

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

In the Matter of:)	
)	
Florida Cablevision Management Corporation)	
d/b/a Time Warner Cable)	CSR 5883-E
)	
Petition for Determination of Effective)	
Competition in Cape Coral, FL)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2002

Released: September 30, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Florida Cablevision Management Corporation d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission a petition alleging that Time Warner is subject to effective competition from competing service providers in its Cape Coral, Florida franchise area. Time Warner alleges that its’ cable system is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission’s rules.² Time Warner bases its allegation of effective competition on the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and DISH Network (“DISH”). No opposition to the petition was filed.

II. DISCUSSION

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 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. Based on the record in this proceeding, Time Warner has met this burden.

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

¹ 47 U.S.C. § 543.

² 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁵

4. Turning to the first prong of the competing provider test, we find that the programming of DBS providers, such as DirecTV and DISH, satisfy the Commission's programming comparability criterion. 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.⁶ Time Warner has provided evidence of the advertising of DBS service in the local media serving its Cape Coral franchise area.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 Time Warner has demonstrated that Cape Coral is 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 franchise area. Time Warner also demonstrated on this record that the two DBS providers are physically able to offer MVPD service to subscribers in Cape Coral, that there exists no regulatory, technical, or other impediments to households within Cape Coral taking the services of the DBS providers, and that potential subscribers in Cape Coral 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.

5. 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. Time Warner is the largest MVPD with 31,934 subscribers of the 40,768 Cape Coral 2000 Census households.¹⁰ Time Warner sought to determine the competing provider penetration by purchasing a five-digit zip code specific subscriber report from SkyTrends that identified the DBS subscribers in the Time Warner franchise area.¹¹ The SkyTrends' report identified 12,722 DBS subscribers in Time Warner's franchise area of 40,768 households resulting in a penetration rate of 31 percent.¹² Accordingly, we find that Time Warner has demonstrated that the number of households subscribing to programming services offered by providers, other than the largest MVPD, exceeds 15 percent of the households in its franchise area. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving Cape Coral, Florida is subject to effective competition.

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

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ *See* Time Warner Petition at 3-4 and Exhibit A.

⁸ *See* 47 C.F.R. §76.905(g). *See also* Time Warner Petition at 4 and Exhibits C, D, and E.

⁹ Time Warner Petition at 4.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 5 and Exhibit B.

¹² *Id.* (12,722 DBS subscribers ÷ 40,768 Cape Coral households = 31%).

III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Florida Cablevision Management Corporation d/b/a Time Warner Cable **IS GRANTED**.

7. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹³

FEDERAL COMMUNICATIONS COMMISSION

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

¹³ 47 C.F.R. § 0.283.