

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

In the Matter of)	
)	
CoxCom, Inc. d/b/a Cox Communications Orange)	CSR 6676-E
County)	CSR 6677-E
)	
Petition for Determination of Effective)	
Competition)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 2007

Released: March 7, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CoxCom, Inc. d/b/a Cox Communications Orange County (“Cox”) has filed a petition with the Commission for determinations of effective competition in twenty-one Southern California franchise areas (the “Franchise Areas”)¹ pursuant to Section 623(a) of the Communications Act (“Act”)² and the Commission’s implementing rules.³ Cox alleges that its cable systems serving these Franchise Areas are subject to effective competition and, therefore, are exempt from cable rate regulation. Specifically, Cox claims that the effective competition present in these Franchise Areas arises from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and EchoStar Satellite, L.L.C. As a result, Cox asserts that it is subject to effective competition in

¹See *CoxCom, Inc. d/b/a Cox Communications of Orange County*, Petition For Determination of Effective Competition, CSR 6676-E (requesting a determination of effective competition for the City of Los Angeles (San Pedro); Los Angeles County (unincorporated); Los Angeles Air Force Base (Fort MacArthur); the City of Rancho Palo Verdes; the City of Palo Verdes Estates; the City of Rolling Hills; and the City of Rolling Hills Estates); *CoxCom, Inc. d/b/a Cox Communications of Orange County*, Petition For Determination of Effective Competition, (requesting a determination of effective competition for the City of Tustin, North Tustin Area (unincorporated), Silverado Canyon, Trabuco Canyon, Modjeska Canyon, Coto de Caza, Emerald Bay, Portola Hills, Foothill Ranch, Laguna Hills (unincorporated), Aliso Viejo (unincorporated, Orange, Newport Beach, and Newport Coast) (collectively “Petition”). In this Memorandum Opinion and Order, we refer to a single “Petition” because the petition filed at CSR 6676-E is identical to the petition filed at CSR 6677-E. Two separate case files were created for the Petition because (1) it covers two cable systems separately situated in two geographic areas, as delineated above, (2) Cox filed the petition twice because regulatory filing fees are assessed by cable system, and (3) only the City of Los Angeles opposed the Petition (such that the all of the requests relating to the Orange County system were unopposed).

²47 U.S.C. § 543(a).

³47 C.F.R. § 76.905(b).

these franchise areas under the “competing provider” test set forth in Section 623(1)(1)(B) of the Communications Act. The City of Los Angeles (the “City”) has filed an Opposition to Cox’s Petition for special relief specific to the community commonly referred to as San Pedro, California (“Area N”).⁴ In sum, the City asserts that: (1) finding effective competition based only on Cox’s production of DBS penetration data supplied by an industry source would be contrary to the intent of the Act; and (2) accepting DBS penetration data from a private entity would constitute an unlawful delegation of the Commission’s authority in the effective competition context.⁵ Cox has filed a Reply to the City’s Opposition, as summarized below.

II. DISCUSSION

2. Pursuant to Section 623(1) of the Act and Section 76.905 of the Commission’s Rules,⁶ we must presume that a cable system does not face effective competition absent a demonstration to the contrary.⁷ Consequently, a cable operator bears the burden of rebutting the presumption that effective competition does not exist by producing evidence demonstrating the presence of effective competition within the relevant franchise areas.⁸

A. Application of the “Competing Provider” Effective Competition Test to the Franchise Areas

3. Section 623(1)(1)(B) of the 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 offer comparable 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.⁹ Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.¹⁰ 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 EchoStar has become the third largest, MVPD provider.¹¹ Because the two DBS providers serve well over 20 percent of all MVPD subscribers nationwide, we believe these statistics support the presumption that Cox’s franchise areas are within their satellite footprint. Moreover, Cox has provided sufficient evidence of DBS advertising in local, regional, and national media that serves the Franchise Areas.¹² We conclude that the population of the

⁴ See *CoxCom, Inc. d/b/a Cox Communications of Orange County*, Opposition of the City of Los Angeles, California to Cox Petition for Determination of Effective Competition, CSR 6676-E (“Opposition”).

