

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

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)	
In the Matter of)	
)	
Mediacom Southeast LLC)	
)	
Petition for Determination of Effective)	CSR 6683-E
Competition in Fairhope, AL (AL0160))	
)	
Petition for Reconsideration)	

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 2007

Released: March 12, 2007

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. In this Order, we consider a late filed petition for reconsideration of our initial order (“Initial Order”) finding Mediacom Southeast LLC (“Mediacom”) subject to effective competition in the City of Fairhope, Alabama (“Fairhope” or “City”).¹ Fairhope filed this Petition for Reconsideration and Request for Correction and Modification of our Initial Order (“Petition for Reconsideration”) requesting that we rescind our effective competition finding for Fairhope and conduct a *de novo* review of Mediacom’s effective competition Petition along with the City’s opposition pleading and related filings. For the reasons set forth below, we grant Fairhope’s Petition for Reconsideration and order the parties to file supplemental pleadings to update the record for the purpose of conducting a *de novo* review. Fairhope also filed a Request to Modify Ex Parte Status to which Mediacom filed an opposition. For the reasons also set forth below, we deny the Request to Modify Ex Parte Status.

2. Mediacom filed its Petition on April 4, 2005 seeking a finding that its cable system serving four communities in Alabama, including Fairhope, was subject to effective competition based on competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and DISH Network. The parties filed numerous pleadings, which for unknown reasons, were not in the Commission’s file when the Petition was reviewed and acted upon.² Accordingly, the Bureau deemed the

¹2005 WL 1565926 (rel. July 6, 2005) (CSR 6683-E).

² On May 11, 2005, Fairhope filed a Motion for Extension of Time to file an opposition to Mediacom’s Petition. Subsequently, on June 6, 2005, Fairhope filed its Opposition to Mediacom’s Petition for effective competition. On June 6, 2005, Fairhope also filed a Conditional Request for Media Bureau Order Requiring Production of Documents and Extension of Pleading Cycle. On June 27, 2005, Mediacom filed an Opposition to the Conditional Request for Production of Documents. On June 27, 2005, Mediacom also filed a Reply to Fairhope’s Opposition. On July 27, 2005, Fairhope filed a Motion to Dismiss Mediacom’s Petition and Reply. On September 6, 2005, Mediacom filed a Motion to Strike Fairhope’s Motion to Dismiss because it was outside the pleading cycle and because the matter was moot due to the Commission’s release of the Initial Order on July 6, 2005 granting
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Petition with regard to Fairhope unopposed. On June 30, 2005, the Bureau adopted the Initial Order granting seventeen unopposed effective competition petitions filed by various cable operators, including Mediacom's Petition for Fairhope, Alabama. The Initial Order was released on July 6, 2005. Fairhope filed its Petition for Reconsideration on August 25, 2005, more than 30 days after the release of our Initial Order, rendering it late filed.³

II. DISCUSSION

A. Petition for Reconsideration

3. Fairhope's Petition for Reconsideration requests partial reconsideration of our Initial Order, which it asserts, inadvertently granted the effective competition Petition that included Fairhope along with other unopposed petitions.⁴ Fairhope would like the Commission to correct or modify the Initial Order by Errata or other means to exclude Mediacom's effective competition request regarding Fairhope so that its opposition and related pleadings may be considered prior to a ruling on Mediacom's Petition.⁵ Fairhope contends that an Errata to the Initial Order is required because the Commission failed to acknowledge and consider its Opposition and related Conditional Request for Production of Documents filed by Fairhope.⁶ Fairhope, in support of its Petition for Reconsideration, submits the following documents: a copy of a June 6, 2005 date stamped letter to the Secretary of the Commission enclosing an "Opposition to Petition for Special Relief" in CSR 6683-E; a copy of a June 6, 2005 date stamped letter to the Secretary of the Commission enclosing a "Conditional Request for Media Bureau Order Requiring Production of Documents and Extension of Pleading Cycle; and a copy of a June 7, 2005 date stamped letter to the Secretary of the Commission stating that it filed its Opposition to Petition for Special Relief on June 6, 2005 with a copy of an affidavit of Mr. James D. Gillespie and enclosing the original.⁷ Thus, Fairhope has submitted evidence that its opposition was timely filed.

