

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

In the Matter of)	
)	
Time Warner Cable Inc.)	MB Docket No. 12-8 CSR 8562-E
)	MB Docket No. 12-16 CSR 8579-E
Petition for Determination of Effective)	
Competition in The Island of Hawaii in the State)	
of Hawaii)	

MEMORANDUM OPINION AND ORDER

Adopted: November 25, 2013

Released: December 3, 2013

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

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc. (“Time Warner” or “the Company”) 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 on the Island of Hawaii (“the Big Island”) in the State of Hawaii. Time Warner alleges that its cable system serving the Big Island 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. The competition on which the Company relies is the direct broadcast satellite (“DBS”) service provided by DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”).

2. The cable franchise authority for the State of Hawaii, the Department of Commerce and Consumer Affairs (“the State”), filed an opposition to the petition.³ Time Warner filed a reply (“Reply”), which contained significant new factual allegations. The State then filed a letter that responded to the Company’s new factual allegations.⁴ Time Warner filed its own responsive letter.⁵ Filings in excess of the usual three are allowed only on a showing of extraordinary circumstances.⁶ We find that extraordinary circumstances exist, justifying both letters. The letters were necessary to explore complex facts that emerged late in this proceeding, and each letter responded to the immediately preceding filing by adding new material facts and observations to the record.⁷

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be

¹ See 47 U.S.C. § 543(l)(1)(B).

² 47 C.F.R. § 76.905(b)(2).

³ Opposition of the State of Hawaii to Petitions for Special Relief (“Opposition”).

⁴ Letter from Bruce A. Olcott, Esq., Squire Sanders (US) LLP, counsel for the State, to Marlene H. Dortch, Commission Secretary (March 23, 2012) (“State Letter”). The Letter included a request that it be included despite exceeding the usual number of pleadings allowed by 47 C.F.R. § 76.7.

⁵ Letter from Craig A. Gilley, Esq., Edwards Wildman Palmer LLP, counsel for Time Warner, to Marlene H. Dortch, Commission Secretary (April 23, 2012) (“Time Warner Letter”).

⁶ 47 C.F.R. § 76.7(d).

⁷ See, e.g., *County of New Hanover, North Carolina*, 24 FCC Rcd 10130, 10132, ¶ 9 (2009).

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 on the Big Island.

II. DISCUSSION

A. Introduction

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.

B. The Franchise Area Issue

5. The petition asserted that the Big Island consists of one franchise area.¹² The State's opposition alleged that it consists of two, East Hawaii (Hilo) and West Hawaii (Kona).¹³ Time Warner's reply admitted that the State is correct, although the parties may be combining the two areas into one presently.¹⁴ Accordingly, we will measure the presence of competing provider effective competition in two franchise areas, East Hawaii and West Hawaii.

C. The First Part of the Competing Provider Test

6. The first part of the competing provider 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.¹⁵ The parties do not dispute, and we agree, that the DBS providers are unaffiliated with each other and with Time Warner, and that the programming of the DBS providers is "comparable" to Time Warner's.¹⁶

7. The parties dispute other matters, however. First, they disagree whether the DBS providers offer service to at least "50 percent" of the households on the Big Island. Time Warner's petition points to the DBS providers' national satellite footprint and to the Commission's presumption that DBS service has universal reach.¹⁷ The State asserts, to the contrary, that DBS service is

⁸ 47 C.F.R. § 76.906.

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

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 See, e.g., Petition at 1 n.2.

¹³ Opposition at 3, 12-14.

¹⁴ Reply at 3.

¹⁵ 47 C.F.R. § 76.905(b)(2)(i).

¹⁶ See, e.g., Petition at 5-6.

