

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

In the Matter of)
Time Warner Cable Inc.) CSR 7704-E, 7705-E, 7713-E, 7714-E,
Petition for Determination of Effective) 7718-E
Competition in various Ohio Communities)

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 petitions are 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 petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

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

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 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 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.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 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.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 Group B 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 Group B Communities.¹⁴ Petitioner sought to

⁶47 U.S.C. § 543(l)(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 3-4.

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.

¹²*See* Petition at 6.

¹³*See* Petition at 6-7.

¹⁴*Id.* at 7-8. In the Communities of Sardinia (CSR 7704-E), Freeport Township, Freeport Village (CSR 7713-E), Madison and Morgan (CSR 7714-E), 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

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determine the competing provider penetration in the Group B 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 Group B Communities on a zip code and zip code plus 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 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.

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 Group B Communities.

B. The Low Penetration Test

9. 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.¹⁷ 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.

10. 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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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.

¹⁵Petition at 7-8.

¹⁶*Id.*

¹⁷47 U.S.C. § 543(l)(1)(A).

III. ORDERING CLAUSES

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

12. **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**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁸47 C.F.R. § 0.283.

ATTACHMENT A

CSR(s) 7704-E, 7705-E, 7713-E, 7714-E, 7718-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
<u>CSR 7704-E</u>	
Mowrystown	OH1230
Sardinia	OH1228
Washington	OH1229
White Oak	OH1231
<u>CSR 7705-E</u>	
Israel	OH2426
Milford	OH1874
Oxford	OH1879
<u>CSR 7713-E</u>	
Freeport Township	OH0403
Freeport Village	OH1327
<u>CSR 7714-E</u>	
Clay	OH0536
Harrison	OH0589
Jefferson	OH0538
Madison	OH0948
Morgan	OH0631
Rush	OH0630
Union	OH2718
Valley	OH0537
<u>CSR 7718-E</u>	
Baltic	OH2196

ATTACHMENT B

CSR(s) 7704-E, 7705-E, 7713-E, 7714-E, 7718-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7704-E</u> Sardinia	OH1228	59.14%	328	194
<u>CSR 7705-E</u> Milford	OH1874	20.16%	2,945	594
<u>CSR 7713-E</u> Freeport Township	OH0403	52.50%	320	168
Freeport Village	OH1327	48.82%	170	83
<u>CSR 7714-E</u> Harrison	OH0589	19.02%	1,677	319
Jefferson	OH0538	39.28%	1,008	396
Madison	OH0948	41.11%	1,379	567
Morgan	OH0631	44.18%	851	376
Rush	OH0630	34.67%	1,165	404
Valley	OH0537	19.42%	942	183
<u>CSR 7718-E</u> Baltic	OH2196	21.09%	275	58

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

CSR(s) 7704-E, 7705-E, 7714-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 7704-E</u> Mowrystown	OH1230	143	17	11.89%
Washington	OH1229	849	31	3.65%
White Oak	OH1231	501	5	1.00%
<u>CSR 7705-E</u> Israel	OH2426	495	48	9.70%
Oxford	OH1879	6,738	40	0.59%
<u>CSR 7714-E</u> Clay	OH0536	1,516	105	6.93%
Union	OH2718	764	58	7.59%