

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

In the Matter of	)	
	)	CSR 8534-E
Time Warner Cable Inc.	)	CSR 8535-E
	)	CSR 8536-E
Petitions for Determination of Effective	)	
Competition in 23 Ohio Communities	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 28, 2011**

**Released: December 29, 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 determinations 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 system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> 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”). 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,<sup>3</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>4</sup> 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.<sup>5</sup> For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

**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.<sup>6</sup> This test is referred to as the “competing provider” test.

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

<sup>5</sup> See 47 C.F.R. §§ 76.906-907(b).

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

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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>10</sup> 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,<sup>11</sup> and is supported in the petitions with copies of channel lineups for both DIRECTV and DISH.<sup>12</sup> 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.<sup>13</sup> 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, exceeds 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.<sup>14</sup> Petitioner sought to determine the competing provider 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.<sup>15</sup>

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,<sup>16</sup> 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. Therefore, the second prong of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing

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<sup>7</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup> See, e.g., Petition in 8534-E at 3-4.

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

<sup>10</sup> 47 C.F.R. § 76.905(e)(2).

<sup>11</sup> See 47 C.F.R. § 76.905(g); see also, e.g., Petition in 8535-E at 5.

<sup>12</sup> See, e.g., Petition in 8536-E at 4 n.12; *id.* at 5.

<sup>13</sup> See, e.g., Petition in 8534-E at 6.

<sup>14</sup> See, e.g., Petition in 8535-E at 6; *id.*, Declaration of Pamela McDonald, Petitioner’s Vice President of Government Relations for the Southwest Ohio Division (October 5, 2011) at ¶ 3.

<sup>15</sup> See, e.g., Petition in 8536-E at 7; *id.* at Exhs. A, C. 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.

<sup>16</sup> See, e.g., Petition in 8534-E at 7; *id.* at Exh. C.

provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

### III. ORDERING CLAUSES

7. 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**.

8. **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**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>17</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>17</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

## CSR 8534-E

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
Town of Aberdeen	OH0001	20.53	760	156
Village of Amelia	OH1122	28.03	1830	513
Village of Maineville	OH1872	36.41	401	146
Sprigg Township	OH1983	23.32	742	173
Union Township (Clermont County)	OH2425	22.02	18,617	4,099

## CSR 8535-E

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
Dinsmore Township	OH1171	16.13	1,277	206
Harrison Township (Champaign County)	OH2348	32.82	326	107
Johnson Township (Champaign County)	OH1053 OH2349	23.13	1,323	306
Monroe Township (Logan County)	OH2366	42.06	611	257
Salem Township	OH2375	32.13	806	259
Van Buren Township	OH1170	26.56	689	183
Washington Township (Darke County)	OH2376 OH2377	41.82	495	207

## CSR 8536-E

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
Village of Cherry Fork	OH2446	18.75	64	12
Colerain Township	OH0733	24.58	22,543	5,541
Fairfield Township	OH0634	28.66	7,387	2,117
Village of Fayetteville	OH1493	18.75	128	24
Village of Greenhills	OH0712	17.48	1,499	262
Village of Milville	OH0834	24.91	269	67
Village of Mount Orab	OH2808	48.52	1,381	670
Pleasant Township (Brown County)	OH2949	15.70	2,249	353
Village of Seaman	OH1068	23.40	47	11
Village of St. Martin	OH1531	15.03	366	55
Village of Winchester	OH1069	21.67	420	91

\*CPR = Percent of competitive DBS penetration rate.