

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

In the Matter of)	
)	
Time Warner Cable Inc.)	CSR 7798-E
)	
Petition for Determination of Effective)	
Competition in Communities in Ohio)	

MEMORANDUM OPINION AND ORDER

Adopted: February 24, 2011

Released: February 28, 2011

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

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc. (“Time Warner” or the “Company”), 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 Time Warner is subject to effective competition in those communities listed on Attachment A (the “Attachment A Communities”). Time Warner 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”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation there because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). Time Warner also claims to be exempt from cable rate regulation in the Communities listed on Attachment B (the “Attachment B Communities”), pursuant to Section 623(l)(1)(A) of the Communications Act³ and Section 76.905(b)(1) of the Commission’s rules,⁴ because the Time Warner serves fewer than 30 percent of the households there.⁵ An “Answer” to the petition was filed by the franchise authority in one Attachment A Community, Bethel Township,⁶ to which Time Warner filed a Reply.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁷ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁸ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ See 47 U.S.C. § 543(l)(1)(A).

⁴ 47 C.F.R. § 76.905(b)(1).

⁵ Time Warner’s Petition concerned 51 Communities, each with a Community Unit Identification Number (“CUID”). By letters dated November 17, 2008, and January 12, 2009, the Company requested that the Commission remove 13 of them. No party opposed that request, and we grant it.

⁶ Answer of Bethel Township, Miami County, Ohio (“Answer”).

⁷ 47 C.F.R. § 76.906.

⁸ See 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

within the relevant franchise area.⁹ For the reasons set forth below, we find that Time Warner is subject to effective competition in all the Communities listed on Attachments A and B, with two exceptions discussed in paragraphs 8 through 10 below. Except for those Communities, the Petition is granted.

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.¹⁰ This test is referred to as the “competing provider” test.

4. The first part 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.¹¹ 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 Time Warner 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.¹² The Commission has held that a party may use evidence of subscribership rates in the franchise area (the second part 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.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 programming¹⁴ and is supported in this petition with citations to the channel lineups for both DIRECTV and DISH.¹⁵ Also undisputed is Time Warner’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 part of the competing provider test is satisfied.

5. The second part 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. Time Warner asserts that it is the largest MVPD in all but five of the Attachment A Communities.¹⁷ In the five Attachment A Communities, Time Warner asserts that its own household share exceeds 15

⁹ See 47 C.F.R. §§ 76.906, -.907(b).

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

¹¹ 47 C.F.R. § 76.905(b)(2)(i).

¹² See Petition at 3-4.

¹³ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁴ See 47 C.F.R. § 76.905(g). See also Petition at 5.

¹⁵ See Petition at 4, 6.

¹⁶ See *id.* at 6.

¹⁷ Petition at 7. The five Communities are Clearcreek (also spelled Clear Creek in the Petition, OH1079), Pleasant (OH1100), Silver Creek (also spelled Silvercreek in the Petition, OH0958), Spring Valley (OH0956) and Wayne (OH1130).

percent and the household share of the two DBS providers combined also exceeds 15 percent.¹⁸ The Commission has recognized that in those conditions, whichever MVPD is the largest, the remaining competitors have subscribership of over 15 percent.¹⁹

6. Time Warner sought to determine the competing provider subscribership in the Attachment A 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 each of those Communities on a five-digit basis.²⁰ Based upon the aggregate DBS subscribership levels that were calculated using Census 2000 household data,²¹ as reflected in Attachment A, we find that Time Warner 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 all but two of the Attachment A Communities.

7. Three Communities merit specific mention. In Dayton City (OH0453), Time Warner claims to be subject to competing provider effective competition based on evidence of 10,112.13 DBS subscribers and 67,409 households. Using those numbers, the Company claims DBS subscribership of exactly 15 percent.²² We choose to round off numbers of DBS subscribers in Dayton to the nearest whole number because there cannot be 13/100 of a subscriber.²³ Thus, our calculations show DBS subscribership in Dayton to be 15.00096 percent ($10112 \div 67409$). This “exceeds fifteen percent,” however slightly, and thus satisfies the numerical requirement of the second part of the competing provider test, Section 623(l)(1)(B)(ii) of the Communications Act.²⁴

8. Second, in Harrison Township (OH0507), Time Warner claims to be subject to competing provider effective competition based on evidence of 1,437.73 DBS subscribers and 10,929 households.²⁵ Rounding off the DBS subscribers to the nearest whole number, DBS subscribership in Harrison Township is $1,438 \div 10,929$, or 13.16 percent. This level of subscribership, stated in the Petition, is below the statutory minimum for competing provider effective competition. In addition, the Petition states that Time Warner’s own subscribership (6,368 subscribers out of 10,929 households²⁶) is far too high to qualify for “low penetration” effective competition (30 percent subscribership by a cable operator).²⁷ Accordingly, we deny the Petition as to Harrison Township.

9. Finally, Bethel Township in Miami County (OH0754, OH1280) appears concerned that any deregulation of Time Warner’s rates for basic cable service will deprive the Township of franchise fees.²⁸ As Time Warner notes in its Reply, that deregulation will not alter the Company’s obligation to

¹⁸ See Petition at 7-8.

¹⁹ If Time Warner is the largest MVPD, then MVPDs other than the largest one are the DBS providers, which have a combined share of over 15%. On the other hand, if one of the DBS providers is the largest MVPD, then Time Warner (which alone has over 15%) and the other DBS provider combined have over 15%. See, e.g., *Time Warner-Advance/Newhouse Partnership*, 17 FCC Rcd 23587, 23589, ¶ 6 (2002).

