

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

In the Matter of
Time Warner NY Cable LLC
Petition for Determination of Effective
Competition in Moorpark, California
CSR 7710-E

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 2008

Released: May 2, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner NY Cable LLC ("Time Warner"), hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the community listed on Attachment A and hereinafter referred to as "Community." Petitioner alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). The petition is unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission's rules. 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. For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Community listed on Attachment A.

II. DISCUSSION

3. Section 623(1)(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

1See 47 U.S.C. § 543(a)(1).

247 C.F.R. § 76.905(b)(2).

347 C.F.R. § 76.906.

4See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

5See 47 C.F.R. §§ 76.906 & 907.

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 15 percent of the households in the franchise area.<sup>6</sup> This test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>7</sup>

5. Turning to the first prong of this test, it is undisputed that this Community is “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability. The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>8</sup> Petitioner has demonstrated that this is the case.<sup>9</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.<sup>10</sup> Time Warner indicates that the program offerings are available on the websites of both DIRECTV and Dish, and we have reviewed their websites and confirmed that their program offerings meet the test.<sup>11</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Community because of their national satellite footprint.<sup>12</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. 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. Petitioner asserts that it is the largest MVPD in the Community.<sup>13</sup> Petitioner sought to determine the competing provider penetration in the Community by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Community on a five-digit zip code basis and using a five-digit allocation formula previously approved by the Commission.<sup>14</sup>

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using

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<sup>6</sup>47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup>47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup>Mediacom Illinois LLC et al., *Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>9</sup> Petition at 4-5, 7-8.

<sup>10</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6.

<sup>11</sup>*See* Petition at 6.

<sup>12</sup>*See* Petition at 7.

<sup>13</sup>Petition at 7.

<sup>14</sup>Petition at 7-8. *See also*, Charter Communications Properties, LLC, 17 FCC Rcd 4617 (2002). Charter Communications, 17 FCC Rcd 15491 (2002); Falcon First, Inc., 17 FCC Rcd 16629 (2002); Falcon Community Cable, L.P., 17 FCC Rcd 22162 (2002); Charter Communications, LLC, 19 FCC Rcd 7003 (2004).

Census 2000 household data,<sup>15</sup> as reflected in Attachment A, we find that Petitioner 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 for the Community.

8. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Community listed on Attachment A.

### III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner NY Cable LLC **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the Community set forth on Attachment A **IS REVOKED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>16</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>15</sup>Petition at 7-8 and Exhibit E.

<sup>16</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 7710-E

<b>Community</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
Moorpark	CA0313	25.79%	8994	2319