

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

In the Matter of	)	
	)	
CoxCom, Inc., d/b/a	)	
Cox Communications Northern Virginia	)	CSR 6957-E
	)	
Petition for Determination of Effective Competition	)	
in Fairfax County, Virginia	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 1, 2007**

**Released: March 5, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. This Order considers a petition<sup>1</sup> that the cable operator CoxCom, Inc., d/b/a/ Cox Communications Northern Virginia (“Cox”), filed with the Commission pursuant to Sections 76.7 and 76.907 of the Commission’s rules.<sup>2</sup> The Petition seeks a determination that, in its several local franchise areas in Fairfax County, Virginia, it is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (“Communications Act”),<sup>3</sup> and is therefore exempt from cable rate regulation. In Fairfax County, a Virginia suburb of Washington, D.C., Cox has several franchises to provide cable service. Cox’s franchises cover the City of Fairfax (“Fairfax City”), the City of Falls Church (“Falls Church”), the Town of Herndon (“Herndon”), the Town of Vienna (“Vienna”), and unincorporated Fairfax County (which, for present purposes, includes the Town of Clifton, excludes the Reston franchise area,<sup>4</sup> and will be referred to as “unincorporated Fairfax County”).<sup>5</sup> These locales will be referred to collectively as the “Communities.”

2. No opposition to the Cox’s petition was filed. After reviewing Cox’s filing, we conclude that it has shown that it is subject to competing provider effective competition in each of the Communities. Accordingly, we grant Cox’s petition as to the Communities.<sup>6</sup>

<sup>1</sup> Petition for Determination of Effective Competition (“Petition”), filed by CoxCom, Inc., Nov. 29, 2005.

<sup>2</sup> 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.

<sup>3</sup> 47 U.S.C. § 543(a)(2).

<sup>4</sup> See Petition at 1-2 n.1.

<sup>5</sup> *Id.* at 1-2 & nn.1-2, 9 n.33. One part of Fairfax County, which Cox calls “the Reston franchise area,” is served by Comcast of Virginia, Inc., not by Cox. *Id.* at 1-2 n.1.

<sup>6</sup> Objective data concerning the Communities is listed in Attachment A. Cox has requested that we treat as confidential certain data that was supplied by its competitor Starpower and that shows Starpower’s activity in Falls Church. Petition at 5 n.16, Exh. 6. Businesses typically protect such data from disclosure, and no one has objected (continued....)

3. Pursuant to Section 623(1) of the Act and Section 76.905 of the Commission's rules,<sup>7</sup> it is presumed that cable systems do not face effective competition absent a demonstration to the contrary.<sup>8</sup> Consequently, the cable operator bears the burden of rebutting the presumption that effective competition does not exist by producing evidence that shows effective competition is present within the relevant franchise area.<sup>9</sup>

## II. COMPETING PROVIDER EFFECTIVE COMPETITION

### A. Competing MVPDs

4. 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 households in the franchise area.<sup>10</sup> Turning to the first prong of this test, the Direct Broadcast Satellite ("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.<sup>11</sup> Neither DirecTV nor DISH is affiliated with the other or with Cox.<sup>12</sup> 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.<sup>13</sup> Because the two DBS providers have nationwide footprints and serve well over 20 percent of all MVPD subscribers nationwide, we believe that the Communities are within their satellite footprints. Moreover, Cox has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities.<sup>14</sup>

5. 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

(...continued from previous page)

to their confidential treatment. Accordingly, we grant Cox's request. We believe that by combining Starpower's Falls Church subscriber figures with the direct broadcast satellite figures provided by the Satellite Broadcasting and Communications Association for Falls Church, we will sufficiently protect the confidentiality of Starpower's subscriber figures. We reserve the right, if another party requests access to the confidential data, to engage in a more formal process for their evaluation, protection, and limited disclosure. *See, e.g., Adelpia Commun. Corp.*, Order DA 05-3226 (rel. Dec. 21, 2005), available at 2005 WL 3489835; *Sprint Petition for Pricing Flexibility for Special Access & Dedicated Transport Services*, Protective Order DA 05-3188 (rel. Dec. 15, 2005), available at 2005 WL 3439243.

<sup>7</sup> See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

<sup>8</sup> 47 C.F.R. § 76.906.

<sup>9</sup> See 47 C.F.R. §§ 76.906 to .907.

<sup>10</sup> 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>11</sup> *See Bright House Networks, LLC*, Memorandum Opinion & Order DA 05-2511 at ¶ 3 (rel. Sept. 27, 2005), available at 2005 WL 2373721.

<sup>12</sup> *See* Petition at 4, 6.

<sup>13</sup> *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2503, 2758, ¶ 6, 2760, ¶ 13, 2793-94, ¶¶ 72-73 (2006).

<sup>14</sup> Petition, Exh. 11.

conclusions and the data discussed below showing that more than 15 percent of the households are DBS subscribers in all but one of the Communities, 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.

