

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

In the Matter of)	
)	
Time Warner Cable Inc.)	
)	CSR 8147 - E
Petition for Determination of Effective)	
Competition in Nine Franchise Areas in New)	
Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 2010

Released: May 17, 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), and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the nine franchise areas listed on the Attachments hereto.¹ Petitioner alleges that its cable system serving the two franchise areas listed in Attachment A hereto (the “Attachment A Communities”) is subject to “competing provider” effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),² and is therefore exempt from cable rate regulation there because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and Dish Network (“Dish”). Petitioner also claims that its cable system serving the nine Communities listed on Attachment B (the “Attachment B Communities”) is subject to “local exchange carrier” or “LEC” effective competition pursuant to Section 623(l)(1)(D) of the Communications Act³ and is therefore exempt from regulation because of the competing service provided by Verizon New Jersey, Inc., hereinafter referred to as “Competitor.”⁴

2. The New Jersey Division of Rate Counsel (the “DRC”) of the New Jersey Department of the Public Advocate filed comments opposing the petition.⁵ Petitioner filed a reply to the DRC’s

¹ Petition for Special Relief, dated March 9, 2009.

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

³ See 47 U.S.C. § 543(l)(1)(D); see also 47 C.F.R. § 76.905(b)(4).

⁴ The two Attachment A Communities are also Attachment B Communities because Petitioner claims that in the two former Communities it is subject to both competing provider and LEC effective competition.

⁵ Comments of the New Jersey Division of Rate Counsel in Opposition To Time Warner Cable Inc’s Petition for Declaration of Effective Competition, dated April 21, 2009. The DRC is a division within the New Jersey Department of the Public Advocate and represents the interests of consumers of cable TV service and other utility services whose interests in rate matters would otherwise be inadequately represented. State of New Jersey, Department of the Public Advocate, Home, Utility Customers, *Learn About the Division*, <http://www.state.nj.us/publicadvocate/utility/about/> (visited May 11, 2009). The DRC is not a “franchise authority” – a government entity that grants franchises to cable operators. In the state of New Jersey, the New Jersey Board of Public Utilities grants such franchises. *New Jersey Board of Public Utilities*, 2007 Annual Report at 16, available at <http://www.bpu.state.nj.us/bpu/pdf/about/annualreports/2007.pdf> (visited May 11, 2009).

comments.⁶

3. Legal Standards. In the absence of a demonstration to the contrary, a cable system is presumed not to be subject to effective competition,⁷ as that term is defined by Section 623(l)(1) of the Communications Act and Section 76.905(b) of the Commission's rules.⁸ A cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within its relevant franchise area.⁹ For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to competing provider effective competition in the Attachment A Communities and LEC effective competition in the Attachment B Communities.

II. DISCUSSION

A. The Competing Provider Test

4. Section 623(l)(1)(B) of the Communications Act sets forth the competing provider test. It provides that a cable operator is subject to that kind of effective competition if its 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.¹⁰

5. The first prong of the competing provider test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer at least "50 percent" of the households in the franchise area "comparable programming."¹¹ It is undisputed that the Attachment A Communities are "served by" both DBS providers and that these providers are unaffiliated with Petitioner and 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.¹² 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.¹³ Petitioner has shown, and the DRC has not disputed, that both DBS providers offer service to at least "50 percent" of the households in the Attachment A Communities because of their national satellite footprint.¹⁴

6. The "comparable programming" element of the first prong is satisfied if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.¹⁵ This requirement is satisfied by the petition's citation to the web

⁶ Reply, dated May 1, 2009.

⁷ 47 C.F.R. § 76.906.

⁸ See 47 U.S.C. § 543(l)(1) and 47 C.F.R. § 76.905(b).

⁹ See 47 C.F.R. §§ 76.906 & 907.

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

¹¹ 47 C.F.R. § 76.905(b)(2)(i).

¹² See, e.g., Petition at 3-5.

¹³ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁴ See Petition at 3-5.

¹⁵ See 47 C.F.R. § 76.905(g); see also Petition at 5-6.

sites for both DBS providers, which show them to be offering far more than the numbers required for their service to be “comparable” to Petitioner’s.¹⁶ Thus, Petitioner’s evidence satisfies the first prong of the competing provider test.

