

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

In the Matter of)	
)	
Time Warner Entertainment-Advance/Newhouse Partnership)	CSR 8051-E
)	
Petition for Determination of Effective Competition in Communities in North Carolina)	

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 2013

Released: November 27, 2013

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 the Company is subject to effective competition in the 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 regulation of the rates for its basic service in those Communities. The alleged competition is from the two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc., and DISH Network. 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 Company serves fewer than 30 percent of the households there.

2. Virtually identical oppositions to the Petition were filed by 17 local governments in the Attachment A Communities (“the Franchise Authorities”).⁵ No opposition was filed concerning any Attachment B Community. Time Warner filed a single “Reply” to all the oppositions. Recently, the Company filed a letter (“May 19 Letter”) that included new calculations of the DBS providers’ and the Company’s market shares in the Attachment A and B Communities, respectively, using 2010 Census data.⁶ The Company sent a copy of the May 19 Letter to each of the Franchise Authorities.⁷ None

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 The oppositions were filed by Alamance County; the Cities of Asheboro, Burlington, Eden, Graham and Greensboro; Guilford County; the Town of Haw River, the City of High Point; the Towns of Liberty, Mayodan, and Pleasant Garden; the Town of Ramseur; Randolph County; the Cities of Randleman and Reidsville; Rockingham County; and the Town of Stokesdale. Each opposition is titled with the name of the filing government entity, followed by “Opposition to Petition for Special Relief for Determination of Effective Competition.”

⁶ Letter from Craig A. Gilley, Esq., Edwards Angell Palmer & Dodge LLP, counsel for Time Warner, to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau (dated May 19, 2011).

⁷ E-Mail from Mr. Gilley to John W. Berresford, Esq., Media Bureau, 11:55 A.M., July 13, 2011.

responded to it.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁸ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁹ 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.¹⁰ For the reasons set forth below, we grant the petition based on our finding that Time Warner is subject to effective competition in the Communities listed on Attachments A and B.

II. DISCUSSION

A. The Competing Provider Test

4. 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.¹¹ This test is referred to as the "competing provider" test.

1. The First Part of the Competing Provider Test

5. 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.¹² It is undisputed that the Attachment A Communities are "served by" both DBS providers 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.¹³ The Commission has held that a party may use evidence of penetration 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.¹⁴ 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,¹⁵ and is supported in the petition with citations to the channel lineups for both DBS providers.¹⁶

6. Time Warner asserts that both DBS providers offer service to at least "50 percent" of the

⁸ 47 C.F.R. § 76.906.

⁹ See 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

¹⁰ See 47 C.F.R. §§ 76.906-907(b).

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

¹² 47 C.F.R. § 76.905(b)(2)(i).

¹³ See Petition at 4.

¹⁴ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁵ See 47 C.F.R. § 76.905(g); see also Petition at 6.

¹⁶ See Petition at 5 n.12; *id.* at 6.

households in the Attachment A Communities because of their national satellite footprint.¹⁷ The Franchise Authorities object that Time Warner's evidence for this assertion is based on five-digit Zip Codes, and that the Company should have used more precise nine-digit Zip Codes.¹⁸ This objection misreads Time Warner's petition. The Company relies not on Zip Codes or numbers, but on our longstanding presumption that the DBS providers' nationwide satellite footprint makes their service available to at least 50 percent of the households in every community.¹⁹ The Franchise Authorities have submitted nothing showing that the presumption is not correct. Accordingly, we find that DBS service is offered to at least 50 percent of the households in the Attachment A Communities and that the first part of the competing provider test is satisfied as to each of those Communities.

2. The Second Part of the Competing Provider Test

7. 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 four of the Attachment A Communities.²⁰ In those four, it is unclear whether Time Warner or one of the DBS providers is the largest MVPD. In each of them, however, the DBS providers' combined household share is over 15 percent and is larger than Time Warner's, and Time Warner's household share is also over 15 percent.²¹ This data makes clear that, whichever of the three MVPDs is the largest, the combined share of the other two is also over 15 percent.²²

8. The second part of the competing provider test thus required Time Warner to calculate a ratio for each Attachment A Community the numerator of which was the number of DBS subscribers in the Community and the denominator of which is the number of households there. Time Warner began composing its numerator – the number of DBS subscribers in each Attachment A Community – by obtaining a list from Media Business Corporation of the five-digit Zip Codes that lay totally or partly within each Attachment A Community.²³ Then, Time Warner obtained from the Satellite Broadcasting and Communications Association (“SBCA”) a statement of how many DBS subscribers were in each of those Zip Codes.²⁴ Next, for each Attachment A Community that contained only part of a Zip Code (a

¹⁷ *Id.* at 7.

