

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

In the Matter of
Mediacom Southeast LLC
Petition for Determination of Effective
Competition in Various Alabama Communities
CSR 6893-E

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2009

Released: February 25, 2009

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

I. INTRODUCTION AND BACKGROUND

1. Mediacom Southeast LLC ("Mediacom"), hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 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) of the Communications Act of 1934, as amended ("Communications Act")<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish").<sup>3</sup> Petitioner alternatively claims to be exempt from cable rate regulation in Baldwin County listed on Attachment B because the Petitioner serves fewer than 30 percent of the households in the franchise area. The petition is opposed by Baldwin County.<sup>4</sup>

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>5</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>6</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

<sup>1</sup>See 47 U.S.C. § 543(a)(1).

<sup>2</sup>47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

<sup>3</sup>Mediacom filed a Motion for Leave and Extension of 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. Baldwin County filed a Response to Mediacom's Reply to Opposition and Mediacom filed a Motion to Strike it. Mediacom's Motion to Strike Baldwin County's Response to Mediacom's Reply to Opposition is granted because it was outside of the pleading cycle.

<sup>4</sup>Baldwin County filed an Opposition to Mediacom's claim that it satisfied the competing provider effective competition test. However, Mediacom had alternatively claimed that it was subject to effective competition under the low penetration competing provider test. Baldwin County's Opposition does not contest Mediacom's claim of low penetration effective competition. Because Mediacom has established that it is subject to effective competition under the low penetration test, we need not address the County's arguments under the competing provider test.

<sup>5</sup>47 C.F.R. § 76.906.

<sup>6</sup>See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

within the relevant franchise area.<sup>7</sup> 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 Attachments (A and B).

## 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;<sup>8</sup> 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.<sup>9</sup>

5. Turning to the first prong of this test, it is undisputed that these Communities are “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.<sup>10</sup> 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.<sup>11</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>12</sup> 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 programming<sup>13</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.<sup>14</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.<sup>15</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

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<sup>7</sup>See 47 C.F.R. §§ 76.906 & 907.

<sup>8</sup>47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>9</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup>*See* Petition at 4-5 and Exhibit A.

<sup>11</sup>Mediacom 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).

<sup>12</sup>47 C.F.R. § 76.905(e)(2).

<sup>13</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition at 5.

<sup>14</sup>*See* Petition at 5 and Exhibits B and D.

<sup>15</sup>*See* Petition at 6.

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 area. Petitioner asserts that it is the largest MVPD in the Communities.<sup>16</sup> Petitioner sought to determine the competing provider penetration in the Communities 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 Communities on a zip code plus four basis.<sup>17</sup> Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>18</sup> 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 Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

7. 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 Communities listed on Attachment A.

#### **B. The Low Penetration Test**

8. 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.<sup>19</sup> 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.

9. 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 Communities listed on Attachment B. Therefore, the low penetration test is also satisfied as to the Communities.

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<sup>16</sup>*Id.*

<sup>17</sup>Petition at 7 and Exhibit E and Erratum.

<sup>18</sup> *Id.* and Exhibit G.

<sup>19</sup>47 U.S.C. § 543(l)(1)(A).

**III. ORDERING CLAUSES**

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

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

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>20</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>20</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 6893-E

## COMMUNITIES SERVED BY MEDIACOM SOUTHEAST LLC

<b>Communities</b>	<b>CUID(S)</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
Loxley	AL0316	21.53%	562	121
Robertsdale	AL0377	24.45%	1779	353
Silverhill	AL0378	20.33%	241	49

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT B

## CSR 6893-E

## COMMUNITIES SERVED BY MEDIACOM SOUTHEAST LLC

<b>Communities</b>	<b>CUID(S)</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Baldwin County	AL0407	28675	1,560	5.44%
Gulf Shores	AL0679			
Lillian	AL0346			
Orange Beach	AL0369			