

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

In the Matter of)	
CoxCom, Inc., d/b/a)	
Cox Communications Gainesville/Ocala)	
)	CSR 6626-E, 6627-E
Petition for Determination of Effective Competition)	
in Five Local Franchise Areas in Florida)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2007

Released: March 1, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers a petition¹ that the cable operator CoxCom, Inc. (“Cox”), filed with the Commission, pursuant to Sections 76.7 and 76.907 of the Commission’s rules,² for a determination that, in five local franchise areas in Florida, it is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (“Communications Act”),³ and is therefore exempt from cable rate regulation. The five areas in question are in two neighboring counties in north inland Florida, Alachua County and Marion County. The specific areas are the City of Gainesville (the “City”), the City of Alachua, unincorporated Alachua County, the City of Ocala, and unincorporated Marion County.

2. No opposition to the petition was filed concerning the City of Alachua or unincorporated Marion County. The County of Alachua and the City of Gainesville filed oppositions,⁴ to which Cox filed replies.⁵ The City of Ocala filed an opposition on May 24, 2005.⁶ Cox filed no reply to that Opposition but, on July 11, withdrew its Petition as to the City of Ocala.⁷ Thus, before us for decision are

¹ Petition for Determination of Effective Competition (“Petition”), filed by CoxCom, Inc. Cox filed two petitions, but they are identical and so for simplicity we will refer to them as one.

² 47 C.F.R. §§ 76.7, 76.907. Cox’s petition does not invoke 47 C.F.R. § 76.905 (“Standards for identification of cable systems subject to effective competition”), but we will treat the petition as if it does.

³ 47 U.S.C. § 543(a)(2).

⁴ Opposition to Petition for Special Relief (“Unincorporated Alachua Opposition”); City of Gainesville’s Opposition to CoxCom, Inc.’s d/b/a/ Cox Communications Gainesville/Ocala Petition for Determination of Effective Competition (“Gainesville Opposition”).

⁵ Reply to Opposition (“Unincorporated Alachua Reply”); Reply to the Opposition of the City of Gainesville, Florida (“Gainesville Reply”).

⁶ City of Ocala’s Opposition to CoxCom, Inc.’s d/b/a/ Cox Communications Gainesville/Ocala Petition for Determination of Effective Competition.

⁷ Letter from Gary S. Lutzker, Counsel for Cox, to Marlene H. Dortch, Commission Secretary, re CSR 6227-E.

requests for findings that effective competition exists in four areas, requests that are opposed as to two (the City of Gainesville and unincorporated Alachua County) and unopposed as to two (the City of Alachua and unincorporated Marion County).

3. After reviewing all the filings, we conclude that Cox has shown that it is subject to competing provider effective competition in unincorporated Alachua County, the City of Alachua, and unincorporated Marion County (the “Communities”). Accordingly, we grant Cox’s petition as to the Communities.⁸ As described in Section II below, we find that unincorporated Alachua County and the City of Gainesville are separate franchise territories for purposes of this decision. Cox has stated that, if we make that finding, it “does not request an independent determination of effective competition for the City of Gainesville.”⁹ Accordingly, we make no finding about effective competition in that City and dismiss Cox’s petition as to it without prejudice.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,¹⁰ as that term is defined by Section 623(l)(1) of the Communications Act¹¹ and Section 76.905 of the Commission’s rules.¹² A cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that it does exist.¹³

II. THE CITY OF GAINESVILLE AND UNINCORPORATED ALACHUA COUNTY

5. A threshold dispute between Cox and the City of Gainesville is whether, for purposes of deciding whether competing provider effective competition exists, we should consider the City and unincorporated Alachua County as one entity alone or as two separate ones. Cox argues that we may and should combine them for that purpose,¹⁴ but the City of Gainesville urges us to consider them separate.¹⁵ Cox appears to concede that it cannot satisfy any criterion for competing provider effective competition in the City alone, although it claims it can in unincorporated Alachua County alone and in a combined area consisting of both the City and unincorporated Alachua County.¹⁶

6. 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.”¹⁷ The Section goes on to allow two other kinds of effective competition to be shown “in the *franchise area*.”¹⁸ Although the statute does mention “a cable system,”¹⁹ its primary focus is on a

⁸ Objective data concerning these four communities is listed in Attachment A.

⁹ Petition at 20 n.71; *see also id.* at 10 n.28.