¹⁷ See Petition at 3; see also *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992*, 8 FCC Rcd 5631, 5658-61, ¶¶ 31-32 (1993) ("Report & Order"), on reconsideration, 9 FCC Rcd 4316, 4321-22, ¶¶ 8-10 (1994) ("Reconsideration Order"), reversed in part on other grounds, *Time Warner Entertainment*

significantly less available on the Big Island than in the continental United States (“CONUS”). The State claims that the Big Island’s disadvantages are the “relatively low elevation angle between the DBS providers’ satellites and the Island of Hawaii” and the westward shadows of the several volcanoes that form the Big Island and block lines of sight between homes in West Hawaii and DBS satellites near the CONUS. The State claims that these factors impair DBS reception for many residences in West Hawaii.¹⁸ These claims are generalities. They are not detailed factual evidence that rebuts our presumption that DBS service has nationwide reach and therefore is offered to at least 50 percent of the households on the Big Island’s franchise areas.¹⁹

8. In addition, factual evidence belies the State’s characterization of DBS service in West Hawaii. Of the 12 zip codes in West Hawaii, all but two have more than 100 DBS subscribers. Several zip codes in West Hawaii have several hundred DBS subscribers, which is more than most East Hawaii zip codes have.²⁰ Also, although the State is correct that 64 percent of the Big Island’s DBS subscribers live in East Hawaii,²¹ that means that 36 percent of them live in supposedly inaccessible West Hawaii. DBS subscribership in West Hawaii, while lower than that in East Hawaii, is not so much lower as to indicate that DBS does not reach half the households in West Hawaii.²² The numbers just stated are convincing, objective evidence that the factors noted by the State do not prevent DBS service from being offered on a wide scale in West Hawaii. We conclude that the DBS providers offer service to at least 50 percent of the households not only in East Hawaii, but also in West Hawaii.

9. Second, the parties dispute whether the Big Island is “served by” the DBS providers. A franchise area is considered “served by” an MVPD if its 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.²³

10. The State disputes that DBS service is actually available on the Big Island.²⁴ The State claims that households there are not reasonably aware of DBS’s availability.²⁵ In support of this argument, the State makes the same assertions that we found unconvincing in the previous paragraphs. We find the assertions unconvincing, and the contrary evidence convincing, about actual availability. In

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Co., L.P. v. FCC, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996); *Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, 6 FCC Rcd 4545, 4554, ¶ 42 n.52 (1991).

¹⁸ Opposition at 5-6.

¹⁹ *Accord, Cablevision Systems East Hampton Corp.*, 24 FCC Rcd 10846, 10847, ¶ 6 (2009); *Cablevision Systems Westchester Corp.*, 24 FCC Rcd 872, 876, ¶ 15 (2009); *Cablevision of Paterson*, 17 FCC Rcd 17239, 17242, ¶ 6, n.22 (2002).

²⁰ Reply at Exs. D, G.

²¹ See Opposition at 6 n.17; see also Attachment A hereto.

²² Nor is East Hawaii’s 64% figure strikingly or very disproportionately large. East Hawaii contains 61% of the Big Island’s population. Reply at 5.

²³ See *Report & Order*, 8 FCC Rcd at 5654-57, ¶¶ 27-29; *Reconsideration Order*, 9 FCC Rcd at 4321, ¶ 8; Petition at 3-4.

²⁴ The State does not, in so many words, dispute that DBS service is technically available on the Big Island. To the extent that it does claim technical unavailability, we disagree for the reasons stated elsewhere about offering to at least 50% and actual availability.

²⁵ Opposition at 6-10.

addition, the State points to the absence from the Petition of evidence that the DBS providers use direct mail or advertise in mass media that reach The Big Island.²⁶ The State notes the relatively large dishes needed to receive DBS service in Hawaii and the DBS providers marketing their service through “only a handful of stores” and using major retail stores very slightly.²⁷

