

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

In the Matter of)
Coxcom, Inc. d/b/a Cox Communications) CSR 7537-E
Northern Virginia)
Petition for Determination of Effective)
Competition in Various Virginia Communities)

MEMORANDUM OPINION AND ORDER

Adopted: August 12, 2008

Released: August 13, 2008

By the Associate Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Coxcom, Inc. d/b/a Cox Communications Northern Virginia, hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(1), 76.905(b)(2), 76.905(b)(4) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the community listed on Attachment A and hereinafter referred to as "Community." Petitioner alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Community because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). Petitioner additionally claims to be exempt from cable rate regulation in the Community listed on Attachment B because of the Petitioner serves fewer than 30 percent of the households in the franchise area. Petitioner finally claims that it is exempt from cable rate regulation in the Community listed on Attachment C because of the competing service provided by Verizon Virginia, hereinafter referred to as "Competitor." The petition is opposed by Stafford County.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission's rules. 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. 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, B, and C).

1See 47 U.S.C. § 543(a)(1).

247 C.F.R. § 76.905(b)(2).

3Dish is a registered trademark of EchoStar Communications Corporation.

447 C.F.R. § 76.906.

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

6See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

A. The Competing Provider Test

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 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;⁷ this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁸

5. Turning to the first prong of this test, it is undisputed that the Community is “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁹ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹⁰ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Community to support their assertion that potential customers in the Community are reasonably aware that they may purchase the service of these MVPD providers.¹¹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹² and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹³ Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Community because of their national satellite footprint.¹⁴ Accordingly, we find that the first prong of the competing provider test is satisfied.¹⁵

6. 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

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

⁸47 C.F.R. § 76.905(b)(2)(i).

⁹*See* Petition at 5-7.

¹⁰Mediacom Illinois LLC et al., *Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹¹47 C.F.R. § 76.905(e)(2).

¹²*See* 47 C.F.R. § 76.905(g). *See also* Petition at 4.

¹³*See* Petition at 4 and Exhibit 1.

¹⁴*See* Petition at 4.

¹⁵Stafford “accepts without conceding that the two DBS providers satisfy the first prong of the Competing Provider test – comparable programming is being made available to at least 50 percent of the households in the franchise area and these potential consumers are reasonably aware of the service availability.” Opposition at 2-3.

area. Petitioner asserts that it is one of the largest MVPDs in the Community.¹⁶ Petitioner sought to determine the competing provider penetration in the Community by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Community on a zip code plus four basis.¹⁷

7. In opposition, Stafford County (“Stafford” or “County”) argues that the SBCA data supplied by Cox is flawed because it is not precise enough to determine whether the DBS subscribers attributed to the County actually live in it or simply share a zip code with residents that live outside of it.¹⁸ Stafford asserts that the Commission has accepted the use of a five digit zip code allocation formula, but only in a proceeding that was uncontested, while in this instance, the County has a specific objection to the use of such data, and the evidence and information provided is overly broad and possibly inaccurate.¹⁹ Stafford contends that neither the Commission nor the County is able to verify the accuracy of the zip code information provided by Cox to SBCA regarding the jurisdictional boundaries, and if the boundaries are incorrect, the data cannot be relied upon.²⁰ Stafford also contends that zip code 22408 covers Spotsylvania County and not Stafford.²¹ In addition, the County argues that Cox includes zip code 22556 and its corresponding DBS subscribers (2,840) as part of the franchise area, but has no corresponding household data.²² Stafford further argues that Cox fails to take into consideration the County’s 24 percent increase in households and provides information from the Census Bureau indicating that there were 39,741 occupied households in the County as of 2006.²³ Stafford claims that the 2000 Census Bureau (30,187) estimates are outdated for the County and should not be used.²⁴ Finally, Stafford argues that Cox fails to mention that it only serves the southern portion of the County while Comcast Cable Communications, LLC (“Comcast”) serves the northern portion of the County.²⁵ According to Stafford, Cox does not compete head to head with Comcast and erroneously counts the entire population of the County and DBS subscribers throughout the County even though it actually serves less than one-half of the County under its franchise agreement.²⁶ Thus, Cox has failed to provide sufficient documentation for the Commission to verify the accuracy of Cox’s conclusions.