4. Fairhope argues that the Commission's "authority to correct inadvertent, ministerial, processing errors is not subject to any specific time constraints" and the inclusion of Fairhope is clearly inadvertent on the face of the Initial Order since it states that no oppositions to any of the petitions were filed although Fairhope indeed filed an opposition.⁸ Thus, the Bureau should not have included Fairhope with the other 28 communities covered by its Initial Order.⁹ Fairhope contends that the Bureau's failure to conduct a careful review of Mediacom's Petition and Fairhope's Opposition is unlawful and violated Fairhope's rights under the Administrative Procedure Act.¹⁰

5. Fairhope acknowledges that its Petition for Reconsideration was filed late, but argues that

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Mediacom's Petition. On September 7, 2005, Fairhope filed an Opposition to Mediacom's Motion to Strike. On September 28, 2005, Mediacom filed a Reply to Fairhope's Opposition to Motion to Strike. The Motion for Extension of Time is granted. The remaining motions that were not ruled on are considered moot and are dismissed.

³See 47 C.F.R. § 1.106(f).

⁴Petition for Reconsideration at 1.

⁵*Id.*

⁶*Id.*

⁷Petition for Reconsideration, Exhibit A.

⁸*Id.* at 1-2, citing *Stale or Moot Docketed Proceedings, Order*, 19 FCC Rcd 2527, 2533 (2004).

⁹*Id.* at 3.

¹⁰*Id.*

it was unaware of the Initial Order because the Bureau failed to provide the City or its counsel with a copy as required by the Commission's rules,¹¹ and consequently, Fairhope did not learn of the Bureau's decision until August 22, 2005, when it received a copy with Mediacom's Motion to Strike.¹² By that time, Fairhope's time for filing a petition for reconsideration had expired.¹³ Fairhope, however, argues that based on the decision in *Gardner v. FCC*, the Commission may waive or extend the 30-day filing period "where extraordinary circumstances indicate that justice must be served."¹⁴ Fairhope argues that all of the requirements of *Gardner* are met here because Fairhope was not given actual notice of the Initial Order until it received Mediacom's Motion to Strike and thereafter requested a copy of the Initial Order from Mediacom. By that time, the thirty day period for filing a petition for reconsideration had already expired, thereby preventing Fairhope from filing a timely petition. Fairhope argues that it filed the Petition for Reconsideration within four days of receiving actual notice.¹⁵ Thus, the thirty day filing requirement should be waived or extended.¹⁶ Fairhope would like the Commission to issue an Erratum to delete references to Fairhope from the Initial Order and conduct a de novo review of Mediacom's effective competition Petition and related pleadings.¹⁷ Mediacom did not file an opposition to Fairhope's Petition for Reconsideration. However, Mediacom's Opposition to Fairhope's Request to Modify Ex Parte Status notes that the Petition for Reconsideration was filed out of time.¹⁸

6. In the 1976 *Gardner* decision, the petitioner argued that his petition for reconsideration of a Commission order was late because the Commission didn't send him a copy of its initial decision. The Court held that the statutory thirty day limit for reconsideration petitions did not prevent the Commission from considering the late filed petition for reconsideration under extraordinary circumstances, such as the Commission's failure to provide Mr. Gardner with notice of its decision as required by the Administrative Procedure Act and its own practice.¹⁹ *Gardner*, however, is not the final word on this issue. In the 1986 *Reuters Limited v. FCC* decision, the Court held that the Commission exceeded its legal authority when it acted upon a late filed petition for reconsideration.²⁰ The Court distinguished its decision in *Gardner*, noting that unlike in *Gardner*, the party in *Reuters Limited* that filed the late petition for reconsideration was a sophisticated business concern represented by distinguished Washington, D.C. counsel.²¹

7. After careful consideration of Fairhope's Petition for Reconsideration, we believe the public interest favors granting it. Section 405 of the Communications Act governs petitions for reconsideration of Commission actions and expressly provides that "a petition for reconsideration must be filed within 30-days from the date upon which public notice is given of the order, decision, report, or action complained of."²² Fairhope relies on *Gardner* to support its argument that we should consider its

¹¹See 47 C.F.R. § 0.445(a). The Bureau failed to provide Fairhope with a copy of the Initial Order because, as discussed above, Bureau staff was not aware that Fairhope was a party to the proceeding.

