

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

In the Matter of)	
)	
Time Warner Entertainment – Advance/Newhouse Partnership)	CSR 8033-E, 8052-E, 8030-E, 8047-E, 8044-E, 8050-E, 8039-E, 8027-E
)	
Petition for Determination of Effective Competition in Several Texas 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 petitions 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 petition(s) 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 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 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 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.

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 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 8039-E, 8050-E, 8047-E, 8044-E, 8030-E, 8052-E
COMMUNITIES SERVED BY TIME WARNER CABLE, INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
Asherton	TX2042	27.34%	428	117
Carrizo Springs	TX0185	32.93%	1816	598
Crystal City	TX0186	22.26%	2183	486
Agua Dulce	TX2350	25.64%	234	60
Beeville	TX0122	26.12%	4697	1227
Driscoll	TX2349	25.39%	256	65
Odem	TX2156	28.09%	776	218
Orange Grove	TX1209	45.67%	473	216
Robstown	TX0742	25.44%	3644	927
San Diego	TX0322	20.80%	1548	322
Woodsboro	TX0758	35.24%	613	216
Cotulla	TX2052	30.79%	1208	372
Dilley	TX0351	29.53%	955	282
Pearsall	TX0339	23.40%	2201	515
Anthony	TX0634	18.13%	684	124
Clint	TX0556	27.92%	308	86
El Paso	TX0242	19.12%	182063	34819
Horizon City	TX0423	26.74%	1668	446
Beaumont	TX0251	17.17%	44361	7617
Bridge City	TX0457	19.50%	3195	623
Orange	TX0106	29.82%	7310	2180
Pine Forest	TX1637	23.32%	223	52
Pinehurst	TX0107	21.52%	962	207
Port Arthur	TX0223	15.12%	21839	3302
Rose Hill Acres	TX1297	16.57%	169	28
Silsbee	TX0370	26.37%	2385	629
Vidor	TX0458	23.19%	4222	979
West Orange	TX0108	21.47%	359	1672
Del Rio	TX0183	18.46%	10778	1990
Laughlin AFB	TX2105	18.43%	120	651
Gonzales	TX0284	37.22%	2571	957
Yoakum	TX0234	45.92%	2156	990

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 8027-E, 8030-E,8047-E, 8052-E

COMMUNITIES SERVED BY TIME WARNER CABLE, INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
Kerr County	TX0484	8611	1792	20.81%
Orange County	TX2377	13868	1632	11.77%
Fabens	TX0057	2147	442	20.59%
Socorro	TX0558	6756	1674	24.78%
Sunland Park	NM0151	3355	570	16.99%
Vinton	TX2347	496	114	22.98%
Val Verde County	TX1458	31642	1854	5.86%