8. In reply, Cox argues that the Commission should dismiss the Opposition because it is unsupported by a Declaration and Verification as required by the Commission’s rules and because it contains inaccurate assertions and arguments that the Commission has specifically rejected, making it by

¹⁶*Id.* at 8. Cox is unable to determine the largest MVPD in the Community because the DBS subscribership data obtained from SBCA is aggregated and does not break down the individual subscribership of each DBS provider. Nevertheless, Cox argues that it is subject to effective competition because in addition to DBS penetration exceeding 15 percent of the occupied households, the number of Cox subscribers also exceed 15 percent and the Commission has recognized that in such cases the second prong of the competing provider test is satisfied.

¹⁷Petition at 7-10.

¹⁸Opposition at 3.

¹⁹*Id.*

²⁰*Id.* at 4.

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 5.

²⁶*Id.*

definition, frivolous.²⁷ Cox asserts that its petition has followed procedures that the Commission has developed and repeatedly affirmed over the past fourteen years for establishing effective competition.²⁸ Initially, Cox notes that the Bureau has rejected challenges to the five digit zip code allocation methodology used and described in detail in the petition.²⁹ Cox asserts that 0.2 percent of zip code 22408 is located in the County based upon information provided by the U.S. Postal Service and MelissaData reports.³⁰ Because the zip code is partially located within the County, Cox argues that it is properly included in the franchise area and is consistent with the Bureau's policies and procedures.³¹ Cox also argues that even if you exclude 22408, DBS penetration exceeds 45 percent.³² Furthermore, Cox rejects the contention that it improperly excluded household data for zip code 22556.³³ According to Cox, as it explained in its petition, the U.S. Postal Service created zip code 22556 after data gathering for the 2000 Census was complete, and thus, no 2000 Census data was available for the new zip code.³⁴ However, the 2000 Census data for the new zip code were already included in Cox's calculations because at the time the Census was taken, the new zip code and its households were part of zip code 22554.³⁵ Thus, Cox included in its calculations all occupied households within the new 22556 zip code and properly included all DBS subscriber data associated with that zip code.

9. Cox also argues that the County's argument about the 2000 Census is irrelevant. According to Cox, the County fails to provide evidence that would change the outcome.³⁶ Bureau precedent demonstrates that Cox could properly use 2000 Census data.³⁷ Cox claims that the 2000 Census data is more accurate because the 2006 U.S. Census estimates are unverified and unsupported by affidavit or otherwise and the County has made no effort to explain or demonstrate the reliability of the estimated data.³⁸ Thus, the Bureau is not required to use the 2006 occupied household information, but even if the Bureau does use the 2006 data, DBS penetration would exceed 30 percent of the occupied households.³⁹ Finally, Cox asserts that it has not redefined its franchise area, noting that until 2006, the Cox franchise area only included the southern portion of the County, but under its 2006 franchise agreement with the County, it is authorized to provide service throughout the County.⁴⁰ Cox indicates that it provides overlapping service in a portion of the County that is also served by Adelphia Cable Communications.⁴¹ Thus, the fact that Cox has not completely build-out the entire County since entering

²⁷Reply at 1-2.

²⁸*Id.* at 3.

²⁹*Id.* at 4-6.

³⁰According to the Reply, MelissaData is a thirty-two year old online data service company that permits users to determine all zip codes associated with a particular county, municipality, or other political subdivision. Reply at 6-7 n. 21.

³¹*Id.* at 6-7.

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* at 8-10.

³⁷*Id.*

³⁸*Id.*

³⁹*Id.* at 9.

⁴⁰*Id.* at 10-15.

⁴¹*Id.* at 15 and Exhibit 5.

the 2006 franchise agreement, which expanded its franchise area to encompass the whole County, does not mean that it has affirmatively limited its service area so that it can be considered to be redefined.⁴²