11. We find these facts insignificant. That DBS dishes, advertising, and marketing on the Big Island are different from those in the CONUS does not mean that DBS service is not actually available on the Big Island.²⁸ Advertising and other techniques used in the CONUS are not the only effective techniques. DIRECTV’s web page states unequivocally it serves Hawaii.²⁹ The State concedes that both DBS providers’ services are marketed in Hawaii. Moreover, the Commission has held that subscribership in a franchise area (the second part of the competing provider test discussed below) may show that consumers there are reasonably aware of its availability,³⁰ and the subscribers reflected in the subscribership numbers are obviously not the only Big Island residents who are aware of DBS service. All of the foregoing facts satisfy the standard, which is reasonable awareness, not universal or unanimous awareness.³¹ Even if DBS service and its subscribers on the Big Island face challenges not present in the CONUS, that does not mean that DBS service is unavailable there or that residents are unaware of it. The strong weight of the evidence points to the conclusion that DBS service is technically and actually available in East and West Hawaii. Accordingly, we find that the first part of the competing provider test is satisfied there.

D. The Second Part of the Competing Provider Test

12. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Time Warner asserts that it is the largest MVPD on the Big Island (and, we presume, in both East and West Hawaii).³² The State does not dispute this assertion. The second part of the competing provider test thus requires Time Warner to calculate ratios, separately for East and West Hawaii, the numerator of which is the number of DBS subscribers in each area and the denominator of which is the number of households there. If a ratio exceeds 15 percent, then the second part of the test is satisfied.

²⁶ *Id.* at 6-7.

²⁷ *Id.* at 7-9, 11-12.

²⁸ See *Report & Order*, 8 FCC Rcd at 5656-57, ¶ 29 (italics added):

“we do not believe that [reasonable] awareness necessarily depends on whether the marketing of the competitive service occurs on a local, as opposed to a national, level. Catalog companies, for example, make their services available to customers nationwide by means of 800 numbers. . . . Thus, potential subscribers may be made reasonably aware of the availability of a competing service, for example, through advertising in regional or local media, direct mail, or any other marketing outlet.”

²⁹ DIRECTV, *Welcome to Answer Center*, http://support.directv.com/app/answers/detail/a_id/1923/~is-directv-available-in-hawaii%3F (visited Feb. 29, 2012); see also Reply at 7 n.21. Even if DISH did not offer service to the Big Island, DIRECTV and Time Warner would satisfy the competing provider test’s requirement of “at least two unaffiliated” MVPDs. 47 U.S.C. § 543(1)(1)(B)(i).

³⁰ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006) (also stating that the nationwide growth of DBS service may show that consumers are reasonably aware of the availability of DBS service).

³¹ *Adelphia Cable Commc’ns*, 20 FCC Rcd 20487, 20488-89, ¶ 5 (2005); *Century-TCI California, L.P.*, 18 FCC Rcd 7049, 7051, ¶ 5 (2003); cf. *Cox Commc’ns Kansas, LLC*, 26 FCC Rcd 2085, 2090, ¶ 22 (2011).

³² See Petition at 7; *id.*, Declaration of Bob Barlow, Regional Vice President of Operations for Time Warner Oceanic, at ¶ 3 (Dec. 6, 2011).

13. Numerator. After Time Warner acknowledged that there were two franchise areas on the Big Island, the Company purchased from the Satellite Broadcasting and Communications Association (“SBCA”) reports stating the number of DBS subscribers in the Big Island’s five-digit zip codes. After considering the subscribers in the one zip code that spans both franchise areas (96743), Time Warner estimated that there are 8,010 DBS subscribers in East Hawaii and 4,304 in West Hawaii.³³

14. The State proposes three adjustments to these numbers. First, it notes that Time Warner has not “passed” (built out its cable system to) every area in East and West Hawaii. The State speculates that DBS subscribership is higher in the areas that Time Warner does not pass. The State proposes that we reduce the number of DBS subscribers in East and West Hawaii by some amount reflecting the supposedly high DBS subscribership in the un-passed areas.³⁴ We reject this proposal. Section 623(l)(1)(B)(ii) of the Communications Act makes “the franchise area”³⁵ the material territory within which to measure effective competition, regardless of where service is actually offered.³⁶ Accordingly, we reject the State’s proposal.³⁷ In this proceeding, the material franchise areas are all of East and West Hawaii.

