

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

In the Matter of)
CoxCom, Inc., d/b/a/ Cox Communications North) CSR 6942-E, 6943-E, 6944-E, 6945-E,
Carolina) 6946-E
Five Petitions for Determination of Effective)
Competition in Thirteen Local Franchise Areas in)
North Carolina)

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 2007

Released: March 7, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers five petitions which the cable operator CoxCom, Inc., d/b/a/ Cox Communications North Carolina ("Cox"), filed with the Commission pursuant to Sections 76.7 and 76.907 of the Commission's rules for a determination that, in 13 franchise areas in North Carolina (the "Communities"), it is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"), and is therefore exempt from cable rate regulation. Cox filed its Petition for Determination of Effective Competition and subsequently filed a revision (collectively, "Petition"). One franchise authority, the City of Greenville (the "City"), filed an Opposition to Petition for Determination of Effective Competition ("Greenville Opposition"). Another

1 47 C.F.R. §§ 76.7, 76.907. Cox's petitions do not invoke 47 C.F.R. § 76.905 ("Standards for identification of cable systems subject to effective competition"), but we will treat the petitions as if they do.

2 The 13 Communities and data concerning them are listed in Attachment A.

3 47 U.S.C. § 543(a)(2).

4 Cox filed one document, titled "Petition for Determination of Effective Competition." Because it concerns five different cable systems, each with its unique physical system identification number, we treated it as five petitions and gave each a unique file number. The five groupings are as follows: File CSR 6942-E concerning PSID 05956, which serves unincorporated Lenoir County (NC0413), the Town of La Grange (NC0412), and the City of Kinston (NC0184); File CSR 6943-E concerning PSID 007253, which serves the City of Rocky Mount (NC0120), the Town of Tarboro (NC0121), and the Town of Conetoe (NC0795); File CSR 6944-E concerning PSID 007246, which serves the City of Greenville (NC0135), the City of Washington (NC0186), the Town of Ayden (NC0183), and Unincorporated Pitt County (NC0182, NC0932); File CSR 6945-E concerning PSID 004155, which serves Unincorporated Pitt County (North) (NC0430) and the Town of Williamston (NC0111); and File CSR 6946-E concerning PSID 006571, which serves the Town of River Bend (NC0382).

5 The revision was to correct an error in the original filing at Ex. 6. Letter ("Lutzker Letter") from Gary S. Lutzker, Esq., counsel for CoxCom, Inc. to Steven A. Broecker, Deputy Chief, Policy Division, Media Bureau, dated Dec. 14, 2005.

franchise authority, Pitt County, filed an Opposition to Petition for Special Relief for Determination of Effective Competition (“Pitt County Opposition”), concerning the territory served by Cox in unincorporated Pitt County. Cox filed a Consolidated Reply to Oppositions of Pitt County and the City of Greenville, North Carolina (“Reply”).

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁶ as that term is defined by Section 623(l)(1) of the Communications Act (“the Act”)⁷ and Section 76.905 of the Commission’s rules.⁸ A cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that it does exist in its franchise area.⁹

II. DISCUSSION

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 (1) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (2) 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.¹⁰ We will address these two “prongs” in turn.

4. The First Prong of the Competing Provider Test. Turning to the first prong of the statutory test, the direct broadcast satellite (“DBS”) services of DirecTV, Inc. (“DirecTV”), and EchoStar Satellite, L.L.C. (“EchoStar”) are presumed to be technically available due to their nationwide satellite footprints, and presumed to be actually available if households in a franchise area are made reasonably aware that the services are available.¹¹ 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.¹² Because the two DBS providers have a nationwide footprint and 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. In addition, Cox has provided sufficient evidence of DBS advertising in local, regional, and national media that serves the franchise areas.¹³ We conclude that the populations of the relevant 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

⁶ 47 C.F.R. § 76.906.

⁷ 47 U.S.C. § 543(l)(1).

⁸ 47 C.F.R. § 76.905.

⁹ See 47 C.F.R. §§ 76.906-07(b).

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

¹¹ See *Bright House Networks, LLC*, 20 FCC Rcd 15229 ¶3 (2005).

¹² *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 21 FCC Rcd 2503 ¶ 6, 2507 ¶13, 2539-40 ¶¶72-73 (2006).

