

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

In the Matter of)
)
Time Warner Entertainment-Advance/Newhouse)
Partnership) CSR 7199-E
)
Petition for Determination of Effective)
Competition in Wilson, North Carolina (CUID)
NC0110))

MEMORANDUM OPINION AND ORDER

Adopted: March 11, 2011

Released: March 16, 2011

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

I. INTRODUCTION AND BACKGROUND

1. Time Warner Entertainment-Advance/Newhouse Partnership ("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 Wilson, North Carolina ("Wilson"). Time Warner alleges that its cable system serving Wilson 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 the Communities because of competing providers of video service. The competing providers are two direct broadcast satellite ("DBS") providers (DirecTV, Inc., and DISH Network) and the local government of Wilson (the "City"), which provides cable service and also operates as a local exchange carrier in Wilson. The petition is opposed by the City.

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

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 Other than the petition, the record herein consists of: the City's Opposition to Petition for Special Relief for Determination of Effective Competition ("Opposition"); Time Warner's Reply ("Time Warner's First Reply"); the City's Supplement to Opposition (the "City's Supplement"), accompanied by Motion for Leave to File Supplement to Opposition ("Motion 1"); Time Warner's Response to Supplement to Opposition ("Time Warner's Response"); the City's Reply to TWEAN Response ("City's Reply"); Time Warner's Supplement; the City's Response to TWEAN Supplement (the "City's Response"); the City's Supplement to Wilson Response ("City's Second Supplement"), accompanied by Motion for Leave to File Supplement to Wilson Response ("Motion 2"); and Time Warner's Reply to Wilson's Response to Supplement ("Time Warner's Second Reply").

We grant Motions 1 and 2 and we allow the other pleadings in excess of the normal three (47 C.F.R. § 76.7(a-d)) because the parties use these additional pleadings not for repetition or minor matters, but to add much new and useful information and to make substantive arguments in this factually complex case.

4 47 C.F.R. § 76.906.

5 See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

within the relevant franchise area.⁶ For the reasons set forth below, we grant the petition based on our finding that Time Warner is subject to effective competition in Wilson.

II. 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.”⁷ This test is referred to as the “competing provider” test.

A. The First Part of 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.⁸ It is undisputed that both DBS providers and the City 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, a presumption that the City does not dispute. DBS service is presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁹ The Commission has held that a party may show reasonable awareness by pointing to the ubiquity of DBS service and referencing evidence of subscription rates in the franchise area.¹⁰

5. The City objects that Time Warner has not shown, by local evidence, that consumers in Wilson are reasonably aware of DBS service.¹¹ Specifically, it complains that Time Warner has provided no evidence of DBS advertising in local media that serve Wilson.¹²

6. We reject the City’s objection. In the early years of effective competition litigation, cable operators often filed copies of advertisements for DBS service in local newspapers and other publications (and direct mail) to show reasonable awareness in particular communities. The Commission found competing provider effective competition to exist in dozens of North Carolina communities based on such evidence.¹³ At no time, however, did the Commission require local evidence to show reasonable

⁶ See 47 C.F.R. §§ 76.906 & 907.

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

⁸ 47 C.F.R. § 76.905(b)(2)(i).

⁹ 47 C.F.R. § 76.905(e)(2); Petition at 4-5.

¹⁰ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006); see also *Marcus Cable Assocs*, 25 FCC Rcd 4369, 4373, ¶ 11 (2010) (“*Marcus*”) (Commission decision finding reasonable awareness of DBS based solely on national and regional evidence, without any local advertising or local subscription to DBS).

¹¹ Opposition at 3-4.

¹² *Id.* at 3. In support of this objection, the City (in footnote 8 of the Opposition, at page 3) confuses two decisions and mistakenly quotes as Commission policy what is merely the contention of a franchise authority. See *Paragon Commun.*, 13 FCC Rcd 8675, 8679-80, ¶ 9 (1998); *Charter Commun. Entertainment II, L.P.*, 13 FCC Rcd 8506, 8510, ¶ 7 (1998).

