

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

In the Matter of)
)
Adelphia Cable Communications)
) CSR 6524-E, CSR 6525-E & CSR 6526-E
Petition for Determination of Effective)
Competition in Various North Carolina)
Communities)

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 2007

Released: March 7, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Adelphia Cable Communications ("Adelphia")¹ has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in Caswell County, Lenoir County, Pink Hill, and Pitt County, North Carolina (collectively the "Communities").² Adelphia alleges that its cable system serving the communities are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act")³ and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH").⁴ Pitt County ("Pitt") filed an opposition, to which Adelphia replied. Pitt also filed a surreply.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be

¹Comcast Corporation and Time Warner recently acquired the assets of Adelphia Communications Corporation. In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner, Inc.; Transferee; Time Warner, Inc., Transferor, to Comcast Corporation, Transferee, 21 FCC Rcd 8203 (2006). As part of that proceeding, the parties requested that the Commission's grant of its consent to the transactions include and accommodate, as appropriate, applications that will have been filed by such licensees relating to such cable systems that are pending at the time of the consummation of the transactions. In this matter, we also will take that to include pending petitions for effective competition. Therefore, the action we take in this proceeding will transfer to the successor-in-interest, either Comcast or Time Warner, as it relates to these Franchise Areas.

²See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2). The franchise areas consist of Caswell County (NC0670), Lenoir County (NC0831), Pink Hill (NC0830), and Pitt County (NC0834).

³ See 47 U.S.C. § 543(a)(1).

⁴DISH Network is a registered trademark of EchoStar Communications Corporation.

subject to effective competition,⁵ as that term is defined by Section 76.905 of the Commission's rules.⁶ 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.⁷ Based on the record in this proceeding, Adelphia has met this burden.

3. 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 households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁸

4. In opposition, Pitt argues that Adelphia fails the first prong of the competing provider test because it does not offer service to at least 50 percent of the households in the franchise area.⁹ Records maintained by Pitt's GIS department indicate that Adelphia's cable plant only passes 1,727 homes in the franchise area and the 2000 Census listed 19,691 homes, resulting in a 8.8 percent penetration rate.¹⁰ Thus, Adelphia does not qualify as a competing provider under the effective competition test. Pitt also claims that Adelphia has failed to satisfy the second part of the first prong of the competing provider test by failing to provide evidence that potential subscriber's are reasonably aware of the offering of DBS service.¹¹ According to Pitt, Adelphia has failed to provide evidence of DBS service in the local newspapers that serve Pitt County and argues that generic ads are insufficient.¹²

5. Adelphia argues that it has satisfied the requirements of the competing provider effective competition test.¹³ Adelphia asserts that the first prong of the competing provider test has been met because the DBS providers offer service to at least 50 percent of the households in the franchise area. According to Adelphia, Pitt incorrectly interprets the first prong of the competing provider test to require that the cable operator seeking the effective competition determination be the one to offer service to 50 percent or more of the franchise area.¹⁴

6. Adelphia also argues that the households in the franchise area are actually and reasonably aware of the services offered by DBS providers.¹⁵ Adelphia has provided evidence of the advertising of DBS service in the news media serving the Communities, however, it argues that potential subscribers are also aware of DBS because of prior Commission findings regarding the ubiquitous availability of DBS service; DBS providers' extensive national, regional and local advertising; and marketing efforts through

⁵47 C.F.R. § 76.906.

⁶47 C.F.R. § 76.905.

⁷See 47 C.F.R. §§ 76.906 & 907.

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

⁹Opposition at 1.

¹⁰*Id.*

¹¹*Id.* at 4-5.

¹²*Id.* at 5-6.

¹³*Id.* at 3.

¹⁴*Id.* at 4.

¹⁵*Id.* at 5-6.

television, radio, internet, print media, and direct marketing.¹⁶

7. Turning to the first prong of the competing provider test, 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.¹⁷ 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.¹⁸ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, 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.¹⁹ Thus, there is no question that the MVPDs serving the area offer service to more than 50 percent of the households in the franchise area.

8. Pitt appears to interpret the first prong of the competing provider test to require that the cable operator seeking the determination be the MVPD that offers service to more than 50 percent of the households in the franchise area. Pitt's interpretation is incorrect. The requirement that at least two unaffiliated MVPDs offer service to more than 50 percent of the households in the franchise area does not necessarily have to include the cable operator seeking the effective competition determination. In this regard, although a cable operator seeking a determination of effective competition may serve as one of the MVPDs offering service to 50 percent of the franchise area, it can also rely on the competitive presence of other MVPDs to satisfy the first prong of the test. The U.S. Court of Appeals for the District of Columbia Circuit reversed an interpretation similar to Pitt's argument as contrary to the plain language of the 1992 Cable Act.²⁰ In so doing, the Court stated that "[t]he statute does not refer to 'multichannel video programming distributors mentioned in § 543 (l)(1)(B)(i) other than the largest' or 'such multichannel programming distributors other than the largest;' it does not limit in any way the multichannel video programming distributors to be considered in aggregating subscribership."²¹ Thereafter, the Commission amended its rules to reflect that a demonstration of "competing provider" effective competition requires only (1) evidence that the franchise area is served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (2) evidence that the number of households subscribing to programming services offered by multichannel video programming distributors, other than the largest multichannel video programming distributor, exceeds 15 percent of the households in the franchise area.²² We therefore reject Pitt's assertion that Adelphia fails its burden of proof under the first prong of the competing provider test.

