

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

In the Matter of	)	
	)	CSR 8243-E
CoxCom, Inc.	)	CSR 8244-E
	)	CSR 8245-E
Petitions for Determination of Effective Competition in 15 Communities in Arkansas	)	CSR 8246-E

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 17, 2010**

**Released: November 17, 2010**

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

**I. INTRODUCTION AND BACKGROUND**

1. CoxCom, Inc., d/b/a/ Cox Communications Arkansas, hereinafter referred to as “Petitioner,” has filed with the Commission petitions pursuant to Sections 76.7 and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in 15 franchise areas in Arkansas (the “Communities”). Petitioner alleges that its cable system is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Communities listed on Attachment A (the “Attachment A Communities”) because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). Petitioner also claims to be exempt from cable rate regulation in the Communities listed on Attachment B (the “Attachment B Communities”) because of the Petitioner serves fewer than 30 percent of the households in those franchise areas. Petitioner 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, L.P., d/b/a/ AT&T Arkansas, hereinafter referred to as “Competitor.” The petitions are unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>4</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>5</sup> For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments A, B, and C.

<sup>1</sup> See 47 U.S.C. § 543(l).

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

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> See 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

<sup>5</sup> See 47 C.F.R. §§ 76.906 & 76.907.

## 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>6</sup> This test is referred to as the “competing provider” test.

4. The first prong 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>7</sup>

5. Turning to the first prong of this test, it is undisputed that the Attachment A Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner 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>8</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong 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>9</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local and national media that serve the Attachment A Communities to support their assertion that potential customers in there are reasonably aware that they may purchase the service of these MVPD providers.<sup>10</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>11</sup> and is supported in these petitions with copies of channel lineups for both DIRECTV and Dish.<sup>12</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Attachment A Communities because of their national satellite footprint.<sup>13</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong 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. Petitioner asserts that it is the largest MVPD in the Attachment A Communities.<sup>14</sup> Petitioner sought to determine the competing provider penetration there by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers

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<sup>6</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup> *See* Petitions at 6.

<sup>9</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

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

<sup>11</sup> *See* 47 C.F.R. § 76.905(g). *See also* Petitions at 4-5.

<sup>12</sup> *See* Petitions at Exh. 2.

<sup>13</sup> *See id.* at 4, 6.

<sup>14</sup> *See id.* at 4, 8-9.

attributable to the DBS providers within the Attachment A Communities on a five-digit zip code basis.<sup>15</sup>

7. Aggregate DBS subscriber penetration levels were calculated using Census data and, for certain “high growth” communities, Petitioner’s own business records, surveys, and calculations.<sup>16</sup> These are reflected in Attachment A. Based on this evidence, we find that Petitioner has demonstrated 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. Therefore, the second prong of the competing provider test is satisfied for each of the Attachment A Communities.

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

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

9. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area. This test is referred to as the “low penetration” test.<sup>17</sup> Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the Attachment B Communities.

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

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

11. 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.<sup>18</sup> This test is referred to as the “LEC” test.

12. 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>19</sup> It is undisputed that the Attachment C Communities are served by both Petitioner and Competitor, 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,

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<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 10-13.

<sup>17</sup> 47 U.S.C. § 543(l)(1)(A).

<sup>18</sup> *See* 47 U.S.C. § 543(l)(D).

<sup>19</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*”).

including at least one channel of nonbroadcast service programming<sup>20</sup> and is supported in these petitions with copies of channel lineups for Competitor.<sup>21</sup> Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Attachment C Communities, 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*.<sup>22</sup>

13. Based on the foregoing, we conclude that Petitioner 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.

### III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by CoxCom, Inc., **ARE GRANTED**.

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

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>23</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

<sup>20</sup> See 47 C.F.R. § 76.905(g). See also Petitions at 24.

<sup>21</sup> See Petitions at Exh. 11.

<sup>22</sup> See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petitions at 18-23.

<sup>23</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 8243-E, 8245-E, and 8246-E

## COMMUNITIES SERVED BY COXCOM, INC.

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>Households</b>	<b>Estimated DBS Subscribers</b>
<b>CSR 8243-E</b>				
Bellfonte	AR0111	33.26%	167	56
Bergman	AR0705	35.36%	155	55
Harrison	AR0044	32.84%	5664	1860
Valley Springs	AR0706	30.03%	80	24
<b>CSR 8245-E</b>				
Fort Smith	AR0016	17.97%	32398	5823
Greenwood	AR0104	25.88%	3641	942
Van Buren	AR0040	27.86%	6947	1936
<b>CSR 8246-E</b>				
Bella Vista Village	AR0083	28.82%	11104	3200
Bentonville	AR0054	18.61%	13582	2527
Rogers	AR0031 AR0639	26.50%	19538	5178

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT B

## CSR 8244-E

## COMMUNITIES SERVED BY COXCOM, INC.

<b>Community</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Washington County	AR0068 AR0562	13504	458	3.39

## ATTACHMENT C

## CSR 8244-E, 8245-E, and 8246-E

## COMMUNITIES SERVED BY COXCOM, INC.

<b>Communities</b>	<b>CUIDs</b>
<b>CSR 8244-E</b>	
Lowell	AR0269
<b>CSR 8245-E</b>	
Barling	AR0129
Fort Smith	AR0016
<b>CSR 8246-E</b>	
Bentonville	AR0054
Rogers	AR0031
	AR0639