¹⁸ *See, e.g.,* City of Asheboro Opposition at 4.

¹⁹ Petition at 4, 7; *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5660-62, ¶ 32 (1993) (“Once a ‘competitive’ DBS satellite system is launched, it will be deemed technically available to households in a franchise area . . . if its footprint covers those households, absent extraordinary circumstances”) (footnote omitted), *on reconsideration*, 9 FCC Rcd 4316, 4322, ¶ 10 (“There is no dispute that multichannel video programming is available throughout the United States from satellite stations (except where there are reception obstacles such as zoning restrictions)”) (1994), *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); *United Cable Television Corp.*, 15 FCC Rcd 20382, 20383, ¶ 3 (2000); *Mountain Cable Co.*, 14 FCC Rcd 13994, 14001, ¶ 15 (1999).

²⁰ The four exceptions are the Towns of Biscoe (NC0410), Candor (NC0724), Franklinville (NC0841) and Liberty (NC0540). Petition at 7; *id.* at Exh. A (Declaration of Jack W. Stanley, Regional Vice President of Government and Public Affairs for the Carolina Region of Time Warner) at ¶ 3.

²¹ Petition at 7-8.

²² *See Time Warner Cable Inc.*, 26 FCC Rcd 547, 548-49, ¶ 7 (2011); *Comcast Cable Commc'ns, LLC*, 23 FCC Rcd 10939, 10941, ¶ 9 (2008); *Time Warner-Advance/Newhouse Partnership*, 17 FCC Rcd 23587, 23589, ¶ 6 (2002).

²³ Petition at Exh. B.

²⁴ *Id.* at Exh. D.

“partial Zip Code”), the Company used an allocation formula that we have accepted in past decisions²⁵ to estimate the percent of the DBS subscribers that were in those partial Zip Codes.²⁶ Finally, Time Warner multiplied the number of DBS subscribers in the Zip Codes by the allocation percent for that Attachment A Community, and added the numbers of DBS subscribers in any Zip Codes that lay totally within the Attachment A Community. This produced an estimate of the number of DBS subscribers in each Attachment A Community.²⁷ These estimates, placed over the number of households in the Communities, show DBS subscribership in excess of 15 percent. If accepted and not overcome by superior evidence or argument, they show that the second part of the competing provider effective competition test is satisfied in each Attachment A Community.

9. All the Franchise Authorities make several points. First, they make a vague objection that there are “significant problems” and “errors in Time Warner’s data.”²⁸ They do not specify any such problem or error, however. Such generalities do not overcome the Company’s specific factual evidence.²⁹ The Franchise Authorities’ objection is meritless.

10. Second, the Franchise Authorities predict harmful consequences for “residents on fixed and lower incomes” if Time Warner’s rates for basic service are deregulated.³⁰ As we have repeatedly held, however, any such consequences are immaterial under Section 623(l)(1)(B) of the Communications Act. The only material issue is whether the cable operator satisfies the criteria stated in the statute.³¹

11. Third, the Franchise Authorities object that Time Warner’s DBS subscriber numbers include courtesy, complimentary, and free accounts.³² This objection also lacks merit, because we have consistently allowed such accounts to be counted in DBS subscriber numbers. The existence of free DBS service for some households shows that the cable operator faces intense competition for such

²⁵ *Time Warner Cable Inc.*, 26 FCC Rcd 7666, 7668-69, ¶¶ 8-10 (2011); *Time Warner Cable Inc.*, 26 FCC Rcd 1728, 1733, ¶ 15 (2011); *Charter Commc’ns*, 26 FCC Rcd 1158, 1161, ¶ 9 (2011).

²⁶ Petition at 8; *id.* at Exhs. B, E (col. F).

²⁷ May 19 Letter, second attached page; *see also* Petition at Exh. E.

²⁸ *See, e.g.*, City of Burlington Opposition at 2. In the same vein, the City of Greensboro alleges without any specificity or evidence that SBCA’s statement “overstates DBS subscribers” and “includes many [DBS] subscribers within the City that are actually in another jurisdiction.” City of Greensboro Opposition at 2.

