

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	DA 95-1137
	)	
Petition for Revocation	)	
	)	
FLORIDA CABLEVISION	)	
MANAGEMENT, CORP.	)	
D/B/A CABLEVISION INDUSTRIES	)	
	)	
of Certification of	)	
Collier County, Florida	)	
to Regulate Basic Cable Service Rates	)	
(FL0107, FL0577)	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: May 19, 1995**

**Released: May 23, 1995**

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. On March 16, 1995, Cablevision Industries ("CVI") filed a petition for revocation challenging the certification of Collier County, Florida ("the County") to regulate rates for basic cable service and associated equipment.<sup>1</sup> On April 17, 1995, the County filed an opposition to CVI's petition for revocation.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable

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<sup>1</sup> The County filed its "Certification of Franchising Authority to Regulate Basic Cable Rates and Initial Finding of Lack of Effective Competition" on October 4, 1993, which became effective on November 3, 1993.

operators that are not subject to effective competition.<sup>2</sup> 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.<sup>3</sup> Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.<sup>4</sup> Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.<sup>5</sup> Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.<sup>6</sup> Once the period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation.<sup>7</sup> Regardless of the grounds, however, the filing of a petition for revocation does not automatically trigger a stay of a franchising authority's ability to regulate basic cable rates.<sup>8</sup>

## II. BACKGROUND

3. In a prior proceeding, the Commission denied CVI's first petition for revocation challenging the County's certification to regulate basic cable service rates.<sup>9</sup> In its

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<sup>2</sup> Communications Act of 1934 § 623(a)(4), 47 U.S.C. § 543(a)(4).

<sup>3</sup> 47 C.F.R. §§ 76.906, 76.910(b)(4).

<sup>4</sup> 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b); see also 47 U.S.C. § 543(a)(4).

<sup>5</sup> 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

<sup>6</sup> 47 C.F.R. § 76.911(c).

<sup>7</sup> 47 C.F.R. § 76.914.

<sup>8</sup> 47 C.F.R. § 76.914(d).

<sup>9</sup> See *Florida Cablevision Management, Corp. D/B/A Cablevision Industries, Petition for Revocation of Certification of Collier County, Florida to Regulate Basic Cable Service Rates*, DA 94-1619 (Cab. Serv. Bur., rel. December 30, 1994) ("Collier").

first petition, CVI claimed that it was subject to effective competition under the low penetration test because it served fewer than 30 percent of the households (*i.e.*, occupied housing units)<sup>10</sup> in the unincorporated areas of Collier County, its franchise area.<sup>11</sup> The County filed an opposition to CVI's petition and a supplement to its opposition. The County claimed that CVI's effective competition claim was inappropriately based on areas unserved by CVI's cable system. Specifically, the County argued that CVI had made an affirmative decision to redefine its franchise area.<sup>12</sup> The County further argued that CVI's claim was contradicted by data in its petition which indicated "saturation" levels greater than 30 percent for two communities within its franchise area. The Commission denied CVI's petition based on its finding that CVI had failed to provide appropriate household data. In light of this finding, the Commission declined comment regarding whether CVI had redefined its

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<sup>10</sup> Both the Communications Act of 1934, as amended, and the Commission's rules require that effective competition be demonstrated based on the number of "households" in the franchise area. Communications Act of 1934 § 623(l)(1), 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905 (b). As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon. Order*"). The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. The Census Bureau's definition is consistent with the plain meaning of the term "household" which is defined as "a domestic establishment including the members of a family and others who live under the same roof." Webster's II at 595.

<sup>11</sup> The Communications Act of 1934, as amended, and the Commission rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(a). One of the bases by which a cable operator will be deemed subject to effective competition is if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

<sup>12</sup> In its *First Order on Reconsideration*, the Commission clarified its definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1880 (1993) ("*First Recon. Order*"). Under that definition, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be more appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

franchise area.

### III. DISCUSSION

4. In the instant petition, CVI argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the unincorporated areas of Collier County, its franchise area.<sup>13</sup> Specifically, CVI claims that it serves 14,838 of the alleged 61,487 households in its franchise area, or 24.13 percent<sup>14</sup> of the total number of households.<sup>15</sup> As supporting documentation, CVI provides 1990 Census data<sup>16</sup> which shows that there are a total of 61,703 households in Collier County.<sup>17</sup> CVI also submits a computer print-out with sufficient subscriber information to show that there are 12,381 "basic

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<sup>13</sup> See footnote 11.

