

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

In the Matter of)
)
Time Warner Entertainment – Advance/Newhouse) CSR 8035-E, 8043-E, 8049-E, 8042-E,
Partnership) 8038-E, 8046-E, 8034-E, 8031-E, 8054-E,
) 8032-E
Petition for Determination of Effective)
Competition in Several North Carolina)
Communities)

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 2008

Released: December 3, 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 is subject to effective competition pursuant to Section 623(1) 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"). Petitioner alternatively claims to be exempt from cable rate regulation in the Communities listed on Attachment B 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,³ as that term is defined by Section 623(1) 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 petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments (A and B).

II. DISCUSSION

A. The Competing Provider Test

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.

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 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 these petitions.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

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* Petitions 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* Petitions at 4-5.

¹²*See* Petitions at 5. While Petitioner did not provide copies of channel lineups for either DIRECTV or Dish, Petitioner did provide links to the relevant DBS websites where listings are available. Petitioner is correct to note that we have consistently found that the programming of both DBS providers satisfies the programming compatibility component of the test.

¹³*See* Petitions at 5-6.

¹⁴*Id.*

subscribers attributable to the DBS providers within the Communities on a zip code basis.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. However, Petitioner included the community of McAdenville (CUID NC0309) in the caption of its petition, but provided no information to support a determination that effective competition exists for this community. According to Petitioner's numbers, DBS penetration for this community is only 14.84%, falling below the 15% minimum required for a finding of effective competition. Accordingly, the petition is denied with respect to this community.

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 B, 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 Communities listed on Attachment B. Therefore, the low penetration test is also satisfied as to the Communities.

¹⁵See Petitions at 6-7, Exhibits B,D.

¹⁶Petitions at 7, Exhibits B, D-E.

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 petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable, Inc. regarding the Community of McAdenville is **DENIED**.

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, except for the Community of McAdenville, **IS REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁸47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8035-E, 8043-E, 8049-E, 8042-E, 8038-E, 8046-E, 8034-E, 8031-E, 8054-3, 8032-E

COMMUNITIES SERVED BY TIME WARNER CABLE, INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
City of Albemarle	NC0286	26.51%	6325	1677
Town of Ansonville	NC1074	31.80%	239	76
Town of Badin	NC1075	26.52%	509	135
City of Belmont	NC0346	18.43%	3272	603
Town of Belwood	NC0839	45.09%	377	170
Bessemer City	NC0005	22.74%	2005	456
Town of Boiling Springs	NC0529	20.41%	1117	228
Town of Casar	NC0843	43.70%	135	59
City of Charlotte	NC0007	20.45%	214971	43960
City of Cherryville	NC0240	27.69%	2174	602
Town of China Grove	NC0284	29.99%	1384	415
Cleveland County (uninc.)	NC0321	26.40%	21890	5779
City of Concord	NC0173	26.70%	21094	5633
Town of Cramerton	NC0311	18.03%	1159	209
Town of Dobbin Heights	NC0648	17.18%	390	67
Town of East Spencer	NC0285	16.52%	702	116
Town of Ellerbe	NC0462	21.57%	394	85
Town of Fairview	NC1084	41.92%	897	376
Gaston County (uninc.)	NC0348	23.68%	30022	7113
City of Gastonia	NC0010	20.44%	25925	5299
Town of Grover	NC0694	20.66%	271	56
Town of Hamlet	NC0025	17.27%	2449	423
Town of Hoffman	NC0963	37.04%	216	80
Town of Huntersville	NC0366	38.25%	9171	3508
Iredell County (uninc.)	NC0147	42.28%	20022	12694
City of Kannapolis	NC0193	24.82%	14676	3642
City of Kings Mountain	NC0308	21.99%	3801	836
Town of Kingston	NC1078	19.92%	256	51
Town of Landis	NC0288	27.48%	1201	330
Town of Lattimore	NC0757	19.67%	122	24
Town of Lilesville	NC0646	33.33%	62	186
City of Locust	NC0518	31.79%	909	289
City of Lowell	NC0310	15.39%	1072	165
Town of McAdenville	NC0309	14.84%	256	38
Town of Midland	NC1065	30.60%	1905	583
City of Monroe	NC0575	29.77%	9029	2688
City of Mt. Holly	NC0347	20.46%	4028	824
Town of Patterson Springs	NC0522	20.83%	240	50
Town of Pineville	NC0505	15.09%	1670	252
Town of Polkville	NC0521	20.10%	204	41
City of Ranlo	NC0243	16.14%	855	138
Richmond County (uninc.)	NC0463	26.15%	10421	2725
City of Rockingham	NC0026	17.17%	3936	676
Rowan County (uninc.)	NC0385	30.50%	29286	8933
City of Salisbury	NC0015	25.97%	10246	2661