¹³ Cox states that the Bureau presumes a reasonable awareness of availability of DBS service based on national, regional, and local advertising within any given community, citing *Time Warner Entertainment–Advance/Newhouse Partnership d/b/a Time Warner Cable*, ___ FCC Rcd ___, DA 05-2505 at ¶ 3 (MB rel. Sept. 23, 2005). In addition, Cox states that potential customers need only contact DirecTV or EchoStar directly using their toll-free telephone ordering systems, visit local dealers such as Best Buy, Blockbuster, Circuit City or other local independent dealers, or contact on-line retailers. Cox Petition at 6.

programming, including more than one non-broadcast channel.¹⁴

5. Additionally, Section 623(l)(1)(B)(1) of the Communications Act and Section 76.905(b)(2)(i) of our rules require the cable operator seeking to prove effective competition to show that its “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.”¹⁵ Additionally, Commission rule 76.905(e)(1) states that service of a multichannel video programming distributor will be deemed offered when the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service.¹⁶

6. Pitt County contends in its opposition that Cox fails to meet its burden of proof under the first prong of the Commission’s competing provider test because although it is the largest MVPD in Pitt’s franchise area, its service is not technically or actually available, nor offered to, 50 percent of those households.¹⁷ Pitt County states that Cox has chosen to limit its service to a concentrated area within Pitt County and “denies service to 63 percent of the households in its Pitt County franchise area.”¹⁸ In requiring that competitors “other than the largest provider” must cumulatively offer service to at least 50 percent of the households in a local franchise area, Pitt County asserts that the Commission conclusively presumes that the largest provider must offer its service to at least as many households.¹⁹ Moreover, Pitt County maintains that there are regulatory and technical impediments to receiving Cox’s MVPD service in its franchise area. Specifically, Cox has a franchise to serve the county’s entire franchise area, but is required to provide cable service to only those areas with an average of 20 homes per mile within three miles of an existing cable plant.²⁰ Pitt County charges that Cox has refused to serve the less dense areas of Pitt County because it is “economically unfeasible” and that there are not enough households in certain areas to make the investment worthwhile for Cox.²¹

7. Cox states, and we agree, that 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 MVPD seeking the effective competition ruling. 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 a similar interpretation as contrary to the plain language of the 1992 Cable Act.²² 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.”²³ The Commission amended its rules to reflect that a demonstration of

¹⁴ See 47 C.F.R. § 76.905(g); see also Cox Petition at 4-5, Ex. 1.

¹⁵ 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

¹⁶ 47 C.F.R. § 76.905(e)(1).

¹⁷ Pitt County Opposition at 9.

¹⁸ *Id.*; see also Pitt County Opposition at 4 n.13.

¹⁹ *Id.* at 10.

²⁰ See Pitt County Opposition, Ex. 2, Franchise Agreement Between The County of Pitt, North Carolina and Multimedia Cablevision, Inc., dated Dec. 30, 1994, § VIII Service Area.

²¹ Pitt County Opposition at 11.

²² See *Time Warner Entertainment Co. v. FCC*, 56 F.3rd 151 (D.C. Cir. 1995).

²³ *Id.* at 189.

“competing provider” effective competition requires only 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 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.²⁴ We reject Pitt County’s assertion that Cox fails its burden of proof under the first prong of the competing provider test based on the county’s interpretation of the controlling statute.

8. Pitt County seems to be arguing that Cox has affirmatively redefined its franchise area to something less than all of Pitt County. All but a few of our effective competition decisions measure effective competition franchise area by franchise area, not by smaller or larger areas. This follows Section 623(l)(1) of the Communications Act, which provides in pertinent part that one kind of “effective competition” means that . . . fewer than 30 percent of the households in the *franchise area* subscribe to the cable service of a cable system.”²⁵ The Section goes on to allow two other kinds of effective competition to be shown “in the *franchise area*.”²⁶ Although the statute does mention “a cable system,”²⁷ its primary focus is on a single franchise area. When we first constructed the term “franchise area” in the context of effective competition, we used its plain meaning: “[t]he term ‘franchise area’ is used for a variety of purposes within the statute and our rules and has a commonly understood meaning in the industry and in regulatory parlance. A franchise area is the area a system operator is granted authority to serve in its franchise.”²⁸

9. In one special circumstance, our decisions measure effective competition in an area smaller than a franchise area. Where the cable operator has made an affirmative decision, confirmed by its own conduct, to serve less than the whole area specified in its franchise, we will measure effective competition in the lesser area if the franchise authority so desires.²⁹ We find no affirmative decision on

²⁴ *Implementation of the Cable Consumer Protection and Competition Act of 1992*, 11 FCC Rcd 20206, 20209 (1996).

