

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

In the Matter of:)	
)	
Alert Cable TV of South Carolina, Inc.)	
)	
and)	
)	CSR 6047-E
Time Warner Entertainment-Advance/Newhouse)	
Partnership, d/b/a Time Warner Cable)	
)	
Petition for Determination of Effective)	
Competition in Thirty-Eight Communities in South)	
Carolina)	

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 2006

Released: January 26, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Alert Cable TV of South Carolina, Inc. and Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in thirty-eight communities in South Carolina (the “Communities”).¹ Time Warner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”)² and therefore exempt from cable rate regulation. Time Warner alleges that its cable systems serving thirty-five Communities are subject to effective competition and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and DISH Network (“DISH”). Time Warner also alleges that three Communities are subject to effective competition under the low penetration test. The County of Richland filed an opposition to which Time Warner replied.

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

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2). Time Warner requests that we revoke the certifications of the local franchising authorities that are currently certified to regulate basic cable rates.

²See 47 U.S.C. § 543(a)(1).

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

with evidence that effective competition is present within the relevant franchise area.⁵ Based on the record presented in this proceeding, Time Warner has met this burden.

II. DISCUSSION

A. Competing Provider Effective Competition

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 of the households in the franchise area.⁶ 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.⁷ Time Warner asserts that households in the Communities are reasonably aware that DBS service is available based on the penetration rates in the communities at issue.⁸ The two DBS providers’ subscriber growth reached approximately 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth largest, MVPD provider.⁹ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the Communities listed on Attachment A are DBS subscribers, we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test.

4. 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.¹⁰ We find that 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 Communities. Time Warner 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.¹¹ Accordingly, we find that 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 asserts that it is the largest MVPD in thirty-three of the thirty-five Communities, for which an effective competition finding is sought under the competing provider test, because Time

⁵See 47 C.F.R. §§ 76.906 & 907.

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

⁷See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸See Time Warner Petition at 5-6.

⁹*Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, 20 FCC Rcd 2755, 2792 at ¶¶ 54-55 (rel. Feb. 4, 2005).

¹⁰See 47 C.F.R. §76.905(g). *See also* Time Warner Petition at 7-8.

¹¹See Time Warner Petition at 5-8.

Warner's subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹² As to two other communities, Darlington County and the Town of Eastover, Time Warner is unable to determine the largest MVPD because the number of DBS subscribers for DirecTV and DISH provided by SkyTrends are aggregated and exceed the number of Time Warner subscribers. Time Warner asserts that the respective aggregate allocated DBS subscriber figures (3,715 and 124) are slightly larger than Time Warner's subscriber counts (3,215 and 115) in those two communities.¹³ However, Time Warner contends that it is likely that Time Warner is still the largest individual MVPD in these franchise areas.¹⁴

6. Time Warner derived the DBS franchise area subscribership based on an allocation methodology previously approved by the Commission.¹⁵ Time Warner initially determined the number of households in the franchise area based on data from the 2000 Census.¹⁶ Time Warner then derived an allocation ratio by dividing the 2000 Census household figure by the SkyTrends' aggregate household figure for the five digit zip code area covering all or part of the franchise area.¹⁷ Time Warner also obtained the number of DBS subscribers for the franchise area from SkyTrends and that figure was reduced by 2 percent to account for commercial or test accounts.¹⁸ The reduced DBS subscriber count was then multiplied by the allocation ratio to determine the number of DBS subscribers allocable to the Franchise Area, which was then divided by the 2000 Census household total to derive DBS penetration.¹⁹

7. In opposition, the County of Richland "accepts without conceding" that Time Warner has satisfied the first prong of the competing provider test, however, it alleges that Time Warner has not met its burden of demonstrating that the number of households subscribing to DBS providers exceed 15 percent of the households in the franchise area.²⁰ Richland argues that the Petition should be denied because: 1) it is contested; 2) Richland objects to the use of the SkyTrends' five digit zip code report; 3) there is evidence that the DBS subscriber information data is widely inaccurate; and 4) Time Warner did not use a SkyTrends' zip plus four report (which are available at a nominal price).²¹ Richland objects to the SkyTrends' Report because it claims that the County is limited to the corporate area limits and several of the zip codes contained in the report are only marginally in the County limits.²² Richland contends that only nine of the nineteen zip codes in the Petition are solely for Richland residents and the majority of the

¹²*Id.* at 5-9 and Exhibit A; Erratum to Petition for Special Relief ("Erratum Supplement") Exhibit A.

¹³*Id.* at 12 and Exhibit B; Erratum Supplement Exhibit A.

