

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

In the Matter of
Time Warner Cable Inc.
Petition for Determination of Effective
Competition in various Illinois, Indiana, and
Kentucky Communities
CSR 8006-E

MEMORANDUM OPINION AND ORDER

Adopted: October 8, 2010

Released: October 8, 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 "Attachment A Communities." Petitioner alleges that its cable system serving the Attachment A 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 B and hereinafter referred to as the "Attachment B Communities" because the Petitioner serves fewer than 30 percent of the households in those franchise areas. 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 A and B.

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 the Attachment A 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 Attachment A Communities to support its assertion that potential customers in those 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 website citations regarding 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 Attachment A 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 Attachment A Communities.<sup>14</sup>

<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 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. The programming listings offered by DIRECTV and Dish are available at [www.directv.com](http://www.directv.com) and [www.dishnetwork.com](http://www.dishnetwork.com).

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

<sup>14</sup>*Id.* at 7. In the Attachment A Communities of Equality, Junction, Old Shawneetown, Ridgway, Shawneetown, and Calhoun, both the Time Warner penetration figure and the aggregate DBS penetration figure clearly exceed 15  
(continued....)

Petitioner sought to determine the competing provider penetration in the Attachment A Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within those 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 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 Attachment A Communities. Therefore, the second prong of the competing provider test is satisfied for each of those 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.<sup>17</sup> Petitioner alleges that it is subject to effective competition in the Attachment B Communities under the low penetration effective competition test because it serves less than 30 percent of the households there.

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

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percent. Time Warner argues that it is subject to effective competition because 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 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 petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc., **IS 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 and B **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

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

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<sup>18</sup>47 C.F.R. § 0.283.

## ATTACHMENT A

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated DBS Subscribers</b>
Equality	IL1209	51.42%	315	162
Junction	IL1723	60.60%	66	40
Old Shawneetown	IL1724	47.00%	100	47
Ridgway	IL1208	46.48%	441	205
Shawneetown	IL1207	47.47%	632	300
Calhoun	KY0831	63.30%	357	226
Daviess County	KY0178	35.00%	13,124	4,593
Owensboro	KY0120	26.05%	22,659	5,903
Uniontown	KY0563	39.77%	445	177

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT B

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Spencer County	IN0629	4,784	126	2.63%
Henderson County	KY0922	5,917	1,295	21.89%
Livermore	KY0390	614	155	25.24%
McLean County	KY0832	2,612	7	0.27%
Waverly	KY0565	126	34	26.98%