

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

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|-----------------------------------------------|---|------------|
| In the Matter of |) | |
| |) | |
| MCC Iowa LLC |) | CSR 6600-E |
| |) | |
| Petition for Determination of Effective |) | |
| Competition in Galena, Illinois (CUID IL0026) |) | |
| and the following Iowa communities: Asbury |) | |
| (CUID IA0055), Dubuque (CUID IA0011), |) | |
| Epworth (CUID IA0115), Farley (CUID IA0114), |) | |
| Sageville (CUID IA0689) |) | |

MEMORANDUM OPINION AND ORDER

Adopted: July 9, 2007

Released: July 11, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. MCC Iowa LLC (“Mediacom”) has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(2) and 76.907 of the Commission’s rules seeking a finding of effective competition in the franchise areas listed in the above caption.¹ Mediacom alleges that its cable systems serving the franchise areas are subject to effective competition pursuant to Section 623(l)(1)(b) of the Communications Act of 1934, as amended (“Communications Act”)² 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”). The City of Dubuque, Iowa (the “City”) filed an opposition, to which Mediacom replied.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission’s rules.⁴ 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.⁵ Based on the record in this proceeding, Mediacom has met this burden in the franchise areas listed in the above caption.

II. DISCUSSION

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

¹ See 47 C.F.R. §§ 76.7(a)(1); 76.905(b)(2) & 76.907.

² See 47 U.S.C. § 543(a)(1).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

⁵ See 47 C.F.R. §§ 76.906 & 907.

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.⁶ 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.⁷ Mediacom has provided evidence of DirecTV and DISH's comprehensive Internet websites and toll-free phone numbers for ordering DBS service.⁸ 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 was the second largest, and DISH the third largest, MVPD provider during that period.⁹ In view of the DBS growth data described above, and the data discussed below showing that more than 15 percent of the households in the franchise areas are DBS subscribers, we conclude that the populations of the franchise areas 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.

4. With respect to the issue of program comparability, we find that the programming of the DBS firms satisfies the Commission's program comparability criterion because they offer at least 12 channels of video programming, including at least one non-broadcast channel.¹⁰ We find that Mediacom has demonstrated that the franchise areas 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 community.¹¹ Mediacom also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the community; that there exists no regulatory, technical, or other impediments to households within the community taking the services of the DBS providers;¹² and that potential subscribers in the community have been made reasonably aware of the MVPD services of DirecTV and DISH. Accordingly, we find that the first prong of the competing provider test is satisfied.

5. 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. Mediacom states that it is the largest MVPD in the franchise areas.¹³ Mediacom sought to determine the competing provider penetration in the franchise areas by using zip+4 data from the Satellite Broadcasting and Communications Association ("SBCA"), to calculate the DBS firms' subscribership in each franchise area.¹⁴ The SBCA reports showed that 196 DBS subscribers exist in Asbury, 3,712 exist in Dubuque, 154 exist in Epworth, 188 exist in Farley, 14 exist in Sageville and 284 exist in Galena.¹⁵ Mediacom divided these figures by the total number of franchise households from 2000 U.S. Census data.¹⁶ Based on this method and data, Mediacom showed that the competing provider penetration rate in

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

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸ *See* Mediacom Petition at 4.

⁹ *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).

¹⁰ *See* 47 C.F.R. § 76.905(g); *see also* Mediacom Petition at 5-6.

¹¹ Mediacom Petition at 5-6.

¹² *Id.* at 3.

¹³ *Id.* at 6.

¹⁴ *Id.* at 6-7, Exh. E; Erratum at Exhs. A-F.

¹⁵ Petition at 6, Exh. E; Erratum at Exhs. A-F.

¹⁶ Petition at 6, Exh. G. The total number of franchise households for Asbury is 846; Dubuque is 22,560; Epworth is 476; Farley is 491; Sageville is 85; and Galena is 1,570.

Asbury is 23.17 percent, in Dubuque is 16.45 percent, in Epworth is 32.35 percent, in Farley is 38.29 percent, in Sageville is 16.47 percent and in Galena is 18.09 percent.

