

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

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	CSR 8337-E
	)	CSR 8338-E
Petitions for Determination of Effective	)	
Competition in various Ohio Franchise Areas	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 8, 2010**

**Released: October 13, 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 petitions pursuant to Sections 76.7, 76.905(b)(2) 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 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 Petitioner is subject to effective competition in the Communities listed on Attachment A.

**II. DISCUSSION**

3. Section 623(1)(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.

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

<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(1)(1) and 47 C.F.R. § 76.905(b).

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

<sup>6</sup> 47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

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 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 to support its 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 is supported in the 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 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.<sup>14</sup> Petitioner asserts that it is the largest MVPD in the Communities.<sup>15</sup> Petitioner sought to determine the competing provider penetration in the 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 the Communities on a five-digit zip code basis.<sup>16</sup>

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using

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<sup>7</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup> See Petitions at 3.

<sup>9</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (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 6 (listings available at [www.directv.com](http://www.directv.com) and [www.dishnetwork.com](http://www.dishnetwork.com)).

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

<sup>14</sup> The two petitions at issue in this proceeding list the same communities. Two petitions were filed because some of the communities are on different Comcast cable systems and separate filing fees are required. The communities are listed as follows: (CSR 8337-E) – PSID No. 003215 (OH1350, OH1818, OH1268, OH0295, OH0483) and (CSR 8338-E) – PSID No. 004656 (OH0866, OH0730, OH0717, OH0742, OH0721, OH0692).

<sup>15</sup> Petitions at 7.

<sup>16</sup> Petitions at 7-8. Because five digit zip codes do not perfectly align with franchise boundaries, Time Warner has reduced the reported number of DBS subscribers in each zip code by an allocation ratio (the number of households in the franchise area over the number of households in the zip code area). The Commission has previously approved this methodology. See, e.g., *Comcast of Dallas, L.P.*, 20 FCC Rcd 17969-70 (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 area).

Census 2000 household data,<sup>17</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 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.

### 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. **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>18</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>17</sup> Petitions at 7-8.

<sup>18</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

## CSR 8337-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Beavercreek	OH1350	16.65%	14,071	2,342.38
Catawba	OH1818	43.22%	106	45.81
Clayton	OH1268	16.23%	4,975	807.40
Fairborn	OH0295	15.06%	13,615	2,050.19
Vandalia	OH0483	15.08%	6,235	940.29

## CSR 8338-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Cincinnati	OH0866	15.58%	148,095	23,067.58
Deer Park	OH0730	17.28%	2,634	455.13
Fairfax	OH0717	16.36%	771	126.14
Lockland	OH0742	16.01%	1,617	258.88
Mariemont	OH0721	16.36%	1,463	239.35
Norwood	OH0692	15.08%	9,270	1,397.77

\*CPR = Percent of competitive DBS penetration rate.