6. Cox also claims that, in some or all of Fairfax County's franchise areas, there are other MVPDs. Cox claims that each of them is unaffiliated with the others and with Cox,<sup>15</sup> and that each offers video programming that is comparable to Cox's. They are Starpower Communications, LLC ("Starpower"), in Falls Church;<sup>16</sup> two Satellite Master Antenna Television ("SMATV") providers (Washington Cable Systems, Inc., and TeleMedia Communications, Inc.) in unincorporated Fairfax County;<sup>17</sup> and a recent entrant, the incumbent LEC Verizon, in Herndon.<sup>18</sup>

7. Cox shows in detail that the programming of each of these competing MVPDs includes substantially more than 12 channels of video programming, including at least one non-broadcast channel,<sup>19</sup> and is therefore comparable to Cox's own programming.<sup>20</sup> In sum, we conclude that the Communities are served by at least two unaffiliated MVPDs, most notably the two DBS providers, each of which offers comparable video programming, and that the two DBS providers do so 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 MVPDs' Penetration**

8. The second prong of the competing provider test requires that the number of households subscribing to MVPDs other than the largest one exceeds 15 percent of the households in a franchise area.<sup>21</sup> Cox asserts that it is the largest MVPD in each of the Communities.<sup>22</sup>

9. Cox's Data. Cox sought to prove the penetration of itself and the other MVPDs in each of the Communities. For the DBS providers,<sup>23</sup> 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 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

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<sup>15</sup> *Id.* at 6, 12.

<sup>16</sup> Petition at iii, 3, 5, 12-20, Exhs. 10, 12, 23. We have repeatedly found that Starpower affiliates are MVPDs. *See, e.g., MediaOne of Massachusetts, Inc.*, 18 FCC Rcd 58, 59-60 (2003) ¶¶ 5-8; *Paragon Comm., Inc.*, 17 FCC Rcd 27866, 27867-68 (2002) ¶¶ 6-8; *AT&T CSC, Inc.*, 17 FCC Rcd 24638, 24639-40 (2002) ¶¶ 5-8.

<sup>17</sup> Petition at 6, 8, Exhs. 7, 8, 12. SMATVs are specifically included in our definition of MVPDs, 47 C.F.R. § 76.905(d) ("A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, . . . a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.").

<sup>18</sup> Petition at ii-iii, 3, 20-24.

<sup>19</sup> *See* 47 C.F.R. § 76.905(g).

<sup>20</sup> Petition at 4-6, Exhs. 7-11, 25; *see also infra* ¶¶ 14, 16.

<sup>21</sup> 47 U.S.C. § 543(1)(1)(B)(ii); *see also* 47 C.F.R. § 76.905(b)(2)(ii).

<sup>22</sup> Petition at 9.

<sup>23</sup> 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. *See* Petition at 10. We assume that, whichever meaning the Petition intends in each use, there is no significant difference from the other.

Community.<sup>24</sup> 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 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.<sup>25</sup> This methodology appears the same as ones that the Commission found reliable in several recent decisions.<sup>26</sup>

10. Cox's estimates of DBS penetration are as follows: in Fairfax City, 20.24 percent; in Falls Church, not in excess of 15 percent; in Herndon, 35.55 percent;<sup>27</sup> in Vienna, 18.77 percent; and, in unincorporated Fairfax County, 22.07 percent. Cox also was told by the two SMATV providers that they have a total of 818 subscribers in unincorporated Fairfax County, which raises MVPD penetration there to 23.34 percent.<sup>28</sup> These percentages satisfy the second prong of the competitive provider test in each Community where Cox is the largest MVPD, except for Falls Church. Cox supplied us with data concerning the subscribers to the MVPD services of Starpower in Falls Church, which raises total MVPD penetration there to in excess of 15 percent. Accordingly, Cox has shown that it is subject to competing provider effective competition in each of the Communities.<sup>29</sup>

### III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition filed by CoxCom, Inc., for a determination of effective competition in the City of Fairfax, the City of Falls Church, the Town of Herndon, the Town of Vienna, and unincorporated Fairfax County,<sup>30</sup> all in the Commonwealth of Virginia, **IS GRANTED**

12. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to the City of Fairfax, the City of Falls Church, the Town of Herndon, the Town of Vienna, and Fairfax County for unincorporated Fairfax County, all in the Commonwealth of Virginia, **ARE REVOKED**.

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<sup>24</sup> The Petition appears to use the terms "household" and "occupied household" interchangeably, and we assume it intends to do so. See Petition at 4. Under our rules, "households" are by definition occupied. 47 C.F.R. § 76.905(c); *Bright House Networks, LLC*, Memorandum Opinion & Order 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.

<sup>25</sup> Petition at 9-10, Exhs. 13-22.

<sup>26</sup> 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.

<sup>27</sup> Cox supplied no estimate of the number of subscribers to Verizon's cable service in Herndon.

<sup>28</sup> Petition at iii, 11-12 & n.45, Exhs. 17-22 (competitor penetration data for the Communities). The SMATV Washington Cable provides 42 channels of video programming and the SMATV TeleMedia provides 55. Petition at 6, Exhs. 7, 8. Marketing materials for these SMATV providers are in Exhibit 12 to the Petition.

<sup>29</sup> Because we find Cox subject to competing provider competition in each of the Communities, we need not address Cox's alternative claims of LEC effective competition in Falls Church and Herndon.

<sup>30</sup> See *supra* ¶ 1 & n.4.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>31</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>31</sup> 47 C.F.R. § 0.283.

## Attachment A

## CoxCom, Inc.

## Competing Provider Effective Competition

Communities	CUID	CPR*	2000 Census Households+	Non-Cox Subscribers+
Fairfax City	VA0326	20.24%	8,035	1,626
Falls Church	VA0327	24.47%	4,471	444
Herndon	VA0346	35.55%	6,962	2,475
Vienna	VA0318	18.77%	5,331	1,000
Unincorporated Fairfax County	VA0301 VA0630	22.34%	302,595	67,607

\* CPR = DBS penetration or subscribership

+ See Cable Operator Petition