¹⁰ 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.906.

¹¹ 47 U.S.C. § 543(l)(1).

¹² 47 C.F.R. § 76.905.

¹³ *See* 47 C.F.R. §§ 76.906-07(b).

¹⁴ Petition at 10-20.

¹⁵ Gainesville Opposition *passim*.

¹⁶ *See* Petition at 10 n.28, 20-21.

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

¹⁸ 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”).

¹⁹ 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*).

single franchise area. When we first construed 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.”²⁰

7. 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 franchising authority so desires.²¹ Also, in the context of rate appeals, we have recognized that in some areas franchising authorities have formally merged their powers and created a new, single, multi-franchise area entity that regulates cable rates in the multi-franchise area.²² In these circumstances, our rate appeal decisions apply to the area that is larger than any one franchise area.

8. Cox appears to concede that the City of Gainesville and unincorporated Alachua County do not fit either of these special circumstances.²³ It argues, however, that our decisions show that we are

²⁰ *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation (“First Reconsideration”),* 9 FCC Rcd 1164, 1180 (1993) ¶ 24 (discussing “low penetration” effective competition, 47 U.S.C. § 543(l)(1)(A)) (footnote omitted), *reconsidering* 8 FCC Rcd 5631, 5673 (1993) ¶ 49 (“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 (1996) ¶ 6 (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).

²¹ *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 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 (2002) ¶¶ 2-4 (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 (1999) ¶¶ 4, 6-7 (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 (1996) ¶ 20 (“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 (1995) ¶ 11 (“The record in this case demonstrates that Cecilton has made an affirmative decision to limit its franchise area.”).

²² *See, e.g., Comcast of Minnesota, Inc.*, Order DA 05-3250 at ¶ 1 n.2 (rel. Dec. 21, 2005), available at 2005 WL 3489824; *TKR*, 11 FCC Rcd at 9978 ¶ 11; *ML Media Partners, L.P.*, 11 FCC Rcd 9216 (1996) ¶ 1 n.2.

²³ Petition at 11.

willing to be flexible and consider areas other than single franchise areas in appropriate cases. Cox urges us to show the same willingness and to hold that the City and unincorporated Alachua County are one “franchise area” within the terms of Section 623(l)(1)(B) of the Communications Act for purposes of this case. Cox argues that if we allow a “franchise area” only to contract and not to expand, we will be powerless to consider areas annexed by franchising authorities unless they are described in franchise agreements.²⁴

9. Cox cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁵ and *NCTA v. Gulf Power*²⁶ for the proposition that the Commission has wide discretion in interpreting statutes where the Communications Act is silent or ambiguous and the subject matter is technical, complex, and dynamic.²⁷ These cases appear inapposite, however, because the statutory term “franchise area” is not ambiguous. The dispute between Cox and the City of Gainesville concerns the interpretation of facts, not a statute. Also, despite the parties’ exhaustive factual examination of the cable system that serves the City and unincorporated Alachua County and its regulation, the material facts do not appear to us to be overly difficult to grasp or likely to change significantly as a result of new technology. We accept Cox’s general urging, however, and will examine whether the City of Gainesville and unincorporated Alachua County, in their regulation of cable service, are in fact so thoroughly combined that, for all practical purposes, they are one franchising authority rather than two for purposes of this decision.

10. Cox describes in great detail the joint activities of the City of Gainesville and unincorporated Alachua County: “virtually identical” franchise agreements²⁸ governing a single cable system that has the same management and rates for the two areas;²⁹ joint non-commercial access programming channels;³⁰ Cox contributions to those channels that, for the two areas, add up to round sums (e.g., \$500,000);³¹ the same consultant for franchise agreement negotiations and rate regulation;³² and significant joint regulatory activities concerning rates.³³

11. The City of Gainesville strongly disputes Cox’s claim that the City and unincorporated Alachua County are, in effect, one franchising authority governing one statutory “franchise area.” The City states that it and unincorporated Alachua County are distinct government entities, each with its own Community Unit Identification number (CUID) issued by the Commission.³⁴ Each granted Cox a separate franchise to operate a cable system in a separate area, each of which is exclusive of the other.³⁵ Cox, in its rate forms, specified different Maximum Permitted Rates (MPR) for the City and the unincorporated County,³⁶ and the City and County adopted different MPRs in previous rate orders.³⁷ The

²⁴ Gainesville Reply at 8 n.22.

²⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984).

²⁶ *NCTA v. Gulf Power Co.*, 534 U.S. 327, 338-39 (2002).

²⁷ Petition at 11 & n.30. See also *NCTA v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

²⁸ Petition at 13.

²⁹ *Id.* at 13-14, 18, 20.

³⁰ *Id.* at 14-15.

³¹ *Id.* at 15-16.

³² Petition at 17-18; Gainesville Reply at 15.

³³ Petition at 10, 18-19 (City of Gainesville agreeing not to challenge Cox rate filing unilaterally); Gainesville Reply at 15.

³⁴ Gainesville Opposition at 13.

³⁵ *Id.* at 11-12.

³⁶ *Id.*, Exh. A, City of Gainesville Form 1240 at 2-3, Unincorporated Alachua County Form 1240 at 2-3.

City claims that it and the County each exercises its own, distinct regulatory authority over Cox in its area.³⁸ For example, each issues its own construction permits to Cox for its own area only, the City handles subscriber complaints on its own,³⁹ the City and County impose different tax rates on Cox,⁴⁰ and the City has reviewed Cox's rate filing on its own.⁴¹ The two authorities' franchise agreements, though very similar, are separate agreements and differ in the crucial definition of each franchise area, says the City.⁴² If the two authorities had wanted to have only one franchise area, they would have executed one franchise agreement with Cox instead of two.⁴³ The City might have also noted another difference between itself and the County, namely that they filed separate and substantially different oppositions to Cox's Petition.

12. Cox replies that many of the differences that the City says exist between it and unincorporated Alachua County are immaterial. In Cox's view, that the City and County have separate papers containing virtually identical franchise agreements, formally different rate reviews after which Cox charges identical rates in both areas, different MPRs based on different rates charged in 1993, and different people enforcing one set of customer service standards at one facility⁴⁴ are all immaterial to the central fact. That fact, Cox argues, is "the interdependent administration of the franchise by the City and County."⁴⁵

13. After weighing all these arguments, we conclude that the City of Gainesville and unincorporated Alachua County are two separate franchise areas for purposes of measuring effective competition. We are guided, however, by Section 623(l)(1)(B) of the Communications Act, which directs us to measure competitive penetration "in the *franchise area*,"⁴⁶ not in the larger area served by an optimally efficient cable system, in an area having common demographic characteristics or competitive penetration, or in an area drawn according to some other criteria. There is no doubt that Cox's cable system spans two different franchise areas, each governed by a different government entity that has a separate CUID number and has a separate franchise agreement with Cox concerning a mutually exclusive

(...continued from previous page)

³⁷ Gainesville Opposition at 15-16, citing Petition, Exh. 18 (City of Gainesville, FL, Resolution No. 031227) at 1, Exh. 19 (Alachua County Board of County Comm'rs Resolution No. 04-38) at 2. Both these resolutions were later rescinded, Petition, Exhs. 20-21.

³⁸ Gainesville Opposition at 11-12; *id.*, Exh. B (Affidavit of Ronald D. Combs, Senior Ass't City Att'y for the City of Gainesville) ("Combs Affidavit") at ¶¶ 7-9; *see also* Unincorporated Alachua Opposition at 5 n.2 ("the County does not concede that the two franchising authorities act as a single franchising authority on this or any other matter.").

Cox disparages the Combs Affidavit based on the Commission's criticisms of self-serving statements in *EchoStar Commun. Corp.*, 17 FCC Rcd. 20559, 20649 (2002) ¶ 239. The statements criticized in *EchoStar* were predictions of the declarant's future behavior under hypothetical conditions. Mr. Comb's Affidavit, on the contrary, describes recent and present events of which he has direct, personal knowledge.

³⁹ Gainesville Opposition at 16; Combs Affidavit, *supra* n.41, at ¶¶ 9-10.

⁴⁰ Gainesville Opposition at 17.

⁴¹ Combs Affidavit, *supra* n.41, at ¶ 8.

⁴² Gainesville Opposition at 11-13.

⁴³ Combs Affidavit, *supra* n.41, at ¶ 5.

⁴⁴ Gainesville Reply at 13-19.

⁴⁵ Gainesville Reply at 15; *see also id.* at 17 ("the City's lack of autonomy in regulating Cox's rates and the general interdependence of the City and County in administering their jointly negotiated franchise.").

