

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

In the Matter Of:)		
)		
Century M.L. Cable Corporation &	)	Bayamon	PR0004
Century M.L. Cable Venture	)	Carolina	PR0007
	)	Guaynabo	PR0006
For Reconsideration of the Certification	)	San Juan	PR0001
of the Puerto Rico Telecommunications	)	Trujillo Alto	PR0005
Regulatory Board To Regulate	)	Toa Baja	PR0010
Basic Cable Rates	)	Toa Alto	PR0026
	)	Catano	PR0012
)		
)		

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 1997

Released: December 2, 1997

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Century M.L. Cable Corporation d/b/a/ Cable Television Company of Greater San Juan and Century M.L. Cable Venture d/b/a Community Cablevision of Puerto Rico (jointly referred to as "Century"), pursuant to Section 76.911(a)(1) of the Commission's rules,¹ have filed this petition with the Commission for reconsideration of the certification of the Puerto Rico Telecommunications Regulatory Board (the "Board") to regulate basic cable rates based upon the presence of effective competition. Specifically, Century argues that the communities of Bayamon, Carolina, Catano, Guaynabo, San Juan, Trujillo Alto, Toa Baja, and Toa Alta, Puerto Rico (collectively, the "Communities") are subject to low penetration effective competition. The Board submitted a consolidated opposition² to which Century replied.

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act permits local franchising authorities to become certified to regulate the basic cable service and associated equipment rates of cable operators within their jurisdictions who are not subject to effective competition.³ For purposes of the initial request for certification, franchising authorities may rely on the presumption that cable operators are not subject

¹47 C.F.R. § 76.911(a)(1).

²The Board submitted a consolidated opposition to the petition filed by Century and to a petition for reconsideration filed by Cable TV Del Noreste which will be addressed in a separate decision.

³Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

to effective competition, unless the franchising authority has actual knowledge to the contrary.⁴ Certification becomes effective 30 days from the date of filing, unless the Commission finds that the franchising authority does not meet the statutory certification requirements.⁵ Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.⁶ Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging effective competition.⁷

3. Section 623(l)(1) of the Communications Act provides that a cable operator is subject to effective competition if any one of the following tests is met:

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is-

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier 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

⁴47 C.F.R. § 76.910(b).

⁵47 C.F.R. § 76.910 (e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations, applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 910(b). *See also* Communications Act § 623(a)(4), 47 C.F.R. § 543(a)(4).

⁶47 C.F.R. §§ 1.106, 76.911; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5693 (1993) ("Rate Order").

⁷47 C.F.R. § 76.911(c)(1).

video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁸

III. SUMMARY OF PLEADINGS

4. Century states that on June 12, 1997, the Board filed with the Commission its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition" on FCC Form 328 to become certified to regulate the cable rates in the Communities. Pursuant to Section 76.910(e) of the Commission's rules, certification became effective on July 12, 1997.⁹ Century further states that it operates two cable systems each of which serves a single franchise area of Puerto Rico, namely, its San Juan system serving the communities of Bayamon, Carolina, Guaynabo, San Juan and Trujillo Alto, and its Toa Alta system serving the communities of Catano, Toa Alta, and Toa Baja. Century maintains that it meets the requirements of the low penetration effective competition test because, fewer than 30 percent of the households in the franchise area subscribe to its cable systems on a systemwide basis.¹⁰

5. In its petition, Century relied upon 1990 Census data¹¹ and developed a growth factor to update that data and arrive at an estimate of the total number of current households in the cable communities at issue. Century calculated the growth factor by comparing Puerto Rico's population growth from 1980 to 1990 (10.2 percent) to Puerto Rico's household growth rate during the same period (21.6 percent).¹² The result of this comparison produces a household growth rate multiple of 2.12. Century applied the household growth rate multiple (2.12) to the Census Bureau's estimate of population growth from 1990 to 1996 (7.4 percent) and concluded that the household growth rate factor for the Communities is 15.69 percent.

6. Century asserts that, according to the 1990 Census, the number of households in the cable communities served by its San Juan system is 317,528 households.¹³ Century applied its Puerto Rico household growth rate factor (15.69 percent) to the number of 1990 households (317,528) and arrived at an estimated 1996 household total of 367,348. Century states that the total number of subscribers to its San Juan system as of July 1997 was 107,447 which results in a penetration rate of 29.25 percent for its

⁸Communications Act of 1934, as amended, §623(l)(1)(A), (B), (C), (D), 47 U.S.C. §543(l)(A), (B), (C), (D); Section (D) was added by Section 301(b)(2) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"); *see also*, 47 C.F.R. §76.905(b)(1), (2), (3), (4).

