

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

In the Matter of)	CSR 8495-E
)	CSR 8496-E
Bresnan Communications, LLC)	CSR 8497-E
)	CSR 8498-E
Petitions for Determination of Effective)	CSR 8499-E
Competition in Six Communities in Colorado,)	CSR 8500-E
Montana, and Wyoming)	

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 2011

Released: August 5, 2011

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

I. INTRODUCTION AND BACKGROUND

1. Bresnan Communications, LLC, hereinafter referred to as “Petitioner,” has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as the “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). 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,³ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ 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.⁵ 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 Attachment A.

II. DISCUSSION

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 (“MVPDs”), 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

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

⁵ See 47 C.F.R. §§ 76.906-.907(b).

households in the franchise area.⁶ 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.⁷ It is undisputed that the 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.⁸ 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.⁹ We further find that Petitioner has provided sufficient evidence of DBS advertising in media that serve the Communities to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ 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 programming¹¹ and is supported in these petitions with copies of channel lineups for both DIRECTV and DISH.¹² Also undisputed is Petitioner’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹³ Accordingly, we find that the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Petitioner asserts that in some Communities it is the largest MVPD; and that, in other Communities, one of the DBS providers may be the largest and the combined household share of Bresnan and the other DBS provider exceeds 15 percent.¹⁴ The Commission has recognized that in those conditions, whichever MVPD is the largest, the remaining MVPDs have subscribership of over 15 percent.¹⁵ Petitioner sought to determine the competing provider penetration in the Communities by purchasing data from Media Business Corporation and the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.¹⁶

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

⁷ 47 C.F.R. § 76.905(b)(2)(i).

⁸ *See, e.g.*, Petition in CSR 8495-E at 2-3.

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

¹⁰ 47 C.F.R. § 76.905(e)(2).

¹¹ *See, e.g.*, 47 C.F.R. § 76.905(g). *See also* Petition in CSR 8496-E at 5.

¹² *See, e.g.*, Petition in CSR 8497-E at Exh. 4.

¹³ *See, e.g.*, Petition in CSR 8498-E at 2.

¹⁴ *See, e.g.*, Petition in CSR 8499-E at 6; *id.* at Exh. 1 (Declaration of Paul Jamieson, Managing Counsel, Legislative and Regulatory, for Petitioner) at ¶ 3 (dated May 18, 2011).

¹⁵ If Bresnan is the largest MVPD, then MVPDs other than the largest one are the DBS providers, which have a combined share of over 15%. On the other hand, if one of the DBS providers is the largest MVPD, then Bresnan (which alone has over 15%) and the others combined have over 15%. *See, e.g., Bresnan Commc’ns, LLC*, 26 FCC Rcd 6122, 6123-24, ¶ 5 (2011); *Time Warner Cable Inc.*, 25 FCC Rcd 14422, 14424, ¶ 6 (2010).

¹⁶ *See, e.g.*, Petition in CSR 8500-E at Exh. 6.

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,¹⁷ as reflected in Attachment A, 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 Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities. 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 Communities listed on Attachment A.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Bresnan Communications, LLC, **ARE GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁷ See, e.g., Petition in CSR 8495-E at Exh. 5.

¹⁸ 47 C.F.R. § 0.283.

ATTACHMENT A

CSRs 8495-E, 8496-E, 8497-E, 8498-E, 8499-E, 8500-E

COMMUNITIES SERVED BY BRESNAN COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
CSR 8495-E				
Swink	CO0239	30.24	248	75
CSR 8496-E				
Boulder	MT0114	64.40	514	331
CSR 8497-E				
Chinook	MT0123	54.59	599	327
CSR 8498-E				
Unincorporated Phillips County	MT0198	89.94	766	689
CSR 8499-E				
Sheridan	WY0010	22.04	7680	1693
CSR 8500-E				
Sinclair	WY0023	51.18	170	87

*CPR = Percent of competitive DBS penetration rate.