

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

In the Matter of:)	
)	
BEACH CABLE, INC.)	
)	
v.)	CSR 4500-R
)	
JONES SPACELINK, LTD.)	
)	
Geographic Uniform Rate)	
Structure Complaint)	

MEMORANDUM OPINION AND ORDER

Adopted: August 19, 1996

Released: August 20, 1996

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Beach Cable, Inc. ("Beach") filed a complaint on December 23, 1994 (amended March 31, 1995) against Jones Spacelink, Ltd. ("Jones"), alleging that certain of Jones's promotional discounts offered to residential customers ("Red-White-Blue Promotion") and to multiple dwelling units ("MDUs") in its Panama City Beach, Florida service area violate the uniform rate structure requirement of the 1992 Cable Act and the Commission's rules.¹ Jones has operated in the Panama City Beach area since 1981 and Beach began providing service to the area in June 1994. On May 1, 1995, Jones opposed the amended complaint, and Beach replied on May 19, 1995. Beach requests that Jones be ordered to cease and desist from the alleged practices and that a monetary fine or forfeiture be imposed to deter future illegal activity.

2. Subsequent to the filing of the aforementioned pleadings, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), which held, *inter alia*, that "the Commission's uniform rate structure regulation is contrary to the [1992 Cable Act] insofar as it applies to cable operators subject to 'effective competition.'" *Id.* at 191. The court stated:

¹Communications Act of 1934 §623(d), 47 U.S.C. §543(d); 47 C.F.R. §76.984. Section 623(d) of the 1992 Cable Act provides:

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.

Application of the uniform rate provision to competitive systems violates 47 U.S.C. §543(a)(2), which prohibits the Commission and franchising authorities from utilizing their rate regulation authority under the 1992 Cable Act to regulate the rates charged by cable systems facing "effective competition."

Id. at 190-91.

In light of this decision, the Commission informed the parties herein that it must first determine that Jones does not face effective competition, as defined by the Communications Act and the Commission's rules,² before ruling on the merits of Beach's complaint, and that, if the Commission determines that Jones is subject to effective competition, the Commission lacks jurisdiction to resolve Beach's complaint.³ The parties were directed to address the issue of the presence or absence of effective competition in supplemental pleadings.⁴ On March 11, 1996, Jones filed its supplement;⁵ Beach responded on April 1, 1996; and Jones replied on April 11, 1996.

PLEADINGS

3. In its supplement, Jones states that it is at present, and was in October 1994, when its Red-White-Blue Promotion was introduced, subject to effective competition in the Panama City Beach and Bay County franchise areas where the promotion was offered. Specifically, Jones states that in its Panama City Beach franchise area, comprised of the incorporated City of Panama City Beach, it is subject to competing provider effective competition; and in its Bay County franchise area, comprised of the unincorporated areas of Bay County, excluding the military base, it is subject to low penetration effective competition..

4. Turning first to its Panama City Beach system, Jones argues that it satisfies the competing provider test for effective competition set forth in 47 U.S.C. §543(l)(1)(B) and 47 C.F.R. §76.905(b)(2).⁶ Under the first prong of that test, Jones states that, according to the 1990

²Communications Act of 1934 §623(l)(1)(A),(B),(C),(D), 47 U.S.C. §543(l)(1)(A),(B),(C),(D); 47 C.F.R. §76.905(b)(1),(2),(3),(4).

³Letter to Jaclyn N. Kolk and Burt A. Braverman from Steven A. Broeckaert, Cable Services Bureau, February 6, 1996.

⁴*Id.*

⁵Jones actually resubmitted on that date its Motion to Dismiss Amended Complaint, originally filed January 25, 1996, which addressed the effective competition issue.

⁶Under this test, first, there must be two or more unaffiliated multichannel video programming distributors that offer comparable programming to at least 50 percent of the households in the franchise area, and, second, more than 15 percent of the households in the franchise area must subscribe to programming provided by other than the largest multichannel video programming distributor.

