

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

In the Matter of)
)
CoxCom, Inc.)
d/b/a Cox Communications Orange County) CSR 8255-E
)
Petition for Determination of Effective)
Competition in Eight Communities in California)

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2010

Released: March 31, 2010

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

I. INTRODUCTION AND BACKGROUND

1. CoxCom, Inc., doing business as Cox Communications Orange County (“Cox”), has filed with the Commission a petition (“Petition”) pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(4) and 76.907 of the Commission’s rules for a determination that Cox is subject to effective competition in eight communities in southern California between Los Angeles and San Diego. Cox alleges that, in the three communities listed on Attachment A and hereinafter referred to as the “Attachment A Communities,” its system is subject to “competing provider” effective competition pursuant to Section 623(1)(B) 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 because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and Dish Network (“Dish”). Cox also alleges that its cable system serving the five Communities listed on Attachment B and hereinafter referred to as the “Attachment B Communities” is subject to local exchange carrier or “LEC” effective competition pursuant to Section 623(1)(D) of the Communications Act because of the competing service provided by Pacific Bell Telephone Company, doing business as SBC Pacific Bell Telephone Company and AT&T California (“AT&T”). None of the foregoing allegations of effective competition is opposed.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(l) of the Communications Act and

¹ See 47 U.S.C. § 543(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ Cox’s Petition claimed that it was only subject to LEC effective competition in one of the Attachment A Communities, Dana Point. The City of Dana Point filed an Opposition to Cox’s claim, dated January 28, 2010. Cox filed a Reply, dated February 23, 2010. On the latter date, Cox also filed a “Motion for Leave to Submit Supplement” (“Motion”) and a “Supplement to Petition for Determination of Effective Competition” (“Supplement”) presenting new data indicating that Cox was also subject to competing provider effective competition in Dana Point. The City of Dana Point has stated that it will not oppose either Cox’s Motion or the evidence in its Supplement. Pleadings such as Cox’s, which are in excess of the three contemplated by our rules, will not be allowed absent “extraordinary circumstances.” 47 C.F.R. § 76.7(d). We find that such circumstances exist here and that they justify granting Cox’s Motion and accepting its Supplement. Specifically, the acceptance of Cox’s unopposed evidence will spare the Commission resolving the contentious, complex, and now-uncontested petition concerning Dana Point.

⁴ 47 C.F.R. § 76.906.

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 Cox is subject to effective competition in the Communities listed on Attachments A and B, with the exception of one of the Attachment B Communities, Laguna Beach.

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 Attachment A Communities are "served by" both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Cox 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 Cox has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Attachment A Communities to support their assertion that potential customers in the Attachment A Communities 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 Cox's assertion that both DIRECTV and Dish offer service to at least "50 percent" of the households in the Attachment A Communities because of their national satellite footprint.¹⁴ Accordingly, we find that

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

⁶ See 47 C.F.R. §§ 76.906, -.907.

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

⁸ 47 C.F.R. § 76.905(b)(2)(i).

⁹ See Petition at 20.

¹⁰ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹¹ 47 C.F.R. § 76.905(e)(2); see also Petition at 22; *id.*, Exh. 12; Supplement at 6.

¹² See 47 C.F.R. § 76.905(g); see also Petition 19.

¹³ See Petition at 19; *id.*, Exh. 11; Supplement at 5-6.

¹⁴ See Petition at 19-23; Supplement at 5-6.

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. Cox asserts that it is the largest MVPD in the attachment A Communities.¹⁵ Cox sought to determine the competing provider penetration in the Attachment A 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 Attachment A Communities on a five-digit zip code basis.¹⁶

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 or 2006-08 household data,¹⁷ as reflected in Attachment A, we find that Cox 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 Attachment A Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Attachment A Communities.

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

B. The LEC Test

9. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition if a 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 operator.¹⁸

10. 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.¹⁹ It is undisputed that the Attachment B Communities (except for Laguna Beach) are served by both Cox and AT&T, 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 programming²⁰ and is supported in this petition with copies of channel lineups for AT&T.²¹ Finally, Cox has demonstrated that AT&T has

¹⁵ Petition at 23; Supplement at 6.

