

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

In the Matter of)	
)	
Inter Mountain Cable, Inc.)	CSR 8248-E
)	CSR 8270-E
)	
Mediacom Southeast LLC)	CSR 8282-E
)	
Petitions for Determination of Effective)	
Competition in Various Communities in Kentucky)	

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 2010

Released: September 28, 2010

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

I. INTRODUCTION AND BACKGROUND

1. Inter Mountain Cable, Inc. and Mediacom Southeast LLC, hereinafter referred to as “Petitioners,” have filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(1-2), and 76.907 of the Commission’s rules for a determination that the Petitioners are subject to effective competition in those communities listed on Attachment A and hereinafter referred to as “Communities.” Petitioners allege that their cable systems serving the Communities are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and are 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”). Petitioner Inter Mountain Cable, Inc. alternatively claims to be exempt from cable rate regulation in the Community listed on Attachment B because the Petitioner serve fewer than 30 percent of the households in those franchise areas. The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ 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.⁵ For the reasons set forth below, we grant the petitions based on our finding that the Petitioners are subject to effective competition in the Communities listed on Attachments A and B.

¹ See 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁵ See 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 (“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 15 percent of the households in the franchise area;⁶ 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.⁷

5. Turning to the first prong of this test, it is undisputed that the 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.⁸ 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.⁹ We further find that Petitioners have 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.¹⁰ 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 programming¹¹ and is supported in the petitions with copies of channel lineups for both DIRECTV and Dish.¹² Also undisputed is Petitioners’ 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.¹³ Accordingly, we find that the first prong of the competing provider test is satisfied.

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. Each Petitioner asserts that it is the largest MVPD in all but one of the Communities.¹⁴ Petitioners

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

⁷ 47 C.F.R. § 76.905(b)(2)(i).

⁸ *See* Petition CSR 8248-E at 6; Petition CSR 8271-E at 6; Petition CSR 8282-E at 5.

⁹ *Mediacom Illinois LLC*, 21 FCC Red 1175, 1176, ¶ 3 (2006).

¹⁰ 47 C.F.R. § 76.905(e)(2).

¹¹ *See* 47 C.F.R. § 76.905(g). *See also* Petition CSR 8248-E at 8; Petition CSR 8270-E at 9; Petition CSR 8282-E at 5.

¹² *See* Petition CSR 8248-E at 8 and Exhibit D; Petition CSR 8270-E at 9 and Exhibit D; Petition CSR 8282-E at 6.

¹³ *See* Petition CSR 8248-E at 4; Petition CSR 8270-E at 3; Petition CSR 8282-E at 6.

¹⁴ Petition CSR 8248-E at 8; Petition CSR 8270-E at 9-10; Petition CSR 8282-E at 7. In circumstances where the largest MVPD is unable to be identified, the Commission can determine that the second prong is met when it finds that the number of households subscribing to the DBS providers and the petitioning cable operator each exceeds 15
(continued....)

sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.¹⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ as reflected in Attachment A, we find that Petitioners have 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.

8. Based on the foregoing, we conclude that Petitioners have submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioners are subject to effective competition in the Communities listed on Attachment A.

B. The Low Penetration Test

9. 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.¹⁷ Petitioner Inter Mountain Cable, Inc. 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 listed on Attachment B.¹⁸

10. 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 that Community.

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percent of the households in the franchise area. First, we assume that Petitioner is the largest MVPD provider in the Community and determine that the combined DBS subscribership is greater than 15 percent; we then assume that one of the DBS providers is the largest MVPD in the Community and determine whether Petitioner’s subscribership is greater than 15 percent. When both exceed 15 percent, then the second prong of the competing provider test is met. Petitioner’s data in Attachment A shows that both these determinations can be made for the City of Pikeville not covered under paragraph 6 above. *Time Warner Cable et al.*, 23 FCC Rcd 12069, ¶ 8 (MB 2008).

¹⁵ Petition CSR 8248-E at 9-10; Petition CSR 8270-E at 10-11; Petition CSR 8282-E at 7.

¹⁶ Petition CSR 8248-E at 1-12 and Exhibit F; Petition CSR 8270-E at 12-13 and Exhibit F; Petition CSR 8282-E at 7 and Exhibit C.

¹⁷ 47 U.S.C. § 543(l)(1)(A).

¹⁸ Inter Mountain Cable also filed for a finding of effective competition under the low penetration test in the County of Pike, however, because it has satisfied the competing provider test, it not necessary to make a determination under the low penetration test.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Inter Mountain Cable, Inc. and Mediacom Southeast LLC **ARE GRANTED**.

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

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁹

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8248-E

COMMUNITIES SERVED BY INTER MOUNTAIN CABLE, INC.

Community	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
County of Pike	KY0212 KY0219 KY0341 KY0362 KY0834 KY0927 KY0936 KY0994 KY1154	23.31	27612	6438

CSR 8270-E

COMMUNITIES SERVED BY INTER MOUNTAIN CABLE, INC.

Community	CUID	CPR*	2000 Census Households	Estimated DBS Subscribers
City of Pikeville	KY1007	19.93	2705	539

CSR 8282-E

COMMUNITIES SERVED BY MEDIACOM SOUTHEAST LLC

Community	CUID	CPR*	2000 Census Households	Estimated DBS Subscribers
Burkesville	KY0185	17.06	768	131

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 8270-E

COMMUNITIES SERVED BY INTER MOUNTAIN CABLE, INC.

City of Pikeville	KY1007	2705	413	15.27
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