Census, there are approximately 1,789 households in Panama City Beach and, using the 2.2% annual growth rate reported by the Bay County Tourist Development Council, there are currently 1,986 households in the City. Jones states that it offers cable service to nearly 100% of the households in its Panama City Beach franchise area and that Beach, according to its reply to Jones's opposition to its amended complaint, offers comparable programming to 80% of the households in Panama City Beach. In addition, Jones states, Primestar, DirecTV, and USSB offer comparable programming to all of the households in Panama City Beach. Jones asserts that these latter systems all cover Panama City Beach with their satellite footprints, market themselves to Panama City Beach residents, and offer comparable programming to all the households in Panama City Beach. Moreover, Jones submits, in October 1994, when it began its Red-White-Blue Promotion, both it and Beach passed more than 50% of the households in Panama City Beach, and Primestar, DirecTV, and USSB offered comparable programming and were available to all of the residents of Panama City Beach.

5. Turning to the second prong of the effective competition test under 47 C.F.R. §76.905(b)(2), Jones states that, based on information received from Beach as to its August 1995 subscribership in Jones's Panama City Beach and Bay County franchise areas combined and a breakdown of the number of Beach subscribers in October 1994, it calculates that Beach, the smaller of the two operators, currently serves 2,458 subscribers in Panama City Beach.⁷ Because a significant portion of the population in Panama City Beach is made up of seasonal, recreational, and occasional residents, Jones states, in calculating the number of households served by its competitor, it reduced the number of subscribers served by Beach by the vacancy rate for Panama City Beach according to the 1990 Census. Jones asserts that this produced 730 households presently served by Beach which, divided by the number of households in Panama City Beach, 1986, means that Beach serves 36.7% of the households in Panama City Beach, well beyond the 15% requirement. Using the same methodology and applying a 2.2% growth rate, Jones submits that, in October 1994, Beach served 281 of the 1,946 households in Panama City Beach at that time, or 14.4% of the total number of households. In addition, Jones states, a SMATV system provided comparable programming to at least 134 households at The Summit condominium complex in Panama City Beach, or 6.9% of the total number of households in the City. Moreover, relying on information from Media Business Corp. d/b/a SkyTrends, which provides quarterly reports on the number of subscribers served by DBS providers according to zip code areas, Jones calculates that DBS providers served at least 9 households in Panama City Beach in October 1994. All told, Jones concludes, competing providers other than itself served 424 households or 21.8% of the total number of Panama City Beach households in October 1994.⁸

6. Next, addressing the situation in its Bay County franchise area, Jones states that it meets the low penetration test for effective competition established in 47 U.S.C. §543(l)(1)(A)

⁷Jones updated Beach's figures by assuming that its subscribers grew at the same rate from August to December 1995, and that the same percentage of those subscribers resided in Panama City Beach and Bay County in 1995 as did in October 1994.

⁸See note 11, *infra*.

and 47 C.F.R. §76.905(b)(1).⁹ That is, using 1990 Census figures, assuming the same 2.2% annual growth rate used for Panama City Beach, and adjusting its subscribership numbers to reflect full-time occupancy, Jones states that it currently serves 3,348 households out of 19,657 households in its Bay County franchise area, or 17% of the total number of households in the unincorporated portions of Bay County. Similarly, Jones asserts, in October 1994, it served 3,491 households, or 18.1% of the total of 19,267 households in Bay County. At both times, Jones concludes, it satisfied the effective competition test of 47 C.F.R. §76.905(b)(1) by serving far fewer than 30% of the households in the Bay County franchise area.

7. In response, Beach focuses exclusively on the status of competition as of October 1, 1994, when Jones's promotional activities began, and argues that its own figures and calculations establish that effective competition did not exist at that time. With regard to competing provider effective competition in the Panama City Beach franchise area, Beach states that both it and Jones passed 15,681 dwelling units and, adjusting for the average annual occupancy rate of 65% for Northwest Florida reported by the Bay County Tourist Development Council, there were a total of 10,193 households in Panama City Beach in 1994. After correcting its 1,065 subscribers for annual occupancy, Beach states, it served 692 households, the SMATV provider served 293 households at The Summit condominium, and DBS or other satellite providers served 19 households, for a total of 1,004 households or 9.85% of the 10,193 total households, which does not constitute effective competition. Beach also disputes Jones's claim that there were only 1,986 households in Panama City Beach in 1994, since Beach passed 15,681 households and Jones stated in a November 1993 article in Multichannel News that it served 8,000 residential subscribers in Panama City Beach. Moreover, Beach asserts that, according to the Bay County Tourist Development Council, there were 9,800 households in Panama City Beach in 1994, and the City billed 11,434 residential water accounts in 1996. In addition, Beach questions the 30% occupancy rate used by Jones in its calculations, which figure contrasts sharply with the average occupancy rate of 65% it relies on, but concedes that, whichever rate is used, the same effective competition percentages are derived as long as one number is used consistently. Beach also states that Jones's figures are unreliable because Jones never discloses the number of households it actually served in 1994 and does not say when Beach passed over 50% of the households or offered service to over 15%. Finally, Beach argues that Jones's reliance on SkyTrends for satellite service is flawed because SkyTrends provides no data for 1994 and SkyTrends omits an entire zip code area served by Jones from its computations.

