

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

In the Matter of)	
)	
Time Warner Cable Inc.)	CSR 7534-E
)	
Petition for Determination of Effective)	
Competition in various Maine and New)	
Hampshire Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 2010

Released: May 18, 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”)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 additionally claims to be exempt from cable rate regulation in the Community listed on Attachment C and hereinafter referred to as the Group C Community because the Petitioner serves fewer than 30 percent of the households in the franchise area. The petition is unopposed.³

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

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).

³On November 19, 2008, Time Warner filed a request that the following Communities be deleted from consideration in this proceeding: Town of Effingham (NH0211); Town of Fryeburg (ME0154); Town of Lovell (ME0270); Town of Middleton (NH0180); Town of Moultonborough (NH0188); Town of Tamworth (NH0190); Town of Tuftonboro (NH0187); and, Town of Wakefield (NH0145). We grant Time Warner’s request. The Town of Tuftonboro filed an opposition to this petition. Because we have granted Time Warner’s request to delete the Town of Tuftonboro from this proceeding, Tuftonboro’s opposition to this petition is rendered moot.

⁴47 C.F.R. § 76.906.

⁵See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

within the relevant franchise area.⁶ 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 Attachment A.

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 (“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;⁷ 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.⁸

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.⁹ 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.¹⁰ 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 their assertion that potential customers in the Group B Communities are reasonably aware that they may purchase the service of these MVPD providers.¹¹ 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 programming¹² and is supported in this petition with citations to the channel lineups for both DIRECTV and Dish.¹³ 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.¹⁴ 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

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁸47 C.F.R. § 76.905(b)(2)(i).

⁹See Petition at 3. .

¹⁰Mediacom 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).

¹¹47 C.F.R. § 76.905(e)(2).

¹²See 47 C.F.R. § 76.905(g). See also Petition at 5-6.

¹³See Petition at 6 (listings available at www.directv.com and www.dishnetwork.com).

¹⁴See Petition at 6-7.

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 Group B Communities.¹⁵ Petitioner 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 zip code allocation formula previously approved by the Commission in other decisions.¹⁶

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁷ 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.¹⁸ 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 Community. Therefore, the low penetration test is also satisfied as to the Group C Community.

¹⁵*Id.* at 7-8. With regard to Acton, Time Warner notes that while the aggregate DBS subscribership for this community is 27.64 %, the Time Warner subscribership for this franchise area is less than 15 percent. Time Warner requests that if the Commission declines to find competing provider effective competition in Acton, then it seeks a finding that Acton is subject to effective competition pursuant to the low penetration effective competition test.

¹⁶Petition at 8; *See, e.g., Charter Communications Properties, LLC*, 17 FCC Rcd 4617, 4619 at ¶ 6 (2002); *Charter Communications*, 17 FCC Rcd 15491, 15492 at ¶ 5 (2002); *Falcon Community Cable, L.P.*, 17 FCC Rcd 22162, 22164 at ¶ 7 (2002).

¹⁷Petition at 7-8.

¹⁸47 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 certifications to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **ARE REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁹

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁹47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7534-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDS
Acton, Town of	ME0337
Ossipee, Town of	NH0189

ATTACHMENT B

CSR 7534-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID	CPR*	2000 Census Household	Estimated DBS Subscribers
Acton, Town of	ME0337	27.64%	855	236.36
Ossipee, Town of	NH0189	21.64%	1,672	361.89

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

CSR 7534-E

COMMUNITY SERVED BY TIME WARNER CABLE INC.

Community	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
Acton, Town of	ME0377	855	7	0.82.%