

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

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	CSR 7515-E
	)	CSR 7516-E
Time Warner Entertainment-	)	CSR 7517-E
Advance/Newhouse Partnership	)	CSR 7518-E
	)	CSR 7519-E
Petitions for Determination of Effective	)	CSR 7521-E
Competition in various Franchise Areas in Maine	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 16, 2008**

**Released: April 17, 2008**

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

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Cable Inc. and Time Warner Entertainment-Advance/Newhouse Partnership, hereinafter referred to as "Petitioners," have filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioners are subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioners allege that their cable systems serving the Communities are subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended ("Communications Act")<sup>1</sup> and the Commission's implementing rules,<sup>2</sup> and are 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,<sup>3</sup> as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission's rules.<sup>4</sup> 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.<sup>5</sup> For the reasons set forth below, we grant the petitions based on our finding that Petitioners are subject to effective competition in the Communities listed on Attachment A.

<sup>1</sup>See 47 U.S.C. § 543(a)(1).

<sup>2</sup>47 C.F.R. § 76.905(b)(2).

<sup>3</sup>47 C.F.R. § 76.906.

<sup>4</sup>See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

<sup>5</sup>See 47 C.F.R. §§ 76.906 & 907.

## 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 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 Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioners 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 Petitioners have 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.<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 this is supported by the petitions.<sup>12</sup> Also undisputed is Petitioners’ 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.<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. Petitioners assert that they are the largest MVPDs in the Communities.<sup>14</sup> Petitioners 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.

<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* Petitions at 5-6.

<sup>12</sup>*See* Petitions at 5-6. While channel line-ups are not included, Petitioners assert that the programming offered by DirecTV and Dish Network are available at [www.directv.com](http://www.directv.com) and [www.dishnetwork.com](http://www.dishnetwork.com) and the programming includes many of the same popular nonbroadcast and broadcast programming services available on Petitioners’ systems. The Petitioners assert that the DBS programming lineups amply demonstrate that at least twelve channels of video programming are offered, including at least one channel of nonbroadcast service. *Id.* We agree.

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

<sup>14</sup>*Id.* at 7 and Exhibits A, E. Petitioners state that they cannot determine the largest MVPD in Princeton, Oxford, Blaine, and New Sweden because the DBS subscribership data obtained from SBCA is aggregated and does not

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 five digit zip code basis.<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 A, we find that Petitioners have 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 Petitioners have submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioners are subject to effective competition in the Communities listed on Attachment A.

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break down the individual subscribership of each DBS subscriber. Nevertheless, Petitioners argue that they are subject to effective competition because in addition to DBS penetration exceeding 15 percent of the occupied households, the number of Petitioners’ subscribers also exceeds 15 percent and the Commission has recognized that in such cases the second prong of the competing provider test is satisfied.

<sup>15</sup>Petitions at 7 and Exhibits E and F. The Petitioners state that the Commission has previously approved the five digit zip code allocation formula to calculate the DBS providers’ subscribership. *See, e.g.*, Comcast of Dallas, L.P., 20 FCC Rcd 17968, 17969-70 (MB 2005) (approving of a cable operator’s use of a Media Business Corporation “allocation factor, which reflects the portion of a five digit postal zip code that lies within the border of the City,” to determine DBS subscribership for that franchise area).

<sup>16</sup>Petitions at 7 and Exhibits E and F.

### 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 Cable, Inc. and Time Warner Entertainment – Advance/Newhouse Partnership ARE GRANTED**.

10. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **ARE REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>17</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

## CSR-7515-E

Communities	CUIDs	CPR*	2000 Census Household	Estimated DBS Subscribers
Ashland	ME0113	40.90%	629	257.25
Mapleton	ME0056	48.68%	749	364.60

## CSR 7516-E

Communities	CUIDs	CPR*	2000 Census Household	Estimated DBS Subscribers
Brownsville	ME0197	35.21%	555	195.39
Milo	ME0152	32.31%	1,021	329.86

## CSR 7517-E

Communities	CUIDs	CPR*	2000 Census Household	Estimated DBS Subscribers
Baileyville	ME0058	43.43%	726	315.29
Baring	ME0182	43.43%	113	49.07
Calais	ME059	18.20%	1,486	270.52
Princeton	ME0183	48.95%	370	181.12

## CSR-7518-E

Communities	CUIDs	CPR*	2000 Census Household	Estimated DBS Subscribers
Oakland	ME0066	23.60%	2,352	555
Oxford	ME0136	37.96%	1,487	564.40
Poland	ME0240	32.92%	1,845	607.42

<b>Richmond</b>	<b>ME0196</b>	<b>30.40%</b>	<b>1,290</b>	<b>392.11</b>
<b>Waterville</b>	<b>ME0023</b>	<b>18.70%</b>	<b>6,218</b>	<b>1,162.66</b>
<b>Winslow</b>	<b>ME0025</b>	<b>21.84%</b>	<b>3,268</b>	<b>713.66</b>

**CSR-7521-E**

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
<b>Blaine</b>	<b>ME0054</b>	<b>31.56%</b>	<b>313</b>	<b>98.78</b>
<b>Caswell</b>	<b>ME0356</b>	<b>17.30%</b>	<b>135</b>	<b>23.35</b>
<b>Easton</b>	<b>ME0112</b>	<b>29.65%</b>	<b>524</b>	<b>155.35</b>
<b>Fort Fairfield</b>	<b>ME0043</b>	<b>25.78%</b>	<b>1,523</b>	<b>392.56</b>
<b>Limestone</b>	<b>ME0045</b>	<b>22.66%</b>	<b>801</b>	<b>181.53</b>
<b>Mars Hill</b>	<b>ME0053</b>	<b>27.41%</b>	<b>614</b>	<b>168.29</b>
<b>New Sweden</b>	<b>ME0357</b>	<b>39.93%</b>	<b>247</b>	<b>98.62</b>
<b>Portage Lake</b>	<b>ME0171</b>	<b>40.90%</b>	<b>183</b>	<b>74.84</b>
<b>Presque Island</b>	<b>ME0042</b>	<b>15.52%</b>	<b>3,963</b>	<b>615.25</b>
<b>Washburn</b>	<b>ME0052</b>	<b>35.20%</b>	<b>692</b>	<b>243.59</b>
<b>Woodland</b>	<b>ME0335</b>	<b>16.25%</b>	<b>528</b>	<b>85.82</b>

**COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP****CSR-7519-E**

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2000 Census Household</b>	<b>Estimated DBS Subscribers</b>
<b>Casco</b>	<b>ME0225</b>	<b>20.82%</b>	<b>1,327</b>	<b>276.26</b>
<b>Gorham</b>	<b>ME0109</b>	<b>15.26%</b>	<b>4,875</b>	<b>743.74</b>
<b>Raymond</b>	<b>ME0224</b>	<b>19.00%</b>	<b>1,616</b>	<b>307.10</b>

\*CPR = Percent of competitive DBS penetration rate.