²⁹ *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 3993, 3995-96, ¶ 8 (2011) (“the City must do more than produce vague doubts”); *Time Warner Cable Inc.*, 25 FCC Rcd 5457, 5460-61, ¶ 11 (2010) (“general objections about the [factual evidence] submitted by Petitioner reveal no flaw in the petition”); *Comcast Cable Commc’ns, LLC*, 23 FCC Rcd 8564, 8566, ¶ 9 (2008) (a cable operator’s credible numerical evidence “cannot be overturned by franchising authorities expressing only generalized concerns and doubts. It is reasonable to require franchising authorities to present factual evidence and showings about their own communities.”) (footnote omitted).

³⁰ *See, e.g.*, City of Eden Opposition at 4.

³¹ *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 3850, 3856, ¶ 24 (2011) (footnote omitted):

“if a cable operator shows that the number of households subscribing to programming services offered by MVPDs other than the largest one exceeds 15 percent of the households in its franchise area, then that cable operator is entitled to be free of regulation of its rates for basic cable service. The statute leaves no room for the subjects that the City attempts to raise herein[, which include alleged “disproportionate effects on residents of fixed and lower incomes”];”

Mediacom Southeast LLC, 23 FCC Rcd 8379, 8381, ¶ 7 (2008) (rejecting claims that deregulation will have a “possible adverse impact on . . . senior citizens and other individuals living on fixed incomes”); *MCC Missouri LLC*, 20 FCC Rcd 17909, 17911, ¶ 6 (2005) (same).

³² *See, e.g.*, City of Graham Opposition at 3.

households.³³

12. Fourth, the Franchise Authorities object that we should require Time Warner to use relatively precise “Zip+4” nine-digit Zip Codes, which avoid the need for an allocation percentage.³⁴ We have several times declined to require nine-digit-based data³⁵ and we do so again. No good purpose would be served by prohibiting a cable operator from using one allocation formula and requiring another method in the absence of any indication that would alter the outcome in the proceeding at hand, or that the method used by the cable operator actually produced an erroneous result. Any of the Franchise Authorities could have purchased its own nine-digit report to refute Time Warner’s five-digit-based calculations. Accordingly, consistent with our longstanding practice, we accept the five-digit Zip Code basis of Time Warner’s showing of the number of DBS subscribers in the Attachment A Communities.

13. The City of Greensboro makes the only objection to Time Warner’s denominator, the number of households in an Attachment A Community. The Company’s petition used the 2000 Census number of households in Greensboro, 92,087.³⁶ The City submits a higher number, 100,570, which is “as of 2008, as determined by the City’s Engineering & Inspections and Planning Departments.”³⁷ We reject the City’s submitted number for two reasons. First, the City has not shown how this number was calculated or, most important, whether it is as reliable as an actual count made by the U.S. Census.³⁸ Second, Time Warner’s May 19 Letter contains a household count for Greensboro from the 2010 Census (111,731). We will use the latter number, following our practice of using the count of households from the most recent decennial Census, absent a more recent number that is shown to be at least equally reliable.³⁹

14. Finally, all the Franchise Authorities characterize two of our past effective competition decisions as stating that if there are “discrepancies in factual data” between the evidence submitted by the cable operator and the franchise authorities, the Commission “must construe such discrepancies against the cable operator.”⁴⁰ Assuming *arguendo* the accuracy of these characterizations, they are inapposite here because, with the exception of the preceding paragraph, the Franchise Authorities have not disputed the Company’s factual evidence with credible factual evidence of their own.⁴¹ They have rested instead

³³ *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 4901, 4904, ¶ 8 (2011); *Comcast Cable Commc’ns, LLC*, 25 FCC Rcd 4967, 4972, ¶ 17 (2010); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4394, ¶ 11 (2007).

³⁴ See, e.g., Guilford County Opposition at 3. The City of Greensboro makes a sweeping objection to using Zip Codes at all in measuring DBS subscribership. City of Greensboro Opposition at 3-4. We reject this objection because Zip Code-based numbers have produced reliable estimates in hundreds of proceedings and the City of Greensboro has not shown that Time Warner’s estimates for Greensboro are, in actual fact, inaccurate in any way.

³⁵ *Time Warner Cable Inc.*, 26 FCC Rcd 7666, 7669, ¶ 10 (2011); *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 3850, 3854, ¶ 18 (2011); *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14151, ¶ 34 (2008).

³⁶ Petition at Exh. E, col. A.

³⁷ City of Greensboro Opposition at 3.

³⁸ See, e.g., *Charter Commc’ns Entertainment I LLC*, 26 FCC Rcd 5975, 5980 ¶ 17 (2011); *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 3733, 3735, ¶ 8 (2011); *Comcast Cable Commc’ns, LLC*, 26 FCC Rcd 3726, 3729, ¶ 9 (2011); see also Reply at 6.