<sup>14</sup> Although CVI claims in its petition that "[t]he current subscriber base of 14,838 households represents 23.39 percent of the 61,487 occupied housing units within unincorporated Collier County," these figures actually result in a penetration of 24.13 percent.

<sup>15</sup> Based on projected calculations, CVI provides a households figure for 1994, in addition to its households figure for 1990. CVI claims that the County has provided updated figures for the total number of housing units in the County in 1994 (111,583). CVI estimates a 18.5% growth rate in housing based on the County's updated housing unit figure and the Census total for housing units in Collier County in 1990 (94,165). It applies this growth rate to its figure for the number of households in the unincorporated areas of Collier County (51,888). This results in an estimated figure of 61,487 households in the unincorporated areas of the County in 1994. CVI argues that even if its households figure for 1990 is used (51,888), this still only results in a penetration of 28.6%.

<sup>16</sup> As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) ("Effective Competition Order").

<sup>17</sup> When determining the number of households in the unincorporated areas of the County, CVI appropriately subtracts the Census data for the number of households in the incorporated area of Naples City (9,815). CVI incorrectly states however, that the Census does not provide a figure for the number of households in Everglades City, the other incorporated area within the County. The relevant page of the 1990 Census provides that Everglades City accounts for 111 households within the County. When both incorporated areas are subtracted from the total number of households in the County this results in a 1990 figure of 51,777 households in the unincorporated areas of the County. If the 18.5% growth rate is then applied to this 51,777 figure, this results in an estimated figure of 61,355 households in the unincorporated areas of the County in 1994.

subs" and 2,457 "commercial equivalent subs" for a total of 14,838 "total equivalent subs" in the unincorporated areas of the County. Finally, CVI provides a copy of the franchise agreement, a letter from the County dated November 4, 1993 notifying CVI of the County's certification to regulate basic cable rates, a chart showing the County's data on dwelling units as of March 31, 1994, and an affidavit under penalty of perjury by a responsible official certifying the accuracy of the data included in the petition.

5. The County claims that CVI has failed to demonstrate that it is subject to effective competition in its franchise area. First, the County claims that CVI's use of subscriber data from December 31, 1994 was inappropriate under the guidelines provided in the *Effective Competition Order*.<sup>18</sup> It argues that according to the *Effective Competition Order*, an operator must "rely on subscriber data as of, or approximately as of, the time of certification, but no earlier than two months before the request for certification was filed." The County further argues that CVI's effective competition claim is inappropriately based on areas unserved by CVI's cable system. Specifically, the County states that CVI has made an affirmative decision to redefine its service area.<sup>19</sup> It argues, as it did in its opposition to CVI's first Petition for Revocation, that CVI has chosen to limit its actual service area to specific communities in the County despite the fact that the franchise agreement does not restrict service to these specific unincorporated areas. The County also argues that CVI has elected not to expand or overbuild its system even though it specifically requested, and was granted a franchise that overlaps with the franchise of another cable operator. In addition, the County argues that figures in CVI's original petition which provide values for what is described therein as "saturation" indicate that CVI's penetration rate is actually 55 percent in Immokalee and 86 percent in Golden Gate (two areas within CVI's franchise area, the unincorporated area of the County).<sup>20</sup> As supporting documentation, the County simply provides a copy of its original opposition in response to CVI's original Petition for Revocation, and an additional map of CVI's franchise area.

6. As a preliminary matter, we find that CVI's use of subscriber data from December 31, 1994 was appropriate under the guidelines provided in the *Effective Competition Order*. The County refers to language from the *Effective Competition Order* which prohibits the use of subscriber data taken earlier than two months prior to the filing of a request for certification by the franchising authority. However, this language does not prohibit the use of more recent subscriber data taken after the filing of a request for certification, and the County fails to cite to any other language in the *Effective Competition*

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<sup>18</sup> See *Effective Competition Order* at 3656.

<sup>19</sup> See footnote 12.

<sup>20</sup> The figures listed in CVI's original petition for "saturation" levels were apparently based on the number of homes passed and the number of subscribers in these locations within CVI's entire franchise area.

