

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

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	MB Docket No. 12-137, CSR 8635-E
	)	MB Docket No. 12-140, CSR 8638-E
Petitions for Determination of Effective	)	
Competition in Communities in Kentucky	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 21, 2013**

**Released: March 21, 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”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> 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 Act<sup>3</sup> and Section 76.905(b)(1) of the Commission’s rules,<sup>4</sup> because the Petitioner serves fewer than 30 percent of the households in the franchise area. An opposition was filed by the Telecommunications Board of Northern Kentucky (“TBNK”), requesting that we reject the petition in CSR 8635-E with respect to the City of Kenton Vale, Kentucky.<sup>5</sup>

2. After filing the petitions, Petitioner requested that it be permitted to withdraw the community of Bellevue, Kentucky from consideration in this proceeding.<sup>6</sup> We grant Petitioner’s request.

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

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> See 47 U.S.C. § 543(l)(1)(A).

<sup>4</sup> 47 C.F.R. § 76.905(b)(1).

<sup>5</sup> Telecommunications Board of Northern Kentucky Opposition to Time Warner Cable’s Petition for Special Relief (“TBNK Opposition”). TBNK does not dispute Petitioner’s claim that effective competition exists in the City of Lakeside Park, Kentucky. *Id.* at 1, 3.

<sup>6</sup> Letter from Craig A. Gilley, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (June 27, 2012).

subject to effective competition,<sup>7</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>8</sup> 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.<sup>9</sup> For the reasons set forth below, we find that Petitioner is subject to effective competition in the Communities listed on Attachments A and B, with the exception of one of the Attachment A Communities, the City of Kenton Vale, Kentucky, and one of the Attachment B Communities, the City of Fairview, Kentucky. Except for those two communities, the petitions are granted.

## 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 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.<sup>10</sup> This test is referred to as the "competing provider" test.

5. 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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,<sup>15</sup> and is supported in these petitions with citations to the channel lineups for both DIRECTV and DISH.<sup>16</sup> Also undisputed is Petitioner's assertion that both DIRECTV and DISH offer service to at least "50 percent" of the

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<sup>7</sup> 47 C.F.R. § 76.906.

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

<sup>9</sup> See 47 C.F.R. §§ 76.906-907(b).

<sup>10</sup> 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

<sup>11</sup> 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

<sup>12</sup> See Petitions at 3-5.

<sup>13</sup> *Mediacom Illinois LLC*, 21 FCC Red 1175, 1176, ¶ 3 (2006).

<sup>14</sup> 47 C.F.R. § 76.905(e)(2); see Petitions at 4-5.

<sup>15</sup> See 47 C.F.R. § 76.905(g). See also Petitions at 5-6.

<sup>16</sup> See Petitions at 5-6 & n. 17.

households in the Attachment A Communities because of their national satellite footprint.<sup>17</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

6. 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.<sup>18</sup> Petitioner sought to determine the competing provider penetration there by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Attachment A Communities on a zip code plus four basis.<sup>19</sup>

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,<sup>20</sup> 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 all but one of the Attachment A Communities.

8. In the City of Kenton Vale, Petitioner claims to be subject to competing provider effective competition based on evidence of nine DBS subscribers and 45 households.<sup>21</sup> Using those numbers, Petitioner claims DBS subscribership of 20 percent.<sup>22</sup> Although the SBCA tracking report provided by Petitioner indicates that there are nine DBS subscribers in the City of Kenton Vale,<sup>23</sup> TBNK submitted a more recent SBCA tracking report providing data current through May 31, 2012, which reflects six DBS subscribers in this community.<sup>24</sup> We have held that we will accept more recent numbers presented by a franchise authority, if the authority shows them to be at least as accurate as the cable operator’s numbers.<sup>25</sup> Using the more recent data submitted by TBNK, our calculations show DBS subscribership in the City of Kenton Vale to be 13.33 percent. This level of subscribership is below the 15 percent statutory minimum for competing provider effective competition. Accordingly, we deny the petitions as to the City of Kenton Vale, Kentucky.

9. In sum, the second prong of the competing provider test is satisfied for each of the Attachment A Communities except for the City of Kenton Vale. 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 with the exception of the City of Kenton Vale.

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<sup>17</sup> See *id.* at 6.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> See *id.* at 7-8.