³⁹ See authorities cited in note 38 *supra*.

⁴⁰ See, e.g., City of Guilford Opposition at 2, citing *Alert Cable TV of North Carolina, Inc.*, 18 FCC Rcd 12848, 12849-50, ¶¶ 5-6 (2003) (considering rival lists of zip codes submitted by the petitioning cable operator and the franchise authority); *Tri-Lakes Cable*, 12 FCC Rcd 13170, 13179-80, ¶¶ 19-20 (1997) (choosing between numbers submitted by the petitioning cable operator and a rival MVPD).

⁴¹ See *supra* note 29.

on generalities that do not undermine Time Warner's factual showings. Accordingly, their claims have no merit.

15. Based upon the aggregate DBS subscribership estimates that were calculated using Census 2010 household data, as reflected in Attachment A,⁴² 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 the Attachment A Communities.⁴³ Therefore, the second part of the competing provider test is satisfied for each of the Attachment A Communities. 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 the Attachment A Communities.

B. The Low Penetration Test

16. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if it serves fewer than 30 percent of the households in the franchise area. This test is referred to as the "low penetration" test.⁴⁴ Time Warner 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.

17. Based upon the subscriber penetration 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 penetration test is satisfied as to the Attachment B Communities.

⁴² The first seven franchise areas for which DBS subscribership calculations are made in Exhibit E to the Petition (the Towns of Elon, Gibsonville, Jamestown, Madison, Mebane, Oak Ridge, and Whitsett) are not listed on the title page of the Petition and are not included in Time Warner's Certificate of Service. Accordingly, we consider the Company not to be seeking findings of effective competition in them.

⁴³ Attachment A shows DBS subscribership in the City of High Point to be 15.0029%. This "exceeds fifteen percent," however slightly, and thus satisfies the numerical requirement of the second part of the competing provider test, 47 U.S.C. § 543(l)(1)(B)(ii). *Time Warner Cable Inc.*, 26 FCC Rcd 2095, 2097, ¶ 7 (2011).

⁴⁴ 47 U.S.C. § 543(l)(1)(A).

III. ORDERING CLAUSES

18. 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**.

19. **IT IS FURTHER ORDERED** that 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**.

20. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴⁵

FEDERAL COMMUNICATIONS COMMISSION

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

⁴⁵ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8051-E

COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-
ADVANCE/NEWHOUSE PARTNERSHIP

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Unincorporated Alamance County	NC0531	34.19	18,808	6,430
Village of Alamance	NC0532	20.92	365	76
City of Archdale	NC0350	23.12	4,556	1,053
City of Asheboro	NC0206	28.28	9,880	2,794
Town of Biscoe	NC0410	42.68	539	230
City of Burlington	NC0006	26.30	20,632	5,426
Town of Candor	NC0724	51.82	296	153
City of Eden	NC0214	20.69	6,645	1,375
Town of Franklinville	NC0841	46.50	388	180
City of Graham	NC0208	31.37	5,801	1,820
Town of Green Level	NC1061	32.31	779	252
City of Greensboro	NC0011 NC0654	16.10	111,731	17,987
Unincorporated Guilford County	NC0323	20.21	28,344	5,728
Town of Haw River	NC0582	34.39	921	317
City of High Point	NC0052 NC0658	15.0029	40,912	6,138
Town of Liberty	NC0540	48.36	1,091	528
Town of Mayodan	NC0215	23.61	1,173	277
Town of Pleasant Garden	NC1048	20.71	1,690	350
Town of Ramseur	NC0577	38.85	640	249
City of Randelman	NC0420	28.81	1,739	501
Unincorporated Randolph County	NC0352 NC0421	30.26	28,210	8,537
City of Reidsville	NC0153	33.82	6,262	2,118
Unincorporated Rockingham County	NC0758 NC0222	31.63	22,104	6,993
Town of Seagrove	NC0840	34.78	97	34
Town of Stokesdale	NC1055	21.29	1,823	388
City of Stoneville	NC0327	35.00	464	162
City of Trinity	NC0351	20.33	2,630	535

* CPR = Percent of competitive DBS penetration rate. Some CPRs may be not exactly correct because of fractional DBS subscribers used in Time Warner's calculations but not reproduced above.

ATTACHMENT B

CSR 8051-E

COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-
ADVANCE/NEWHOUSE PARTNERSHIP

Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Town of Sedalia	NC1069	249	7	2.81
Town of Star	NC0411	361	96	26.59
Town of Swepsonville	NC1059	469	72	15.35
Town of Wentworth	NC1068	1,043	4	.38