7. 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.¹⁷ Petitioner asserts, without objection from the DRC, that it is the largest MVPD in both Attachment A Communities.¹⁸ This makes the DBS providers Petitioner’s “competing providers” in the Attachment A Communities. The competing provider test, therefore, requires Petitioner to create a ratio for each Attachment A Community, the numerator of which is the number of DBS subscribers in it and the denominator of which is the number of households in it, and to show that in each case the ratio is in excess of 15 percent.

8. Petitioner derived its numerator, the numbers of DBS subscribers, by purchasing subscriber tracking reports from the Satellite Broadcasting and Communications Association (“SBCA”). These reports stated a number of subscribers attributable to the DBS providers in each five-digit Zip Code all or part of which was in one of the Attachment A Communities.¹⁹ Petitioner then estimated how many of the DBS subscribers in each five-digit Zip Code were in each Attachment A Community. For its denominator, the number of households in each Attachment A Community, Petitioner used household data from the 2000 Census.²⁰ The resulting ratios, reflected in Attachment A hereto, indicate that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Attachment A Communities.²¹ This evidence, if unrefuted, satisfies the second prong of the competing provider test for each of the Attachment A Communities.

9. The DRC makes several objections, some general and some specific, to Petitioner’s asserted numbers of DBS subscribers and households. We address them in turn in the following paragraphs.

1. The DRC’s General Objections

10. Cancellations of DBS Service. The DRC first objects that the SBCA tracking reports submitted with the petition do not account for cancellations of DBS service that occurred after the report was made and before the petition was filed.²² Attached to the DRC’s comments are publications that, the DRC says, show “a steady decline in satellite subscribership.”²³ We find no merit in the DRC’s objection, which we have rejected other proceedings.²⁴ The available evidence shows that DBS subscribership has generally increased over time (that is, although cancellations have occurred, they have

¹⁶ Petition at 6.

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

¹⁸ Petition at 7.

¹⁹ Petition at Exh. C; Reply Exh. A.

²⁰ Petition at Exh. B.

²¹ *Id.* at Exh. D.

²² *See* Comments at 7.

²³ *See id.* at 7 & Exh. A.

²⁴ *Comcast Cable Commun., LLC* (“Comcast 107”), 24 FCC Rcd 1780, 1784-85, ¶ 15 (2009), *application for review pending*; *Subsidiaries of Cablevision Systems Corp.* (“Cablevision 103”), 23 FCC Rcd 14141, 14145, ¶ 15, *stay denied*, 23 FCC Rcd 17012 (2008) (“Cablevision 103 Stay”), *application for review pending*.

been outnumbered by new subscriptions).²⁵ Indeed, the very publications the DRC attached to its comments state that DBS subscriber numbers grew steadily in absolute terms, and did not decline, in 2007.²⁶ Accordingly, we decline the DRC's request that we fault Petitioner for not making post-petition updates of cancellations of DBS service.²⁷

11. Timeliness of Data. Second, the DRC objects that Petitioner's calculations use DBS subscriber numbers from 2009 and household numbers from 2000. The DRC argues that the household numbers are stale and that Petitioner's DBS subscribership and household numbers should be contemporaneous with each other.²⁸ We disagree with the DRC. Early in litigation about effective competition, we authorized cable operators to use the most recent Census count of "households" as sufficient to sustain their initial burden of proof about the number of households in their communities.²⁹ That is the kind of household number that Petitioner submitted herein for each Attachment A Community. In many decisions, including ones involving the State of New Jersey, we have found competing provider effective competition to exist based on household and DBS subscribership data that are several years apart in time.³⁰ Accordingly, we conclude that the DRC's general objections about the relative dates of

²⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 684 (2009) (Table B-1, showing annual growth in the percent of MVPD subscribers receiving DBS service, rising to 29% of households subscribing to an MVPD in the most recent reported year).