⁴⁶ 47 U.S.C. § 543(l)(1)(B) (*italics added*).

territory. These are the crucial facts in this case.⁴⁷

14. Cox's strongest argument for treating the City and County as one for present purposes is the large amount of cooperative regulation of Cox in which they have engaged. These activities, however, appear designed to enable each government to achieve efficiencies and economies in activities that both perform. We see no sign that, in so doing, either unit, intentionally or not, yielded any authority to the other. The City of Gainesville and Alachua County have not merged and been assigned one CUID number.⁴⁸ Neither has annexed the other, and they have not created a new, multi-area authority and yielded to it irretrievably their individual identities or authorities.⁴⁹ It is our policy to encourage the kind of efficient, economic cooperative activity that the City and County have undertaken.⁵⁰ We are reluctant to hold that if they do so, each may unwittingly lose its independent existence and authority.

15. It is true, as Cox details, that direct broadcast satellite ("DBS") service has grown to significant proportions in recent years.⁵¹ This fact, however, does not allow us to disregard the Communications Act or ignore the separate identities of the City of Gainesville and unincorporated Alachua County. Accordingly, for purposes of measuring competing provider effective competition in those two territories, we consider each of them to be a separate "franchise area" within the terms of Section 623(l)(1)(B) of the Communications Act.

III. COMPETING PROVIDER EFFECTIVE COMPETITION IN THE COMMUNITIES

A. Competing MVPDs

16. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multichannel video programming distributors ("MVPDs") 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 fifteen percent of the

⁴⁷ See *TKR*, 11 FCC Rcd at 9982 ¶¶ 21-22 (at ¶ 21; "The fact that two other . . . municipalities . . . have already approved separate franchise agreements with TKR is further evidence that the political units comprising Boone County have the authority and autonomy to grant distinct franchises."); *Prime Cable of Chicago, Inc.*, 10 FCC Rcd 10032, 10036 (1995) ¶ 14 (refusing to combine two franchise areas to determine effective competition because there were separate franchises, even though granted by one city), *reconsidering* 9 FCC Rcd 6848 (1994); *Tel-Com, Inc.*, 10 FCC Rcd 2114, 2115 (1995) ¶ 8 ("Tel-Com points to nothing in the 1992 Cable Act or our rules that indicates that either Congress or the Commission intended or contemplated that a cable operator could claim effective competition across franchise area lines."); *Summit Communications, Inc.*, 9 FCC Rcd 4833, 4834 (1994) ¶ 8.

⁴⁸ See *TKR*, 11 FCC Rcd at 9982 ¶ 21 ("The Commission's assignment of different community unit identification (CUID) numbers for each franchise area at issue here further supports" the conclusion "that the political units comprising Boone County have the authority and autonomy to grant distinct franchises. . . . These points make it difficult to conclude that unincorporated Boone County and the City of Florence are one franchise area.").

⁴⁹ *TKR*, 11 FCC Rcd at 9982-83 ¶ 22, describes franchising authorities' joint activities as being

"designed to produce administrative efficiency . . . allowing local political units to conserve human resources . . . and reduce task redundancy, and . . . eliminating unnecessary and duplicative filings We do not find that [these activities], in this particular instance, turn[] all of incorporated and unincorporated Boone County into one franchise area, nor do they act to bind the City of Florence with the unincorporated area of Boone County under the effective competition analysis."

⁵⁰ See 47 U.S.C. § 543(b)(5)(B) ("The regulations prescribed by the Commission . . . shall include . . . procedures for the expeditious resolution of disputes between cable operators and franchise authorities").

⁵¹ Petition at 5; Gainesville Reply at 1-4.

households in the franchise area.⁵² Turning to the first prong of this test, the DBS service of DirecTV, Inc. (“DirecTV”), and DISH Network (“DISH”) 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.⁵³ Neither DirecTV nor DISH is affiliated with the other or with Cox. 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.⁵⁴ The two DBS providers are physically able to offer MVPD service to subscribers in the Communities. There exist no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and potential subscribers in the Communities have been made reasonably aware of the DBS services of DirecTV and DISH. Based on these conclusions and the data discussed below showing that more than 15 percent of the households in the Communities are DBS subscribers, we conclude that the population of the Communities may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.