6. In Opposition, the City states that the Commission should deny Mediacom's petition. First, the City contends that the Commission effectively shifts the burden of proof from the cable operator to the community by accepting SBCA data, which the City contends can only be disputed through intensive factual investigation. Second, the City states that by accepting SBCA data as conclusive, the Commission impermissibly delegates authority to a private entity. Third, it contends that the Commission's imposition of a 29-day response period is insufficient for undertaking the kind of factual investigation that would be necessary to impact the Bureau's decision and therefore denies the City due process. In addition, the City contends that even if DBS attracts more than 15 percent of subscribers, competition from DBS does not lower cable rates.¹⁷ Lastly, the City contends that its physical terrain makes it allegedly impossible for a large number of City residents to receive DBS signals, and therefore cable penetration is, and will continue to remain, unusually high.¹⁸

7. In Reply, Mediacom counters that the Commission did not shift the burden of proof to the City. Instead, Mediacom explains that the City failed to counter the evidence Mediacom offered to rebut the presumption that effective competition does not exist.¹⁹ It also refuted the City's claim that the Commission unlawfully delegated its authority because it states that the Commission does not treat SBCA data as conclusive.²⁰ In addition, Mediacom disputes arguments that the Commission's rules deny the City due process, explaining that the rules provide ample opportunity for a response. In fact, Mediacom states that the Commission's rules provide more time than the Federal Rules of Civil Procedure provide for responding to civil complaints.²¹ It also states that despite the City's arguments, the plain language of Section 623(l)(1)(B) of the Communications Act clearly states that franchise areas in which DBS firms surpass a 15 percent penetration rate (among other requirements of the competing provider test) satisfy the definition of effective competition.²² Lastly, Mediacom argues the City's claims that DBS service fail to reach 50 percent of the City's homes are unsubstantiated.²³

8. We agree with Mediacom that the City's arguments are without merit. As Mediacom stated in its Reply, Mediacom had the burden of proving that effective competition exists in the franchise areas. It met that burden by providing unrefuted evidence that met the requirements of the competing provider test. Second, the City is wrong to conclude that accepting SBCA data means we are delegating our authority to a private entity. The SBCA has not decided the merits of Mediacom's petition, it merely provided industry subscribership data to the cable operator to use in its petition. It is the Commission that assesses the reliability of supporting data and decides whether effective competition exists. With regard to the City's claims that the Commission's timing requirements violate due process, we find that our rules are consistent with the Act and pose no undue hardship on the LFAs. Moreover, the Commission frequently grants extensions of time to file oppositions to LFAs for good cause shown. We also disagree with the City's suggestion that even if a cable operator fulfills the requirements of the competing provider

¹⁷ City of Dubuque Opposition at ii-iii.

¹⁸ Exh. 1, Declaration of Merrill Crawford.

¹⁹ Reply at 2-3.

²⁰ *Id.* at 8.

²¹ *Id.* at 6.

²² That section "states that the competing provider test applies to competition from 'unaffiliated multichannel video programming distributors,' a term that Congress expressly defined to include 'direct broadcast satellite service.'" *Id.* at 9.

²³ *Id.* at 4.

test, a DBS penetration rate of 15 percent does not prove the existence of effective competition. As Mediacom correctly explained, denying the presence of effective competition when the statutory requirements have been met would contradict explicit statutory language. As to the City's claims that its physical terrain prevents DBS firms from attracting more subscribers away from cable, the City offered no specific evidence that more than 50 percent of the households in Dubuque are unable to receive DBS service.

9. The City submitted an additional pleading related to a Commission information request for the stated purpose of helping local franchising authorities ascertain whether Mediacom's data was accurate. In a letter dated February 23, 2007, we asked Mediacom to provide the zip codes that correspond to the DBS subscriber numbers listed in the SBCA Effective Competition Tracking Reports submitted in support of its petition.²⁴ As we noted in the letter, "the exclusion of the zip codes prevents the affected local franchising authorities from ascertaining whether the SBCA data accurately reflects the franchise area and, thus, accurately indicates that the number of DBS subscribers in the franchise area."²⁵ We permitted local franchising authorities to oppose, or supplement existing oppositions, within 50 days from the date of the letter.²⁶ The City contends that we violated our *ex parte* rules by not notifying the City of the request the moment it was sent to Mediacom. The City further contends our rules suggest that for effective competition proceedings, we must make requests for additional information by order, "a public document that would be provided to all parties, giving each a full and fair chance to respond."²⁷ The City also reiterates its position that a 50-day response period provides the City with inadequate time to respond, especially in light of the fact that the response time period began on the date of the letter as opposed to the day Mediacom responded.²⁸ Moreover, the City recommends that the Commission dismiss this filing without prejudice and allow a re-filing, because it contends that the two years that have elapsed since the petition was filed renders the underlying data stale. Lastly, the City requests that the Bureau provide a detailed description of all undisclosed contacts it has made to parties adverse to the City in this proceeding, as well as copies of any written communications with such adverse parties.²⁹

