

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

In the Matter of)	
)	
Mediacom Southeast LLC)	CSR 6834-E
)	
Petition for Determination of Effective)	
Competition in Various North Carolina)	
Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 2008

Released: June 25, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Mediacom Southeast LLC, hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(1) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(A) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because Petitioner serves fewer than 30 percent of the households in the franchise area. The petition is opposed by Bertie County (“Bertie” or “County”).³

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁵ 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.⁶ For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.⁷

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(1).

³Mediacom filed a Motion for Leave and Extension of Pleading Cycle to submit an attachment that was omitted from Mediacom’s Reply to Opposition due to an alleged clerical error. Mediacom’s Motion for an Extension of Time is granted. Bertie County filed a Response to Mediacom’s Reply to Opposition and Mediacom filed a Motion to Strike it. Mediacom’s Motion to Strike Bertie County’s Response to Mediacom’s Reply to Opposition is granted because it was outside of the pleading cycle.

⁴47 C.F.R. § 76.906.

⁵See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷Mediacom alternatively claims that it was subject to effective competition under the competing provider test. Because Mediacom has established that it is subject to effective competition under the low penetration test, we do not reach the issue of whether it has satisfied the competing provider test.

II. DISCUSSION

3. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.⁸ Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.

4. In opposition, Bertie argues that Mediacom fails the low penetration effective competition test because it serves more than 30 percent of its “redefined franchise area.”⁹ Pursuant to Mediacom’s Bertie County cable franchise agreement, the designated franchise area is all of unincorporated Bertie County. However, the franchise requires only that Mediacom provide cable service in areas with a household density of 20 homes-per-miles or greater.¹⁰ Bertie states that these conditions allow Mediacom to limit its cable obligations to a very small portion of the County as well as to charge higher installation rates for cable service in low density areas.¹¹ In addition, Bertie notes that subscribers in low density areas are required to pay for the cost of installing the cable, a one-time per home fee, and low density fees.¹² The County concedes that Mediacom is not required to service areas with less than 20 homes per miles.¹³ Bertie asserts that lacking data from Mediacom, its consultant has calculated that Mediacom’s cable plant passes only 17 percent of the occupied homes in the County.¹⁴ Further, Bertie argues that only households that are passed by both Mediacom and another MVPD should be used to calculate Mediacom’s penetration rate. Bertie submits as evidence a street map which it claims Mediacom provided the County which indicates that Mediacom’s cable system traverses the unincorporated portions of the County to connect to and serve the denser populations of the County’s incorporated areas.¹⁵ According to Bertie, Mediacom has affirmatively chosen to serve only 17 percent of the homes in the County, and thus, Mediacom is actually serving about 50 percent of its self-redefined franchise area – significantly above the 30 percent threshold of the low penetration test.¹⁶ Bertie argues that the Commission has previously held in *C-TEC Cable Systems of Michigan, Inc.*,¹⁷ that parts of the cable operator’s franchise area will not be considered when a cable system has elected not to serve those parts of the franchise area.¹⁸ Bertie concludes that Mediacom has redefined its franchise area because it is past its early construction stage, has served the County for eight years, and fails to serve the entire franchise area.¹⁹

5. In reply, Mediacom argues that it has not redefined its franchise area. Mediacom initially notes that its franchise agreement has a homes-per-mile threshold that triggers Mediacom’s build-out requirement.²⁰ According to Mediacom, the Commission has stated that a franchise area is not redefined because the cable

⁸47 U.S.C. § 543(l)(1)(A).

⁹Opposition at 6. In clarifying its definition of “franchise area” for purposes of determining effective competition, the Commission stated that generally “[a] franchise area is the area a system operator is granted authority to serve in its franchise.” *First Order On Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, 9 FCC Rcd 1164, 1180 (1994) (“*First Order on Recon.*”). The Commission stated, however, that a more restricted definition of “franchise area” may be more appropriate under limited circumstances, such as when an 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.” *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an “affirmative decision . . . to restrict service.” *Id.*

¹⁰*Id.* at 9.

¹¹*Id.*

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.* at 8.

¹⁶*Id.*

¹⁷10 FCC Rcd 1028, ¶ 6 (CSB 1995).

¹⁸Opposition at 6.

¹⁹*Id.* at 9-10.

²⁰*Id.*

operator has not completed construction throughout the entire franchise area.²¹ Mediacom asserts that Bertie has presented no specific evidence that it has affirmatively redefined its franchise area and the Commission has never held that the cable operator's failure to build-out its entire franchise area would result in a finding that the franchise area has been redefined.²² Moreover, Mediacom asserts that the franchise area has not been redefined just because Mediacom has not voluntarily built out in areas where the homes-per-mile requirement is not triggered. Mediacom argues that the *C-TEC* decision relied on by Bertie is factually distinguishable, since that franchise was expressly limited to areas where the cable operator provided service, whereas Mediacom is required to extend service to new subscribers as long as the extension needed to do so would pass the requisite 20 homes-per-mile and the extension is contiguous to Mediacom's existing cable plant.²³ Thus, Mediacom asserts that a finding of franchise area redefinition is not appropriate given the instant facts and that it has satisfied the low penetration test for effective competition.

6. We agree with Mediacom that it has not redefined its franchise area. Both Bertie and Mediacom agree that the franchise agreement specifies that Mediacom is not required to extend service to new customers unless the extension would pass 20 homes-per-mile and is contiguous to Mediacom's existing cable plant. Bertie has not asserted that Mediacom has failed to fulfill this term of the franchise agreement. We further agree with Mediacom that the *C-TEC* decision does not support the County's contention that Mediacom has redefined its franchise area. In *C-TEC*, the Commission held that a new franchise agreement between C-TEC and the franchising authority redefined C-TEC's franchise area as the area it currently served.²⁴ Here, in contrast, there is no new franchise agreement that redefines Mediacom's franchise area in Bertie. In addition, we have stated that in reviewing whether a cable operator has redefined its franchise area, there must be an affirmative decision by the cable operator, confirmed by its own conduct, to serve less than the whole area required in its franchise agreement.²⁵ In this instance, Bertie has failed to meet its burden of establishing an affirmative decision by Mediacom to redefine its franchise area.

7. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment A, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Communities. Therefore, the low penetration test is satisfied as to the Communities.

²¹Reply at 4.

²²*Id.*

²³*Id.* at 5.

²⁴10 FCC Rcd 1028, ¶ 6.

²⁵See *Coxcom, Inc., d/b/a Cox Communications North Carolina*, 22 FCC Rcd 4533, 4536-4537 (2007).

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Mediacom Southeast LLC **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

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

²⁶47 C.F.R. § 0.283.

ATTACHMENT A

CSR 6834-E

COMMUNITIES SERVED BY MEDIACOM SOUTHEAST LLC

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
Bertie	NC0611	5684	654	11.51%
Northampton Potecasi	NC0607* NC0662	8691	378	4.35%

*Mediacom operates the unincorporated areas of Northampton and Potecasi pursuant to one franchise, and therefore reports a common set of numbers for both of them.