⁵ See Opposition at 3.

⁶ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁷ 47 C.F.R. § 76.906.

⁸ See 47 C.F.R. §§ 76.906 & 907.

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 *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11, 21 FCC 2503 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹² See Petition at 6.

Franchise Areas may be deemed reasonably aware of the availability of DBS services for the purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the DBS providers' programming satisfies the Commission's program comparability criterion because DirecTV and EchoStar offer more than 12 channels of video programming, including more than one non-broadcast channel.¹³

4. The City asserts that DBS competition is insufficient to curb a cable operator's market power and that DBS is not as effective as wireline-based (*i.e.*, cable overbuilder) video competition in keeping basic cable rates reasonable.¹⁴ Moreover, the City states that the Commission cannot assume that DBS competition offers comparable video programming to cable so long as there is a statistically significant differential between cable rates in DBS-only competitive areas and those areas enjoying wireline competition. Cox argues that the City's subjective view of how effective competition should be defined ignores congressional intent and the express language of the Act and associated Commission regulations.¹⁵

5. We reject the City's arguments and determine that Cox has satisfied the first prong of the competing provider test. First, Section 623 of the Act does not exclude DBS from the competing provider test and does not expressly authorize us to make "market power" determinations when deciding whether a cable operator faces effective competition. Second, we are not authorized by statute to decide whether one form of video competition is more effective than another in keeping basic service tier rates reasonable. Additionally, the Act does not require us to make an economic determination when applying the program-comparability prong. With respect to the issue of program comparability, we find that the DBS providers' programming satisfies the Commission's program-comparability criterion because DirecTV and EchoStar offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁶ We further conclude that Cox has demonstrated that the Franchise Areas are served by at least two unaffiliated MVPDs, namely DirecTV and EchoStar, each of which offer comparable video programming to at least 50 percent of the households in the franchise area.¹⁷ Therefore, 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 MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Cox's assertion that it is the largest MVPD provider in these Franchise Areas was not disputed by the City.

7. To determine the number of DBS subscribers in the Franchise Areas, Cox first ascertained all of the residential zip codes located either wholly or partially within its franchise areas.¹⁸ Cox also

¹³See 47 C.F.R. § 76.905(g); *see also* Petition at 5 (providing that DirecTV and EchoStar offer "well over 100 video channels, most of which are nonbroadcast services"); *see also*, Petition, Exhibit 2 (the Channel Line-ups of DirecTV and EchoStar).

¹⁴ *See Id.* at 16.

¹⁵ *See* Cox Reply at 14-16.

¹⁶See 47 C.F.R. § 76.905(g); *see also* Petition at 6 (providing DirecTV's and EchoStar's web addresses, linking to channel line-ups that show that the DBS providers offer well over 100 channels, most of which are non-broadcast programs).

¹⁷ *See* Petition at 5 and Exhibits 2, 3, and 4.

¹⁸ To ascertain the relevant zip codes, Cox first examined the United States Postal Service and related commercial databases to determine which residential zip codes the Postal Service associates with the franchise areas. Cox then confirmed that all or a portion of each zip code area listed by the Postal Service was actually located wholly or
(continued...)

purchased from the Satellite Broadcasting and Communications Association (“SBCA”) an Effective Competition Tracking Report (“ECTR”) for each Franchise Area. The ECTR reflects the number of DBS subscribers within the zip code(s) associated with a given cable community.¹⁹ Cox then allocated the subscribers reported in the ECTR to Cox’s franchise areas using a Commission-approved allocation methodology.²⁰