²⁶ See Comments at Exh. A, which consists of several company announcements and securities analyses, including *EchoStar Reports First Quarter 2007 Financial Results* ("DISH Network(tm) added approximately 310,000 net new subscribers during the first quarter of 2007"); *EchoStar Reports Second Quarter 2007 Financial Results* ("DISH Network(r) service added approximately 170,000 net new subscribers during the second quarter of 2007"); *EchoStar Reports Third Quarter 2007 Financial Results* ("DISH Network(r) service . . . added approximately 110,000 net new subscribers during the third quarter of 2007"); *DISH Network Reports Fourth Quarter 2007 Financial Results* ("DISH Network added approximately 85,000 net new subscribers during the quarter ended Dec. 31, 2007"); DIRECTV Investors Day (DIRECTV "[e]xpects 17.5 million [subscribers] by year end . . . DIRECTV has 16.8 million subscribers"); Cable360Net, *Satellite in the Slow Lane?* (predicting growth, albeit slow, for DBS); Lisa Daniel, *Subscriber Bases: Quantity or Quality*, SATELLITE TODAY (Sept. 1, 2007) ("The leader in satellite's trend toward higher-paying subscribers is . . . DIRECTV, analysts say. . . . DIRECTV posted its lowest churn rate in three years in the first quarter of this year. . . . EchoStar is adding subscribers . . . Cable has not added subscribers in several years and their penetration rate is declining because of satellite," according to one analyst).

²⁷ See also *infra* ¶¶ 17-18.

²⁸ See Comments at 3-5.

²⁹ *Cable Operators' Petitions for Reconsideration & Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates* ("Reconsideration Order"), 9 FCC Rcd 3656, ¶ 2(3) (1994):

"With respect to household data, we realize that in many cases 1990 census data represents the most recent data available. Accordingly, we believe that 1990 census data is an appropriate measure of households. Operators that have access to more recent data may submit such information if they so choose."

See also *Comcast 107*, 24 FCC Rcd at 1783-84, ¶ 13; *Cablevision 103*, 23 FCC Rcd at 14144, ¶ 13 ("the most recent available Census data may be used to show the number of households in a community"); *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11493, ¶ 16 (2007), *application for review pending*; *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968, ¶ 6 (2004) ("2000 Census data is sufficiently reliable for effective competition determinations"), *application for review pending*.

³⁰ See, e.g., *Cablevision 103*, 23 FCC Rcd at 14143-44, ¶¶ 9-12 (accepting 2000 Census data and 2006 and 2007 DBS subscribership data); *Time Warner Cable Inc.* ("*Time Warner Englewood*"), 23 FCC Rcd 12210, 12214, ¶ 15 (accepting 2000 Census data and 2007 DBS subscribership data), *reconsideration denied*, 23 FCC Rcd 16483 (2008), *application for review pending*; *Jones Intercable, Inc.*, 15 FCC Rcd 7254, 7256, n.12, ¶ 5 (2000) (using 1990 Census despite the fact that it was nearly a decade old); *Tel-Com, Inc.*, 11 FCC Rcd 9153, 9159, n.36, ¶ 11 (1996) (1996 decision using 1990 Census data).

the DBS subscriber and household numbers submitted by Petitioner reveal no flaw in the petition.

12. We also dismiss the DRC's advocacy of a "complete when filed" rule, which apparently would prohibit late-filed updates to Petitioner's data, and which the DRC advocates in the course of its argument that Petitioner's data is stale.³¹ In previous proceedings, the DRC proposed such a rule, and we adopt the analysis by which we declined to follow it in those proceedings.³²

13. Requests for Petitioner's "Analysis and Work Papers." Finally, the DRC objects that Petitioner's filings did not include "the analysis and work papers that underlie and support its calculation of satellite penetration reported by SBCA."³³ We have rejected this objection in earlier decisions as without substance and have found the cases that the DRC relies on to be inapposite.³⁴ We adopt the analysis of those earlier decisions and again reject the DRC's objection. In brief, it is not clear that there are any analysis and work papers that Petitioner has not produced or, if there are any, that a useful purpose would be served by their examination. We also note that the Commission, in its recent decision in *Marcus Cable Associates*, rejected similar requests for underlying data.³⁵