City of Shelby	NC0027	20.32%	7918	1609
Town of Spencer	NC0158	16.93%	1305	221
Town of Spencer Mountain	NC0719	18.75%	16	3
Town of Stanfield	NC0520	40.89%	428	175
Stanly County (uninc.)	NC0515	36.24%	12371	4483
City of Statesville	NC0103	41.97%	9256	3885
Union County (uninc.)	NC0574	30.45%	19833	6040
Town of Unionville	NC1082	28.08%	1617	454
Town of Waco	NC0756	27.61%	134	37
Town of Wingate	NC0498	29.65%	769	228
Town of Clover	SC0277	19.05%	1517	289
City of Cooleemee	NC0872	43.75%	400	175
Town of Danbury	NC0955	48.84%	43	21
Town of Dobson	NC0509	39.20%	551	216
Town of East Bend	NC0679	39.49%	276	109
Town of Elkin	NC0054	37.08%	1691	627
City of King	NC0683	40.60%	2303	935
Town of Midway	NC1062	19.81%	4502	892
Town of Mocksville	NC0391	44.13%	1670	737
City of Mount Airy	NC0014	33.52%	3586	1202
Town of Rural Hall	NC0687	26.31%	1091	287
City of Thomasville	NC0083	17.87%	7961	1423
Village of Tobaccoville	NC0685	26.95%	861	232
Town of Walkertown	NC1024	16.97%	1644	279
City of Winston-Salem	NC0031	17.28%	75982	13129
Town of Yadkinville	NC0589	35.38%	961	340
Davidson County (uninc.)	NC0112	18.69%	41195	7698
Forsyth County (uninc.)	NC0154	18.06%	27651	4994
Surry County (uninc.)	NC0108	37.97%	21940	8331
Yadkin County (uninc.)	NC0966	39.65%	11778	4670
Town of Chadbourne	NC0017	38.37%	889	340
Town of Clarkton	NC0538	44.10%	288	127
City of Whiteville	NC0018	35.71%	2198	785
Elizabeth City	NC0099	30.14%	6579	1983
Pasquotank County (uninc.)	NC0104	29.48%	6330	1866
Town of Butner	NC0263	20.10%	1428	287
Town of Louisburg	NC0844	48.07%	1733	833
Town of Stovall	NC0986	42.58%	155	66
Vance County (uninc.)	NC0132	32.12%	9754	3133
Town of Black Creek	NC0457	17.86%	280	50
Elm City	NC0250	32.49%	474	154
City of Fremont	NC0251	41.99%	593	249
Town of Stantonsburg	NC0460	42.44%	311	132
Wayne County (uninc.)	NC0763	30.91%	24852	7682
Town of Alliance	NC0550	33.69%	282	95
Town of Aurora	NC0560	48.68%	265	129
Town of Bayboro	NC0552	28.33%	300	85
Town of Mesic	NC0556	30.63%	111	34
Town of Vandemere	NC0555	31.90%	116	37
City of Jacksonville	NC0022	16.02%	17209	2757
Town of Maysville	NC0585	24.81%	403	100
Town of Pollocksville	NC0583	31.97%	147	47
Town of Ahoskie	NC0036	34.63%	1857	643
Town of Aulander	NC0824	40.16%	371	149
Town of Cofield	NC0920	34.84%	155	54
Town of Murfreesboro	NC0037	35.79%	908	325
Town of Winton	NC0699	27.05%	366	99
Town of Four Oaks	NC0325	43.52%	602	262

Town of Franklinton	NC0331	37.50%	728	273
Town of Pine Level	NC0253	35.78%	587	210
Town of Wendell	NC0341	35.04%	1675	587

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 8035-E, 8043-E, 8049-E, 8038-E, 8046-E, 8034-E, 8031-E, 8054-E, 8032-E

COMMUNITIES SERVED BY TIME WARNER CABLE, INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
Town of Davidson	NC0012	1909	100	5.24%
Town of Matthews	NC0246	7717	1357	17.58%
Lancaster County (uninc.)	SC0372	18764	1595	8.50%
York County (uninc.)	SC0315	33438	1376	4.12%
Carroll County (uninc.)	VA0446	12186	283	2.32%
Davie County (uninc.)	NC0392	10989	2659	24.20%
Wilkes County (uninc.)	NC0592	23499	409	1.74%
Bladen County (uninc.)	NC0537	9738	1250	12.81%
Town of Bladenboro	NC0536	1649	402	24.38%
Columbus County (uninc.)	NC0566	15560	853	5.48%
Franklin County (uninc.)	NC0845	15544	254	1.63%
Granville County (uninc.)	NC0169	12285	935	7.61%
Town of Kittrell	NC0990	62	13	20.97%
Town of Norlina	NC0317	468	105	22.44%
Town of Saratoga	NC0458	158	26	16.46%
Pamlico County (uninc.)	NC0645	343	447	12.91%
Town of Stonewall	NC0554	120	35	29.17%
Jones County (uninc.)	NC0584	3451	294	8.52%
Onslow County (uninc.)	NC0384	28972	4848	16.73%
Hertford County (uninc.)	NC0535	5581	1073	19.23%
Johnston County (uninc.)	NC0255	32975	5032	15.26%