17. Cox claims that an unaffiliated company named Florida Cable, Inc., “provides service” to a small number of households in the City of Gainesville and unincorporated Alachua County.⁵⁵ It appears, however, that Florida Cable, Inc.’s subscribers are all located in the City of Gainesville, as to which, at Cox’s request, we are dismissing the petition without prejudice.⁵⁶ Accordingly, we will not discuss this company further.

18. Cox claims, and no party disputes, that the programming of the DBS providers is comparable to its own.⁵⁷ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because they offer substantially more than 12 channels of video programming, including at least one non-broadcast channel.⁵⁸ In sum, we conclude 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 each Community. Therefore, the first prong of the competing provider test is satisfied in the Communities.

B. Competing MVPD Penetration

19. 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.⁵⁹

20. Cox’s Data. Cox sought to prove the penetration of itself and the other MVPDs (chiefly, the DBS providers DirecTV and DISH) in the Communities. It made a list of all the residential five-digit

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

⁵³ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁵⁴ *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).

⁵⁵ Petition at 3-4 & Exh. 8 (“Florida Cable Subscribers”).

⁵⁶ According to Cox’s evidence, Florida Cable, Inc., serves fewer than 1,000 customers, all in the City of Gainesville and, even in Cox’s hypothetical franchise area of unincorporated Alachua County and the City of Gainesville, its share of households is only 1.22%. Petition at 4; *id.*, Exh. 8, *supra* n.58.

⁵⁷ Petition at 4.

⁵⁸ *See* 47 C.F.R. § 76.905(g).

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

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 and other satellite⁶⁰ 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.⁶¹ 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. Cox thus produced an estimate of the number of DBS subscribers in the Community. Finally, Cox divided this estimate into the total number of households in the Community, which produced Cox’s estimate of DBS penetration in the Community.⁶² These calculations appear the same as or similar to ones that the Commission found reasonable in several recent decisions,⁶³ and no party challenges them except as described below. Cox’s estimates of DBS penetration are as follows: in unincorporated Alachua County, 19.3849 percent;⁶⁴ in the City of Alachua, 45.18 percent; and, in unincorporated Marion County, 37.36 percent.⁶⁵

21. Cox also claims that an unaffiliated company named Bright House Networks (“Bright House”) is a franchised cable operator in unincorporated Marion County, where it serves 21.27 percent of the households.⁶⁶ No party disputes this claim, we see no reason to doubt it, and we accept it as true for purposes of this decision. This would increase the estimate of the penetration of MVPDs other than Cox in unincorporated Marion County to 58.63 percent.

22. Unincorporated Alachua County. Cox asserts that it is the largest MVPD in unincorporated Alachua County.⁶⁷ Cox supports this assertion with data.⁶⁸ No party disputes the data, and we accept them. Accordingly, the other MVPDs in unincorporated Alachua County are the DBS providers. Their penetration exceeds 15 percent of the households in the franchise area. Accordingly, Cox has shown competing provider effective competition in unincorporated Alachua County if its estimate of DBS penetration is accurate.

23. Alachua County, however, challenges Cox’s estimate of DBS penetration, proposing three downward revisions to it. The County claims that if its proposed revisions are made, then DBS

⁶⁰ The Petition appears to use the term “DBS” sometimes to refer to only DirecTV and DISH and at other times to include home or large satellite dish service. *Compare* Petition at 6 *with id.* at 7-8; *cf.* Unincorporated Alachua Reply, Exh. 1 (“Agreement for Provision and Use of Confidential Data”) at 3 (definition of “data”).

⁶¹ The Petition appears to use the terms “household” and “occupied household” interchangeably, and we assume it intends to do so. *Compare* Petition at 3 (discussing statutory test in terms of “households”) *with id.* at 9 (applying same test in terms of “occupied households”). Under our rules, “households” are by definition occupied. 47 C.F.R. § 76.905(c); *Bright House Networks, LLC*, DA 05-2850 at ¶ 10 n.40 (rel. Oct. 28, 2005), available at 2005 WL 2838916; *Marcus Cable Associates, LLC*, 17 FCC Rcd. 16652, 16654 (2002) ¶ 7 n.19, *reconsideration denied*, 18 FCC Rcd 9649, 9651 (2003) ¶ 6.

⁶² Petition at 7-8 & Exhs. 1-6.