²⁵ 47 U.S.C. § 543(l)(1)(A) (italics added).

²⁶ 47 U.S.C. § 543(l)(1)(B)(i, ii), D (italics added); *see also* 47 U.S.C. § 543(l)(1)(C) (“in that franchise area”).

²⁷ Gainesville Reply at 4 n.13 citing 47 U.S.C. § 543(a)(2) (“If the Commission finds that a *cable system* is subject to effective competition . . .”) (italics added).

²⁸ *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation (“First Reconsideration”)*, 9 FCC Rcd 1164, 1180 ¶24 (1993) (discussing “low penetration” effective competition, 47 U.S.C. § 543(l)(1)(A)) (footnote omitted), *reconsidering* 8 FCC Rcd 5631, 5673 ¶49 (1993) (“The effective competition determination will be made on a franchise-area basis for cable programming service complaints as well as basic service regulation.”); *see also Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937, 5939 ¶6 (1996) (while adopting a new form of effective competition, describing the existing rule as providing that “a system is subject to effective competition in the area covered by its *local franchise* if any one of the following three tests are met: . . .”) (italics added), *rev’d on other grounds*, *Time Warner Entertainment Co. v FCC*, 240 F.3d 1126 (D.C. Cir.), *cert denied*, 534 U.S. 1054 (2001).

²⁹ *First Reconsideration*, 9 FCC Rcd at 1181 ¶25:

“[T]here may be some limited situations (such as, for example, where a system operator has county-wide operating rights but has determined to serve only a specific named community within that area) where use of a more restricted ‘franchise area’ definition may be both appropriate and consistent with the statutory language. An affirmative decision by a system operator to restrict service logically redefines its franchise area in terms of the objectives of this provision. Accordingly, we will permit franchise authorities to demonstrate the boundaries of such a redefined franchise area. Such a showing, however, will be limited to situations in which a system operator has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator’s ‘franchise area.’ The fact that a

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the part of Cox to redefine its Pitt County franchise area. Pitt County concedes that Cox's franchise by its express terms extends to the entire area of the county. Moreover, the fact that Cox has not built its system beyond areas not required by its franchise build out terms is not evidence of franchise area redefinition. Accordingly, we find that Cox has satisfied the first prong of the competing provider test.

10. The Second Prong of the Competing Provider Test. 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.³⁰ Cox asserts that it is the largest MVPD in the Communities except for unincorporated Lenoir County.³¹ No party disputes Cox's assertion.

11. Cox sought to prove the penetration of itself and the other MVPDs in each of the Communities. For the DBS providers,³² Cox made a list of all the residential five-digit zip codes that are wholly or partly in each of the Communities. Then, it obtained a report from the Satellite Broadcasting and Communications Association ("SBCA") stating the total of DBS subscribers in each such zip code. Next, for each Community, Cox used 2000 Census data to calculate the number of households in the Community and the number of households in all of the zip codes that are wholly or partly in the Community.³³ Dividing the latter by the former, Cox produced an allocation percentage that it then applied to the number of DBS subscribers in all the aforementioned zip codes.³⁴ Cox thus produced an estimate of the number of DBS subscribers in each Community. Finally, Cox divided this estimate into the total number of households in each Community, which produced Cox's estimate of DBS penetration there.³⁵ This methodology appears the same as one that the Commission found reasonable in several

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franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."

See, e.g., Cablevision of Paterson, 17 FCC Rcd 17239, 17240-41 ¶¶2-4 (2002) (at ¶ 2, "We have, however, acknowledged that in some limited circumstances a cable operator may voluntarily redefine its franchise area through its own conduct. In doing so, we indicated that the fact that a cable system's construction was not yet complete would not, in of itself, demonstrate franchise redefinition.") (footnote omitted); *Century Cable of Northern California, Inc.*, 14 FCC Rcd 18604, 18606-08 ¶¶4, 6-7 (1999) (at ¶ 7, "This record establishes more than merely that Century has not yet filled out its service area, it provides substantial evidence that Century has no intention to expand its system into the portions of San Buenaventura not now served and has thus redefined its service area"); *TKR Cable of Northern Kentucky* ("TKR"), 11 FCC Rcd 9973, 9882 ¶20 (1996) ("We find that TKR has not redefined its Boone County franchise area. . . . The Cable Board presents no evidence that TKR has made an affirmative decision to limit its franchise area to its current service area. In fact, TKR presents evidence that it has continued to build out its system in accordance with the density service requirements of its franchise agreement."); *Cecilton CATV, Inc.*, 10 FCC Rcd 2937, 2939 ¶11 (1995) ("The record in this case demonstrates that Cecilton has made an affirmative decision to limit its franchise area.").