2. The DRC's Specific Objections

14. Five- and Nine-Digit Zip-Code Data. The DRC notes that in August of last year we denied Petitioner's request for a finding of competing provider effective competition in one of the Attachment A Communities, Englewood (City).³⁶ We did so because Petitioner's data showed the subscribership of its cable service and the DBS providers' service amounting to more than 100 percent of the households there. This was obviously impossible to believe, especially because it failed to attribute any households to over-the-air television, or cable service by a LEC, or no television at all.³⁷ We noted that Petitioner's estimated number of DBS subscribers, for Englewood and many other communities, were based on five-digit Zip Code data and that, for a small community that is part of a large five-digit Zip Code, a more accurate number might be based on relatively small, nine-digit Zip Codes. We allowed, but did not require, Petitioner to re-file its petition using nine-digit Zip Codes.³⁸

15. In the petition before us now, Petitioner submits a new estimated number of DBS subscribers in Englewood that is approximately 300 more than it submitted before and a number of its own customers that is almost 1,400 fewer than the number it submitted before.³⁹ It thus appears that the

³¹ Comments in at 6 ("It is appropriate to apply a 'complete when filed' requirement in order to weigh supporting data of even date").

³² *Comcast 107*, 24 FCC Rcd at 1784, ¶ 14; *Cablevision 103*, 23 FCC Rcd at 14147, ¶¶ 21-22; *see also Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd at 11496-97, ¶ 24.

³³ Comments at 7.

³⁴ *Comcast 107*, 24 FCC Rcd at 1785-86, ¶¶ 16-19; *Cablevision 103*, 23 FCC Rcd at 14146-47, ¶¶ 19-20; *Time Warner Englewood*, 22 FCC Rcd at 12215, ¶ 16.

³⁵ *Marcus Cable Assoc's, LLC*, Memorandum Opinion & Order FCC 10-64 at ¶ 10 (rel. April 22, 2010), *denying review to* 18 FCC Rcd 9649 (2003) *and* 17 FCC Rcd 16652 (2002).

³⁶ Comments at 2-3, 8, referring to *Time Warner Englewood*. The DRC states vaguely (at 3) that "the factual flaws that caused denial of the previous petition persist and remain uncorrected" in the petition that is now before us. To the extent that the DRC is attempting to revive its arguments that we considered in great detail in *Time Warner Englewood* and found wanting, we reject its attempted resurrection of them. The DRC has given us no new facts or arguments, much less any reason to re-visit *Time Warner Englewood*.

³⁷ *Time Warner Englewood*, 23 FCC Rcd at 12212, ¶ 8, *reconsideration denied*, 23 FCC Rcd at 16485-86, ¶ 9.

³⁸ *Time Warner Englewood*, 23 FCC Rcd at 12212, ¶ 8, *reconsideration denied*, 23 FCC Rcd at 16486-87, ¶¶ 7, 10.

³⁹ *Compare* Petition for Special Relief in CSR 7547-E at Exhs. A, E, *with* Petition at 7 & Exh. D.

principal flaw in Petitioner's earlier evidence, at least in the case of Englewood, was in its estimate of its own customer number rather than that of the DBS providers. In the petition before us now, Petitioner's new DBS customer number is based on five-digit Zip Code data.

16. The DRC objects to Petitioner's continued use of five-digit Zip Code data and faults the petition for not containing nine-digit Zip Code data.⁴⁰ We disagree. Our decision of August last year did not require Petitioner to use nine-digit Zip Code data in any new filing. Moreover, Petitioner has given us a good reason for continuing to use five-digit data for Englewood, namely that one five-digit Zip Code (07631) is almost 99 percent co-extensive with Englewood. Therefore, using nine-digit Zip Code data would add only incremental accuracy to Petitioner's estimate of DBS subscribership there.⁴¹ Accordingly, we reject the DRC's objection that Petitioner's case is flawed because it does not include nine-digit Zip Code data.⁴²

17. Timeliness of DBS Subscriber Numbers. Second, the DRC objects that the DBS subscriber number submitted with the Petition was calculated by SBCA as of December 31, 2008, and the petition containing that number was sent to us on March 9, 2009, 68 days later. The DRC appears to believe that 68 days is too long a gap between a DBS number and the petition containing it.⁴³ Petitioner responded by including in its reply a new DBS number, which was current as of March 31, 2009.⁴⁴ This satisfies the DRC's objection.

