

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

In the Matter of )
Time Warner Cable Inc. ) CSR 7706-E, 7779-E, 7780-E, 7781-E
Petition for Determination of Effective )
Competition in various Ohio and Indiana )
Communities )

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 2008

Released: June 26, 2008

By the Associate Chief, 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;<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 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.

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.<sup>14</sup> Petitioner sought to

<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>*See* Petition at 3-4.

<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.

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

<sup>13</sup>*See* Petition at 6-7.

<sup>14</sup>*Id.* at 7. In the Communities of Elizabeth, Gettysburg, Johnson, Pike, Roszburg, Union (CSR 7706-E), Coolville (CSR 7780-E), and Amanda Village (CSR 7781-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

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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.<sup>15</sup>

7. 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.

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.<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.

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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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.

<sup>15</sup>Petition at 7-8.

<sup>16</sup>*Id.*

<sup>17</sup>47 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.<sup>18</sup>

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy  
Associate Chief, Media Bureau

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<sup>18</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

CSR(s) 7706-E, 7779-E, 7780-E, 7781-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
<u>CSR 7706-E</u>	
Adams	OH0857
	OH2347
Allen	OH2359
Anna	OH1165
Ansonia	OH0855
Arcanum	OH0915
Botkins	OH1166
Bradford	OH0698
Brookville	OH0687
Brown	OH0861
Butler	OH1423
Camden	OH0684
Casstown	OH1025
Castine	OH1753
Christiansburg	OH1655
College Corner	OH1330
Concord	OH2378
Degraff	OH1168
Eaton	OH0685
Eldorado	OH1552
Elizabeth	OH1026
	OH2361
Farmersville	OH1551
Franklin	OH2371
	OH1173
German	OH1177
	OH1278
Gettysburg	OH0853
Gordon	OH1755
Gratis	OH0975
Green	OH1114
	OH2372
Greenville	OH0494
	OH0856
	OH2352
Harrison	OH1000
Hollansburg	OH2353
Ithaca	OH1754
Jackson	OH1052
	OH2433
	OH1172
Jackson Center	OH1167
Jefferson	OH1305
Johnson	OH1053
	OH2349
Laura	OH1424
Lewisburg	OH0680
Liberty	OH2354

	OH2365
Lockington	OH2368
Logan	OH2054
Lost Creek	OH1027
	OH2362
Ludlow Falls	OH1425
Mad River	OH1064
Madison	OH1331
Mechanicsburg	OH0635
Monroe	OH0647
	OH0833
Moorefield	OH1115
Mutual	OH2055
Neave	OH0859
New Lebanon	OH0686
New Madison	OH0854
New Paris	OH0683
Newberry	OH0554
Newton	OH1055
	OH2363
North Hampton	OH1058
Oxford	OH0914
	OH1284
Palestine	OH2356
Phillipsburg	OH0688
Pike	OH1116
Pitsburg	OH1283
Pleasant Hill	OH0753
Potsdam	OH1426
Quincy	OH1169
Richland	OH1001
Rosburg	OH2357
Sidney	OH0051
Springfield	OH1063
St. Paris	OH0700
Staunton	OH2364
	OH1028
Tipp	OH0832
Tremont City	OH1059
Troy	OH0646
Union Township	OH0812
	OH2367
Union City	OH0052
	IN0047
Van Buren	OH0858
Verona	OH0682
Wayne Lakes	OH0979
West Alexandria	OH0681
West College Corner	IN0541
West Elkton	OH1752
West Manchester	OH1553
Woodstock	OH1896
<u>CSR 7779-E</u>	
Archbold	OH0207
Brady	OH2393
Bryan	OH0336
Center	OH0387

<b>Edgerton</b>	<b>OH0508</b>
<b>German</b>	<b>OH0783</b>
<b>Jefferson</b>	<b>OH0386</b>
<b>Montpelier</b>	<b>OH0411</b>
<b>Pulaski</b>	<b>OH0354</b>
<b>Springfield</b>	<b>OH2394</b>
<b>St. Joseph</b>	<b>OH0933</b>
<b>Stryker</b>	<b>OH0208</b>
<b>Superior</b>	<b>OH2395</b>
<b>Tiffin</b>	<b>OH2390</b>
<b>West Unity</b>	<b>OH0371</b>