¹⁴Time Warner was not able to determine the largest MVPD because the DBS providers' aggregated subscriber counts were larger than its subscriber count. Nevertheless, Time Warner was able to establish that the competing provider test was met because the penetration rate of both the DBS providers and Time Warner exceeded the 15 percent rate required by the competing provider test. Time Warner's penetration in Darlington County is 16.7% ($3215 \div 19251 = 16.7\%$) and DBS penetration is 19.3%. Time Warner's penetration in the Town of Eastover is 37.5% ($115 \div 307 = 37.5\%$) and DBS penetration is 40.4%.

¹⁵Time Warner Petition at 8-10; *see, e.g., In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

¹⁶Time Warner Petition at 8 and Exhibit D.

¹⁷*Id.* at 9-10 and Exhibit G.

¹⁸*Id.* and Exhibits E and F.

¹⁹*Id.* and Exhibit F.

²⁰Opposition of Richland County at 3.

²¹*Id.* at 1-6.

²²*Id.* at 3-5.

remaining zip codes (29016, 29036, 29045, 29063, 29075, 29078, 29130, 29180, 29210, and 29212) substantially overlap areas that are located outside of the County's franchise area.²³ As a result, the household population is inflated.²⁴ In addition, the "shared" zip code blocks are in communities that are more rural than Richland and therefore have a greater likelihood of a higher DBS subscribership than Richland because cable line extension to those areas would be cost prohibitive.²⁵ This results in a higher number of DBS subscribers in rural adjacent areas. Therefore, DBS subscriber counts for these zip code areas are unreliable indicators of the DBS penetration within the Richland franchise area.²⁶ Thus, Richland argues Time Warner has not satisfied the second prong of the competing provider test.

8. In reply, Time Warner argues that it has accurately applied the Commission's methodology for determining effective competition under the 50/15 competing provider test.²⁷ It also asserts that the zip code allocation methodology has been recently affirmed in numerous cases, including ones that were opposed.²⁸ Time Warner argues that contrary to the County's contention, it has not claimed that all of the households in zip codes 29016 or 29036 are exclusively within the County, but recognizes that zip codes may not precisely match government territorial limits.²⁹ Rather, SkyTrends has identified all of the five digit zip codes that cover the County, in whole or in part and the County has not disputed it.³⁰ Nor does the County claim that Time Warner's mathematical application of the zip code allocation methodology was done incorrectly.³¹ Finally, Time Warner argues that the Commission does not require that zip plus four data be utilized and the Commission has found the allocation methodology to be reasonable and reliable.³²

9. We reject the County's challenges to the use of the SkyTrends' Report. The SkyTrends' Report identifies the zip codes contained in the Report as being within the franchise area and within the County in whole or in part.³³ As both parties are aware, zip codes do not match franchise areas identically, so the fact that some of the zip codes are not solely within the County does not exclude them from the franchise area. Zip codes that are partially within the franchise area are still relevant for the purpose of determining DBS penetration under the effective competition test. Moreover, the allocation methodology works to prevent over counting of households by estimating and excluding households outside of the franchise area. We therefore reject the County's argument that we delete all the zip codes except those that are wholly contained within the County. We also reject the County's argument that the allocation method for determining DBS subscribership is limited to uncontested cases.³⁴ Furthermore, we reject the County's assertion that Time Warner was required to use a zip code plus four report. While the

²³*Id.* at 3-4.

²⁴*Id.* at 5.

²⁵*Id.*

²⁶*Id.*

²⁷Reply at 1.

²⁸*Id.* at 2.

²⁹*Id.* at 6.

³⁰*Id.* at 7.

³¹*Id.*

³²*Id.*

³³Time Warner Petition Exhibits E and F.

³⁴*See, In the Matter of Adelpia Cable Communications*, 20 FCC Rcd 4979 (2005); *In the Matter of Comcast of Dallas, L. P.*, 2005 WL 3240068 (2005); *In the Matter of Texas Cable Partners, L.P.*, 19 FCC Rcd 6213 (2004).

Commission accepts zip code plus four data, it has not expressed a preference for one form of data over another and accepts five digit zip code data as reliable for purposes of determining effective competition. Furthermore, the County has not supplied any information to support its claim that the evidence is inaccurate other than its argument that a number of zip codes included partial areas outside the County. Finally, we reject Richland's argument that our analysis should consider that DBS service is more prevalent in outlying areas of the County that Time Warner does not serve. In the absence of specific evidence supporting this allegation, we cannot discount or otherwise discredit the DBS penetration data submitted by Time Warner.³⁵ Accordingly, we will accept the number of Richland DBS subscribers indicated in Time Warner's petition as calculated using the Commission-approved allocation method.

10. Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,³⁶ 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 the Community. Therefore, the second prong of the competing provider test is satisfied as to the Communities. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving the Communities is subject to effective competition.

B. Low Penetration Effective Competition

11. 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 households in the franchise area subscribe to the cable service of the cable system."³⁷ As to the three remaining franchise areas, Clarendon County, Georgetown County, and Kershaw County, Time Warner's penetration rate is 6.76 percent in Clarendon County, 14.3 percent in Georgetown County, and 8.17 percent in Kershaw County. Time Warner's penetration rate in these franchise areas as listed on Attachment B shows that less than 30 percent of the households within these three franchise areas subscribe to its cable services. Based on this record, we conclude that Time Warner has demonstrated the existence of low penetration effective competition under our rules.

³⁵See *Charter Communications, LLC d/b/a Charter Communications*, 19 FCC Rcd 7003 (2004); *Texas Cable Partners*, 19 FCC Rcd 6213 (2004); *Time Warner Entertainment Co., L.P.*, 18 FCC Rcd 13043 (2003).

³⁶Time Warner Petition Exhibits D, E and G.

³⁷47 U.S.C § 543(l)(1)(A).

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Alert Cable TV of South Carolina, Inc. and Time Warner Entertainment-Advance/Newhouse Partnership **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Alert Cable TV of South Carolina, Inc. and Time Warner Entertainment-Advance/Newhouse Partnership **ARE REVOKED**.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³⁸

FEDERAL COMMUNICATIONS COMMISSION

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

³⁸47 C.F.R. § 0.283.

Attachment A

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Communities	CUIDS	CPR*	2000 Census Households ⁺	DBS Subscribers ⁺
Town of Andrews	SC0164 SC0193 SC0194	33.7%	1182	398
Town of Batesburg-Leesville	SC0305 SC0306 SC0307	38%	2167	824
City of Bishopville	SC0029	33.9%	1438	487
Town of Blythewood	SC0452 SC0558	35.6%	73	26
Town of Chapin	SC0370	30.9%	249	77
Town of Cordova	SC0381	15.3%	59	9
Darlington County	SC0115	19.3%	19251	3715
City of Darlington	SC0114	21.3%	2812	600
Town of Eastover	SC0339	40.4%	307	124
Town of Elgin	SC0297	29.9%	288	86
Florence County	SC0057	17.5%	29936	5245
City of Georgetown	SC0001	20.9%	3411	714
Town of Greeleyville	SC0530 SC0571	36.8%	163	60
Town of Hemingway	SC0209 SC0210	42.1%	259	109
City of Johnsonville	SC0208 SC0211	33.8%	532	180
Town of Kingstree	SC0108 SC0284	24.7%	1448	358

City of Lake City	SC0003	22.3%	2409	537
Town of Lane	SC0551	28.3%	223	63
Lexington County	SC0052 SC0342 SC0549 SC0550	20.7%	60681	12554
Town of Lexington	SC0082 SC0308	20.5%	3644	748
Town of Little Mountain	SC0417	49.6%	121	60
City of Manning	SC0185 SC0187	30.1%	1550	466
Town of Mayesville	SC0431	25.1%	331	83
Orangeburg County	SC0114	26.5%	26054	6895
City of Pamplico	SC0313	41.3%	419	173
Town of Pelion	SC0437	35.4%	192	68
Town of Pine Ridge	SC0189	24.8%	606	150
Town of Pinewood	SC0390	31.1%	190	59
Richland County	SC0053 SC0175 SC0344 SC0454 SC0455 SC0559 SC0572	16.9%	69901	11837
Town of St. Matthews	SC0319	37.1%	823	305
Town of Scranton	SC0005	31.8%	314	100
Town of South Congaree	SC0190	16.4%	890	146
Town of Summerton	SC0186	26.1%	452	118
Sumter County	SC0116	17.6%	22643	3975
Town of Timmonsville	SC0192	27.5%	829	228

Attachment B

Low Penetration Effective Competition

Communities	Franchise Area Households	Cable Subscribers	Penetration Level
Clarendon County	9471	640	6.76%
Georgetown County	16997	2437	14.3%
Kershaw County	16861	1377	8.17%

*CPR = Percent of competitive DBS penetration rate.

+See Petition at 10-13 and Exhibits D, E, F, and G; Erratum to Supplement to Petition for Special Relief and Exhibit A.