³⁰ *See supra* n.12.

³¹ Cox Petition at 8.

³² The Petition appears to use the term "DBS" sometimes to refer to only DirecTV and EchoStar and at other times to include home or large satellite dish service. *See* Cox Petition at 9. We assume that, whichever meaning the Cox Petition intends in each use, there is no significant difference from the other.

³³ The Cox Petition appears to use the terms "household" and "occupied household" interchangeably, and we assume it intends to do so. *See* Cox Petition at 4-5. Under our rules, "households" are by definition occupied. 47 C.F.R. § 76.905(c); *see also Bright House Networks, LLC* ("Bright House"), 20 FCC Rcd 16823, 16827 ¶10 n.40 (2005); *Marcus Cable Associates, LLC* ("Marcus Cable"), 17 FCC Rcd 16652, 16654 ¶7 n.19 (2002), *recon. denied*, 18 FCC Rcd 9649, 9651 ¶6 (2003).

³⁴ Cox Petition at 8-9, Exs. 3-4.

³⁵ Cox Petition at 10-11, Exs. 5-16.

recent decisions.³⁶

12. Concerning Greenville in particular, Cox, using 2000 Census data and data for households subscribing to DBS, estimates that Greenville has 25,204 households and 4,102.35 DBS households, for a 16.28 percent penetration rate.³⁷ The City challenges Cox's use of outdated 2000 Census data. The City objects that because both Greenville's population and DBS subscribership are growing, using a relatively old number for the former and a relatively new one for the latter overstates DBS penetration in Greenville.³⁸ The City proposes, specifically, that we estimate the number of households in Greenville and/or the State of North Carolina from 2004 Census data for total population, divided by 2.18 persons per household (a number from the Census). These calculations raise the number of Greenville households to 31,507.8 and 30,962.84, respectively. When divided by Cox's estimate of DBS households, the City's calculations yield estimates of DBS penetration for Greenville of 13.02 percent and 13.25 percent, respectively.³⁹ Both of these calculations are below the statutory threshold for competing provider effective competition.⁴⁰

13. Cox answers the City's objections on several grounds that we consider meritorious. We have relied on decennial Census data in many cases, even several years after the data were issued.⁴¹ Although the Commission has indicated that it will accept more recent household data that is demonstrated to be reliable,⁴² the City has not submitted such household data here. Its data estimate total population, but also include a significant number of group dwellings, such as dormitories and nursing homes, that are not considered households.⁴³ Section 76.905 (c) of the Commission's rules excludes "dwellings that are used solely for seasonal, occasional, or recreational use" from our definition of households.⁴⁴ For example, in *Marcus Cable*, we held that dormitories should not be counted as households because they are, "[p]ursuant to U.S. Census Bureau definitions, . . . noninstitutional group quarters rather than households."⁴⁵ It appears that the City's population data includes these dwellings and their residents. This overstates the number of "households" in Greenville and is therefore not reliable for measuring competing provider effective competition. In addition, the population data that the City

³⁶ See *Time Warner-Advance/Newhouse Partnership* ("Time Warner-Advance/Newhouse"), 20 FCC Rcd 5225, 5227 ¶7 (2005); *Cable One, Inc.*, 20 FCC Rcd 4991, 4993 ¶4 (2005); *Amzak Cable Midwest, Inc.*, 19 FCC Rcd 6208, 6210 ¶6 (2004); *CC VIII Operating, LLC*, 19 FCC Rcd 6204, 6205-06 ¶4 (2004); *Texas Cable Partners, L.P.*, 19 FCC Rcd 6213, 6215 ¶7 (2004).

³⁷ Cox Petition at 11.

³⁸ Greenville Opposition at 2-3.

³⁹ Greenville Opposition at 3-5.

⁴⁰ 47 U.S.C. § 543(l)(1)(B)(ii); 47 C.F.R. § 76.905(b)(2)(ii).

⁴¹ See, e.g., *Comcast Cable Communications, LLC* ("Comcast"), 20 FCC Rcd 20438, 20441 ¶11 (2005); *Comcast of Dallas, L.P.* ("Comcast of Dallas"), 20 FCC Rcd 17968, 17972 ¶9 n.31 (2005); *Bright House*, 20 FCC Rcd at 16827 ¶10; *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968 ¶6 (2004).