**CSR 7780-E**

<b>Belpre</b>	<b>OH0660</b>
<b>Beverly</b>	<b>OH0105</b>
<b>Bloom</b>	<b>OH1133</b>
<b>Chester</b>	<b>OH1709</b>
<b>Coolville</b>	<b>OH1708</b>
<b>Malta</b>	<b>OH1842</b>
<b>McConnelsville</b>	<b>OH0014</b>
<b>Olive</b>	<b>OH1710</b>
<b>Stockport</b>	<b>OH1748</b>
<b>Waterford</b>	<b>OH0081</b>

**CSR 7781-E**

<b>Amanda Village</b>	<b>OH1675</b>
<b>Amanda Township</b>	<b>OH1676</b>
<b>Circleville</b>	<b>OH1919</b>
<b>Clearcreek</b>	<b>OH1678</b>
<b>Hocking</b>	<b>OH1679</b>
<b>Pickaway</b>	<b>OH1682</b>
<b>Salt Creek</b>	<b>OH1683</b>
<b>Tarlton</b>	<b>OH1681</b>
<b>Walnut</b>	<b>OH1684</b>
<b>Washington</b>	<b>OH1685</b>

## ATTACHMENT B

## CSR(s) 7706-E, 7779-E, 7780-E, 7781-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7706-E</u>				
Anna	OH1165	34.38%	474	163
Ansonia	OH0855	36.36%	451	164
Arcanum	OH0915	35.99%	853	307
Botkins	OH1166	24.17%	463	112
Bradford	OH0698	37.80%	693	262
Brookville	OH0687	28.45%	2,204	627
Butler	OH1423	16.13%	3,298	532
Camden	OH0684	36.80%	897	330
Casstown	OH1025	40.15%	127	51
Castine	OH1753	34.88%	43	15
Christiansburg	OH1655	37.50%	216	81
College Corner	OH1330	31.03%	203	63
Degraff	OH1168	44.25%	479	212
Eaton	OH0685	26.29%	3,274	861
Eldorado	OH1552	32.54%	212	69
Elizabeth	OH1026 OH2361	19.96%	586	117
Farmersville	OH1551	49.71%	354	176
German	OH1177 OH1278	22.97%	3,095	711
Gettysburg	OH0853	37.96%	187	71
Gordon	OH1755	36.48%	74	27
Gratis	OH0975	29.79%	349	104



Green	OH1114 OH2372	20.99%	1,067	224
Greenville	OH0494 OH0856 OH2352	23.04%	5,649	1,302
Hollansburg	OH2353	38.37%	86	33
Ithaca	OH1754	36.11%	36	13
Jackson	OH1052 OH2433 OH1172	30.67%	903	277
Jackson Center	OH1167	29.02%	541	157
Jefferson	OH1305	22.07%	2,714	599
Johnson	OH1053 OH2349	38.93%	1,297	505
Laura	OH1424	40.57%	175	71
Lewisburg	OH0680	35.39%	678	240
Lockington	OH2368	17.56%	74	13
Ludlow Falls	OH1425	33.33%	81	27
Mad River	OH1064	15.95%	4,545	725
Mechanicsburg	OH0635	40.99%	705	289
Monroe	OH0647 OH0833	21.74%	5,923	1,288
Moorefield	OH1115	17.82%	4,618	823
Mutual	OH2055	47.05%	51	24
New Lebanon	OH0686	22.23%	1,574	350
New Madison	OH0854	41.27%	344	142
New Paris	OH0683	34.39%	692	238
North Hampton	OH1058	23.70%	135	32
Oxford	OH0914 OH1284	15.88%	5,870	932
Palestine	OH2356	22.80%	57	13
Phillipsburg	OH0688	28.45%	250	71
Pike	OH1116	31.33%	1,452	455