¹²Petition for Reconsideration at 3.

¹³*Id.*

¹⁴530 F.2d 1086, 1091 (D.C. Cir. 1976).

¹⁵Petition for Reconsideration at 4.

¹⁶*Id.*

¹⁷*Id.* at 2.

¹⁸Mediacom Opposition to the Request to Modify Ex Parte Status at 1 n.2.

¹⁹*Gardner*, 530 F.2d at 1088.

²⁰781 F.2d 946, 951 (D.C. Cir. 1986).

²¹*Id.*

²²47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

Petition for Reconsideration as timely filed. Although it is a close call over whether *Gardner* or *Reuter's Limited* should govern under these facts, we believe that *Gardner* is controlling here for the following reasons. First, Fairhope filed a timely Opposition which inadvertently was not included in the record in this proceeding. Second, it was the Commission's error which substantially contributed to Fairhope's failure to file a timely Petition for Reconsideration. Third, Fairhope acted as quickly as possible to bring the error to the Commission's attention and file its Petition for Reconsideration. Finally, we believe the public interest supports considering fully the arguments of local franchising authorities prior to acting on a determination of effective competition. Accordingly, we will treat Fairhope's Petition for Reconsideration as timely filed and review *de novo* our determination of effective competition as it applies to Fairhope fully considering the arguments raised in the complete record in this proceeding.

B. Effective Competition

8. In order to conduct a *de novo* review, we order the parties to update the record. The update is necessary because of the length of time that has passed since the Petition was filed and the complexity of the issues raised by the parties. The updated information should reflect the best possible data available and accurately reflect the current state of MVPD competition in Fairhope. The parties should also take into consideration recent Commission decisions in the area of effective competition.²³ Finally, before filing the updated pleadings, we strongly encourage the parties to discuss and stipulate the precise zip codes or zip code plus four exchanges that comprise the Fairhope franchise area.²⁴ Mediacom's updated Petition shall be due 30 days from the release of this Order. Fairhope's updated Opposition will be due 60 days from the release of this Order. Mediacom's updated Reply, if necessary, will be due 75 days from the release of this Order. Following the completion of the updated pleading cycle, the Media Bureau will expeditiously issue a decision determining the status of effective competition in the City of Fairhope, Alabama.

C. Request to Modify Ex Parte Status

9. Fairhope requests that the Commission modify the ex parte status of this proceeding from restricted to permit-but-disclose to permit it and other interested parties to present their position directly to the Bureau and its staff.²⁵ Fairhope argues that the Commission is authorized under Section 1.1200(a)

²³Many of the issues that the parties will revisit have been addressed by the Commission recently. See *Adelphia Cable Communications*, 2007 WL 685469 (2007); *Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004) (Commission rejected challenges to the use of 2000 Census data); *MCC Iowa LLC*, 2005 WL 2413517 (2005) (Commission has indicated that it will accept more recent household data that is demonstrated to be reliable); cf. *TCI Cablevision, Inc.*, 10 FCC Rcd 2925-26 (1995) (the Commission held that the City's compilation of housing data was more current than the 1990 Census data, which the City updated by adding new housing units and reducing the new figure based on occupancy rate); *Beach Cable, Inc.*, 11 FCC Rcd 10390, 10396 (1996) (the Commission held that the cable operator properly updated the 1990 Census data by using the Metropolitan Statistical Area growth rate). We have also recently discussed the use of DBS subscriber data furnished by the Satellite Broadcasting and Communications Association ("SCBA"). See *CoxCom Inc., d/b/a Cox Communications Orange County*, 2007 WL 6854831 (2007); *U.S. Cable of Coastal-Texas, L.P.*, 2006 WL 845479 (2006); *MCC Iowa LLC*, 2005 WL 3555454 (2005) (Commission has repeatedly accepted SBCA subscriber reports on behalf of the DBS providers in satisfaction of 47 C.F.R. § 76.907(c) of the Commission's rules); see also *Time Warner Entertainment-Advance Newhouse Partnership*, 2007 WL 654257 (2007) (Commission denied the effective competition petition filed by the cable operator due to zip code plus four data submitted by the local franchising authority that reflected a penetration rate of less than 15 percent).