²⁰ Petition at Exh. D.

²¹ *Id.* at Exh. C.

²² *Id.* at Exh. E.

²³ *Time Warner Cable Inc.*, 23 FCC Rcd 12069, 12073, ¶ 15, *reconsideration denied*, 23 FCC Rcd 16483 (2008).

²⁴ 47 U.S.C. § 543(l)(1)(B)(ii); 47 C.F.R. § 76.905(b)(ii).

²⁵ Petition at Exh. E.

²⁶ Petition at Exhs. A, E.

²⁷ 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(a).

²⁸ Answer at 3-5.

pay franchise fees.²⁹ Second, Bethel Township notes that the Petition states that Time Warner has 6,661 subscribers in Bethel and that this number is incorrect.³⁰ In its Reply, Time Warner states the correct number, 1,007.³¹ Time Warner's correction reveals a remarkable overstatement by the Company in its Petition. Based on that and on the Company's request for deregulation in Harrison Township, where it is clearly not entitled to it, we encourage Time Warner to be more careful in preparing future filings.

10. Furthermore, Time Warner's revelation that it has only 1,007 subscribers in Bethel (11.11 percent of that Community's 9,063 households) is fatal to its case under the second prong of the competing provider test. With Time Warner's own household share under 15 percent, it is conceivable that the DBS provider with the smaller number of subscribers has so few of them that its and the Company's subscribers (the subscribership of the MVPDs other than the largest one) do not amount to more than 15 percent of the households in the franchise area. 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 Bethel.³² Accordingly, Time Warner has not shown that the second part of the competing provider test is satisfied in Bethel.

11. In sum, the second part of the competing provider test is satisfied for each of the Attachment A Communities except for Harrison and Bethel Townships. Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Time Warner is subject to effective competition in all the Attachment A Communities except Harrison and Bethel Townships.

B. The Low Penetration Test

12. Section 623(l)(1)(A) of the Communications Act, the above-mentioned “low penetration” test, provides that a cable operator is subject to effective competition if the operator serves fewer than 30 percent of the households in the franchise area. Time Warner alleges that it is subject to effective competition under the low subscribership effective competition test because it serves less than 30 percent of the households in the Attachment B Communities.

13. Based upon the subscriber subscribership level calculated by Time Warner, as reflected in Attachment B, we find that Time Warner 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 subscribership test is satisfied as to the Attachment B Communities.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner **IS GRANTED** except for Harrison and Bethel Townships.

15. **IT IS FURTHER ORDERED** that, with the exception of Harrison and Bethel Townships, 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**.

²⁹ Reply at 1.

³⁰ Answer at 3; Petition at Exh. A.

³¹ Reply at 2.

³² *Time Warner Cable Inc.*, Memorandum Opinion & Order DA 11-130 at ¶ 7 (rel. Jan. 25, 2011), available at 2011 WL 235287; *Time Warner Cable Inc.*, 22 FCC Rcd 6805, 6807, ¶ 9 (2008).

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³³

FEDERAL COMMUNICATIONS COMMISSION

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

³³ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7798-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Bethel Township	OH0754, OH1280	22.97%	9063	2081
Cedarville Village	OH0953	32.12%	681	219
Clearcreek Township	OH1079	36.97%	7225	2671
Dayton City	OH0453	15.00096%	67409	10112
Donnelsville Village	OH0755	25.45%	98	25
Englewood City	OH0481	17.03%	5062	862
Enon Village	OH0690	17.01%	1118	190
Franklin Township	OH1113	19.17%	10724	2056
Green Township	OH1114	20.93%	1067	223
Harmony Township	OH1099	18.88%	1305	246
Harrison Township	OH0507	13.16%	10929	1438
Huber Heights City	OH0372	20.76%	14392	2987
Jamestown Village	OH0954	35.29%	743	262
Mad River Township	OH0691	15.94%	4545	725
Miami Township (Montgomery County)	OH0604	15.55%	19026	2958
Miamisburg City	OH0500	16.49%	7449	1228
Moraine City	OH0509	18.72%	2855	534
New Carlisle City	OH0689	25.45%	2207	562
New Jasper Township	OH0959	25.52%	895	228
Pleasant Township	OH1100	36.77%	1135	417
Riverside City	OH0961	18.37%	9768	1794
Silver Creek Township	OH0958	35.29%	1355	478
South Solon Village	OH1707	42.01%	141	59
Spring Valley Township	OH0956	25.95%	1008	262
Trotwood City	OH0484	16.66%	11110	1851
Union City	OH0482	17.19%	2080	358
Wayne Township	OH1130	39.08%	2670	1043
West Carrollton City	OH0499	16.49%	6134	1012

*CPR = Percent of competitive DBS subscribership rate. Subscribership rates may be slightly inaccurate due to use of fractional DBS subscriber numbers not stated above.

ATTACHMENT B

CSR 7798-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Subscribership Percentage
Bath Township	OH0493	16020	2198	13.72%
Beavercreek Township	OH2085	15570	1015	6.52%
Cedarville Township	OH0957	1091	36	3.30%
Clay Township	OH2281	3447	427	12.39%
Madison Township	OH2279	1070	18	1.68%
Miami Township (Greene County)	OH1057	2090	8	.38%