

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

In the Matter of:)	
)	
Time Warner/Advance-Newhouse Partnership)	
d/b/a Time Warner Cable)	CSR-5932-E
)	
Petition for Determination of Effective)	
Competition in Cities of Archer, Holiday and)	
Wichita Falls, TX (CUID Nos. TX0763, TX1300 &)	
TX0483))	

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2002

Released: November 1, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Time Warner/Advance-Newhouse Partnership d/b/a Time Warner Cable ("Time Warner") has filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition in the three above-captioned communities in Texas (the "Communities").¹ Time Warner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.905(b)(2) of the Commission's rules, and seeks revocation of the certification of the local franchising authority in the City of Wichita Falls, the only city certified to regulate basic cable service rates.² Time Warner claims the presence of effective competition in the Communities stems from the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Communications Corporation ("EchoStar"). 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

¹ 47 C.F.R. § 76.7.

² 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

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 programming services offered by MVPDs, other than the largest MVPD, exceeds fifteen percent (15%) of the households in the franchise area.⁵

4. 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.⁶ Time Warner has provided evidence of the advertising of DBS service in news media serving the Communities.⁷ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.⁸ Time Warner has 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 franchise areas. Time Warner has 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 EchoStar.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 has obtained subscriber numbers for DirecTV and Echostar, DBS providers operating in the Communities.¹⁰ Time Warner sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.¹¹ However, rather than simply accepting SkyTrends' figures, Time Warner assumes that some of the DBS subscribers identified in the report may actually live in zip codes outside of the Communities.¹² To account for such a possibility, Time Warner has used a formula that compares U.S. Census household data for the

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

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

⁷ Petition at 4 - 5 and Exhibit A.

⁸ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 5 and Exhibits B and C. Exhibits B and C contain the nationwide channel lineups of DirecTV and EchoStar and Exhibit D includes the channel line-ups for Time Warner's cable systems serving the Communities.

⁹ Petition at 3 - 6.

¹⁰ *Id.* at 8 and Exhibits G and H.

¹¹ *Id.* at 7 - 8.

¹² *Id.*

Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹³ Time Warner also reduces the estimated DBS subscriber count by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹⁴ The Commission believes that Time Warner's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. Time Warner asserts that it is the largest MVPD in the Communities because Time Warner's subscribership exceeds the aggregate DBS subscribership for each franchise area.¹⁵ Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data,¹⁶ we find that Time Warner 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 each of the Communities. 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 systems serving the Communities are subject to effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Time Warner/Advance-Newhouse Partnership d/b/a Time Warner Cable **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service in the City of Wichita Falls, Texas, **IS REVOKED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

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¹³ *Id.* at 7 - 8 and Exhibit H.

¹⁴ *Id.* at 8. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." *See Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002).

¹⁵ Petition at 6 - 7 and Exhibits E, G and H.

¹⁶ *See id.* at Exhibit F.

¹⁷ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5932-E

**COMMUNITIES SERVED BY
Time Warner/Advance-Newhouse Partnership d/b/a Time Warner Cable**

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS[‡] Subscribers⁺	Time Warner Subscribers⁺
Archer City, TX	TX0763	26.43%	758	200.33	429
Holiday, TX	TX1300	24.14%	622	150.13	359
Wichita Falls, TX	TX0483	15.02%	37,970	5,702.03	22,557

*CPR = Percent of DBS penetration rate.

⁺See Petition at Exhibits F and H.

[‡]DBS subscriber estimate includes 10% reduction.