

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

In the Matter of )
Time Warner Cable Inc. ) CSR 7969-E
Petition for Determination of Effective )
Competition in various Ohio Communities )

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 2010

Released: October 6, 2010

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 petition is 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 petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments B and C. We deny the petition as to the Addyston Community, which is listed only on Attachment A, for the reasons stated in paragraph 11.

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 (“MVPDs”) 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 its 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 most of the Group B Communities.<sup>14</sup> Petitioner

---

<sup>6</sup>47 U.S.C. § 543(l)(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 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>*Id.*

<sup>14</sup>*Id.* at 7. In the Communities of Clark, Clearcreek, Crosby, Franklin, Neville, Pike, and Williamsburg, both the Time Warner penetration figure and the aggregate DBS figure clearly exceed 15 percent. Time Warner argues that it is subject to effective competition because in addition to DBS penetration exceeding 15 percent of the occupied

(continued....)

sought to 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 five-digit or nine-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 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.

### **C. Addyston, Ohio**

11. In the Addyston, Ohio franchise area (CUID OH0673), Petitioner claims to be subject to competing provider effective competition based on evidence of 365 households and 50.72 DBS subscribers there. Using those numbers, Petitioner claims DBS subscribership of 13.90 percent.<sup>18</sup> We choose to round off numbers of DBS subscribers in Addyston to the nearest whole number because there cannot be 72/100 of a subscriber. Our calculations show DBS penetration in Addyston to be 13.972 or rounded to 13.97 percent (51 ÷ 365). This is insufficient to show competing provider effective competition as the Communications Act requires subscribership that exceeds fifteen percent.<sup>19</sup> Furthermore, Petitioner’s data show its own subscribership in Addyston to be 78.08 percent (285 basic customers, 285 ÷ 365).<sup>20</sup> This amount far exceeds the permissible threshold for showing “low

---

(...continued from previous page)

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 8.

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

<sup>17</sup>47 U.S.C. § 543(l)(1)(A).

<sup>18</sup>Petition, Exh. E at 1.

<sup>19</sup>47 U.S.C. § 543 (l)(1)(B)(ii).

<sup>20</sup>Petition, Exh. A at 1.

penetration” effective competition.<sup>21</sup> Accordingly, we deny Petitioner’s effective competition finding for the Addyston, Ohio franchise area.<sup>22</sup>

### III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **IS GRANTED** for the Communities listed on Attachments B and C.

13. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachments B and C **IS REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.<sup>23</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

---

<sup>21</sup>See *supra* ¶ 9.

<sup>22</sup>See *Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership*, 25 Petitions for Determination of Effective Competition in Various Communities in the State of New York and the Commonwealth of Pennsylvania, 23 FCC Rcd 12069 (2008).

<sup>23</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 7969-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUID(s)</b>
Addyston	OH0673
Batavia Township	OH1123
Batavia Village	OH1345
Bethel	OH1511
Clark	OH1881
Clearcreek	OH1956
Colerain	OH2126
Crosby	OH1957
Delhi	OH0675
Fairfield	OH2269
Felicity	OH1514
Franklin	OH1880
Georgetown	OH0324
Green	OH1882
Hamilton	OH1788
Hanover	OH1876
Harlan	OH1869
Harrison	OH2308
Lemon	OH2309
Liberty	OH1599
Miami	OH0677
Monroe	OH1118
Morgan	OH1927
Morrow	OH1295
Moscow	OH1921
Neville	OH2311
New Richmond	OH1121
Ohio	OH1117
Pierce	OH1346
Pike	OH1883
Pleasant Plain	OH1870
Reily	OH1875
Ross	OH1928
Salem	OH1296
Sterling	OH1884
Tate	OH1119
Turtle Creek	OH1955
Washington	OH1922
Whitewater	OH0867
Williamsburg Township	OH1120
Williamsburg Village	OH1124

## ATTACHMENT B

## CSR 7969-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(s)	CPR*	2000 Census Households	Estimated DBS Subscribers
Batavia Township	OH1123	27.10%	6,238	1,690
Batavia Village	OH1345	25.80%	651	168
Bethel	OH1511	34.20%	1,012	346
Clark	OH1881	38.13%	1,133	432
Clearcreek	OH1956	18.17%	7,225	1,313
Colerain	OH2126	20.41%	22,418	4,575
Crosby	OH1957	31.90%	1,025	327
Fairfield	OH2269	22.32%	16,960	3,785
Felicity	OH1514	44.18%	344	152
Franklin	OH1880	40.46%	1,525	617
Georgetown	OH0324	47.02%	1,565	736
Hanover	OH1876	19.40%	2,809	545
Miami	OH0677	21.51%	4,518	972
Monroe	OH1118	32.04%	2,843	911
Morgan	OH1927	22.65%	1,810	410
Morrow	OH1295	40.47%	462	187
Moscow	OH1921	49.45%	91	45
Neville	OH2311	48.93%	47	23
New Richmond	OH1121	33.12%	788	261
Pike	OH1883	42.78%	1,323	566
Pleasant Plain	OH1870	41.81%	55	23
Ross	OH1928	19.07%	2,318	442
Salem	OH1296	23.57%	1,523	359
Sterling	OH1884	42.71%	1,276	545

Tate	OH1119	35.24%	3,204	1,129
Whitewater	OH0867	30.98%	2,133	661
Williamsburg Township	OH1120	30.45%	1,859	566
Williamsburg Village	OH1124	41.10%	927	381

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT C

## CSR 7969-E

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUID(s)</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Delhi	OH0975	10,357	15	.14%
Green	OH1882	1,213	31	2.56%
Hamilton	OH1788	3,524	399	11.32%
Harlan	OH1869	1,255	146	11.63%
Harrison	OH2308	1,716	171	9.97%
Lemon	OH2309	3,274	311	9.50%
Liberty	OH1599	7,062	786	11.13%
Ohio	OH1117	1,825	176	9.64%
Pierce	OH1346	4,656	141	3.03%
Reily	OH1875	917	99	10.80%
Turtle Creek	OH1955	3,279	366	11.16%
Washington	OH1922	812	76	9.36%