8. As to Jones' assertion of low penetration effective competition in Bay County, Beach maintains that Jones acknowledged that it served 5,808 households in the unincorporated area in 1994, which is far more than 30% of the 7,031 households cumulatively passed by Jones and Beach. Even when these numbers are reduced to accord with the 60% occupancy rate employed by Jones for Bay County, Beach states, Jones still served more than 30% of the households passed. Beach argues that there can be no finding of effective competition under the competing

⁹Pursuant to this test, there is effective competition if fewer than 30% of the households in the franchise area subscribe to the cable service of a cable system.

provider test either, since as of October 1, 1994, Beach provided service to less than 50% of Jones's Bay County service area. Moreover, Beach submits that it served 322 subscribing households in the Bay County area and that DBS and other satellite providers served 7 subscribing households, which equates to approximately 7% of the households passed, using the same 65% occupancy rate employed for Panama City Beach. Finally, Beach contends that the data submitted by Jones for its Bay County franchise is insufficient to determine what areas of Bay County it serves, and that Jones has never entered all of Bay County but has confined itself to areas adjacent to its Panama City Beach franchise.¹⁰

9. In reply, Jones asserts that Beach's response relies on erroneous descriptions of Jones's franchise areas. Specifically, Jones states that its Panama City Beach franchise area is limited to the incorporated area of the City of Panama City Beach, whereas the entire area served by Beach, referred to by residents as Panama City Beach, includes not only the City but adjacent areas of unincorporated Bay County as well. According to the Bay County Tourist Development Council, Jones states, the City represents only 20% of the Beach area's resident population, the remaining 80% of which is located in unincorporated Bay County. Jones contends that Beach has defined Jones's City of Panama City Beach franchise area to include the entire area served by Beach. Thus, for example, Jones states, the number of housing units indicated by Beach for Panama City Beach, 15,681, far exceeds the number within the corporate limits of the City as reported on the 1990 Census, 6,013. In addition, Jones contends, Beach relies on the number of water accounts for the entire Beach area, rather than the City alone; Beach refers to the number of households reported by the Tourist Council for the entire Beach area as opposed to the City proper; the Multichannel News article Beach cites concerned the number of subscribers passed by Jones in the City and Bay County together; and the zip code omitted from SkyTrends' report of competition is located outside the City limits.

10. In calculating effective competition, Jones states, it appropriately used 1990 Census figures for the number of City of Panama City Beach households.¹¹ Moreover, Jones continues, it accounted for growth from 1990 to 1994 by using the growth rate reported by the Tourist Council for the entire Beach area because a growth rate for the City was not available. Indeed, Jones claims, by extrapolating a higher household number, it made its effective competition showing more difficult. Its City household count for 1994, Jones also asserts, is consistent with the Tourist Council count of households in the Beach area, approximately 20% of which were

¹⁰Beach also claims at page 8 of its response that it lost approximately \$295,000 in gross revenue over a two year period as a result of Jones's promotional activities. We will not consider this allegation because it contravenes the clear direction in the Commission's February 6, 1996 letter to the parties, note 3, *supra*, that "[a]ll pleadings shall be limited to the issue of the presence or absence of effective competition in the ... franchise area."