8. The City questions Cox’s reliance on SBCA data as support for its Petition. The City states that the Commission has never fully examined SBCA’s data collection methodologies for reliability and accuracy and such data should not be the only source of competitive information for a finding of effective competition.²¹ It argues that the Commission must consider other relevant data supplied by local franchising authorities (“LFAs”) to substantiate a cable operator’s findings, such as recent residential growth²² and whether individuals living in multiple dwelling units may be unable to receive satellite television service.²³ The City additionally asserts that the current system of collecting evidence is burdensome because it must obtain its own SBCA data and conduct lengthy independent investigations to oppose an effective competition filing.²⁴ It argues that this effectively shifts the evidentiary burden from the cable operator to the LFA in violation of the Act and the Commission’s regulations.²⁵

9. The City also argues that the Commission’s reliance on SBCA’s data “essentially delegated to a private entity the regulatory task of determining the facts on which its local regulatory authority depends.”²⁶ The City asserts that this alleged delegation of private authority is unlawful because neither the statutory definition of effective competition nor any other provision of the Act authorizes the Commission to delegate authority to decertify an LFA.²⁷ According to the City, the Commission’s unchallenged acceptance of SBCA data is unsound and improper because there has been no general public participation in the full range of data collection and data accuracy issues.²⁸

10. The City also argues that Cox’s methodology of using a five-digit zip code to calculate DBS penetration in each franchise area lacks precision. The City faults Cox for not using the SBCA “Zip-plus-4” data, which would produce more accurate results.²⁹ When using the “Zip-plus-4” data, the City

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partially within the borders of the Franchise Areas by purchasing and consulting detailed maps that reflected municipal boundaries as well as zip code areas. Cox Petition at 8.

¹⁹ See Exhibits 5-18 attached to Cox’s Petition.

²⁰ See Petition at 8 citing *Amzak Cable Midwest, Inc.* 19 FCC Rcd 6208 at ¶ 6.

²¹ See Opposition at 4-5.

²² For example, the City asserts that the number of households in the Franchise Area was nearly 3 percent greater than Cox’s calculations. See Opposition at 5 and Exhibit 1.

²³ See *id.* at 6. The City asserts that over 37 percent of the households in Franchise Area N reside in multiple dwelling units. *Id.* at 6.

²⁴ See *id.* at 6-7.

²⁵ See *id.* at 7-8.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11-12.

²⁸ See Opposition at 12.

²⁹ See *id.* at 8-9.

purportedly found that Cox's allocation formula overestimated the DBS penetration rate in the Franchise Area.³⁰ The City states that the Commission should require the use of Zip-plus-4 data, which results in significantly lower DBS penetration rates.

11. Cox states that the City provides no reasonable basis for the Commission to reject its Petition. Essentially, Cox asserts that: (1) the Commission consistently has rejected the City's burden-shifting argument; (2) the SBCA's five-digit zip code service is an approved method of demonstrating DBS penetration and, in any case, even if the zip code plus four data were accepted, more than 15 percent of the occupied households in Area N subscribe to a competing MVPD,³¹ and (3) the acceptance of SBCA's satellite subscriber data is not an impermissible delegation of authority by the Commission.³² As to the latter assertion, Cox states that the City's argument fails because the raw subscriber data provided by SBCA does not evaluate, let alone decide, whether a cable operator is subject to effective competition under the Act.³³

12. For the following reasons, we reject the City's arguments and determine that Cox has satisfied the second prong of the competitive provider test. First, our reliance on SBCA data is not an impermissible delegation of authority. The SBCA has not decided the merits of Cox's Petition; it merely has provided industry subscriber data to the cable operator for use in its Petition. It is the Commission that assesses the reliability of supporting data and decides whether effective competition exists. As Cox observes, we repeatedly have determined that data such as SBCA's, on which the satellite industry relies to conduct business, is sufficiently reliable.³⁴ With regard to the City's "burden" arguments, we find that the current evidentiary standards for effective competition set forth in our rules are consistent with the Act and pose no undue hardships on either the cable operator or the relevant LFA. Although there may be some costs associated with obtaining the necessary subscriber penetration data, there are very few other expenses associated with establishing or disproving effective competition. Further, cable operators routinely attach the DBS subscriber report they obtained from SBCA, obviating the need for the LFA to purchase its own report. Cox, in fact, did so in this proceeding.

