

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

In the Matter of:) CSR 5297-E
)
Marcus Cable Associate, LLC) West Point, GA
) CUID No. GA0043
For Determination of)
Effective Competition)

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1999

Released: January 26, 1999

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Marcus Cable Associates, LLC ("Marcus") has filed a Petition for Special Relief seeking a determination of effective competition. Marcus asserts that it is subject to local exchange carrier ("LEC")¹ effective competition in West Point, Georgia because of the presence of ITC Globe, Inc.'s, d/b/a/ KnoLogy, ("KnoLogy") cable service in that city. This petition is unopposed. For the reasons discussed below, the Petition is granted.

2. Section 623(a)(4) of the Communications Act of 1934, as amended ("Communications Act") allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.² For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.³ Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.⁴ In *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996* ("Cable Act Reform Order"),⁵ the Commission instructed cable operators

¹The Communications Act defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

Communications Act § 3(26), 47 U.S.C. § 153(26).

²Communications Act §623(a)(4), 47 U.S.C. §543(a)(4).

³47 C.F.R. §§76.906, 76.910(b)(4).

⁴47 C.F.R. §76.910(e); 47 C.F.R. §76.910(b); *see also* Communications Act §623(a)(4), 47 U.S.C. §543(a)(4).

⁵11 FCC Rcd 5937, 5944 (1996).

believing themselves subject to local exchange carrier ("LEC") effective competition under Section 623(l)(1)(D) of the Communications Act to file a petition for determination of effective competition pursuant to Section 76.7 of the Commission's rules.⁶ Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition where:

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 video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁷

II. THE PLEADINGS

3. Marcus asserts that it is subject to LEC effective competition in its West Point, Georgia franchise area, where it currently serves over 1,200 subscribers.⁸ With regard to the LEC affiliation requirement,⁹ Marcus asserts that KnoLogy is a competing franchised cable operator affiliated with Interstate/Valley Telephone Company, which is an incumbent local exchange carrier in portions of Georgia and Alabama.¹⁰

4. With regard to the requirement that the LEC competitor offer¹¹ video programming service

⁶47 C.F.R. §76.7.

⁷Communications Act §623(l)(1)(D), 47 U.S.C. §543(l)(1)(D); *see* 47 C.F.R. §76.905(b)(4).

⁸Marcus Petition at 2.

⁹The Commission determined that the definition of affiliate provided in Section 3 of the 1996 Act will apply to the LEC effective competition test:

The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Cable Act Reform Order, 11 FCC Rcd at 5944 (quoting Communications Act § 3(1), 47 U.S.C. § 153(1)).

¹⁰*Id.* at 1 and Exhibit A (detailing the corporate affiliation between Interstate/Valley Telephone Company and KnoLogy).

¹¹In implementing the LEC effective competition test on an interim basis, the Commission determined that its pre-existing definition of the term "offer" as used in the three effective competition definitions set forth in the 1992 Cable Act would apply to the LEC test. 11 FCC Rcd at 5942. The Commission previously determined that service of a multichannel video programming distributor will be deemed offered:

- (1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and
- (2) When no regulatory, technical or other impediments to households taking service exist,

in the unaffiliated cable operator's franchise area, Marcus asserts that KnoLogic is now providing such service to subscribers in West Point.¹² To substantiate its claim, Marcus states that 205 of its subscribers have switched over to KnoLogic's cable service and that KnoLogic has a total subscriber base of 214.¹³ Marcus states that KnoLogic has heavily marketed the availability of its cable service through newspaper and radio ads, direct mail solicitations, and on Interstate/Valley Telephone Company telephone bills.¹⁴ Marcus states that potential subscribers can even register for KnoLogic's service on its internet website.¹⁵ Marcus asserts there are no regulatory, technical, or other impediments to households taking service from KnoLogic.

5. Marcus also asserts that KnoLogic offers comparable programming¹⁶ to West Point subscribers. Specifically, Marcus provides KnoLogic's channel line-up which demonstrates that KnoLogic offers 85 channels, 10 of which are local television broadcasting signals.¹⁷ Marcus offers 78 channels of programming, 9 of which are local broadcast signals, in West Point.¹⁸

6. Finally, Marcus states that it has made several pricing and marketing changes in response to increased competition from KnoLogic. Marcus notes that it recently: (1) completed a \$5 million system upgrade; (2) added six new cable programming services to its expanded basic package and reduced the price for that package; (3) implemented an overall price reduction of up to 48%, with rates that are guaranteed until January 2000--by reducing the prices charged for both its regulated service tiers and its unregulated premium service offerings, such as its HBO and Cinemax packages; (4) ceased charging customers for its wire maintenance protection plan; and (5) implemented various marketing and advertising plans detailing its rate and service changes.¹⁹

III. ANALYSIS

and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.

