

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

In the Matter of
Time Warner Cable Inc.
Petition for Determination of Effective
Competition in Various Franchise Areas in Ohio
CSR-7724-E

MEMORANDUM OPINION AND ORDER

Adopted: June 12, 2008

Released: June 13, 2008

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

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable system serving the communities listed on Attachment B and hereinafter referred to as Group B Communities is subject to effective competition pursuant to Section 623(1) 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"). Petitioner additionally claims to be exempt from cable rate regulation in the Communities listed on Attachment C and hereinafter referred to as Group C Communities because the Petitioner serves fewer than 30 percent of the households in the franchise area. 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.

3. For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A. However, Petitioner included the community Warrensville (CUID OH0162) in the caption of its petition, but provided no information to support a determination that effective competition exists for this community. Accordingly, the petition is denied as to Warrensville without prejudice; Petitioner may file a petition including the necessary information for Warrensville.

1See 47 U.S.C. § 543(a)(1).

247 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

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.

## II. DISCUSSION

### A. The Competing Provider Test

4. 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 15 percent of the households in the franchise area;<sup>6</sup> this test is otherwise referred to as the “competing provider” test.

5. 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>

6. Turning to the first prong of this test, it is undisputed that these Group B Communities are “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.<sup>8</sup> 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>9</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Group B Communities to support their assertion that potential customers in the Group B Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>10</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>11</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.<sup>12</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Group B Communities because of their national satellite footprint.<sup>13</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

7. 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 Group B Communities.<sup>14</sup> Petitioner sought to determine the competing provider penetration in the Group B Communities by purchasing a subscriber

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<sup>6</sup>47 U.S.C. § 543(l)(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>*See* Petition at 3-5.

<sup>9</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>10</sup>47 C.F.R. § 76.905(e)(2).

<sup>11</sup>*See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6.

<sup>12</sup>*See* Petition at 6.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Group B Communities on a zip code plus four basis.<sup>15</sup>

8. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>16</sup> as reflected in Attachment B, 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 Group B Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Group B Communities.

9. 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 Group B Communities.

#### **B. The Low Penetration Test**

10. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.<sup>17</sup> Petitioner alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the franchise area.

11. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment C, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Group C Communities. Therefore, the low penetration test is also satisfied as to the Group C Communities.

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<sup>15</sup>Petition at 7-8. In the townships of Burton, Jefferson, Lenox, Rice, and Townsend, as well as the village of North Randall, both Time Warner Cable Inc.’s penetration figure and the aggregate DBS penetration figure clearly exceed 15 percent. Petitioner argues that it is subject to effective competition because in addition to DBS penetration exceeding 15 percent of the occupied households, the number of Time Warner Cable Inc.’s subscribers also exceed 15 percent and the Commission has recognized that in such cases the second prong of the competing provider test is satisfied.

<sup>16</sup>Petition at 8, n.25.

<sup>17</sup>47 U.S.C. § 543(l)(1)(A).

**III. ORDERING CLAUSES**

12. Accordingly, **IT IS ORDERED** that, consistent with the terms of this Order, the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **IS GRANTED IN PART AND DENIED IN PART.**

13. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED.**

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>18</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>18</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*
Amherst	OH0831	
Amherst	OH1029	
Aquilla	OH1323	
Ashtabula	OH0009	
Ashtabula	OH0253	
Auburn	OH2231	
Aurora	OH0930	
Austinburg	OH0397	
Bainbridge	OH1233	
Bath	OH1269	
Bedford	OH0805	
Bedford Heights	OH0967	
Bentleyville	OH1926	
Berlin	OH1441	
Berlin Heights	OH1440	
Boston Heights	OH1624	
Bratenahl	OH2290	
Brownhelm	OH1621	
Brunswick	OH1076	
Brunswick Hills	OH1077	
Burton	OH1585	
Burton	OH2060	
Carlisle	OH0989	
Chagrin Falls	OH0804	
Chagrin Falls	OH2673	
Chardon	OH1109	
Chardon	OH1232	
Chester	OH0897	
Claridon	OH1387	
Cleveland	OH1632	
Concord	OH0892	
Copley	OH1270	
Eastlake	OH0699	
Eaton	OH2287	
Euclid	OH0109	
Fairport Harbor	OH0996	
Florence	OH1631	
Geneva	OH0244	
Geneva	OH0329	
Geneva on the Lake	OH0288	
Glenwillow	OH1180	
Grand River	OH0879	
Hambden	OH1322	
Harpersfield	OH0194	
Hiram	OH1288	
Hiram	OH1289	
Hudson	OH0922	
Jefferson	OH0396	

