

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

In the Matter of )
Time Warner Cable Inc. ) CSR 7233-E
Petition for Determination of Effective )
Competition in Cheshire, MA )

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2011

Released: February 15, 2011

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Petitioner" or "Time Warner," has filed with the Commission a petition 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 the community listed on Attachment A and hereinafter referred to as the "Community." Petitioner alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(1)(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 the Community because of the competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"). The petition is opposed by the Town of Cheshire ("Cheshire") and the Massachusetts Department of Telecommunications and Cable ("MDTC"). Time Warner filed replies.

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(1) 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 petition based on our finding that Petitioner is subject to effective competition in the Community listed on Attachment A.

1 See 47 U.S.C. § 543(a)(1).

2 47 C.F.R. § 76.905(b)(2).

3 Cheshire filed a Motion to File its Opposition One Day Late. The Motion is granted.

4 On June 23, 2009, almost two years after the Cheshire petition appeared on public notice on July 5, 2007, MDTC filed a letter requesting that it be denied. Pursuant to 47 C.F.R. § 76.7(b)(1), comments or oppositions to petitions are to be filed within 20 days of public notice. Further, according to 47 C.F.R. § 76.7(d), except as provided in the rules or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted. While MDTC did not present any extraordinary circumstances to allow for the late filing of its letter, we will nonetheless, upon our own motion, include its letter in the record as an informal comment for the benefit of having a complete record before us.

5 47 C.F.R. § 76.906.

6 See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

7 See 47 C.F.R. §§ 76.906 & 907.

## II. COMPETING PROVIDER EFFECTIVE COMPETITION

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>8</sup> This test is otherwise referred to as the “competing provider” test.

### A. The First Prong

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>9</sup> Turning to the first prong of this test, it is undisputed that the Community is “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>10</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>11</sup> We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Community are reasonably aware that they may purchase the service of these MVPD providers.<sup>12</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>13</sup> and is supported in this petition with citations to the channel lineups for both DIRECTV and Dish.<sup>14</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Community because of their national satellite footprint.<sup>15</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

### B. The Second Prong

#### 1. Petitioner’s Evidence

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 Community.<sup>16</sup> Petitioner sought to determine the competing provider penetration in the Community by purchasing a subscriber tracking report from the

<sup>8</sup> 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>9</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup> *See* Petition at 3.

<sup>11</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>12</sup> 47 C.F.R. § 76.905(e)(2).

<sup>13</sup> *See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6.

<sup>14</sup> *See* Petition at 6 (listings available at [www.directv.com](http://www.directv.com) and [www.dishnetwork.com](http://www.dishnetwork.com)).

<sup>15</sup> *Id.* at 6-7.

<sup>16</sup> *Id.* at 7.

Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Community on a five-digit zip code basis.<sup>17</sup> Only one zip code is involved in this case, 01225.

## 2. Cheshire’s Objections

6. Cheshire makes two arguments in opposition to Time Warner’s petition. First, Cheshire asserts that its service copy of the Petition did not have attached Exhibits A through D and therefore it was deprived of the ability to effectively comment on the petition.<sup>18</sup> Second, Cheshire argues that Time Warner’s calculation regarding DBS penetration in the Community overestimates the actual number of DBS subscribers in the franchise area.<sup>19</sup> In support, Cheshire submits the affidavit of the Town Administrator stating that, based on his familiarity with the homes in the franchise area, the number of DBS subscribers in the town is less than 15 percent.<sup>20</sup>

7. In reply, Time Warner argues that Cheshire’s ability to comment on the petition was not prejudiced by the exclusion of the exhibits.<sup>21</sup> Time Warner argues that any missing exhibits were the result of inadvertent error, and were harmless to the degree that Time Warner provided a complete copy of the Petition on July 26, 2007, upon receipt of the opposition.<sup>22</sup> Moreover, Time Warner argues that a complete copy of the petition was available in the Commission’s public files since the petition was placed on public notice on July 5, 2007.<sup>23</sup> Time Warner also agreed to an extension of time to allow Cheshire to review this material and provide a supplement to its opposition.<sup>24</sup>

8. Time Warner further argues that its DBS subscribership calculation is an accurate representation of the percentage of DBS penetration in the franchise area.<sup>25</sup> Time Warner asserts that the affidavit submitted by Cheshire is insufficient to rebut its showing that DBS penetration in Cheshire exceeds 15 percent.<sup>26</sup> Time Warner argues that the Commission consistently has rejected anecdotal visual observation of DBS dishes as a more reliable method of measuring DBS subscribership than the use of commercially available DBS subscribership reports compiled by SBCA from data obtained directly from DBS providers.<sup>27</sup>

9. We find that Cheshire’s arguments have no merit. In light of Time Warner’s correction of its oversight regarding the exhibits to its petition and in light of the fact that Cheshire had additional

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<sup>17</sup> *Id.*

<sup>18</sup> Cheshire Opposition at 1-2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> See Affidavit of Mark Webber, Town Administrator for the Town of Cheshire (July 25, 2007) at 2, attached to the Cheshire Opposition.

