

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

In the Matter of)	
)	
Time Warner NY Cable LLC)	CSR 7593-E, 7594-E, 7603-E
)	
Petition for Determination of Effective)	
Competition in various Idaho and Washington)	
Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: June 5, 2008

Released: June 6, 2008

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

I. INTRODUCTION AND BACKGROUND

1. Time Warner NY Cable LLC, 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 those communities listed on Attachment A and hereinafter referred to as “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² 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 petitions are unopposed.

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 623(l) of the Communications Act and 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.⁵ 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.

II. DISCUSSION

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

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.

programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁶ 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.⁷

5. Turning to the first prong of this test, it is undisputed that these 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.⁸ 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.⁹ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ 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 programming¹¹ and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹² Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹³ 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 Communities.¹⁴ Petitioner sought to determine the competing provider penetration in the Communities 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 Communities on a zip code and zip code plus

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

⁷47 C.F.R. § 76.905(b)(2)(i).

⁸*See* Petition at 4-5.

⁹*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).

¹⁰47 C.F.R. § 76.905(e)(2).

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

¹²*See* Petition at 6.

¹³*See* Petition at 7.

¹⁴*Id.* at 7. In the Communities of Athol, Hauser, Rathdrum (CSR 7593-E), Mountain Home AFB, Mountain Home City (CSR 7594), and Genesee, Juliaetta, Kendrick, Onaway, Potlatch, Colton, Palouse, and Uniontown (CSR 7603), both the Time Warner penetration figure and the aggregate DBS penetration figure clearly exceed 15 percent. Time Warner 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 subscribers also exceed 15 percent and the Commission has recognized that in such cases the second prong of the competing provider test is satisfied.

four basis where necessary.¹⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ 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 Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

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 Communities listed on Attachment A.

III. ORDERING CLAUSES

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

10. **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**.

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

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckert
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¹⁵Petition at 8-9. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

¹⁶Petition at 8-9.

¹⁷47 C.F.R. § 0.283.

ATTACHMENT A

CSR(s) 7593-E, 7594-E, 7603-E

COMMUNITIES SERVED BY TIME WARNER NY CABLE LLC

Communities	CUID(s)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7593-E</u>				
Athol	ID0220	63.92%	255	163
Coeur d'Alene	ID0001	29.99%	13,985	4,194
Dalton Gardens	ID0124	29.41%	833	245
Fernan Lake	ID0126	30.60%	70	21
Hauser	ID0194	40.29%	273	110
Hayden	ID0127	38.56%	3,501	1,350
Hayden Lake	ID0128	34.13%	208	71
Huetter	ID0195	35.13%	37	13
Post Falls	ID0125	40.62%	6,369	2,587
Rathdrum	ID0139	45.98%	1,570	722
<u>CSR 7594-E</u>				
Mountain Home AFB	ID0081	47.90%	1,476	707
Mountain Home City	ID0089	48.95%	4,337	2,123
<u>CSR 7603-E</u>				
Genesee	ID0016	59.43%	355	211
Julietta	ID0196	67.06%	255	171
Kendrick	ID0020	66.66%	153	102
Moscow	ID0031	21.57%	7,724	1666
Onaway	ID0119	53.01%	83	44

Communities	CUID(s)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7603-E</u> Potlatch	ID0093	53.61%	332	178
Albion	WA0136	17.52%	274	48
Colton	WA0380	55.40%	148	82
Palouse	WA0137	48.14%	432	208
Pullman	WA0138	16.81%	8,828	1,484
Uniontown	WA0381	46.61%	133	62

*CPR = Percent of competitive DBS penetration rate.