¹⁶ Petition at 23-25; Supplement at 7.

¹⁷ Petition at 23; Supplement at 7.

¹⁸ See 47 U.S.C. § 543(l)(D).

¹⁹ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-15 (1999) ("Cable Reform Order").

²⁰ See 47 C.F.R. § 76.905(g); see also Petition at 17-18.

²¹ See Petition, Exh. 9.

commenced providing video programming service within the Attachment B Communities (except for Laguna Beach),²² 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*.²³

1. The Laguna Beach Franchise Area

11. The facts in Cox's Laguna Beach franchise area are different in a significant respect. Cox makes clear that AT&T is not offering its competing video service in that franchise area.²⁴ The statute that creates the LEC test requires, however, that the LEC "offer[] video programming services . . . to subscribers . . . in the franchise area."²⁵ Our *Cable Reform Order* also makes clear that, to show LEC effective competition in a franchise area, the petitioning cable operator must establish that the LEC is offering service there.²⁶ Cox not only fails to establish this; it makes clear that AT&T is not offering its service in Cox's Laguna Beach franchise area. Therefore, Cox has failed to satisfy the requirements of the LEC effective competition test for that franchise area.²⁷

12. In an earlier decision concerning San Diego, we found LEC effective competition from AT&T to exist in three Cox franchise areas although AT&T had not begun offering its competing video service there.²⁸ In that case, however, there were objective indications that AT&T's service was imminent.²⁹ There are no indications in the record herein of imminent service by AT&T in Laguna

²² Petition, Exh. 1 (Letter from David J. Miller, AT&T General Attorney, to Gary S. Lutzger, Esq., Dow Lohnes PLLC, counsel for Cox (dated Aug. 12, 2009) (at 2, AT&T notifying "Cox that it offers video programming services to subscribers in" all the Attachment B Communities except for Laguna Beach); *id.*, Exh. 4 (news media stories stating that AT&T service is offered in all the Attachment B Communities except for Laguna Beach); *id.*, Exh. 5 (AT&T notifications to Cox that it is offering service in all the Attachment B Communities except for Laguna Beach and Laguna Hills).

²³ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16; see also Petition at 7-17; Reply at 16.

²⁴ Petition at 9 n.37 ("AT&T notified Cox that U-verse video service now is provided in all the Communities other than Laguna Beach"); see also note 22 *supra*.

²⁵ 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4). Also, 47 C.F.R. § 76.905(e) provides that a "[s]ervice of a [MVPD] will be deemed offered . . . [w]hen the [MVPD] is physically able to deliver service . . . ; and . . . [w]hen no . . . technical . . . impediments to households taking service exist." From the record presented by Cox, it is clear that AT&T is not delivering service to potential subscribers in Laguna Beach.

²⁶ *Cable Reform Order*, 14 FCC Rcd at 5301, ¶ 9 ("We reject the argument advocated by cable interests that any service offering in the franchise area, no matter how minimal, should be sufficient for a finding of effective competition."), 5303-04, ¶ 11 ("In his Additional Views appended to S. Rep. No. 23, Senator Hollings explained that 'the bill changes the definition of "effective competition" in the 1992 Act to allow cable rates to be deregulated as soon as a telephone company begins to offer competing cable service in a franchise area'), 5305, ¶ 13 ("If the LEC has not completed its buildout or roll out, the incumbent cable operator must establish . . . that the LEC has begun actual commercial service"), 5305, ¶ 14 ("Documentation of actual commercial service must also be provided").

²⁷ Cox does not assert that it faces any other kind of effective competition in Laguna Beach.

²⁸ *CoxCom, Inc.*, 23 FCC Rcd 7106 (2008).

²⁹ Petition for Determination of Effective Competition in CSR 7768-E (dated Jan. 28, 2008), Exh. 17 (AT&T applications for electric and right of way permits in unserved franchise areas); in CSR 7768-E, Letter from Mr. Lutzger to Ms. Marlene Dortch, Commission Secretary (dated April 11, 2008) ("April 11 Ex Parte"), Att. D (AT&T application for encroachment permit). The earlier decision about San Diego was unopposed and involved many more areas than this proceeding; Cox was less forthcoming than in the present Petition about AT&T not yet offering service; and there were vague statements in the record about conditions in the three franchise areas. See, e.g., April 11 Ex Parte, Att. A (Letter from Graham Mitchell, City Manager of Lemon Grove, to Ms. Dortch (dated March 27,

(continued....)