15. Second, the State claims that Time Warner, when it considered the five-digit zip code that spans both East and West Hawaii, mistakenly counted the DBS subscribers in the zip code twice. Specifically, the State claims, Time Warner included all 816 DBS subscribers in that zip code in both franchise areas.³⁸ Time Warner acknowledged this mistake.³⁹ To correct it, the State proposed an estimated allocation of those subscribers between East and West Hawaii.⁴⁰ In response, Time Warner obtained more accurate and recent numbers, namely an actual count of the number of DBS subscribers in nine-digit zip codes that are within the five-digit zip code in question and within West Hawaii – 813.⁴¹ We find the Company’s more recent and actual number to be more probative than the State’s estimate. Therefore, we will count 3 of zip code 96743’s 816 DBS subscribers as being in East Hawaii and 813 of them as being in West Hawaii.⁴² We will also use, from Time Warner’s Letter, the most recent count of

³³ Reply at 5 (col. E); *see also id.* at Exs. D, G.

³⁴ Opposition at 16-17 (alleging at 17 that there are 5,324 such households on the Big Island).

³⁵ 47 U.S.C. § 543(l)(1)(B)(ii).

³⁶ We may reduce a franchise area when a franchise authority shows that a cable operator has made an affirmative decision, confirmed by its own conduct, to serve less than the whole area specified in its franchise. In those rare cases, we will measure effective competition in the lesser area if the franchise authority so desires. *See, e.g., County of New Hanover, North Carolina*, 23 FCC Rcd 15348, 1350-52, ¶¶ 7-12 (2008); *CoxCom, Inc.*, 22 FCC Rcd 4533, 4536-37, ¶¶ 8-9 (2007); *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992*, 9 FCC Rcd 1164, 1181, ¶ 25 (1993). Here, however, the State has not attempted any such detailed showing. *See* Time Warner Letter at 2-4.

³⁷ Another reason we reject the State’s proposal is that it is incomplete. The State proposes only to subtract un-passed DBS subscribers from the numerator of the competing provider ratio, but has omitted any reduction in the denominator to account for un-passed households. *See* State Letter at 6 n.13.

³⁸ State Letter at 3-4.

³⁹ Time Warner Letter at 2.

⁴⁰ State Letter at 4 (7 DBS subscribers in East Hawaii and 809 in West Hawaii).

⁴¹ *See* Time Warner Letter at 2; *id.* at Exs. 2-3. Time Warner obtained the numbers from Media Business Corporation and SBCA.

⁴² The use of these numbers together is imperfect because the 816 number dates from February 2012 and the 813 number dates from March 2012. *Compare* Reply at Ex. G with Time Warner Letter at Exs. 2-3. The numbers are reasonably contemporaneous, however, and any imperfection is much too small to be significant to the outcome of this proceeding.

DBS subscribers in the five-digit zip codes that are all in West Hawaii – 3,745.⁴³ Accordingly, we adopt the State’s second proposed adjustment to Time Warner’s numbers, but we will implement it with the Company’s recent, actual numbers. Accordingly, starting with the Company’s numbers stated above, we change the number of DBS subscribers to 7,197 (8,010-813) in East Hawaii and 4,558 (3,745 + 813) in West Hawaii.

16. Third, the State notes that SBCA’s numbers of DBS subscribers (the ratios’ numerators) include seasonal homes, but the numbers of households (the denominators, discussed immediately below) do not. To make the ratio one of apples and apples, the State proposes that we reduce SBCA’s numbers by the number of seasonal homes in East and West Hawaii.⁴⁴ Such a reduction is proper if it is adequately documented.⁴⁵ The State proposes a reduction in DBS subscriber numbers in East and West Hawaii by what, according to the 2010 Census, is the percentage of all Hawaii housing units (occupied and unoccupied) that are “[f]or seasonal, recreational, or occasional use.” That percent is 8.67.⁴⁶ Time Warner does not object to this reduction.⁴⁷ We adopt the State’s third proposed adjustment to Time Warner’s numbers and reduce the number of DBS subscribers by 8.67 percent – to 6,573 in East Hawaii and 4,163 in West Hawaii. These numbers are the numerators of the ratios that form the second part of the competing provider test.

