

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

In the Matter of)	CSR 8342-E
)	CSR 8343-E
Time Warner Cable Inc.)	CSR 8348-E
)	CSR 8364-E
Petitions for Determination of Effective)	CSR 8365-E
Competition in Franchise Areas in New York and)	CSR 8366-E
Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Adopted: January 21, 2011

Released: January 25, 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 six 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 the “Communities.” Petitioner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² 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.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(l) 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 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.

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ By letters dated January 11, 2011, and by e-mails sent at 4:33 P.M. on January 18, 2011, and at 12:54 P.M. on January 19, 2011, Petitioner corrected certain numerical inaccuracies in the petitions and withdrew its request for a finding of effective competition in the Village of Pike (NY1656) because that Village had been dissolved.

⁴ 47 C.F.R. § 76.906.

⁵ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

⁶ See 47 C.F.R. §§ 76.906, -.907(b).

II. DISCUSSION

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.⁷ 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.⁸

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.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 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 the petitions with citations to the 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 Communities because of their national satellite footprint.¹³ 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, exceeds 15 percent of the households in a franchise area.

7. Petitioner asserts that it is the largest MVPD in the Communities, with two exceptions.¹⁴ The exceptions are the Towns of Eagle and Middlebury in CSR 8364-E. There, it is unclear whether Petitioner or one of the DBS providers is the largest MVPD.¹⁵ In the Town of Eagle, the DBS providers’ combined household share is over 15 percent and is larger than Petitioner’s, and Petitioner’s household share is also over 15 percent.¹⁶ This data makes clear that, whichever of the three MVPDs is the largest,

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

⁸ 47 C.F.R. § 76.905(b)(2)(i).

⁹ *See, e.g.*, Petition in CSR 8342-E at 3-5.

¹⁰ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹¹ *See* 47 C.F.R. § 76.905(g). *See also, e.g.*, Petition in CSR 8343-E at 6.

¹² *See, e.g.*, Petition in CSR 8348-E at 4 n.12; *id.* at 6.

¹³ *See, e.g.*, Petition in CSR 8364-E at 2-3.

¹⁴ *See* Petition in CSR 8365-E at 7.

¹⁵ Petition in CSR 8364-E at 8.

¹⁶ *Compare id.* at 9 *with id.* at Exh. A.

the combined share of the other two is also over 15 percent.¹⁷ In the Town of Middlebury, however, Petitioner's household share is under 15 percent (11.51 percent, to be precise).¹⁸ There, it is possible that one of the DBS providers is the largest MVPD and that the combined share of the other DBS provider and Petitioner is not in excess of 15 percent. If these are the facts – which the evidence at hand does not exclude as a possibility – then the second part of the competing provider test would not be met in the Town of Middlebury franchise area. If these are the facts, however, the criteria for “low penetration” effective competition would be met because “fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system.”¹⁹

8. Petitioner sought to determine the DBS 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 zip code plus four basis.²⁰ Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,²¹ 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 (except for the Town of Middlebury). Therefore, the second prong of the competing provider test is satisfied for each of those Communities.

9. 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 competing provider effective competition in the Communities listed on Attachment A except for the Town of Middlebury. We also conclude that Petitioner has submitted sufficient evidence demonstrating that it is subject to low penetration effective competition in the Town of Middlebury.

¹⁷ See *Comcast Cable Communications, LLC*, 23 FCC Rcd 10939, 10941, ¶ 9 (2008); *Time Warner-Advance/Newhouse Partnership*, 17 FCC Rcd 23587, 23589, ¶ 6 (2002).

¹⁸ Compare Petition in CSR 8364-E at 9 with *id.* at Exh. A (61 subscribers ÷ 530 households = 11.51% share).

¹⁹ 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1). See *Comcast Cable Comm., LLC*, 24 FCC Rcd 2246, 2248, ¶ 6, n.14 (2009); *Mountain Cable Co.*, 14 FCC Rcd 13994, 14002, ¶ 19 (1999).

²⁰ Petition in CSR 8366-E at 7. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

²¹ See, e.g., Petition in CSR 8366-E at Exh. B.

III. ORDERING CLAUSES

10. 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**.

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

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²²

FEDERAL COMMUNICATIONS COMMISSION

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

²² 47 C.F.R. § 0.283.