10. We find that the County's arguments lack merit.⁴³ We have previously accepted data provided by SBCA since it merely provides industry subscriber data for the cable operator to use in its Petition.⁴⁴ We also have accepted the allocation methodology used by Cox in this matter in contested cases.⁴⁵ With regard to the County's challenge to the inclusion of zip code 22408, we have previously held that zip codes may be either wholly or partially in the franchise area.⁴⁶ Regarding the County's challenge to new zip code 22556, we agree with Cox that the household population would have been reflected in the housing figure for the zip code that the population previously belonged to. We reject the County's challenge to the use of the 2000 Census data since we have previously held that use of the 2000 Census is sufficiently reliable for effective competition determinations.⁴⁷ However, even if we were to adopt the County's position regarding the exclusion of two zip code areas from the franchise area and use the 2006 Census household data, Cox would still satisfy the requirements for establishing competing provider effective competition in the County. For example, if we exclude DBS subscribership data for zip codes 22408 and 22555 from the DBS subscribership total, as argued by the County, and use the 2006 Census household figure for the County, the DBS penetration, as reflected in Attachment A, is 27.18 percent, well in excess of the 15 percent required by the statute to establish competing provider effective competition. Thus, adopting the County's position regarding zip codes and population figures does not change the outcome. Finally, we reject the County's argument that Cox cannot use county-wide household figures since it has redefined its franchise area. As Cox has indicated in its reply, as a result of the 2006 franchise agreement, it is permitted to serve areas of the County other than just the southern portion. Furthermore, the 2006 franchise agreement specifically states that service is mandated to be expanded only when the area that can be served by extension of the system past a specified number of occupied dwelling units.⁴⁸ Thus, there is no evidence that Cox has redefined its franchise area. Accordingly, we will accept the revised DBS penetration figures for the franchise area.

11. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,⁴⁹ as reflected in Attachment A, we find that Petitioner 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 Community. Therefore, the second prong of the competing provider test is satisfied for each of the Community.

12. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Community listed on Attachment A.

⁴²*Id.*

⁴³Although we have found that the County's arguments lack merit, we do not consider them to be "frivolous" as Cox has argued in its reply. Furthermore, while the opposition lacks the declaration and verification required by our rules, we will consider it in the interests of a full and complete record.

⁴⁴*Coxcom, Inc. d/b/a Cox Communications Orange County*, 22 FCC Rcd 4522, 4526 (2007).

⁴⁵*Id.*

⁴⁶*Id.* at 4524-4525.

⁴⁷*Adelphia Cable Communications*, 22 FCC Rcd 4458, 4462 (2007)

⁴⁸Reply Exhibit 5, page 6, ¶ 2.06B.

⁴⁹Petition at 2 and Exhibit 7; Opposition Exhibit A; Reply to Opposition at 8-10. The parties agree that using Census data from the 2006 American Community Survey is more conservative and reflective of the current occupied housing data.

B. The Low Penetration Test

13. 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.⁵⁰ 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.

14. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, 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 Community listed on Attachment B. Therefore, the low penetration test is also satisfied as to the Community.

C. The LEC Test

15. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition if a local exchange carrier (“LEC”), or its affiliate, offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator⁵¹; this test is otherwise referred to as the “LEC” test.

16. The Commission has stated that the incumbent cable operator must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not completed its build-out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.⁵² It is undisputed that the Community on Attachment C are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming⁵³ and is supported in this petition with copies of channel lineups for Competitor.⁵⁴ Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Community on Attachment C, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.⁵⁵

17. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable system serving the Community on Attachment C has met the LEC test and is subject to effective competition.

⁵⁰47 U.S.C. § 543(l)(1)(A).

⁵¹See 47 U.S.C. § 543(l)(D).

⁵²See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) (“*Cable Reform Order*”).

⁵³See 47 C.F.R. § 76.905(g). See also Petition at 20-21.

⁵⁴See Petition at 20-21 and Exhibit 15.

⁵⁵See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petition at 15-21.

III. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Coxcom, Inc. d/b/a Cox Communications Northern Virginia **IS GRANTED**.

19. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachments A, B, and C **IS REVOKED**.

20. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵⁶

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy
Associate Chief, Media Bureau

⁵⁶47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7537-E

COMMUNITIES SERVED BY COXCOM, INC. D/B/A COX COMMUNICATIONS NORTHERN VIRGINIA

Communities	CUID	CPR*	2000 Census Household	Estimated DBS Subscribers
Stafford County	VA0023	44.64%	30187	13476

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

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COMMUNITIES SERVED BY COXCOM, INC. D/B/A COX COMMUNICATIONS NORTHERN VIRGINIA

Communities	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
Spotsylvania County	VA0022	31308	1322	4.22%

ATTACHMENT C

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COMMUNITIES SERVED BY COXCOM, INC. D/B/A COX COMMUNICATIONS NORTHERN VIRGINIA

Communities	CUID
Fredericksburg	VA0020