17. Denominator. Time Warner states, using numbers from the 2010 Census, that there are 40,839 households in East Hawaii and 26,257 households in West Hawaii.⁴⁸ The State concurs.⁴⁹ Accordingly, we adopt the numbers just stated.

18. Conclusion. We conclude that East and West Hawaii contain the numbers of DBS subscribers and households stated in paragraphs 16 and 17 above. They create ratios (DBS subscribership) of 16.09 percent in East Hawaii and 15.85 percent in West Hawaii.⁵⁰ Time Warner has thus demonstrated that, in each franchise area on the Big Island, the number of households

⁴³ Time Warner Letter at Ex. 1.

⁴⁴ In its initial Opposition, the State made a proposal of similar effect, to increase the number of *households* (the ratio’s *denominator*) in East and West Hawaii by the numbers of seasonal homes there. Opposition at 15-16. The State appears to have abandoned this proposal; our decisions have rejected it. 47 U.S.C. § 543(l)(1)(B)(ii) makes “households” the denominator of the ratio. We follow Congress’s intent and define “households” using the Census definition of that term (U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/meta/long_HSD310200.htm, visited Feb. 28, 2012; *Reconsideration Order*, 9 FCC Rcd at 4324, ¶ 17 (“As used in the Cable Act, we presume that Congress did not intend ‘households’ to have a different meaning than in the 1990 Census that would include vacant units or even partial-year vacant units”). The Census’ definition excludes seasonal homes and, accordingly, our rules specifically provide that “‘households’ shall not include those dwellings that are used solely for seasonal, occasional, or recreational use.” 47 C.F.R. § 76.905(c).

⁴⁵ *Charter Commc’ns*, 25 FCC Rcd 2289, 2294, ¶ 15 (2010); see also *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4394, ¶ 11, 4395, ¶ 13 (2007); *Comcast Cable Commc’ns, LLC*, 22 FCC Rcd 1691, 1697-98, ¶ 16, *partial reconsideration granted on other grounds*, 22 FCC Rcd 5320 (2007).

⁴⁶ State Letter at 3; see also Petition at Ex. C at 1.

⁴⁷ Time Warner Letter at 2.

⁴⁸ Reply at 4-5.

⁴⁹ E-mail from Mr. Olcott to John W. Berresford, Media Bureau Staff Attorney (3:35 PM, April 25, 2012).

⁵⁰ The State notes that the Commission’s estimated DBS subscribership in the State of Hawaii as a whole was only 4.65%. Opposition at 5. This number, however, is in a 2009 Report that uses 2006 data. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 663, ¶ 257 (2009). It is entirely conceivable that the DBS providers have raised their subscribership significantly in the last six years, as indicated by the numbers in the text above.

subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households there. Based on the foregoing, we conclude that the Company has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and it is subject to effective competition in those areas, as shown on Attachment A.

III. ORDERING CLAUSES

19. 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**.

20. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of the State of Hawaii for the Big Island **IS REVOKED**.

21. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵¹

FEDERAL COMMUNICATIONS COMMISSION

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

⁵¹ 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 12-8, CSR 8562-E
 MB Docket No. 12-16, CSR 8579-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
MB Docket No. 12-8, CSR 8562-E				
Island of Hawaii (East)	HI0022, HI0040, HI0079, HI0096, HI0101, HI0102, HI0103, HI0104, HI0105, HI0106, HI0109, HI0110, HI0111	16.09	40,839	6,573
MB Docket No. 12-16, CSR 8579-E				
Island of Hawaii (West)	HI0020, HI0023, HI0024, HI0025, HI0026, HI0027, HI0028, HI0029, HI0030, HI0031, HI0032, HI0056, HI0075, HI0078, HI0083, HI0093	15.85	26,257	4,163

*CPR = Percent of competitive DBS penetration rate.