18. Also, 68 days is not so long a gap between the calculation of a DBS number and its filing with us as to call into question its reliability in a typical case. That much time can sensibly be spent by DBS providers gathering their own subscriber numbers and reporting them to SBCA, by SBCA calculating an aggregate DBS subscriber number for each of millions of zip codes, by a petitioning cable operator allocating those numbers among its franchise areas, and with the other activities that precede the filing of a petition with us.⁴⁵ The DRC has not shown that this case is atypical or that any fact makes Petitioner's original DBS number suspect. The two numbers submitted by Petitioner for each Attachment A Community are not very different; in neither case is the later number significantly lower than the earlier one;⁴⁶ and both numbers for each Community, set forth in Exhibit A hereto, result in DBS subscribership that is comfortably above the statutory minimum for showing competing provider effective competition.

19. The DRC points to a 1994 statement by this Bureau's predecessor, the Cable Services Bureau, requiring cable operators to file subscriber numbers that were no more than 60 days old.⁴⁷ Specifically, in that year franchise authorities were still being certified to regulate cable operators' basic

⁴⁰ Comments at 2, 8-9, citing Petition, Exh. D.

⁴¹ Petition at 8 n.24; Reply at 6.

⁴² The DRC has given us no reason to question the validity of Petitioner's five-digit Zip Code data for the other Attachment A Community, Englewood Cliffs.

⁴³ Comments at 5-6.

⁴⁴ Reply at Exh. A.

⁴⁵ *Id.* at 3-4.

⁴⁶ SBCA calculated, in pertinent five-digit Zip Codes, that Englewood had 1,860 DBS subscribers on December 31, 2008, and 1,928 on March 31, 2009, and that for Englewood Cliffs the numbers were 392 and 391. Petition, Exh. C; Reply, Exh. A.

⁴⁷ Comments at 6, citing *Reconsideration Order*, 9 FCC Rcd at 3656, ¶ 2(3) (cable operators petitioning for reconsideration of franchise authorities' certification to regulate basic cable rates "must rely on subscriber data as of or approximately as of the time of certification, but no earlier than two months before the request for certification was filed").

rates (a process that usually took 30 days)⁴⁸ and the Bureau allowed cable operators who believed that they were subject to effective competition to petition for reconsideration of the certifications (within 30 days of the certification⁴⁹). The Bureau's statement required that cable operators' reconsideration petitions contain subscriber numbers that were no older than 60 days before the franchise authority asked to be certified. This Bureau requirement actually tolerated data that was 120 days old when it was filed with the Bureau. This requirement does not impair the timeliness of the 68 day old DBS subscriber numbers in the petition herein.

20. Also, the Bureau's statement was made at a time (July 1994) when DBS competition was barely born – of the two DBS providers, DIRECTV had been providing service for six weeks and Dish had not begun service.⁵⁰ It is inconceivable that any claim of effective competition at that time would be based on DBS subscribership. The only other kind of effective competition that requires the filing of customer numbers, and therefore the kind that the Bureau's statement was clearly contemplating, was “low penetration” effective competition. The subscriber number that that kind of effective competition requires is the petitioning cable operator's own subscriber number.⁵¹ Such a number is, of course, easily available to the petitioning cable operator in the precise form (by franchise area) that the statute requires.⁵² Producing such data poses none of the above-mentioned Zip Code-related complexities of producing DBS subscriber numbers in a competing provider effective competition petition. Accordingly, the DRC is mistaken in applying the Bureau's 1994 statement to competing provider effective competition.⁵³

21. Timeliness of Household Numbers. The DRC's third objection to Petitioner's proposed ratio for competing provider effective competition concerns the denominator of that ratio, the number of households in the Attachment A Communities. As already noted, we have long allowed cable operators to sustain their initial burden of proof by submitting the most recent Census count of “households” in a community.⁵⁴ We have also stated, however, that we will accept household numbers that are more recent if they are at least as reliable as Census data.⁵⁵ The DRC has submitted 2007 Census estimates of the population of the Attachment A Communities, both of which show growth since the 2000 Census.⁵⁶

⁴⁸ 46 C.F.R. § 76.910(e).

⁴⁹ 46 U.S.C. § 405(a).

