

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

In the Matter of
Time Warner Cable Inc.
Petitions for Determination of Effective
Competition in Communities in Ohio and
Pennsylvania
CSR 8489-E
CSR 8490-E

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 2011

Released: August 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 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 "Attachment A Communities." Petitioner alleges that its cable system serving the Attachment A Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and is therefore exempt from cable rate regulation in those 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 B and hereinafter referred to as Attachment B Communities, pursuant to Section 623(l)(1)(A) of the Communications Act and Section 76.905(b)(1) of the Commission's rules, because the Petitioner serves fewer than 30 percent of the households in the franchise area. 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, as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules. 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. For the reasons set forth below, we grant the petitions based on our

1 Page 3 of the Petition in 8489-E states that competing provider effective competition exists in Franklin Township. That Township, however, is not listed on the title page of the Petition. Also, the body of the Petition is silent about Franklin Township's DBS subscriber number and subscribership. Accordingly, we make no ruling concerning whether Petitioner is subject to effective competition in Franklin Township.

2 See 47 U.S.C. § 543(l)(1)(B).

3 47 C.F.R. § 76.905(b)(2).

4 See 47 U.S.C. § 543(l)(1)(A).

5 47 C.F.R. § 76.905(b)(1).

6 47 C.F.R. § 76.906.

7 See 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

8 See 47 C.F.R. §§ 76.906-907(b).

finding that Petitioner is subject to effective competition in the Communities listed on Attachments A and B.

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.⁹ 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.¹⁰ It is undisputed that the Attachment A 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.¹¹ 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.¹² We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in those Communities are reasonably aware that they may purchase the service of these MVPD providers.¹³ 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,¹⁴ and is supported in these petitions with citations to the channel lineups for both DIRECTV and DISH.¹⁵ Also undisputed is Petitioner’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Attachment A Communities because of their national satellite footprint.¹⁶ 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 A Communities.¹⁷ Petitioner sought to determine the competing provider penetration there by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers

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

¹⁰ 47 C.F.R. § 76.905(b)(2)(i).

¹¹ *See, e.g.*, Petition in CSR 8489-E at 4-5.

¹² *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹³ 47 C.F.R. § 76.905(e)(2).

¹⁴ *See* 47 C.F.R. § 76.905(g); *see also* Petition in CSR 8489-E at 6.

¹⁵ *See, e.g.*, Petition in CSR 8490-E at 4 n.12; *id.* at 6.

¹⁶ *See, e.g.*, Petition in CSR 8489-E at 7.

¹⁷ *See, e.g.*, Petition in CSR 8490-E at 7.

attributable to the DBS providers within the Attachment A Communities on a zip code plus four basis.¹⁸

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,¹⁹ 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 Attachment A Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Attachment A Communities. 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 Attachment A Communities.

B. The Low Penetration Test

7. 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.²⁰ 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 Attachment B Communities.

8. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, 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 B Communities. Therefore, the low penetration test is satisfied as to the Attachment B Communities.

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 certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachments A and B **IS REVOKED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁸ See, e.g., Petition in CSR 8489-E at 8.

¹⁹ See, e.g., Petition in CSR 8490-E at Exh. B.

²⁰ 47 U.S.C. § 543(l)(1)(A).

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSRs 8489-E, 8490-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
CSR 8489-E				
Brimfield Township	OH0566	21.20	3996	847
Bronson Township	OH2004	28.89	727	210
Fowler Township	OH1609	26.95	1,024	276
Garrettsville Village	OH0449	25.52	964	246
Gloria Glens Village	OH1506	17.88	179	32
Jackson Township	OH2184 OH0464	38.75	1,164	451
Lordstown Village	OH1663	22.45	1,412	317
Loudonville Village	OH0007	21.48	1,071	230
Madison Township	OH0470	18.54	4,632	859
Montville Township	OH1996	19.97	3,906	780
Oxford Township	OH2634	35.13	649	228
Spencer Village	OH1462	16.84	285	48
Sugar Bush Knolls Village	OH1328	27.54	69	19
Vienna Township	OH0215 OH1760	17.03	1,715	292
Wadsworth Township	OH2244 OH2249	16.91	1,502	254
Washington Township (Richland County)	OH0473	23.83	2,556	609
Sharon City	PA0486	17.81	6,035	1,075
CSR 8490-E				
Avon City	OH1258	23.48	7,584	1,781
Elyria Township	OH0737	22.39	1,398	313
Elyria City	OH0693	19.16	22,400	4,291
Hunting Valley Village	OH1399	34.66	277	96
Kingsville Township	OH0399	18.97	659	125
Kirtland Hills Village	OH1215	26.53	245	65
Kirtland City	OH0893	18.24	2,544	464
Lakeline Village	OH0803	16.84	95	16
Marblehead Village	OH1393	38.13	417	159
Orange Village	OH0774	15.04	1,277	192
Pepper Pike City	OH1062	15.90	2,176	346
Richmond Heights City	OH0765	15.90	4,766	758

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
CSR 8490-E (continued)				
Russell Township	OH1235	22.89	2,071	474
Sharon Township	OH1273	22.00	1,823	401
South Euclid City	OH0778	17.15	8,913	1,529
Waite Hill Village	OH0891	27.46	193	53

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSRs 8489-E, 8490-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
CSR 8489-E				
Canaan Township	OH2473	1,800	84	4.67
Cass Township	OH2009	535	6	1.12
Homer Township	OH1382	451	87	19.29
Hubbard Township	OH0310	5,749	474	8.24
Mechanic Township	OH2050	889	225	25.31
Mifflin Township	OH2187	452	31	6.86
Nelson Township	OH1592	1,167	23	1.97
Richland Township	OH0061	459	1	.22
Ridgefield Township	OH0463	875	38	4.34
Ripley Township	OH1255	346	41	11.85
Smith Township	OH0558	1,808	35	1.94
Springfield Township	OH1690 OH1808	4,386	78	1.78
Washington Township (Stark County)	OH1623	1,758	376	21.39
Weathersfield Township	OH0211	11,025	548	4.79
CSR 8490-E				
Cuyahoga Heights Village	OH1196	258	73	28.29
Linndale Village	OH2289	66	6	9.09
Middlefield Township	OH2653	1,186	96	8.09
Rice Township	OH2099	514	114	22.18