¹³ See, e.g., *Time Warner Cable Inc.*, 24 FCC Rcd 1397, 1398, ¶ 5 (2009); *Time Warner Entertainment-Advance/Newhouse Partnership*, 23 FCC Rcd 17337, 17338, ¶ 5 (2008); *Charter Commun. Entertainment II, LLC*, 22 FCC Rcd 4529, 4530, ¶ 4 (2007).

awareness.¹⁴

7. Moreover, in recent years, no evidence of advertising in any media has been required. The Commission recognized that DBS service, many years after its introduction, is well known nationwide and is advertised continually in media that reach every part of the country, even if not in every local newspaper. DBS has grown in popularity every year. As long ago as 2005, DirecTV and DISH became the second and third largest MVPDs in the country, with tens of millions of subscribers.¹⁵ Their share of the nation's households in 2009 was almost twice the level needed to establish competing provider effective competition.¹⁶ In these conditions, it would be unnecessary and wasteful to require evidence drawn from local newspapers in every franchise area or other media to show that households there are reasonably aware of DBS service.¹⁷

8. The City has given us no reason to ignore the nationwide awareness of DBS service. The City has produced no evidence, and does not allege, that households in Wilson are not reasonably aware of DBS service. We see no reason to believe that residents of Wilson are less informed about DBS than other Americans. In earlier litigation between Time Warner and the City about competing provider effective competition in Wilson, we concluded that households in Wilson were reasonably aware of DBS service,¹⁸ and nothing in the record indicates a reduced awareness specific to Wilson.

9. The City implies that, by not requiring individual proof of reasonable awareness in

¹⁴ *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5661, ¶ 32 (1993) (“households in a franchise area must be reasonably aware that the service is available in their area . . . [S]uch awareness may be accomplished through *any* sort of local, *regional or national media*, provided that such media reach the community in question”) (footnotes omitted; italics added), *on reconsideration*, 9 FCC Rcd 4316 (1994) (“*Rate Regulation Reconsideration*”), *reversed in part on other grounds*, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

¹⁵ *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506, ¶ 6 (2006); Thirteenth Annual Report, 24 FCC Rcd 542, 545, ¶ 5 (2009); *Dish Network turnaround costly*, AP Data Stream 15:45:02 (May 10, 2010) (“Dish Network Corp. added 237,000 net subscribers in the first quarter [of 2010], the fourth consecutive period with customer gains”); *Merger Charge Brings DirecTV to 4Q Loss*, SATELLITE WEEK (Feb. 22, 2010), available at 2010 WLNR 3824448 (DirecTV gained 119,000 subscribers in the fourth quarter of 2009). The City doubts the continued growth of the DBS providers. *See, e.g., Opposition at 4 n.11*. Publicly available data show that although DISH had a slight net loss of subscribers in 2007, it has had net gains in every other year, and that DirecTV and DISH combined have had net gains every year. *See generally* the Reports cited above and their predecessors (cited in footnote 1 of both Reports), especially Tables B-1 and C-1.

¹⁶ Publicly available data state that in 2009 there were 113.5 million households in the United States, and DirecTV and DISH had 18.5 and 14.1 million subscribers, respectively. $32.6 \div 113.5 = 28.7\%$. Answers.com, *How many households are in the US?* (visited July 26, 2010); DirecTV 10-K Form at 3 (Feb. 26, 2010), <http://investor.directv.com/secfiling.cfm?filingID=1047469-10-1456> (visited July 26, 2010); DISH 10-K at 3 (March 1, 2010), <http://dish.client.shareholder.com/secfiling.cfm?filingID=950123-10-18671> (visited July 26, 2010).

¹⁷ *See, e.g., Bright House Networks, LLC*, 22 FCC 4390, 4392, ¶ 6 (2007):

“Over more than ten years, we have made hundreds of findings that households in particular franchise areas are reasonably aware that they may purchase DBS services based on localized evidence. These accumulated showings amount to substantial evidence that households in all franchise areas are reasonably aware that they may purchase DBS services.”

See also Comcast Cable Commun., LLC, 25 FCC Rcd 2282, 2283, ¶ 5 (2010); *Comcast Cable Commun., LLC*, 24 FCC Rcd 4849, 4850, ¶ 5 (2010).