ATTACHMENT A

CSRs 8342-E, 8343-E, 8348-E, 8364-E, 8365-E, 8366-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

CSR 8342-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Village of Arcade	NY0858	15.37%	1672	257
Village of Barker	NY1428	29.38%	211	62
Town of Chautauqua	NY1242	28.71%	1881	540
Town of Clarence	NY0854	30.07%	9154	2753
Village of Delevan	NY0862	22.48%	436	98
Village of East Aurora	NY1223	18.57%	2596	482
Village of Farnham	NY1550	33.63%	113	38
Village of Gowanda	NY1301, NY1302	29.37%	1161	341
Town of Grand Island	NY0899	30.11%	6898	2077
Village of Lewiston	NY0313	17.19%	1268	218
Village of Mayville	NY1241	29.45%	686	202
Village of North Collins	NY1297	40.10%	414	166
Town of Pendleton	NY1259	35.40%	2116	749
Village of Sherman	NY1510	22.65%	287	65
Village of Springville	NY1161	25.75%	1705	439
Town of Wheatfield	NY1027	35.68%	5305	1893
Village of Youngstown	NY0727	23.11%	809	187

CSR 8343-E

Community	CUID	CPR*	2000 Census Households	Estimated DBS Subscribers
Village of Forestville	NY1212	33.22%	304	101

*CPR = Percent of competitive DBS penetration rate.

CSR 8348-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Village of Allegany	NY0009	26.83%	753	202
Town of Andover	NY0015	44.44%	432	192
Village of Belmont	NY0016	41.07%	392	161
Village of Cattaraugus	NY0860	36.61%	437	160
Town of Cuba	NY0913	21.11%	1336	282
Village of East Randolph	NY1153	46.46%	198	92
Township of Eldred	PA1531	54.66%	686	375
Town of Ellicotville	NY0857	58.96%	770	454
Village of Ellicotville	NY0856	22.73%	242	55
Village of Franklinville	NY0864	21.00%	1205	253
Village of Portville	NY0366	22.84%	416	95
Village of Randolph	NY1151	57.64%	550	317
Town of Wellsville	NY0018	30.06%	2162	650

CSR 8364-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Town of Alexander	NY0895	31.63%	860	272
Village of Alexander	NY0894	16.86%	172	29
Village of Attica	NY0892	17.35%	1072	186
Town of Batavia	NY0850	18.59%	2334	434
Town of Bethany	NY1540	38.21%	636	243
Village of Corfu	NY0997	20.39%	309	63
Town of Eagle	NY1793	74.29%	424	315
Village of Elba	NY0896	16.33%	245	40
Village of Gainesville	NY1268	15.93%	113	18
Village of Lyndonville	NY1265	18.77%	325	61
Town of Mendon	NY1052	15.83%	3070	486
Town of Middlebury	NY1600	44.72%	530	237
Village of Middleport	NY1219	18.65%	756	141
Village of Mount Morris	NY1051	19.20%	1307	251
Village of Nunda	NY1220	15.05%	505	76
Town of Stafford	NY0891	21.34%	909	194

CSR 8365-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Village of Clyde	NY0347	17.11%	859	147
Town of Fayette	NY0557	27.72%	1367	379
Village of Interlaken	NY1181	32.03%	256	82
Village of Manchester	NY0583	15.59%	648	101
Village of Naples	NY0606	17.88%	453	81
Town of Ontario	NY0787	15.95%	3617	577
Village of Ovid	NY1180	22.04%	245	54
Village of Phelps	NY0768	15.42%	791	122
Village of Red Creek	NY1130	41.90%	210	88
Town of Romulus	NY1174	52.66%	583	307
Village of Shortsville	NY0592	16.14%	508	82
Town of South Bristol	NY0705	39.85%	670	267
Town of Varick	NY1178	27.46%	630	173
Town of Victor	NY0655	21.38%	3685	788
Village of Victor	NY0608	15.51%	935	145

CSR 8366-E

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Town of Jerusalem	NY1390	48.32%	1606	776
Village of Penn Yan	NY0217	20.69%	2141	443
Town of Pulteney	NY1388	34.10%	566	193
Village of Rushville	NY1399, NY1752	22.32%	224	50
Town of Wayne	NY1395	20.48%	494	199