

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

In the Matter of:)
Adelphia Communications) CSR 6307-E, 6318-E & 6319-E
Cable One, Inc.) CSR 6302-E
Seren Innovations, Inc.) CSR 6312-E & 6327-E
Six Unopposed Petitions for Determination of)
Effective Competition in Thirty-five Local)
Franchise Areas)

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 2004

Released: September 24, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers six unopposed petitions which cable operators (the "Cable Operators") have filed with the Commission pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission's rules for a determination that such operators are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules and are therefore exempt from cable rate regulation in the communities listed in Attachment A (the "Communities"). No opposition to any petition was filed. Finding that the Cable Operators are subject to effective competition in the listed Communities, we grant the petitions.

II. DISCUSSION

A. Competing Provider Effective Competition

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 76.905 of the Commission's rules. 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. 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

147 C.F.R. § 76.906.

247 C.F.R. § 76.905.

3See 47 C.F.R. §§ 76.906 & 907.

offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁴

3. In four of the petitions, the Cable Operators, Cable One and Adelphia, claim the presence of effective competition stems from the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and DISH Network (“DISH”). Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁵ The Cable Operators have provided evidence of the advertising of DBS service in the news media serving the Communities for which a competing provider determination is requested.⁶ Moreover, the two DBS providers’ subscriber growth reached approximately 20.4 million as of June 30, 2003, comprising approximately 20 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth largest MVPD provider.⁷ With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission’s program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.⁸ We find that the Cable Operators have demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the Communities. The Cable Operators have also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and DISH.⁹ Therefore, the first prong of the competing provider test is satisfied for each of the Communities.

4. 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. The Cable Operators sought to determine the competing provider penetration in the Communities by purchasing a satellite subscriber tracking report that identified the number of subscribers attributable to the DBS providers within the Communities on a five digit zip code basis.¹⁰ The Cable Operators assert that they are the largest MVPD in twenty-one Communities because their subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹¹ Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, we find that the Cable Operators have 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 these twenty-one Communities. As to the remaining Community, Salmon, Idaho, the Cable Operator is unable

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

⁵*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁶*See e.g.*, Cable One Petition at 3-6 and Exhibit C; Adelphia Petitions at 4 and Exhibit 1.

⁷ *Tenth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 04-5 at ¶¶ 65-67 (rel. Jan. 28, 2004).

⁸47 C.F.R. §76.905(g); *see also* Cable One Petition at 6-7 and Exhibits D, E and F; Adelphia Petitions at 4-5 and Exhibits 2-3.

⁹*See e.g.*, Cable One Petition at 3-7; Adelphia Petitions at 3-5.

¹⁰*See e.g.*, Cable One Petition at 9-10; Adelphia Petitions at 5.

¹¹*See e.g.*, Cable One Petition at 9-11 and Exhibit D, E and F; Adelphia Petitions at 5 and Exhibit 4.

to determine the largest MVPD because the number of DBS subscribers for DirecTV and DISH are aggregated and exceed the number of the Cable Operator's subscribers. Nevertheless, we are able to conclude that the second prong is met by analyzing the data submitted for both the Cable Operator and DBS providers.¹² Therefore, the second prong of the competing provider test is satisfied for all of these Communities. Based on the foregoing, we conclude that the Cable Operators have submitted sufficient evidence demonstrating that their cable systems serving the Communities set forth on Attachment A are subject to competing provider effective competition.

5. In another petition, the Cable Operator, Seren, claims the presence of effective competition in six Communities stems from the services provided by competing cable providers. The Cable Operator argues that the first prong of the competing provider test is satisfied by itself and the competing cable providers, Comcast, Charter, and U.S. Cable, all of whom offer comparable programming to at least 50 percent of the households in the Communities.¹³ With respect to the issue of program comparability, we find that the programming of the Cable Operator and the competing providers are comparable.¹⁴ We note that each provider offers at least 12 channels of video programming, including at least one non-broadcast channel. This satisfies the Commission's programming comparability criterion. We find that the Cable Operator has demonstrated that the communities are served by at least two unaffiliated MVPDs, namely the competing cable providers, each of which offers comparable video programming to at least 50 percent of the households in the six Communities. Therefore, the first prong of the competing provider test is satisfied for the six Communities served by the Cable Operator's franchises.

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. The Cable Operator sought to determine the competing provider penetration in six of its franchise areas by requesting subscribership data from its competing providers.¹⁵ The Cable Operator asserts that the incumbent competing providers are the largest MVPD in five of the six Communities. In the City of St. Joseph, the Cable Operator, Seren, is the largest MVPD.¹⁶ Based upon the aggregate subscriber penetration levels of all MVPDs as reflected in Attachment A, calculated using 2000 Census household data,¹⁷ we find that the Cable Operator 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 these six Communities. Therefore, the second prong of the competing provider test is satisfied as to these Communities. Based on the foregoing, we conclude that the Cable Operator has submitted sufficient evidence demonstrating that its cable systems serving the six Communities set forth on Attachment A are subject to effective competition.

