

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

In the Matter of)
)
Time Warner Cable Inc.) CSR 8349-E
)
Petition for Determination of Effective)
Competition in various Ohio Franchise Areas)

MEMORANDUM OPINION AND ORDER

Adopted: June 6, 2011

Released: June 9, 2011

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)(1-2), 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 system serving the communities listed on Attachment B and hereinafter referred to as Attachment 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 Communities listed on Attachment C and hereinafter referred to as Attachment 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,³ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ 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.⁵ 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.

¹ See 47 U.S.C. § 543(1)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(1); 47 C.F.R. § 76.905.

⁵ See 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.⁶ This test is 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.⁷ It is undisputed that the Attachment 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.⁸ 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.⁹ We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Attachment B Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ 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 programming¹¹ and is supported in this petition with copies of channel lineups for both DirecTV and Dish.¹² Also undisputed is Petitioner’s assertion that both DirecTV and Dish offer service to at least “50 percent” of the households in the Attachment B Communities because of their national satellite footprint.¹³ Accordingly, we find that the first prong of the competing provider test is satisfied.

5. 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 the Attachment B Communities.¹⁴ Petitioner sought to determine the competing provider penetration in the Attachment B 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 Attachment B Communities on a zip code plus four basis.¹⁵ For the numbers of households in the Attachment B

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

⁷ 47 C.F.R. § 76.905(b)(2)(i).

⁸ *See* Petition at 4.

⁹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁰ 47 C.F.R. § 76.905(e)(2).

¹¹ *See* 47 C.F.R. § 76.905(g); *see also* Petition at 6-7.

¹² *See* Petition at 6 (listings available at www.directv.com and www.dishnetwork.com).

¹³ *See id.* at 7.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 8-9.

Communities, the petition used household numbers from the 2000 Census.¹⁶

6. On November 17, 2010, the Media Bureau sent the Petitioner a letter requesting supplemental information in this case.¹⁷ The Bureau cited flawed data in 14 of the 27 Attachment B Communities originally listed in the Petition¹⁸ because the combined number of subscribers to Time Warner's cable service and to the DBS providers was more than the number of households in these Communities.¹⁹ The Bureau requested that the Petitioner supplement its Petition with either (a) other evidence that explains these discrepancies or sufficiently reliable household numbers that eliminate the flaw or (b) household numbers from the 2010 Census.²⁰

7. On May 20, 2011, Time Warner responded to the Bureau Letter and submitted updated information reflecting the release of the Census Bureau's updated 2010 household figures for the Communities in this proceeding.²¹ Based on the updated figures, Time Warner requests that the following communities be deleted from further consideration in this proceeding: Cherry Fork (OH2446), Fairfield Township (Butler Co.) (OH0634), Fairfield Township (Highland Co.) (OH2451), Hamilton Township (OH0945), Midland (OH1494), Millville (OH0434)²² and Winchester (OH1069). This request is granted.²³ The use of 2010 household numbers and the deletion of the aforementioned communities leave no estimations of competing provider subscribership that suffer from the flaw described in the preceding paragraph.

8. Accordingly, based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,²⁴ 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 Attachment B Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Attachment B Communities. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence

¹⁶ *Id.* at 8 & Exhibit B.

¹⁷ See Letter from Steven A. Broeckaert Esq., Senior Deputy Chief, Policy Division, Media Bureau, to Craig A. Gilley, Esq., Fleischman and Harding LLP, counsel for Time Warner (Nov.17, 2010) ("Bureau Letter").

¹⁸ Petition at 8-9.

¹⁹ Bureau Letter at 1. The letter stated that the areas in question were as follows: Cherry Fork (OH2446), Fairfield Township (Butler Co.) (OH0634), Hamilton (OH0945), Harrison (OH0720), Mason (OH0726), Miami (OH0795), Midland (OH1494), Monroe (OH0838), Montgomery (OH0706), Newton (OH0791), Peebles (OH0229), South Lebanon (OH0903), Trenton (OH0615), and Winchester (OH1069). With regard to Fairfield Township (Butler Co.), we note that Time Warner asserted in its Petition that this community was subject to effective competition under the low penetration test. Petition at 9-10. Review of Exhibits A and B in the Petition, however, demonstrate that Time Warner appears to have meant to list Fairfield Township (Highland Co.) as the community subject to low penetration effective competition, while Fairfield Township (Butler Co.) would be eligible for consideration under the competing provider effective competition test.

²⁰ Bureau Letter at 1.

²¹ See Letter from Craig A. Gilly, Esq., Edwards, Angell, Palmer & Dodge LLP, to Steven Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau (May 20, 2011) ("Time Warner Letter").

²² We note that the CUID number listed for the Village of Millville in Time Warner's Petition is OH0834. Petition at 1. The Time Warner Letter requesting deletion of this community lists the CUID number for Millville as OH0434.

²³ Two of the communities listed in the Time Warner Letter for deletion were not the subject of the Bureau's Letter with regard to flawed data. Nonetheless, these communities – Fairfield Township (Highland Co.) and Millville – will accordingly be deleted from consideration in this proceeding.

²⁴ Time Warner Letter at 3-4 (charts reflecting 2010 Census data and DBS subscribers by community).

demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Attachment 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 referred to as the “low penetration” test.²⁵ 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 Attachment C Communities. Therefore, the low penetration test is also satisfied as to the Attachment C Communities

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 Attachments B and C **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

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

²⁵ 47 U.S.C. § 543(l)(1)(A).

²⁶ 47 C.F.R. § 0.283.

ATTACHMENT A

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COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDS
Arlington Heights	OH0707
Blanchester	OH0313
Franklin (Adams Co.)	OH2447
Franklin (Warren Co.)	OH0379
Harrison	OH0720
Highland	OH1312
Lincoln Heights	OH0719
Mason	OH0726
Miami	OH0795
Monroe	OH0838
Montgomery	OH0706
Newtown	OH0791
Peebles	OH0229
Seven Mile	OH0533
South Lebanon	OH0903
Springdale	OH0731
Sycamore	OH0710
Terrace Park	OH0723
Trenton	OH0615
West Union	OH0214
Wilmington	OH0328
Woodlawn	OH0722
Wyoming	OH0714

ATTACHMENT B

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COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Arlington Heights	OH0707	20.06%	329	66
Blanchester	OH0313	24.94%	1,636	408
Harrison	OH0720	21.97%	3,765	827
Highland	OH1312	27.96%	93	26
Lincoln Heights	OH0719	18.96%	1,287	244
Mason	OH0726	22.30%	11,016	2,457
Miami (Clermont Co.)	OH0795	22.83%	14,785	3,375
Monroe	OH0838	22.65%	4,649	1,053
Montgomery	OH0706	18.60%	3,849	716
Newton	OH0791	28.05%	1,123	315
Peebles	OH0229	22.30%	758	169
Seven Mile	OH0533	21.02%	295	62
South Lebanon	OH0903	16.05%	1,533	246
Springdale	OH0731	26.56%	4,631	1,230
Sycamore	OH0710	17.64%	8,383	1,479
Terrace Park	OH0723	15.30%	758	116
Trenton	OH0615	24.21%	4,160	1,007
West Union	OH0214	24.28%	1,322	321
Wilmington	OH0328	17.61%	5,072	893
Woodlawn	OH0722	18.45%	1,507	278
Wyoming	OH0714	15.07%	3,105	468

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

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COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Franklin Township (Adams Co.)	OH2447	1,021	44	4.31%
Franklin Township (Warren Co.)	OH0379	10,724	2,824	26.33%