¹¹Jones notes, however, that it slightly overstated the number of City households listed in the Census as 1,789 whereas the correct figure is 1,781. It also notes that Beach reported in its response that it served 1,065 subscribers in the City in 1994 as opposed to 947, the number previously reported to Jones. Adjusting for these new figures, Jones recalculates its effective competition showing, and finds that Beach served 316 or 16.3% of the households and that Beach, the SMATV provider, and the satellite providers together served 459 or 23.7% of the 1,938 households in the City in 1994. See Jones's Reply, Exhibit 7.

located in the City. Jones further states that the 30% occupancy rate it used in its calculations was derived by dividing the number of households reported for the City in the 1990 Census by the number of housing units, thereby obtaining only occupied units. The 65% occupancy rate used by Beach, Jones maintains, is less reliable because it is the figure reported by the Tourist Council for the entire Beach area. Moreover, Jones maintains, use of a higher occupancy rate would increase the number of households in the City served by its competitors and strengthen its effective competition showing. Finally, Jones states that it did not provide the number of households it serves in its City of Panama City Beach franchise area because that number does not factor into its effective competition showing, but that, in fact, in November 1995, it had 2,090 subscribers which, multiplied by the 30% occupancy rate, equates to 621 households.

11. Jones further contends that Beach has also defined Jones's Bay County franchise area incorrectly. Jones states that it has a franchise to serve the unincorporated areas of Bay County but that Beach has improperly sought to redefine Jones's franchise area by claiming that Jones has confined its service to areas adjacent to its Panama City Beach franchise area. Jones asserts that Beach has not met its burden of proving a franchise redefinition and that its allegation is unsupported. Jones also submits that Beach's effective competition analysis, which is purportedly based on the competing provider test rather than the low penetration test utilized by Jones, is completely without empirical support. Lastly, Jones notes that Beach does not oppose Jones's showing of effective competition at the present time in both its franchise areas. This showing is relevant, Jones argues, because even assuming *arguendo* that it did not face effective competition in 1994, it would be free of the uniform rate structure requirement once it did become subject to effective competition, and Beach's asserted damages would be limited to the period prior to the presence of effective competition.

DISCUSSION

12. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.¹² The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.¹³ Jones has met this burden.

13. Jones has correctly tied its effective competition showing to its individual franchise areas.¹⁴ With respect to its City of Panama City Beach franchise area, Jones relies on the competing provider effective competition test set forth in 47 C.F.R. §76.905(b)(2). In this regard,

¹²47 C.F.R. §76.906.

¹³47 C.F.R. §76.911(b)(1).

¹⁴See Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631, 5673 (1993) ("*Rate Order*"). Jones has separate franchises to serve the City of Panama City Beach and the unincorporated areas of Bay County. See Jones Reply, Exhibits 1 and 6.

Jones has properly looked to 1990 Census data¹⁵ and has reasonably attempted to update the Census figures to account for growth since 1990 by using available data for the growth rate of the Panama City Metropolitan Statistical Area (MSA), i.e., the Beach area. Jones has shown that it offers cable service to nearly 100% of the households in its City of Panama City Beach franchise area, that Beach offers comparable programming to over 50% of the households there, and that various satellite systems offer comparable programming¹⁶ to all of the households in the franchise area.¹⁷ Jones has also demonstrated that the same providers offered service to over 50% of the households in October 1994, when its Red-White-Blue Promotion began.¹⁸ Thus Jones has satisfied the first prong of the competing provider test for effective competition in its City of Panama City Beach franchise area.

14. Based on subscribership information received from Beach, Jones calculated the number of households currently served by Beach in the City of Panama City Beach franchise area. Jones properly focused on households in order to exclude unoccupied housing units or housing units used for seasonal, occasional, or recreational use.¹⁹ Jones derived the occupancy rate for the City by dividing the number of households reported in the 1990 Census for the City by the number of housing units. After reducing Beach's subscribers accordingly, Jones correctly concluded, without even considering penetration from SMATV and satellite providers, that Beach alone serves almost 37% of the households in the City of Panama City Beach, which is substantially above the 15% benchmark for effective competition.²⁰ Employing the identical methodology, and on the basis of revised information (*see* note 11, *supra*), Jones determined that in October 1994, Beach alone served 16.3% of the households in the City of Panama City Beach; an additional 7.4% of households were served by SMATV and satellite providers, for a total of 23.7%. Although Beach questions the reliability of SkyTrends data to determine DBS penetration in 1994, Jones calculates that these providers served only 9 households (or less than 0.5% of the total households), and even excluding these households entirely from the overall count would not

¹⁵See *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 ¶2(3) (Cab. Serv. Bur. 1994).