⁵⁰ *Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Services*, 9 FCC Rcd 7442, 7474, ¶ 63 (1994) (“On June 17, 1994, DirecTV . . . began providing high-power DBS service”); *id.* at 7476, ¶ 67 (Dish “is required by the terms of its construction permit to have its system in operation by August 15, 1995”).

⁵¹ 47 U.S.C. § 543(l)(1)(A) (defining “low penetration” effective competition as “fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system”).

⁵² We understand that most cable operators ordinarily maintain their own customer numbers on a franchise area by franchise area basis, if only because that is the basis for their payments to franchise authorities, see 47 U.S.C. § 542.

⁵³ We also note that a cable operator claiming low penetration effective competition and using stale numbers of its own subscribers would increase its chances of showing effective competition, because its subscribership would probably rise over time. On the other hand, if the same cable operator claimed competing provider effective competition based on DBS subscribership and used stale numbers of DBS subscribers, it would decrease its chances of showing effective competition, because DBS subscribership would probably rise over time. In those circumstances, the cable operator would have no incentive to use stale DBS subscriber numbers in an effective competition filing.

⁵⁴ See *supra* note 29.

⁵⁵ *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462, ¶ 14 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4393, ¶ 11 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007).

⁵⁶ Comments at 8.

Although the DRC's source (the Census) is reliable, its submitted numbers are of population, not households. Section 623(l)(1)(b)(ii) of the Communications Act clearly requires numbers of households.⁵⁷ Population data is irrelevant even if it is recent and reliable. Moreover, even if we increase the Attachment A Communities' household numbers from 2000 by the percent increase in population that the Communities underwent from 2000 to 2007, DBS subscribership in each Community remains well above the statutory minimum to show competing provider effective competition.⁵⁸

22. The DRC also submitted a 2007 Census number that is relevant, namely the estimated number of households in one of the Attachment A Communities, Englewood.⁵⁹ Because it is the most recent Census number about the relevant matter (households), we will use it in calculating DBS subscribership in Englewood. As shown in Attachment A even after substituting the Census's 2007 household estimate for its 2000 number, DBS subscribership in Englewood remains significantly above the statutory minimum to show competing provider effective competition.

3. Conclusion

23. Based upon the subscribership levels for the DBS providers that are reflected in Attachment A, and despite the general and specific objections made by the DRC, 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 each of the Attachment A Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Attachment A Communities. Accordingly, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied in the Communities listed on Attachment A and that Petitioner is subject to effective competition there.

B. The LEC Test

24. The LEC test is set forth in Section 623(l)(1)(D) of the Communications Act and provides that a cable operator is subject to effective competition if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator.⁶⁰ Petitioner asserts that the cable service offered by Competitor (Verizon New Jersey, Inc.) satisfies the LEC test in the Attachment B Communities.

25. The Commission has stated that the incumbent cable operator must show that the LEC intends to build out its cable system, in an area that substantially overlaps the incumbent cable operator's, within a reasonable period of time if it has not completed its build-out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased; that the LEC has actually begun to

⁵⁷ 47 U.S.C. § 543(l)(1)(b)(ii) (in excess of "15 percent of the *households* in the franchise area") (emphasis added).

⁵⁸ Census data from 2000 and 2007 show Englewood's population growing from 26,203 to 28,009, or 6.89%, and Englewood Cliffs' growing from 5,322 to 5,775, or 8.51%. Those percentages of growth, applied to the 2000 Census household numbers, grow the number of households in Englewood from 9,273 to 9,912 and in Englewood Cliffs from 1,818 to 1,972. Using Petitioner's more recent DBS subscriber numbers (1,850 in Englewood and 334 in Englewood Cliffs), DBS subscribership is 18.66% in Englewood and 16.94% in Englewood Cliffs. Petition at Exh. B; Comments at Exh. B; Reply at Exhs. A, B.

⁵⁹ Comments at Exh. C.

