

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

In the Matter of:)	
)	
Kansas City Cable Partners)	CSR-5956-E
)	
Petition for Determination of Effective)	
Competition in Shawnee, Kansas (KS0431))	
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2003

Released: July 9, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Kansas City Cable Partners (“KCCP”) has filed with the Commission a petition (“Petition”) pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in Shawnee, Kansas (“Shawnee”). KCCP alleges that its cable system serving Shawnee is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission's implementing rules,² and seeks revocation of the certification of the local franchising authority in Shawnee to regulate basic cable service rates. KCCP claims the presence of effective competition in Shawnee stems from the competing services provided by Everest Midwest Licensee (“Everest”), a franchised cable operator that also provides local exchange carrier (“LEC”) service in Shawnee.³ Everest filed a Response to the Petition and KCCP filed a Reply.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ 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.⁶ Based on the

¹ 47 U.S.C. § 543(a)(2).

² 47 C.F.R. § 76.905.

³ 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906-907.

record in this proceeding, KCCP has met this burden.

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a 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, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁷

4. The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁸ The incumbent also must show that the LEC intends to build out its cable system within a reasonable period of time if it has not already done so, 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.⁹

5. KCCP operates a cable television system in Shawnee for which it seeks a determination of effective competition. KCCP has provided information demonstrating that Everest is a telephone company that provides local exchange and other telephone services within Shawnee.¹⁰ Therefore, Everest qualifies as a LEC for purposes of the LEC effective competition test.¹¹

6. In addition to qualifying as a LEC, Everest was awarded a franchise for the provision of cable service within Shawnee.¹² KCCP states that Everest is required by its franchise to fully construct its system such that its plant passes 100 percent of all households, before December 3, 2006. KCCP estimates that Everest already passes approximately 4,330 homes, over 23 percent of the more than 18,522 households in Shawnee.¹³ KCCP also states that Everest's franchise states that Everest must build out its system within five years or it will face monetary penalties chargeable against a \$100,000 performance bond.¹⁴ KCCP asserts that Everest's current level of buildout is more than sufficient for the Commission to immediately deem its cable system subject to effective competition.¹⁵

⁷ 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) is referred to as the "LEC" effective competition test.

⁸ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁹ *Id.*

¹⁰ Petition at 2.

¹¹ *See* 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹² KCCP Petition at 4.

¹³ KCCP Petition at 4.

¹⁴ *Id.* at 6, Exhibit C.

¹⁵ KCCP Reply at 2.

7. In its response, Everest argues that KCCP has understated the number of households in Shawnee and it has overstated the number of Shawnee households passed by the Everest network. Everest states that there are 19,674 households in Shawnee and its system actually passes only 3,008 homes in the franchise area.¹⁶ Everest asserts that it passes just 15 percent of households rather than 23 percent as misstated by KCCP. Everest argues that the systems do not substantially overlap to the degree necessary to find that there is effective competition in the franchise area.

8. Notwithstanding Everest's arguments, KCCP demonstrates that there are no regulatory, technical or other impediments to Everest's provision of cable service within Shawnee.¹⁷ While Everest may disagree with the numbers provided by KCCP, record evidence indicates that more than 15 percent of households in the franchise area may choose between two cable operators for the provision of cable service.¹⁸ Under these circumstances, we find that KCCP has demonstrated that Everest's operations in the franchise area will substantially overlap those of KCCP. In addition, as stated by KCCP, there are over 2,100 DBS subscribers in the franchise area.¹⁹ This is an additional indication that Shawnee residents have a choice among multichannel video programming distributors.

9. Moreover, as KCCP states, it has recently made major improvements to its system in response to the competitive pressures posed by Everest and DBS providers.²⁰ It explains that it has fully upgraded its system and is offering new channels of programming, cable modem service, home networking, HDTV, as well as video-on-demand. These services, which are an outgrowth of competition, benefit subscribers and support our decision to grant KCCP's petition.

10. Everest has widely distributed marketing materials and has staged marketing events in Shawnee, all pointing out that residents need only call Everest for installation in areas where it has activated its service.²¹ These marketing materials, as well as publicity generated by news stories in the local media like the *Kansas City Star*, have raised awareness of competitive cable service sufficient enough to satisfy the LEC effective competition test.²² Moreover, KCCP has adequately demonstrated that Everest's cable service offers over 200 channels of video programming that includes non-broadcast programming services such as ESPN, HBO, CNN, as well as a complement of local television broadcast stations, such as KSHB (NBC), KMBC (ABC), and KCTV (CBS).²³ Therefore, Everest provides comparable programming as required by the LEC effective competition test.

11. Everest argues that neither KCCP nor any other incumbent cable operator should be permitted to offer geographically non-uniform prices before receiving a determination that it is subject to

¹⁶ Everest Response at 3.

¹⁷ KCCP Reply at 2-5.

¹⁸ News reports subsequent to the close of the pleading cycle in this proceeding indicate that Everest continues to build out its network in Shawnee. "Overland Park will be 75 percent complete by year end [2002], as will be 65 percent of Shawnee." See Aaron Barnhart, *Everest Emerges as Competitor for Area Cable, Phone and Web Providers*, KANSAS CITY STAR, (Oct. 27, 2002); see also, www.everestgt.com/news.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 10.

²¹ *Id.* at 9.

²² *Id.* at 10.

²³ *Id.* at 9, Exhibit A.

effective competition. Everest alleges that KCCP is illegally offering deeply discounted rates in only those areas where Everest's service is currently available. Everest requests that the Commission issue a cease and desist order against KCCP barring the company from providing special rates to those living in Everest's service area until after the agency issues its ruling.²⁴ Given that we have found KCCP to face effective competition in Shawnee, Everest's request for a cease and desist order is effectively moot.

12. KCCP has demonstrated that Everest has commenced providing cable service within Shawnee, 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*.²⁵ Based on the foregoing, we conclude that KCCP has submitted sufficient evidence demonstrating that its cable system serving Shawnee is subject to LEC effective competition.

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the petition filed by Kansas City Cable Partners for a determination of effective competition in Shawnee, Kansas **IS GRANTED**.

14. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates of Shawnee, Kansas **IS REVOKED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

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²⁴ Everest Response at 9-10.

²⁵ See *Cable Reform Order*, 14 FCC Red at 5305.

²⁶ 47 C.F.R. § 0.283.