

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

In the Matter of	)	CSR 8222-E
	)	CSR 8223-E
Cox Communications Kansas, LLC	)	CSR 8224-E
	)	CSR 8225-E
Petitions for Determination of Effective	)	CSR 8226-E
Competition in Communities in Kansas	)	CSR 8227-E
	)	CSR 8228-E

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 23, 2011**

**Released: February 24, 2011**

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

**I. INTRODUCTION AND BACKGROUND**

1. Cox Communications Kansas, LLC (“Cox”), has filed with the Commission petitions pursuant to Sections 76.7 and 76.907 of the Commission’s rules<sup>1</sup> for a determination that it is subject to effective competition in those communities listed on Attachment A (the “Attachment A Communities”).<sup>2</sup> Cox alleges that its cable systems serving the Attachment A Communities are subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)<sup>3</sup> and the Commission’s implementing rules,<sup>4</sup> and are therefore exempt from cable rate regulation there because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”) and Dish Network (“Dish”). Cox also claims to be exempt from cable rate regulation in the Communities listed on Attachment B (the “Attachment B Communities”) because Cox serves fewer than 30 percent of the households there. Cox finally claims that it is exempt from cable rate regulation in the Communities listed on Attachment C (the “Attachment C Communities”) because of the competing service provided by Southwestern Bell Telephone Company, d/b/a/ AT&T Kansas (“AT&T”). The petitions are opposed by The League of Kansas Municipalities (the “League”),<sup>5</sup> a voluntary, nonpartisan organization of hundreds of Kansas cities that operates as a public agency and instrumentality of its member cities.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be

<sup>1</sup> See 47 C.F.R. §§ 76.7, 76.907.

<sup>2</sup> Earlier litigation on this subject is *Cox Commun. Kansas, LLC*, 25 FCC Rcd 4773, *vacated*, 25 FCC Rcd 4864 (2010).

<sup>3</sup> See 47 U.S.C. § 543(1)(1)(B).

<sup>4</sup> 47 C.F.R. § 76.905(b)(2).

<sup>5</sup> The League filed an Opposition to Petition for Special Relief by the League of Kansas Municipalities (“Opposition,” dated Oct. 28, 2009), to which Cox filed a Reply to Opposition (“Reply,” dated Nov. 12, 2009).

The League then filed a letter, dated November 25, 2009, containing brief supplemental comments (“Letter”) and Cox filed a Reply to Supplemental Opposition (“Reply II,” dated Dec. 23, 2009). The latter two pleadings included motions for leave to file them. Such motions are not routinely granted. 47 C.F.R. § 76.7(d). The Letter contains no new factual allegations responding to new matters raised in Cox’s Reply. The Letter consists almost entirely of points that the League made, or could have made, in its Opposition. Accordingly, we deny the motions for leave to file the Letter and Reply II and will base our decision on the first three pleadings filed by the parties.

subject to effective competition,<sup>6</sup> as that term is defined by Section 623(l)(1) of the Communications Act and Section 76.905(b) of the Commission's rules.<sup>7</sup> 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.<sup>8</sup> For the reasons set forth below, we grant the petitions based on our finding that Cox is subject to effective competition in the Communities listed on Attachments A, B, and C.

## 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>9</sup> This test is referred to as the "competing provider" test.

#### 1. The First Part

4. The first part 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>10</sup> Cox asserts 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.<sup>11</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part 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>12</sup> Also, Cox has provided sufficient evidence of DBS advertising in local and regional media that serve the Attachment A Communities, as well as direct mail to those 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.<sup>13</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>14</sup> and is supported in the petitions with copies of channel lineups for both DIRECTV and Dish.<sup>15</sup> Cox also asserts that both DIRECTV and Dish offer service to at least "50 percent" of the households in the Attachment A

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<sup>6</sup> 47 C.F.R. § 76.906.

<sup>7</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

<sup>8</sup> See 47 C.F.R. §§ 76.906 & 76.907(b).

<sup>9</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>10</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>11</sup> See Petitions at 6.

<sup>12</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>13</sup> 47 C.F.R. § 76.905(e)(2). See also Petitions at 7 & Exh. 4.

<sup>14</sup> See 47 C.F.R. § 76.905(g). See also Petitions at 5.

<sup>15</sup> See Petitions at Exh. 3.