¹⁸ *Time Warner Entertainment-Advance/Newhouse Partnership*, 22 FCC Rcd 4417, 4220, ¶ 10 (2007) (“*Wilson P*”).

Wilson by local evidence, we have effectively abolished the first part of the competing provider test.¹⁹ We have not. We have in effect created a presumption based on hundreds of proceedings and years of experience, which the City is free to rebut. We also rely on our finding of 16.10 percent DBS subscribership in Wilson, which we reach below.²⁰ It is reasonable to believe that many more Wilson residents were aware of DBS but chose not to subscribe. This is a common sense application of the reasonable awareness requirement, not the abolition of it. Finally, it is not impermissible to make two findings (awareness and competition) based on one piece of evidence (16.10 percent subscribership) if the evidence supports both findings. Accordingly, we find, consistent with our longstanding presumptions and case law and the evidence described elsewhere in this decision, that households in Wilson are reasonably aware that DBS service is available there.²¹

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 programming²² and is supported in the petition with citations to the channel lineups for both DBS providers.²³ Also undisputed is Time Warner’s assertion that both DBS providers offer service to at least “50 percent” of the households in Wilson because of their national satellite footprint.²⁴ Accordingly, we conclude that the first part of the competing provider test is satisfied in Wilson.

B. The Second Part of the Competing Provider Test

11. 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 Wilson.²⁵ The City does not dispute this assertion, and we accept it. Thus, the second part of the competing provider test requires Time Warner to calculate a mathematical ratio, the numerator of which is the number of subscribers to the DBS providers and the City’s cable service and the denominator of which is the number of households in Wilson. Only if the ratio is in excess of 15 percent is the second part of the competing provider test passed.

1. Number of Competing Provider Households in Wilson

a. Number of DBS Subscribers

12. The parties have submitted several different estimates of the number of DBS subscribers in Wilson.²⁶ First, Time Warner used the list of nine-digit or “zip+4” zip codes that the City proffered in previous litigation.²⁷ Time Warner then purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers

¹⁹ Opposition at 3 n.7; City’s Supplement at 5 n.10.

²⁰ See *infra* § II.B.3.

²¹ See *Comcast Cable Commun., LLC*, 23 FCC Rcd 10939, 10941, ¶ 6 (2008).

²² See 47 C.F.R. § 76.905(g); see also Petition at 6.

²³ See Petition at 6.

²⁴ See *id.* at 2-3.

²⁵ *Id.* at 7.

²⁶ All the parties’ numbers of DBS subscribers relied on herein reflect an annexation that the City made “before July 2, 2005.” See City’s Supplement at 8-9.

²⁷ Petition at 8; Opposition at 4 n.12. The decision in the previous litigation found DBS penetration to be only 13.51%. *Wilson I*, 22 FCC Rcd at 4222.

attributable to the DBS providers in each of those nine-digit zip codes.²⁸ This number is 2,650.²⁹ Later, Time Warner wanted to reflect the growth in Wilson since the previous litigation. This growth had led to the creation of new nine-digit zip codes, and Time Warner supplemented its earlier DBS subscriber count by the number of DBS subscribers in the new nine-digit zip codes. Time Warner's supplemental count (also from SBCA) calculated that there were 2,850 DBS subscribers in Wilson.³⁰

13. The City objected that the new nine-digit zip codes were carved out of old nine-digit zip codes and therefore some of the DBS subscribers in the new ones had already been counted in SBCA's first report. The City also objected that many of the new nine-digit zip codes (and associated DBS subscribers) claimed by Time Warner represent post office boxes, were non-existent, or were otherwise invalid.³¹

14. In response, Time Warner submitted an entirely new set of zip codes and DBS subscriber numbers. The new zip codes were *five*-digit zip codes, parts of which are inside Wilson and parts of which are outside it. Time Warner also produced a formula to allocate the DBS subscribers in the zip codes between those who lived in Wilson and those who lived outside it. This new filing put the number of DBS subscribers at 3,696,³² approximately one third higher than the Company's previous estimate.

15. The City then presented a new list of nine-digit zip codes, taken from the billing database of residences served by its municipal electric utility.³³ This utility, it appears, serves customers only in Wilson and "directly outside" Wilson,³⁴ and the latter were removed from the list.³⁵ The City claims that this excludes nine-digit zip codes that are post office boxes or general delivery or otherwise are unlikely to contain households in Wilson.³⁶ This list of nine-digit zip codes yields an estimate of 2,799 DBS subscribers.³⁷

16. Time Warner alleges that the City's proposed list is mistaken because it excludes ten nine-digit zip codes that are within Wilson and that contain 202 DBS subscribers.³⁸ This evidence

²⁸ A nine-digit zip code analysis allocates DBS subscribers to a franchise area using nine-digit zip code information. In general, this reflects franchise area boundaries in a more accurate fashion than standard five-digit zip code information.

²⁹ Petition at 8.

³⁰ Time Warner's Response at 9. Time Warner's new count also included some growth in DBS subscription in stable areas of Wilson since the Company ordered its first report from SBCA. *Id.* at 8.

³¹ City's Reply at 1-5; City's Response at 4.

³² Time Warner's Supplement at Exh. B.

³³ City's Supplement at 2; *see also* City's Response at 1-2.

³⁴ City's Response at 1 n.3; *see also* Time Warner's First Reply at 7.

³⁵ City's Second Supplement at 1-2.

³⁶ *Id.* at 1-2 & Exh. B (Declaration of Action Audits Associate Rosanne Licciardi, July 3, 2008) at ¶ 2.

³⁷ *Id.* at 2. This list of areas served by the City's electric utility is used to measure the scope of the franchise area, not to count the number of households in it, *see infra* note 58.

³⁸ Time Warner's Second Reply at 4-6 & n. 13; *id.* at Exhs. B-C. These 202 DBS subscribers include 23 in 9 nine-digit zip codes and a much larger number in a certain nine-digit zip code, 248930000. In most cases, zip codes that end in 0000 are for post office boxes, which do not count as households. 248930000, however, is used by DBS providers as a last resort for subscribers who know that they are in the 24893 five-digit zip code but do not know what nine-digit zip code they are in. There are 218 such subscribers in 248930000. To this number, Time Warner applied its 82% allocation figure for zip code 24893, which reduces the number of subscribers to 178.76. 23 + 179 = 202.

submitted by Time Warner is detailed, supported by SBCA, and uncontradicted by the City.

17. To measure DBS subscribers in Wilson, we will not use the number Time Warner calculated based on five-digit zip codes and an allocation formula. One reason is that that number is strikingly higher than the other numbers produced by the parties' other calculations. More important, however, the number recently proposed by the City is more reliable. It is based on the most recent data of any number proposed by any party herein. Also, the City's recent number (2,799) is based on relatively precise nine-digit zip codes and is therefore likely to be more accurate than a number based on five-digit zip codes (especially when the latter number is anomalous).³⁹ We will also add to that number the 202 additional DBS subscribers identified in the preceding paragraph. Accordingly, we find that the number of DBS subscribers in Wilson is 3,001.

b. The City's Own Cable Service

18. In mid-2008, the City itself began providing cable service in Wilson, as well as local exchange telecommunications service.⁴⁰ The service is called Greenlight. The last pleading filed herein contains a Wilson newspaper story quoting Wilson's City Manager stating that the City's system had passed 400 to 500 homes in Wilson and had achieved 31 percent subscribership.⁴¹ Using the lower estimate of the number of homes passed by Greenlight, 31 percent of 400 amounts to 124 subscribers. Time Warner does not claim that this evidence establishes the elements of "municipal provider"⁴² or "local exchange carrier"⁴³ effective competition.⁴⁴ The Company does propose, however, to count the subscribers to the City's cable service in the numerator of the statutory ratio. This is reasonable because the City's cable service is clearly an MVPD service provided by an MVPD other than the largest one in Wilson. Accordingly, we add 124 subscribers to the numerator of the statutory ratio.⁴⁵

c. Conclusion

19. The 124 subscribers to the City's cable service, added to the 3,001 DBS service subscribers determined above, make the numerator of the statutory ratio – the number of households in Wilson subscribing to programming services offered by MVPDs other than the largest MVPD – 3,125.

³⁹ We have stated that we will accept DBS numbers based on either five- or nine-digit zip code data. *See, e.g., Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14151, ¶ 34, *stay denied*, 23 FCC Rcd 17012 (2008), *application for review pending* ("Subsidiaries of Cablevision"); Time Warner's Supplement at 5 n.7. In this case, where the parties have submitted both kinds of data, we prefer the more precise (and, in this case, more recent) nine-digit data. *See Wilson I*, 22 FCC Rcd at 4421, ¶ 11 ("in the absence of error, ZIP+4 data will rebut an estimate premised on five digit ZIP code data").

⁴⁰ Time Warner's First Reply at 8; Time Warner's Second Reply at 6-8.

⁴¹ Rochelle Moore, *Greenlight finds initial popularity*, WILSON DAILY TIMES (July 19, 2008), available at 2008 WLNR 13521482, cited in Time Warner's Second Reply at 7 n.18. The City has not denied or supplemented its City Manager's statement. Time Warner attempted diligently to obtain subscriber numbers for Greenlight from the City, but the City was not forthcoming. Second Reply, Exhs. E-G (correspondence between the parties' counsel).

⁴² *See* 47 U.S.C. § 623(l)(1)(C).

⁴³ *See* 47 U.S.C. § 623(l)(1)(D).

⁴⁴ *See* City's Supplement at 9 n.25.

⁴⁵ It appears that the City's service, called Greenlight, is still in operation. Its precise geographic scope is not entirely clear, however. *See* Greenlight, *Frequently Asked Questions*, <http://www.greenlightnc.com/index.php/about/FAQ> (visited July 27, 2010) ("The network is complete now, so it's open to everyone in the city limits" and "They *will* be available to every address in town") (italics added).

2. Number of Households in Wilson

20. The parties have submitted several estimates of the statutory denominator, the number of households in Wilson. Section 623(l)(1)(B)(ii) requires that we measure “households,”⁴⁶ a term defined by the U.S. Census as an occupied housing unit.⁴⁷ A housing unit, in turn, is a house, an apartment, a mobile home, a group of rooms, or a single room occupied (or if vacant, is intended for occupancy) as separate living quarters. Separate living quarters are those in which the occupants live and eat separately from any other persons in the building and which have direct access from the outside of the building or through a common hall.⁴⁸ Thus, households do not include unoccupied housing units, college or university dormitories,⁴⁹ seasonal or vacation homes,⁵⁰ or nursing homes and similar assisted living facilities.⁵¹

21. Our usual measurement of the number of households in a franchise area is the count of households in the most recent decennial Census.⁵² We will accept more recent estimates of households in a community, but we require that they be as reliable as the Census and that they be estimates of households as defined by the Census.⁵³ In past decisions, especially in the early years of effective competition litigation and when the 1990 Census was almost a decade old, we accepted several kinds of estimates based on data that was available and that we judged to be sufficiently reliable.

22. The 2000 Census states that the number of households in Wilson is 17,296.⁵⁴ The City objects that this number is several years old and that Wilson has grown significantly since 2000.⁵⁵ The City proposes several ways of estimating the number of households in Wilson. Two are based on population estimates from the North Carolina State Data Center⁵⁶ and the numbers of residential accounts with active electric meters served by the City’s municipal utility.⁵⁷ We reject these proposals because they may well include places, such as unoccupied and seasonal homes, that are not households as defined

⁴⁶ See *supra* note 7 & accompanying text.

⁴⁷ U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/meta/long_HSD310200.htm (visited July 22, 2010) (“A household includes all the persons who occupy a housing unit”).

⁴⁸ See *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11491, ¶ 11 & n. 43 (2007), citing *Rate Regulation Reconsideration*, 9 FCC Rcd at 4324, ¶ 17.

⁴⁹ *Marcus*, 25 FCC Rcd at 4372, ¶ 9; *CoxCom, Inc.*, 22 FCC Rcd 4533, 4538, ¶ 13 (2007).

⁵⁰ 47 C.F.R. § 76.905(4) (“households’ shall not include those dwellings that are used solely for seasonal, occasional, or recreational use”).

⁵¹ *CoxCom, Inc.*, 22 FCC Rcd at 4538, ¶ 13.

⁵² See, e.g., *Time Warner Cable Inc.*, Memorandum Opinion & Order DA 10-878 at ¶ 21 & authorities cited therein (rel. May 17, 2010) (“*Time Warner P*”); *Adelphia Cable Commun.*, 20 FCC Rcd 4979, 4982, ¶ 9 (2005); *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968, ¶ 6 (2004).

⁵³ See, e.g., *Time Warner I*, *supra* note 52, at ¶ 21; *Subsidiaries of Cablevision*, 23 FCC Rcd at 14149-51, ¶¶ 27-33 (rejecting estimates based on the number of buildings, projections made with unstated criteria, and numbers of “residential units” and “current households” without any definition of terms or explanation of how the data was gathered); *Adelphia Cable Commun.*, 20 FCC Rcd at 4982, ¶ 10.

⁵⁴ Petition at 8 & Att. 4. The company’s last filing states that the number of households in Wilson is 17,206 (Time Warner’s Second Reply at Exh. A), but we will use the 17,296 number stated by the Census and reproduced in Attachment 4 to the Petition.

⁵⁵ Opposition at 5.

⁵⁶ *Id.* at Exh. A.

⁵⁷ Opposition at 5-6; City’s Response at 6-7.

by the Census.⁵⁸

23. In the alternative, the City proposes to use recent estimates of housing units in Wilson (estimates made by itself or the Census), reduced by a recent estimate by the North Carolina state government of housing vacancies there.⁵⁹ We decline this proposal because it does not use the one actual number in the record – the number of households in Wilson, which is the 2000 Census number of 17,296.

24. To account for growth in Wilson since 2000, we will begin with the 2000 Census count of 17,296 households and will increase that by an estimate of growth. A filing by the City shows that the Census estimates that housing units (occupied and unoccupied) in Wilson grew from 18,660 in 2000⁶⁰ to 20,941 in 2006.⁶¹ That shows growth of 2,281, or 12.22 percent from 2000 to 2006.⁶² The record herein shows no reason to believe that housing units in Wilson have grown substantially faster or slower than the number of households there. Our starting with the number of households in the most recent decennial Census and applying a growth factor to it is similar to what the Commission has done in past decisions.⁶³ In this case, we use data all of which comes from the U.S. Census. We do so because Census data is easily accessible, is likely to be collected and calculated in an internally consistent manner (unlike numbers from multiple sources), and is from a source of known reliability. We note that these numbers are more favorable to the City, or insignificantly less favorable, than several other numbers proposed by the City.⁶⁴ Applying the 12.22 percent growth factor to the 2000 Census number of 17,296 households yields an estimate that in 2006 there were 19,410 households in Wilson.⁶⁵

25. In past decisions, the Commission has used growth rates and other estimates that we decline to use here.⁶⁶ Those decisions do not govern us here, however. The Commission's past decisions

⁵⁸ See, e.g., *Marcus*, 25 FCC Rcd at 4372, ¶ 9; *Mediacom Southeast LLC*, 23 FCC Rcd 8379, 8381, ¶ 9 (2008) (rejecting household number based on number of residents subscribing to water service); *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd at 11493-94, ¶ 17 (refusing to change housing count because of recently granted Certificates of Occupancy); *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd at 6968, ¶ 6 (same for Certificates of Occupancy and tax records).

The City's electric utility counts "residential accounts," which it defines as "a dwelling in which a person sleeps overnight." Opposition at 6 & Exh. C. Obviously, these can include seasonal homes, dormitories, and other places that are not "households" within the terms of Section 543(l)(1)(B)(ii).

⁵⁹ Opposition at 6 & Exh. A; City's Response to Supplement Exh. C; City's Response to Supplement Exh. C.

⁶⁰ City's Response at 8 n.27.

⁶¹ U.S. Census Bureau, American FactFinder, Fact Sheet, Wilson, North Carolina, 2006-08, http://factfinder.census.gov/servlet/ACSSAFFacts?_event=&geo_id=16000US3774540&_geoContext=01000US%7C04000US37%7C16000US3774540&_street=&_county=wilson&_cityTown=wilson&_state=04000US37&_zip=&_lang=en&_sse=on&ActiveGeoDiv=geoSelect&_useEV=&pctxt=fph&pgsl=160&_submenuId=factsheet_1&ds_name=DEC_2000_SAF&_ci_nbr=null&qr_name=null®=null%3Anull&_keyword=&_industry= (visited July 21, 2010), cited in City's Response at 8 n.27. These numbers, which date from 2006 or later, apparently reflect household growth resulting from the annexation mentioned in footnote 26 above.