⁶³ *See Time Warner-Advance/Newhouse Partnership*, 20 FCC Rcd 5225, 5227 (2005) ¶ 7; *Cable One, Inc.*, 20 FCC Rcd 4991, 4993 (2005) ¶ 4; *Amzak Cable Midwest, Inc.*, 19 FCC Rcd 6208, 6210 (2004) ¶ 6; *CC VIII Operating, LLC*, 19 FCC Rcd 6204, 6205-06 (2004) ¶ 4; *Texas Cable Partners, L.P.*, 19 FCC Rcd 6213, 6215 (2004) ¶ 7.

⁶⁴ Petition at 20-21.

⁶⁵ Petition at 3, 9 & Exhs. 3-4.

⁶⁶ Petition at 3-4 & n.8 & Exh. 7 (“Brighthouse [sic] Cable Subscribers”).

⁶⁷ Lutzker Letter, *supra* n.4, at 1 & Addendum; *cf.* Petition at 9.

⁶⁸ See Attachment A hereto.

penetration in unincorporated Alachua County falls below the statutory minimum.⁶⁹

24. First, the County argues that, of the 18 zip codes Cox has assigned unincorporated Alachua County, four have fewer than 20 percent of their addresses in the County and therefore cannot reasonably be assigned to it.⁷⁰ The County cites *Falcon Cable Systems Co., II*, where we found competing provider effective competition based on only zip codes whose geographic center was within the franchise area.⁷¹ That decision merely allowed such a showing, however. It did not require it. As noted in paragraph 20 above, Cox's calculations in this case appear the same as ones that the Commission found reasonable in several recent decisions, including calculations of how many DBS subscribers to include for zip codes that lie partly within franchise areas. Accordingly, we do not find Cox's calculations to be flawed on this ground.

25. Second, Alachua County points out that, for another zip code (32631), Cox has estimated zero households but 90 DBS subscribers.⁷² Apparently, no population or household data for this zip code are available from the Census Bureau.⁷³ Alachua County proposes that this zip code and its 90 DBS subscribers be excluded from any numerical estimates in this case.⁷⁴ Cox responds that zip code 32631 is, in fact, in unincorporated Alachua County.⁷⁵ Cox speculates that the zip code was created after the 2000 Census and that that Census accounted for its then-inhabitants in another zip code out of which the zip code 32631 was later created.⁷⁶ We find that Cox has not sustained its burden of proof on this issue. Cox should have given a more factual explanation than the speculation provided.⁷⁷ Even after deducting 90 DBS subscribers from Cox's estimates, however, DBS penetration in unincorporated Alachua County remains well above the statutory minimum.

26. Third, Alachua County claims that our past decisions have reduced DBS subscriber numbers by 15 percent to reflect the imprecision of five-digit zip codes compared to nine-digit ones, the number of "dual households" (ones subscribing to both cable and DBS service), and the commercial and test accounts of DBS providers.⁷⁸ The Commission has accepted showings of competing provider effective competition based on five-digit zip codes.⁷⁹ The Commission has also concluded that the competing provider test does not require the exclusion of dual households from the number of households subscribing to competing MVPDs.⁸⁰ Finally, the DBS penetration estimates that Cox obtained from

⁶⁹ Unincorporated Alachua Opposition at 5 & n.3

⁷⁰ *Id.* at 2-3.

⁷¹ *Falcon Cable Systems Co. II*, 17 FCC Rcd 4648, 4650-51 (2002) ¶ 7.

⁷² Unincorporated Alachua Opposition at 3-4.

⁷³ Petition, Exh. 2 (Zip Code and DBS Subscriber Allocation for Alachua County/Gainesville, Alachua City, Marion County, and Ocala City) at 1.

⁷⁴ Unincorporated Alachua Opposition at 4.

⁷⁵ *Id.*, Exh. B ("Map of Alachua County Municipalities & Zip Codes").

⁷⁶ Unincorporated Alachua Reply at 6.

⁷⁷ See, e.g., *Falcon Community Ventures I, L.P.*, 13 FCC Rcd 21762, 21767-68 (1998) ¶¶ 14-15.

⁷⁸ Unincorporated Alachua Opposition at 4-5, citing, e.g., *Time Warner Entertainment Co.*, 18 FCC Rcd 13043, 13044-45 (2003) ¶ 5.

⁷⁹ See, e.g., *Comcast Cable Commun., Inc.*, DA 05-3328 at ¶ 10 (rel. Dec. 28, 2005), available 2005 WL 3543449; *Charter Communications, Inc.*, 19 FCC Rcd 6878, 6881 (2004) ¶¶ 10-11; *Texas Cable Partners, L.P.*, 19 FCC Rcd 6213, 6215 (2004) ¶ 8.