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Jefferson	OH0398
Lakewood	OH1449
Lenox	OH1281
Leroy	OH1242
Lorain	OH0202
Macedonia	OH0926
Madison	OH0278
Mantua	OH1286
Mantua	OH1287
Maple Heights	OH1004
Marblehead	OH1393
Margaretta	OH2102
Middlefield	OH1586
Middlefield	OH2653
Moreland	OH1061
Munson	OH1234
New Russia	OH2307
Newburgh Heights	OH1194
Newbury	OH1584
North Perry	OH1095
North Randall	OH0757
North Ridgeville	OH0696
Northfield	OH0969
Northfield Center	OH0927
Norton	OH2671
Oakwood	OH1001
Painesville	OH0894
Painesville	OH0880
Peninsula	OH2652
Perry	OH0895
Perry	OH0960
Plymouth	OH0255
Reminderville	OH0924
Rice	OH2099
Richfield	OH1275
Richfield	OH1276
Sagamore Hills	OH0925
Saybrook	OH0254
Shalersville	OH1290
Sheffield	OH1691
Sheffield	OH2510
Sheffield	OH1320
Sheffield Lake	OH1022
Solon	OH0968
South Amherst	OH1112
South Russell	OH1388
Timberlake	OH0987
Townsend	OH2556
Twinsburg	OH0928
Twinsburg	OH0929
Vermilion	OH0994
Vermilion	OH0995
Vermilion	OH1164
Wakeman	OH1417
Wakeman	OH1418
Walton Hills	OH1306
Warrensville	OH0162
Warrensville Heights	OH0113

Willoughby  
Willowick

OH0770  
OH0776

## ATTACHMENT B

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000	Estimated
			Census	DBS
			Household	Subscribers
Amherst (City)	OH0831	16.22%	4459	723.05
Amherst (Township)	OH1029	15.10%	2853	430.80
Aquilla	OH1323	24.58%	138	33.92
Ashtabula (City)	OH0009	15.05%	8435	1269.13
Ashtabula (Township)	OH0253	15.05%	9412	1416.13
Auburn	OH2231	26.44%	320	84.62
Aurora	OH0930	21.65%	5047	1092.87
Austinburg	OH0397	29.24%	821	240.05
Bainbridge	OH1233	20.22%	3845	777.40
Bath	OH1269	16.27%	3506	570.39
Bedford	OH0805	17.79%	6659	1184.76
Bedford Heights	OH0967	17.41%	5119	891
Bentleyville	OH1926	15.09%	297	44.83
Berlin	OH1441	21.17%	1366	289.24
Berlin Heights	OH1440	42.07%	257	108.13
Boston Heights	OH1624	18.82%	392	73.76
Bratenahl	OH2290	16.19%	711	115.09
Brunswick	OH1076	25.00%	11883	2970.75
Brunswick Hills	OH1077	18.67%	1924	359.27
Burton (Township)	OH1585	30.12%	1549	466.63
Burton (Village)	OH2060	39.55%	585	231.38
Carlisle	OH0989	17.47%	2795	488.15
Chagrin Falls (Village)	OH2673	15.09%	1862	281.04
Chardon (Township)	OH1109	24.58%	1673	411.23
Chardon (Village)	OH1232	24.58%	2147	527.74
Chester	OH0897	20.04%	3952	791.96
Claridon	OH1387	29.40%	1136	333.96
Cleveland	OH1632	16.89%	190638	32207.56



