

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

In the Matter of)
)
Time Warner Cable Inc.)
) CSR 8376-E
Petition for Determination of Effective)
Competition in Ten Nebraska Franchise Areas)

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2011

Released: February 11, 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 (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) 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 Attachment A Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). Petitioner also claims to be exempt from cable rate regulation in the Communities listed on Attachment B (the “Attachment B Communities”) because the Petitioner serves fewer than 30 percent of the households in those franchise areas. 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(l) 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 Attachments A and B.

¹ See 47 U.S.C. § 543(l).

² 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

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

⁵ See 47 C.F.R. §§ 76.906, -.907(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.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

5. Turning to the first prong of this test, 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.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 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 the petition 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 Attachment A 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, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Attachment A Communities, except for Cedar Bluffs.¹⁴ Petitioner sought to determine the competing provider penetration in those Communities by

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 3.

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 5-6.

¹² *See* Petition at 6. Petitioner cites program listings available on www.directv.com and www.dishnetwork.com.

¹³ *See* Petition at 6-7.

¹⁴ *See* Petition at 7-8 and attached Declaration of Ann Shrewsbury, Vice President of Communications for Time Warner Cable. Time Warner states it is not clear if Time Warner is the largest MVPD in Cedar Bluffs. However, Time Warner asserts that for this franchise area, both DBS and cable penetration exceed 15% of the occupied households. In

(continued....)

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 A Communities on a five digit zip code basis.¹⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ 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.

8. 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 Communities listed on Attachment A.

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.¹⁷ 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.

10. 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.

(...continued from previous page)

such cases, the Commission has recognized that the second prong of the competing provider test is satisfied. *See, e.g., Charter Communications – Seven Local Franchise Areas in Missouri*, 21 FCC Rcd 1208, 1210 at ¶ 5 (2006).

¹⁵ Petition at 8-9. Time Warner states that it has used the five-digit zip code allocation formula previously used by the Commission in numerous decisions to calculate the DBS providers’ subscribership in various Communities. *See, e.g., Comcast of Dallas, L.P.*, 20 FCC Rcd 17968, 17969-70 (2005) (approving of a cable operator’s use of a Media Business Corporation “allocation factor, which reflects the portion of a five digit postal zip code that lies within the border of the City,” to determine DBS subscribership for that franchise).

¹⁶ Petition at 8-9 and Exhibit E.

¹⁷ 47 U.S.C. § 543(l)(1)(A).

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 A and B **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁸ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8376-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Cedar Bluffs	NE0521	45.91%	247	113.30
Inglewood	NE0074	29.27%	154	45.08
Lincoln	NE0032	15.04%	90,485	13,606.01
Lancaster County (unincorporated)	NE0082	22.94%	6,367	1,460.68

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

CSR 8376-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Dodge County (unincorporated) Dodge County, Lake Ventura (unincorporated)	NE0470 NE0525	2,189	313	14.30%
Platte County (unincorporated)	NE0441	2,472	71	2.87%
Saunders County (unincorporated) Saunders County, Woodcliffe Lakes (unincorporated)	NE0523 NE0524	3,048	272	8.92%
Seward County (unincorporated)	NE0522	1,967	12	0.61%