⁶⁰ See 47 U.S.C. § 543(l)(1)(D).

provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.⁶¹

26. It is undisputed that the Attachment B Communities are served by both Petitioner and Competitor, that Competitor is a LEC, and that these two MVPD providers are unaffiliated. 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.⁶² The petition herein includes copies of the channel lineups for Competitor in the Attachment B Communities showing that Competitor’s service includes many more channels than the numerical minimums that we require.⁶³ Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Communities pursuant to its “system-wide” franchise,⁶⁴ has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.⁶⁵

27. These showings, if unrefuted, would demonstrate that Petitioner’s cable system serving the Communities listed on Attachment B is subject to LEC effective competition. The DRC, however, makes several objections to Petitioner’s showings. Three are substantive and one is procedural, and we address them in the following paragraphs.

1. The DRC’s Substantive Objections

28. The DRC objects, first, that Competitor is offering cable service pursuant to a system-wide franchise, that such franchises were not contemplated when Congress enacted the statutory provision for LEC effective competition, and that therefore Competitor’s service cannot be the basis for a finding of LEC effective competition.⁶⁶ The DRC’s second objection is that Petitioner has not shown that Competitor’s service has any subscribers.⁶⁷ The DRC’s third objection is that Competitor does not offer video programming that is “comparable” to Petitioner’s because Competitor’s programming does not yet include public, government, and educational (“PEG”) channels.⁶⁸

⁶¹ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) (“*Cable Reform Order*”).

⁶² See 47 C.F.R. § 76.905(g). See also Petition at 14-15.

⁶³ See Petition at Exh. I.

⁶⁴ Under a New Jersey law enacted in 2006, a company may receive from the BPU “a system-wide franchise by constructing or operating a [cable] system at any location within the State in which the company, at the time of issuance of the system-wide franchise, either has plant or equipment in use for the provision of any consumer video, cable or telecommunications service, or has proposed to place such plant or equipment into use to provide such service.” Evidently, Verizon’s system-wide franchise has the scope of the territory in which it has provided telecommunications service. See The Assembly Telecommunications & Utilities Committee reports favorably Assembly Committee Substitute for Assembly Bill No. 804, No. 804--L.2006, c.83 (May 11, 2006), printed in N.J.S.A. 48:5A-2.

⁶⁵ See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petition at 10-14, Exhs. F-H.

⁶⁶ Comments at 10-13 (also objecting, at 11-12, that whether a system-wide franchise may be the basis for a finding of LEC effective competition must be decided by the full Commission). The LEC effective competition provision, 47 U.S.C. § 543(1)(1)(D), was first enacted in 1996. Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(b)(3)(C), 110 Stat. 56, 115, approved Feb. 8, 1996.

⁶⁷ Comments at 14.

⁶⁸ *Id.* at 9-10, 13, 15 (also objecting, at 14, that whether a competitor’s programming can be comparable without PEG channels must be decided by the full Commission).

29. The DRC has made these same objections in past proceedings and we have rejected them.⁶⁹ We incorporate the analysis of our decisions in those proceedings as if set forth herein verbatim. Also, assuming *arguendo* that it is necessary, Petitioner has shown that Competitor does have actual subscribers in all but one of the Attachment B Communities.⁷⁰ Accordingly, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable system serving the Attachment B Communities is subject to LEC effective competition.

2. The DRC's Procedural Objection

30. The DRC also objects that the issues it has raised about system-wide franchises and PEG channels are beyond this Bureau's delegated authority and must be addressed first by the full Commission.⁷¹ We disagree. Section 0.61(f)(2) of the Commission's rules delegates to the Media Bureau the authority to "[a]dminister and enforce rules and policies regarding . . . [c]able television systems, operators, and services, including those relating to rates, . . . competition to cable systems, . . . and federal-state/local regulatory relationships."⁷² The Media Bureau, however, is not delegated the authority to decide "[m]atters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines."⁷³ Those latter matters may be resolved only by the Commission itself.

31. The DRC is correct that its points about system-wide franchises and PEG channels have not been resolved by the full Commission, but it errs in believing that all policy matters and matters of first impression must be resolved by the Commission. In fact, the Commission rule quoted above allows delegated authority to resolve matters that can "be resolved under existing precedents and guidelines."⁷⁴ The DRC has advanced no legislative history, case law, or reasoning indicating either that system-wide franchises do not fit LEC effective competition (Section 623(l)(1)(D) of the Communications Act) or that PEG channels are required for comparable service. Section 623(1)(1)(D) speaks of franchises without regard to whether they are local or system-wide and, in fact, the Section does not require the LEC to have any franchise at all,⁷⁵ and our rules define "comparable programming" without reference to PEG

⁶⁹ Concerning system-wide franchises, see *Cablevision of Oakland Inc.*, 24 FCC Rcd 1801, 1803, ¶ 6 (2009), *application for review pending*; *Comcast 107*, 24 FCC Rcd at 1790, ¶ 34; *Cablevision 103*, 23 FCC Rcd at 14153-54, ¶ 40.