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Columbia	OH1024	26.53%	2388	633.61
Concord	OH0892	17.47%	5730	1001.26
Copley	OH1270	15.69%	5140	806.55
Eastlake	OH0699	17.34%	8055	1396.68
Euclid	OH0109	15.89%	24353	3869.27
Fairport Harbor	OH0996	21.08%	1404	295.99
Florence	OH1631	24.24%	896	217.15
Geneva (City)	OH0244	19.65%	2515	494.08
Geneva (Township)	OH0329	19.65%	4681	919.61
Geneva on the Lake	OH0288	19.65%	665	130.64
Glenwillow	OH1180	20.08%	205	41.16
Grand River	OH0879	21.08%	122	25.72
Hambden	OH1322	24.58%	1450	356.42
Harpersfield	OH0194	27.04%	970	262.25
Hiram (Village)	OH1289	37.07%	234	86.74
Hudson	OH0922	18.43%	7357	1355.56
Jefferson (Township)	OH0396	34.57%	2059	711.70
Jefferson (Village)	OH0398	34.57%	2059	711.70
Lenox	OH1281	42.24%	497	209.92
Leroy	OH1242	21.90%	1079	236.27
Lorain	OH0202	17.51%	26434	4629.04
Macedonia	OH0926	23.63%	3276	774.19
Madison (Township)	OH0278	20.30%	6800	1380.09
Madison (Village)	OH0281	20.30%	1107	224.67
Mantua (Township)	OH1286	33.29%	1693	563.66
Mantua (Village)	OH1287	26.78%	440	117.85
Maple Heights	OH1004	18.36%	10489	1925.75
Marblehead	OH1393	15.17%	332	50.38
Middlefield (Village)	OH2653	24.61%	955	235.06
Moreland Hills	OH1061	15.09%	1286	194.10
Munson	OH1234	23.10%	2105	486.24
Newburgh Heights	OH1194	20.04%	1052	210.84
Newbury	OH1584	26.62%	2112	562.29
North Perry	OH1095	23.79%	302	71.84
North Randall	OH0757	20.31%	465	94.44
North Ridgeville	OH0696	18.02%	8356	1506.01
Northfield	OH0969	18.85%	1573	296.57
Northfield Center	OH0927	18.85%	1913	360.67

Norton	OH2671	15.90%	4343	690.57
Oakwood	OH1001	17.41%	1416	246.47
Painesville (City)	OH0894	21.08%	6525	1375.61
Painesville (Township)	OH0880	21.08%	7394	1558.82
Peninsula	OH2652	22.08%	240	52.99
Perry (Township)	OH0895	21.11%	2847	600.95
Perry (Village)	OH0960	23.79%	426	101.34
Plymouth	OH0255	19.10%	789	150.67
Reminderville	OH0924	21.65%	917	198.57
Rice	OH2099	25.50%	514	131.05
Richfield (Township)	OH1275	16.50%	1933	318.88
Richfield (Village)	OH1276	20.10%	1227	246.63
Sagamore Hills	OH0925	18.85%	3818	719.83
Saybrook	OH0254	16.82%	4141	696.64
Shalersville	OH1290	20.64%	1942	400.89
Sheffield (Township)	OH2510	18.59%	1597	296.89
Sheffield (Village)	OH1320	20.28%	1089	220.83
Sheffield Lake	OH1022	20.28%	3498	709.33
Solon	OH0968	20.08%	7554	1516.78
South Amherst	OH1112	16.22%	669	108.48
South Russell	OH1388	19.27%	1364	262.81
Timberlake	OH0987	17.34%	309	53.58
Townsend	OH2556	17.34%	555	96.22
Twinsburg (City)	OH0928	19.66%	6641	1305.85
Twinsburg (Township)	OH0929	19.03%	769	146.32
Vermilion (City)	OH0994, OH0995	21.47%	4254	913.40
Vermilion	OH1164	18.25%	3833	699.43
Wakeman (Village)	OH1418	41.33 %	359	148.38
Walton Hills	OH1306	17.41%	903	157.17
Willowick	OH0776	17.34%	6101	1057.87

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT C

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUID(S)</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Berlin	OH1926	1366	411	30.09%
Brownhelm	OH1621	2869	197	6.87%
Burton	OH1585	1549	246	15.88%
Chagrin Falls	OH0804	1905	35	1.84%
Eaton	OH2287	2065	53	2.57%
Hiram	OH1288	804	111	13.81%
Jefferson	OH0398	2059	465	22.58%
Lakewood	OH1449	26693	831	3.11%
Lenox	OH1281	497	128	25.75%
Margaretta	OH2102	2377	239	10.05%
Middlefield	OH1586	1200	96	8.00%
New Russia	OH2307	853	37	4.34%
North Randall	OH0757	465	84	18.06%
Rice	OH2099	514	114	22.18%
Sheffield	OH1691	517	71	13.73%
Townsend	OH2556	555	91	16.40%
Wakeman (Township)	OH1417	937	109	11.63%
Warrensville Heights	OH0113	6325	152	2.40%
Willoughby	OH0770	10265	2669	26.00%