Pittsburg	OH1283	36.29%	135	49
Pleasant Hill	OH0753	30.96%	423	131
Potsdam	OH1426	40.90%	66	27
Quincy	OH1169	42.60%	256	109
Rosburg	OH2357	46.51%	86	40
Sidney	OH0051	20.29%	7,981	1,619
Springfield	OH1063	16.10%	26,254	4,226
St. Paris	OH0700	37.00%	781	289
Staunton	OH2364 OH1028	17.29%	746	129
Tipp	OH0832	18.69%	2,060	385
Tremont City	OH1059	25.37%	134	34
Troy	OH0646	16.67%	8,920	1,487
Union City	OH0052 IN0047	31.88%	690	220
Union Township	OH0812 OH2367	21.89%	4,017	879
Van Buren	OH0858	33.67%	591	199
Verona	OH0682	35.44%	158	56
Wayne Lakes	OH0979	22.96%	283	65
West Alexandria	OH0681	32.29%	576	186
West Elkton	OH1752	38.02%	71	27
West Manchester	OH1553	35.71%	168	60
Woodstock	OH1896	47.52%	101	48
<u>CSR 7779-E</u> Archbold	OH0207	19.34%	1,717	332
Bryan	OH0336	15.36%	3,528	542
Center	OH0387	18.97%	1,128	214
Edgerton	OH0508	35.47%	812	288
Montpelier	OH0411	32.70%	1,751	572
Pulaski	OH0354	17.21%	1,104	190

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Stryker	OH0208	28.41%	542	154
West Unity	OH0371	26.87%	733	197
<u>CSR 7780-E</u> Belpre	OH0660	23.59%	1,585	374
Beverly	OH0105	36.23%	552	200
Bloom	OH1133	52.54%	432	227
Coolville	OH1708	56.33%	213	120
McConnelsville	OH0014	52.54%	805	423
<u>CSR 7781-E</u> Amanda Village	OH1675	53.51%	256	137
Circleville	OH1919	22.03%	917	202
Hocking	OH1679	19.47%	1,140	222
Talton	OH1681	47.05%	102	48
Washington	OH1685	24.64%	1,051	259

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT C

CSR(s) 7706-E, 7779-E, 7780-E, 7781-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 7706-E</u>				
Adams	OH0857 OH2347	1,266	137	10.82%
Allen	OH2359	409	4	0.98%
Brown	OH0861	775	69	8.90%
Butler	OH1423	572	31	5.42%
Concord	OH2378	10,858	1,555	14.32%
Franklin	OH2371 OH1173	1,021	92	9.01%
German	OH1177 OH1278	2,965	268	9.04%
Green	OH1114 OH2372	326	24	7.36%
Greenville	OH0494 OH0856 OH2352	7,516	842	11.20%
Harrison	OH1000	1,087	25	2.30%
Jackson	OH1052 OH2433 OH1172	2,125	184	8.66%
Liberty	OH2354 OH2365	1,526	142	9.31%
Lost Creek	OH1027 OH2362	600	77	12.83%
Neave	OH0859	762	113	14.83%
Newberry	OH0554	2,438	221	9.06%
Newton	OH1055 OH2363	1,211	41	3.39%
Oxford	OH0914 OH1284	6,738	40	0.59%

Richland	OH1001	314	18	5.73%
Union Township	OH0812 OH2367	6,028	532	8.83%
<u>CSR 7779-E</u> Brady	OH2393	1,094	75	6.86%
German	OH0783	2,426	65	2.68%
Jefferson	OH0386	716	167	23.32%
Springfield	OH2394	988	84	8.50%
St. Joseph	OH0933	1,114	66	5.92%
Superior	OH2395	2,289	71	3.10%
Tiffin	OH2390	633	125	19.75%
<u>CSR 7780-E</u> Chester	OH1709	899	68	7.56%
Malta	OH1842	283	6	2.12%
Olive	OH1710	736	35	4.76%
Stockport	OH1748	227	5	2.20%
Waterford	OH0081	1,476	5	0.34%
<u>CSR 7781-E</u> Amanda Township	OH1676	872	38	4.36%
Clearcreek	OH1678	1,197	254	21.22%
Pickaway	OH1682	672	160	23.81%
Salt Creek	OH1683	8,884	42	0.47%
Walnut	OH1684	865	247	28.55%