<sup>20</sup> Petitions at 8 & Exhs. B, C; Letter from Craig A. Gilley, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, at 1 and Attachment (Nov. 14, 2012) (supplementing the Petition in CSR 8635-E to provide an SBCA subscriber tracking report for the City of Falmouth, Kentucky).

<sup>21</sup> See Petition in CSR 8635-E at 8.

<sup>22</sup> *Id.*

<sup>23</sup> See *id.* at Exh. C. The SBCA tracking report for Kenton Vale, Kentucky provided by Petitioner provides data current through March 31, 2012. *Id.*

<sup>24</sup> See TBNK Opposition at 4 & Exh. A.

<sup>25</sup> See, e.g., *Time Warner Entertainment-Advance/Newhouse Partnership*, 26 FCC Rcd 3840, 3844, ¶ 12 (2011). Given that TBNK submitted an effective competition tracking report prepared by SBCA—the same evidence provided by Petitioner to demonstrate DBS subscribership, we find that the more recent data submitted by TBNK is as accurate as that submitted by Petitioner.

**B. The Low Penetration Test**

10. 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.<sup>26</sup> 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.<sup>27</sup>

11. With respect to the City of Fairview, Petitioner provided conflicting data for the number of occupied households. Specifically, the petition in CSR 8635-E indicates that there are 114 occupied households in the City of Fairview,<sup>28</sup> but the chart listing 2010 Census data cited to support this figure and appended at Exhibit B to the petition indicates that there are 60 occupied housing units in this community.<sup>29</sup> Based on evidence of 31 subscribers to Petitioner’s cable service, Petitioner claims that its cable penetration in the City of Fairview is 27.19 percent.<sup>30</sup> However, using the correct figure of 60 occupied housing units, as listed on the U.S. Census Bureau website,<sup>31</sup> our calculations show Petitioner’s cable penetration in the City of Fairview to be 51.67 percent, which is well over the statutory maximum of 30 percent for low penetration effective competition. Accordingly, we deny the petitions as to the City of Fairview, Kentucky.

12. 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 except for the City of Fairview. Therefore, the low penetration test is satisfied as to the Attachment B Communities with the exception of the City of Fairview.

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<sup>26</sup> 47 U.S.C. § 543(l)(1)(A).

<sup>27</sup> See Petition in CSR 8635-E at 8-9; Petition in CSR 8638-E at 8.

<sup>28</sup> See Petition in CSR 8635-E at 9.

<sup>29</sup> See *id.* at Exh. B.

<sup>30</sup> See *id.* at 9.

<sup>31</sup> See U.S. Census Bureau, 2010 Census Interactive Population Search for KY – Fairview city, available at <http://www.census.gov/2010census/popmap/ipmtext.php?fl=2126236>.

**III. ORDERING CLAUSES**

13. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc. **ARE DENIED** for the City of Kenton Vale, Kentucky and the City of Fairview, Kentucky, and **ARE GRANTED** for all the other Attachment A and B Communities.

14. **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, except for the City of Kenton Vale, Kentucky and the City of Fairview, Kentucky, **IS REVOKED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>32</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>32</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

## MB Docket No. 12-137, CSR 8635-E

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
City of Crittenden	KY0870	18.20	1,302	237
City of Erlanger	KY0675	16.31	7,092	1,157
City of Falmouth	KY0857	22.29	875	195
City of Kenton Vale	KY0681	13.33	45	6
City of Lakeside Park	KY0682	16.60	1,181	196
City of Union	KY0692	28.42	1,661	472
City of Walton	KY0710	15.96	1,291	206
City of Warsaw	KY0539	17.13	648	111

## MB Docket No. 12-140, CSR 8638-E

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
City of Cold Spring	KY0666	17.91	2,607	467
City of Dayton	KY0672	15.20	2,052	312
City of Melbourne	KY0686	39.84	128	51
City of Mentor	KY1226	26.67	75	20

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT B

## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

## MB Docket No. 12-137, CSR 8635-E

<b>Communities</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
City of Fairview	KY0747	60	31	51.67
Gallatin County (Uninc.)	KY1237	2,284	9	0.39
Grant County (Uninc.)	KY0868	5,074	1,477	29.11
Pendleton County (Uninc.)	KY1110	3,057	288	9.42

## MB Docket No. 12-140, CSR 8638-E

<b>Communities</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
City of Woodlawn	KY0695	89	26	29.21