Communities because of their national satellite footprint.<sup>16</sup>

5. The League challenges Cox's claims that comparable DBS programming is available to at least 50 percent of the households in the Attachment A Communities and that consumers there are reasonably aware of the availability of DBS service. The League objects that Cox makes these claims based on mere presumptions and that, because the presumptions were not adopted in a rulemaking, they are contrary to due process and federal statutes and regulations.<sup>17</sup>

6. The League is mistaken for several reasons. First, the League cites no authority for the proposition that presumptions must be adopted in rulemakings. We are aware of none. In fact, the Supreme Court has stated that an administrative agency "is not precluded from announcing new principles in an adjudicative proceeding."<sup>18</sup> Second, the Commission has stated in more than one rulemaking that DBS service will be presumed to be available nationwide.<sup>19</sup> Third, in this case Cox has not relied on presumptions alone, but has submitted objective evidence (unchallenged by the League) that DBS service is available in the Attachment A Communities and that consumers there are reasonably aware of it.<sup>20</sup> Fourth, the League has not produced any evidence to counter our presumptions and Cox's evidence. Accordingly, we find that the first part of the competing provider test is satisfied in the Attachment A Communities.

## 2. The Second Part

7. The second part 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.<sup>21</sup> The League does not dispute that assertion and we accept it. Thus, the second part of the competing provider test requires Cox to calculate a ratio, the numerator of which is the number of DBS subscribers in each Attachment A Community and the denominator of which is the number of households there.

8. To calculate the denominators of the statutory ratio, Cox made a list of all five-digit zip codes that lay wholly or partly in any of the Attachment A Communities. Cox then purchased a report from the Satellite Broadcasting and Communications Association that identified the number of subscribers to DBS service in each of those five-digit zip codes.<sup>22</sup> To account for the five-digit zip codes that lay partly in one of those Communities and partly outside it, Cox used a methodology we have

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<sup>16</sup> See *id.* at 4-6.

<sup>17</sup> Opposition at 3, citing 47 U.S.C. § 543(1)(1)(B), 47 C.F.R. §§ 76.906 & 76.907(b).

<sup>18</sup> *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294 (1974), followed in *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998).

<sup>19</sup> *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5660-61, ¶ 32 (1993) ("Once a 'competitive' DBS satellite system is launched, it will be deemed technically available to households in a franchise area . . . if its footprint covers those households, absent extraordinary circumstances"), on reconsideration, 9 FCC Rcd 4316 (1994), reversed in part on other grounds, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), cert. denied, 516 U.S. 1112 (1996). See also *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4554, ¶ 42 n.52 (1991) ("DBS will be considered to be available to the entire United States when any one DBS licensee begins operation.").

<sup>20</sup> Petitions at Exhs. 3-4. Also, the subscriberships stated in Attachment A are evidence of general awareness of the availability of DBS service in the Attachment A Communities.

<sup>21</sup> See Petitions at 4, 9.

<sup>22</sup> *Id.* at 9 & Exh. 5.

accepted in previous cases for apportioning the DBS subscribers between those living in the Attachment A Community and those living outside it.<sup>23</sup> Cox then made its calculation of the numbers of DBS subscribers in each Attachment A Community.<sup>24</sup>

9. Cox calculated the denominator of the statutory ratio, the number of households in each Attachment A Community in different ways. For some Attachment A Communities, Cox used household numbers stated in the 2000 Census. For most Attachment A Communities, including some in which there has been rapid growth since 2000, Cox used 2000 Census data and its own business records and surveys.<sup>25</sup> The resulting ratios, if accepted, establish 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.

10. The League objects to several aspects of Cox's showings, arguing that Cox's calculations are "convoluted"<sup>26</sup> and speculative<sup>27</sup> and produce "at best an approximation"<sup>28</sup> of DBS subscribership in the Attachment A Communities. The League argues that perhaps DBS subscribership is unevenly distributed throughout some of the five-digit zip codes involved in this case, that some of the subscriberships shown by Cox are barely above the statutory minimum, that data taken from the 2000 Census is stale, and Cox's data ignore that the transition from analog to digital TV caused some consumers to subscribe to cable service.<sup>29</sup>

11. These objections are unconvincing for several reasons. First, the League's arguments are mostly generalities without any evidence that Cox's calculations are, in fact, inaccurate.<sup>30</sup> The League does not claim or show, for example, that its assertions about uneven subscribership or the DTV transition are actually true in any of the Attachment A Communities.<sup>31</sup> These omissions are conspicuous because the League presumably knows at least as well as Cox about conditions in the Attachment A Communities.

12. The League's criticisms about speculation and approximation in Cox's calculations could be made about any method short of an actual house-by-house count of each Attachment A Community. The League does not suggest that such expensive and time-consuming evidence should be required, however, and we do not require it. Cable operators, the vast majority of franchise authorities, and numerous Commission decisions have accepted the data and methodologies that Cox used in this case (including 2000 Census numbers) as a reasonable way to estimate DBS subscribership in a franchise area.<sup>32</sup> Once a cable operator has used them and shown DBS subscribership in excess of 15 percent, the burden shifts to the opposing franchise authority. The opposing authority must produce evidence of, for example, more recent household numbers that are as reliable as Census numbers and that show DBS

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<sup>23</sup> *Id.* at 10.

