

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

In the Matter of)
Bright House Networks, LLC)
Petition for Determination of Effective)
Competition in Farmington, Michigan (CUID)
MI0640) CSR 8086-E

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2011

Released: May 27, 2011

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

I. INTRODUCTION AND BACKGROUND

1. Bright House Networks, LLC ("Petitioner"), has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the Detroit suburb of Farmington, Michigan, which is listed on Attachment A. Petitioner alleges that its cable system serving Farmington is subject to effective competition pursuant to Section 623(l)(1)(D) 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 Farmington because of the competing service provided by AT&T Michigan ("AT&T"). The petition is opposed by a letter signed by the City Manager of Farmington and a member of the Southwestern Oakland Cable Commission. Petitioner filed a Reply to the letter.

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(l) 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 Farmington.

1 See 47 U.S.C. § 543(l)(1)(D).

2 47 C.F.R. § 76.905(b)(4).

3 Letter from Vincent Pastue, City Manager of Farmington, Michigan, and member of the Southwestern Oakland Cable Commission, to Steven Broecker, Senior Deputy Division Chief, Policy Division, Media Bureau ("Pastue Letter"). The Pastue Letter cannot be considered a formal opposition because it was filed two weeks late, was not accompanied by a motion showing good cause for the lateness, was not served on Petitioner, did not contain "a detailed full showing, supported by affidavit, of any facts or considerations relied on. 47 C.F.R. §§ 1.46, 76.7(b)(1). We will consider the points made in the Pastue Letter as informal comments.

4 Letter from Craig A. Gilley, Esq., Edwards Angell Palmer & Dodge LLP, counsel for Petitioner, to Marlene H. Dortch, Commission Secretary.

5 47 C.F.R. § 76.906.

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

7 See 47 C.F.R. §§ 76.906-.907(b).

II. DISCUSSION

3. 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 operator.⁸ This test is referred to as the “LEC” test.

4. 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.⁹ It is undisputed that this Community is served by both Petitioner 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 programming¹⁰ and is supported in this petition with copies of channel lineups for AT&T.¹¹ Finally, Petitioner has demonstrated that the AT&T has commenced providing video programming service within Farmington, 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*.¹²

5. The City Manager of Farmington and member of the Southwestern Oakland Cable Commission objects that he is unaware of effective competition, that rates for cable service have risen faster than inflation, and that AT&T’s entry “has not helped this problem.”¹³ These objections overstate the evidence that is required to show LEC effective competition. In adopting the LEC competition test, Congress believed that a LEC would be a formidable competitor to an incumbent cable operator from its commencement of service in a community.¹⁴ Therefore, we have consistently required that a petitioner show only that a LEC has actually begun to provide service in areas that substantially overlap petitioner’s, that the LEC is marketing its services so that potential customers are aware of it, and that it intends to build out its cable system within a reasonable period of time if it has not already done so.¹⁵ AT&T’s services substantially overlap the incumbent cable operator’s services in Farmington, serving at least 95

⁸ See 47 U.S.C. § 543(l)(1)(D).

⁹ 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*”).

¹⁰ See 47 C.F.R. § 76.905(g). See also Petition at 6.

¹¹ See Petition at Exh. C.

¹² See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. See also Petition at 3-6 & Declaration of Robert A. McCann, Bright House Division President, at ¶ 4 (“AT&T U-Verse is currently available to at least 95% of the total number of households in Farmington”).

¹³ Pastue Letter.

¹⁴ *Cable Reform Order*, 14 FCC Rcd at 5302, ¶ 9 (“The thrust of the 1996 Act is Congress’ expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and . . . their ubiquitous presence in the market”) (footnote omitted); *Subsidiaries of Cablevision Systems Corporation*, 23 FCC Rcd 14141, 14155, ¶ 43 (2008), *application for review pending*.

¹⁵ *Cable Reform Order*, 14 FCC Rcd at 5303-05, ¶¶ 11-13.

percent of the households in Farmington.¹⁶ Further, AT&T's marketing efforts, combined with the press coverage of AT&T in the media have ensured that potential subscribers are reasonably aware of the availability of AT&T's services.¹⁷ Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable system serving Farmington, Michigan, has met the LEC test and is subject to effective competition.

III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bright House Networks, LLC, **IS GRANTED**.

7. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the Community set forth on Attachment A **IS REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁶ See *supra* note 12.

¹⁷ Petition at 5-6.

¹⁸ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8086-E

COMMUNITY SERVED BY BRIGHT HOUSE NETWORKS, LLC

Community	CUID
Farmington	MI0640