Concerning a LEC's actual customers, see *Cablevision of Oakland Inc.*, 24 FCC Rcd at 1803, ¶ 6; *Comcast 107*, 24 FCC Rcd at 1791, ¶ 36; *Cablevision 103*, 23 FCC Rcd at 14154-55, ¶¶ 42-43.

Concerning PEG channels, see *Cablevision of Oakland Inc.*, 24 FCC Rcd at 1803-04, ¶¶ 6-8; *Comcast 107*, 24 FCC Rcd at 1790-91, ¶ 35; *Cablevision 103*, 23 FCC Rcd at 14154, ¶ 41, *Cablevision 103 Stay*, 23 FCC Rcd at 17014, ¶ 6; *CoxCom, Inc.*, 14 FCC Rcd 7134, 7142, ¶ 19 (1999), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000).

⁷⁰ Petition, Exh. H (affidavit listing the numbers of Petitioner's subscribers who cancelled Petitioner's service saying that they were switching to Competitor's service). In the one Attachment B Community in which Petitioner does not know that it has lost a customer to Competitor, there are only 7 households. *Time Warner Englewood*, 23 FCC Rcd at 12219.

⁷¹ Comments at 12-14.

⁷² 47 C.F.R. § 0.61(f)(2); *see also* 47 C.F.R. § 0.61(h) (delegating authority to "[p]rocess and act on all . . . petitions for special relief . . . regarding the areas listed"); *see also Establishment of the Media Bureau, the Wireline Competition Bureau & the Consumer & Governmental Affairs Bureau*, 17 FCC Rcd 4672 (2002).

⁷³ 47 C.F.R. § 0.283(c).

⁷⁴ *Id.*

⁷⁵ *See supra* note 60 & accompanying text.

channels.⁷⁶ It is within our delegated authority to decide that a statute which, by its own plain words, does not require a LEC to have any kind of franchise does not require it to have a certain kind of franchise, and that a Commission-adopted rule that makes no mention of PEG channels does not require PEG channels. For the Bureau to defer the resolution of any such issues until the full Commission can attend to them would, in effect, require a decision by the full Commission in every case and would render delegated authority a practical nullity. Accordingly, we reject the DRC's assertion that two of its substantive objections must be resolved in the first instance by the full Commission.

3. Conclusion

32. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that its cable system serving the Attachment B Communities is subject to LEC effective competition.

III. ORDERING CLAUSES

33. 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**.

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

35. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁷⁷

FEDERAL COMMUNICATIONS COMMISSION

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

⁷⁶ 47 C.F.R. § 76.905(g).

⁷⁷ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8147-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(s)	CPR*	2000 Census Households	Estimated DBS Subscribers**
CSR 8147-E				
As of Dec. 31, 2008				
Englewood Cliffs (Borough)	NJ0208	18.43%	1818	335
Englewood (City)	NJ0251	18.64%	9273***	1729
As of March 31, 2009				
Englewood Cliffs (Borough)	NJ0208	18.38%	1818	334
Englewood (City)	NJ0251	19.33%	9572****	1850

* Percent of competitive DBS subscription rate.

** Petitioner's fractional estimates rounded off to the nearest whole number.

*** 2000 Census number submitted by Petitioner.

**** 2007 Census estimate submitted by the DRC.

ATTACHMENT B**CSR 8147-E****COMMUNITIES SERVED BY TIME WARNER CABLE INC.**

Communities	CUID(s)
CSR 8147-E	
Cliffside Park	NJ0232
Edgewater	NJ0092
Englewood	NJ0251
Englewood Cliffs	NJ0208
Fort Lee	NJ0082
Leonia	NJ0431
Palisades Park	NJ0252
Ridgefield	NJ0254
Teterboro	NJ0484