households data used by Mediacom problematic.[22] In any event, as shown below, use of this higher subscriber count fails to establish that Mediacom is not subject to effective competition.

9. The LMCC disputed Mediacom's subscriber count by referring to three Mediacom reports that provided it with breakouts of homes passed and cable subscriber counts of 9,441 (July 2003), 12,079 (August 2003), and 11,803 (September 2003).[23] Neither of these counts would serve to reduce the DBS penetration figure developed by Mediacom or show that Mediacom isn't the larger DBS provider. Consequently, these figures do not undermine Mediacom's effective competition showing.

10. The LMCC contends that the DBS subscriber count produced by SkyTrends is inaccurate, because it fails to remove accurately from reported Zip Codes DBS subscribers located outside of the Franchise Area, fails to exclude commercial DBS subscribers, and fails to eliminate dual cable/DBS subscribers from the DBS count. The LMCC contends that an examination of Mediacom's Zip+4 report by Action Audits revealed that of 2,814 Zip+4 zip codes provided to SkyTrends, 89 represented commercial establishments and 25 were in franchise areas not listed in Mediacom's petition.[24] We decline to accept the Action Audits reports as more credible than that provided by SkyTrends. First, no other information or data of any kind was provided in support of the Action Audits report. Second, the SkyTrends 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. Moreover, the LMCC failed to offer a better alternative.

11. The LMCC contends that Mediacom provided verifiable evidence of only one DBS

[20] *Id*.

[21] Opposition at 12-15 & Exhibit I.

[22] *Id*.

[23] Opposition at 6 and 15.

[24] Opposition at 18 & Exhibit F.

[25] Petition at 6-7 & Exhibit F.

subscriber per each of 2,384 Zip+4 records provided to SkyTrends, and argues that therefore there are only 2,384 DBS subscribers.[26] This argument fails to recognize that Zip+4 records do "not have a one-for-one relationship with a direct-to-home satellite subscriber. One Zip+4 record may represent more than one DTH subscriber," as noted by the SkyTrends report.[27] Absent any showing to the contrary, we accept the 4,190 DBS subscriber count developed by SkyTrends.

12. The LMCC disputed Mediacom's Franchise Area households figure, suggesting that the homes passed information provided by Mediacom shows more homes passed by cable than Census 2000 data shows as existing households.[28] Mediacom points out, however, that the figures referenced by the LMCC include 4,414 homes passed in a community not in the Franchise Area; that subtracting those 4,414 homes from the total leaves 17,210, a figure larger than the 2000 Census figure of 17,015 by 195 homes; and that using the 17,210 figure against the 4,190 DBS subscriber figure yields a 24.35 percent penetration level.[29] Using even the problematic LMCC 18,576 household count provided by the communities' officials noted above, a penetration level of 22.5 percent (4,190 DBS Subs / 18,576 households = 22.5%) is shown.

13. Based on a Lehman Brothers' Equity Report, from which it obtained an estimated nationwide average dual cable/DBS subscribership level of 15.4 percent, the LMCC contends that 15.4% of DBS subscribers must be removed from the penetration level calculation.[30] The LMCC argues that the second prong of the statutory effective competition test provision "disallows households subscribing to the services of 'the largest provider' [sic] when measuring the 15 percent competitive threshold" and thus requires the elimination of dual subscribers from the DBS count.[31] We find that the clause "other than the largest multichannel video programming distributor" must be read as modifying the opening clause, which ends with the word "distributors." The clause thus separates smaller MVPDs from the largest MVPD for purposes of determining the penetration level of the smaller MVPDs. The predicate, "exceeds 15 percent of households in the franchise area," completes the thought introduced by the opening clause of this provision. Clearly, this provision requires the measuring of the percentage of households served within a franchise by the smaller MVPDs without excluding from that computation any households served by the largest MVPD, as suggested by the LMCC. Accordingly, the dual cable/DBS subscribers need not be subtracted from total DBS subscribers before calculating the DBS penetration level. The LMCC's untenable position would permit an absurd finding of no effective competition where 85 percent of households were dual cable/DBS subscribers, as long as less than 15 percent of households subscribed only to DBS. However, the presence of dual subscriber households represents the very essence of MVPD competition that Section 632 of the Communications Act addresses. Based on the foregoing, we conclude that Mediacom has submitted sufficient evidence to demonstrate that its cable system serving the Franchise Area, is subject to effective competition.

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[26] Opposition at 26.

[27] Petition at Exhibit F, p. 1.

[28] Opposition at 15 and Exhibit A.

[29] Reply at 16, n 66.

[30] We find that other analysts consider the overlap between cable and DBS subscribers to be relatively small. *See* Morgan Stanley Equity Research Report "Cable/Satellite" at 8 (Jan. 8 2004) (3 percent overlap between cable and DBS).

[31] Reply to Response at 12.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition in the Franchise Area, filed by Mediacom Minnesota LLC, **IS GRANTED**, and the certification of the Lake Minnesota Cable Commission to regulate basic cable service in the Franchise Area granted to Mediacom by the LLMC **IS HEREBY REVOKED**.

15. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.[32]

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

[32] 47 C.F.R. §0.283.

ATTACHMENT A

Minnesota Communities Included in Franchise Area Granted to Mediacom

Deephaven	Minnestra
Excelsior	Orono
Greenwood	Shorewood
Independence	Spring Park
Long Lake	St. Bonifacius
Loretto	Tonka Bay
Medina	Victoria
Minnetonka Beach	Woodland