⁴² *Comcast of Dallas*, 20 FCC Rcd at 17972 ¶9; *Bright House*, 20 FCC Rcd at 16827 ¶10.

⁴³ Cox Reply at 4 n.9, 24-25. See 47 C.F.R. § 76.905(c).

⁴⁴ When we adopted this regulation, we addressed "dwelling units that are empty for a significant portion of the year" and observed that "[p]eople who are not present cannot be presumed to be choosing local competitive alternatives. We believe that the best and most constant indicator of local viewers' choices is represented by the full-time residents of an area. Moreover, it is the full-time residents who are most affected by the determination whether their cable rates are subject to regulation." *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd 4316, 4324 ¶17 (1994).

⁴⁵ *Marcus Cable*, 18 FCC Rcd at 9652 ¶7.

obtained from the State of North Carolina appear based, in part, on building permits issued by local governments.⁴⁶ Because our competing provider effective competition test measures households, we reject estimates based on building permits, certificates of occupancy and the like because they may reflect housing units that are unoccupied.⁴⁷

14. Finally, the City has not supported using, along with 2004 population data, an estimate of household size dating from 2000.⁴⁸ Cox observes that between 1990 and 2000, average household size in Greenville fell from 2.35 to 2.18.⁴⁹ If a similar fall occurred between 2000 and a later year, then using the City's 2.18 number would overstate the number of households in Greenville. We decline to use Greenville's population estimates because we cannot conclude that they are more reliable than those supplied by Cox. Accordingly, we find that Cox has demonstrated competing provider effective competition in the City of Greenville.

15. Pitt County asserts that Cox fails the second prong of the competing provider test by counting DBS subscribers who are located outside Pitt County's franchise area. Pitt County contends that when a current household count for Pitt County is used, comparison DBS subscriber figures reveal fewer than 15 percent of the households in Pitt County's franchise area subscribe to satellite service.⁵⁰ Specifically, Pitt County objects to Cox's use of 5-digit zipcode data from the Satellite Broadcasting and Communications Association ("SBCA"), stating that the General Accountability Office ("GAO") notes that the Commission accepts such zipcode methodology "without any validation of the method's mathematic legitimacy."⁵¹ Pitt County states that the accuracy of Cox's DBS subscriber totals hinges on how accurately the 5-digit zipcodes measure the local franchise area. Any methodology, Pitt County asserts, that includes satellite subscribers located outside the franchise area is unacceptable, as is any allocation of DBS subscribers generated from households located outside the franchise area.⁵² Pitt County maintains that Cox's DBS count should be rejected because its methodology fails to remove DBS subscribers located outside Pitt County's franchise area.⁵³

⁴⁶ Greenville Opposition, Ex. B at 2.

⁴⁷ *MCC Iowa LLC* ("MCC Iowa"), 20 FCC Rcd 15267, 151269-70 ¶¶6-7 nn.22-23 (2005) (at ¶7: "The Commission has determined, that for effective competition purposes, the term 'household' has the same meaning as that used by the U.S. Census Bureau. The U.S. Census Bureau defines 'households' as '[a] person or group or persons who live in a housing unit' or 'occupied housing units.' The Commission has long distinguished between vacant and occupied homes in reference to the effective competition tests.") (footnotes omitted; brackets in original); see also *Adelphia Cable Commun.* ("Adelphia"), 20 FCC Rcd 4979, 4982 ¶9 n.20 (2005); *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968 ¶6 (2004); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770 ¶8, n.27 (2003); *Marcus Cable*, 18 FCC Rcd 9649, 9652 ¶7 (2003).

⁴⁸ Cox Reply at 25.

⁴⁹ Compare Cox Reply, Ex. B at 2 with Greenville Opposition at 4-5.

⁵⁰ Pitt County Opposition at iii, 13-17.

⁵¹ *Id.* at 13.

⁵² *Id.* at 14.

⁵³ Pitt County further asserts that Cox's DBS figures are unreliable because when those figures are compared against similar DBS figures provided by Adelphia Cable in its Petition for Special Relief filed against Pitt County in February 2005, Cox's DBS penetration rate was 35% higher than Adelphia's for Pitt County even though Adelphia failed to exclude both commercial accounts (2%) and seasonal homes (3%). Pitt County contends that when adjusted for the inclusion of commercial accounts alone, and using a current occupied households total for Pitt County, Adelphia's DBS penetration for Pitt County is 14.93%, without accounting for dual subscribers. Pitt County Opposition at 16-17. Cox replies that Pitt County has provided no evidence that Adelphia serves the same franchise area that Cox serves or what zip codes and calculation methodologies Adelphia used to make its

