

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

In the Matter of:	)	
	)	
U.S. Cable of Coastal-Texas, L.P.	)	CSR 6510-E
	)	
Petition for Determination of Effective Competition in Fort Stockton, Texas	)	
	)	
Petition for Reconsideration of the Certification of the City Fort Stockton, Texas to Regulate Basic Cable Service Rates	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 30, 2006**

**Released: March 31, 2006**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. U.S. Cable of Coastal-Texas, L.P. (“U.S. Cable”) has filed with the Commission pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination of effective competition in Fort Stockton, Texas. U.S. Cable alleges that its cable system serving the City of Fort Stockton, Texas (the “City”) is 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, and is therefore exempt from cable rate regulation. More particularly, U.S. Cable claims the presence of effective competition in Fort Stockton stems from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, DirecTV and Dish Network. U.S. Cable claims it is subject to effective competition in the City under the “competing provider” effective competition test set forth in Section 623(l)(1)(B) of the Communications Act.<sup>2</sup> The petition is opposed by the City. U.S. Cable filed a reply. U.S. Cable also has filed pursuant to Sections 76.911(a)(1) and 1.106 of the of the Commission's rules a petition for reconsideration of the FCC Form 328 Rate Certification filed by the City on February 1, 2005. As discussed below, we find cause to grant the petition for effective competition and dismiss the petition for reconsideration.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(1) of the Communications Act of

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<sup>1</sup> 47 U.S.C. § 543(1).

<sup>2</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>3</sup> 47 C.F.R. § 76.906.

1934, as amended, and Section 76.905 of the Commission's rules.<sup>4</sup> 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.<sup>5</sup>

## II. DISCUSSION

### A. Competing Provider Effective Competition

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>6</sup> 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.<sup>7</sup> The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.<sup>8</sup> In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the City are DBS subscribers, we conclude that the population of the franchise area 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 substantially more than 12 channels of video programming, including more than one non-broadcast channel.<sup>9</sup> We further find that U.S. Cable has demonstrated that the City 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. 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. U.S. Cable provided information showing that its residential subscribership in the City 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 City.<sup>10</sup>

5. U.S. Cable sought to determine the competing provider penetration in the City by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA")

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

<sup>5</sup> See 47 C.F.R. §§ 76.906 & 907.

<sup>6</sup> 47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>8</sup> *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

<sup>9</sup> See 47 C.F.R. § 76.905(g). See also U.S. Cable Petition at Exhibit 3.

<sup>10</sup> U.S. Cable Petition at 3.

that identified the number of subscribers attributable to the DBS providers within the City on a five digit zip code basis.<sup>11</sup> U.S. Cable also provided 2000 Census data for the City, from which estimated 2000 household numbers for the franchise area were developed.<sup>12</sup> U.S. Cable compared the 2000 Census households for the City with the households in the single zip code encompassing the franchise area, and allocated that proportion of the DBS subscribers within the zip code to the City.<sup>13</sup> The resulting numbers of DBS subscribers were then compared to the household numbers for the City to demonstrate that the DBS MPVD providers collectively have attained subscriber penetration levels of 16.01 percent in Fort Stockton.<sup>14</sup>

6. The City argues that U.S. Cable has not met its burden of demonstrating that the number of DBS subscribers within the City exceeds 15 percent of the households in the U.S. Cable franchise area.<sup>15</sup> It contends that U.S. Cable's references to the SBCA report and the 2000 Census calculations identifying the number of households within the franchise area fail to provide the Commission with sufficient documentation necessary to verify the accuracy of U.S. Cable's conclusions.<sup>16</sup> The City also argues that neither the Commission nor the City has the ability to verify whether the zip code information provided by U.S. Cable to SBCA is accurate for the jurisdictional boundaries of the City.<sup>17</sup> Moreover, the City asserts that U.S. Cable provides no clarification regarding how it outlined the franchise area and how it determined the appropriate zip code to provide to SBCA to appropriately verify its calculations.<sup>18</sup> The City also argues that U.S. Cable should not be permitted to utilize census information which is in excess of five years old and compare it to current DBS penetration numbers because it has experienced growth since the 2000 Census and even a minor increase in the total number of households in the last five years would serve to reduce the penetration level below the 15 percent minimum threshold.<sup>19</sup>