²⁴See *Alert Cable TV of North Carolina, Inc., d/b/a Time Warner Cable*, 18 FCC Rcd 12848 (2003) (Due to conflicting evidence in the record regarding the zip codes applicable to the franchise area, the Media Bureau requested and the parties agreed to submit a stipulation as to the zip codes encompassing the franchise area.).

²⁵Fairhope Request to Modify Ex Parte Status at 1.

of its rules to modify the ex parte status of a proceeding where the public interest requires or in cable rate proceedings when issues of a general nature are raised.²⁶ Fairhope asserts that the modification of ex parte status is appropriate here because the Bureau still routinely considers 2000 Census occupied household data for purposes of determining DBS penetration rates even though the information is almost six years old and there is uncertainty regarding the type of alternative household occupancy data that can be used.²⁷ In addition, Fairhope asserts there is great concern regarding the evidentiary burden on local franchising authorities to prove the number of occupied households in effective competition cases when Census data is stale.²⁸ Fairhope asserts that other general procedural issues that have important policy implications are the procedures used by Mediacom and other cable operators to determine DBS subscriber penetration in franchise areas, the alleged improper delegation of Commission authority to determine the number of DBS subscribers in a franchise area to private entities such as SBCA and the Media Business Corporation (“MBC”), and the alleged shifting of the burden of proving effective competition from cable operators to local franchising authorities.²⁹ Finally, Fairhope argues that there is a need for a full and fair public review by the Bureau of these issues that involve the administration of the consumer protection provisions of the Cable Television Consumer Protection and Competition Act of 1992.³⁰

10. In opposition, Mediacom argues that the City’s ex parte modification request is untimely since the Bureau has already granted its effective competition Petition which has become final and thus, there is no need to consider Fairhope’s Request.³¹ In addition, Mediacom asserts that the City repeats the same arguments it raised in its opposition to the effective competition Petition and fails to show that any additional proceedings would clarify these issues.³² Finally, Mediacom argues that there is an open rulemaking proceeding in which Fairhope can raise these issues and such issues would more appropriately be addressed in that proceeding.³³

11. We reject the City’s Request to Modify Ex Parte Status of this matter. The City’s arguments regarding the use of 2000 Census and SBCA and MBC information raise issues of general concern that exceed the limits of its Petition for Reconsideration. As Mediacom correctly states, there is an open rulemaking proceeding that is the appropriate forum for raising these issues.³⁴ Accordingly, we deny Fairhope’s Request to Modify Ex Parte Status.

²⁶*Id.* at 3-4.

²⁷*Id.* at 4.

²⁸*Id.*

²⁹*Id.* at 4-5.

³⁰Reply to Opposition to the Request to Modify Ex Parte Status at 1.

³¹Opposition to the Request to Modify Ex Parte Status at 1.

³²*Id.* at 2.

³³*Id.* at 3.

³⁴*Revisions to Cable Television Rate Regulations, Notice of Proposed Rulemaking and Order*, FCC 02-177, 17 FCC Rcd 11550 (2002). Fairhope could make its policy arguments in this proceeding by filing an ex parte presentation.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petition for Reconsideration filed in the captioned proceeding by the City of Fairhope, Alabama **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the parties submit supplemental pleadings in this proceeding for the Media Bureau to conduct a *de novo* review of effective competition in the City of Fairhope, Alabama.

14. **IT IS FURTHER ORDERED** that the request to modify ex parte status filed by the City of Fairhope, Alabama **IS DENIED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Deputy Chief, Media Bureau

³⁵47 C.F.R. § 0.283.