10. We reject the City's requests. First, the February 23rd letter was completely consistent with our *ex parte* rules. An express exemption to the *ex parte* rules permits Commission requests for further information.³⁰ That exemption required only service to Mediacom, and, in turn, required Mediacom to serve the other parties in the matter with the answer. Thus, the City was given proper notice of the letter when Mediacom served the City with its response. The City concedes it received the

²⁴ See Letter from Steven A. Broeckaert, Deputy Chief, Media Bureau Policy Division to Bruce J. Gluckman, Vice President, Legal and Regulatory Affairs, Mediacom Communications Corporation, et al (Feb. 23, 2007) ("February 23rd Letter").

²⁵ See *id.* at 1.

²⁶ See *id.* at 2.

²⁷ Letter from Frederick E. Ellrod, III, Miller and Van Eaton, Counsel to the City of Dubuque, Iowa, to Steven Broeckaert at 2 (Apr. 16, 2007) ("City Letter of April 16, 2007").

²⁸ *Id.* at 3.

²⁹ *Id.*

³⁰ See 47 C.F.R. § 1.1204(a)(10)(ii). Section 1.1204(a)(10)(ii) of the Commission's rules provides that "The following types of presentations are exempt from the prohibitions in restricted proceedings . . . The presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction evidence, or for the resolution of issues, including possible settlement, subject to the following limitations . . . In restricted proceedings not designated for hearing, any new written information elicited from such request . . . shall promptly be served by the person making the presentation on the other parties to the proceeding." *Id.* In fact, the February 23rd Letter expressly directed Mediacom to "Please serve a copy of your supplement and this letter on each of the affected local franchising authorities." February 23rd Letter at 2.

response on March 19, 2007, a full four weeks before the reply deadline.³¹ The City suggests that pursuant to Section 76.907 of the Commission's rules the information request should have been made by order. We disagree. A careful reading of that provision shows that the cited language applies specifically to LEC effective competition proceedings, not the competing provider test for effective competition.³² The City offers no evidence in its letter that refutes Mediacom's data and calculations. Given that the City has provided us with no evidence to reject Mediacom's data, we accept Mediacom's unrefuted evidence.³³

11. Mediacom satisfied the first prong of the competing provider test by demonstrating that the DBS providers offer comparable programming to at least fifty percent of the households in the franchise areas. In addition, Mediacom has satisfied the second part of the competing provider test by establishing that the DBS providers serve at least 15 percent of the households in the franchise areas. Based on the foregoing, we conclude that Mediacom has submitted sufficient evidence demonstrating that its cable systems serving the franchise areas are subject to "competing provider" effective competition.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by MCC IOWA LLC **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certifications of Asbury, Iowa; Dubuque, Iowa; Epworth, Iowa; Farley, Iowa; Sageville, Iowa; and Galena, Illinois to regulate basic cable service rates **ARE REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

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

³¹ City Letter of April 16, 2007 at 2. "The [C]ity received Mediacom's March 13 package on March 19." The Bureau required responses within 50 days of our February 23, 2007 letter. Therefore, the reply deadline was April 14, which was on a Saturday. April 16 was the next business day after that deadline.

³² The City states that 47 C.F.R. 76.907 indicates that "a request by the Commission for additional data in an effective competition proceeding should be by order." City Letter of April 16, 2007 at 2. Presumably, the City is referring to the following language: "In addition, with respect to petitions filed seeking to demonstrate the presence of effective competition pursuant to §76.905(b)(4), the Commission may issue an order directing one or more persons to produce information relevant to the petitions disposition." 47 C.F.R. § 76.907(c). The rule cited, 47 C.F.R. 76.905(b)(4), is used for assessing whether effective competition exists in franchise areas where local exchange carriers provide MVPD service.

³³ We also hereby clarify that the February 23rd Letter was the only communication between Commission staff and Mediacom in this proceeding.

³⁴47 C.F.R. § 0.283.