7. In its Reply, U.S. Cable states that the City ignores the fact that the zip code information provided to SBCA included the only zip code that could be determined to be within the city boundaries.<sup>20</sup> It also states that it is incumbent on the City to come forward with evidence that counters that submitted by U.S. Cable and the City has failed to present any such evidence. Moreover, U.S. Cable argues that the

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<sup>11</sup> A standard five digit zip code in certain cases may not coincide precisely with the boundaries of a cable operator's franchise area. To overcome this potential problem, U.S. Cable has applied a competitive penetration methodology. The Commission has approved this methodology for determining DBS subscribership. *See, e.g., In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

<sup>12</sup>Petition at 7 and Exhibit 1. 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>13</sup> *Id.*

<sup>14</sup> Petition at 7 and Exhibit 6.

<sup>15</sup> City of Fort Stockton Opposition at 2-3.

<sup>16</sup> Opposition at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> U.S. Cable Reply at 3.

City presents no independent evidence of household growth to rebut the use of the 2000 Census data, which is an established and accepted source of household data that is appropriate for use in connection with effective competition determinations.<sup>21</sup> Further, U.S. Cable provides evidence that the population of Fort Stockton may have actually decreased since the 2000 Census.<sup>22</sup>

8. The Commission repeatedly has accepted DBS subscriber reports provided by the SBCA and the zip code methodology when determining the number of subscribers to DBS providers within franchise areas on a franchise-specific zip code basis in satisfaction of Section 76.907(c) of the Commission's rules.<sup>23</sup> 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.<sup>24</sup> The City offers unsubstantiated objections regarding the specific zip code included in U.S. Cable's SBCA DBS subscriber report. Without more, we cannot discredit U.S. Cable's submission. The City is knowledgeable of the boundaries of U.S. Cable's franchise area and able to determine the zip code exchanges that fall within those boundaries. The City failed to identify any specific errors to the SBCA report.

9. With regard to its concerns that the use of 2000 Census household data is inappropriate since Fort Stockton is a growing area and the 2000 Census data may be outdated, the City offers no evidence to support this assertion. The Commission will accept more recent household data that is demonstrated to be reliable.<sup>25</sup> The City, however, supplies no information regarding how many households have been added since the 2000 Census. Without more, we are required to find that U.S. Cable has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in that community. Therefore the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that U.S. Cable has submitted sufficient evidence demonstrating that its cable system serving the City of Fort Stockton is subject to effective competition.

## **B. Petition for Reconsideration**

10. On February 16, 2005, after filing its effective competition petition, U.S. Cable filed a petition for reconsideration of the FCC Form 328 Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") filed by the City on February 1, 2005. The City did not file an opposition. We dismiss the petition filed by U.S. Cable for reconsideration. According to the Commission's records, the City was already certified at the time of its February 1, 2005 filing. The Commission has on file two FCC Form 328s for the City of Fort Stockton, CUID TX0134. One is dated September 27, 1993 and the other is dated February 5, 2003. As the City was already certified, the FCC Form 328 dated February 1, 2005 is redundant. Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.<sup>26</sup> As the City has been certified since 1993, U.S. Cable's petition for reconsideration is moot and will be dismissed.

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<sup>21</sup> Reply at 3-4.

<sup>22</sup> Reply at 4.

<sup>23</sup> See 47 C.F.R. § 76.907(c).

<sup>24</sup> See, e.g., *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005).

<sup>25</sup> See *MCC Iowa LLC*, 2005 WL 2513517 (2005).

<sup>26</sup> 47 C.F.R. §§ 1.106 & 76.911.

### III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition filed by U.S. Cable of Coastal-Texas, L.P. for a determination of effective competition in Fort Stockton, Texas **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to Fort Stockton, Texas overseeing the cable operator **IS REVOKED**.

13. **IT IS FURTHER ORDERED** that the petition for reconsideration of the FCC Form 328 filed by the City of Fort Stockton, Texas **IS DISMISSED**.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>27</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
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<sup>27</sup>47 C.F.R. § 0.283.