9. 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.²³ We find

¹⁶See Petition at 4-5 and Exhibit 1.

¹⁷See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹⁸*Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13. 72-73 (rel. March 3, 2006).

¹⁹In addition, Cox Communications ("Cox") provides service to 38 percent of the households in the franchise area.

²⁰See *Time Warner Entertainment Co. v. FCC*, 56 F.3rd 151 (D.C. Cir. 1995).

²¹*Id.* at 189.

²²*Implementation of the Cable Consumer Protection and Competition Act of 1992*, 11 FCC Rcd 20206, 20209 (1996).

²³See 47 C.F.R. § 76.905(g). See also Petition at 4-5 and Exhibits 2 and 3.

further that Adelphia has demonstrated that the 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 with respect to all of the Communities.

10. 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 asserts that it is the largest MVPD in Caswell County, Lenoir County, and Pink Hill because Adelphia's subscribership exceeds the aggregate DBS subscribership for those franchise areas.²⁴ Adelphia sought to determine the competing provider penetration of its franchise area by purchasing an Enhanced Satellite Tracking Report from Media Business Corp ("MBC," previously known as SkyTrends), which identified the number of subscribers attributable to the DBS providers within the Community on a five-digit zip code basis.²⁵ Adelphia derived the DBS subscribership based on an allocation methodology previously approved by the Commission.²⁶

11. Pitt argues that Adelphia fails the second prong of the competing provider test because Adelphia is not the largest cable provider in Pitt County.²⁷ The largest cable provider is Cox.²⁸ Moreover, Adelphia reported to Pitt in November 2004 that it has 316 subscribers, which means that it has less than a one percent penetration rate compared to Cox, which has a 38 percent penetration rate in the County.²⁹ Pitt also argues that with Cox being the largest provider, Adelphia and the DBS providers combined subscribership must exceed 15 percent of the households in Pitt County, but they fail to do so because the MBC numbers include both commercial and dual subscribers.³⁰ When Pitt calculated the Adelphia and DBS' combined subscribers, the penetration rate was only 14.37 percent.³¹ Pitt has adjusted the 2000 Census household number to reflect growth by using occupancy permits and reducing the number of permits by the current vacancy rate, which is 15 percent.³² Finally, Pitt argues that Adelphia could have purchased SBCA's zip code+4 satellite data, which would have provided a more accurate measurement of the DBS households in the franchise area.³³

12. In reply, Adelphia claims that Pitt incorrectly contends that it fails to satisfy the requirements of the competing provider test; alternatively, Adelphia argues that Pitt's opposition demonstrates that Adelphia serves less than 30 percent of the households in the franchise area and, thus, satisfies the low penetration effective competition test.³⁴ Adelphia contends that it has satisfied the

²⁴Petition at 6 and Declaration of Andrew Elson.

²⁵Petition at 6-7 and Exhibit 4. According to Adelphia, the Enhanced Satellite Tracking Report distills the aggregate DBS subscriber counts to the franchise level utilizing enhanced mapping software to map the actual physical franchise boundaries and Census block group level households.

²⁶*Id.*

²⁷Opposition at 6.

²⁸*Id.*

²⁹*Id.*

³⁰*Id.* at 7.

³¹*Id.* at 8.

³²*Id.*

³³*Id.* at 7.

³⁴Reply at 2. According to Adelphia, it serves 316 subscribers in the franchise area and the 2000 U.S. Census lists 19,691 occupied households in the unincorporated portion of Pitt County. Thus, Adelphia's resulting penetration rate in the franchise area is 1.6 percent.

second prong of the competing provider test in Pitt County because the penetration rate of the MVPDs other than the largest, which is the DBS providers and Adelphia combined, equals 19.4 percent.³⁵ Finally, Adelphia objects to Pitt's reduction of DBS subscribers and enlargement of households. Adelphia argues that there is no Commission precedent or statute or regulation that requires the affirmative exclusion of dual DBS/cable subscribers from the competing provider calculation, but in any event, there is no basis for Pitt's proposed reduction of subscribers by 15 percent.³⁶ Adelphia objects to Pitt's inflated household count based on occupancy permits because there is no correlation between Pitt's occupancy permits and occupied households.³⁷