B. The Low Penetration Effective Competition Test

7. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if "fewer than 30 percent of the

¹² If the subscriber penetration for both the cable operator and the aggregate DBS information each exceed 15 percent in the franchise area, the second prong of the competing provider test is satisfied. *See Time Warner Entertainment Advance/Newhouse Partnership, et al.*, 17 FCC Rcd 23587, 23589 (MB 2002).

¹³ Seren Petition at 5 and Exhibit C. In any event, as discussed above, the service of DBS providers would also satisfy the first prong of the competing provider test for these franchise areas. *See supra* ¶ 3.

¹⁴ *See* 47 C.F.R. §76.905(g); *see* Seren Petition at 5 and Exhibit C.

¹⁵ 47 C.F.R. § 76.907(c).

¹⁶ Seren Petition at 7 and Exhibit A.

¹⁷ *Id.* and Exhibit A

households in the franchise area subscribe to the cable service of the cable system.”¹⁸ One Cable Operator listed on Attachment A provided information showing that less than 30 percent of the households within its franchise areas subscribe to its cable services in seven Communities. Based on this record, we conclude that the Cable Operator has demonstrated the existence of low penetration effective competition under our rules.

8. Based on the foregoing, we conclude that the three Cable Operators listed on Attachment A have submitted sufficient evidence to demonstrate that their cable systems are subject to effective competition.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petitions filed by the Cable Operators listed on Attachment A for a determination of effective competition in the Communities listed thereon **ARE GRANTED**.

10. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing the Cable Operators **ARE REVOKED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission’s rules.¹⁹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

¹⁸47 U.S.C § 543(l)(1)(A).

¹⁹47 C.F.R. § 0.283.

Attachment A

Cable Operators Subject to Competing Provider Effective Competition

Adelphia Communications: CSR 6307-E, 6318-E & 6319-E

Communities	CUIDS	CPR*	2000 Census Households ⁺	DBS Subscribers ⁺	Adelphia Subscribers ⁺
Homestead, FL	FL0237	20.17	10,095	2,036	4,110
Kelso, WA	WA0078	26.78	4,616	1,236	2,273
Longview, WA	WA0079	20.03	14,066	2,818	7,613
Trinidad, CO	CO0029	20.00	3,701	740	2,897

*CPR = Percent of competitive DBS penetration rate.

⁺See Adelphia Petitions at 6 and Exhibits 4-5.

Cable One, Inc. : CSR 6302-E

Communities	CUIDS	CPR*	2000 Census Households ⁺	DBS Subscribers ⁺	Cable One Subscribers ⁺
Idaho Falls	ID0046	15.48	18,793	2,910 ²⁰	3331
Ammon	ID0048	15.10	1,843	278	334
Basalt	ID0135	20.79	121	25	30
Bingham County	ID0072 ID0207	23.09	7,549	1,743	2092
Bonneville County	ID0049	15.88	7,306	1160	1393
Blackfoot	ID0073	23.09	3,685	851	1021
Firth	ID0134	21.13	142	30	36
Fremont County	ID0104	33.09	1,916	634	761
Madison County	ID0157	16.73	2,529	423	508
Rexburg	ID0053	16.75	4,274	716	859
Rigby	ID0096	28.35	1,051	298	358
Ririe	ID0133 ID0148	27.23	191	52	62
Shelley	ID0095	18.73	1,201	225	270
Saint Anthony	ID0103	33.36	1,091	364	437
Sugar City	ID0094	26.38	326	86	104
Teton	ID0155	30.21	192	58	71
Salmon	ID0129	45.87	1,369	628	474
Salmon (uninc. Lemhi)	ID0130	45.89	1,863	855	986

*CPR = Percent of competitive DBS penetration rate.

⁺See Cable One Petition at 9 and Exhibits B, H, and I.

²⁰ Represents 2,775 aggregate DBS subscribers + 135 Teton Wireless Television, Inc. subscribers.

Seren Innovations, Inc.: CSR-6312-E & CSR-6327-E

Communities	CUIDS	CPR*	2000 Census Households⁺	Cable Subscribers	Seren Subscribers⁺
Concord	CA1528	37.15	44,020	22,799	16,353
City of Sartell	MN1014	62.65	3,443	2,217	2,157
City of Sauk Rapids	MN1013	53.89	3,921	2,253	2,113
City of St. Cloud	MN 1012	48.28	22,652	15,022	10,937
City of St. Joseph	MN1119	44.02	1,120	493	800
City of Waite Park	MN1015	44.96	2,967	1,511	1,334

*CPR = Percent of competing provider, other than the largest provider, penetration rate.

⁺See Seren Petition at 6-7 and Exhibit A.

Cable Operators Subject to Low Penetration Effective Competition**Seren Innovations, Inc.: CSR-6312-E & CSR-6327-E**

Communities	CUIDS	CPR*	2000 Census Households⁺	Seren Subscribers⁺
Contra Costa County	CA1632	25.68	3,591	922
Walnut Creek	CA1585	22.88	30,301	6,934
Haven Township	MN1049	7.66	666	51
Le Sauk Township	MN1048	7.67	639	49
Minden Township	MN1051	15.47	627	97
Sauk Rapids Township	MN1050	25.93	270	70
St. Joseph's Township	MN1047	24.62	845	208

*CPR = Percent of Seren penetration rate.

⁺See Seren Petition at 3 and Exhibit B.