⁹47 C.F.R. § 76.910(e) (certification becomes effective 30 days after the date of filing).

¹⁰Century states that while it believes that it also meets the competing provider effective competition test because Puerto Rico was formerly served by AlphaStar, a direct broadcast satellite ("DBS") service provider, and is currently served by another DBS service provider, Echostar, it will file supporting evidence in a separate filing. Petition at 3. Century has not made such a filing. Accordingly we do not address the competing provider test in this order.

¹¹Petition at 4 and Exhibit A (1990 Census Bureau Household Data for Puerto Rico).

¹²Petition at Exhibit B (1980 Census Bureau Household and Population Data for Puerto Rico) and Exhibit C (1990/1996 Census Bureau Population Data for Puerto Rico).

¹³Petition at 5.

San Juan cable system.¹⁴ Century maintains that it meets the low penetration test because its penetration rate is less than 30 percent in the cable communities served by its San Juan system.

7. With regard to its Toa Alta cable system, Century states that, using the same methodology described above, it arrived at an estimated 1996 household total of 56,079 households. Century further states that, as of July 1997, it had 11,345 subscribers to its Toa Alta cable system which results in a penetration rate of 20.2 percent for its Toa Alta cable system. Century thus maintains that its Toa Alta cable system meets the low penetration effective competition test.

8. In opposition, the Board does not oppose Century's petition with respect to its Toa Alta cable system. With regard to Century's San Juan system, the Board asserts that Century's calculation of current households based upon its Puerto Rico household growth rate factor is designed to hide the fact that Century's penetration rate for its San Juan cable system exceeds 30 percent of 1990 Census household data. The Board argues that Century's methodology is unreliable because Century developed its 15.69 percent household growth rate factor based upon flawed assumptions. The Board asserts that Century's methodology employs stale data from the period 1980-1990 and that Century's calculations are skewed because the 1980-1990 period was one of relative prosperity for the San Juan franchise area. The Board further argues that Century uses population growth figures for Puerto Rico as a whole rather than the individual communities served by Century's San Juan cable system.

9. The Board asserts that its own methodology has several advantages over the method employed by Century. The Board states that its method uses the most recent data available from the Census Bureau, that it reflects changes in population growth on an individual community basis, and that it is based upon the average household population density of each community which accounts for the blend of housing units among apartments and single family homes.

10. The Board states that in the San Juan franchise area, 1990 Census data show that there were 317,582 households¹⁵ and that Century's current subscriber rolls indicate that it serves 107,447 households. Those figures result in a 33.83 percent penetration rate for Century's system serving the San Juan franchise area. Additionally, the Board provides updated household data more current than the 1990 Census data by using the Census Bureau's 1996 population estimates for each community in the San Juan franchise area and dividing each estimate by the population-per-household figure for that community. The Board calculated the population-per-household figures by using 1990 Census data and dividing the population in each community by the number of households in that community.¹⁶ For instance, the Board states that in the community of San Juan the Census Bureau's 1996 population estimate is 433,705.¹⁷ The Board, in order to calculate the number of households, divided the 1996 population estimate (433,705) by the population-per-household figure for that community (2.91) for a total of 149,040 households. The Board made the same calculations for each community served by Century's San Juan system. The Board

¹⁴Petition at 5 and Exhibit D (Memoranda to Board stating subscriber totals).

¹⁵Consolidated Opposition at 7.

¹⁶*Id.* at Exhibit 1.

¹⁷Opposition at Exhibit 1.

estimates that the San Juan franchise area currently contains a total of 330,395 households which results in an updated penetration rate of 32.52%.

11. In reply, Century maintains that it has demonstrated that its San Juan system is subject to low penetration effective competition and that the Board's methodology is flawed. Century points out that the Commission has stated that, where a local franchising authority submits alternative household data, it would accept the operator's estimates if they are more accurate and reliable than those submitted by the franchising authority.¹⁸ Century argues that its household estimates are more accurate and reliable because the Board's 1990 calculations compare current subscribership data with 1990 housing data. Century further argues that the Board's 1996 updated household calculations are based solely on the rate of population growth when there is no basis to assume that population and the number of occupied housing units increase at the same rate. Century further argues that the Board's allegation that Century ignores the impact of differences in economic conditions between 1980-1990 and the period 1990-1996 is unsubstantiated and insufficient to rebut Century's reasonable, historically-based assumptions about the rate of household growth in the San Juan franchise area.