<sup>21</sup> Time Warner Reply at 2.

<sup>22</sup> *Id.* Time Warner also states that had Cheshire requested any of the missing exhibits, it would have promptly provided additional copies of the exhibits as it did when it re-sent, both by electronic copy and overnight mail, a complete copy of the Petition upon receipt of Cheshire’s Opposition. *Id.*

<sup>23</sup> Time Warner Reply at 2.

<sup>24</sup> *Id.* at 3. Commission records do not reflect that such a supplement was filed by Cheshire.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 3-4, citing *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11495 (2007); *Cablevision of Paterson d/b/a Cablevision of Allamuchy, N.J.*, 17 FCC Rcd 17239, 17243 (2002).

time to comment on the complete petition, we find this error to be harmless. As noted by prior Commission decisions, the mere subjective impressions and visual inspection of households is not more reliable than the standard DBS subscribership reports submitted by Time Warner.<sup>28</sup> We find that Cheshire has failed to show that Time Warner's DBS subscribership calculation overestimates the number of DBS subscribers in the franchise area.<sup>29</sup>

### 3. MDTC's Objections

10. MDTC also asserts that there are flaws in the DBS subscriber data submitted by Time Warner in order to demonstrate that more than 15 percent of the households in the Cheshire franchise area subscribe to a video provider other than Time Warner. Specifically, MDTC argues that reliance on the five-digit zip code standard to calculate the penetration rate for DBS providers in this rural franchise area produces inaccurate and artificially high results.<sup>30</sup> MDTC contends that the Bureau's reliance on DBS penetration rates as an indication of effective competition in the franchise areas with severely limited traditional cable service produces inflated penetration numbers that distort actual market conditions.<sup>31</sup>

11. In this regard, MDTC argues that the five-digit zip code may encompass parts of surrounding communities, which are not contained within the Cheshire franchise area.<sup>32</sup> Pointing to Exhibit D in Time Warner's petition, MDTC notes that there is a difference of 215 households, or roughly 14 percent of the total five-digit zip code households, when comparing the figure for 2000 Census households to the Media Business Corp. ("MBC") five-digit zip code household number.<sup>33</sup> According to MDTC, it is reasonable to conclude that some of these households are not located within the Cheshire franchise area and that including them would result in a miscalculation of the DBS penetration percentage in the franchise area.<sup>34</sup>

12. MDTC asserts, for instance, that Time Warner allocated a percentage of total franchise households from census data – a 0.86 allocation percentage – under the premise that DBS penetration remains constant throughout the five-digit zip code area.<sup>35</sup> MDTC however asserts that DBS penetration

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<sup>28</sup> See *supra* n. 27.

<sup>29</sup> Through the affidavit of Town Administrator Mark Webber, Cheshire expresses concern that certain towns that about Cheshire that are not served by a cable operator and have a significantly larger number of DBS subscribers may have been included in Time Warner's calculations. See Affidavit of Mark Webber, Town Administrator for the Town of Cheshire at 1, ¶ 4. Time Warner responds that it has used the five-digit zip code allocation formula previously approved by the Commission in these cases and its numbers are accurate. Time Warner Reply at 4, citing *Charter Communications Properties, LLC*, 17 FCC Rcd 4617 (2002); *Charter Communications*, 17 FCC Rcd 15491 (2002). Because Cheshire has failed to provide any data that supports its contention, we cannot find that there is a credible basis for rejecting the data and DBS subscriber allocations presented by Time Warner based on Cheshire's arguments.

<sup>30</sup> MDTC Letter at 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 3, citing *see, e.g., In the Matter of Comcast Cable Communications, LLC, on behalf of subsidiaries and affiliates (107 Franchise Areas in New Jersey)*, 24 FCC Rcd 1780, 1787 n.52 (2009) (noting that a "single zip code may include all or parts of two or more franchise areas because . . . zip code boundaries do not always coincide precisely with municipal boundaries or with popular names associated with them.").