*Order* which would suggest that the data provided by CVI is inappropriate.<sup>21</sup> Accordingly, we accept CVI's use of more recent subscriber data.<sup>22</sup> As we discuss *infra*, CVI's evidence demonstrates that its cable system is subject to effective competition, regardless of which subscriber figure is used.

7. However, we note that in the instant petition, CVI inappropriately includes commercial subscriptions in its subscriber count. As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend 'households' to have a different meaning than in the 1990 census ..."<sup>23</sup> The 1990 Census defines the term "household" to include only occupied housing units.<sup>24</sup> Thus, as this definition does not include commercial entities, such entities may not be counted in either the subscriber or household totals for purposes of effective competition. If CVI's figure for "commercial equivalent subs" is excluded from the subscriber total, this results in a subscriber count as of December 31, 1994, of only 12,381 CVI subscribers in the unincorporated areas of the County.

8. Second, we are unpersuaded that the appropriate franchise area for purposes of effective competition is something less than the entire unincorporated area of Collier County, Florida. The County provides insufficient evidence to support its claim that CVI has made an affirmative decision to redefine its franchise area. The County concludes that CVI has decided not to serve the entire franchise area because, the County claims, CVI's actual service area is limited to certain communities in the county, and CVI has not expanded beyond these communities despite its ability to do so under the franchise agreement. The County's argument is, in essence, that CVI has failed to expand into all areas of its franchise area. However, as the Commission has ruled previously, "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."<sup>25</sup>

9. Next, the County argues that the "saturation" data provided by CVI in its

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<sup>21</sup> Indeed, we believe that, in cases such as this, where an operator is challenging a certification that became effective more than a year prior to the filing of a petition for revocation, more recent subscriber data (*i.e.*, at or around the date the petition for revocation is filed) is appropriate.

<sup>22</sup> We further note that CVI provided data in its original petition indicating only 16,915 subscribers in the unincorporated areas of Collier County as of February 11, 1994.

<sup>23</sup> *Third Recon. Order, supra*.

<sup>24</sup> Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

<sup>25</sup> *First Recon. Order, supra*, 9 FCC Rcd at 1181.

subscriber printout and in its report to an official cable television directory demonstrate that CVI's penetration rate is actually greater than 30% based on the number of subscribers in the specific communities it serves and the number of homes passed by CVI's system. These communities, however, are a part of CVI's total franchise area. As such, in the absence of a demonstration that CVI has made an affirmative decision to limit service to these particular communities, evidence of "saturation" levels in these communities is immaterial to the issue of whether CVI faces effective competition in its entire franchise area.<sup>26</sup> The County does not provide any specific evidence to indicate that CVI has made an affirmative decision to restrict its service. Therefore, we find that the County has failed to sustain its burden of proof that CVI has redefined its franchise area.

10. Turning to CVI's petition, in the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.<sup>27</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.<sup>28</sup> CVI has met this burden. CVI appropriately relied on data reflecting the number of households as required by our rules.<sup>29</sup> Relying on this data, CVI has submitted sufficient evidence demonstrating that its cable system serving the unincorporated areas of Collier County, Florida, as of December 31, 1994, serves 12,381 of the 51,777 households, or 23.91% of the households, within its stated franchise area.<sup>30</sup> Thus, we find that CVI's system serving Collier County, Florida is subject to effective competition. Accordingly, its petition is granted.

#### IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition for revocation filed by Cablevision Industries challenging the certification of Collier County, Florida to regulate basic cable rates **IS GRANTED**.

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<sup>26</sup> See footnote 12.

<sup>27</sup> 47 C.F.R. § 76.906.

<sup>28</sup> 47 C.F.R. § 76.911(b)(1).

<sup>29</sup> *Third Recon. Order, supra.*

<sup>30</sup> The penetration level for CVI's system based on projected 1994 household figures for the unincorporated areas of Collier County (61,355) would be 22.04%. We also note that if this projected 1994 household figure is compared with the subscribership data contained in CVI's original petition (16,915 subscribers as of February 11, 1994) this results in a penetration level of 27.56%. Thus, regardless of which set of subscriber and household data is used, CVI's cable system is still subject to effective competition.

12. **IT IS FURTHER ORDERED** that the certification of Collier County, Florida to regulate Cablevision Industries' basic cable service rates **IS RESCINDED**.

13. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

**FEDERAL COMMUNICATIONS COMMISSION**

**Meredith J. Jones**  
Chief, Cable Services Bureau