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16. In its reply to the opposition, Cox states that the objections to use of zip code data by Pitt County emanate from a lack of understanding by the county as to the Bureau's use of the allocation methodology and its operation. Cox maintains that the Bureau, in recent decisions, has affirmed the use of the allocation methodology with zipcode data, in part, because it recognizes that each community has several "partial zipcodes," and that for every one in which the cable operator over-estimates DBS penetration in a community, there is another partial zipcode in which the operator under-estimates it.⁵⁴ Additionally, Cox asserts that the current household figures proposed by Pitt County do not meet the Commission's standards of reliability because those figures rely on occupancy permits. Cox cites Commission precedent indicating that reliance on local inspections and permits does not demonstrate that a particular building is occupied full time such that it would qualify as a household under the definition utilized by the Census.⁵⁵ As discussed above, Cox employed an allocation formula to determine the number of DBS subscribers in each of its franchise areas that the Commission has approved in numerous cases. None of the arguments raised by Pitt County cause us to question the validity of this formula. As the Commission has long recognized, competing provider cases necessarily involve the imperfect match between franchise areas and zip codes.⁵⁶ We have been unwilling to exclude a zip code entirely from our calculations simply because it is not entirely located inside the franchise area boundary.⁵⁷ The formula that Cox uses to calculate DBS penetration in these zip codes is a reasonable one and has been approved by the Commission in many past decisions, even when most of a zip code lies outside a franchise area.⁵⁸ We are unwilling to depart here from this reasonable recognition of the state of available information.

17. Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that its cable systems serving the Communities are subject to competing provider effective competition as set forth in Attachment A.

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competing provider showing. Moreover, asserts Cox, Pitt County did not submit Adelphia's competing provider showing as part of the record in this proceeding. Cox Reply at 17 n.60.

⁵⁴ See *Comcast*, 20 FCC Rcd at 20442 ¶10.

⁵⁵ *Marcus Cable*, 18 FCC Rcd at 9652.

⁵⁶ See, e.g., *Falcon Cable Systems Co. II*, Memorandum Opinion and Order, 17 FCC Rcd 4648, 4651 ¶7 (2002) ("While the level of accuracy in these instances necessarily varies with the shape and size of the zip code area, we accept the Sky Trends data presented by Charter because it is the best available source for determining DBS subscribership in such zip code areas.").

⁵⁷ Lake Alfred Opposition at 3.

⁵⁸ *Time Warner-Advance/Newhouse*, 20 FCC Rcd at 5230; *Charter Commun., LLC*, Memorandum Opinion and Order, 19 FCC Rcd 7003, 7009 (2004); *Charter Commun., Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 6878, 6888 ¶10 (2004).

III. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the petitions filed by Cox Cable Communications, LLC, for a determination of effective competition in the Communities listed on Attachment A **ARE GRANTED**.

19. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Cox in the Communities listed on Attachment A **ARE REVOKED**.

20. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵⁹

FEDERAL COMMUNICATIONS COMMISSION

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

⁵⁹ 47 C.F.R. § 0.283.

Attachment A

I. Competing Provider Effective Competition

CoxCom, Inc.: CSR 6942-E

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Unincorporated Lenoir County	NC0413	37.03%	12616	4671.85
La Grange	NC0412	40.94%	1211	495.78
Kinston	NC0184	21.75%	9829	2138.07

CoxCom, Inc.: CSR 6943-E

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Rocky Mount	NC0120	16.52%	21435	3541.54
Tarboro	NC0121	27.29%	4359	1189.45
Conetoe	NC0795	37.42%**	125	46.78

CoxCom, Inc.: CSR 6944-E

Communities	CUIDS	CPR*	2000 Census Households+	DBS Subscribers+
Greenville	NC0135	16.28%	25,204	4102.35
Washington	NC0186	20.62%	3968	818.02
Ayden	NC0183	33.71%	1936	652.55
Unincorporated Pitt County	NC0182 NC0932	24.15%	19620	4738.24

Cox Cable Communications, LLC: CSR 6945-E

Communities	CUID	CPR*	2000 Census Households+	DBS Subscribers+
Unincorporated Pitt County (North)	NC0430	(see Unincorporated Pitt County above)		
Williamston	NC0111	30.14%	2350	708.25

CoxCom, Inc.: CSR 6946-E

Community	CUID	CPR*	200 Census Households+	DBS Subscribers+
River Bend	NC0382	20.62%	1343	276.87