<sup>33</sup> MDTC Letter at 2, 3 and Petition, Exhibit D. Column B (Total five-digit zip code households from MBC) 1,582 – Column A (Total franchise households from the 2000 Census) 1,367 = 215.

<sup>34</sup> MDTC Letter at 3.

<sup>35</sup> *Id.* See also Petition, Exhibit D. Column A (Total franchise households from the 2000 Census) 1,367 ÷ Column B (Total five-digit zip code households from MBC) 1,582 = 0.86 (Column C).

rates are not constant throughout the zip code area and that several towns bordering Cheshire have no cable provider.<sup>36</sup> In this case, contends MDTC, DBS penetration rates will be higher in these towns because they lack a cable system. According to MDTC, if portions of these towns are located within the outlying areas of the five-digit zip code, then they will have higher DBS penetration than the Cheshire zip code overall, thus leading to an inaccurately high DBS penetration rate in the Cheshire franchise area.<sup>37</sup>

13. MDTC concludes that Time Warner has presented “highly questionable” levels of DBS subscribership and the Bureau should deny its petition without prejudice to allow Time Warner to re-file using what it terms as “slightly” more accurate nine-digit zip code data (zip code plus four) or another kind of evidence that will sustain Time Warner’s burden of proof.<sup>38</sup>

14. In response, Time Warner argues that although the Commission accepts zip code plus four data in these cases, it has also reaffirmed its policy that there is no preference for zip code plus four over five-digit only zip code data, and it will routinely accept both as equally reliable for effective competition purposes.<sup>39</sup> Moreover, Time Warner asserts that the Commission has rejected local franchising authority challenges to petitions using five digit zip code data that claim that zip code plus four data is more accurate and should be used.<sup>40</sup>

15. Time Warner also argues that MDTC has presented no compelling reason to reject five-digit zip code data in this case just because parts of the single five-digit zip code used in the Petition

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<sup>36</sup> MDTC Letter at 3. MDTC states that of the six towns that border Cheshire, there are three – Windsor, New Ashford, and Savoy – that have no cable service provider. As a general matter, MDTC points out that many communities in western Massachusetts, such as Cheshire, are characterized by low population density and mountainous topography, making wide-spread cable coverage, especially outside of town centers, highly cost-prohibitive. *Id.* at 3-4.

<sup>37</sup> MDTC Letter at 3. MDTC notes that the Bureau has previously recognized these kinds of situations. *See, e.g., In the Matter of Time Warner Cable Inc. (8 Communities in New Jersey)*, 23 FCC Rcd 12210, 12212 at ¶ 8 (2008) (noting that “excessive subscribership totals” using five-digit zip code data may result from “the combined application of very small populations . . . and five-digit zip codes that cover large areas and many households outside the franchise area.”)

<sup>38</sup> MDTC Letter at 1, 5. When referencing “highly questionable” levels of DBS subscribership, MDTC refers to the Public Notice, “Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service,” 24 FCC Rcd 8198 (2009) (“*Public Notice*”). In this Public Notice, the Commission determined that it would not require the use of nine-digit data in any showing of effective competition and would entertain filings using five-digit, nine-digit, or other kinds of evidence. However, the Commission did state that it would “dismiss evidence that shows obviously inaccurate or highly questionable levels of subscription regardless of the format of such evidence.” In further support of its arguments, MDTC cites *In the Matter of Time Warner Cable Inc. and Time Warner Entertainment-Advance Newhouse Partnership (25 Petitions in Various Communities in the State of New York and the Commonwealth of Pennsylvania)*, 23 FCC Rcd 12069 (2008), *reconsideration denied*, 23 FCC Rcd 16483 (2008). We note, however, that Time Warner’s petitions were denied as to many franchise areas in that case because its data in those areas proved to be obviously “inaccurate and unreliable,” and in that instance the Bureau allowed for Time Warner to re-file using nine-digit zip code data. Specifically, the combined subscribership of both DBS providers and Time Warner in that case exceeded 100% in many franchise areas, thus making the submitted data patently inaccurate and unreliable. In the instant case, the combined subscribership of DBS and Time Warner’s cable service in the franchise area is 97.29% (15.36% + 81.93%) -- [209.98 DBS subscribers ÷ 1,367 2000 Census households = 15.36%] and [1,120 Time Warner subscribers ÷ 1,367 2000 Census households = 81.93%]. Even if the figures were rounded up, the total combined subscribership in this case would be 98%.