IV. DISCUSSION

12. We grant Century's request with respect to its Toa Alta system, which is unopposed by the Board, and we deny Century's request with respect to its San Juan system.¹⁹ The Board agrees that Century's penetration rate for its Toa Alta system easily satisfies the low penetration test. With regard to Century's San Juan system, Century and the Board each submitted data more current than 1990 Census data in an attempt to show the total number of households in the franchise area. We have stated that "where both the cable operator and the franchising authority submit household numbers more current than the most recent available census data, it is the cable operator's burden to demonstrate that its more current household numbers are more accurate and reliable than the household numbers submitted by the franchising authority."²⁰

13. The Board's calculation of Century's 1990 penetration rate by using 1990 Census data and Century's current subscriber number is an acceptable method of determining a cable operator's current penetration rate.²¹ Updated household data, however, can more closely determine actual penetration rates. Both Century and the Board made calculations to update the data. The difference between the Board's methodology and the methodology used by Century centers on Century's use of older population data from the period 1980-1990 for all of Puerto Rico which it then used to calculate a household growth rate factor for the communities. The Board utilizes 1996 Census population estimates for each community in the San Juan franchise area and the community's population-per-household figure derived from 1990 Census data

¹⁸Reply at 3 citing *TCI Cablevision, Inc.*, 10 FCC Rcd 2925 (1995) ("*TCI*").

¹⁹Century's Toa Alta system serves the communities of Toa Alta, Toa Baja, and Catano.

²⁰*TCI*, 10 FCC Rcd at 2927.

²¹See *Upper Peninsula Communications, Inc.*, 11 FCC Rcd 2970 (1996), see also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Third Order on Reconsideration*, 9 FCC Rcd 4316, 4324 (we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census).

to update household data for the communities. Century states that data from the period 1980-1990 are actual historical data but fails to demonstrate why such data are more accurate than the Board's updating of household data from the period 1990-1996. Century also fails to explain why its household growth rate factor, which is based upon the population growth rate of Puerto Rico as a whole rather than the population growth rate of the communities at issue, is more accurate and reliable than the household numbers submitted by the Board. The Board's use of population and household data for each community and of a population-per-household figure derived from 1990 Census data seems to be a more reasonable approach. Thus we are not convinced that the current household data submitted by Century are more accurate and reliable than the alternative data submitted by the Board.

14. Since we are unable to conclude that Century's household data are more accurate than the alternative data submitted by the Board, we will rely on the Board's household data to determine Century's penetration rate in the San Juan franchise area. The Board has prepared two sets of data. Both show that Century serves more than 30 percent of the households in the franchise area. Based upon 1990 Census data, the San Juan franchise area contained 317,582 households and Century serves 107,447 subscribers in that franchise area, resulting in a penetration rate of 33.83 percent. Based upon updated figures, the San Juan franchise area contains 330,395 households as of 1996 and, using Century's 107,447 subscribers, we find that Century's San Juan system serves 32.52 percent of the households in the franchise area at issue. Accordingly, we find that Century's San Juan system is not subject to low penetration effective competition and we deny its petition.

V. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by Century M.L. Cable Corporation and Century M.L. Cable Venture challenging the certification of the Puerto Rico Telecommunications Regulatory Board to regulate basic cable rates **IS GRANTED** with respect to the Toa Alta cable system serving the communities of Catano, Toa Alta, and Toa Baja.

16. **IT IS FURTHER ORDERED** that the certification granted to the Puerto Rico Telecommunications Regulatory Board to regulate Century's basic cable rates in the Toa Alta franchise area **IS REVOKED**.

17. **IT IS FURTHER ORDERED** that the petition for reconsideration with respect to Century's San Juan system serving the communities of Bayamon, Carolina, Guaynabo, San Juan and Trujillo Alto **IS DENIED**.

18. This action is taken pursuant to delegated authority under Section 0.321, 47 C.F.R. § 0.321, of the Commission's rules as amended.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau