

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

In the Matter of)	
)	MB Docket No. 12-335, CSR 8741-E
Time Warner Cable Inc.)	MB Docket No. 12-367, CSR 8755-E
)	MB Docket No. 12-368, CSR 8756-E
Petitions for Determination of Effective)	MB Docket No. 13-28, CSR 8765-E
Competition in Communities in New York)	

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2013

Released: July 11, 2013

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 a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as 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)(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 in those Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). Petitioner additionally claims to be exempt from cable rate regulation in the communities listed on Attachment B and hereinafter referred to as 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 Petitioner serves fewer than 30 percent of the households in the franchise area. 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,⁵ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁶ 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.⁷ 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 Attachments A and B.

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 *Id.* § 76.906.

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

⁷ 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 multichannel 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.⁸ 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.⁹ 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.¹⁰ 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.¹¹ We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in those Communities are reasonably aware that they may purchase the service of these MVPD providers.¹² 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,¹³ and is supported in these petitions with citations to the channel lineups for both DIRECTV and DISH.¹⁴ 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.¹⁵ 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, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Attachment A Communities.¹⁶ Petitioner sought to determine the competing provider penetration there 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 Attachment A Communities on a zip code plus four basis.¹⁷

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

⁹ 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ See Petitions at 3.

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

¹² 47 C.F.R. § 76.905(e)(2); see Petitions at 4-5.

¹³ See 47 C.F.R. § 76.905(g). See also Petitions at 5.

¹⁴ See Petitions at 5-6.

¹⁵ See *id.* at 6.

¹⁶ Petition in CSR 8741-E at 7; Petition in CSR 8755-E & 8756-E at 6; Petition in CSR 8765-E at 6.

¹⁷ See Petitions at 7 and Exh. C.

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,¹⁸ 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. 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 Attachment A Communities.

B. The Low Penetration Test

7. 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.¹⁹ 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.²⁰

8. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment B, we find that Petitioner has demonstrated that 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.

III. ORDERING CLAUSES

9. 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** for the Attachment A and B Communities.

10. **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**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁸ *Id.* at 7 and Exhs. B, C.

¹⁹ 47 U.S.C. § 543(l)(1)(A).

²⁰ See Petition in CSR 8755-E & 8756-E at 8. See also Petition in CSR 8765-E at 8; Letter from Craig A. Gilley, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (Mar. 6, 2013) (deleting the Town of Marcy (NY0077) from consideration under the low penetration test).

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

MB Docket No. 12-335, CSR 8741-E

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Town of Barker	NY1592	31.05	1,021	317
Town of Binghamton	NY0132	16.26	1,894	308
Village of Marathon	NY0829	15.68	389	61
Town of Nanticoke	NY0983	24.79	601	149
Town of Newark Valley	NY1650	22.51	1,537	346

MB Docket No. 12-367, CSR 8755-E

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Town of Laurens	NY0207	40.57	1,050	426
Town of Milford	NY0056	31.01	1,290	400
Town of Norwich	NY0554	25.10	1,546	388

MB Docket No. 12-368, CSR 8756-E

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Town of Caroline	NY0088	26.16	1,403	367
Town of Danby	NY0310	23.82	1,373	327
Town of Dryden	NY0090	19.98	6,016	1,202

MB Docket No. 13-28, CSR 8765-E

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Town of Deerfield	NY0075	19.40	1,644	319
Town of Inlet	NY1692	18.74	886	166
Village of Poland	NY0965	15.10	192	29
Town of Schuyler	NY0082	20.01	1,469	294
Town of Webb	NY1693	29.23	3,294	963
Town of Westmoreland	NY0614	15.35	2,372	364

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

MB Docket No. 12-367, CSR 8755-E

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Town of Columbus	NY1711	364	1	0.27
Town of Decatur	NY1885	152	1	0.66
Town of Hamden	NY1987	569	1	0.18
Town of Jefferson	NY1548	584	78	13.36
Town of Summit	NY1517	493	81	16.43

MB Docket No. 12-368, CSR 8756-E

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Town of Groton	NY0578	2,322	343	14.77