13. 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, and Adelphia satisfies this prong. Adelphia incorrectly claimed that it was the largest MVPD, but it sought to satisfy the second prong by establishing that the two DBS providers had a combined penetration rate exceeding 15 percent. Based upon the information provided by MBC contained in Attachment A, the DBS providers penetration rate is 17.79 percent. Even if we reduced the DBS providers numbers for dual subscribers as Pitt proposes and combined the new DBS subscriber number with the Adelphia subscribers, and used 2000 Census household numbers, the penetration rate would be 16.73 percent, and thus Adelphia would satisfy the second prong of the competing provider test. The Commission has also previously concluded that the competing provider test does not require the exclusion of dual households from the number of households subscribing to competing MVPDs.³⁸ Pitt also wants a reduction for commercial subscribers, but the MBC Report states that commercial subscribers represent less than 2 percent of the DBS subscribers. Even if we were to reduce the number of DBS subscribers shown on Attachment A by 2 percent, the DBS penetration level is still 17.4 percent.³⁹ Thus, we see no justification for the proposed reductions.

14. We also reject Pitt's argument that the 2000 Census data is outdated since we have consistently held that 2000 Census data is sufficiently reliable for effective competition determinations.⁴⁰ Nevertheless, the Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."⁴¹ Pitt has not offered more-recent, equally reliable data regarding the number of households in the franchise area. Rather, Pitt has offered only to adjust the Census data by using occupancy permits and reducing the number by the current vacancy rate of 15 percent. The competing provider test for effective competition set forth in Section 623(l)(1)(B) of the Communications Act expressly instructs the Commission to evaluate effective competition on the basis of "households."⁴² The Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."⁴³ The estimates based on occupancy permits do not approximate the 2000 Census data because

³⁵Reply at 7.

³⁶*Id.* at 7-8.

³⁷*Id.* at 9.

³⁸*Coxcom, Inc., d/b/a Cox Communications Gainesville/Ocala*, 2007 WL 623579 (2007).

³⁹ $(3433 \text{ Pitt County DBS subscribers (reduced by 2\%)} \div 19691 \text{ households} = 17.4\%)$.

⁴⁰*See, e.g., Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁴¹*Bright House Networks, LLC*, 20 FCC Rcd 16823, 16827 (2005); *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *MCC Iowa LLC*, 2005 WL 2513517 (2005).

⁴²47 C.F.R. § 543(l)(1)(B).

⁴³*Bright House Networks, LLC*, 20 FCC Rcd 16823, 16827 (2005); *Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *MCC Iowa LLC*, 2005 WL 2513517 (2005).

permits do not guarantee that households are actually occupied.⁴⁴ We will rely on the Census 2000 data. Finally, we reject Pitt's argument that Adelphia should have obtained a SBCA zip-plus-4 report. The five digit zip code allocation methodology used to calculate DBS penetration data has been used by cable operators in the past. The Commission supports, but does not at this time require, the submission of effective competition calculations using zip-plus-4 information.

15. Pitt filed a surreply and argues that Adelphia's original petition sought a determination under the competing provider test but has used its reply to file a second petition seeking a determination under the low penetration effective competition test.⁴⁵ Therefore, if Adelphia now seeks an effective competition determination under the low penetration test, it must file a separate petition and filing fee and Pitt must be afforded the requisite 20 days to respond to those new arguments.⁴⁶ Because we find that Adelphia is subject to competing provider effective competition in its Pitt County franchise area, we need not address its low penetration argument.

16. Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,⁴⁷ we find that Adelphia 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 the Communities. Therefore, the second prong of the competing provider test is satisfied as to the Communities. Based on the foregoing, we conclude that Adelphia has submitted sufficient evidence demonstrating that its cable systems serving the Communities are subject to effective competition.

III. ORDERING CLAUSES

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

18. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Adelphia Cable Communications **ARE REVOKED**.

19. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁸

FEDERAL COMMUNICATIONS COMMISSION

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

⁴⁴*Comcast Cable Communications, LLC*, 2007 WL 268673 (2007).

⁴⁵Surreply at 1.

⁴⁶*Id.*

⁴⁷*Id.* at 7-10 and Exhibit G.

⁴⁸47 C.F.R. § 0.283.

CSR 6524-E, 6525-E & 6526-E

COMMUNITIES SERVED BY ADELPHIA CABLE COMMUNICATIONS

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS Subscribers⁺
Caswell County	NC0670	35.86%	7947	2850
Lenoir County	NC0831	27.93%	12545	3502
Pink Hill	NC0830	45.63%	206	94
Pitt County	NC0834	17.4%	19691	3433

*CPR = Percent of competitive DBS penetration rate.

⁺See Adelpia Petition at 7-9 and Exhibits B, C, D and E, F; Adelpia Reply at 2-3 and Exhibit A.