<sup>39</sup> Time Warner Letter at 2, citing *see, e.g., Time Warner Cable Inc. (Twenty-Three North Carolina Communities)*, 24 FCC Rcd 1397, 1399 at ¶ 7 (2009).

<sup>40</sup> Time Warner Letter at 2, citing *Time Warner/Advance Newhouse Partnership*, 20 FCC Rcd 5225, 5228 at ¶ 11 (2005).

encompass areas outside of the Cheshire franchise area.<sup>41</sup> It is almost always the case, Time Warner asserts, that a five-digit zip code only partially overlaps a franchise area.<sup>42</sup> Time Warner points out that the Commission-approved allocation methodology for five-digit zip code data was created to address such concerns by allocating only a percentage of the total number, based on relative Census and zip code household figures, to the franchise area at issue.<sup>43</sup> Time Warner states that in this situation, the correlation between the single five-digit zip code used (01225) and the franchise area is 86 percent, which it claims is higher than in many cases and, as such, any distortion has to be considered minimal or non-existent.<sup>44</sup>

16. Finally, Time Warner contends that because MDTC provides only general observations and no specific, objective evidentiary support, its argument that DBS service is more prevalent outside the franchise area in rural and less dense areas sharing the 01225 zip code must be rejected.<sup>45</sup> Time Warner asserts that the Commission does not discredit five-digit DBS penetration data in the absence of specific, documented evidence to support such assertions.<sup>46</sup> Specifically, Time Warner argues that the Commission previously has rejected requests to discount five-digit zip code data because adjacent rural areas shared the same zip code.<sup>47</sup>

17. We find that MDTC has failed to rebut Time Warner's evidentiary showing regarding DBS penetration figures. MDTC has not submitted specific, objective evidence to support its claim that the current five-digit zip code data provided by Time Warner is, as it asserts, "highly questionable." As stated, although the Commission accepts zip code plus four data, it has not expressed a preference for one form over another and accepts five-digit zip code data as reliable for effective competition purposes.<sup>48</sup> Therefore, the established methodology used by Time Warner to demonstrate effective competition in Cheshire under the second prong of the test is acceptable, and its evidence derived from that methodology is the best objective evidence in the record. Accordingly, we decline MDTC's request to deny this petition without prejudice to re-file using nine-digit zip code (zip code plus four) or another kind of data.

#### 4. Conclusion

18. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>49</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 Community. Therefore, the second prong of the competing provider test is satisfied for the Community.

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<sup>41</sup> Time Warner Letter at 2.

<sup>42</sup> *Id.*

<sup>43</sup> Time Warner Letter at 2, citing *CoxCom*, 22 FCC Rcd 4533, 4540 at ¶ 16 (2007); *Time Warner-Advance/Newhouse Partnership*, 20 FCC Rcd 5225, 5228 at ¶ 11 (2005).

<sup>44</sup> Time Warner Letter at 2. Time Warner states in its letter that the relevant zip code is 01125. Review of Time Warner's Petition and Exhibits A and C reveal that the actual zip code is 01225.

<sup>45</sup> Time Warner Letter at 2.

<sup>46</sup> *Id.*, citing *Charter Communications, LLC*, 19 FCC Rcd 7003, 7006 at ¶ 6 (2004); *Texas Cable Partners*, 19 FCC Rcd 6213, 6215 at ¶ 8 (2003); *Time Warner Entertainment Co., L.P.*, 18 FCC Rcd 13043, 13047 at ¶ 10 (2003).

<sup>47</sup> Time Warner Letter at 2, citing *Time Warner Entertainment Company LP (Germantown, Ohio)*, 22 FCC Rcd 805, 806 at ¶ 4 (2007).

<sup>48</sup> *Public Notice*, *supra* note 38.

<sup>49</sup> Petition at 7-8.

19. 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 Community listed on Attachment A.

### III. ORDERING CLAUSES

20. 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**.

21. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the Community set forth on Attachment A **IS REVOKED**.

22. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>50</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>50</sup>47 C.F.R. § 0.283.



## ATTACHMENT A

## CSR 7233-E

## COMMUNITY SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUID</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated DBS Subscribers</b>
Cheshire	MA0002	15.36%	1,367	209.98

\*CPR = Percent of competitive DBS penetration rate.