47 C.F.R. §76.905(e).

¹²Marcus Petition at 7.

¹³*Id.* at 8-9.

¹⁴*Id.* at 8-9 and Exhibits G and H.

¹⁵*Id.* at 9 and Exhibit K ("www.knology.com/valley").

¹⁶The Commission observed that Congress specified a different definition of comparable programming for the LEC effective competition test from that adopted for the first three effective competition tests enacted as part of the 1992 Cable Act. Although soliciting comment as to the revised definition, the Commission on an interim basis determined that it will apply this new comparable programming standard which "includes access to at least 12 channels of programming, at least some of which are television broadcasting signals" to the LEC effective competition test. *See Cable Act Reform Order* at ¶12 (quoting 1996 Act Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996)).

¹⁷Marcus Petition at 10 and Exhibit K.

¹⁸*Id.* at 11 and Exhibit M.

¹⁹*Id.* at 11-12 and Exhibit N.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act.²⁰ The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.²¹ Marcus has met this burden.

8. With regard to the first part of the LEC effective competition test, which requires that the alleged competitive service be provided by a LEC or its affiliate (or any multi-channel video programming distributor ("MVPD") using the facilities of such LEC or its affiliate), we find that Marcus has provided sufficient evidence demonstrating that KnoLogic is an MVPD affiliated with a LEC. Interstate/Valley Telephone Company is a LEC as defined by the Communications Act,²² and KnoLogic meets the Commission's definition of MVPD. Therefore, we find that Marcus satisfies the affiliation prong of the LEC effective competition test. Marcus is unaffiliated with both Interstate/Valley Telephone Company and KnoLogic.

9. We also find that Marcus has submitted sufficient evidence to show that the programming of KnoLogic is comparable to the programming which it provides. The channel information for KnoLogic submitted by Marcus establishes that KnoLogic offers 85 channels of programming, including 10 local broadcast channels. This satisfies the programming comparability criterion.

10. In addition, we find that based on the information before us, KnoLogic is franchised to serve West Point and is offering service in Marcus's franchise area sufficient to demonstrate the presence of effective competition. KnoLogic has overbuilt Marcus' system in the City of West Point and is now competing for customers with Marcus in the area at issue. We find that KnoLogic's undisputed recruitment of 214 subscribers to be a clear indicator that KnoLogic is physically able to offer service in the franchise area.

11. We note that KnoLogic's extensive marketing efforts and the wide press coverage of KnoLogic's construction activity in the local media ensure that potential subscribers are reasonably aware of the availability of KnoLogic's service. Generally, subscribers in West Point are able to receive KnoLogic's cable service for only a minimal additional investment and without encountering regulatory or technical obstacles. We also note that, to aggressively compete with KnoLogic's service, Marcus has lowered its rates, added new channels, and upgraded its cable plant, which benefits subscribers in West Point. Consistent with Congressional intent in adopting Section 623(1)(1)(d) of the Communications Act, under the circumstances we find "effective competition" to be present.

IV. ORDERING CLAUSES

²⁰47 C.F.R. §76.906.

²¹47 C.F.R. §76.911(b)(1).

²²The Communications Act defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

12. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Marcus Cable Associates, LLC, challenging the certification of the City of West Point, in West Point, Georgia **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certification of the City of West Point, Georgia to regulate the basic cable rates of Marcus in West Point, Georgia **IS REVOKED**.

14. This action is taken pursuant to the interim rules adopted in *Implementation of Cable Reform Provisions of the Telecommunications Act of 1996*, and is without prejudice to any further action taken by the Commission in adopting final rules pursuant to the Notice of Proposed Rulemaking contained therein.²³

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.²⁴

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen
Chief, Cable Services Bureau

²³*Cable Act Reform Order*, 11 FCC Rcd at 5938-5945, 5961-5964.

²⁴47 C.F.R §0.321.