<sup>24</sup> Because AT&T refused to disclose how many subscribers it had in the Attachment A Communities, Cox was unable to add them to its numbers of DBS subscribers. Petitions at 15 n.49.

<sup>25</sup> Petitions at 10-14.

<sup>26</sup> Opposition at 4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> *Id.* at 5-7.

<sup>30</sup> Reply at 9.

<sup>31</sup> Cox claims, on the contrary, that the DTV transition coincided with a net decrease in subscription to the service of incumbent cable operators such as itself. Reply at 13 n.57.

<sup>32</sup> See, e.g., *CoxCom, Inc.*, 22 FCC Rcd 4663, 4665-66, ¶¶ 6-7 (2007); *CoxCom, Inc.*, 22 FCC Rcd 4522, 4524-27, ¶¶ 7-13 (2007); *CoxCom, Inc.*, 22 FCC Rcd 4384, 4386-87, ¶ 9 (2007).

subscribership at 15 percent or lower.<sup>33</sup> The League, however, has raised only general doubts about Cox's showings. Indeed, Cox took the unusual steps of updating its household counts for several Communities that have experienced recent, rapid growth.

13. We reject, as we have in the past, the League's argument that because DBS subscribership in a few Attachment A Communities is close to 15 percent, we should be especially skeptical. First, in the three Attachment A Communities that have the lowest DBS subscribership, Cox presented household numbers that were increased from the 2000 Census to reflect rapid growth there, thus taking some pains not to overstate DBS subscribership. Second, Cox's numbers of subscribers to MVPDs other than the largest one were understated because of AT&T's refusal to disclose the numbers of subscribers to its MVPD service in the Attachment A Communities.<sup>34</sup> Third and more fundamentally, Section 623(l)(1)(B)(ii) of the Communications Act finds effective competition whenever DBS subscribership "exceeds 15 percent," with no allowance for close cases. We will find anything in excess of 15 percent to be effective competition, just as we have found showings of exactly 15 percent or slightly less to be insufficient.<sup>35</sup> For all the foregoing reasons, we reject the League's criticisms and find that the second part of the competing provider test is satisfied for each of the Attachment A Communities.

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

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

15. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if Cox serves fewer than 30 percent of the households in the franchise area. This test is referred to as the "low penetration" test.<sup>36</sup> Cox alleges that it is subject to effective competition under the low penetration effective competition test because it serves fewer than 30 percent of the households in each of the Attachment B Communities. The League does not dispute Cox's allegation.<sup>37</sup>

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

#### **C. The LEC Test**

17. 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

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<sup>33</sup> See, e.g., *Time Warner Cable Inc.*, 25 FCC Rcd 5457, 5464, ¶ 21 (2010) ("*Time Warner*"); *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1783-84, ¶ 13 (2009); *Charter Commun., LLC*, 19 FCC Rcd 7003, 7006, ¶ 7 (2004).

<sup>34</sup> Petitions at Exh. 9.

<sup>35</sup> See, e.g., *Cablevision Systems Westchester Corp.*, 24 FCC Rcd 872, 876 ¶ 16 & nn. 37-39 (2009); *Time Warner Cable Inc.*, 23 FCC Rcd 12069, 12073, ¶ 15 (2008).

<sup>36</sup> 47 U.S.C. § 543(l)(1)(A).

<sup>37</sup> Opposition at 2 n.3.

provided by the competing unaffiliated cable operator.<sup>38</sup> This test is referred to as the LEC test.

18. 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.<sup>39</sup>

19. It is undisputed that the Communities on Attachment C 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 programming<sup>40</sup> and is supported here by copies of channel lineups for AT&T's video service, which is called U-verse.<sup>41</sup> There is no dispute that Cox has established these elements of the LEC test.

20. Cox has also demonstrated that the AT&T has begun providing, or has announced that it has begun providing, video programming service within the Attachment C Communities, that its franchise obligates it to provide service throughout the Attachment A Communities (apparently by mid-2013), that AT&T has marketed its U-verse service in a manner that makes potential subscribers reasonably aware of it, and that AT&T has otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.<sup>42</sup>

21. The League, however, argues that Cox's evidence of the "actual status" of AT&T's U-verse service in the Attachment C Communities is not sufficient. The League also claims that some unidentified persons are unaware that U-verse service is available in their areas and that AT&T's service is unavailable in many City Halls in the Attachment C Communities.<sup>43</sup>

22. The League's points are unconvincing. Cox's evidence of the actual offering of AT&T cable service is the kind we and the vast majority of franchise authorities have accepted.<sup>44</sup> It is not defeated by the undocumented unawareness of an uncertain number of unnamed persons and the unavailability of service in a few locations that are not residences. The standard adopted in the *Cable Reform Order* is "reasonable," not "ubiquitous," awareness.<sup>45</sup> Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that its cable system serving the Attachment C Communities has met the LEC test and is subject to effective competition.

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<sup>38</sup> See 47 U.S.C. § 543(l)(1)(D).

<sup>39</sup> See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) ("*Cable Reform Order*").

<sup>40</sup> See 47 C.F.R. § 76.905(g). See also Petitions at 23-24.

<sup>41</sup> See Petitions at Exh. 14.

<sup>42</sup> See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petitions at 18-23 & Exh. 12.

<sup>43</sup> Opposition at 8.

<sup>44</sup> See, e.g., *Time Warner*, 25 FCC Rcd at 5464-66, ¶¶ 24-29; *CSC TKR, Inc.*, 25 FCC Rcd 4948 (2010); *Cablevision Systems Corp.*, 25 FCC Rcd 4953 (2010).

<sup>45</sup> *Cable Reform Order*, 14 FCC Rcd at 5303, ¶ 11, 5305, ¶ 13, 5306, ¶ 15.

**III. ORDERING CLAUSES**

23. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Cox Communications Kansas, LLC, **ARE GRANTED**.

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

25. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>46</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>46</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

CSRs 8222-E, 8223-E, 8224-E, 8225-E, 8226-E, 8227-E, 8228-E

## COMMUNITIES SERVED BY COX COMMUNICATIONS KANSAS, LLC

Cases and Communities	CUIDs	DBS Subscribership	Households	Estimated DBS Subscribers*
<b>CSR 8222-E</b>				
Dodge City	KS0002	23.08%	9298.58	2145.77
Garden City	KS0063	19.80%	9338	1848.68
<b>CSR 8223-E</b>				
Great Bend	KS0016	20.55%	6371	1309.41
<b>CSR 8224-E</b>				
Junction City	KS0040	15.73%	9800.65	1541.33
<b>CSR 8225-E</b>				
Salina City	KS0052 KS0411	17.59%	21641.45	3807.74
<b>CSR 8226-E</b>				
Arkansas City	KS0007	19.19%	4855	931.65
El Dorado	KS0184	19.29%	6128.51	1182.45
Hutchinson	KS0071	16.87%	16335	2755.78
McPherson City	KS0069	15.02%	6067.43	911.35
Pratt	KS0051	18.01%	3087.77	556.18
Winfield	KS0075	17.99%	5146.09	925.72
<b>CSR 8227-E</b>				
Shawnee County	KS0658 KS0341 KS0531 KS0309 KS0532 KS0342 KS0574	20.58%	15386	3166.92
<b>CSR 8228-E</b>				
Coffeerville	KS0019	25.65%	4971.14	1274.99
Iola	KS0037	16.04%	3012.79	483.34
Pittsburg	KS0050	17.70%	7980	1412.11

\* Does not include subscribers to AT&T's competing MVPD service, which appears to be offered in all the Attachment A Communities.



## ATTACHMENT B

## CSRs 8223-E, 8224-E

## COMMUNITIES SERVED BY COX COMMUNICATIONS KANSAS, LLC

<b>Cases and Communities</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Cable Subscribership</b>
<b>CSR 8223-E</b>				
Pawnee County	KS0468	650	56	8.62%
<b>CSR 8224-E</b>				
Unincorporated Pottawatomie County	KS0409	3217	302	9.39%
Unincorporated Riley County	KS0410	3917	739	18.87%

## ATTACHMENT C

## CSRs 8224-E, 8226-E, 8227-E

## COMMUNITIES SERVED BY COX COMMUNICATIONS KANSAS, LLC

Cases and Communities	CUIDs
<b>CSR 8224-E</b>	
Manhattan	KS0042
Ogden	KS0032
	KS0415
<b>CSR 8226-E</b>	
Andover	KS0156
	KS0642
Augusta	KS0148
Bel Aire	KS0271
Benton	KS0733
Butler County	KS0330
	KS0570
	KS0599
Colwich	KS0760
Derby	KS0127
Eastborough	KS0226
Goddard	KS0296
Haysville	KS0126
Kechi	KS0286
Maize	KS0264
McConnell Air Force Base	KS0307
Mulvane	KS0225
Park City	KS0268
Rose Hill	KS0265
Sedgwick	KS0154
	KS0253
	KS0267
	KS0615
	KS0614
	KS0618
Towanda	KS0313
Valley Center	KS0153
Wichita	KS0080
<b>CSR 8227-E</b>	
Auburn	KS0335
Shawnee County	
Berryton	KS0658
Montara	KS0531
Pauline	KS0532
Shawnee	KS0309
Shawnee North	KS0341
Shawnee East	KS0342
Shawnee Southwest	KS0574
Topeka	KS0079