13. We accept the data provided by Cox as establishing a reasonable basis for finding that DBS penetration exceeds 15 percent in the Franchise Areas. Cox's penetration estimates provide a margin of error with respect to the 15 percent competing provider test threshold that is sufficient to overcome any concerns raised by unsupported arguments about DBS penetration differentials in the subject Franchise Areas. Moreover, Cox's methodology in calculating DBS penetration have been approved by the Commission in previous cases with fact patterns identical to those described by Cox in its Petition.³⁵ We conclude, therefore, that Cox has provided evidence sufficient to meet the second prong of the competing provider effective competition test.

³⁰ The City states, for example, that Cox determined there was a DBS penetration rate of 22.9 percent in Franchise Area B using the five digit zip codes, while it found that the penetration rate was 15.68 percent using the zip-plus-4 method. *Id.* at 9-10.

³¹ Cox hired Media Business Corporation, an independent media research firm, to further study DBS penetration in Franchise Area N.

³² *See* Cox Reply at 2-4.

³³ *See id.* at 4.

³⁴ *See id.* at 5.

³⁵ *See Americable International Arizona, Inc.*, 11 FCC Rcd 11588 at ¶¶ 12 and 16 (1996); *Cable TV Del Noroeste*, 13 FCC Rcd 12512 at ¶¶ 8 and 11 (1998).

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition in the Franchise Areas, as set forth in Attachment A, filed by CoxCom, Inc. **IS GRANTED**.

15. The certifications of any local franchising authorities associated with the Franchise Areas, as set forth in Appendix A, to regulate basic cable rates **ARE REVOKED**.

FEDERAL COMMUNICATIONS COMMISSION

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

ATTACHMENT A

File No. CSR 6676-E

File No. CSR 6677-E

FRANCHISE AREAS SERVED BY
Cox Cable on behalf of its AffiliatesCompeting Provider Test³⁶

Franchise Area	2000 Census Household ³⁷	DBS Subs Allocated	CPR: DBS Penetration Rate
Los Angeles-San Pedro	17,161	3588.45	20.91%
Los Angeles County (unincorporated areas) ³⁸	867	193	22.26%
Fort MacArthur AFB	727	143	19.79%
Orange County (unincorporated areas) ³⁹	23,620	4,158	17.60%
Orange	1,403	269	19.15%
Newport Beach	12,686	2,778	21.89%
Palos Verdes Estates	4,993	997	19.98%
Rancho Palos Verdes	15,256	2,894	18.98%
Rolling Hills	645	139	21.61%
Rolling Hills Estates	2,806	560	19.98%
Tustin City	23,831	4,842	20.32%

³⁶ See Petition at 11.

³⁷ Household Data Figures, available at <http://factfinder.census.gov>; see also Exhibit 8 attached to the Petition.

³⁸ Cox requested a determination of effective competition in two unincorporated portions of Los Angeles County, designated by the County as “Part A” and “Part B” (CUID No. CA1448). See Petition at 2, n.5.

³⁹ Cox requested a determination of effective competition in four unincorporated portions of Orange County: the North Tustin Area (CUID No. CA0194); the Laguna Beach Area (unincorporated Laguna Hills (CUID No. CA1431) and Emerald Bay (CUID No. CA1084)); the South County Area (Coto de Caza (CUID No. CA0765)), and the Canyon Area (Foothill Ranch (CUID No. CA1310), Portola Hills (CUID No. CA1243), Modjeska Canyon (CUID No. CA0723), Silverado Canyon (CUID No. CA0675)), Trabuco Canyon (CUID No. CA0719)), and unincorporated Aliso Viejo (CUID No. CA1520)). See Petition at 2, n.5.