¹⁶See *Rate Order*, 8 FCC Rcd at 5660-61; *Annual Assessment of the State of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 95-61, 10 FCC Rcd 7805, 7813 (1995).

¹⁷See Jones's Motion to Dismiss Amended Complaint, Affidavit of Ray Kistler, at para. 5; Beach's Reply to Jones's Opposition to Amended Complaint, at 5.

¹⁸See Jones's Motion to Dismiss Amended Complaint, Affidavit of Ray Kistler, at para. 6.

¹⁹See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket Nos. 92-266 and 90-262, *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4324 (1994); 47 C.F.R. §76.905(c); *Horizon Cable I Limited Partnership*, 9 FCC Rcd 7305 (Cab. Serv. Bur. 1994); *Apollo Communications Corp.*, 10 FCC Rcd 988 (Cab. Serv. Bur. 1994).

²⁰Use of the higher overall occupancy rate reported for Northwest Florida, as urged by Beach, would have increased the number of households served by Beach and made Jones's effective competition showing even stronger.

appreciably alter the finding that the total competitive penetration was well in excess of the 15% level required for effective competition.²¹

15. With respect to its unincorporated Bay County franchise area, Jones has demonstrated that it is subject to effective competition under the low penetration test set forth in 47 C.F.R. §76.905(b)(1). Although Beach, in its response, attempts to show that Jones does not satisfy the competing provider test for effective competition set forth in 47 C.F.R. §76.905(b)(2), Jones has the burden of rebutting the presumption that effective competition does not exist, and chose to make its showing under the low penetration test set forth in 47 C.F.R. §76.905(b)(1). Because the effective competition provisions are stated in the alternative,²² and there is no requirement that an operator satisfy the same test in all franchise areas, Jones was free to choose which effective competition test specified by the rule it would attempt to meet in its Bay County franchise area.

16. In its showing, Jones correctly used 1990 Census data to determine the number of households and applied the 2.2% annual growth rate for the Beach area, i.e., the Panama City MSA, to determine the number of households in 1995. It then multiplied the number of subscribers it presently has in Bay County, 5,570,²³ by the 60% occupancy rate, which figure was derived by dividing the number of households listed in the 1990 Census by the total number of housing units in its Bay County franchise area. This means that Jones serves 3,348 households, or 17% of the total number of households in the Bay County franchise area. Similarly, Jones had 5,808 subscribers in its Bay County franchise area in October 1994,²⁴ which meant, after applying the 2.2% area annual growth rate and the 60% full-time occupancy rate for Bay County, that Jones served 3,491 households, or 18.1% of the total of approximately 19,267 households in the franchise area at that time. At both times, the penetration level was well below the Commission's 30% low penetration test ceiling. Finally, as to the parties' "franchise redefinition" contentions, Beach has not submitted specific evidence to support its contention that Jones has made an affirmative decision to limit its Bay County service area to areas adjacent to its City of Panama City Beach franchise area. Thus, we are unpersuaded that the appropriate franchise area for

²¹We also agree with Jones that the very different effective competition analysis offered by Beach in its response appears to be the result of its erroneous use of household and other statistical data for the entire Beach area, including Bay County, rather than for the much smaller City of Panama City Beach franchise area. See para. 8, *supra*.

²²47 C.F.R. §76.905(b) states:

A cable system is subject to effective competition when *any one* of the following conditions is met:
(emphasis added)

²³See Jones's Motion to Dismiss Amended Complaint, Affidavit of Ray Kistler, at para. 9.

²⁴*Id.*

purposes of effective competition is some area other than the entire unincorporated area of Bay County.²⁵

17. In sum, Jones has met its burden in this case by establishing that effective competition is present in its City of Panama City Beach and Bay County franchise areas and was present at the time it introduced the "Red-White-Blue Promotion" that is the subject of Beach's complaint. In these circumstances, as explained earlier, the Commission is without jurisdiction to consider Beach's complaint that Jones violated the uniform rate structure requirement.

ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, that the uniform rate structure complaint filed by Beach Cable, Inc. IS DISMISSED.

19. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated under Section 0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

²⁵See TCI Cablevision of Georgia, Inc. 10 FCC Rcd 597 (Cab. Serv. Bur. 1994); *American Cable Co.*, 9 FCC Rcd 7212 (Cab. Serv. Bur. 1994).