Beach. Accordingly, our earlier decision's reasoning does not govern this one. Moreover, to the extent that our earlier decision contemplates finding LEC effective competition before the LEC offers competing video service, we find the analysis in this decision a more precise application of the applicable statute and rules.

13. Cox asks that we waive the standards of the LEC test as to Laguna Beach, invoking a paragraph in the *Cable Reform Order* in which we said that we would entertain waivers where a petitioning cable operator shows, among other things, that "the extent of the LEC's presence is sufficient to have a direct impact on the cable operator's services throughout its service area, and particularly on the price."³⁰ Cox argues that, despite its lack of service in Laguna Beach, AT&T's wide reputation, build-out obligations, vigorous regional marketing, actual service in many surrounding communities, and other factors create enough competitive impact in Laguna Beach to prevent Cox from charging unreasonable prices after deregulation.³¹

14. We deny Cox's request for a waiver, for several reasons. First, the requirement that the LEC offer competing service is in a statute, Section 623(l)(1)(D) of the Communications Act, and we may not waive a statute. Second, the language in our *Cable Reform Order* that creates the waiver that Cox seeks requires that "that the LEC has begun actual commercial service."³² Cox cannot show that element of the case for a waiver. Accordingly, because all the evidence before us shows that AT&T is not offering video service in competition with Cox's cable service in Cox's Laguna Beach franchise area, Cox is not subject to LEC effective competition there.

2. Conclusion

15. Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that its cable system serving the Communities listed on Attachment B (except for Laguna Beach) has met the LEC test and is subject to effective competition.³³

III. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by CoxCom, Inc., doing business as Cox Communications Orange County, **IS DENIED** for Laguna Beach, California, and **IS GRANTED** for all the other Attachment A and B Communities.

17. **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 Attachment B, except for Laguna Beach, California, **IS REVOKED**.

(...continued from previous page)

2008) ("AT&T is in the process of offering competitive multi-channel video programming services in Lemon Grove").

³⁰ Petition at 15 n.72, citing *Cable Reform Order*, 14 FCC Rcd at 5305, ¶ 13.

³¹ Petition at 7-17. The other factors are significant DBS subscriberhip in Laguna Beach and Cox's response to AT&T's entry by improving its service, adding technical personnel, and holding its rates in certain Communities (but not, evidently, Laguna Beach, see Petition, Exh. 7), below the Maximum Permitted Rate.

³² *Cable Reform Order*, 14 FCC Rcd at 5305, ¶ 13.

³³ Because the foregoing paragraphs find Cox subject to one kind of competing provider competition in each of the Communities (except Laguna Beach), we need not address its alternative claims of a second kind of effective competition for some of the same Communities (LEC effective competition in Mission Viejo or Rancho Santa Margarita, and "low penetration" effective competition, 47 U.S.C. § 543(l)(1)(A), in Laguna Woods).

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

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

³⁴ 47 C.F.R. § 0.283.

ATTACHMENT A**CSR 8255-E****COMMUNITIES SERVED BY COXCOM, INC.,
DBA COX COMMUNICATIONS ORANGE COUNTY**

Communities	CUID(s)	CPR*	Census Households	Estimated DBS Subscribers
Dana Point	CA0549	15.39%	13,911	2,141
Mission Viejo	CA1345	15.58%	32,449	5,055
Rancho Santa Margarita	CA1205	16.19%	16,253	2,632

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 8255-E

**COMMUNITIES SERVED BY COXCOM, INC.,
DBA COX COMMUNICATIONS ORANGE COUNTY**

Communities	CUID(S)
Aliso Viejo	CA1520
Laguna Beach	CA0311
Laguna Hills	CA1085
Laguna Niguel	CA0316
Laguna Woods	CA1768