⁶² $20,941 - 18,660 = 2,281$. $2,281 \div 18,660 = 12.224$.

⁶³ See, e.g., *Bright House Networks, LLC*, 22 FCC Rcd 4057, 4059, ¶ 6, 4062, ¶ 10 (2007); *Texas Cable Partners, L.P.*, 16 FCC Rcd 4886, 4888, ¶¶ 5-6 (2001); *Texas Cable Partners, L.P.*, 16 FCC Rcd 4718, 4721, ¶ 8 (2001).

⁶⁴ Among the City's proposals were a growth rates of 7.7% (Opposition at 5, 8); and reducing a housing unit estimate of 20,642 housing units (Opposition at Exh. B) by a vacancy rate of 7.3% (Opposition at 6). The latter yields a household estimate of 19,135 ($20,642 \times .927 = 19,135$).

⁶⁵ $17,296 \times 1.1222 = 19,409.571$.

⁶⁶ See, e.g., *Bright House Networks, LLC*, 22 FCC Rcd at 4059, ¶ 6 (using locally generated household numbers and a vacancy rate).

do not adopt a single formula for estimating post-Census events. One important number we use here – the Census estimates of housing units in 2006-08 – was not available in previous cases or was not introduced into evidence there. Also, the parties’ briefs in previous cases were not as extensive as in this proceeding. In this proceeding, as in past ones, we have examined the totality of the evidence submitted and reached the best conclusions that can be drawn from the record.⁶⁷

3. Conclusion

26. The foregoing paragraphs produce the following numbers. The numerator of the statutory ratio is 3,001 DBS subscribers and 124 Greenlight subscribers, for a total of 3,125 subscribers to MVPDs in Wilson other than the largest MVPD. The denominator of the statutory ratio is 19,410 households in Wilson. The ratio is 16.10 percent,⁶⁸ which satisfies the statutory standard of in excess of 15 percent. Accordingly, we conclude that the second part of the competing provider test is satisfied in Wilson.

27. 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 Wilson, North Carolina.

4. Effective Date

28. The City cites Section 1.103 of our Rules to the effect that our ruling will be effective upon public notice of its release.⁶⁹ That same Section states, however, that that rule is “[u]nless otherwise specified by Commission rule” and that “the Commission may, on its own motion . . . , designate an effective date this is either later or earlier in time than the date of public notice of such action.”⁷⁰ Consistent with our longstanding practice, the order herein is effective as of the date the petition herein was filed.⁷¹

⁶⁷ *Falcon Telecable*, 10 FCC Rcd 1654, 1655, ¶ 7 (1995).

⁶⁸ $3,125 \div 19,410 = .1609994$.

⁶⁹ Opposition at 10 n.36, citing 47 C.F.R. § 1.103(a) (“the effective date of any Commission action shall be the date of public notice of such action”).

⁷⁰ 47 C.F.R. § 1.103(a); Time Warner’s First Reply at 9.

⁷¹ *Charter Commun. Entertainment I, LLC*, 22 FCC Rcd 13890, 13890, ¶ 1, n.5 (2007); *Comcast Cable of Dallas, L.P.*, 20 FCC Rcd 19282, ¶ 3 (2005); *Mediacom Minnesota, LLC*, Order, 20 FCC Rcd 15687, 15688, ¶ 4 (2005).

III. ORDERING CLAUSES

29. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Entertainment-Advance/Newhouse Partnership **IS GRANTED**.

30. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

31. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁷²

FEDERAL COMMUNICATIONS COMMISSION

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

⁷² 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7199-E

**COMMUNITIES SERVED BY
TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP**

Community	CUID	CPR*	Households	Competing Provider Subscribers
Wilson, North Carolina	NC0110	16.10%	19,410	3,125

*CPR = Percent of competitive DBS penetration.