⁸⁰ *Adelphia Cable Communications*, DA 05-3337 at ¶ 14 (rel. Dec. 29, 2005), available at 2005 WL 3555457; *Mediacom Minnesota LLC*, 20 FCC Rcd 4984, 4988 (2005) ¶ 13.

SBCA exclude commercial and test accounts.⁸¹ Accordingly, we will accept Cox's SBCA penetration data against these claims.

27. We conclude that Alachua County presents no reliable basis to disbelieve Cox's evidence that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in unincorporated Alachua County. Therefore, the second prong of the competing provider test is satisfied. Accordingly, based upon the aggregate subscriber penetration levels and Census household data reflected in Attachment A.I, Cox has shown competing provider effective competition in unincorporated Alachua County.

28. The City of Alachua. Cox asserts that it is the largest MVPD in the City of Alachua.⁸² Cox supports this assertion with data,⁸³ no party disputes it, and we accept it. The DBS providers' penetration exceeds 15 percent of the households in those areas.⁸⁴ Accordingly, based upon the aggregate subscriber penetration levels and Census household data reflected in Attachment A.I, Cox has shown competing provider effective competition in the City of Alachua.

29. Unincorporated Marion County. According to Cox's data, among households in unincorporated Marion County its penetration rate is 16.6 percent;⁸⁵ the DBS providers' is 37.36 percent;⁸⁶ and Bright House's is 21.27 percent.⁸⁷ No party disputes this data and we accept it. Because Cox does not know the individual penetration rates of each of the DBS providers, Cox is unable to state which is the largest MVPD in unincorporated Marion County. If Bright House is the largest MVPD in the area, however, then the other MVPDs' penetration surpasses the 15 percent penetration threshold of the second prong of the competing provider test. Conversely, if one of the other MVPDs is the largest, then the combined MVPD penetration of the other MVPDs clearly surpasses the 15 percent threshold. Based on this data, Cox 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 area. Accordingly, based upon the aggregate subscriber penetration levels and Census household data reflected in Attachment A.I, Cox has shown competing provider effective competition in unincorporated Marion County.⁸⁸

IV. ORDERING CLAUSES

30. Accordingly, **IT IS ORDERED** that the petition filed by CoxCom, Inc., for a determination of effective competition in the City of Alachua, unincorporated Alachua County, and unincorporated Marion County **IS GRANTED**.

⁸¹ Unincorporated Alachua Reply at 7, citing *id.*, Exh. 1, *supra* n.63, at 3 ("Commercial and test accounts are not included"), 14 (same).

⁸² Lutzker Letter, *supra* n.4, at 1 & Addendum; *cf.* Petition at 9.

⁸³ See Attachment A hereto.

⁸⁴ See *supra* ¶ 20.

⁸⁵ Lutzker Letter, *supra* n.4, at 2.

⁸⁶ Petition at 9 & Exh. 4 ("Competitor Allocation & Penetration Calculation & Census Data for Marion County, Florida").

⁸⁷ Petition at 4, 9, & Exh. 4, *supra* n.89. We presume that the remaining households in unincorporated Marion County (approximately 25% of the total) either use traditional broadcast television or no television.

⁸⁸ Because Cox has demonstrated that it is subject to competing provider effective competition in unincorporated Marion County, we need not address its alternative low penetration effective competition claim.

31. **IT IS FURTHER ORDERED** that the petition filed by CoxCom, Inc., for a determination of effective competition in the City of Gainesville **IS DISMISSED WITHOUT PREJUDICE**.

32. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to the City of Alachua, unincorporated Alachua County, and unincorporated Marion County **ARE REVOKED**.

33. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁸⁹

FEDERAL COMMUNICATIONS COMMISSION

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

⁸⁹ 47 C.F.R. § 0.283.

Attachment A**CoxCom, Inc.****I. Competing Provider Effective Competition**

Communities	CUID	CPR*	2000 Census Households+	Non-Cox Subscribers+
City of Alachua	FL1249	45.19%**	2348	1061
Unincorporated Alachua County	FL0340	20.11%**	43412	8731
Unincorporated Marion County	FL0160	58.63%	85129	49915

* CPR = DBS penetration or subscribership

+ See Cable Operator Petition & Lutzker Letter

** Minor corrections to Petitioner's data